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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

PATRICK KASHALA TSHISHIMBI

Grievor

and

SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL

Employer

Indexed as

Kashala Tshishimbi v. Social Sciences and Humanities Research Council

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Kim Patenaude, counsel

For the Employer: Philippe Giguère, counsel

Heard at Ottawa, Ontario,
June 24 to 26 and November 26 to 28, 2019.
(FPSLREB Translation).

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Introduction

[1] Patrick Kashala Tshishimbi (“the grievor”) works for the Social Sciences and Humanities Research Council (SSHRC or “the employer”). On May 25, 2015, he was demoted from his senior program evaluation officer (GR-08) position to a program officer (GR-06) position, which he grieved on May 28, 2015.

[2] The employer dismissed the grievance at the final level of the process. It replied that the manager acted in good faith by communicating to the grievor clear objectives, performance indicators, and targets to achieve. It added that the manager provided continuous support and coaching during a performance improvement plan. It also responded that the grievor was given reasonable time to meet the objectives and that he was given timely advice about the consequences of not meeting the performance standards.

[3] On March 31, 2016, the grievor referred his grievance to adjudication.

[4] The grievor submitted that his demotion was a disguised attempt to impose discipline. For its part, the employer submitted that the demotion was administrative and that therefore, I had no jurisdiction. It raised the preliminary issue of my jurisdiction before the hearing and asked that I dismiss the grievance. I determined that I had to hear the evidence to decide the matter.

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

[6] For the following reasons, I find that several irregularities that appeared in the documentation and testimonies presented by the employer demonstrated a significant lack of openness to the grievor and raised doubts about the honesty of the operation. Given those inconsistencies, I find the cited administrative reason inconclusive, and it resembles a sham.

II. Preliminary issue

[7] On May 25, 2015, the grievor was demoted, effective June 8, 2015. The demotion letter included the following:

...

In response to the letter you received from your manager dated March 9, 2015; I have decided to proceed with the recommended action. This letter will therefore serve as notice of demotion in accordance with the delegation afforded to me under Section 12. (2)(d) of the Financial Administration Act.

...

[Emphasis in the original]

[8] Section 12(2)(d) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; FAA) states the following:

12 (2) Subject to any terms and conditions that the Governor in Council may direct, every deputy head of a separate agency, and every deputy head designated under paragraph 11(2)(b), may, with respect to the portion of the federal public administration for which he or she is deputy head,

...

(d) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct.

[9] The grievor referred his grievance to adjudication under s. 209(1)(b) (demotion for disciplinary reasons) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*), not s. 209(1)(d) (at a separate agency, demotion for any reason that does not relate to a breach of discipline or misconduct).

[10] Section 209(1) of the *FPSLRA* reads as follows:

209 (1) An employee 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

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(c) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

[11] It should be noted that s. 209(1)(c) of the *FPSLRA* (in the core public administration, a demotion for any reason that does not relate to a breach of discipline) applies only to the core public administration, which, under s. 2(1) of the *FPSLRA*, refers to the definition in s. 11(1)(c) of the *FAA* and does not include the separate agencies listed in Schedule V to that Act. The employer is a separate agency listed in that Schedule V, and the grievor's demotion was effected under section 12(2)(d) of the *FAA* (a demotion for a reason other than a breach of discipline).

[12] On the other hand, it is questionable whether s. 209(1)(d) of the *FPSLRA* (in a designated separate agency, a demotion for any reason that does not relate to a breach of discipline or misconduct), which applies to the separate agencies listed in Schedule V to the *FAA*, could have applied in this case. That section provides that in the case of an employee of a separate agency designated under subsection (3), the employee can refer to adjudication any individual grievance against a demotion for any reason that does not relate to a breach of discipline or misconduct.

[13] Section 209(3) of the *FPSLRA* reads as follows:

209 (3) *The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).*

[14] I will respond that that is not so in this case as the employer is not designated by an order under s. 209(3) of the *FPSLRA* for the purposes of s. 209(1)(d).

[15] Thus, when the grievance against the demotion was referred to adjudication, the only recourse available to the grievor under the *FPSLRA* was that set out in s. 209(1)(b) (disciplinary action resulting in demotion). The issue under that section is determining whether the decision to demote him was a disciplinary action.

[16] The employer submitted that the demotion was an administrative and not a disciplinary action. It alleged that it demoted the grievor due to his unsatisfactory performance in the senior evaluation officer position classified at the GR-08 group and level.

[17] Thus, according to the employer, the demotion of an employee for that reason is an administrative decision. It added that it is not open to an adjudicator to examine the merits of such a decision unless it is found to have constituted disguised discipline.

[18] According to the employer, a grievance may be referred to adjudication under s. 209(1)(b) of the *FPSLRA* (action resulting in a demotion) only if the decision to demote the grievor was disguised discipline.

[19] The grievor argued that the Board had jurisdiction to hear this grievance. He asked that the employer's objection to the Board's jurisdiction be dismissed. He submitted that his demotion resulted from his difficult relationship with his new managers and that it was disguised discipline. At a minimum, he asked that the Board grant him a hearing so it could hear all the evidence before ruling on the preliminary objection to this grievance against the demotion.

[20] The parties agreed to examine the evidence on the merits and to more fully address the employer's objection in the arguments.

[21] Therefore, I will examine all the evidence to determine whether the grievor's demotion was disguised discipline.

III. Summary of the facts

[22] The employer called three witnesses: Shannon Clark-Larkin, Manager, Evaluation at the SSHRC as of the events; Susan Morris, Director, Evaluation at the SSHRC and the Natural Sciences and Engineering Research Council (NSERC); and Murielle Vergnhes, Manager, Evaluation at the SSHRC and NSERC.

[23] The grievor testified in support of his position.

[24] The employer adduced its evidence first, followed by the grievor. For consistency, I assembled the evidence and will present it in chronological order.

A. The grievor's training and journey

[25] The grievor explained that he has a degree in medicine from the University of Kinshasa in the Congo, but because of his immigration to Canada, his journey was difficult and led to a career change. Specifically, he received his degree in medicine from the University of Kinshasa in 1993. From 1996 to late 2001, he held a position as the district of health chief medical officer in the Democratic Republic of the Congo. He was responsible for 1 referral hospital, 4 referral health centres, and 16 health centres that were not referrals. He also obtained a specialization from the School of Public Health at the University of Kinshasa in 2002. He then immigrated to Canada.

[26] The grievor explained that a doctor holding a foreign degree cannot practise medicine in Canada. An equivalency degree must be obtained, which is issued by a provincial government. He did not choose that route as he had to work.

[27] However, in 2005, he completed a master's degree in preventive social medicine at Université Laval in Québec. He then trained in health informatics at the Faculty of Medicine at Université de Sherbrooke. In 2009, he earned a health informatics specialist diploma.

[28] From 2005 to 2008, he worked at Université Laval on the research and evaluation team carrying out two kinds of work. First, as a research officer, he was responsible for data collection, analysis, and presenting results. Second, as a teaching assistant, he coordinated student health internships under an instructor's guidance. The grievor explained that he acted as a bridge between students and health centres.

[29] The grievor has been working for the employer since September 29, 2008. Negative discussions about his work performance at the SSHRC did not occur until 2012, after a restructuring in which he changed teams. From then on, he worked under a new manager and a new director. From 2008 until 2012, his work involved two components: (1) assessing both SSHRC and inter-agency programs; and (2) developing performance measures.

[30] As part of assessing programs, the grievor performed the following duties: (1) collecting data; (2) analyzing components internally and preparing reports; (3) supporting external evaluators, who were responsible for preparing the final reports; and (4) presenting results to management. As for developing performance

measures, he developed such strategies for the SSHRC and inter-agency program groups that did not have the time to develop them themselves.

[31] The grievor explained that from 2008 to 2012, his supervisor, H el ene Gauthier, assessed his performance. He adduced in evidence his performance evaluation for October 2008 to September 2009, when he held a GR-07 position. He received a completely positive review for those 10 months.

[32] His next evaluation covered September 2009 to June 2010, when he was in a position classified at the GR-08 group and level, after his position was reclassified on October 1, 2009. His evaluation was identical to that of the year before.

[33] The grievor explained that when he had difficulties, his supervisor at the time, Ms. Gauthier, helped him without blaming him. She guided him constructively, while recognizing that he was a good worker. At that time, among other things, he prepared evaluation plans, collected data, and helped external collaborators. He has good memories of that time, in which discussions led to a general sharing of fruitful ideas. He was appreciated and recognized then.

[34] The grievor received a completely positive performance evaluation for June 2010 to June 2011, which included annotations like this:

[Translation]

...

Patrick showed his analytical skills when he created two evaluation frameworks (IOF-BOREAS and SIG-ASU) in which he had to synthesize all the issues and problems of those programs...

...

[35] The grievor received a very positive performance evaluation from his supervisor covering April 2011 to March 2012. The abilities assessed involved, for example, knowledge, planning, organization, implementation, control, creation-innovation, assessment-evaluation, communications, and interpersonal relations. The only nuance involved the ability to define performance indicators. Ms. Gauthier noted the following:

[Translation]

Patrick showed his evaluation analytical skills when he prepared the feasibility study for evaluating knowledge mobilization. The analysis was rigorous and exhaustive. The definition of

performance indicators for SSHRC programs and representative of social sciences and humanities remains a challenge.

[36] The evaluation summary read as follows:

[Translation]

Overall, Patrick had a productive year in terms of evaluation. He worked on several SSHRC and inter-agency projects. He also worked with colleagues in his division on several evaluation components. The experience was positive for everyone. Patrick remains hard-working. His contribution to the division's goals was substantial, including preparing a feasibility study for the summary evaluation of knowledge mobilization grants. He still needs to lead a major evaluation project from start to finish, such as a summary evaluation of knowledge mobilization grants.

B. The restructuring

[37] Ms. Clark-Larkin, who managed the evaluator team, stated that as part of the deficit reduction plan in June 2012, the SSHRC underwent restructuring in that the two evaluation teams, at the SSHRC and NSERC, were merged, and a shared services centre was created. Ms. Morris became the new director of that centre. The restructuring meant reorganizing the staff.

[38] The grievor held a senior program evaluation officer position (“senior evaluation officer”) classified at the GR-08 group and level. Before the restructuring, his manager, Ms. Gauthier, was assigned to a new position. He changed teams, and Ms. Clark-Larkin became his new manager. Her team included two senior evaluation officers, namely, the grievor and someone else.

[39] Ms. Morris, the new director of the shared services centre, explained that after the 2012 restructuring, she headed a team of seven evaluators, comprising four from NSERC and three from the SSHRC. She explained that the senior evaluation officers on her team are responsible for evaluation projects. The managers are responsible for quality control. Specifically, the senior evaluation officers lead the projects and the managers — who supervise too many projects to lead them — provide oversight to ensure that the presentations to managers in the EX group are of a reasonable quality in the end.

[40] Ms. Morris explained that she is responsible for the final quality of the projects for presentation to the NSERC and SSHRC presidents. Many people review the projects before they are submitted to the presidents.

[41] Ms. Morris stated that in general, before the restructuring, the managers classified at the GR-10 group and level led the evaluations, with help from the senior evaluation officers classified at the GR-08 group and level, who offered support. In addition, the evaluations were partially outsourced, and consultants were responsible for much of the work. Either the consultants did the basic work and the internal evaluators prepared the reports, or the internal evaluators did the basic work and the consultants prepared the reports.

[42] That evolved over time. Given the limited resources in 2012, it was decided that the senior evaluation officers would carry out the basic work and the report preparation internally. They now lead the projects. Therefore, evaluations are no longer commonly outsourced. Thus, senior evaluation officers classified at the GR-08 group and level must design, lead, and carry out the work themselves, in three phases: planning an evaluation, implementing and analyzing it, and preparing the report.

[43] Ms. Morris specifically explained that she intervenes in all three phases, to ensure that the design reports are adequate, to support that the projects are completed effectively, and to ensure that the analysis and reporting processes progress well. She added that the managers classified at the GR-10 group and level also intervene at all stages by providing direction and advice to the evaluators and by ensuring that the work is of sufficient quality before it reaches her.

[44] Ms. Morris explained that the senior evaluation officers lead an average of one or two projects at a time when they are at different stages of progression. Her team of 7 monitors the proper progress of about 10 projects, all at different stages. Some projects start, and others end. All programs are evaluated every 5 years.

[45] Ms. Clark-Larkin also explained that in 2013, the job profile for senior program evaluation officers was changed. The profile for the senior evaluation and performance officer position, which dated from 2009, included a list of specific duties related to SSHRC programs. Among other things, the first responsibility listed in it in 2009 was as follows:

[Translation]

Plans, organizes, and manages the SSHRC's performance and program evaluations (rationale, effectiveness, and impact of activities in accordance with the strategic objectives of the

program activity architecture). Determines the combination of skills and expertise and the program measurement tools required for a study. Proposes evaluation strategies, options, project scope, and governance provisions to guide and advise teams during an evaluation study.

[46] Ms. Clark-Larkin explained that the program performance evaluation duties at the SSHRC were removed from the position profile in 2013 and were transferred to a different team (business services). A new position title (senior program evaluation officer) and profile were adopted in 2013; the profile listed specific SSHRC and NSERC program duties. Among other things, the first responsibility listed is as follows:

[Translation]

In consultation with NSERC and SSHRC program managers and colleagues responsible for evaluation, determine whether programs can be grouped, to evaluate them. Assess risk, classify evaluations based on urgency, and propose their scope and the priorities to be included in the NSERC and SSHRC evaluation plan. Develop detailed strategies and work plans to support the design and implementation of studies and projects for the evaluation of management frameworks, performance measures, and program design and delivery models at NSERC and the SSHRC. Determine the need to change methods and techniques or to create unique approaches for results-based management when there is no precedent.

[47] Ms. Clark-Larkin presented the factors used when evaluating work that are included in the position profile. They include specific skills, creative initiative described as follows, and the desired outcomes:

[Translation]

Problem solving is the amount and nature of thinking required to analyze, reason, evaluate, create, use judgement, form hypotheses, draw conclusions, find solutions, etc. It has two parts: 1) the reasoning framework, or in other words, the extent of assistance or direction from others or from established practices and precedents; and 2) the challenge posed by the novelty and complexity of the required thinking.

[48] Ms. Clark-Larkin also confirmed that before the 2012-2013 restructuring, the employer hired consultants for the majority of the evaluation studies, i.e., for data gathering, analysis, and report preparation. However, due to the 2012-2013 change, the employer greatly reduced its consultant hiring.

[49] Ms. Clark-Larkin explained that initially, things went very well with the grievor. From the start, the evaluators agreed to a work method, in a collegial spirit. The climate was of positive agreement, and the meetings she organized with him went well.

[50] However, tension gradually developed between them when she had to provide the grievor with feedback on his prepared reports. Ms. Clark-Larkin recalled that from 2012 to 2013, he worked alone and provided her with a draft report when it was completed. She quickly noted problems with the reliability of the provided information. She emailed her feedback and provided it to him in person, but it was misunderstood and was not welcomed. He agreed to make the requested minor changes to his prepared reports. However, he disagreed with the more substantive comments. Specifically, he disagreed with the usefulness of making the changes to his reports affecting the methodology, data validity, or clarity.

[51] Ms. Clark-Larkin explained that she had to carry out her manager role, assess the reports, and ensure that their quality was satisfactory before forwarding them to the director.

[52] Ms. Clark-Larkin said that she then offered the grievor general feedback on the quality and reliability of his reports. She also noted that he had difficulty collaborating in areas of common interest with the other senior evaluation officer. In particular, she reminded him of the importance of collaborating more with his SSHRC colleague, who was also a senior evaluation officer. Most of the time, he maintained a professional relationship with his manager, despite the disagreements.

[53] The grievor was on leave from mid-November 2012 to the end of January 2013.

C. Ms. Clark-Larkin's report evaluations

[54] As part of her responsibilities for planning and evaluating reports, Ms. Clark-Larkin kept her director, Ms. Morris, informed of her discussions with the grievor. She also asked her for advice on how to deal with the grievor to obtain his suggestions.

[55] Ms. Clark-Larkin might have intended to adopt a performance improvement plan for the grievor as early as March 15, 2013. An email she sent him on that date contains the handwritten note, "performance improvement plan". Ms. Morris stated that she also had concerns about the quality of the grievor's written reports, which

necessitated greater monitoring by Ms. Clark-Larkin. So, in April 2013, Ms. Morris asked Ms. Clark-Larkin to identify the difficulties so that they could discuss them.

[56] Therefore, in a note to file on April 2, 2013, prepared at Ms. Morris' request, Ms. Clark-Larkin indicated her observations of the grievor's performance problems, which she hoped to resolve. Her notes covered difficulty accepting feedback, difficulty collaborating within the evaluation division (with certain colleagues), and quality of work. In them, she described his difficulty accepting feedback as follows:

Patrick was responsible for a component of a recent evaluation study; his task was to prepare the program efficiency technical report. This involved liaising with Finance and Program staff to collect the necessary data and also consult with evaluation staff to ensure that the correct figures were being used in the analysis. Given anticipated in actual difficulties in collecting the data, a number of meetings were held to discuss the best approach for the project (at least 5 meetings). At these meetings Patrick had difficulty discussing and collaborating with myself and the project lead in a constructive way, often arguing for an analysis approached that was not feasible given the available data. At these meetings the scope of his task was often discussed (i.e., this should be a short analysis given the lack of available data, the short timeframe to complete the analysis and because it is just one of many lines of evidence for the evaluation study). Patrick was also asked to use the outline from a previous program efficiency analysis report that he prepared last year. The program efficiency technical report that Patrick eventually prepared did not reflect the earlier discussions (i.e., additional analysis that had been deemed out of scope were included). As such, the report required substantial revisions to meet the needs of the evaluation study. This feedback was provided in track changes and Patrick was not happy with the comments and suggestions provided (see attached email) - but he did accept to make some revisions. He selectively made some of the suggested changes and then further revisions to report were made by myself and the project lead. In addition, Patrick passed along his draft report to another evaluator in the division for feedback without my knowledge.

[Sic throughout]

[57] For his part, the grievor explained that after the 2012 restructuring, he found himself in Ms. Morris' division, under the direction of Ms. Clark-Larkin and later, Ms. Vergnhes. He reiterated that Ms. Clark-Larkin supervised two senior evaluation officers: him, and N.M. (whose name is anonymized in this decision). They had been merged with NSERC evaluators.

[58] The grievor explained that the problems then began. At that time, he was responsible for one project, the summary evaluation of knowledge mobilization grants at the SSHRC. However, he explained that his colleague N.M. came to him one day to tell him very impolitely that she now handled that project. The grievor was flabbergasted. They then had a rude exchange because, according to him, only their manager, Ms. Clark-Larkin, could decide to reassign the file.

[59] So, the grievor asked Ms. Clark-Larkin why N.M. told him that the file had been reassigned to her. According to him, Ms. Clark-Larkin confirmed the reassignment and apologized for not informing him. She reportedly said that she would be more careful next time. He explained that the incident created considerable awkwardness between him, his colleague, and Ms. Clark-Larkin.

[60] A second incident added to the awkwardness in the team. He explained that in that file (the evaluation of knowledge mobilization at the SSHRC), a disagreement arose about whether to include the costs of peer evaluation activities. According to the grievor, at a meeting, Ms. Morris had given specific instructions to not include those costs when calculating the administrative costs, as it was voluntary work that the evaluation committees carried out. Ultimately, whether they were included changed the ratio resulting from the number of grants made and the administrative cost of each one. However, N.M. felt that those costs should be included in the report. According to the grievor, Ms. Clark-Larkin sided with N.M. Therefore, they asked him to change the ratios in question in the report. For his part, he decided to include two tables with different ratios, one with and the other without the amounts. However, N.M. then corrected the report. According to him, those costs should not have been considered. Thus, a poor work environment developed, and it persisted. According to the grievor, Ms. Clark-Larkin maintained it.

[61] As for the tension between the grievor and N.M., Ms. Clark-Larkin stated that she contacted the Informal Conflict Management System office and that she recommended a conflict-resolution approach for the two evaluators, to reduce the tension. However, according to her, the grievor apparently replied that such an approach was not needed.

D. The June 2013 performance evaluation

[62] Then, in the grievor's performance evaluation of June 2013, Ms. Clark-Larkin informed him of his performance problems in terms of an overview of the situation and what to improve in the areas of organization, implementation, creation-innovation, analysis-evaluation, and communication. The evaluation summary was as follows (as indicated on the first page of the document, the grievor wanted the performance evaluation report prepared in English):

From April to June 2012, Patrick worked as a Senior Performance and Evaluation Officer with the SSHRC Corporate Performance and Evaluation Division. In July 2012 the NSERC and SSHRC Evaluation Divisions merged and Patrick now works as a Senior Evaluator Officer with the NSERC-SSHRC Evaluation Division. Although Patrick's job description as [sic] remained the same some of his roles and responsibilities on projects have changed as a result of the merge. In particular, there is an increased requirement for evaluation products to be produced in-house and there is a greater expectation regarding the leadership of projects (albeit under the oversight of the evaluation manager). At the outset, Patrick experienced some difficulty adjusting to the new work environment and this was evident in the quality of his work, which did not meet the expected level. More recently, Patrick seems to be adjusting to the new work environment, however, I encourage Patrick to continue working on collaborating within the evaluation division, giving and receiving feedback, and improving the quality of his work. It will be important that Patrick and his supervisor develop clear objectives in these three areas for this year.

[63] Ms. Morris signed the evaluation on the same day as did Ms. Clark-Larkin, which was June 14, 2013. By signing it, Ms. Morris confirmed that she had taken note of the review's content and that she agreed with it. She had discussed it in advance with Ms. Clark-Larkin. This was the first indication to the grievor of problems observed in his work. The goal was to inform him of the objectives to be met for the following year. He reported to a new supervisor; he needed clarification.

[64] Ms. Morris added that she reviewed the evaluations that the managers on her team prepared before they were given to the employees when they were delicate or when they might not be well received. She could then advise the manager.

[65] The grievor stated that his evaluation for June 2012 to June 2013 was based on the fact that the employer felt that he was not collaborating with N.M., his colleague. His opinion is that Ms. Clark-Larkin maintained that environment and that she did not

provide clear instructions to her subordinates. Before the 2012 merger, there were no problems with his colleague, N.M. He disagreed with the evaluation that he received.

E. The arrival of a new manager: Ms. Vergnhes

[66] On December 20, 2013, Ms. Vergnhes joined the evaluation team as the new manager, classified at the GR-10 group and level. She explained that she had worked in the research field for 30 years and that she had over 20 years of experience in evaluation research. She carried out a large number of program evaluations in the positions she held. She has been a manager for a dozen years. When she arrived in December 2013, she took over some of the evaluators' projects, including one of the grievor's projects. Therefore, she had the opportunity to work closely with him.

[67] Ms. Vergnhes explained that after the year-end holidays and after having time to study the grievor's project, she asked him many questions. Therefore, over the following weeks, she interacted with him considerably. Among other things, they discussed the choice of appropriate indicators and strategies. Since she has significant evaluation research experience, she repeatedly questioned the logic of his proposed methods. Her opinion was that he had difficulty explaining his choices. He did not provide or seem able to provide definitive answers to her questions.

[68] Specifically, Ms. Vergnhes explained that in his main project, the grievor was to propose directions, priorities, and options and to make recommendations. Being new to the team, she first revised the evaluation, among other things based on the statement of criteria, the project's design, the evaluation framework, the letter to the community, the measurement indicators, and the data collection. For example, she found that some project design indicators were strange. The grievor had not selected the correct analysis category, and she informed him of it. However, he was unable to explain the reasons for his choice, which she considered a red flag.

[69] Thus, as part of the same project, Ms. Vergnhes found that the grievor's answers to her questions were inadequate. They then met with the director of the evaluated program, who was also a public servant. Again, Ms. Vergnhes found the grievor unable to answer the questions being asked.

[70] Ms. Vergnhes added that a second project for which the grievor was responsible was quite advanced. It involved three different stakeholders. She noted that each one

provided many comments to him; his role was to distinguish between their demands or preferences as to which were justified, particularly with respect to the project objectives. Without that value judgement to sort the comments, the project became an “[translation] unmanageable monster”, she added. Ultimately, she found that he had not sorted the comments, and she decided to do it.

[71] She also stated that for another task the grievor was involved in, a consultant had created a questionnaire that involved case studies and analyses. However, as the project’s strategic objectives had not been articulated well, the consultant did not understand the mandate. According to Ms. Vergnhes, the grievor did not properly communicate the objectives to the consultant, who therefore did not fully understand the mandate.

[72] In addition, as part of that project, the cost-effectiveness analysis still had to be prepared. She had to intervene, as the grievor’s analysis, which reiterated an older one, could not be used because new variables and new numbers were involved. Ms. Vergnhes explained to him how to do it. She noted that he refused to work in French, as he wanted to practise his English. Finally, she had to prepare the cost-effectiveness analysis, to conclude the issue.

[73] Ms. Vergnhes explained that the same issues came up in a documentary review that she finally completed in the grievor’s place. First, she explained to him that he had to synthesize the information, as the document that he had given her was massive; it was more than 100 pages of text copied and pasted from earlier reports, and it did not include an analysis of the information.

[74] At that point, which was a few weeks after she arrived, Ms. Vergnhes felt that the red flags could not be ignored or downplayed. She spoke about it with Ms. Morris in January 2014 to ask her if the grievor understood his mandate for the projects assigned to him. She explained that considerable work had to be done to recover what he had written.

[75] As for the massive 100-plus-page document that he had given to Ms. Vergnhes, the grievor explained that it was a draft annual report and that it was at the first stage, i.e., the chart-adding stage, when he gave it to her. He had not reached the second stage, which was synthesizing the information. After he submitted it, he learned that Ms. Vergnhes had wanted it at the second stage, which was a new instruction.

[76] Ms. Morris explained that at that time, she held weekly meetings with the two managers on her team, Ms. Clark-Larkin and Ms. Vergnhes. Together, they discussed topics such as project stages, which the Director had to review; how projects were progressing; and the challenges encountered and the solutions found. Finally, the Director shared with her managers information shared at management meetings. Ms. Morris also sometimes scheduled additional meetings as needed, to discuss projects.

[77] Ms. Morris stated that two months after Ms. Vergnhes arrived, or in mid-February, at a meeting with Ms. Clark-Larkin and Ms. Vergnhes, Ms. Vergnhes indicated that she had concerns about the quality of the grievor's work, that he was unable to provide a correct analysis, and that communicating with him was difficult.

[78] In late February 2014, Ms. Morris met with the grievor on a Friday afternoon to inform him of the following, based on notes prepared beforehand:

Follow up on various bilats - group meetings so all on same page.

... performance appraisals are looming and I wanted to avoid any surprises.

Obj. for this year was to improve quality of deliverables so they don't require extensive edits.

the [sic] feedback from both Murielle and Shannon is that it continues to be the case that what you submit requires significant revisions.

[Translation] - and I wish to point out that - with [the] performance [evaluation], we are preparing a performance improvement plan that we will give you with your performance [evaluation].

[79] At that meeting, the grievor shared his point of view with Ms. Morris as to the difficulties encountered. She sensed that his disagreement with the two managers, Ms. Clark-Larkin and Ms. Vergnhes, arose partly from poor communication between the parties and disagreements about projects. She recommended that he follow the instructions that he received from his supervisors when a disagreement persisted. She advised him that choosing to not do the requested work was not a good idea.

[80] For the grievor, hearing of a performance improvement plan was the last straw. He had to consult his doctor, who prescribed medication and placed him on sick leave.

[81] The following Monday, the grievor went to the office, but only to advise management that he would be on sick leave from March 3 to May 3, 2014.

[82] The grievor also explained that Ms. Vergnhes arrived in his team in December 2013. He began working with her in January 2014, after his vacation. As he remembered, apparently, she told him that she would assess his work. He explained that before she arrived, he worked on two projects with her predecessor, with whom he had a good relationship. He prepared terms of reference for one of those projects, the one about the Networks of Centres of Excellence, but Ms. Vergnhes rewrote them when she arrived. However, according to him, she forgot an important part, which was analyzing the program's administrative data. Because of that omission, Ms. Clark-Larkin then prepared an inadequate request for proposals for an external evaluator. When he was hired, the external evaluator wanted to clarify his role and find out who would handle the omitted component. Ms. Morris was informed. However, according to the grievor, Ms. Clark-Larkin blamed him for the omission in question. Later, she noted it as a failure in his performance evaluation even though she was, along with Ms. Vergnhes, responsible for the omission.

[83] The grievor also explained that as part of his other project, about the indirect costs program, he remembered that his discussions were difficult with the manager of the inter-agency program for facilities. He was responsible for collecting data. He and the program manager disagreed as to the data collection. It seemed that the grievor had already contacted the officer holding the data and that he had already obtained some, yet other data was missing. However, the grievor wanted to continue the work before asking for more recent data.

[84] At the hearing, the grievor explained why he wanted to wait before submitting a new request for more recent data. He had noted that the officer in charge of data collection had complained about receiving repeated requests for data. Therefore, the grievor felt that before resuming his requests, he first had to identify the data he had on hand, so that he would request only the missing data. He added that ultimately, Ms. Vergnhes was unhappy with that strategy, as he had presented a table without data because he was waiting for new data. According to him, she held him responsible for the delay caused by the imbroglio, but he noted that his approach was plausible and logical.

[85] The grievor also said that Ms. Vergnhes constantly criticized the content of his reports and stated that it was unsuitable. He recalled that at one point, she told him that the employer would find him another position better suited to him. He then felt

that his job was in jeopardy and that he was being chased from the division. Thus, he felt harassed by Ms. Vergnhes and was very hurt by it. He spoke about it with Ms. Morris; he said that she did not deny Ms. Vergnhes's words. According to him, Ms. Morris saw it as a communications issue. She committed to speaking with Ms. Vergnhes about it.

[86] However, according to the grievor, despite the fact that his relationship with his managers was tense because of the disagreement about the quality of his work, Ms. Clark-Larkin and Ms. Vergnhes prepared his performance evaluations and a performance improvement plan.

[87] That was when the grievor went on sick leave from March 3 to May 3, 2014. At the hearing, he explained that the sick leave was necessary because of the stress that Ms. Vergnhes had caused him. His work situation was very difficult and had made him sick.

F. The March 2014 performance evaluation

[88] While the grievor was absent, Ms. Clark-Larkin completed his performance evaluation for the period ending March 31, 2014. It seems that they did not discuss its contents before his absence. In it, she again wrote that he had performance problems. She wrote that he had to improve his performance in the areas of organization, implementation, creation-innovation, analysis-evaluation, and communication. The evaluation summary read as follows:

At the time of last year's performance appraisal Patrick was encouraged to continue working on four areas: collaborating within the evaluation division, giving and receiving feedback, and improving the quality of his work with respect to analytical and interpretation skills as well as leadership skills. While some improvements have been noted in his ability to collaborate within the division, Patrick needs improvement in order to meet the requirements of the position and further improvement is required immediately with respect to giving and receiving feedback and improving the quality of his work. Based on the performance appraisal, a performance improvement plan has been developed for Patrick. This plan will clearly outlined [sic] Patrick's objectives for 2014-2015, the results expected, and a [sic] support that will be provided to him.

[89] As for that performance evaluation, Ms. Morris mentioned that because it was the first time that management had assessed the objectives and expectations that had

been shared with the grievor, she felt that it was necessary to provide him with more detail on the noted failures. She also added that with the arrival of Ms. Vergnhes, who is francophone, Ms. Morris could see that the problems encountered were due not to a second-language issue but to work analysis functions.

[90] Ms. Morris showed me a report that the grievor prepared before the performance improvement plan was put in place. First, she explained that she had to send a few emails to obtain the report from him. He was late to provide it to her as requested. It seems that it was an isolated case.

[91] Then, when she received the report, she realized that it contained a large amount of information without any synthesis, which required a major revision. Indeed, the report looked like a draft for personal use or an outline. The judgement required to organize and summarize that information had not been exercised. She also showed me tables in the report and added that she did not understand them. The tables had the same titles but did not include the same numbers. Ms. Morris and Ms. Clark-Larkin then spent time with him, explaining their expectations.

[92] For all those reasons, management found it appropriate to prepare a performance management plan for the grievor.

[93] In response to his performance evaluation for the year ending on March 31, 2014, the grievor presented feedback that in his view, was not considered. Here are some extracts from it:

...

I understand that I have to produce products of high quality; however, as a member of a team, there should have been at least discussions on the content highlights with the supervisor; that never happened. As a consequence, most of my deliverables were still draft documents.

...

This is strange to me. I am not informed of any serious written issues regarding the clarity or the flow of ideas from the only report I produced for the NCE/BL-NCE Evaluation - the cost-efficiency study.

[94] In fact, he explained at the hearing that he tried to communicate the following four points to Ms. Clark-Larkin. First, as for the difficulties that he encountered in his

indirect costs program project, he recognized that his exchanges with the inter-agency facilities program manager had been difficult and that the report that he prepared proved incorrect, as it contained incomplete data for 2012. When he prepared the report, he believed that he had all the data. Management then accused him of not collecting data correctly and of collecting it from the wrong person. The grievor recognized that complete data were required.

[95] Second, he disagreed with Ms. Clark-Larkin's comments on the difficulties that he encountered in the project on the Networks of Centres of Excellence. He explained that the terms of reference that Ms. Vergnhes prepared and that Ms. Clark-Larkin approved were incomplete. Ms. Clark-Larkin did not include the administrative data analysis in the work for an external evaluator to carry out. Then, when she corrected the report in question, she found the analysis missing. She felt that he should accomplish that task, while he found that the external evaluator should have accomplished it.

[96] Third, he disagreed with the comments in his performance evaluation that he did not consult others enough. For example, his opinion was that he had specifically consulted Ms. Morris for advice about the SSHRC's Institutional Grants and Aid to Small Universities programs. During their discussion, he told her that he was considering the methodology to use, which is why he had not finished his report. Finally, Ms. Clark-Larkin noted in the performance evaluation that for example, not consulting more with third parties involved in the programs reflected her view that he did not consult others enough. According to him, when he consulted a third party like Ms. Morris for direction, he was then accused of not properly understanding his work well. Thus, he felt cornered.

[97] Fourth, the grievor disagreed with the fact that his difficulties with Ms. Vergnhes were included in his performance evaluation. He stressed the fact that when they had disagreements, there were reasons and explanations that nonetheless were completely ignored.

[98] Ms. Vergnhes stated that during the three months in which she worked closely with the grievor, she had frank and sincere conversations with him about his difficulties. However, he was defensive from the outset of their discussions. According to her, he had hit a wall in terms of his performance. He did not accept the idea that

there were performance issues. Communication or learning problems arose between them when she had to train him. She explained that she did her best so that their discussions would be compassionate and friendly, which was difficult when they discussed his performance, even though he was very pleasant as a colleague, wanted to do well, and spent many hours on his work. Despite everything, his performance was unsatisfactory.

G. The performance improvement plan

[99] Ms. Clark-Larkin explained that given her concerns and those of Ms. Vergnhes about the quality of the grievor's work, and with Ms. Morris's agreement, she consulted the Human Resources Section and the Labour Relations Section. Together, they decided to implement a six-month performance improvement plan for him. Ms. Morris stated that she was also involved in the process. She contacted the Human Resources Section for advice, and she read the performance improvement plan before it was communicated to the grievor.

[100] When the grievor returned from sick leave, he and his union representative met with management. It was a huge shock for him to be presented with the performance improvement plan on his return. At the same time, he denounced what he saw as psychological harassment by Ms. Vergnhes. He spoke with the Human Resources Section to denounce the harassment of which he said he was a victim. A human resources advisor suggested that he take part in mediation sessions. He asked for time to think. At that time, he was shaken.

H. The harassment allegation

[101] Ms. Vergnhes, who had been in her position for only six months when the harassment allegation was made, found it very hard to hear that the grievor had accused her of harassment. She explained that it was a serious accusation and that she had simply done her work, even though it was difficult and unpleasant. She explained that indeed, it is very difficult to tell an employee that his or her work and performance are unsatisfactory. She explained that she asked the grievor about his education and professional interests. He told her about his medical training but stated that because of his immigration to Canada, his journey had been quite difficult and had resulted in a career change. She felt empathy for him because she had also immigrated to Canada, from France.

[102] Ms. Vergnhes explained why she asked the grievor about his education and professional interests. Because she teaches in the performance measurement field, her view is that people should not be deprived of the opportunity to develop analytical and research skills, regardless of their level. However, her view was that his analytical and synthesis skills were limited, contrary to the opinion of his previous manager, Ms. Gauthier.

[103] Ms. Vergnhes added that generally, the grievor would respond to her that he already knew what to do, that he was in the right place, and that his position was well suited to his skills. For her part, Ms. Vergnhes tried to tell him that if he wanted to, she could help him find a job better suited to his skills and abilities. However, he saw that as a threat.

[104] When he received the performance improvement plan and reviewed it, the grievor told Ms. Morris that he felt trapped and that the plan would lead to certain failure. As mentioned, he told Ms. Morris that he felt harassed by Ms. Vergnhes. Ms. Morris became concerned, so immediately, she began dealing with the complaint and contacted the Treasury Board Secretariat's Informal Conflict Management System office. After receiving advice from it, she spoke with the grievor and Ms. Vergnhes and advised them that the office had agreed to intervene in their matter as a facilitator.

[105] After that proposal, the grievor told Ms. Morris that he had said all that he had to say in his meeting with her when he received the performance management plan and that he did not want to pursue the matter with that office.

[106] For her part, Ms. Vergnhes explained that she had called the office, as Ms. Morris had suggested. The facilitator told her that to launch the process, the grievor also had to take the initiative of calling the office. However, as he was not interested in that, no attempt at resolution was possible. Ms. Vergnhes found it unfortunate that the harassment issue remained unresolved. The entire matter caused her considerable stress.

[107] The grievor also felt very tired. During his sick leave, he contacted his member of Parliament, asking for help. When he returned to work, it was agreed that he would no longer be asked to work with Ms. Vergnhes.

[108] Ms. Morris explained that after steps were taken such that the grievor and Ms. Vergnhes would no longer work together, he remained very cordial with Ms. Vergnhes. However, she explained that Ms. Vergnhes felt very vulnerable, particularly as another incident had occurred in the meantime. In fact, during the grievor's sick leave, he had believed and had told Ms. Morris that Ms. Vergnhes had called him at home. However, his belief was quickly set aside. It turned out that in fact, another person in the grievor's extended circle, who also had the first name Murielle, had tried to reach him by telephone during his sick leave. However, the allegation against Ms. Vergnhes and the misunderstanding caused her significant concern. She feared that the grievor would make false allegations against her. She then stopped working directly with him. Her only contribution was to provide certain information that management requested for preparing his evaluation.

I. The implementation of the performance improvement plan

[109] Thus, on May 21, 2014, Ms. Clark-Larkin presented the grievor with a letter to advise him that the performance improvement plan was being implemented. In particular, it stated the following:

[Translation]

...

We have already noted your shortcomings in terms of your performance and have shared our expectations for the future. In particular, significant improvements are expected in the following areas:

- *Carrying out evaluation projects with minimal supervision;*
- *Meeting established deadlines and quality standards;*
- *Ability to lead project teams;*
- *Ability to communicate effectively and to integrate feedback from different team members.*

...

Patrick, while we remain committed to helping you improve the quality of your work and will continue to provide you with assistance and support, the current situation cannot continue any longer. If you are unable to significantly and continuously improve your performance as required to meet all the requirements of your position, we will have to consider other options.

[110] The performance improvement plan identified the areas to improve from May 26 to November 26, 2014. Noted was that during the period covered by the last

performance evaluation, the grievor did not satisfactorily meet his performance objectives. Under the circumstances, the plan identified the objectives he had to achieve and maintain, in addition to maintaining his performance in other areas related to his work. The following five responsibilities were listed, along with their performance indicators (and only the first four responsibilities were cited to support the demotion):

[Translation]

Responsibility 1: Carry out evaluation projects with minimal supervision, while respecting delivery deadlines and quality standards

Performance indicators:

1.1.1 % of draft evaluation products that do not require major revisions by the supervisor

1.1.2 100% of evaluation products delivered on time [This indicator is written in English and French. The English version is more precise and includes the 100% criterion.]

Responsibility 2: Develop plans and strategies to support the design and implementation of evaluation projects - Identify the need to change methods and techniques or to develop unique approaches

Performance indicators [These indicators are written in English and French. The English version is more precise and includes the 100% criterion.]:

2.1.1 100% Quality and relevance of the data collection and analysis processes used in evaluating projects

2.1.2 100% of evaluation products with no analysis and/or data interpretation errors and/or reporting results clearly and concisely

Responsibility 3: Provide technical leadership to project teams made up of program evaluation specialists, staff assigned by the programs and consultants, ensure the quality of the work, the validation of the evaluation results interpretation, and the credibility of causality

Performance indicators [These indicators are written in English and French. The English version is more precise and includes the 100% criterion.]:

3.1.1 Demonstrate the ability to lead project teams by engaging stakeholders at the right time - Appropriate clients are included in project meetings 100% of the time

3.1.2 100% of products with no quality issues raised (Issues related to the quality of the work, the validation of the evaluation results interpretation, and the credibility of causality) - high quality products, current and accurate information, attention to detail is apparent

Responsibility 4: Undertake and coordinate the production of evaluation reports, special studies, and different presentations and present and defend them before committees and working groups

Performance indicators:

4.1.1 100% of evaluation products with no language errors and/or report approaches/results in a clear and concise manner, no major revisions [This indicator is written in English and French. The English version is more precise and includes the 100% criterion.].

4.1.2 100% of verbal communications are understood (no question of clarification by the supervisor or staff) [This indicator 4.1.2 does not appear in French. It was written only in English and was translated.].

Responsibility 5: Accept, seek, and integrate workplace feedback

5.1.1 100% demonstration of the ability to seek and/or accept and/or integrate feedback from his supervisor and colleagues [This indicator is written in English and French. The English version is more precise and includes the 100% criterion.].

[111] On June 9, 2014, the grievor was advised by letter that ultimately, the performance improvement plan would cover May 29 to November 28, 2014.

J. The request for mid-term reviews and the change to the evaluation criteria

[112] The grievor's opinion was that the methodology adopted in the performance improvement plan would not allow for measuring his gradual progress over the evaluation period. Specifically, the evaluation method consisted of indicating whether he had achieved the stated objectives. According to him, it amounted to a requirement that he achieve 100% of each objective. Otherwise, he would receive a "[translation] does not meet" score, meaning that he would obtain 0%. Therefore, he requested that a column be added to the plan with performance targets, to allow for an overview of his progress.

[113] Specifically, the grievor asked that Ms. Clark-Larkin assess his progress as a percentage rather than as "[translation] meets" or "does not meet". According to him, as was noted, based on the methodology that Ms. Clark-Larkin chose, he had to achieve 100% to obtain an evaluation of "meets" for a given criterion. Instead, he wanted to target a percentage, such as 70%, for example.

[114] The grievor presented another reason for disagreeing with the evaluation method for his work used in the performance improvement plan. He insisted that the

evaluation method that management chose was completely subjective. He proposed an assessment with a threshold of acceptability or a performance sale. He brought up the following example: points could have been assigned to him for different criteria, such as 10 points for presenting a report on time, 25 points for data collected with the necessary thoroughness, 25 points for an in-depth analysis, etc., and all with a pass mark of 70%, for example.

[115] Instead, the employer chose the “meets” or “does not meet” assessment. The grievor stressed the fact that he and his union representative did everything they could so that his evaluation would not be based entirely on Ms. Clark-Larkin’s subjective assessments; he did not get along well with her. However, she categorically refused any variation to the proposed correction method and to the “meets” and “does not meet” evaluation criteria.

[116] According to the grievor, Ms. Clark-Larkin told him that his proposal was not possible because, in such a report, all the data presented must be reliable, and there can be no confusion.

[117] At the hearing, Ms. Clark-Larkin said that the reports had to be clear and concise. Under the circumstances, the “meets” or “does not meet” criteria were appropriate. She also stated that she would have awarded “meets” had the drafts required only minor revisions. She cited the example of a revision to the exact wording of an idea; she would have considered it an acceptable minor revision. However, she explained that she had to use “does not meet” when the content was unacceptable, i.e., for deficiencies in the clarity of, the analysis in, or the flow of the report. She stated that the reports’ contents were discussed in advance with the senior evaluation officers and that based on that preparation work done in advance, the need for major revisions was unacceptable.

[118] The grievor explained that he asked if there was a policy on the right to use the “meets” or “does not meet” criteria. According to him, Ms. Clark-Larkin consulted a human resources advisor, who told her that a reference document supported a methodology using a criterion of 100% for achieving each objective. However, the grievor indicated that the reference document was not shared with him, even though he asked for it.

[119] The grievor then stated that although he had the opportunity to take two courses during the assessment period, one on critical analysis, and the other, entitled “Plain language business writing”, they did not help him achieve the criteria set out in the performance improvement plan, as he did not have time to use that knowledge in the evaluations carried out between June and November 2014. He stressed the fact that Ms. Clark-Larkin continually reworded the sentences in his reports.

K. The first assessment based on the improvement plan, dated July 14, 2014

[120] Management did not agree to change the assessment criteria in the plan but agreed to assess the grievor at different intervals during the plan, to help him improve. At those times, management wanted to discuss his improvements and his difficulties, as well as the tools available to help him. As such, his first assessment was dated July 14, 2014.

[121] At that time, Ms. Clark-Larkin indeed stated in the plan that the grievor had not achieved the desired results based on her assessment of performance indicators 1.1.1, 1.1.2, 3.1.1, 4.1.2, and 5. Specifically, under performance indicator 1.1.2, she indicated that he had delivered his reports on time, but it did not allow him to meet the expectations for responsibility 1. It was noted that responsibility 2 could not be assessed for that review period and that performance indicators 3.1.2 and 4.1.1 had not been assessed. Ms. Clark-Larkin provided examples illustrating the difficulties that the grievor had encountered. Ms. Morris affirmed that Ms. Clark-Larkin had examples to support each of her decisions and conclusions.

[122] At that time, the grievor was surprised to find out that he had failed all the responsibilities assessed because, among other things, his reports had been delivered on time, so he had met indicator 1.1.2. The assessment mentioned some of his achievements. Despite everything, he received only failing marks. In his view, this showed that the assessment method was deficient. His overall assessment was “does not meet” for all objectives. He informed management of this inconsistency; it refused to change the assessment method.

[123] Another mid-term review of the plan was scheduled for August 29, 2014. However, it was never conducted, due to summer vacations. It was postponed to September 25, 2014.

[124] On September 2, 2014, Ms. Clark-Larkin emailed Ms. Morris; she acknowledged that the grievor was working regularly. Her general impression was that the draft report that he had prepared at that time “[translation] was not bad for a first draft”. However, she then dissected each part of it and wrote that here and there, she suspected that the information was inaccurate.

L. The September 25, 2014, evaluation based on the performance improvement plan

[125] On September 25, 2014, Ms. Clark-Larkin again noted in the plan that the grievor did not achieve the desired results based on her assessment of performance indicators 1.1.1, 3.1.1, 3.1.2, 4.1.1, and 4.1.2. He had achieved the desired results for performance indicators 1.1.2 and 5, but it did not allow him to meet the expectations for responsibility 1. He had met the expectations for responsibility 5. It was noted that responsibility 2 could not be assessed for that review period.

[126] On September 26, 2014, at the meeting held to discuss his performance in accordance with the plan, Ms. Clark-Larkin clearly informed the grievor that management expected a project to be precise, verified, and critically reviewed when it was submitted to supervisors. The meeting notes specifically mentioned that the “expectation is that a draft is accurate, checked, critically looked at when submitted to supervisors”.

[127] On October 21, 2014, Ms. Clark-Larkin sent the grievor another letter, which contained the following:

This letter is further to our meeting on September 26, 2014 where we discuss [sic] the progress of your performance improvement plan to date.

...

Throughout your performance improvement plan, I have offered support to you by means of regular meetings, coaching, feedback, and training courses in Analytical Thinking and English as a Second Language. In reviewing your progress, I recognize that you had limited time to apply the skills learned in your training courses. You will have opportunities to apply these skills for the duration of the performance Improvement plan. Please be advised that significant and sustained improvement in your performance is required in order for you to meet the requirements of your position, specifically:

- *carrying out evaluation-related projects with minimal supervision, in accordance with the timelines and quality standards;*
- *developing plans and programs to support the design and implementation of evaluation projects;*
- *providing technical direction to project teams made up of program evaluation specialist, program staff, and consultant, ensuring quality of work, validity of the interpretation of evaluation results, and the credibility of the causal analysis; and*
- *undertaking and coordinating the production of evaluation reports, special studies, and various presentations, including presenting and defending them before committees and working groups.*

While I remain committed to helping you develop your skills and abilities to fully meet the requirements of your substantive positions [sic], it is important for you to realize that the current situation must be fully redressed by the end of the performance improvement plan. In the event that there would not be a significant and sustained improvement in your performance by November 26th, 2014, we will have to consider alternative solutions to rectify the situation, up to and including demotion or termination of employment.

...

[128] On October 23, 2014, Ms. Morris emailed Ms. Clark-Larkin. She wanted to inform Ms. Clark-Larkin that she had met with the grievor in the hallway earlier that day and that he had asked her what she thought about his meeting that morning with management, as he doubted Ms. Clark-Larkin's good faith. He said that the methodology used to assess him was unreasonable. At the hearing, he emphasized that he had argued that a 70% threshold would have been more reasonable than the required 100% threshold. His opinion was that it was normal for management to make some corrections in a large report. It was not fair to ask him not to make any mistakes. In her email, Ms. Morris wrote that she had invited the grievor to accompany her to her office, thinking that she could reinforce some of the messages that management had given him that morning. She noted that he disagreed with others' opinions, particularly in that an indicator applied only to one program, not two. Ms. Morris emphasized that she wanted to help him understand that he had not successfully communicated his point of view because everyone else had reached a different conclusion.

[129] After his assessment, the grievor again noted that despite some of his achievements, he had again received an overall mark of "does not meet" for assessed

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

objectives 1, 3, and 4. Thus, Ms. Clark-Larkin did not account for his progress. At the hearing, he brought to my attention the fact that page 6 of his assessment, for example, indicates “meets” for objective “[translation] 5.1 Work openly and cooperatively”. However, Ms. Clark-Larkin primarily provided negative comments.

[130] When he received Ms. Clark-Larkin’s October 21, 2014, letter that stated that his work performance had not improved significantly, the grievor perceived that the plan was being used only to document his supposed failures and not to record his improvements. It can be noted that he had improved in terms of collaborating with others within the evaluation division. Therefore, he had progressed, and he met point 1.1.2.

[131] The grievor explained that at that time, the only feedback he received on his work was related to the continual corrections to his reports. He was instructed to correct everything. He added that therefore, he would receive a letter for each mid-term review in accordance with the performance improvement plan. In his view, clearly, it was a way of documenting his allegedly unsatisfactory performance.

[132] The final assessment based on the plan was postponed from November 26 to December 5, 2014.

M. The December 5, 2014, assessment based on the performance improvement plan

[133] On December 5, 2014, Ms. Clark-Larkin again stated in the plan that the grievor did not achieve the desired results based on her assessment of performance indicators 1.1.1, 1.1.2, 3.1.1, 3.1.2, 4.1.1, and 4.1.2. It was noted that responsibility 2 could not be assessed for that review period and that he had achieved the desired results for responsibility 5.

[134] The grievor, who had worked very hard, expected to achieve several objectives in the plan. He explained that at the time, he truly realized that there was nothing he could do. Regardless of his efforts, his work was consistently deemed unsatisfactory.

[135] On December 18, 2014, he received a letter with the following heading: “FINAL NOTICE FOR WORK RELATED PERFORMANCE ISSUES”. In it, Ms. Clark-Larkin informed him that as one last chance to show significant improvement in his performance, she had decided to extend the performance improvement plan to March 31, 2015. She identified the same four areas for improvement. The letter also stated the following:

...

Over the course of the plan, additional support has been offered to you by Susan Morris, Director of the Evaluation Division and I, including a reduced workload (e.g., one evaluation study) in order to allow you additional time to focus on improving your work performance. You were also provided with coaching, guidance, and written feedback on your work. This report continues to be available to you.

...

At this time, I believe that I have provided you with every opportunity to succeed in meeting the requirements of a Senior Program Evaluation Officer in the Evaluation Division, classified at a GR-08 level. Consequently, I hereby inform you that if your performance has not significantly improved to the point where you meet the requirements of your position by March 31, 2015, I will proceed in recommending other arrangements. Such arrangements may result in a demotion from your current position or, should a demotion not be feasible, I will proceed in recommending that your employment at SSHRC be terminated....

[136] At that time, sensing that his job was in jeopardy, the grievor, desperately seeking a last-resort solution, wrote to the SSHRC's executive vice-president. He explained his difficulties with Ms. Clark-Larkin and Ms. Vergnhes. He asked for help to save his job.

[137] On January 12, 2015, the grievor and his union representative met with Ms. Clark-Larkin and a human resources advisor. He received a letter with the following heading: "AMENDMENT TO FINAL NOTICE FOR WORK RELATED PERFORMANCE ISSUES ISSUED ON DECEMBER 18, 2014". Ms. Clark-Larkin explained that he had told her that part of the last letter had been unclear. Specifically, the following sentence was then clarified:

...

Please note that I may proceed in recommending a demotion earlier than March 31, 2015 if you are unable to demonstrate significant and sustained improvement by the mid-point of the three-month extension (February 23rd, 2015) and a suitable opportunity within the organization arises.

...

[138] The letter stated that if an opportunity arose for a demotion before March 31, 2015, Ms. Clark-Larkin could recommend that steps be taken before then, or she could terminate his employment were a demotion not possible.

[139] In response to his request for help of December 18, 2014, the Executive Vice-President asked the Human Resources Section to contact the grievor about the harassment issue. Thus, he had a discussion and a meeting with a human resources advisor about his harassment allegations. On January 27, the advisor prepared a summary of the topics discussed at the meeting, as follows: (1) harassment by Murielle Vergnhes, and (2) concerns with Shannon Clark-Larkin. Under the last point, four topics were discussed, as follows:

- i Alleging your performance objectives were not met;*
- ii Alleging that she made you gather financial information that was not recommended by the head of the Evaluation Division;*
- iii Alleging that she accused [the grievor] of having contacted a wrong person for the data collection; and*
- iv Alleging that she indicated she can dismiss you at any time before the end of March 2015.*

[140] The grievor was then invited to meet with Ms. Morris for a follow-up on that meeting.

N. The March 1, 2015, assessment

[141] On March 1, 2015, Ms. Clark-Larkin noted in the plan that the grievor did not achieve the desired results for the following performance indicators: 1.1.1, 2.1.1, 2.1.2, 3.1.2, 4.1.1, and 4.1.2. It was noted that he achieved the desired results in whole or in part for responsibilities 1.1.2, 3.1.1, and 5.

[142] On March 5, 2015, in an email to Ms. Morris, Ms. Clark-Larkin indicated her observations from her meeting with the grievor that day that did not go particularly well. She noted that before sending her assessment to him, she had wanted to have a brief discussion with him, to see how he thought things were going. She noted that when she asked him what he thought about the quality of the work that he had produced, he told her that he felt that his work had greatly improved since the previous year, that he was diligent, and that he accounted for all the feedback she had provided to him in the reports. According to Ms. Clark-Larkin, he went on to state that he was satisfied with his work and with how things were going. In her note, Ms. Clark-Larkin indicated that she had then told him that she had completed her assessment and that unfortunately, it was not the same as his.

[143] According to Ms. Clark-Larkin's note, her comments surprised the grievor. He was taken aback and asked how it was possible that his manager could not have seen any improvement in his performance over the previous year. She replied that some areas had indeed improved, such as communication with his manager and the review and integration of her feedback in previous preliminary versions of his work. He replied that in the future, when his manager commented on his work, he would like to have someone objective in the room decide whether the comments were reasonable and specific enough. Ms. Clark-Larkin replied that that could not be done because her job as a manager was to judge the quality of his work and that a third party did not necessarily have the same mandate.

[144] Ultimately, on March 5, 2015, the grievor stated that he felt that the performance improvement plan had been useless, as his managers had already decided the outcome of the process. He also stated that that was why he did not speak in earlier discussions.

O. The recommendation to demote

[145] On March 9, 2015, the grievor received a letter with the following heading: "RECOMMENDATION FOR DEMOTION". In it, Ms. Clark-Larkin informed him of the following:

...

At this time, the mid-point period of the three-month extension of your performance improvement plan has passed. I regret to inform you that you have not demonstrated significant improvement despite previous efforts to assist you in improving your performance, including training, a reduced workload, coaching, guidance, as well as verbal and written feedback on your work. I will therefore be recommending to the delegated authority, Susan Morris, Director, Evaluation Division, that action be taken to demote your employment for unsatisfactory performance in accordance with section 12.(2)(d) of the Financial Administration Act.

...

[146] Ms. Clark-Larkin stated that Ms. Morris then handled the demotion process. She spoke with directors from other divisions. A program officer position in the research portfolio was available. The grievor's competencies were assessed against the key competencies for the position. He had the required competencies.

P. The May 21, 2015, performance evaluation

[147] On May 21, 2015, Ms. Clark-Larkin and Ms. Morris signed the grievor's final annual performance evaluation, for April 2014 to March 2015. As indicated on its first page, the grievor wanted the performance evaluation report prepared in English. The following was in the evaluation:

...

Overall, Patrick's deliverables continue to require extensive revisions. In fact, often numerous rounds of revisions are required and in the end, the product is revised by the supervisor to bring it to the required level of quality. Patrick continues to be responsive to feedback from his supervisor - he is willing to make changes based on the feedback from both his supervisor and other staff. His supervisor has noticed that, although Patrick is responsive to her comments and addresses feedback, it is not clear if he understands that the work requires improvement. An overall concern is whether or not Patrick is learning from the feedback provided in order to be able to apply it to his future work. On a number of occasions he has indicated that he feels that the changes requested by his supervisor are not necessary. Even though Patrick's supervisor provides extensive feedback in order to improve the quality of Patrick's work, he does not seem to apply this feedback in subsequent work. It appears that he fundamentally disagrees with his supervisor regarding the quality standards of deliverables prepared by a senior evaluator.

[148] The same day, the grievor replied to Ms. Clark-Larkin. He stated that he felt that as were the mid-term evaluations, this one was unfair and biased.

[149] The grievor showed me two examples of his comments in response to his negative annual review. For example, he wrote the following:

Contradictory! In a previous evaluation of the PIP, the supervisor concluded that I met the objective, with respect to seeking feedback from the supervisor. I consulted with my colleagues when I needed. I regularly consulted with and provided feedback to staff who were working on different components of the evaluations that I led.

...

This is one of the nightmares of working with the supervisor. It was not possible to get a clear expectation from the supervisor on this issue. It turned out that when I provided more detailed information, this was not appreciated. Conversely, when a [sic] limited the quantity of information, this was also criticized and disapproved. There was no clear direction from the supervisor on her expectations in terms of how much detailed information should be provided.

[150] After that feedback, Ms. Clark-Larkin did not change her assessment.

[151] I note that normally, the annual and the mid-term evaluations for the common review periods should not be in stark contrast. However, it can be seen that the annual review is not consistent with the mid-term reviews. For instance, for the “[translation] Organization” criterion, it reads, “[translation] he has difficulty managing his time”, while the July 14, September 25, and December 5, 2014, and March 1, 2015, reviews indicate that he respected deadlines.

[152] The opposite is also true. For the “[translation] Qualities” criterion, the annual review states: “[translation] Has demonstrated to some extent his analytical capabilities”. However, this finding is not mentioned in the mid-term reviews.

[153] On the issue of the grievor’s reduced workload, Ms. Clark-Larkin stated that she had hired a consultant to enter data because no junior employee was available and that that was not a senior evaluation officer’s role. Thus, the grievor had one main project instead of several. As such, according to her, he had no competing priorities. However, according to Ms. Morris’s testimony, it would also be the norm for all evaluators.

[154] As for the language of the reports, Ms. Clark-Larkin stated that the grievor could choose to prepare reports in French or English. He prepared them in English to practise that language.

[155] Ms. Clark-Larkin showed me several versions of reports that the grievor prepared and in which she provided significant feedback. She explained that they showed that the first drafts of the reports were not at the level of a senior evaluation officer. She explained that once he incorporated the feedback, the second versions of his draft reports were more consistent with a first draft prepared by a senior evaluation officer.

[156] I also note that as of September 25, 2014, feedback was no longer one of the things he needed to improve. He met the expectation; therefore, it was not one of the grounds for demotion. Indeed, he had improved in that area as of July 14, 2014.

[157] For her part, Ms. Morris stated that the performance improvement plan had been established for a period of six to nine months. It was extended to one year to give the grievor more time to meet the requirements of the position. His duties and the required deliverables were regularly explained to him. However, the reports that he

delivered were not of good quality. Ms. Clark-Larkin had to intervene to a greater extent than she should have. He did not agree with the feedback he received, but it was important, and management intended to instruct him as to how to prepare his next reports. However, the same problems persisted. He had to apply the new knowledge to other deliverable products. Despite the scope of the provided feedback, his written deliverable products were not acceptable.

[158] Ms. Morris also stated that these competencies were essential to his position, and the assessment was reasonable that the grievor's performance was unsatisfactory. Therefore, she decided to demote him.

[159] For his part, the grievor simply stated that if he included too much information in his reports, he was blamed for including too much detail. However, when he took it out, he was accused of not being clear enough. According to him, Ms. Clark-Larkin was unable to express her expectations. It was a matter of instinct. No matter how diligent and hard-working he was, he was unable to sense what she wanted. He added the following with discouragement: "[translation] But is not the saying, if one wants to kill a cat, just say it has rabies?"

[160] He presented as evidence a report entitled, "Evaluation of Institutional Research Capacity Grants", which Ms. Morris corrected. He explained that Ms. Clark-Larkin had already corrected it. So, he was confused then, as some of the comments that Ms. Morris and Ms. Clark-Larkin made were contradictory. He wondered which ones he had to incorporate.

[161] That evaluation was of the SIG ("SSHRC Institutional Grants") and ASU ("Assistance to Small Businesses") programs. The grievor brought to my attention a comment from Ms. Morris with which he disagreed because his table included data relating only to small universities, which was not an error. According to him, Ms. Morris had not understood, as she had compared the data to other data that applied to all universities, of different sizes.

[162] He stressed the fact that sometimes, he had already discussed topics with Ms. Clark-Larkin, but that after reading his reports, Ms. Morris then asked technical questions. According to him, Ms. Clark-Larkin and Ms. Morris had different requirements, and it was hard to satisfy them both.

[163] The grievor brought to my attention another report, dated January 19, 2014, which he prepared. It was entitled, "Evaluation of Institutional Research Capacity Grants". He said that he felt that the person who corrected his report and who commented throughout it did not seem to have first read the program description in the official document. He insisted that he had disagreed with the comments and that he had no longer known which way to turn. He also stated that he was not the only one who included certain information twice in reports in different formats or versions, so that the most appropriate version could be chosen later. However, the comments added to the document criticized that approach.

Q. The demotion

[164] Ms. Morris mentioned that throughout the evaluation process, she wanted the grievor to succeed at improving his performance. Despite everything, he did not meet the requirements of his position. She added that he makes a valuable contribution to the SSHRC. For instance, he is able to do many kinds of work. Generally, he works well as part of a team and has a good work ethic, but given the work to be done in his division and the scarcity of resources, she had to consider finding him another position that was better suited to him.

[165] In fact, she had found that she could not deliver the goods with her complement of staff. She added that she has the same expectations for all GR-08 employees in her division. She considered finding him another position classified at the GR-08 group and level, but he did not seem to meet the key competencies for those positions, which was a challenge. Therefore, she decided to demote him from his GR-08 position to one at a lower level.

[166] First, she considered finding him a position classified at the GR-07 group and level, but the only one available at that level did not match the grievor's education and experience. She noted that he had wanted to replace a former colleague, but that position included supervisory duties, and he had no experience in that area. Moreover, given his improvement plan, she found that option unsuitable.

[167] Ms. Morris then considered the option of finding him a position classified at the GR-06 group and level in her division, to keep him on the team. However, her division needed someone classified at the GR-08 group and level with functional potential. She

determined that it was clear that the work to be done in her division had to be carried out by an efficient employee classified at the GR-08 group and level.

[168] Ms. Morris then reviewed the list of available positions. In fact, only one option was left at the GR-06 group and level, and it was offered to the grievor. She felt that he would perform better in that position.

[169] Ms. Morris found it very hard to make the decision to demote the grievor. She knew that his daily life would be affected. In short, she felt bad because he had already told her that he really liked working in the evaluation field and that he felt comfortable there. Therefore, she found it hard to tell him that given his strengths and weaknesses, it was not the best position for him at the SSHRC.

[170] Therefore, on May 25, 2015, Ms. Morris sent the grievor a letter with the following heading: "DEMOTION FOR UNSATISFACTORY PERFORMANCE". It informed him that he was demoted, and it included the following:

In response to the letter you received from your manager dated March 9, 2015; I have decided to proceed with the recommended action. This letter will therefore serve as notice of demotion in accordance with the delegation afforded to me under section 12.(2)(d) of the Financial Administration Act.

[Translation through the last bullet point] *This decision is based on ongoing performance problems that have been identified and communicated to you since June 2013. Despite ongoing support, including the implementation and extension of a performance improvement plan, significant gaps have persisted. In particular, you need to improve the following areas:*

- carrying out evaluation projects with minimal supervision, in accordance with timelines and quality standards;*
- developing plans and programs to support the design and implementation of evaluation projects;*
- providing technical direction to project teams made up of program evaluation specialists, program staff, and consultants, ensuring the quality of the work, the validity of the interpretation of evaluation results, and the credibility of the causal analysis; and*
- undertaking and coordinating the preparation of evaluation reports, special studies, and various presentations, including presenting and defending them before committees and working groups.*

Over the past twelve months, your manager supported you through on-going [sic] discussions, coaching and training in an effort to improve your performance skills. Unfortunately, there has been no improvement in the areas identified by your manager. I have reviewed the documentation supporting your manager's efforts in this regard and agree that this is the best possible option available.

I recognized the efforts that you have been making and am convinced that you remain a valuable member of the Social Sciences and Humanities Research Council (SSHRC); my intention is to keep you employed within the Agency where your skills can be better utilized.

I have reviewed and evaluated all available options within the Agency to identify a position that would best compliment [sic] your skills and abilities. Therefore, effective June 8, 2015, you will be appointed to position number 12238, Program Officer, classified at the GR-06 level, within the Research Training Portfolio under the Research Programs Directorate. Your rate of pay will be calculated in accordance with article 27.05 of the Collective Agreement for the Administrative and Foreign Services Category.

...

[171] The grievor explained that he experienced great stress when he received that letter, which led to a relapse of his health issues. He was on sick leave until October 5, 2015, after which he began working as a program officer in the research training portfolio of the Programs Division.

[172] In cross-examination, the employer's representative asked the grievor if he had filed a judicial review application with the Federal Court to challenge his demotion. He replied in the negative. Instead, with his bargaining agent's support, he filed this grievance to challenge his demotion.

[173] The employer's representative also asked the grievor if he was a good worker and if he was engaged and diligent in his work. He replied in the affirmative. He also agreed with the suggestion of the employer's representative that he had never been negligent. He was also asked to answer whether he had ever been at fault, committed a malicious act, or breached rules of civility or ethics. He said that he had not and that he gave his best while at work. He added that in his previous evaluations, his manager had specifically recognized the quality of his work, his innovative spirit, and his good behaviour.

[174] In conclusion, the employer's representative asked the grievor if he recognized that in general, the employer's interest had been to ensure that every employee was able to perform satisfactory work. He responded that that was a valid interest but that his work was satisfactory. He performed well. The problems began because of the tension that had arisen between him and his new manager, after the new team was created. According to him, she imposed the performance improvement plan on him to remove him from his job because of that tension; the plan had an incorrect and unfair methodology and approach, which caused him harm and the loss of his position.

[175] Finally, the grievor added that all the performance evaluations that he received were good after he was demoted to his new position classified at the GR-06 group and level. And as of the hearing, he was in a position classified at the GR-07 group and level on an acting basis and had received very good feedback on his performance.

IV. Was the grievor's demotion disguised discipline?

A. The employer's position

[176] The employer argued that the measure imposed on the grievor was administrative, i.e., a demotion for unsatisfactory performance, which the Board could not be seized of under the *FPSLRA* as the employer is an undesignated separate agency. Thus, the employer argued that the Board did not have jurisdiction to determine whether the performance evaluation was fair or accurate. If the grievor felt that his work was assessed unfairly, the appropriate recourse would have been to seek judicial review of the final-level decision, which was not done.

[177] The employer stressed that when a grievance is not subject to adjudication, a party can ask the Federal Court for a judicial review of the final-level decision. To support that claim, the employer cited the specified paragraphs from the following decisions: *Green v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2017 PSLREB 17 at para. 340; *Cameron v. Deputy Head (Office of the Director of Public Prosecutions)*, 2015 PSLREB 98 at para. 85; *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 31 at para. 164 (judicial review application dismissed in 2018 FCA 203); and *Canada (Attorney General) v. Assh*, 2005 FC 734 at para. 12.

[178] Thus, the employer argued that to support his grievance, the grievor had to show that his demotion was a disciplinary action. However, if the evidence established

that it was due to a performance issue, the Board would not have jurisdiction, as the employer is an undesignated separate agency.

[179] According to the employer, with respect to the evidence, the grievor failed to demonstrate that on a balance of probabilities, his demotion was a disguised disciplinary action that the employer took against him. The employer argued that it was his responsibility to demonstrate that its action was not what it seemed on first view. It cited the specified paragraphs from the following decisions to support its argument: *Wong v. Deputy Head (Canadian Security Intelligence Service)*, 2010 PSLRB 18 at para. 34; *Green*, at paras. 342 and 376; *Peters v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 7 at paras. 304 and 334; *Lindsay v. Canada (Attorney General)*, 2010 FC 389 at para. 46; and *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2010 PSLRB 130 at para. 96.

[180] The employer added that the grievor did not establish that on one hand, it intended to punish and discipline him. On the other hand, according to the employer, he failed to establish the existence of an underlying culpable behaviour or harmful act.

[181] First, to support its argument that the grievor did not establish that it intended to punish or discipline him, the employer argued that it has been recognized that the vast majority of an employer's actions in the workplace are purely administrative and are not forms of discipline. The employer referred me to *Canada (Attorney General) v. Frazee*, 2007 FC 1176 at para. 20, which reads as follows: "The authorities confirm that not every action taken by an employer that adversely affects an employee amounts to discipline."

[182] According to the employer, the following decisions demonstrate that "[translation] an employer's intention is central to determining whether an administrative action is in reality discipline" (see *Agbodoh-Falschau v. Canadian Nuclear Safety Commission*, 2014 PSLRB 4 at para. 29; *Chamberlain*, at para. 96; *Frazee*, at para. 22; and *Cameron*, at para. 96). It argued that those decisions indicate that the grievor had to establish that the employer intended to punish or discipline him.

[183] According to the employer, the relevant facts of management's intention can be summarized as follows: (1) Ms. Clark-Larkin and Ms. Morris both testified that the purpose of the entire performance exercise was to help the grievor; (2) they also

testified that they wanted him to achieve the objectives set out in the performance improvement plan; and (3) they testified and the documentary evidence showed that the employer spent a great deal of time and effort to help him improve his performance. However, his performance was unsatisfactory. For all these reasons, the employer submitted that he did not demonstrate an intention to punish and discipline him.

[184] According to the employer, the evidence demonstrated that management had legitimate operational concerns about the grievor's performance. It added that the related facts are as follows: (1) in cross-examination, he did not challenge the fact that the employer had legitimate operational concerns about his performance reaching the expected production level, and (2) during his examination-in-chief, he added that he sometimes supervises employees and that "[translation] supervision is a process to help employees be efficient".

[185] The employer argued that the demotion might have harmed the grievor but that "[translation] it resulted from a decision that was aimed not at causing him harm but at addressing a legitimate operational interest".

[186] The employer also noted that ss. 6 and 7 of the *FPSLRA* protect and enshrine its management rights. Similarly, according to the employer, the *FAA* "[translation] confers on the employer the authority to organize the administration of the federal public service and to manage HR, including working conditions".

[187] Second, the employer argued that the grievor failed to establish the existence of an underlying culpable behaviour or harmful act. It claimed that several decisions state that discipline is normally based on the grievor's misconduct, which the employer wished to punish (see *Chamberlain*, at para. 95; *Frazer*, at paras. 25, 29, and 30; *Green*, at para. 376; *Peters*, at para. 309; and *Wong*, at paras. 36 and 38).

[188] Thus, according to the employer, the grievor had the onus of demonstrating "[translation] that underlying reasons would support the allegation that disciplinary action was taken". As stated at paragraph 86 of *Garcia Marin v. Treasury Board (Public Works and Government Services Canada)*, 2006 PSLRB 16, the grievor had to establish that he was guilty of some form of culpable act or misconduct of some kind.

[189] According to the employer, instead, the facts can be summarized as follows: (1) in cross-examination, the grievor confirmed that he had never demonstrated an underlying culpable behaviour in the events in question; (2) he confirmed that the employer did not need to resolve delays or unjustifiable absences on his part; (3) he confirmed that the employer did not need to resolve any breaches he made of its safety rules; (4) he confirmed that he was not negligent or disloyal at work, did not make disrespectful or discriminatory statements, and did not violate the *Values and Ethics Code for the Public Sector*; and (5) all the witnesses, including the grievor, testified that he was a good person, that he was a good worker, and that he was diligent. In summary, according to the employer, the evidence showed that the grievor had no intention of hindering it through the performance problems and that those problems arose from actions that were involuntary and not wrong and that related to his performance, which were not the subject of a disciplinary response from the employer.

[190] According to the employer, the grievor stated the following at the hearing: “[translation] I am a good guy; I work well. I conducted myself properly.” Thus, according to the employer, he did not claim that it accused him of a harmful act. Therefore, he allegedly presented no evidence of underlying culpable behaviour on his part.

[191] Finally, the employer claimed that “[translation] the grievor’s perceptions, impressions, or feelings do not change an administrative measure into discipline”. According to the employer, in his testimony, the grievor presented his perceptions, impressions, and feelings that he had been subject to discipline. However, it wanted to respond to his comments, which I have grouped into the following points: (1) he said that his reviews were biased, and so was the entire process established to help him improve his performance; (2) he said that the employer was looking for perfection; (3) he said that the expectations were not clear; (4) he said that his relationship with management was strained but also said that he had a good relationship with Ms. Morris and that he could make small talk with her in the hallways; (5) he said that he had a good relationship with Ms. Clark-Larkin, except when they discussed his performance; (6) he said that Ms. Vergnhes had harassed him; (7) he said that the employer ignored the feedback he provided after his performance evaluations; and (8) he said that Ms. Clark-Larkin said that she could dismiss him.

[192] The employer presented its positions in response to each point.

[193] First, Ms. Clark-Larkin explained that she consulted the Human Resources Section throughout the process. She also relied on her supervisor, Ms. Morris, for a second opinion and to ensure that her comments, assessments, and feedback were fair. Ms. Morris also asked Ms. Vergnhes to work with the grievor on a project, to receive another opinion from a francophone manager. Ms. Vergnhes did not know the grievor and had just joined the SSHRC. These three people reported serious performance problems.

[194] Second, Ms. Clark-Larkin and Ms. Morris testified that they did not seek perfection but rather a meaningful and durable improvement that they described as a “significant and sustained improvement”. The documentary evidence also referred to the meaningful and durable improvement required of the grievor’s performance.

[195] Third, the documentary evidence and the testimonies of Ms. Clark-Larkin and Ms. Morris showed that the employer informed the grievor of its expectations many times in emails, performance evaluations, the performance improvement plan, comments about his work, and verbally at meetings.

[196] Fourth, the grievor stated that he had good relationships with Ms. Morris and Ms. Clark-Larkin.

[197] Fifth, with respect to his exchanges with Ms. Clark-Larkin, although they got along well, he found it hard to discuss his performance with her because she was like the “[translation] devil”, according to him. However, according to the employer, he provided no examples to support his allegation. She also affirmed that her relationship with him was professional. They were able to discuss performance problems professionally. Disagreements arose, and he often did not receive the feedback well, but the discussions always remained professional.

[198] Sixth, the grievor never made a harassment complaint against Ms. Vergnhes. So, the harassment allegations were simply allegations. For her part, Ms. Vergnhes explained that she tried to understand the grievor’s performance issues. She knew that he is a doctor and that he had had to change professions. She wanted to see how he felt in his work, to know if he was comfortable and satisfied, and to know if he had other interests. If he had other interests, she could have offered him help and support.

Unfortunately, he perceived that initiative a threat to his job. However, according to the employer, instead, it was an attempt by Ms. Vergnhes to understand the issues that might explain his performance problems and to offer him help, if he wanted it.

[199] Ms. Vergnhes also shared another example of a misunderstanding. She explained that the grievor had accused her of calling his home. However, he later recognized that someone else, a family acquaintance with the same first name, had called.

[200] Seventh, Ms. Clark-Larkin and Ms. Morris confirmed that they reviewed and considered the grievor's comments in the performance evaluations. According to the employer, he was entitled to disagree with the evaluations, but management has the prerogative to manage, evaluate activities, and make operational decisions.

[201] Eighth, Ms. Clark-Larkin did not tell the grievor that she could dismiss him. She told him verbally and in writing that he was not meeting the requirements of his senior program evaluation officer position and of the possible consequences of continually failing to meet them. In her letter dated January 12, 2015, she wrote this:

the [sic] purpose of this letter is to inform you that you are not meeting the requirements of your position as a Senior Program Evaluation Officer in the evaluation division and to advise you of the consequences of continued failure to meet these requirements.

[202] Thus, according to the employer, the grievor translated his perceptions, impressions, and feelings into unsubstantiated claims against his managers. That was not enough. He had to present other evidence.

[203] The employer added that in the following decision, the Board held that a grievor's perceptions, impressions, or feelings must be supported by other evidence to establish the existence of discipline (see *Tudor Price v. Deputy Head (Department of Agriculture and Agri-Food)*, 2013 PSLRB 57 at paras. 47 and 51 (judicial review application dismissed by Federal Court order, its file no. T-1074-13, on March 31, 2014); *Ho v. Deputy Head (Department of National Defence)*, 2013 PSLRB 114 at para. 56; *Garcia Marin*, at para. 85; and *Frazee*, at para. 21).

[204] According to the employer, in this case, the Board cannot allow the grievor to do indirectly what he cannot do directly; i.e., it cannot allow him to challenge his demotion for unsatisfactory performance. In summary, according to the employer, the

following facts show that the grievor challenged his demotion: (1) in his examination-in-chief, he argued that his work objectives were not clear and that the employer did not provide him with clear feedback or disagreed with his performance evaluations or action plan; (2) in cross-examination, he indicated that he was not satisfied with the results of the process the employer put in place to assess his performance and that he received advice to proceed with adjudication instead of filing a judicial review application; and (3) at the hearing, he insisted that he was not satisfied with the results of the evaluation plan. He did not argue that he had been disciplined.

[205] The employer argued that in a similar case, in which the employer was an undesignated separate agency, the Board ruled that it did not have jurisdiction to determine which party was right on an unsatisfactory performance issue. The *FPSLRA* does not give the Board the authority to examine the validity of a demotion for unsatisfactory performance in an undesignated separate agency. The employer cited paragraphs 26 to 28 and 30 of *Agbodoh-Falschau* in support of its position.

[206] In closing, the employer claimed that it has a legitimate operational interest to ensure that its employees meet the performance requirements of their positions. Despite the grievor's perceptions, feelings, and impressions, the employer acted openly and in good faith toward him. The employer did not intend to punish him; instead, it tried to help him meet the requirements of his position. It kept him informed of management's expectations of him and of the consequences of not meeting the position's requirements. Management gave him the opportunity to adapt and meet expectations. It truly tried to help him; it reduced his workload, offered him training, provided him feedback (verbal and written), and considered other solutions before demoting him.

[207] For those reasons, the employer claimed that the Board has no jurisdiction to examine the extent to which the grievor's performance evaluation was fair or accurate. In its view, if the grievor felt that his work was being assessed unfairly, his only recourse was to apply for judicial review of the final-level decision.

[208] Therefore, the employer maintained its objection that the grievor's grievance was not adjudicable, as in fact, it contested the grievor's demotion for unsatisfactory performance, which the Board has no jurisdiction to examine.

[209] Alternatively, if the objection is dismissed, the employer submitted that the Board must determine whether the discipline imposed on the grievor was justified under the circumstances. It provided no additional arguments on this point.

B. The grievor's position

[210] Since a conflict arose between the grievor and two of his supervisors, Ms. Clark-Larkin and Ms. Vergnhes, and since they prepared the performance evaluations and the performance improvement plan, the grievor submitted that in fact, his demotion was a disciplinary and not an administrative action. According to him, the performance improvement plan was established with the intention of demoting him.

[211] The grievor argued that as stated at paragraph 21 of *Fraze*, "The case authorities indicate that the issue is not whether an employer's action is ill-conceived or badly executed but, rather, whether it amounts to a form of discipline involving suspension." That decision states that one of the primary factors when determining whether an employee has been disciplined is the employer's intention. As stated at paragraph 22, "The question to be asked is whether the employer intended to impose discipline and whether its impugned decision was likely to be relied upon in the imposition of future discipline ...".

[212] The grievor added that I must examine the elements underlying the employer's stated reason, as noted as follows at paragraphs 23 to 25 of *Fraze*:

23 It is accepted, nonetheless, that how the employer chooses to characterize its decision cannot be by itself a determinative factor. The concept of disguised discipline is a well known [sic] and a necessary controlling consideration which allows an adjudicator to look behind the employer's stated motivation to determine what was actually intended....

24 The problem of disguised discipline can also be addressed by examining the effects of the employer's action on the employee. Where the impact of the employer's decision is significantly disproportionate to the administrative rationale being served, the decision may be viewed as disciplinary ... However, that threshold will not be reached where the employer's action is seen to be a reasonable response (but not necessarily the best response) to honestly held operational considerations.

25 Other considerations for defining discipline in the employment context include the impact of the decision upon the employee's career prospects, whether the subject incident or the employer's view of it could be seen to involve culpable or corrigible behaviour

by the employee, whether the decision taken was intended to be corrective and whether the employer's action had an immediate adverse effect on the employee....

[213] The grievor argued that in this case, the impact of the employer's decision was significantly disproportionate to the stated administrative reason. Therefore, the decision must be considered disciplinary. He added that this standard was met since the employer's imposed measure cannot be viewed as a reasonable response to honestly held operational considerations.

[214] The grievor also brought to my attention paragraph 75 of *Gauthier v. Deputy Head (Department of National Defence)*, 2013 PSLRB 94, which reads as follows:

[75] Far be it from me to conclude that the employer's decision is a sham. Nonetheless, the overwhelming evidence leads me to believe that the decision to demote Ms. Gauthier on grounds of performance conceals the disciplinary intent by changing the appearance of the situation (camouflage) and using a clever and disguised way (camouflage) to justify incompetence, which was initially deemed by the employer to be voluntary deviant behaviour. I certainly do not want jump to conclusions about the employer's intent by concluding that there was intent to deceive, but ultimately, that is what happened.

[215] Paragraph 66 of *Gauthier* is quite clear — the decision cannot be considered as discipline if it involved actions beyond the grievor's control, with respect to which he or she was not to blame but instead was incompetent.

[216] The grievor argued that in this case, the employer had to demonstrate the following, as set out at paragraph 121 of *Morissette v. Treasury Board (Department of Justice)*, 2006 PSLRB 10:

[121] In situation [sic] such as this, the employer must show:

- that it has acted in good faith;*
- that it has set appropriate standards of performance which were clearly communicated to the employee;*
- that it gave the employee the necessary tools, training and mentoring to achieve the set standards in a reasonable period of time;*
- that it warned the employee in writing that failure to meet the set standards by a reasonably set date would lead to a termination of employment, and finally,*
- that the employee has failed to meet the standards within the set period of time.*

[217] I note that those obligations are imposed on the employer in cases of termination for incompetence. In this case, the grievor claimed that the employer did not meet the first three listed criteria. He submitted that the evidence he presented showed that (1) he is highly educated and hard-working, (2) he holds several university degrees, (3) he worked as a research officer before joining the SSHRC in 2008, and (4) he received positive performance evaluations from 2008 to 2012, when he reported to Ms. Gauthier.

[218] He acknowledged that his skills are not perfect in all areas, as Ms. Gauthier stated as follows in his performance evaluation for April 2011 to March 2012: “[translation] Defining performance indicators within the scope of SSHRC programs and representative of social sciences and humanities remains a challenge.” However, his overall assessment for 2011-2012 was as follows:

[Translation]

Overall, Patrick had a productive year in terms of evaluation. He worked on several SSHRC and inter-agency projects. He also worked with colleagues in his division on several evaluation components. The experience was positive for everyone. Patrick remains hard-working. His contribution to the division's goals was substantial, including preparing a feasibility study for the summary evaluation of knowledge mobilization grants....

[219] He added that then, as a result of the restructuring, he was under a new supervisor and a new director. On his new team, tensions arose between him and his new supervisor. According to him, she, and later Ms. Vergnhes, made a 180-degree turn in assessing his work, such that they found his performance completely unsatisfactory.

[220] Ms. Clark-Larkin then imposed a performance improvement plan with an incorrect methodology and approach that caused him harm and to lose his position, according to him. The grievor submitted that no effort was made to assess his performance objectively, as Ms. Clark-Larkin and Ms. Vergnhes always assessed it.

[221] He added that tensions arose, among other things, when Ms. Clark-Larkin took the grievor's feasibility study for the summary evaluation of knowledge mobilization grants away from him, without informing him in advance. She reassigned the project to his colleague. It created considerable awkwardness within the team. Then, she attributed all the difficulties that arose to him.

[222] Specifically, the conflict persisted when the grievor received conflicting instructions on how to collect data, based on which he created two tables in his report, one with certain amounts, the other without them. However, Ms. Clark-Larkin criticized his approach in his 2012-2013 evaluation.

[223] Then, shortly after Ms. Vergnhes joined the team, she told him that she was tasked with assessing him. A very short time later, she told him that he could potentially lose his job.

[224] The grievor added that Ms. Vergnhes did not acknowledge informing him that she was tasked with assessing him, but she did effectively assess his work as part of her new duties. Similarly, Ms. Morris stated that she asked Ms. Vergnhes for her opinion on the quality of the grievor's work.

[225] The grievor argued that even if Ms. Vergnhes's intention was not to threaten to remove him from his job — she said that she wanted to help find him a position elsewhere — it is reasonable that he perceived her as a threat to his job, given the context in which she assessed him.

[226] This situation had a devastating effect on his mental health. He consulted his doctor, who prescribed medication and placed him on sick leave. Thus, he was off work from March 3 to May 3, 2014. During his leave, Ms. Clark-Larkin wanted to complete his performance evaluation before he returned, as her goal was to impose a performance improvement plan on him as soon as possible, which she did. Initially, the plan targeted May 5 to November 5, 2014, which then was changed to May 26 to November 26, 2014.

[227] However, the performance improvement plan did not include an assessment scale. The grievor submitted that by including no minimum performance targets but only “meets” (100%) and “does not meet” criteria (0%), he had no chance to achieve the objectives. He added that it is impossible to prepare a perfect program evaluation the first time. With his union representative's help, he tried everything to include a measurement scale in the performance measurement plan for measuring his progress. However, the employer categorically refused that request. It used the all-or-nothing criteria — “meets” or “does not meet”.

[228] According to the grievor, throughout the assessment process, the employer maintained that those criteria and the approach were appropriate, according to a TBS policy, but it never provided that information to him or even to the Board. Thus, according to him, with respect to the first criterion, the employer did not act in good faith. Moreover, it failed to meet its obligation to set appropriate performance standards. Therefore, it also did not meet the second criterion.

[229] Finally, according to the grievor, the employer did not meet the third criterion, as it also did not provide the tools, training, and mentoring he required to achieve the set standards within a reasonable period. On one hand, the plan's duration, which initially was six months with a short extension, did not give him much time to improve. However, in particular, the employer did not ask him if the few courses he was offered helped him and applied to his work. Finally, he did not receive any specific training during that period.

[230] In addition, according to him, the feedback he received was insufficient. He received comments on his evaluation reports; namely, information was missing, or some passages were unclear. He emphasized that that help was not enough for him to significantly improve. In other words, he did not receive coaching. He also received feedback from several people, i.e., Ms. Clark-Larkin, Ms. Morris, and Ms. Vergnhes, which he described as a cacophony of opinions, sometimes expressing varied ideas. He was confused and no longer knew where to turn.

[231] The employer then agreed to provide the grievor with mid-term assessments, but they simply confirmed his concern that he could never achieve the "meets" criterion (100%) for each objective.

[232] Despite his hard work, it became impossible for the grievor to meet the objectives set out in the performance improvement plan. He argued strongly that he was assessed incorrectly. For example, his assessment mentioned that once, he had communicated with the wrong person. However, he had communicated with the project manager for that data, who had provided him with partial data. He also added that his assessment mentioned that he did not sufficiently consult others. However, according to him, when in the past, he consulted Ms. Morris for advice, she then accused him of not understanding what she expected of him. Therefore, he submitted

that it was not surprising that the situation did not improve during his assessment, which led to his demotion in May 2015.

[233] He insisted on stating that the employer's intention since February 2014 — which Ms. Vergnhes disclosed in a discussion with the grievor — was to demote him. She specifically told him that he should consider finding a position elsewhere.

[234] The grievor argued that the demotion had a significant impact on him and that his mental health was affected. It was a disproportionate measure, according to him, compared to his performance. The entire process made him sick, and he had to be off work on sick leave from March to May 2014 and from May to October 2015.

[235] The grievor also argued that he was demoted by two levels, instead of just one, which had a significant financial impact on him. And, according to him, the option of providing him with some salary protection was not considered, but it could have been. He brought to my attention that Ms. Morris said that she would have preferred to demote him to a position classified at the GR-07 group and level but that it was not possible as no position was available at that level for which he was qualified.

[236] In summary, the grievor argued that his demotion amounted to discipline, taking into account the following eight criteria: (1) he and his manager had a palpable tension that arose from the fact that without his knowledge, Ms. Clark-Larkin removed him from his project on the summary evaluation of knowledge mobilization grants; (2) as early as February 2014, Ms. Vergnhes informed him that his position was not suited to his performance and that he should consider finding another one; (3) the performance improvement plan was imposed on him immediately after he returned from sick leave, while the tension persisted between him and Ms. Clark-Larkin and Ms. Vergnhes; (4) the plan did not contain any minimum performance targets, simply the “meets” (100%) and “does not meet” (0%) criteria; (5) with his first mid-term assessments, he realized that it was impossible for him to achieve the 100% criterion required for each objective; (6) he was offered minimal training but only toward the end of the initial assessment period; (7) he received no coaching during his assessment, only criticism from his supervisors; and (8) Ms. Clark-Larkin conducted his assessments while they were in conflict.

[237] According to the grievor, the performance improvement plan was imposed on him with the intention of documenting his failures and demoting him. Therefore, the

Board has jurisdiction to hear the grievance. Thus, he asked that I allow his grievance, that I set aside his demotion, and that I order his reinstatement into his position classified at the GR-08 group and level, with compensation for lost wages. He also asked for damages to compensate for his psychological distress, which the employer's actions caused.

C. Conclusion

[238] The *PSLRA* gives me jurisdiction to rule over the grievor's demotion only if it resulted from a disciplinary action. The employer challenged my jurisdiction. It alleged that the demotion resulted from an administrative action related to his performance. On the other hand, he argued that it was "[translation] disguised discipline" because, according to him, in reality, it was based on disciplinary considerations.

[239] In this case, the employer demoted the grievor for the following reason:

Over the past twelve months, your manager supported you through on-going [sic] discussions, coaching and training in an effort to improve your performance skills. Unfortunately, there has been no improvement in the areas identified by your manager. I have reviewed the documentation supporting your manager's efforts in this regard and agree that this is the best possible option available.

I recognized the efforts that you have been making and am convinced that you remain a valuable member of the Social Sciences and Humanities Research Council (SSHRC); my intention is to keep you employed within the Agency where your skills can be better utilized.

[Emphasis added]

[240] Thus, I must decide whether the employer's action was administrative or disciplinary. Therefore, I must examine all the evidence to determine whether the grievor's demotion was more likely an administrative or a disguised disciplinary action.

[241] To discharge its burden of convincing me that the demotion resulted from an administrative action, the employer had to establish that on a balance of probabilities, it had an administrative reason to demote the grievor.

[242] Once that obligation was met, the onus shifted to the grievor to contradict the employer's evidence or to establish that on a balance of probabilities, the reasons it

cited were a sham or subterfuge. See *Stevenson v. Canada Revenue Agency*, 2009 PSLRB 89 at para. 18.

[243] The parties made arguments on the employer's subjective intent to punish or the absence of it. However, I note that *Bergey v. Canada (Attorney General)*, 2017 FCA 30, which reflects the jurisprudence on this point, particularly *Frazee*, notes that the employer's subjective intent is not determinative when deciding whether it engaged in disguised discipline. Thus, the absence of bad faith does not necessarily lead to concluding that the action taken was not disguised discipline (and that instead, it was an administrative action). In fact, disguised discipline can result from bad faith or procedural unfairness. Paragraph 24 of *Frazee* states the following:

24 ... Where the impact of the employer's decision is significantly disproportionate to the administrative rationale being served, the decision may be viewed as disciplinary ... However, that threshold will not be reached where the employer's action is seen to be a reasonable response (but not necessarily the best response) to honestly held operational considerations.

[244] In this case, I am of the view that several irregularities in the employer's documentation and testimonies reveal communication problems and a serious lack of openness toward the grievor, which raise doubts about the honesty of the operation. All in all, it is clear that the measure that the employer imposed was an unreasonable reaction to honestly held operational considerations. Moreover, "... the impact of the employer's decision is significantly disproportionate to the administrative rationale being served ..." (see *Frazee*). The irregularities or inconsistencies are presented later in this decision. Therefore, I find that the administrative reason that was supplied is inconclusive and that it resembles a sham. Thus, all these findings confirm that the grievor's demotion was disguised discipline.

[245] The important facts that punctuate this story are as follows. The restructuring of SSHRC and NSERC Evaluation Services took place in 2012. Before it, the grievor's work had two parts, evaluating SSHRC and inter-agency programs, and developing performance measurements. After the 2012-2013 restructuring, the performance measurement duties were removed from the position profile and were transferred to Business Services. So, the nature of the grievor's work changed significantly.

[246] And before the restructuring, consultants were responsible for much of the evaluation work. However, due to more limited resources in 2012 and 2013, it was

decided that the senior program evaluation officers would from then on carry out the basic work and report preparation internally. They had to lead projects.

[247] The grievor received completely positive reviews in his 2008 to 2012 performance evaluations. His performance was deemed entirely satisfactory. In March 2012, in the last assessment that Ms. Gauthier prepared, she addressed each examined criterion and noted that he excelled in almost all the following areas: (1) knowledge, (2) planning, (3) organization, (4) implementation, (5) control, (6) creation-innovation, (7) analysis-evaluation, (8) communications, and (9) interpersonal relations. The only nuance she raised was under the analysis-evaluation objective. She noted that he had prepared an analysis but that he had had difficulty defining the performance indicators. She wrote this:

[Translation]

Patrick showed his evaluation analytical skills when he prepared the feasibility study for evaluating knowledge mobilization. The analysis was rigorous and exhaustive. The definition of performance indicators for SSHRC programs and representative of social sciences and humanities remains a challenge.

[248] After the restructuring, the grievor was under a new supervisor and a new director. His new manager, Ms. Clark-Larkin, was responsible for assessing his reports. She immediately found that his work was unsatisfactory and that he needed to improve its quality. She discussed it with Ms. Morris, who also expressed concerns about the quality of the grievor's written reports, as Ms. Clark-Larkin had to continually correct them.

[249] The grievor expressed his disagreement with Ms. Clark-Larkin's position. Tension developed between them.

[250] Ms. Morris, Ms. Vergnhes, and the grievor asserted (see paragraphs 79, 85, 98, 128, and 159) that communication problems between management and him were at the root of some of the problems or animosity encountered. Specifically, sometimes, he and management disagreed as to the quality standards for the deliverables prepared by a senior evaluator. So, for them, communication was difficult.

[251] Similarly, the grievor stated that Ms. Clark-Larkin communicated only bad news to him about his work problems and faults. However, he frequently questioned the accuracy of the instructions or negative comments he received from her. He

questioned the effectiveness of her interventions. The tension was palpable when they discussed his work performance; he felt isolated.

[252] Ms. Morris asked Ms. Vergnhes, who had just joined the NSERC and SSHRC Evaluation Division as a manager and who had considerable experience in the evaluation field, to work on his projects with the grievor. She is francophone; so is he. She revised his main project and questioned the validity of the information in his report. During their interactions, she asked him a significant number of questions. However, she found that he had great difficulty answering her questions. Finally, she reported communication and performance issues to Ms. Morris and Ms. Clark-Larkin.

[253] The grievor found that Ms. Vergnhes also communicated only bad news to him about his work problems and faults. He challenged several of her instructions. He felt that she did not believe that he could do his job correctly. He sensed that her objective was to assess him negatively so that he would lose his job. He felt that she harassed him.

[254] Ms. Clark-Larkin and Ms. Morris consulted the Human Resources Section, and the decision was made to create a performance improvement plan for the grievor, of which Ms. Clark-Larkin and Ms. Morris informed him.

[255] That news shocked him, given that he had held his job since 2008 and that his performance problems were recent and linked to the arrival of new management. Feeling sick, he went off work for a few months due to his feeling of helplessness from his new managers' behaviour, Ms. Vergnhes in particular, who had supervised him for three months. He perceived her many criticisms as harassment.

[256] With respect to Ms. Clark-Larkin, who was always responsible for assessing his work, the grievor's view was that in her assessments of his projects, she provided him feedback a little at a time instead of all at once. For her part, she stated that she worked considerably on each revision to improve the quality of his work, including making many comments to him, and including advice, opinions, and instructions.

[257] Under his new managers' governance, the grievor received a negative performance evaluation. In response, he submitted feedback to Ms. Clark-Larkin. However, he noted that his comments were not considered, even when he raised inconsistencies in Ms. Clark-Larkin's and Ms. Morris's interpretations and instructions.

[258] When the performance improvement plan was introduced, the grievor said that he disagreed with the assessment method chosen; it seemed to him that the plan was not objective and that the assessment criteria were not appropriate. According to him, it would surely lead to an unfair and biased assessment of his performance.

[259] In particular, he found unfair the method for assessing his work against the objectives set out in the performance improvement plan. He proposed an assessment with an acceptability threshold or a performance scale. For example, he would have preferred that a score be allocated for different criteria, such as the timely presentation of reports, thorough data collection, in-depth analysis, etc., all with an acceptable performance threshold of 70%, for example. He also recalled that the Human Resources Section had promised to provide him with a reference document that explained the instructions with respect to the objectives and assessment criteria, but he never received it.

[260] Nevertheless, the employer retained the “meets” or “does not meet” criteria to assess him. However, it agreed to assess his work mid-term, to inform him of his progress. The employer considered the plan a tool to help him clearly understand the expectations and how he would be assessed. Since the plan set out the objectives to achieve, the employer found it more appropriate to determine whether they had been met rather than assigning a mark.

[261] Thus, after the restructuring and throughout the assessment process, disagreements persisted between the parties about the best and most appropriate way to perform certain assessment-related tasks. The employer’s three witnesses stated that sometimes, the grievor had inaccurate data in his reports. For example, in an evaluation of the indirect costs program, when gathering data, he used incorrect data for the 2012-2013 fiscal year. He replied that it was not his fault, as the program manager had provided it to him. However, when that manager viewed the draft report in fall 2013, she sounded the alarm because the data did not cover an entire year.

[262] My role is not to determine who was right with respect to these issues, either the employer or the grievor, as that is not the real issue before me. Rather, I must determine whether the implementation of the performance management plan and the demotion were disguised discipline in the context of the employer’s operations.

[263] I find that the irregularities or specifics revealed in the documentation and testimonies that the employer presented can be grouped into these five distinct categories: (1) gaps in the set timelines for meeting the expectations; (2) inconsistencies in the mid-term assessments and the annual review, and the failure to recognize the progress observed in the grievor; (3) gaps in the levels of training offered, delays applying the concepts received in the offered training, and insufficient training in the area of supervision; (4) arbitrary and therefore unreasonable performance standards; and (5) significant changes to the level of work that the grievor had to complete.

1. Gaps in the set timelines for meeting the expectations

[264] I note that the employer's witnesses testified that the grievor was assessed after the performance improvement plan was implement and over one year. In reality, the overall period in which he was assessed for the purposes of the performance improvement plan was actually nine-and-a-half months, from May 26, 2014, the start date of the performance improvement plan, to March 9, 2015, the date on which the demotion was recommended. From that date, I find that the employer no longer foresaw any possible performance improvements from the grievor. Specifically, between March 9 (the demotion recommendation) and May 25, 2015 (the demotion), improvements in the grievor's work performance were no longer considered. Thus, his progress over those 11 weeks was not considered, even though the purpose of the mid-term work assessments was to inform him of his progress.

[265] In addition, for some responsibilities, the grievor did not benefit from a period of nine-and-a-half months in which to improve. For example, this occurred for responsibility 2, entitled: "Develop plans and programs to support the design and implementation of evaluation projects - Identify the need to change methods and techniques or to develop unique approaches".

[266] To measure the grievor's performance under this responsibility, the plan set two performance indicators. The first, 2.1.1 (quality and relevance of the data collection and analytical process used in evaluating projects), was measured using the following criterion: 100% of deliverables use appropriate analytical methods and techniques. The second, 2.1.2 (the number of evaluation products with no analysis and/or data interpretation errors and/or reporting results clearly and concisely), was measured using the following criterion: 100% of deliverables had to include error-free data

analysis, a correct interpretation of the results, and clear and concise reporting of the results.

[267] In the mid-term assessments dated July 14, September 25, and December 5, 2014, the grievor was not assessed on those two performance indicators. Thus, although the assessment period covered by the performance improvement plan began on May 26, 2014, his assessment did not begin on that date for that responsibility. Rather, it began on December 6 and ended with the assessment dated March 1, 2015. Thus, he was assessed over a period of just under three months on a single project for which Ms. Clark-Larkin concluded that he had difficulty with data analysis. Therefore, he did not, as suggested, benefit from a period of one year to improve with respect to all the responsibilities.

[268] I also note that on December 18, 2014, the grievor received the last warning about his performance problems. He was advised that he had one last chance to show significant improvement in his performance relative to the four responsibilities with which he was having difficulty. Thus, with respect to responsibility 2, given that his assessment had begun on December 6, 2014, Ms. Clark-Larkin gave him a final warning 12 days later. This is a problem from the standpoint of procedural fairness.

[269] It can also be noted that for performance indicator 3.1.2, described later in this decision, the grievor was assessed over a period of 7.5 and not 12 months. The same was true for performance indicator 4.1.1, described later in this decision.

2. Inconsistencies in the mid-term assessments and the annual review, and the failure to recognize the progress observed in the grievor

[270] Responsibility 1, which was assessed, was entitled “Carry out evaluation projects with minimal supervision, while respecting delivery deadlines and quality standards”. To measure the grievor’s performance under this responsibility, the plan identified two performance indicators.

[271] In his mid-term assessments dated July 14, September 25, December 5, and March 1, Ms. Clark-Larkin concluded that the grievor did not meet the first indicator, 1.1.1 (the percentage of draft evaluation products that do not require major revisions by the supervisor) for several reasons. However, in his annual assessment covering April 1, 2014, to March 31, 2015, she indicated that while some analytical skills had not been met, others had been met. I note that those mid-term and annual assessments

covered the same period but that all in all, the assessments are different. The annual assessment does not reflect the mid-term assessments. This may be an indication that something is not right.

[272] With respect to performance indicator 1.1.2 (the percentage of evaluation products delivered on time), Ms. Clark-Larkin indicated in the July 14 and September 25, 2014, assessments that he met the deadlines (she wrote “[translation] The anticipated results were met in accordance with the set timelines discussed with the supervisor”). However, he received a failing mark for responsibility 1. It is true that he did not meet the requirements set out in indicator 1.1.1, but he met the ones set out in 1.1.2. Despite everything, he received a failing mark for responsibility 1.

[273] Then, in her assessments on December 5, 2014, and March 1, 2015 (when she noted that he delivered his drafts within a reasonable time), Ms. Clark-Larkin accused the grievor of not developing concrete deadlines or not being proactive when he could not deliver on time. Thus, she again wrote that he did not meet (December 5) or partially meet (March 1) the performance indicator. These discrepancies in viewpoints were sources of confusion and uncertainty for the grievor. Therefore, he expressed his misunderstanding with respect to those assessments; he found them subjective and contradictory. However, Ms. Clark-Larkin did not consider it.

[274] In addition, responsibility 3, which was assessed, was entitled, “Provide technical leadership to project teams made up of program evaluation specialists, staff assigned by the programs and consultants, ensure the quality of the work, the validation of the evaluation results interpretation, and the credibility of causality”. To measure the grievor’s performance under this responsibility, the plan identified two performance indicators.

[275] Indicator 3.1.1 stated that he had to show his ability to “... lead project teams by engaging stakeholders at the right time ... 100% of the time”.

[276] In her mid-term assessments on July 14, September 25, and December 5, 2014, Ms. Clark-Larkin noted that the grievor failed to achieve this indicator, as he had made an error in the minutes of a meeting, did not have a list of questions for discussion with a group, had to ensure that he consulted the appropriate client to confirm the information in the reports that he provided to his supervisor, and had to distinguish between when he could proceed alone and when he had to have his supervisor’s

authorization. In the March 1, 2015, assessment, she noted that he had met this indicator. Thus, he had made progress.

[277] However, the grievor was demoted on the ground that his performance did not improve, including, among others, in this area (see the demotion letter dated May 25, 2015). So, Ms. Clark-Larkin acknowledged his improvements under this responsibility in her last assessment on March 1, 2015, and later, in the annual review. However, she recommended that he be demoted because of his alleged problem in this area. This may be another indication that something is not right. All in all, these inconsistencies are troubling.

[278] Moreover, according to indicator 3.1.2, the grievor had to provide “100% of products with no quality issues raised ...”. He was not assessed for this indicator on July 14, 2014. Thus, his assessment period began on July 15, 2014. After the mid-term assessments on September 25 and December 5, 2014, and on March 1, 2015, Ms. Clark-Larkin noted that he had not met this indicator on the grounds that he had to ensure that he consulted the appropriate client to confirm the information in the reports he provided to his supervisor, and the data provided to his supervisor and staff was sometimes not specific.

[279] Similarly, responsibility 5, which was assessed, was entitled, “Accept, seek, and integrate workplace feedback”. To measure the grievor’s performance under this responsibility, the plan identified a single performance indicator, i.e., demonstrating “... the ability to seek and/or accept and/or integrate feedback from his supervisor and colleagues”. In the July 14, 2014, assessment, Ms. Clark-Larkin concluded that he had not met this indicator, although she wrote that he had collaborated with her and with others. She considered that he had to seek clarification from her when he wanted to amend a report based on her feedback.

[280] However, in the September 25, 2014, assessment she wrote the same comment, but this time, he achieved the indicator. Ms. Clark-Larkin also indicated that he met this indicator in his assessments of December 5, 2014, and March 1, 2015. In addition, in a note to Ms. Morris dated March 5, 2015, Ms. Clark-Larkin acknowledged that the grievor had improved in terms of revision and of integrating her feedback into subsequent preliminary versions of his work.

[281] Finally, I would like to clarify that in its evidence, although the employer strongly emphasized the grievor's difficulty receiving feedback from his supervisors, it is not one of the grounds cited to support his demotion. As of September 25, 2014, management recognized that he was meeting expectations on this point.

[282] However, there is an inconsistency between the mid-term assessments and the annual review in this respect. In the May 21, 2015, annual review, the employer again emphasized his alleged difficulties integrating provided feedback, while his mid-term assessments show that that difficulty had been resolved since September 25, 2014.

[283] Specifically, on May 21, 2015, in the annual review, Ms. Clark-Larkin noted the following: “[translation] His supervisor [Ms. Clark-Larkin] noted that while Patrick is receptive to her comments and accounts for her feedback, it is not clear that he understands that the work has to be improved.” In my view, this negative assessment is inconsistent with her assessment that since September 25, 2014, he had met “... the ability to seek and/or accept and/or integrate feedback from his supervisor and colleagues”. In short, was it reasonable to assess him negatively on this criterion in his annual review when the difficulty had been resolved for eight months? This is another indication that something is not right.

[284] Finally, it is worth repeating that several times, the grievor asked Ms. Clark-Larkin to clarify her comments and to correct the inconsistencies brought to her attention. However, she struggled to agree or simply refused to do it.

3. Gaps in the levels of training offered, delays applying the concepts received in the offered training, and insufficient training in the area of supervision

[285] In her October 21, 2014, letter about the training that the grievor had completed as of that date, Ms. Clark-Larkin stated that she acknowledged that he had had little time to apply the skills acquired in the training courses, i.e., between one and five months. Were those periods enough to integrate the acquired knowledge? Maybe not. However, I note that he again benefitted from less time to apply the skills he acquired after October 21, 2014.

[286] For example, the grievor took a course on writing in a professional context in November 2014. However, he benefitted from little time to apply those new concepts; he had approximately four months.

[287] And in her testimony, Ms. Morris pointed out that she would have liked to have found another position at a level comparable to the grievor's rather than demoting him two levels. She explained that a position that included supervisory functions was available but added that he had no supervisory experience or training. It should be noted that he was demoted in part because his ability to lead project teams was not sufficiently developed.

[288] However, the employer is the origin of the change to the grievor's duties. It added supervisory duties (leading project teams) to this group and level in 2013; before then, employees classified at the GR-10 group and level had performed them.

[289] However, based on the evidence and testimony, the employer never offered the grievor supervisory training, even though he had supervisory responsibilities since 2013. Therefore, the grievor was in a difficult position that he did not choose.

[290] Finally, I note that he received training in a related field, namely, teamwork and communication, in December 2014, but that he benefitted from only three months to apply that training before Ms. Clark-Larkin recommended demoting him.

4. Arbitrary and therefore unreasonable performance standards

[291] I note that for most of the assessed criteria, the grievor had to have a 100% success ratio. Were the high standards in part arbitrary?

[292] For example, responsibility 4, which was assessed, was entitled, "Undertake and coordinate the production of evaluation reports, special studies, and different presentations and present and defend them before committees and working groups". To measure the grievor's performance under this responsibility, the plan identified two performance indicators. Indicator 4.1.1 was about written communication and required that "100% of evaluation products with no language errors and/or report approaches/results in a clear and concise manner ..." and that "[translation] no major revisions" are needed.

[293] The grievor was not assessed for this indicator on July 14, 2014. His assessment period began on July 15, 2014, and lasted until March 1, 2015, thus covering a period of seven-and-a-half months. After the mid-term assessments on September 25 and December 5, 2014, and on March 1, 2015, Ms. Clark-Larkin noted that he had not met this indicator, as she found that substantial revisions were needed.

[294] Indicator 4.1.2 (3.1.2 is incorrectly indicated in the plan) involved oral communication and required that “[translation] 100% of the grievor’s verbal communications are understood — the manager and staff need not ask for clarifications when he presents [his studies] or asks questions”. In this case, any question or request for clarification ultimately meant failing. In my opinion, it is unfair and counterproductive to require perfection from a human being, particularly when the other human being requiring that perfection produces irregularities and inconsistencies.

[295] Finally, after the mid-term assessments on July 14, September 25, and December 5, 2014, and March 1, 2015, Ms. Clark-Larkin noted that the grievor had not met this indicator on the grounds that she and the staff had had difficulty interpreting his explanations and responses. At the same time, in a note to Ms. Morris on March 5, 2015, Ms. Clark-Larkin acknowledged that communications between her and the grievor had improved.

[296] It is important to remember that to measure the grievor’s performance under responsibility 2, the plan identified two performance indicators. The first, 2.1.1, was measured based on the following criterion: 100% of deliverables use appropriate analytical methods and techniques. The second, 2.1.2, was measured based on the following criterion: 100% of deliverables had to include an error-free data analysis, a correct interpretation of the results, and clear and concise reporting of the results.

[297] Similarly, performance indicators 3.1.1 and 3.1.2 also had 100% performance standards, as did 4.1.1, 4.1.2, and 5.1.1.

[298] Ultimately, the constant requirements of perfection seem to me high standards that in part were arbitrary. Did Ms. Clark-Larkin show a somewhat closed mind when she assessed the grievor? It would seem so. Did that closed mind result from a communications problem between her and the grievor? That is possible. It is true that he frequently challenged her directives and instructions. However, he often had reason to.

5. Significant changes to the level of work that the grievor had to complete

[299] It is worth repeating that that several of the employer’s decisions made between 2008 and 2013 considerably changed the grievor’s work environment. First, remember

that in 2008, the employer hired him into a position classified at the GR-07 group and level. Then, in 2009, it exercised its authority and decided to reclassify his position to the GR-08 group and level. After that, in 2012, it again exercised its authority and undertook a major restructuring that created a new work environment for him, which was under a new director and a new supervisor.

[300] As has been seen, the 2012-2013 restructuring resulted in an evolution of the senior program evaluation officers' duties. Performance measurement development duties were removed from the position profile and transferred to another team. The position title changed from senior evaluation and performance officer to senior program evaluation officer, and evaluations were emphasized. A new profile (or job description) was adopted for the position.

[301] In addition, before the 2012-2013 restructuring, the employer hired consultants who performed most evaluation studies, i.e., part or all of the data collection, analysis, and report preparation. Because of the 2012-2013 changes, the employer considerably reduced its hiring of consultants.

[302] Thus, in 2013, the employer changed the job profile for the grievor's position. His duties changed substantially. His new responsibilities then included duties that had been performed by external consultants and employees classified at the GR-10 group and level, including the responsibility for leading project teams. However, when his position changed substantially in 2012-2013 and after that, the employer did not assess him to determine whether he had the necessary skills to carry out his new responsibilities. Rather, it irrevocably decided that after observing him in his work, Ms. Clark-Larkin would implement a performance improvement plan, and that demotion or termination would be considered if he did not meet the new expectations.

[303] Thus, although the employer was the origin of the significant changes to the work for the grievor to complete, and it failed to assess him before assigning him the new duties, it escaped unscathed from the situation by demoting him two levels. It suffered no loss or damage from its initiatives or actions that originated the changes to the grievor's work.

[304] It must be noted that after the restructuring, the support and coaching provided to the grievor in his senior evaluation officer position was not entirely adequate. Given the significant changes to his work, the feedback that Ms. Clark-Larkin and Ms.

Vergnhes provided to him and the little training he received were not, in my view, sufficient to offset the major changes to the nature of his work.

[305] Finally, I note that the grievor worked in another section as of the hearing and that his performance there was judged as more than adequate. He was regularly invited to hold higher-level positions on an acting basis.

6. The factors set out in *Stevenson*

[306] Thus, in this case, it seems to me at first glance that the demotion imposed by the employer was not a reasonable response to honestly held operational considerations. However, for the sake of detail, I wish to consider the factors set out by the adjudicator in *Stevenson* to determine whether the demotion was, ultimately, a reasonable response to honestly held operational considerations.

[307] In that decision, the substantive issue was whether there had been an administrative or disciplinary demotion in a separate agency. At paragraph 22, as follows, the adjudicator considered certain factors when reaching his conclusions:

[22] I conclude that, based on the record before me, in fact, the employer acted in a forthright manner with the grievor with respect to the performance issues ... My conclusion is that the employer acted in good faith, kept the grievor fully informed of what was expected of him and the consequences of not meeting those expectations, gave the grievor the opportunity to adjust and meet the expectations, provided assistance to the grievor, and explored alternate solutions before deciding to demote him....

[308] I have enumerated those factors as follows, in the form of questions:

- Did the employer act forthrightly and in good faith with respect to the grievor's performance?
- Did the employer keep him fully informed of what was expected of him and the consequences of not meeting those expectations?
- Did the employer give him the opportunity to adjust and meet the expectations, and did it help him?
- Did the employer explore alternate solutions before demoting him?

[309] I will address each question briefly, based on the specific facts of this case.

a. Did the employer act forthrightly and in good faith with respect to the grievor's performance?

[310] As noted in the preceding paragraphs, the adduced evidence led me to believe that Ms. Clark-Larkin showed a significantly closed mind when she assessed the

grievor and that it outweighed the genuine interest in helping him and allowing him to adapt to his new duties. In my opinion, Ms. Clark-Larkin, who replaced Ms. Gauthier, saw the grievor's reactions and disagreements as misconduct that she wanted to correct. It is true that frequently, he fundamentally disagreed with his supervisor with respect to the quality standards for deliverables prepared by a senior evaluator. A disguised intent to discipline can take root in the face of such behaviour.

[311] I note that Ms. Vergnhes also guided the grievor, but he also disagreed with her assessments of his work. Specifically, she assessed him from the end of December 2013 to March 2, 2014. However, remember that supervising an employee for two or three months does not allow making a full assessment of the employee. Clause 30.01(b) of the collective agreement that applies in this case states that the employer's representative who assesses an employee's performance must have had the opportunity to observe the employee's performance or to know him or her for at least six months during the reference period.

[312] In the paragraphs preceding this one, I described the inconsistencies and weaknesses in the mid-term assessments and the annual review and the lack of recognition of the progress observed in the documentation and testimonies that the employer presented. For example, in her March 9, 2014, letter recommending the demotion, Ms. Clark-Larkin indicated that the grievor had not shown significant improvement. However, despite the 100% perfection required, he had achieved certain objectives, namely, responsibilities 1.1.2, 3.1.1, and 5.

[313] Finally, in its demotion letter of May 25, 2015, the employer indicated that the grievor had shown no improvement after the performance improvement plan was implemented. That statement is not true, as Ms. Clark-Larkin had acknowledged improvements in the mid-term assessments and the annual review.

[314] And remember that on December 18, 2014, the grievor received a final warning about his performance problems. He was advised that he was being given a last chance to show significant improvement in his performance with respect to the four responsibilities with which he was having difficulty. However, with respect to responsibility 2, given that his assessment had begun on December 6, 2014, he received a final warning 12 days later. As noted, this is a problem from a procedural fairness standpoint.

[315] I have already mentioned that the annual assessment on May 21, 2015, which covered the grievor's performance from April 1, 2014, to March 31, 2015, came after the recommendation to demote him. However, the review does not clearly reflect the mid-term assessments made during the assessment year; many times, the assessments were contradictory.

[316] In short, the sum of these actions raises doubts about the good faith of the managers and the honesty of the operation. In my view, they show that something fishy was going on. For all these reasons, I find that the employer did not demonstrate that it acted forthrightly and in good faith with respect to the grievor's performance.

b. Did the employer keep the grievor fully informed of what was expected of him and the consequences of not meeting those expectations?

[317] The grievor submitted that the employer partly informed him of its expectations of him but that it set inappropriate performance standards. He is not wrong. It has been seen that for several of the responsibilities assessed, he had to have a 100% success ratio. I explained why those high standards were partly arbitrary.

[318] I find that the employer's expectations were unrealistic and that although to some extent, it kept the grievor informed of its expectations of him and of the consequences if he did not meet them, it was unfair and counterproductive to demand perfection from him at all times. Ms. Clark-Larkin stated that she would have allowed him some margin of error, but that was not what the performance improvement plan stated. Thus, I am not certain that he benefitted from such openness or flexibility, particularly when examining the many negative, and sometimes contradictory, comments that Ms. Clark-Larkin made in the improvement plan.

[319] Moreover, although Ms. Clark-Larkin and Ms. Vergnhes provided a comprehensive critique of the reports that the grievor prepared, the evidence showed that there was not necessarily a spirit of mutual assistance between him and the new managers. Mainly, they informed him of the problems and deficiencies observed in his work. They acknowledged that communication and understanding problems were the origin of the situation.

[320] For these reasons, I find that although the employer kept the grievor partly informed of the expectations of him and of the consequences of not meeting them, it

was not completely transparent and fair with him when it imposed the high standards on him that were, in part, arbitrary.

c. Did the employer give the grievor the opportunity to adjust and meet the expectations, and did it help him?

[321] Did the employer give the grievor the opportunity to adjust and meet the expectations?

[322] In fact, the performance improvement plan began on May 26, 2014, and initially was to cover a period of six months but ultimately covered a longer period. Nevertheless, for some responsibilities, particularly responsibility 2, the employer gave the grievor very little time to adapt and meet the expectations. He was assessed for the first time on March 1, 2015, after less than three months.

[323] In addition, his assessment for that responsibility began only on December 6, 2014, and Ms. Clark-Larkin sent him a last warning 12 days later (on December 18). But such pressure could affect an operation's effectiveness.

[324] In short, the employer did not provide the grievor with enough time for each responsibility to adapt and meet the expectations.

[325] So, did the employer help the grievor?

[326] I note that the following training was provided to the grievor (in group sessions):

[Translation]

(1) For responsibility 1 (Running evaluation projects with minimal supervision, etc.) and specifically performance indicator 1.1.1, the grievor received training in analytical thinking in September 2014 (with five or six months to apply that training, given the holiday season) and in strategic thinking in October 2014 (with five months to apply that training).

(2) For Responsibility 4 (Undertake and coordinate the preparation of evaluation reports, special studies, and different presentations, etc.) and specifically, performance indicator 4.1.1 (written communication), the grievor received training on writing in a professional context in November 2014 (with approximately four months - including the holiday period - to apply that training, as it was assessed over a period of seven-and-a-half months, from July 15, 2014, to March 1, 2015).

(3) He received “Getting your Way” training in May 2014 and “Canadian Evaluation Society Conference” training in June 2014.

[327] Therefore, the employer provided the grievor with some assistance. Ms. Clark-Larkin, Ms. Vergnhes, and Ms. Morris also made a large number of criticisms and comments after reviewing his reports.

[328] At the same time, it is important to keep in mind that in 2013, the grievor inherited tasks that external consultants had performed and became responsible for the technical direction of project teams, which employees classified at the GR-10 group and level had done. This was responsibility 3 (provide technical leadership to project teams composed of program evaluation specialists, staff assigned by the programs and consultants, etc.), which was assessed as part of the performance improvement plan. Based on the evidence, it seems that the grievor did not receive any training on carrying out this new responsibility.

[329] The employer also appointed a new supervisor and a new director to the team after the section was restructured. They found the grievor’s performance unsatisfactory and provided him with feedback. However, in my opinion, the feedback did not equate to tailored coaching or training sessions.

[330] Additionally, the employer did not ask the grievor if in the end, the training he was offered helped him meet his objectives.

[331] For all these reasons, I find that the employer did not give the grievor enough of an opportunity to adapt and meet the expectations and that it did not provide him with enough assistance.

d. Did the employer explore alternate solutions before demoting the grievor?

[332] The employer considered other alternatives to demoting the grievor two levels, and Ms. Morris explained them. She also explained that ultimately, she had no choice but to demote him two levels. However, I note that although she said that she had wanted to help him, she did not explore the option of offering him any salary protection. Therefore, demoting him two levels had significant repercussions on him in terms of salary and mental health.

[333] In conclusion, I find that although the employer considered alternate solutions before demoting the grievor two levels, it did not examine the possibility of offering

him more in-depth and extensive support. I find that in the end, the evidence showed the employer's narrowmindedness with respect to the grievor.

7. Final findings

[334] Ms. Gauthier, the grievor's first manager, recognized his many professional skills, including in analysis, from 2008 to 2012. Throughout those years, she deemed his performance entirely satisfactory. After the 2012-2013 restructuring, his new manager, Ms. Clark-Larkin, temporarily supported by another manager and the director, found that he did not have sufficient skills in the areas of analysis and evaluation to be able to carry out his work.

[335] In fact, the grievor and his new supervisor did not share the same point of view on project objectives and on how to present projects. They disagreed on the important substantive issues discussed in the reports. He expressed his disagreement with his manager's comments on methodology, data validity, and report clarity.

[336] Tensions arose between the grievor and his new manager, resulting in conflicts within the team. His relationship with Ms. Clark-Larkin suffered. According to her, his lack of skills was the source of the problems. Therefore, she qualified as incompetence what had initially been an attitude and behaviour that she felt were unjustified.

[337] Therefore, Ms. Clark-Larkin implemented a performance improvement plan to help the grievor achieve the objectives that she set. However, the evaluation standards that she set were arbitrary, in part. The evidence also showed a significant lack of openness from her toward the grievor. She did not give him any real opportunity to adapt and meet the requirements of his position.

[338] After the performance improvement plan was implemented, the grievor reported the irregularities that he encountered in the assessment process. He then tried to understand as he went why his progress was hard to recognize or was simply ignored. However, his alerts were ignored.

[339] Therefore, the preponderance of the evidence leads me to believe that the decisions to implement the performance improvement plan and later to demote the grievor on performance grounds concealed disciplinary intentions. The employer used indirect means, the performance improvement plan and the performance evaluations, to qualify as incompetence the difficulties encountered with respect to the grievor's

attitude and behaviour. In my opinion, communication problems were at the root of all the difficulties.

[340] In effect, the restructuring led to serious communication problems between the parties involved in this matter (see paragraphs 79, 85, 98, 128, and 159). Those communication problems and misunderstandings were counterproductive and aggravated the situation.

[341] However, given the extent of the changes to the senior evaluation officers' duties — using consultants less frequently, and new duties for the officers — the employer should have expected operating problems at the outset, until everyone became familiar with their new roles.

[342] In my opinion, managers must give their delegates some flexibility to freely express their points of view, opinions, and convictions in their own words and to contribute to decisions related to their work. However, the main difficulties that the grievor encountered were related to a lack of sufficient support from his new team and a lack of focused training to ensure that he could adequately perform his work, including the technical direction of project teams.

[343] Therefore, it seems to me that the employer treated the grievor's disagreements as misconduct to be corrected. As was shown, a disguised intent to discipline can take root in such behaviour, even if it is not expressed clearly.

[344] Thus, in my view, the demotion was not "... a reasonable response ... to honestly held operational considerations ..." (see *Bergey*).

[345] For all these reasons, although I do not doubt that the employer had a legitimate operational concern to ensure that the grievor's performance was adequate, I find that its action was in fact disguised discipline resulting from bad faith that hindered procedural fairness, as set out in *Bergey*.

[346] Therefore, I find unfounded the preliminary objection to my jurisdiction.

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

(The Order appears on the next page)

V. Order

[348] The preliminary objection is dismissed.

[349] The grievance is allowed.

[350] The grievor shall be reinstated to a position, classified at the GR-08 group and level, which the parties agree to mutually and within 90 days of this decision, unless they reach another agreement for compensation in lieu of reinstatement.

[351] The employer shall pay the grievor all compensation and benefits that he was not paid due to his demotion, retroactive to the date of his demotion, less any statutory or other deductions required by legislation or a collective agreement and the deduction of any amounts claimed as income tax for that period.

[352] The grievor sought damages to address the psychological distress he suffered. I invite the parties to agree on an appropriate amount in this case, failing which I could rule on the issue. Therefore, I will remain seized of the issue of damages if no agreement is reached. In that case, I will invite the parties to present their written arguments on the alleged damages so that I may rule on this issue.

[353] If the parties opt for compensation in lieu of reinstatement to a position classified at the GR-08 group and level, and if they are unable to agree to the value of that payment on their own, I will remain seized of the matter to determine the applicable amount.

[354] I shall remain seized of the enforcement of any order under this decision for a period of six months from the date of this order.

August 24, 2020.

FPSLREB Translation

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