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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

STÉPHANE GARIÉPY

Grievor

and

DEPUTY HEAD
(Department of National Defence)

Respondent

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

In the matter of individual grievances referred to adjudication

Before: Steven B. Katkin, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Sylvain Beauchamp, counsel

For the Respondent: Geneviève Ruel, counsel

Heard at Montreal, Quebec,
October 6 to 9, 2015, and May 3 to 6 and November 22 to 24, 2016.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievances referred to adjudication

[1] Stéphane Gariépy ("the grievor") was an employee of the Department of National Defence ("the employer" or "the department") beginning in November 2008. From then to February 2009, he worked in Ottawa. He was transferred to Montreal on February 23, 2011, and remained there until his financial analyst position, classified at the FI-02 group and level, was abolished as part of a workforce adjustment process.

[2] The relevant collective agreement was for the Financial Management bargaining unit concluded between the Treasury Board and the grievor's bargaining agent, the Association of Canadian Financial Officers, which expired on November 6, 2014 ("the collective agreement").

[3] On March 10, 2014, the grievor filed a grievance challenging what he alleged was a suspension imposed by the employer on February 26, 2014. That grievance was referred to adjudication on May 8, 2014 (file 566-02-9762) under s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) (disciplinary action resulting in termination, demotion, suspension, or financial penalty). The employer confirmed that no decision was made at the different levels of the grievance process as it considered the grievance in abeyance.

[4] On January 30, 2015, the grievor filed another grievance under s. 209(1)(b), alleging that the employer let the layoff period expire to then proceed with his disguised dismissal (file 566-02-11009). According to him, the employer had an obligation to pause the notice period for an opting employee as of the suspension, February 26, 2014, on the grounds that due to the suspension, he was on forced sick leave and was found unfit to work. As a result, he was unable to find a new job in the public service during the imposed period. He alleged that in fact, the layoff was a dismissal. On August 21, 2015, at the final level of the grievance process, the employer responded that nothing would lead it to conclude that the end of employment was a termination.

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace

the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

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

II. Preliminary objections

[7] In a letter to the Board's Registry dated September 1, 2015, the employer raised two preliminary objections to the Board's jurisdiction to hear the grievor's grievances.

[8] As a preliminary objection, the employer first noted that the suspension grievance (file 566-02-9762) had been referred to adjudication under s. 209(1)(b) of the *FPSLRA*, which limits the Board's jurisdiction to disciplinary matters. According to the employer, its decision to place the grievor on leave on February 26, 2014, for a fitness-to-work evaluation (FTWE) was a purely administrative act over which the Board has no jurisdiction.

[9] The second preliminary objection was about the grievor's dismissal grievance (file 566-02-11009). The employer claimed that he had been laid off under s. 64 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) when his position was abolished as part of a workforce adjustment. It argued that given the existence of recourse under s. 65 of the *PSEA*, and under s. 208(2) of the *FPSLRA*, the grievor could not file a grievance against his layoff, which is not among the issues referred to in s. 209(1) of the *FPSLRA*. In addition, pursuant to s. 211 of the *FPSLRA*, the Board has no jurisdiction over any termination of employment set out under the *PSEA*.

[10] I will address the objections in the analysis section of this decision.

III. Summary of the evidence

A. The witnesses and other intervenors

[11] At the outset of this decision, it is appropriate to present some of the employer's main witnesses, to place them in the summary of the evidence. It is also important to note that the workplace in question was the Land Force Quebec Area (LQFA) at the Montreal Garrison and that in the summer of 2013, the LFQA officially became the 2nd Canadian Division ("2nd Division").

[12] Colonel ("Col") Normand Lalonde was the LQFA-2nd Division's chief of staff from July 2012 to July 2014. The workforce adjustment process was already underway when he joined LFQA-2nd Division, and he took it over. Among other things, he was responsible for managing civilian personnel. In that role, he was supported by the deputy commanding officer, Major ("Maj") Sylvain Rhéaume, which allowed him to focus on his primary responsibility, the operations of LFQA-2nd Division.

[13] Maj Rhéaume was the deputy commanding officer of LFQA-2nd Division from June 2012 to 2014. His responsibilities consisted of ensuring the proper management of personnel, hiring civilian and military employees, maintaining adequate working conditions, applying civilian and military disciplinary measures, and advising Col Lalonde on the daily administration of Headquarters. He was responsible for performance reviews, in collaboration with Human Resources (HR), and made related recommendations. Maj Rhéaume testified that he had managed staff for 26 years.

[14] Maj Patrick Martin, then a captain ("Capt"), worked in the comptroller's office of 5 Area Support Group (5 ASG) from 2009 to 2012 as a deputy comptroller. He became the grievor's manager in January 2012. In June 2012, he was promoted to major and became the 5 ASG's comptroller. As of then, he was still the grievor's manager. In the summer of 2013, Maj Martin became the 2nd Division's comptroller.

[15] Estelle Simard had been the HR manager for civilian employees with the department since 2004. She had 34 years of experience in the public service, 32 of them in HR. She had held all HR positions and managed a team of HR advisors, specialists, and generalists, as well as assistants. She was deeply involved in the

workforce adjustment process and supported Col Lalonde. She explained employees' rights and obligations to them and conducted several mediations with Col Lalonde.

[16] The military police appeared several times in this case. Col Lalonde explained that LFQA had virtually no reporting relationship with the military police, which are a separate entity. The commanding officer of the military police is an advisor to the commanding officer and Col Lalonde. Their representative sits in on chief-of-staff meetings but only for operational issues, such as drunk driving, drugs, etc. Col Lalonde stated that if someone uttered a threat that was not reported to him by the military police, anyone with knowledge of the threat could call the military police. A concrete, founded threat will be reported because of its potential impact on personnel safety.

B. The 2011 harassment complaint

[17] In 2008, the grievor worked in Ottawa at the Canadian Forces Housing Agency ("the Agency") within the department. He was an advisor to the comptroller. His position was classified at the FI-02 group and level. At that time, his colleagues were mainly civilian employees, specifically accountants and accounting technicians. Almost all the employees worked in accounting.

[18] In 2011, the grievor worked at the headquarters of the Montreal Garrison. He held a position with the employer as a financial analyst classified at the FI-02 group and level. He held professional designations as a chartered professional accountant (CPA) and a certified management accountant (CMA). He was also an inspecting auditor, and he held a master's degree in accounting.

[19] At that time, the employer wanted to develop a draft for producing financial models. It wanted to have the same model as the Agency but in a military context. As the grievor had worked in manufacturing and the media, a transition to military culture was necessary, and he told himself that he would adapt. Initially, his transition went very well. He reported to Maj Marc Auclair and Lieutenant-Colonel ("LCol") Pierre Simard. They were deployed in 2011 and were replaced by Maj Isabelle Marion.

[20] According to the grievor, Maj Marion, his supervisor, had been trained at the Royal Military College of Canada. She asked him to adapt more to the military environment. According to him, she was unfriendly toward employees who came from the private sector, whom she considered consultants. Maj Marion did not speak to him

for two months after she arrived. She reportedly told him, "[translation] Mr. Gariépy, people like you from the private sector, we'll have them do secretarial work." Maj Marion had no professional accounting designation.

[21] During 2011, the grievor's supervisor made several allegations of breaches of responsibility and insubordination against the grievor, who was having difficulty with her. There was no evidence before me about those allegations. According to the employer, the grievor questioned Maj Marion's competency, specifically that she did not hold his accounting designations. He insisted on doing his work his way, rather than how his supervisor asked him to. He testified that he believed that over time, the tone would soften, and Maj Marion would see what he could do.

[22] In September 2011, the performance review period was near. The grievor understood that after Maj Auclair and LCol Simard left, his performance should have been evaluated, and he spoke about it with Maj Marion in September 2011.

[23] The situation between Maj Marion and the grievor did not improve. He testified that he approached her to try to understand and clarify things, but the situation became more tense. He contacted Col Marc Gagné, the commanding officer at that time. The colonel's administrative assistant told the grievor to write a letter. The grievor testified that at first, it was not a complaint. Col Gagné told him that to address the situation, the grievor should convert the letter into a complaint. Under cross-examination, when Maj Rhéaume was reminded of the fact that Col Gagné had said that the grievor's complaint was admissible, he replied that Col Gagné was not qualified to investigate harassment complaints.

[24] The grievor made a harassment complaint against Maj Marion and her supervisor, LCol Gilles Ross, on November 16, 2011.

[25] In January 2012, the grievor was temporarily transferred to 5 ASG, where he did not report to Maj Marion. His manager was Maj Martin (then Capt), Deputy Comptroller, and his superior was Maj Sarah Gauthier, the comptroller. Maj Martin and Maj Gauthier held professional accounting designations. The grievor testified that things went well on that team. There was no reporting relationship between him and Maj Martin. In June 2012, Maj Gauthier was deployed to Afghanistan. Maj Martin then became the comptroller and the grievor's supervisor.

[26] According to the employer, before Maj Rhéaume assumed his position, and to prevent the situation with the grievor from deteriorating, between June and December 2012, it was decided that the grievor would be temporarily reassigned to 5 ASG. His immediate supervisor was Maj Martin, who reported to Col Lalonde. No incidents were reported that involved the grievor. Maj Martin could work with the grievor. Therefore, it was decided that he would be left in the position there.

[27] Maj Rhéaume learned about the grievor for the first time by reviewing his complaint file when he arrived in June 2012. Maj Marion and LCol Ross had described the grievor as an employee who had difficulty working as part of a team, although Maj Martin had told Maj Rhéaume that he had no problems with the grievor. The complaint file had not been completed, and Maj Rhéaume asked Maj Marion and LCol Ross to respond in writing to the grievor's allegations. When he received their responses, he forwarded the file to LCol Bruno Plourde, who was qualified to investigate harassment complaints. LCol Plourde concluded that there had been no harassment and that therefore, a more thorough investigation was not needed. Maj Rhéaume met with the grievor, along with HR Advisor Élisabeth Marion, to inform him of LCol Plourde's findings. According to Maj Rhéaume, the grievor was very receptive and courteous and seemed to accept the findings. That was Maj Rhéaume's last meeting with the grievor for several months.

[28] The grievor introduced in evidence his performance review, signed by Maj Gauthier on June 14, 2012, covering a three-month period of supervision, and the one signed by Maj Marion on July 25, 2012, covering a seven-month period of supervision. He testified that his performance reviews were very good. In them, the managers indicated that he had carried out his projects professionally and thoroughly; had shown significant initiative; was resourceful, very meticulous, and hard-working; and had excellent analytical skills. They also indicated that he needed to make more efforts to adapt his language to the military environment and to respect rank and the chain of command, to fully adapt to his environment.

[29] The grievor worked at 5 ASG until January 11, 2013. He left the workplace on leave due to health reasons. Maj Rhéaume and Col Lalonde testified that they had been told that the grievor was on sick leave but did not know the reason. Col Lalonde never asked about the reasons for the leave. Maj Martin testified that the grievor never talked about why he was on sick leave.

[30] Under cross-examination, when he was asked if he had shared the reason for his sick leave with his colleagues, the grievor testified that had HR, the Sun Life insurance company (“Sun Life”), or his supervisor needed information, he would have provided it.

[31] In the summer of 2013, Maj Marion was transferred to Ottawa, and LCol Ross retired from the forces. Maj Martin was transferred to be the comptroller at 2nd Division and informed Maj Rhéaume that he had no objection to the grievor going with him there.

C. The workforce adjustment

[32] In 2011, a workforce adjustment process comprising four waves was undertaken within the department; 250 positions were abolished in the Quebec Region. First, an exercise was run to identify the affected positions. Then, a letter was sent to the affected employees. The employer hoped that they would choose voluntary retirement. It decided that the affected employees who were on sick leave would be informed verbally. However, it waited until they returned to work to give them the option letter so that there would be no impact on the surplus-status period and to avoid penalizing them more.

[33] The options were (a) become a surplus employee for 12 months with pay and priority status; (b) resign, and benefit from a transition period based on years of service; (c)(i) resign, and receive transition support and $11 000 for education; and (c)(ii) benefit from transitional measures and two years of leave without pay. After returning from leave, the employee had laid-off employee status with priority status for 12 months.

[34] For the priority right, the employee had 120 days to reflect and to make a choice. If no choice was made within 120 days, he or she became a surplus employee. If the employee chose option (a) and the 120 days had not expired, at the employee’s request, the unexpired days were added to the 12-month priority period. According to Ms. Simard, the layoff period could not be postponed because, according to the workforce adjustment policy, once the employee made a choice and the countdown began, it could not be changed. The priority right meant that an employee declared surplus by a department had the highest priority for that department but not for another department.

[35] Thirty days before the end of the 12-month surplus priority period, the employee was advised that his or her status would change. At the end of the period, the employee was laid off, was no longer attached to the department, no longer had a salary, and remained in the pool maintained by the Public Service Commission.

[36] Col Lalonde arrived when the workforce adjustment process had begun. He took it over because his responsibilities included managing civilian employees.

[37] According to Maj Rhéaume, the person responsible for the workforce adjustment process was Élisabeth Marion at the Civilian HR Centre.

[38] For the workforce adjustment process, Col Lalonde made three recommendations: (1) cuts were to primarily target administration rather than operations; (2) responsibilities needed to be divested that were not part of the LFQA's mandate, such as the harassment investigation office made up of retired members of the military who conducted few investigations and offered their services to other departments; and (3) positions were to be cut that were not 100% filled and that had duties that could be assumed by other entities without increasing the staff.

[39] Col Lalonde was also supported by Ms. Simard, who did not usually handle files. However, in late 2013 and early 2014, there was a shortage of generalists. As she had been one, she took on some client files. With respect to the grievor's file, she was involved with his grievances, helped management with them, and provided advice.

[40] Col Lalonde was responsible for everything related to the grievor's file, although Maj Rhéaume was responsible for managing it.

[41] In 2013, the employer went through another wave of job cuts as part of the workforce adjustment process. According to Col Lalonde, 92 positions were abolished, including the grievor's position. Employees were informed of the workforce adjustment through an employee meeting with a union representative. The process was explained, but not the positions that were to be abolished.

[42] During the grievor's sick leave, Maj Rhéaume was advised of several waves of job cuts. The grievor's position was identified among the last cuts at LFQA. Col Lalonde decided which positions to abolish, in consultation with his branch chiefs. Maj Rhéaume's role was to inform and meet with employees whose positions were affected by the cuts.

[43] On May 27, 2013, 2nd Division employees affected by the workforce adjustment exercise were informed that their positions might be abolished. Col Lalonde wrote a letter to the grievor on May 27, 2013, to advise him that as a result of the abolishment of his position, his services would no longer be required. His position had been identified by his supervisor because his duties did not take up all his time and could be assumed by the comptroller or the deputy comptroller.

[44] While the grievor was on leave, Maj Rhéaume called him at home and asked him to come to the workplace. He asked if the meeting could be held by phone; Maj Rhéaume refused. At the meeting, Maj Rhéaume gave him the May 27, 2013, letter and asked him to read it. Maj Rhéaume asked the grievor if he had any comments. Right away, the grievor asked if there were any people who would lose their positions and who had not been relocated. Maj Rhéaume told him that he did not have to give him that information. Maj Rhéaume told him that the content of the letter did not take effect during his sick leave and that when he returned, he would have opting employee status. The meeting lasted about four minutes. In her testimony, Ms. Simard indicated that that way of proceeding had been chosen to not unduly punish the grievor because when he received the opting employee letter, the workforce adjustment process period would begin.

[45] The grievor began a gradual return to work on September 19, 2013, and returned to his position at 2nd Division. He inquired with his manager, Maj Martin, who had become the comptroller there in July 2013, about the work to be done. Maj Martin replied that he would be involved in a bankruptcy file but that he should use his work time to find a job elsewhere, as he had no future with the employer. Maj Martin denied telling him to find "[translation] a job elsewhere". He confirmed that the grievor looked for work almost full-time; Maj Martin gave him all the time he needed to find a position in the department or go to interviews. Maj Martin gave him a closed office, in addition to his cubicle, for his job search. Maj Martin said that he never spoke with the grievor about his sick leave and that he did not try to find out the reasons behind it. During the time he supervised the grievor, formally or informally, no one gave Maj Martin orders about how to act with the grievor.

[46] Maj Rhéaume knew that it was a difficult situation. Therefore, management tried to be flexible with employees, to allow them time to take the steps to find another position. Maj Rhéaume was concerned for the grievor's health because when

he returned from sick leave, his position had been abolished, and he had to be affected, like everyone else. The grievor spent his days in an office with the door closed.

[47] On October 3, 2013, the grievor received a letter informing him that due to the workforce adjustment, his services would no longer be needed, and his position would be abolished. He received the letter from Col Lalonde, in the presence of Élisabeth Morin. A guarantee of a reasonable job offer could not be given to him. He had the choice between a 12-month paid surplus priority period, a transition support measure, or an education allowance. On October 7, 2013, the grievor returned to 2nd Division full-time.

[48] On October 9, 2013, the grievor chose the option of the 12-month surplus-employee priority period. On October 16, 2013, Col Lalonde granted him surplus employee status from October 17, 2013, to February 9, 2015. The unexpired days of the grievor's 120-day reflection period were added to the 12-month surplus-employee period. Col Lalonde advised him that if he did not obtain an appointment or transfer during that period, he would be laid off on February 10, 2015. In the weeks and months following the October 16, 2013, letter, the grievor immediately began his job search.

[49] The grievor testified that in November 2013, Maj Martin spoke with the civilian employees and told them that if military members could be dismissed for burnout, then why would civilian employees not be subject to the same obligations? When Maj Martin made that comment, the grievor concluded that his position had been abolished because of his illness. In rebuttal, Maj Martin denied telling him when he returned that depression and burnout among military members was not tolerated and that it was no different for civilian employees. He denied stating that military members had been dismissed on those grounds. Maj Martin testified that military members were trained to detect depression and burnout and that tools were available on how to direct military members to the right places. Maj Martin did not know why the grievor's position was abolished because at that time, he was at 5 ASG and was not involved in those decisions. Maj Martin did not know when the decision was made, but he was present with Élisabeth Marion when the grievor was informed of it. He knew that the grievor was on sick leave when he was informed of the abolishment of his position.

D. The Engineering Branch

[50] His colleagues and Guy Gibeau, a representative of the Union of National Defence Employees (UNDE), informed the grievor that two positions were vacant, one with the Engineering Branch, and the other with 25 Supply Depot (25 CFSD). The two financial analyst positions were in his workplace. He felt that he could have been appointed to one of them. During his job search, the department made no offers.

[51] Élisabeth Marion met with the grievor and told him that there was a position for him at the Engineering Branch, with salary protection. She told him that she would put him in touch with the manager of the position and that his hiring would be a formality. Ms. Simard first heard of the grievor's situation when he learned that a position classified at the FI-01 group and level in the Engineering Branch would eventually be staffed.

[52] The hiring manager, Maj Hugo Marcotte, met with the grievor on September 27, 2013, in the presence of Capt J. Kilburn. He introduced him to the organization in general and to the position in its context and stated the duties. They then discussed the grievor's CV, experience, and professional interests. Maj Marcotte indicated that he was assessing the essential qualifications and that the process underway for the FI-01 position was the best opportunity to do it. According to the grievor, Maj Marcotte did not have the right to proceed that way. Maj Marcotte inquired with Aurélie Delaurière in HR and decided to move forward with the process.

[53] The grievor told Ms. Delaurière that he was aware of two positions and that he should have received a guarantee of a reasonable offer. He asked her to provide the names of people whose positions had been abolished and who had not been relocated. He carried out the exercise with the UNDE. He was the only one not relocated. According to him, with a guarantee of a reasonable offer, there was no need for a professional or personality assessment. Élisabeth Marion wanted to comply with the *Work Force Adjustment Directive* (WFAD), but not Maj Marcotte.

[54] Meanwhile, Maj Marcotte checked with Maj Marion, who had previously supervised the grievor. Her comments reinforced his decision to assess the grievor, particularly his personal suitability.

[55] Maj Rhéaume reported statements allegedly made by Maj Marcotte, who did not testify. Maj Marcotte contacted him because the grievor was taking steps within his organization. He had an odd feeling about the grievor. He had heard of him. Maj Marcotte had known Maj Rhéaume for a long time and wanted his opinion. Maj Rhéaume explained to Maj Marcotte that he left it to his good judgment to assess the grievor. However, he added that if the position included supervising staff, he recommended a test or an interview to determine whether the grievor was qualified for it.

[56] Supervising staff was among the qualifications on the statement of merit criteria. A specific exam assessed that competency. When the grievor was informed that he would need to write it on December 19, 2013, he replied that because he was in a position classified at the FI-02 group and level, he should be appointed to the position without an assessment of the merit criteria. According to him, the employer had an obligation to make every reasonable and possible effort to reassign employees whose positions had been abolished.

[57] Ms. Simard testified that because there was a 6% salary gap between the FI-01 and FI-02 positions, the grievor had not been considered for the position. Moreover, an employee with priority status could apply for promotions or for positions at lower groups and levels. Those responsible for the process informed the grievor that he could be appointed to a position classified at the FI-01 group and level.

[58] On December 20, 2013, the grievor filed a grievance about how the FI-01 position was staffed, given that he was the only one on the priority list. Ms. Simard attended the hearing. Through Maj Martin, the employer responded on January 21, 2014, at the first level, stating that the grievance was not admissible on two grounds, first that the grievor did not have authorization from his bargaining agent and second that the grievance was related to staffing a position. Nevertheless, the employer assessed the merits of the grievance and noted the grievor's lack of cooperation in the assessment of his application. That grievance is not before the Board.

[59] On April 15, 2014, at the request of Maj Rhéaume, Maj Marcotte provided him with a summary of his interactions with the grievor in relation to his candidacy for the FI-01 position in the Engineering Branch. The grievor noted that Maj Marcotte had had

no right to assess him in any way. He was asked to appear to be assessed but refused. From that point, Maj Marcotte had no further communication with the grievor.

E. 25 CFSD

[60] In November 2013, Marie-Claude Aubin, who had been the financial services manager at 25 CFSD since 2011, sought to staff an accounts payable supervisor position classified at the FI-01 group and level. The grievor had heard about it and had spoken with two former employees of the work unit who had held it in the past.

[61] The grievor was presented to Ms. Aubin as a priority. Her first contact with him was by email during the week of November 18, 2013. He had asked her for the statement of merit criteria for the position, as he had an idea of its duties, and according to him, it should have been classified at the FI-02 group and level. Ms. Aubin told him that it was an FI-01 position, and the grievor replied that he was still interested.

[62] Ms. Aubin asked the grievor to meet with her for an interview. He replied by asking her for an informal discussion. She expected a phone conversation, but he preferred to meet with her. The meeting took place on November 21, 2013. She believed that it would take 30 to 45 minutes, but it lasted about 2 hours, which the grievor confirmed. They discussed the position and its nature, along with their respective concerns. Ms. Aubin's concerns were related to the grievor's very high level of education and his excellent CV. He held an FI-02 position and was accepting a position at a lower level. It was important for her to ensure that he was comfortable with it.

[63] According to Ms. Aubin, the meeting was peculiar and bizarre. At the start, the grievor told her that she did not want him because he was a priority and she could not choose her candidate. She tried to make him understand that priority individuals were sometimes very good candidates.

[64] They discussed the context of the FI-01 position, which consisted of supervising employees and supporting the team. The conversation quickly became peculiar, even bizarre, according to Ms. Aubin. The grievor often returned to the Depot's inventory, which people he knew had told him was a challenge within their unit. Ms. Aubin tried

to explain that the inventory was not theirs and that the position's mandate was to oversee accounts payable.

[65] According to Ms. Aubin, the grievor quickly became arrogant, in both his words and his body language. He told her that she did not see the challenges, that she did not want him, and that people had told him that there were great challenges in their unit. That was true, but the challenges were not the ones the grievor alluded to. He was fixated with inventory and said that he had worked for Air Canada, where he had identified similar challenges, and so, he could bring that experience to bear. Ms. Aubin had no doubt about it, but that was not their mandate.

[66] The grievor told Ms. Aubin that she did not need to assess him because he was a priority and that she had to offer him the position. He told her that she should not worry, that she would be his manager, and that he would not steal her thunder, which was not a concern for her. Several times, he said that she did not want to work with him. According to her, it was an inappropriate way to act, and he had been disrespectful to her.

[67] According to Ms. Aubin, during the meeting, the grievor's comments were arrogant, and the atmosphere was heavy, which she had never felt in an interview. At the end of the interview, the grievor told her that he was considering another post, with the Engineering Branch. They were to speak again at the beginning of the next week because the grievor wanted to think about the position he wanted to choose. He continually returned to the fact that the choice was his. Under cross-examination, Ms. Aubin acknowledged that she did not end the interview and that the grievor did not force her to continue. She also acknowledged that he did not swear, intimidate or physically threaten her, and did not comment about her.

[68] During their oral and email discussions, Ms. Aubin was confused by the grievor's arrogant and sarcastic tone. He often insisted that she return emails quickly. According to her, dealing with such a situation from a person to whom she could offer a position was not normal. She found the situation destabilizing. She was not opposed to the idea of working with him, but she was concerned by his attitude, which seemed to conflict with the team.

[69] According to the grievor, during the interview, Ms. Aubin told him that cuts occurred every year. She wanted challenges in her section, but there were none of the

scope he wanted. There were always new military members, and starting over was required. It was hard to supervise civilian employees because Ottawa interfered with their work, and the military members ostracized them.

[70] The grievor related that during the first hour of the discussion, Ms. Aubin told him that it was a terrible place to work. During the second hour, he tried to lead her into topics related to the position. The discussion ended very coldly. He told her that he knew his position and that he would think about it. She seemed disinterested.

[71] After the grievor left, Ms. Aubin spoke with her superior, Maj Paul Anderson, and told him that the interview had become inappropriate in the circumstances. She asked for his help because she did not know how to respond to such a situation.

[72] On November 25, 2013, Ms. Aubin emailed the grievor about conducting a more-formal interview in the presence of one of her colleagues. The grievor left her a telephone message asking her to discuss the position again. As it was late, Ms. Aubin asked one of her colleagues, Carolyne Dubois, to call him back, which she did, on the evening of November 25, 2013.

[73] The grievor testified that he had spoken with colleagues at the office who had been supervised by Ms. Aubin. They told him to send his CV to Maj Anderson, Ms. Aubin's supervisor, which he did on November 26, 2013.

[74] The grievor provided the details of his meeting with Ms. Aubin in an email to Maj Anderson on November 26, 2013, and asked about the needs of the Finance Section. According to Ms. Aubin, everything in the email was false. In it, the grievor indicated that according to his interpretation, Ms. Aubin was not interested in his candidacy. She felt that the email was directed against her given that the grievor mentioned that 25 CFSD needed an experienced accountant. She found that the email was long and that it made several negative points about her, particularly that she had a relatively empty schedule and did nothing all day, that he had spoken with other people about the inventory challenge, and that he could provide better support. He reiterated that he was a priority and that Ms. Aubin had no choice but to hire him. According to her, he was very direct with Maj Anderson.

[75] Regardless, Ms. Aubin emailed the grievor on November 26, 2013, to set up a meeting with him for an interview on November 30, 2013. He left her a telephone

message stating that he had sent his CV to her superior, Maj Anderson. Ms. Aubin then met with Maj Anderson.

[76] Ms. Aubin wrote to Maj Anderson. She stated that she had saved the grievor's telephone messages because he had no idea how sarcastic and arrogant the grievor was. The messages were not introduced in evidence.

[77] According to the grievor, Ms. Aubin called him between November 26 and 28, 2013. Several times, she asked him if he would go through the assessment and told him that he had to. About an hour after Ms. Aubin's call, the grievor received a call from Ms. Dubois in HR. She told him that Ms. Aubin did not like that he sent his CV to her manager. The grievor knew that 25 CFSD was not interested, and he had no further communications with Ms. Aubin.

[78] On November 27, 2013, Maj Anderson wrote to Maj Marion for her opinion on the grievor's personal suitability for the FI-01 position at 25 CFSD. On November 28, 2013, Maj Marion responded that the grievor had been the employee with the most difficult and disagreeable character of her entire career. According to her, he was a social misfit. In no way would she take him into her section or assign him to supervise personnel.

[79] On November 28, 2013, Ms. Aubin informed Maj Anderson of the grievor's disrespect toward her after a telephone conversation with him. Ms. Dubois was a witness to that conversation. Ms. Aubin expressed her concerns. In that conversation, the grievor reportedly shouted, several times, "[translation] come on, Marie-Claude". Ms. Dubois reportedly heard the grievor shout. Ms. Aubin told him to stop shouting. She could not remember if it was before or after the email to Maj Anderson. I note that Ms. Dubois did not testify.

[80] On the same date, around 10:37, the grievor followed up with Maj Anderson about his application. Around 10:52, Maj Anderson replied to the grievor that he had reviewed the grievor's exchanges of the day before with Ms. Aubin and Ms. Dubois, that he had found the grievor's comments to them very offensive, and that the grievor was to cease immediately. If he did not cease his behaviour, Maj Anderson indicated that those two could make harassment complaints. Maj Anderson ordered them to cease communicating with the grievor, until further notice. Ms. Aubin saw that email exchange because she was copied on it. She noted the greeting used by the grievor,

"Mr. Anderson" rather than "Maj Anderson". She indicated that when working with military members, ranks are to be used. When she was asked whether she was offended by the grievor going over her head, Ms. Aubin replied that he had not followed the norm. She was not annoyed because she had already spoken to Maj Anderson about it.

[81] Under cross-examination, Maj Rhéaume indicated that he felt that it was pretentious for someone looking for a job to talk about challenges and problems within the organization. As for the greeting of "Mr. Anderson" rather than "Maj Anderson", Maj Rhéaume testified that he had always asked to grievor to call him "Major" because he called him "Mister". He never took it personally because it was a gesture of courtesy, not an obligation.

[82] In a subsequent email on November 28, 2013, at around 15:17, Maj Anderson advised the grievor that he would be the grievor's point of contact for this file at 25 CFSD.

[83] Ms. Simard heard about the grievor with respect to the FI-01 position on an acting basis at 25 CFSD in about October to November 2013. She was informed of the incident involving Ms. Aubin by Maurice Joly, an HR advisor at 25 CFSD, who feared for her. However, no evidence was presented of Mr. Joly's fears. Ms. Simard also had telephone conversations with Maj Rhéaume and Col Lalonde about the incident with Ms. Aubin. According to them, the grievor's behaviour was of concern, and he did not seem well. They reported that he was nervous and tense; they feared his reactions but could not explain why. No evidence was presented of their fears. Ms. Simard told them that when the grievor was on sick leave, he had been advised verbally that his position would be abolished. He returned to work and tried to find a job. In his context, namely, a possible job loss and no disability benefits from Sun Life since January 2013, which I will address later in this decision, I do not find it surprising that he was nervous and tense.

[84] On December 2, 2013, Ms. Aubin had a telephone conversation with the grievor. After it, at around 12:00, she reported to the military police that he had been arrogant and that he had raised his voice several times. He seemed to want to meet with her outside her work to discuss his work situation, but she refused to.

F. The guardhouse incidents

1. The first guardhouse incident: December 2, 2013

[85] Depending on the version of the facts, the first guardhouse incident occurred on December 2 or 3, 2013. Based on the military police's report and investigation notes, the first incident was on December 2, 2013. According to Ms. Aubin's email and testimony and Richard Sirois's (a co-worker) written statement, it occurred on December 3, 2013. Thus, I must determine the date on which it occurred.

[86] According to Ms. Aubin and Mr. Sirois's written statement, on the afternoon of December 3, 2013, at around 14:30, Ms. Aubin encountered the grievor at the guardhouse door while speaking with Mr. Sirois on her way out of the Garrison, returning home. She explained to Mr. Sirois that the grievor was a priority and that he was not supposed to communicate with her. Later, this decision will explain why he was not to communicate with her. After encountering him, Ms. Aubin and Mr. Sirois made several calls, including one to Maj Anderson's assistant. They stayed close to Ms. Aubin's car when they made the calls. In a discussion with Maj Anderson, he told her that she should have called the military police then, which she did not do.

[87] However, in their incident report, the military police indicated that they met with Ms. Aubin at 15:00 on December 3, 2013, 30 minutes after the end of her shift. Given the sequence of events reported by Ms. Aubin and in Mr. Sirois's statement, it is unlikely that the events in question occurred on the same day as the meeting with the military police, which began at 15:00. That being so, as the military police stated that they met with Ms. Aubin on December 3, 2013, and as she said that she did not communicate with them on the same day as the first guardhouse incident, it must be concluded that the first incident occurred on December 2, 2013, based on what is mentioned in the military police's report and investigation notes.

[88] In her testimony, Ms. Aubin explained that the Montreal Garrison is located partly on both Notre-Dame Street and Hochelaga Street. She worked at 25 CFSD, on the Notre-Dame-Street side, and the grievor worked on the Hochelaga-Street side. To get by the guardhouse, an individual must have been invited and must be expected by someone in the Garrison. As will be set out later, the grievor indeed met with someone. He confirmed that he encountered Ms. Aubin at the guardhouse. She did not speak to him.

[89] Ms. Aubin testified that she had had an odd feeling that had made her uncomfortable. She added that the grievor had looked at her in an intimidating manner. She found it very strange that he was there, as Maj Anderson had asked that he no longer communicate with her. She did not know where he was going and was worried that he was on the premises and might try to confront her. She indicated that Mr. Sirois had not paid any attention to the grievor and that he had thought that the grievor might be meeting with someone. Mr. Sirois did not testify, but a written statement was introduced on his behalf. Ms. Aubin called Maj Anderson, but he did not answer. She left a message. She also called her partner. Maj Anderson's administrative assistant called her back to say that in fact, it was the grievor. When she was close to home, Maj Anderson returned her call and told her that if she was worried, she had to call the military police. As the grievor had left, they agreed that it was too late to call them. The Commissionaire at the guardhouse confirmed that the grievor had been in to see a man in the workplace and that he had left.

[90] The grievor testified that he walked toward the 25 CFSD buildings on his way to consult Mr. Gibeau, who was in the Engineering Branch buildings. He saw Ms. Aubin as she left. The sidewalk was wide. He told himself to look down and that she would go by.

[91] Mr. Gibeau confirmed that he had an appointment with the grievor. The UNDE and the grievor's bargaining agent had made an agreement to represent him. Mr. Gibeau represented the grievor for two or three months. He helped the grievor primarily in his efforts to obtain a reasonable job offer.

[92] Corporal ("Cpl") Michel Belizaire, a military police officer, went to the meeting of Mr. Gibeau and the grievor at around 16:00. He wanted to meet with the grievor alone. The grievor asked Mr. Gibeau to be present, as a union representative. The officer asked him why the grievor had passed through 25 CFSD. Mr. Gibeau explained that those working on the north side, the Garrison's administrative area, do not necessarily have access to the south side, which is industrial. To access the south side, the guardhouse at 25 CFSD and the one at Building 22, three or four streets further east, must be passed through. The Officer asked the grievor why he had passed through the guardhouse at 25 CFSD. The grievor replied that it was because he had been next to Building 7. According to Mr. Gibeau, the grievor did not know that he could go through the guardhouse at Building 22.

[93] According to the grievor, Cpl Belizaire came to inform him that Ms. Aubin had asked her manager, Maj Anderson, to make a complaint with the military police. She indicated that she felt that her safety was seriously threatened by the grievor's presence near the 25 CFSD building.

[94] Mr. Gibeau testified that Cpl Belizaire was aggressive and insistent. The Officer said that it seemed that the grievor had encountered a woman who had felt intimidated by him and who had told him to communicate with her no longer. Therefore, I find that between 14:30 and 16:00, someone advised the military police that the grievor and Ms. Aubin had crossed paths at the guardhouse at around 14:30. Cpl Belizaire told him that were the grievor to communicate with her and were she to make a harassment complaint, the officer would arrest him. The grievor told the officer that he did not understand and that he had not even looked at her. He indicated that he was in a workforce adjustment process. Mr. Gibeau did not recall the date or year of the incident. It was the first time he had seen the military police intervene in a union meeting. The grievor told Cpl Belizaire that he would follow his instructions but that he wanted an incident report.

2. The second guardhouse incident: December 3, 2013

[95] The next day, as she was finishing work, Ms. Aubin received a call from one of her employees, who told her that the grievor was at the guardhouse. That employee did not testify. Ms. Aubin immediately went to see Maj Anderson, who took her to the office of the commanding officer at the time, LCol Julie Pelletier. She told her that she would not take any risks and that she feared for her safety, and she called the military police. Ms. Aubin testified that she felt terrified; if the commanding officer, who was trained in such situations, did not feel right, then neither did Ms. Aubin. She did not see the grievor again after that. I note that neither Maj Anderson nor LCol Pelletier testified.

[96] On December 3, 2013, at around 15:00, Cpl Belizaire of the military police investigated criminal harassment accusations against the grievor related to his presence at the guardhouse. Cpl Belizaire met with Ms. Aubin, who verbally recounted the events of December 2, 2013. He then met with the grievor, at around 16:00, to advise him to no longer communicate with Ms. Aubin.

[97] Around 15:00 on December 4, 2013, Cpl Belizaire again met with Ms. Aubin about the December 2, 2013, incident. Ms. Aubin had noted during a telephone conversation that the grievor had been insistent and that a few times, he had raised his voice. He apparently then told her that he wanted to meet with her outside her work to discuss his work situation "[translation] informally", according to him. The same day, December 2, 2013, the grievor encountered Ms. Aubin in front of Building 7 of 25 CFSD. According to Ms. Aubin, he then apparently looked at her intimidatingly. She immediately notified her supervisor.

[98] At around 16:00, Cpl Belizaire met with the grievor and told him to not communicate with Ms. Aubin. He cooperated with the military police and indicated that in the future, he would inform his union of any administrative disputes. Cpl Belizaire advised the grievor that he was the subject of a harassment complaint made by Maj Anderson and that he had to escort the grievor to his office in Building 193. Cpl Belizaire added that no longer, under any circumstances, could the grievor communicate with employees in the accounting section of 25 CFSD.

[99] Maj Anderson expressed his concerns in an email to HR in response to questions about the events at 25 CFSD. He said that he lived in a city where someone could take a firearm to a public place and shoot people. He mentioned the attack at the time on Pauline Marois on the evening of her election and an incident involving an employee at another depot who had been a target a few years earlier. He did not know the grievor, but he did not take any risks.

[100] On December 5, 2013, Maj Rhéaume emailed Maj Anderson for a statement or a summary from Ms. Aubin about her interview with the grievor and the subsequent email or verbal exchanges. The purpose of Maj Rhéaume's request was to "[translation] add to his file" on the grievor. In rebuttal, Maj Rhéaume testified about his intention to add to the file. He had been informed of the grievor's efforts with respect to the position at 25 CFSD. Ms. Simard advised him to gather as much information as possible, after the grievor's interactions with Ms. Aubin. He contacted Maj Anderson for his version of the facts.

[101] Maj Anderson informed Maj Rhéaume of the incident at 25 CFSD. They exchanged emails and had telephone conversations about the grievor. Maj Anderson told Maj Rhéaume that Ms. Aubin's meeting with the grievor had not gone well. He said

that she felt intimidated by the grievor and that he did not agree to submit to an assessment process to determine his competency for the position in question. Under cross-examination, Maj Rhéaume indicated that he could not comment on whether Ms. Aubin had any fears.

[102] Maj Rhéaume had seen email exchanges of the grievor and Maj Anderson in which the grievor stated that he did not want to submit to an assessment. According to the grievor, since he was an employee affected by a workforce adjustment, the employer was not entitled to assess him. Maj Anderson emailed Maj Rhéaume exchanges with Ms. Aubin, including her statement in an email dated December 4, 2013. A short time later, the military police informed Maj Rhéaume of the incident with Ms. Aubin.

[103] Col Lalonde testified that he had not received any information from the military police about the incident. However, he was told that the grievor had had an altercation with an employee of 25 CFSD, that the employee had felt threatened, and that she had called the military police. When he was asked if that incident had led him to say that the grievor had been acting strangely, Col Lalonde replied that there was an existing conflict, that he had met with the grievor, and that his behaviour had been reported as strange. Col Lalonde did not identify the individuals who had reported that the grievor was acting strangely.

[104] In cross-examination, Maj Rhéaume acknowledged that he did not ask the grievor for his version of the facts because some documents indicated what had happened and because the military police's reports meant that he could not become involved. The military police informed him verbally of the incident with Ms. Aubin. Also in cross-examination, Ms. Simard acknowledged that she did not ask the grievor for his version of the incidents at 25 CFSD or for his version of the incidents with Ms. Aubin. She indicated that it had not been up to her to intervene with respect to Ms. Aubin.

[105] The military police did not follow up on the 25 CFSD incident; there was no criminal offence. They did not contact the grievor when they completed their investigation.

[106] On January 23, 2014, the grievor wrote to Maj Anderson and copied Ms. Aubin and Ms. Dubois about a grievance that he planned to file against him. On January 24,

2014, Maj Anderson reminded the grievor that he was his sole point of contact for 25 CFSD. He noted in his email that the grievor had included Ms. Aubin and Ms. Dubois, despite the warnings to stop communicating with them due to their perceptions of his intimidation and harassment. He told him that his email to them could be viewed as a threat. On January 28, 2014, the grievor filed a grievance with Maj Anderson about the FI-01 position at 25 CFSD, as it was then filled by a temporary employee. The employer responded to that grievance at the first level on February 11, 2014. Ms. Simard represented the employer at the grievance hearing and found that the grievance was not admissible, as the grievor was not represented by his bargaining agent. That grievance is not before the Board.

G. The December 19, 2013, meeting

[107] On December 19, 2013, the grievor met with Maj Rhéaume, in the presence of Maj Martin and Ms. Simard. The grievor testified that he told them that two FI-01 positions were open, one in the Engineering Branch, and one at 25 CFSD. He told them that if they placed him in an FI-01 position, he would find a job elsewhere in the public service. He asked for a copy of the report on the incident involving Ms. Aubin at 25 CFSD. He also asked to record the meeting. Maj Rhéaume refused to let the meeting be recorded, which Maj Martin confirmed. Maj Martin did not know why Maj Rhéaume had not allowed it, but the grievor complied. According to Maj Martin, the tone was cordial and not elevated. Maj Rhéaume did not threaten the grievor.

[108] According to the grievor, apparently, Maj Rhéaume indicated that he knew that the grievor was "[translation] in a mess" with Sun Life. Maj Rhéaume would not have specified the nature of that "[translation] mess", but the evidence showed that the grievor was having difficulty receiving disability benefits from Sun Life. I will return to this later. According to the grievor, Maj Rhéaume told him that what happened at 25 CFSD was only an introduction to what would happen to him. Referring to the Sun Life claims and the findings of Cpl Belizaire of the military police, Maj Rhéaume wanted the grievor to be aware that if the conflicts continued, "[translation] something serious would happen to him". The grievor added that Maj Rhéaume had refused to give him a copy of the incident report and had told him that "[translation] it will end a lot worse than what he is currently experiencing". Maj Rhéaume's tone was reportedly aggressive and almost impolite. He told the grievor that he had a chance to get a job, which he could lose. Maj Rhéaume did not remember that meeting.

[109] About four times in meetings between the grievor and Maj Rhéaume, he reportedly told the grievor that he was aware of what was happening with Sun Life. The grievor believed that Sun Life was separate from the employer but learned that the employer knew about what was going on with it.

[110] On December 19, 2013, at approximately 17:00, the grievor emailed Maj Martin and then spoke with him the next day. He asked Maj Martin to tell Maj Rhéaume that he was not impressed that a labour relations issue had become criminal. Maj Martin had to obtain the incident report. The grievor received it in May 2014 after making an access-to-information request.

[111] When he returned after the holidays, Col Lalonde became increasingly concerned about the grievor. He said that the grievor acted impulsively and questioned authority but Col Lalonde did not specify anything. He was told that the grievor was not the same as he had been a few months earlier. Maj Martin did not make a report to him. They spoke and observed, solely from the perspective of helping the grievor. Had Maj Martin made a report, Col Lalonde would have taken administrative or disciplinary action. Everything reported came from directors or supervisors. Col Lalonde did not specify the directors or supervisors he mentioned.

[112] Several colleagues reportedly commented to Maj Rhéaume about the grievor. The most frequent comment was that "[translation] this guy has the profile of someone who could come to the Garrison and kill everyone". Maj Rhéaume did not specify the colleagues. Under cross-examination on that comment, Maj Rhéaume acknowledged that it was not a psychiatrist's or a social worker's opinion. He did not meet with the grievor about it and acknowledged that he was not responsible for security at Headquarters. He said that several signs gave him butterflies in his stomach.

[113] Col Lalonde spoke with Maj Rhéaume mostly about the possibility of an FTWE of the grievor after the holidays. Col Lalonde had noted that from time to time, when the grievor was faced with a situation in which he was not winning, his behaviour would become increasingly bizarre. Col Lalonde was concerned about personnel safety. He spoke with Maj Rhéaume and Ms. Simard about whether they could compel the grievor to undergo an FTWE. They concluded that there was not enough evidence and that they had to continue helping the grievor.

[114] Based on the military police report on the events at 25 CFSD and the grievance hearing, Maj Rhéaume asked Élisabeth Marion if it would be possible to compel the grievor to undergo an FTWE. The responses from Ms. Marion's superior, Ms. Simard, were still negative, as there was no basis for an FTWE. According to Ms. Simard, there were no significant facts, which were needed to build a case for an FTWE. Maj Rhéaume did not specify the grievance hearing he referred to, either the one for the grievance about the Engineering Branch position between December 20, 2013 (the grievance filing), and January 21, 2014 (the first-level response), or the one for the grievance about the 25 CFSD position between January 28, 2014 (the grievance filing), and February 11, 2014 (the first-level response). In any case, Maj Rhéaume referred to the period of January and February 2014.

[115] Under cross-examination, Ms. Simard explained that the criteria for proceeding with an FTWE were physical or psychological. The individual could not perform his or her duties. It was common sense; as nobody was a doctor, Health Canada would furnish a healthcare professional. Before conducting an FTWE, Maj Rhéaume had to call the doctor in charge of it to determine if it was the way to go.

H. The barracks guard

[116] Maj Rhéaume testified about the comments he received following a "barracks guard", as the main witness of the statements reported from here on, Master Warrant Officer ("MWO") François Fleury, did not testify. The parties did not specify the timing of the barracks guard. It is a mini-parade of 14 or 15 military members, uniformed and armed, which is set up to welcome a distinguished visitor. It is supervised by a sergeant major with the rank of chief warrant officer or master warrant officer. The barracks guard in question was commanded by MWO Fleury, who knew the grievor well because they worked in the same section. MWO Fleury was also the unit sergeant-major and advised Maj Rhéaume on order and discipline at Headquarters.

[117] The day of the barracks guard, in the afternoon, MWO Fleury asked to see Maj Rhéaume in his office to discuss the fact that he had found it odd for the grievor to ask him if the weapons used during the barracks guard were loaded. MWO Fleury said that if anyone else at the barracks had asked him the same question, it would not have raised any concerns. The fact that the grievor had asked it made MWO Fleury feel the need to speak with Maj Rhéaume.

[118] Under cross-examination, Maj Rhéaume acknowledged that he did not ask the grievor for his version of the facts of the loaded-weapons issue because some documents indicated what had happened. However, no such documents were introduced, and no documentary or testimonial evidence showed that a complaint had been made or that the employer had carried out any follow-up.

[119] Maj Rhéaume testified that as the Headquarters manager, and with his experience as an educator specializing in young adults, he began to have concerns about the grievor.

I. The February 3, 2014, meeting

[120] Col Lalonde began hearing about the grievor more often, particularly the change to his behaviour. Maj Rhéaume, Maj Martin, and MWO Fleury, whom Col Lalonde rubbed shoulders with almost every day, told him about the grievor. Col Lalonde decided to meet with him to find out if he needed help and to explain the manager role. At the meeting, he gave him some advice, told him that he had to be careful about his behaviour, and stated that his door was open for him.

[121] According to the grievor, the meeting involved him, Col Lalonde, and Maj Martin, and it was held on February 3, 2014. Maj Martin told the grievor that Col Lalonde wanted to meet with him. The grievor had never met him before. The grievor went to Col Lalonde's office at 14:00, and Maj Martin was there. Col Lalonde testified that the meeting might have been on February 3, 2014, although according to him, it took place in November or December 2013.

[122] According to Col Lalonde, at the meeting, he told the grievor that its purpose was to explain a manager's point of view. Being surplus did not relieve the grievor of the obligation to submit to the selection process. For Col Lalonde, as a manager, being surplus meant that when the competencies were the same, the grievor would receive the position because he was surplus. Col Lalonde reportedly told him that he had to be careful, given what had been observed of his character, namely, being imposing, authoritarian, and intimidating, to achieve what he wanted (he was not open; he would adopt a position and not change his mind). It was simply advice, and it was up to the grievor to decide what to do with it. Col Lalonde understood that the grievor's situation was not easy and wanted to support him. The grievor had time at the office to look for a job. Col Lalonde told him that he could meet with him, Maj Rhéaume, or

Maj Martin. At that time, Col Lalonde might have been aware that the grievor had filed two grievances, but there was no reason to discuss them, because the grievor had been entitled to file them.

[123] According to the grievor, Col Lalonde called him to his office to warn him that if he did not withdraw his grievances, Col Lalonde would have to increase the level of repressive measures taken against him, that something serious would happen to him, and that this time, management would attack his health. Col Lalonde reportedly told him, "[translation] It's not going well for you". The grievor reportedly told him that it was probably because of his grievances (against the Engineering Branch and 25 CFSCD). Col Lalonde reportedly replied as follows: "[translation] It's not your turn to speak; I'm speaking", The grievor testified that Col Lalonde quickly changed his language from more respectful to less formal. Col Lalonde then reportedly told him, "[translation] You will withdraw your two grievances because something serious will happen to you". At that moment, Col Lalonde was one foot away from the grievor. The grievor reportedly replied that if they could reach an agreement, he would set aside the grievances. If he was no longer on the priority list, and if he was assigned the Engineering Branch post, he would find another position at his level. Col Lalonde reportedly said the following: "[translation] The burnout story is not working for military members, and it's not going to work for civilian employees. If I place you in an FI-01 position in the Engineering Branch, you may well stay there for two years". According to Maj Martin, the grievor apparently stated that if a position was open, Maj Martin had to place him in it automatically, without an interview or exam. Col Lalonde disagreed; in his organization, before hiring, an interview and maybe an exam had to be done. There was no automatic hiring.

[124] Col Lalonde allegedly commented that the grievor was sturdy, to which the grievor reportedly replied that he liked to run and do cardiovascular exercises. Col Lalonde then apparently told him this: "[translation] People like you could easily be seen as dangerous and imposing". The grievor reportedly replied that rather than continuing to escalate the tension, they could agree, to which Col Lalonde would have replied, "[translation] You do not understand. This time, your mental health will be attacked".

[125] It seems that Col Lalonde first raised the sick-leave issue. However, according to Maj Martin, it was not discussed because the grievor was not on sick leave at the time. I

believe that the grievor might have been referring to the sick leave from January to September 2013, rather than the one that started on February 26, 2014. He reportedly told Col Lalonde that he had received several requests for references, to which Col Lalonde reportedly replied, "[translation] No, you'll stay there". The grievor then reportedly replied that if he could not reach common ground, he would pursue his grievances.

[126] The grievor apparently informed Col Lalonde that he had gone to 25 CFSD to meet with the union steward who was working closely with him. According to Maj Martin's testimony, Col Lalonde would have told the grievor that given the tense situation, it was not a good idea to meet with the union steward at 25 CFSD and that it would be better to ask the union steward to come to his office next time. Maj Martin stated that Col Lalonde's attitude during the meeting was very calm. He did not remember Col Lalonde making any threats to the grievor.

[127] The grievor then called the UNDE's local president and told him about the meeting. The President asked him if he had recorded the meeting. The grievor replied that he had not. The President then told him to bring a recorder next time without saying anything and to call him if any problems arose.

J. Sun Life

[128] During his leave from January to September 2013, the grievor had difficulties with Sun Life, specifically with the payment of his disability benefits.

[129] The grievor testified that he completed an application for a compensation claim with Sun Life. He told Sun Life that he did not have a family doctor and that he went to clinics. During the sick leave from January 2013 to September 2013, Sun Life asked him to submit reports.

[130] The grievor did not receive any disability benefits between January and October 2013. Discussions with the Sun Life agent responsible for his case, Chantal Morin, were difficult. The situation was resolved when the grievor contacted Ms. Morin's manager, Gail St-Pierre, in October 2013. Ms. Morin and Ms. St-Pierre often requested documents from him, and Ms. St-Pierre told him that if he did not provide the required information, she would contact his employer.

[131] The situation became tense when he made a complaint with Ms. St.-Pierre. Its details were not specified, but I infer that it was related to difficulties receiving his benefits. In late October or early November 2013, the grievor also contacted Sun Life's ombudsman.

[132] After Ms. St-Pierre's intervention, Ms. Morin called the grievor in December 2013 and told him that a cheque would be mailed soon. He noted that she had received instructions; she was courteous. The situation was resolved in four weeks. He received Sun Life's cheque around December 10, 2013.

[133] After Sun Life's cheque was received, Ms. Morin requested more information. The letter accompanying the cheque indicated that it was only an advance and that the amount could be revocable, although it was made out for the full amount. The grievor found the letter troubling and contacted Ms. St-Pierre. He wanted to stay as far as possible from Ms. Morin.

[134] On February 13, 2014, around 18:18, the grievor left a message at the Sun Life call centre about his compensation claim. At 21:30, using his cell phone, he left a message in Ms. Morin's voicemail asking her to forward the medical note to the medication department. He left the message at that time to be sure that Ms. Morin would not be at her office. His message lasted three or four minutes because he asked that the note be forwarded to a specific person at a specific telephone number.

[135] On February 14, 2014, the grievor went to the office around 09:00. He was in his cubicle with his colleagues Maj Martin, Capt Philippe Rodrigo, and Stéphane Provencher when he received a call on his cell phone. All the staff could hear it. Thinking that the call could be from his union representative or his lawyer, he answered it.

[136] At around 09:51, Ms. Morin called the grievor back, on his cell phone. He testified that she told him that she did not have his medical note and that he had to submit another one. He replied as follows: "[translation] Again, you're not going to have a heart attack at work. You are being very lax. You are doing everything to ensure that it does not work. I will have to call your boss." Ms. Morin replied, "[translation] This time, Mr. Gariépy, there will be consequences. It will not work." The grievor said that his colleagues were listening. He heard Maj Martin say to Capt Rodrigo and Mr. Provencher, "[translation] Shh … listen." According to the grievor, Maj Martin heard the

conversation very well. The grievor indicated that he never threatened Ms. Morin. According to the military police report, Maj Martin confirmed that he heard the grievor raise his voice but was unable to confirm whether the grievor made threats. Under cross-examination, Maj Martin stated that he did not hear the grievor threaten Ms. Morin.

[137] Col Lalonde testified that Maj Rhéaume had told him that the grievor had said something similar to, "[translation] it will get nasty", and that his behaviour was authoritarian and imposing. According to Maj Rhéaume, the grievor reportedly made threats against Ms. Morin that included the word "[translation] bomb". The grievor apparently argued throughout the call and refused to follow the procedures she requested. He reportedly raised his voice and told her to "[translation] be careful, a bomb could go off". Also according to Col Lalonde, when Ms. Morin asked the grievor to repeat that statement, he reportedly replied that "[translation] she had understood well".

[138] At around 11:00, the grievor followed up on what he had said to Ms. Morin and called Ms. St-Pierre, leaving her a message. It seems that she did not return his call.

[139] At around 14:07, Ms. St.-Pierre contacted the military police to report that the grievor had allegedly been aggressive in his comments on the phone. Cpl Pierre Dion was assigned to investigate.

[140] As part of the complaint with the military police, according to Sergeant ("Sgt") Stéphane Charbonneau's notebook, he interviewed Ms. Morin by telephone on February 14, 2014, at around 16:00. She reported that the grievor had apparently told her to be careful and that "[translation] a bomb could go off". At around 16:15, Cpl Dion contacted the grievor to ask him to come for an interview. The grievor said that he did not see why the military police were involved and that he would contact a lawyer before confirming his presence at the meeting. He then learned that a Sun Life employee had made a complaint against him with the military police, whose officer did not share the contents of the complaint with him (nor did Ms. Simard or Maj Rhéaume later on). The grievor then called the security department at Sun Life and offered his full cooperation. The person who answered took down the grievor's contact information and told him that Ms. Morin's manager would call him back, which it seems did not happen.

[141] On Saturday, February 15, 2014, at around 09:58, the grievor contacted Cpl Dion of the military police. The grievor expressed his dissatisfaction and his disagreement with the military police's jurisdiction over the incident. According to Cpl Dion's notebook, he noted at 10:00 that after reviewing the file, it would be transferred to the City of Montreal's police department (SPVM), which ultimately did not occur. The discussion lasted 30 minutes. According to Sgt Charbonneau's report, Cpl Dion transferred the grievor to him. He spent an hour on the phone with him explaining why the military police's jurisdiction was in question and stated that they were entitled to continue the ongoing investigation. Cpl Dion also told the grievor that he had been accused of a hate crime.

[142] Col Lalonde testified that the military police had reported the Sun Life incident to Maj Rhéaume and Maj Martin on February 25, 2014, in the afternoon. Maj Rhéaume testified that according to him, the commanding officer of the military police, Maj Renée Point, came to his office and told him that someone at Sun Life had made a complaint. Under cross-examination, he stated that the commanding officer had not referred to a bomb on February 14, 2014. However, under re-examination, Maj Rhéaume testified that he could not say without a doubt when he was informed of the Sun Life incident, which Maj Rhéaume reported to Col Lalonde.

[143] Maj Martin testified that the military police had met with him to inquire about what he knew about a call to Sun Life and whether the call had been placed from the offices or from outside the base. Maj Martin told the military police that he did not know where the call had been placed from. He had not been aware of any phone call to Sun Life or of any threats that might have been made.

[144] Maj Martin testified that the military police report, dated February 25, 2014, at 15:00, was incorrect on the following points:

> [Translation]
>
> …
>
> *a) Maj MARTIN confirmed that in the morning of February 14, 2014, he heard Mr. GARIÉPY with someone from SUN LIFE FINANCIAL;*
>
> *b) at one point in the conversation, he raised his voice, but he could not confirm whether Mr. GARIÉPY had threatened the person on the other end of the line;*

> *c) Maj MARTIN confirmed that Mr. GARIÉPY did not have a good work history due to his attitude;*
>
> …

[145] According to Maj Martin, the only true point in that report is, "[translation] d. every day since the announced budget cuts, Mr. GARIÉPY has spent at least an hour in room 205C, Building 193, Montreal Garrison, Quebec Region, making phone calls".

[146] Ms. Simard testified that Maj Rhéaume had also spoken to her about meeting possible witnesses and the conversation on February 14, 2014, between the Sun Life compensation officer and the grievor. Maj Rhéaume reportedly told her what was apparently said when the grievor was in the offices at Headquarters and that after checking, he could confirm that the grievor had been at work on February 14, 2014. Ms. Simard could not recall whether Maj Rhéaume told her what the grievor had reportedly said to the Sun Life agent. However, she remembered that he said that the comments were serious and troubling enough for Sun Life to make a complaint with the SPVM. According to Ms. Simard, the fact that Sun Life complained to the SPVM worried the employer, as Sun Life compensates most employees in the federal public service. In cross-examination, Ms. Simard said that Maj Rhéaume had called her to tell her that the military police had come to question him about a death threat made against a Sun Life agent and specifically to find out if there had been any witnesses and if the grievor had been at the office that day.

[147] Ms. Simard testified that she heard about the Sun Life incident on February 24 or 25, 2014. She noted that Maj Rhéaume had told her that were an unfortunate incident involving the grievor to take place at the Garrison and were an investigation then held, as a manager, he would have no choice but to say that he had raised concerns about the grievor.

[148] Maj Rhéaume testified that in view of all the events, the different incidents, and the comments from several employees about the grievor's attitude, he wanted Ms. Simard's opinion about whether an FTWE was needed, in light of the latest incident, with Sun Life, and whether placing him on sick leave was appropriate in the circumstances.

[149] Under cross-examination, Maj Rhéaume presented the facts on which he relied to propose that the grievor undergo an FTWE, which were the 25 CFSD incident, the loaded-weapons incident, and the Sun Life incident. He did not react specifically to the

25 CFSD incident. He was concerned by all the facts, the perceptions, and the comments he received from people working at Headquarters.

[150] Maj Rhéaume told Ms. Simard that management had reached its risk-management limit and that the grievor had to be placed on sick leave to undergo an FTWE. Ms. Simard found that doing so was becoming reasonable. When she was asked why she changed her opinion, Ms. Simard replied that she had been struck by the threat to the Sun Life agent that had led to the complaint with the SPVM. They were at the point that they wanted to protect the organization, the grievor, and the other employees.

[151] Maj Rhéaume brought the incident to Col Lalonde's attention. He also told him of his concerns and discomfort with keeping the grievor in his position at Headquarters. According to Col Lalonde, the incident represented an escalation of the grievor's reactions, and he needed help.

[152] Col Lalonde testified that he did not witness the facts but that he acted based on Maj Rhéaume's reporting. He did not remember what Maj Rhéaume told him. He told Maj Rhéaume that there was enough information for an FTWE. He and Maj Rhéaume told Ms. Simard that no more chances could be taken; the tension had reached the point that the grievor had to undergo an FTWE. For Col Lalonde, it was a matter of safety, for both the staff and the grievor, which also impacted the grievor's health. It was not a labour relations issue.

[153] According to Ms. Simard's recommendation, the best option was to place the grievor on sick leave and request an FTWE. According to her, he had stepped over the line with the death threat. Management did not want to be responsible for what could happen. She added that Maj Rhéaume had told her that if she did not act and something happened, he would say that he had asked for help and had not received it. She specified that Maj Rhéaume had not insisted any more forcefully than that. Although before the Sun Life incident, she had found the FTWE request premature, the death threat was a trigger.

[154] After consulting Maj Martin and Maj Rhéaume, Col Lalonde decided that the grievor should undergo an FTWE. He asked them to consult Ms. Simard.

[155] On February 26, 2014, at around 10:00, Maj Rhéaume and Maj Martin met with the grievor to follow up on his telephone conversation of February 14, 2014, with Ms. Morin. Maj Rhéaume indicated that he was very concerned about the grievor's health. He said that given the escalation in events over a longer period, management felt that the grievor had become a danger to his co-workers, who feared for their safety. After the complaint, Col Lalonde decided to suspend the grievor on the grounds of poor health. Maj Rhéaume wanted to ensure a safe environment for all staff.

[156] Maj Rhéaume reportedly told the grievor that he could obtain a medical certificate and that he would then be sent to Health Canada to have his "[translation] dangerousness" assessed. Maj Rhéaume would also have indicated that even if the grievor's doctor provided him with a report stating that he was in good physical and mental health, a Health Canada physician would challenge it. The grievor confirmed to Maj Rhéaume that he felt perfectly healthy and that the insinuations were unfounded that his health was failing and that therefore, he was a danger to the safety of his colleagues. He told Maj Rhéaume that the suspension was a method of intimidation to make him abandon the two grievances he filed about positions being staffed in an uncompliant way.

[157] Maj Rhéaume suspended the grievor without pay and told him that the military police had taken over the Sun Life complaint.

[158] According to the grievor, Maj Rhéaume then told him that he would receive no salary and that the employer would remove sick leave from his bank of sick-leave credits, which he would then have to reimburse. Maj Rhéaume allegedly told him to prepare for it to be lengthy because "[translation] we have our doctors at Health Canada". Maj Rhéaume replied that he did not think he said that. Instead, he remembered telling the grievor that he would be on leave but that he would be welcome to return when the doctor certified that he was fit for work. Maj Martin also did not remember Maj Rhéaume saying it. In rebuttal, Maj Martin said that Maj Rhéaume's attitude was not aggressive and that he had taken the appropriate action.

[159] On February 26, 2014, at around 11:00, the grievor was forced on leave. Maj Martin was asked to accompany the grievor to his office and then to the door, where the grievor was to hand over his building access card. According to Maj Rhéaume, he

had police on hand, in case the situation degenerated. At around 11:11, the grievor left the Montreal Garrison.

[160] After the meeting, Maj Martin did not receive any orders from Col Lalonde or Maj Rhéaume about the grievor.

[161] According to the grievor, the forced sick leave equated to a suspension. He assumed that the employer would interrupt his 15-month surplus-status period during the FTWE. On January 5, 2015, in a letter from Col Stéphane Boucher, he learned for the first time that the employer "[translation] had let the 15 months pass" without advising him.

[162] Under cross-examination, when he was asked why he waited until February 26, 2014, to suspend the grievor, given that the grievor had threatened to place a bomb, Maj Rhéaume replied that for several weeks, he had requested an assessment of the grievor and that it took a long time to start the process. He added that he read the risk assessments each week and that the threat to Ms. Morin at Sun Life did not mean that the Canadian Forces would take a defensive position each time a threat was made. Maj Rhéaume acknowledged that he did not ask the grievor for his version of the facts because some documents indicated what had happened. He said that he had military police reports and that he could not interfere.

[163] The grievor did not have many sick-leave credits accumulated. When he returned from sick leave in September 2013, all his credits were exhausted. The employer could advance 25 days of sick leave, so it assessed what was possible. According to its calculations, to delay the start of the grievor's period of unpaid sick leave, he could have been advanced sick leave up to March 31. Ms. Simard discussed it with him on the phone. The terms related to severance pay had been repealed, and employees had the option of cashing it out within 30 days or waiting for it to be paid when they left the public service. If no choice was made, the severance would be paid on leaving the public service. The grievor made no choice. Maj Rhéaume asked Ms. Simard if the grievor could make a choice, even if it was late. She replied that he could.

[164] At Maj Rhéaume's request, Ms. Simard prepared an email informing the grievor of his sick-leave balance. Maj Rhéaume wanted to ensure that the grievor continued to benefit from a period in which he would be paid. The employer also granted the grievor leave.

[165] Under cross-examination, when she was asked if there were any directives about an FTWE request for an employee suspended with or without pay, Ms. Simard replied that the grievor had been not suspended but forced on sick leave, to consult his treating physician. Management did not think that it would take so long and that it would need to ask Health Canada to conduct an FTWE.

[166] On February 27, 2014, at around 11:30, Cpl Belizaire met with Maj Rhéaume. Maj Rhéaume said that the grievor had been involved in a harassment case and that he had uttered threats against Sun Life in recent days. He said that the grievor had sent 600 emails to the civilian employees' union at the Montreal Garrison. I note that none of them was put into evidence and that therefore, I do not know what they were about. Administrative action was taken against the grievor because he was potentially a threat to other employees. Maj Rhéaume mentioned that given the number of incidents involving the grievor, the Sun Life one was the trigger for his dismissal. Under cross-examination, Maj Rhéaume stated that he had never used the words "[translation] dismiss" or "[translation] terminate" with respect to the grievor and that Cpl Belizaire had understood what he had wanted to understand.

[167] On February 27, 2014, at 13:00, Cpl Belizaire had an interview with Ms. Morin at Sun Life's offices in the presence of Ms. St-Pierre and André Montecino, at which Ms. Morin provided a written statement. The evidence did not specify who Mr. Montecino was or his role at the meeting.

[168] On March 4, 2014, Capt Roy of the military police wrote to the Command Group at 2nd Division. He stated that the investigation was complete. The military police laid criminal charges against the grievor.

[169] On March 6, 2014, at around 11:20, the grievor contacted Sgt Charbonneau of the military police to complain about intimidation by the military police. Several times, Sgt Charbonneau tried to explain to the grievor that the investigation had ended and that the case had been sent to the attorney general, given his refusal to meet with the investigator in the case. The grievor told Sgt Charbonneau that he would see him in court, that he would say that he was a victim of intimidation by the military police, and that his bargaining agent would support him. In his report, Sgt Charbonneau wrote that the grievor seemed agitated during the calls and did not give him time to speak.

[170] On March 14, 2014, the grievor made a harassment complaint with Brigadier-General Jean-Marc Lanthier against Col Lalonde and Maj Rhéaume about facts related to intimidating and oppressive behaviour. Col Lalonde testified that he did not remember having been the subject of a complaint. He added that Maj Rhéaume had told him about the fourth allegation in the harassment complaint, which was about how the grievor had been treated at the February 3, 2014, meeting. The complaint included many other allegations, including how he was treated when he returned to work in September 2013, the 25 CFSD incident, the Sun Life incident, and the leave. Ms. Simard never saw the complaint. The grievor testified that he had stopped the process for his complaint because no investigator agreed to investigate it.

[171] On March 25, 2014, the grievor made a complaint with the department's ombudsman about the leave.

[172] According to the grievor, the Crown prosecutor received the complaint from the military police in April 2014, but not his deposition. According to his understanding, the prosecutor asked the military police to take his deposition, which was done in April 2014. According to Col Lalonde, the incident was serious enough for the police to become involved in the case, to initiate a prosecution.

[173] At around 13:00 on April 25, 2014, Cpl Belizaire contacted the grievor, to schedule an interview. The grievor gave his version of the facts to the military police on April 28, 2014, at 13:00.

[174] In an access-to-information request on May 20, 2014, the grievor asked Sun Life to provide him with the telephone message that he had left in Ms. Morin's voicemail on February 13, 2014, and the recording of the conversation with Ms. Morin on February 14, 2014.

[175] The grievor testified that on May 21, 2014, the Ombudsman told him that he did not have access to Ms. Morin's deposition stating that the grievor had apparently told her that he would blow up the Sun Life building. Only then did the grievor learn from the Ombudsman the content of Ms. Morin's allegations.

[176] On June 16, 2014, Ms. St-Pierre wrote to the grievor to advise him that Sun Life had received incomplete disability claim forms, as the treating physician's statement was missing. Sun Life also determined that he was in perfect health and able to return

to work. Sun Life understood that if the treating physician's statement were not received, the grievor would not pursue his disability benefits application. Maj Rhéaume received a copy of that letter.

[177] On August 18, 2014, the grievor appeared before the Court of Quebec for the disclosure of evidence by the Crown prosecutor, who had received the file involving criminal charges that the military police had prepared. Other than a statement from Ms. Morin, the Crown introduced no evidence. I note that that statement was not introduced in evidence.

[178] In late summer 2014, Sun Life's lawyer contacted the grievor's lawyer and stated that the requested recording had been destroyed.

[179] The grievor testified that between August 2014 and January 2015, no discussions took place with the employer on the criminal charges. I note that at times, the employer and Sun Life discussed the grievor. He referred to an email between an employee at the Civilian HR Service Centre and Ms. Morin on February 17, 2014. Maj Rhéaume was also copied on Sun Life's letter of June 16, 2014.

[180] On January 5, 2015, according to its record of proceedings, the Court of Quebec acquitted the grievor of the criminal charges against him. The minutes detail that the hearing began at 11:39 and that it ended at 11:40.

K. The FTWE

[181] On March 3, 2014, the grievor tried to contact Dr. Mélissa Quirion, who had been following up with him since his return to work in September 2013. Also, she had signed his return-to-work form. On that date, she was not at the clinic.

[182] Ms. Simard said that she had prepared the letter to the treating physician around March 3 or 4, 2014. She spoke with management to prepare a history of the file. She had no reason to doubt the reported facts. She was aware of the grievor's file. Some things that management reported were included, to show that the grievor had had difficult periods in his work. Ms. Simard did not consult all of the grievor's file before preparing the letter. When she was asked if she knew that the grievor had a dispute with Sun Life, Ms. Simard said that she did not know the details. She knew that the employer was copied on Sun Life's letters to the grievor. She had no reason to believe that he abused sick leave.

[183] Under cross-examination, Maj Rhéaume testified that the FTWE request was based on everything, which provided a complete picture. The basis included the incident with Ms. Aubin, the information from MWO Fleury about the barracks guard incident, and the Sun Life incident. Maj Rhéaume did not agree that the letter to the doctor had been written in a way that described the grievor as a problematic employee. According to him, the grievor was in a downward spiral of confrontation and conflict, and for that reason, an attempt was made to include as much detail as possible in the letter. When he was asked why the 25 CFSD incident was mentioned, given that the military police had not followed up on it, Maj Rhéaume indicated that the grievor's conduct had been worrisome.

[184] Maj Rhéaume testified that it had not been thought appropriate to include the word "[translation] bomb" in the letter. When he was asked if it was possible that that word had never been used and instead that Col Lalonde had said "[translation] it will get nasty", Maj Rhéaume said that Col Lalonde would have to be asked that question.

[185] Maj Rhéaume indicated that he did not remember whether he had consulted the harassment file before writing the letter. He believed that the accumulation of incidents, including the insubordination in 2011, had to be brought to the doctor's attention. The 2011 harassment complaint was included to show that there was a conflict with the grievor's supervisor. He included the grievances to explain all the incidents to the doctor. He provided neutral explanations so that the doctor would understand. I note that no evidence of insubordination by the grievor was presented.

[186] According to Ms. Simard, management did not seal the letter to the doctor, for transparency reasons. It wanted the grievor to read it and know what it asked of the doctor. There seems to be a contradiction between the testimonies of Ms. Simard and the grievor as to whether the letter was sealed. According to the grievor, Maj Rhéaume gave him a sealed letter and told him: "[translation] We know you, Mr. Gariépy. You will open the letter. If you open it, there will be consequences." The grievor stated that he opened it because he did not trust Maj Rhéaume. I wonder what interest the grievor would have had in admitting that he opened a sealed letter, given that management had told him not to. In any event, I do not need to examine this apparent contradiction because, although he viewed the letter, the grievor did not give it to the doctor.

[187] In the letter, Col Lalonde indicated that Sun Life had made a complaint with the SPVM, which was false, according to the grievor. Under cross-examination, when she was asked why she had not mentioned the death threat in the letter, as it could have been important to the doctor, Ms. Simard replied that she did not go that far, to spare the grievor.

[188] As for the letter to the treating physician, when he was asked what a treating physician is, Maj Rhéaume indicated that he hoped that it was someone familiar with the grievor's history. As the grievor had been on sick leave for a long time, Maj Rhéaume assumed that he had one or more doctors.

[189] In a letter dated March 4, 2014, Col Lalonde confirmed the decision dated February 26, 2014, to force the grievor on leave and to send him for a medical assessment of his fitness to work. He also prepared a letter to the grievor's treating physician for the medical assessment. Although Col Lalonde signed the documents, Maj Rhéaume and Ms. Simard contacted the grievor (Élisabeth Marion had left for another position, and given the file's complexity, Ms. Simard managed it with Maj Rhéaume).

[190] On March 10, 2014, the grievor reached Dr. Quirion. Apparently, she told him that his employer, she believed it was Maj Rhéaume, had called her and had asked questions, which she had refused to answer. The grievor explained the situation to her. She said that she did not handle administrative and labour relations forms. Maj Rhéaume denied being acquainted with Dr. Quirion and denied the grievor's testimony that he had called her to ask questions about the grievor's sick leave. He testified that he did not personally contact any health professional about the grievor's sick leave. He used the word "[translation] personally", because Ms. Simard had told him that she had done it.

[191] On March 11, 2014, the grievor went to the clinic he had been going to since 2009. He had decided that he would not deliver the letter that the employer had prepared for the doctor because he felt that Ms. Morin had made a false complaint. He did not want to be seen as a dangerous criminal. He explained his situation to Dr. Michèle Dussault, who told him that she did not want to replace Dr. Quirion, who should have signed the medical certificate. The grievor said that Dr. Dussault was hard to convince and that he told her that she had to sign it. According to him, she

questioned whether Dr. Quirion had given up because of the forms and why she had to sign them. Dr. Dussault examined the file and answered the three questions.

[192] On March 11, 2014, at 16:17, the grievor emailed Maj Rhéaume and included a medical certificate signed by Dr. Dussault and dated March 11, 2014. On the medical certificate, Dr. Dussault indicated that the grievor had been fit to work since September 2013, according to the clinical file. The employer found the medical certificate succinct and unclear.

[193] Maj Rhéaume asked Ms. Simard for her opinion on the validity of the certificate and whether it was acceptable. She had never seen one of that type. When she looked at it, she wondered if Dr. Dussault had consulted the letter to the physician.

[194] Maj Rhéaume spoke with Ms. Simard because the medical certificate did not correspond to what they had asked for. Its content suggested that the doctor had not read the letter given to the grievor for the doctor.

[195] Under cross-examination, when he was asked for his grounds to question the medical certificate *a priori*, Maj Rhéaume replied that Dr. Dussault was not the grievor's treating physician and that she was not familiar with his history. The grievor's counsel noted that this was *a posteriori*. Maj Rhéaume denied that he had assumed the grievor's bad faith and indicated that he found the document unconvincing.

[196] Maj Rhéaume asked Ms. Simard for recommendations. She recommended not accepting the certificate as conforming with the request that was made to the grievor. As the grievor did not seem to want to work with the employer to consult the doctor of his choice, she recommended proceeding with Health Canada for the FTWE, to allow management to make an informed decision. The grievor's consent was required to proceed with that FTWE, as it has its own forms and procedures. Health Canada insisted that the communication be between it and the department's HR section. Col Lalonde decided to follow the recommendations. Ms. Simard prepared the documents. I must note that the grievor consulted the doctors of his choice, namely, Dr. Quirion and Dr. Dussault.

[197] As Ms. Simard handled the FTWE process, she contacted Dr. Dussault for more information because she found the certificate very meager. Ms. Simard called the clinic.

The receptionist told her that Dr. Dussault was not attached to the clinic but attended there occasionally, for emergencies. She told her that Dr. Dussault had been at the clinic on March 11, 2014. Ms. Simard asked that Dr. Dussault contact her.

[198] Dr. Dussault called Ms. Simard on March 12 at 12:10. Ms. Simard told her that she wanted Dr. Dussault to verify whether she had met with an employee of the department the day before. Dr. Dussault replied that she had and said that she did not know the grievor but that he had remained in her office for about 20 minutes and that he had insisted that she sign the form because his employer needed it. Dr. Dussault said that she gave in under the pressure because she wanted him to leave her office. Ms. Simard asked her if she had read a letter dated March 4, 2014, from the department to the treating physician. Dr. Dussault confirmed to her that she had not been given anything but the form. That letter contained the following:

> [Translation]
>
> *Our request is motivated by the fact that we were informed on February 25, 2014, by military police officers of an incident involving Mr. Gariépy and a Sun Life insurance company agent in which Mr. Gariépy apparently made threatening statements that led Sun Life officials to make a complaint with the Montreal police. That incident, of much concern, along with several situations, behaviour, and statements by or about Mr. Gariépy, led us to fear for the health and safety of our staff. We have reason to believe that Mr. Gariépy's health may be the cause of it. For that reason, he was forced on leave on February 26, 2014 ….*
>
> *We feel that it is important to depict to you an outline of the situation from when Mr. Gariépy began in his position until the incident that led to his forced leave.*
>
> …
>
> *Throughout 2011, Mr. Gariépy was accused by his then-immediate supervisor of several situations involving breaches of his responsibilities and of insubordinate behaviour. Mr. Gariépy made a harassment complaint against that supervisor and the supervisor of that supervisor in November 2011, but after an investigator reviewed it, it was deemed inadmissible.*
>
> …

[199] The rest of the letter refers as follows to steps the grievor took with several stakeholders after being advised that his position would be abolished:

> [Translation]

…

> *Discussions occurred about the different steps that Mr. Gariépy took with the stakeholders involved, which they described as ranging from at the least difficult up to intimidating and even harassing. In one particular case, the military police were asked to intervene because Mr. Gariépy's presence when two employees were leaving the workplace made them fear for their safety. It is worth mentioning that after speaking with Mr. Gariépy, the military police did not pursue the matter ….*
>
> *In addition to the events surrounding the steps taken to get back on track, in the past few months, several people who have dealt with Mr. Gariépy in their duties mentioned that they found his behaviour odd and even worrisome.*

[200] Dr. Dussault said that she was not the grievor's treating physician and that she did not know him. She indicated that it was the first time she had met him. She also indicated that she was unable to include any information other than what was in his file, which dated from his gradual return to work. She stated that she had never seen or had any knowledge of the FTWE request. Under cross-examination, when she was asked if she had violated the grievor's right to privacy, Ms. Simard stated that she had not asked for a diagnosis but simply whether Dr. Dussault had seen the employer's letter. Dr. Dussault could have told her that she would not discuss it with her. It was not clearly determined whether the grievor gave Dr. Dussault his consent to disclose the information in his medical file.

[201] Ms. Simard said that the certificate signed by Dr. Dussault was not a document that they had given to the grievor to have signed. She informed Maj Rhéaume that she had received confirmation that the doctor had never read the letter that had been given to the grievor that indicated the context of the FTWE request.

[202] Maj Rhéaume and Ms. Simard found that the medical certificate that the grievor provided did not meet their requirements to approve his return to work, of which they informed him.

[203] According to Maj Rhéaume, had the grievor obtained a medical certificate stating that he was fit to work, he would have been prepared to take him back until his time with the organization ended due to the abolishment of his position. It would have been much more effective had the grievor submitted a doctor's note, as requested.

[204] On March 18, 2014, Maj Rhéaume replied to the grievor that he did not accept the certificate from his treating physician. He had learned that the physician the grievor had consulted was not his treating physician and that he had not given her the letter addressed to the physician. According to Col Lalonde, this was a lack of cooperation on the part of the grievor. The grievor testified that he learned from that letter that Dr. Dussault's medical certificate was not suitable. He testified that the letter was in part incorrect in that Dr. Dussault had access to his full medical file. He had received an email from Maj Rhéaume, and the letter followed in the mail.

[205] On March 18, 2014, Col Lalonde followed up on the March 4, 2014, letter and indicated to the grievor that he had not followed the instructions in it. Col Lalonde concluded that the fact of not following the instructions clearly demonstrated the grievor's lack of cooperation. Thus, he decided to request an FTWE through Health Canada. He asked the grievor to complete the consent forms for undergoing an FTWE and for the disclosure of medical information.

[206] After the medical certificate was refused, the grievor agreed to cooperate and to be evaluated by Health Canada. He wanted to see the rules; that is, the employee handbook and the FTWE protocol. He felt comfortable with how the FTWE worked.

[207] On March 21, 2014, the grievor forwarded to Health Canada the two witness consent forms that Ms. Simard had sent to him, which were not signed. They indicated his agreement to undergo an FTWE and summarized the entire situation.

[208] On March 21, 2014, Maj Rhéaume informed the grievor that he could not hear the suspension grievance because the grievor was on forced sick leave and therefore was considered unfit to attend a grievance hearing.

[209] On March 25, 2014, Dr. Michèle Bélanger of Health Canada informed Ms. Simard that the consent forms could not be altered, that a witness had to sign the consent, and that the originals had to be sent to Health Canada. She also indicated that the grievor could not directly access Health Canada's services. The grievor found this response "[translation] quite dry". Ms. Simard found that there was little cooperation from him. She said that he "[translation] bypassed her by going directly to Health Canada".

[210] In an email of March 26, 2014, Maj Rhéaume asked the grievor to provide the originals of the consent forms with signatures from him and the witnesses, preferably the employer's witnesses. According to the grievor's understanding, it meant that Maj Rhéaume had to sign as a witness. The grievor testified that having to compromise by passing through the employer was contrary to the rules for an FTWE. He referred me to the following paragraph of the Health Canada document entitled, "[translation] Fitness-to-Work Evaluation: Employee Guide": "[translation] Be advised that no one, even your employer, will receive confidential medical information without your informed written consent or as prescribed by law". With respect to the Health Canada consent form, the grievor noted that it states, "[translation] The HR manager must not see this form, unless the employee specifically requests HR's help completing it",

[211] On March 31, 2014, Col Lalonde wrote to Dr. Bélanger to ask that she proceed with the grievor's FTWE and identify his temporary or permanent functional limitations, if any.

[212] On April 1, 2014, Ms. Simard completed the form and contacted Dr. Bélanger to provide her with the information and documentation required to proceed with the grievor's FTWE. Under cross-examination, when it was pointed out that the letter contained no mention of a death threat, Ms. Simard said that she had spoken with Dr. Bélanger before sending the letter.

[213] Given the number of medical certificates from different doctors, Dr. Bélanger asked for the grievor's consent to obtain his full medical file from the Régie de l'assurance-maladie du Québec (RAMQ).

[214] On April 8, 2014, the grievor provided consent for the RAMQ to disclose information so that it could provide Health Canada with the names of the health professionals who had provided him with services covered by the RAMQ, the amounts that the RAMQ paid for those services, and the dates on which the services were provided between September 19, 2013, and April 30, 2014.

[215] On April 28, 2014, Ms. Simard wrote to the grievor to inform him that when Health Canada received his medical file from the RAMQ, Dr. Bélanger had noted the names of nine physicians whom the grievor had consulted in recent years. Ms. Simard told the grievor that Dr. Bélanger required his consent to contact the nine physicians. The employer attached the grievor's medical profiles to his letter. Ms. Simard did not

give any medical information about the grievor to Dr. Bélanger, and Dr. Bélanger did not give her any medical information, other than the physicians' names.

[216] On May 6, 2014, Dr. Bélanger requested the seven consent forms required to disclose medical information. On May 7, 2014, Col Lalonde informed the grievor that Health Canada had informed him that he had provided only two consent forms for that disclosure. He asked the grievor to complete the seven missing forms and return them to Ms. Simard. She could then send them to Dr. Bélanger as soon as possible, so that the doctor could begin her evaluation. He told the grievor that if he failed to comply with the request, it could lead to disciplinary or administrative action. Col Lalonde stated that the labour relations advisors had instructed that that last sentence could be added. No disciplinary action was taken. Maj Rhéaume indicated that had he wanted to take disciplinary action against the grievor, he would have asked Ms. Simard to prepare the documents. He stated firmly that he had never used the word "[translation] dismiss" or "[translation] termination" with respect to the grievor. The grievor testified that he had understood that if he did not sign, he would be dismissed.

[217] As of May 7, 2014, the grievor was on unpaid leave as he had exhausted all his sick, personal, and annual leave.

[218] On May 9, 2014, the grievor wrote to Valérie Simoneau at Health Canada to inform her that he would provide her with the two consent forms on May 12, 2014. On that same date, he also wrote to Lise Pelletier at Health Canada, indicating that he had not seen five of the nine physicians on the RAMQ's list on the dates listed on the RAMQ's report. He provided her with the two consent forms for the two physicians whom they had discussed. Ms. Pelletier was to contact Catherine Lauzon at Health Canada and the director of the program in Ottawa.

[219] The grievor testified that he did not know most of the physicians. On May 9, 2014, he agreed with Ms. Lauzon that he would sign the consent forms for four physicians but not for the five physicians he did not know. Ms. Pelletier asked him to sign a statement indicating that he did not know the five physicians, which he did. Health Canada did not ask him again for consent forms or sworn statements.

[220] On May 20, 2014, Dr. Bélanger informed Ms. Simard that she was unable to provide her with an opinion on the grievor's functional limitations, accommodations, and fitness for work.

[221] On May 27, 2014, Col Lalonde informed the grievor that due to his refusal to sign seven of the nine consent forms for the disclosure of medical information that Dr. Bélanger had requested, she could not issue the requested medical opinion. Col Lalonde reiterated his request and advised the grievor that failing to comply with it could lead to administrative action, up to and including termination.

[222] On June 18, 2014, Maj Rhéaume supported the grievor's severance pay request.

[223] Maj Rhéaume left his position as the deputy commanding officer in June 2014. He informed his successor that given the complexity and nature of the grievor's case, he could continue with it, if needed. He was not very involved; he approved severance and leave payments. He was informed that Health Canada had not been able to proceed with the FTWE.

[224] As for the tone of his meetings with the grievor, Maj Rhéaume replied that the grievor had not been in a good mood but that neither of them had to lower their voices. The required information was communicated civilly. Maj Rhéaume stated that the grievor never made any threats.

[225] In early July 2014, Col Lalonde left his chief-of-staff position. The grievor still had not been evaluated after his May 27, 2014, letter. Col Lalonde stated that during that period, the ultimate goal was to help the grievor and ensure that the FTWE was conducted as soon as possible, for the safety of staff. It was a priority file for Maj Rhéaume and Ms. Simard, who always dealt with it quickly.

[226] The grievor signed five other consent forms in July 2014. Dr. Bélanger indicated that since the grievor had signed seven of the nine consent forms, she would plan a meeting with an expert physician of her choice. Ms. Simard consulted the grievor to find out when he was available.

[227] On August 18, 2014, the grievor contacted Ms. Lauzon at Health Canada to inform her that since no evidence had been provided during the disclosure at the Court of Quebec, therefore, Health Canada could see that the criminal accusations were false and that the employer had fabricated them. He asked Ms. Lauzon to contact him so that the story of alleged aggressive behaviour could end. He indicated that he was suffering considerable harm in his work environment, including the defamation of his professional reputation.

[228] On September 16, 2014, Dr. Dussault confirmed that she saw the grievor at the walk-in clinic on March 11, 2014. She also confirmed that she completed the medical certificate based on the medical information in his file as of the visit.

[229] In October 2014, Col Boucher was the manager, chief of staff. Ms. Simard and Maj Rhéaume informed him about HR files, including the grievor's.

[230] On October 2, 2014, the grievor met with Dr. Louis J. Bérard of Health Canada for about two hours. With Dr. Bérard's approval, the grievor recorded the meeting. He also requested a confidentiality order for the recording. I will address that order later in this decision. The grievor noted that Dr. Bérard had medical reports in hand that he had given to Sun Life. Dr. Bérard related excerpts to him from the medical reports. The grievor asked him how he had received them, as he had withdrawn his consent to share consultation reports with health specialists during his sick leave from January to September 2013. The grievor testified that he told Dr. Bérard that he was not entitled to the reports and that he would advise the union that Dr. Bérard had obtained them from Sun Life. The grievor called Ms. Lauzon and told her everything on October 21, 2014.

[231] I listened carefully to the recording of that meeting, which the grievor introduced into evidence. I note that the tone of the interview was cordial and respectful and that the grievor was cooperative. After the interview had already gone on for 1 hour and 40 minutes, Dr. Bérard began a discussion of the medical reports from the health specialists whom the grievor had consulted in February 2013. At that point, the grievor told Dr. Bérard that he had obtained the reports illegally, as he had withdrawn his consent to disclose medical reports from consultations during the period of his sick leave. Dr. Bérard replied that the reports in question were part of the file that Dr. Bélanger had forwarded to him. Dr. Bérard then asked the grievor if he agreed to continue the interview or if he wanted to end it.

[232] The grievor said that he did not want to discuss his state of health during the period of his sick leave because, according both to him and to what a lawyer had told him, an FTWE must be restricted to the period during which the employee is at work. He told Dr. Bérard that on leaving the interview, his lawyer would contact him. Dr. Bérard replied that the grievor could call his lawyer right away if he wished to. The grievor said that he would not because he had to check some things.

[233] As the grievor did not wish to continue the interview, Dr. Bérard told him that he would contact Dr. Bélanger to inform her that there was a problem with using forwarded documents and that no report would be made until the situation was clarified. He did not say that the evaluation had gone badly.

[234] In its arguments, the employer referred to the session with Dr. Bérard as an example that several facts reported by the grievor differed from reality. He testified about Dr. Bérard's remarks and his disparaging attitude toward him. The recording shows that Dr. Bérard never made the reported statements and that he had not been disparaging but rather had been surprised by how the session went when the grievor accused him of illegally possessing certain documents. The employer argued that what happened was not important but that what the grievor reported in his testimony was not accurate.

[235] Thus, a disparity exists on some points between the grievor's testimony at the hearing and his statements in the recording. Although that might be seen as affecting the grievor's credibility somewhat, I wonder why he would have introduced the recording in evidence if he intended to contradict it or fabricate allegations in his testimony. What interest would he have had in intentionally undermining his credibility by introducing the recording? It makes no sense. His testimony and the recording are consistent on how the meeting with Dr. Bérard went but not about certain comments that Dr. Bérard allegedly made.

[236] Under the circumstances, in my view that disparity does not raise doubts about the grievor's overall testimony. In any event, I will not consider it for the purposes of this decision. The session with Dr. Bérard was on October 2, 2014, several months after the grievor had been forced on sick leave on February 26, 2014. Thus, there is no link to the employer's decision to force him on sick leave. Nor was that session linked to the grievance alleging that the grievor's layoff was a disguised dismissal. I also consider that the mere fact that Dr. Bérard received documents from Sun Life, the employer's insurer, does not constitute evidence of a conspiracy between Sun Life and the employer.

[237] Dr. Bérard called Dr. Bélanger to inform her that the grievor had challenged the validity of the consent he had given for the expertise. He told her that until the grievor signed his consent to allow him to submit his report, he would not prepare one.

[238] On October 29, 2014, Dr. Bélanger wrote to Ms. Simard, stating that the grievor had been referred for an expert opinion to Dr. Bérard, who felt that the grievor questioned the consent for the evaluation. As a result, Dr. Bérard could not submit the evaluation report unless the grievor signed a new authorization. Ms. Simard testified that Dr. Bélanger called her to share the contents of the October 29, 2014, letter and that she had informed her that there would be no report.

[239] Maj Rhéaume testified in reply evidence that he did not know Dr. Bérard.

[240] Around November 4, 2014, the grievor was still on sick leave awaiting the Health Canada FTWE. The employer asked him to provide a medical certificate from his treating physician stating that he could proceed with the grievance process.

[241] On November 13, 2014, the grievor wrote to Ms. Lauzon at Health Canada. He told her that according to the conversation on October 21, 2014, she acknowledged that Dr. Bérard had used illegal questioning methods and that he had illegally obtained physicians' reports as part of the October 2, 2014, meeting.

[242] The grievor testified that through Ms. Lauzon, Health Canada informed him that the employer was unable to continue the FTWE because the criminal charge had been withdrawn, and there was no longer any risk of danger, which the employer did not contradict. On January 5, 2015, Col Boucher informed the grievor that he would be laid off as of February 10, 2015, unless he was appointed or transferred to another position in the public service before that date. He learned for the first time in that letter that the employer "[translation] had let the 15 months pass" without advising him.

[243] On January 9, 2015, Dr. Josée Pilon of Health Canada informed Gilles Madore of the office of the department's ombudsman that Health Canada considered the grievor's file closed because his evaluation was incomplete. Mr. Madore informed the grievor that the FTWE process had stopped. The grievor indicated that he received a letter every 30 days and that the file was not closed. Mr. Madore wanted to organize a meeting between the grievor and the employer, which told him that the grievor was on sick leave for "[translation] dangerousness" and that until a medical certificate was in place, it could not meet with him, even for the two grievances he had filed. On January 30, 2015, Col Boucher informed the grievor that since he had questioned the consent he had signed for the medical evaluation, Health Canada was still unable to rule on his fitness to work and his functional limitations. Col Boucher asked him one last time to

provide written authorization to obtain the medical information required for the FTWE and stated that if he failed to comply, it could lead to administrative measures up to and including termination. Ms. Simard helped draft the letter. The same day, the grievor filed a grievance alleging that he had been dismissed.

[244] On February 10, 2015, the grievor was laid off. From February 10, 2015, to February 9, 2016, he benefitted from a laid-off priority. He was no longer in the public service and was no longer attached to the department. The Public Service Commission then took over the process.

[245] On August 21, 2015, the employer responded at the final level of the grievance process with respect to the layoff notice of January 5, 2015. Nothing led the employer to find that the termination of the grievor's employment constituted a dismissal.

L. Job offers and references

[246] The grievor had difficulty obtaining references for future job offers. He testified that he expected the references to be consistent with his performance appraisals and that his absence of a year-and-a-half was problematic. He did not want to give Maj Rhéaume's name as a reference because his supervisor was Maj Martin.

[247] In the fall of 2014, the grievor was interviewed for a position with the Department of Canadian Heritage. He did not want to tell it that he had been accused of being a dangerous person. He contacted Ms. Simard, who told him that she would speak with Maj Rhéaume. The grievor accepted the risk of allowing Maj Rhéaume to contact Heritage Canada. Maj Rhéaume testified that he had asked Maj Martin to prepare a first draft of the reference request. They then met to finalize the text.

[248] Alain Couture of Heritage Canada called Maj Martin and told him that he would send him the reference form. Mr. Couture sent the form to Maj Martin on October 28, 2014, and asked him to complete it.

[249] Maj Martin testified that he did not receive any help and that he did not consult anyone else when completing the form. He showed it to Maj Rhéaume before sending it to Ms. Simard because of the chain of command and because the document was to go external. He did not discuss it with Maj Rhéaume. Maj Martin did not remember why he sent it to Ms. Simard. According to Maj Rhéaume, he and Maj Martin met to finalize the

reference's content. Maj Rhéaume testified that he did not read the grievor's performance appraisals before preparing the reference.

[250] As for the reference form's content, Maj Martin testified that he completed it the same day, to the best of his knowledge. The references were only for the period in which he had supervised the grievor. He included the absence of a year-and-a-half because he included only the months in which he had been able to assess the grievor's work. It was not a positive reference, although he said that he had told the truth. Maj Martin testified about the term "[translation] meticulousness". He stated that in one file that he had given to the grievor, a lawyer had provided very simple instructions. However, the grievor had stubbornly worked his way. Maj Martin testified that he and Maj Gauthier had found that the grievor had difficulty adapting to the military environment. Maj Gauthier had informed the grievor of it at a meeting in 2011 that Maj Martin attended. The grievor insisted on not using the right terms, even after two years of service. Maj Martin testified that the grievor used the expression "[translation] hotel and restaurant services" instead of "[translation] accommodation and rations". He also used the term "[translation] shareholders" in an accounting document, even though the department has no shareholders.

[251] When he was asked whether he was annoyed that the grievor did not use the correct ranks, Maj Martin replied that the grievor's failure to use military terminology caused confusion. Maj Martin stated that he did not lose any sleep at night because the grievor mixed up the ranks.

[252] When he was asked if he had anything positive to say about the grievor, Maj Martin replied in the affirmative.

[253] With respect to his general opinion of the grievor at work, Maj Martin testified that everything had always gone well and that there had been no conflicts. When he was referred to the fact that thus, the grievor had no problems at work, Maj Martin replied that to be a comptroller in the army, a professional accounting designation is not required. Maj Martin had the impression that the grievor did not have much esteem for those who did not have professional accounting designations. It was not the same for Maj Martin and Maj Gauthier as they had that professional designation.

[254] After speaking with Maj Rhéaume, Mr. Couture from Heritage Canada emailed the grievor and indicated that he had not met all the criteria. According to the grievor, Maj Martin ruined his career.

[255] On March 4, 2015, the Department of Veterans Affairs asked the grievor for authorization to contact his last supervisor with the employer for a reference. When he refused, it concluded that he did not meet the essential requirements of the position.

[256] Another job offer arose in March 2015, from the Department of Veterans Affairs' Ste. Anne's Hospital. It informed the grievor that it was having difficulty recruiting staff because the hospital was to be transferred to the Government of Quebec. It invited him to an interview. He thought that it would not work because of Maj Rhéaume. At the interview, he was informed that he had been selected. He stated that his relationship with the department was difficult and that so would be the reference check. Ms. Lavoie called him back the next day and told him that she had to speak with the immediate supervisor. He told her that he would call Ottawa to find someone because his performance appraisals were very good.

[257] The grievor contacted the department's assistant deputy minister of HR and spoke with that person's assistant to find a solution to avoid Maj Rhéaume. She informed him by email that only Maj Rhéaume could provide references. Given his experience with Heritage Canada, the grievor did not want to do that and so advised Ms. Lavoie.

[258] The grievor received another offer from Ste. Anne's Hospital in July 2015. In the fall of 2015, the manager for the FI-01 position at the hospital called him to ask if the references issue had been resolved. The grievor replied that it had not. She told him that they could not move forward.

[259] Still in the fall of 2015, the grievor interviewed with the Department of Public Works. Afterwards, its representative told him that he was on the list of priorities, that it was interested, and that the grievor needed to provide references. He had provided his performance appraisals. Given the lack of references, it could not hire him.

[260] Under cross-examination, when it was noted that he refused to provide references, the grievor testified that Maj Rhéaume presented him as a serial killer.

M. Fact after the hearing

[261] On January 30, 2018, counsel for the grievor wrote to the Board to inform it that the grievor had died suddenly on January 8, 2018.

IV. Summary of the arguments

A. For the employer

[262] The employer argued that the Board's jurisdiction is limited to what is specifically mentioned in the *FPSLRA*. Section 208 concerns individual grievances, and s. 209(1)(b) limits references to adjudication to disciplinary actions (*Chamberlain v. Canada (Attorney General)*, 2015 FC 50 at paras. 40 and following).

[263] The employer's actions against the grievor were administrative. Therefore, the Board has no jurisdiction to hear the grievances. The Board cannot review administrative actions by the employer (*Ho v. Deputy Head (Department of National Defence)*, 2013 PSLRB 114; *Hood v. Canadian Food Inspection Agency*, 2013 PSLRB 49 at para. 120; *Burke v. Deputy Head (Department of National Defence)*, 2014 PSLRB 79 at paras. 92 and 93; and *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63).

[264] According to *Canada (Attorney General) v. Frazee*, 2007 FC 1176 at para. 22, and *Braun*, the issue is not whether the employer's decisions were badly executed but, rather, whether disciplinary action was intended. For administrative measures, the analysis must end there, regardless of whether the Board agrees with the decisions when they were made or whether the employer could have acted better. Although the decisions might have had an impact on the grievor, even if the grievor disagrees with them and feels aggrieved, it is still not disciplinary action. The employer's intent never was to punish the grievor by imposing disciplinary actions. It acknowledged that the Board might assess the grounds for the actions to determine whether they were reasonable.

[265] The grievor had to bear the burden of demonstrating that they were disguised disciplinary actions (*Lindsay v. Canada (Attorney General)*, 2010 FC 389 at para. 46).

1. The suspension grievance

[266] According to the employer, the suspension was purely an administrative measure, and the Board has no jurisdiction. Its action was related to its obligation to

ensure the health and safety of all employees. For some time, the employer was concerned about the grievor's health. As a result, it decided to put him on leave and to conduct an FTWE. The grievor seemed in a confrontation with everyone.

[267] The employer argued that the actors must be differentiated. To determine the employer's intention, the Board must consider those who had the authority to make decisions that would affect the grievor, rather than every person directly or indirectly involved in the matter, whether or not they were employees. The remarks, actions, and decisions of Health Canada and its physicians, the military police, the HR Advisor, the Crown attorney in the criminal case, and the employees of Sun Life or the SPVM must not all be considered when determining the employer's intent. Col Lalonde made the decision to suspend the grievor based on a recommendation by Maj Rhéaume and Ms. Simard. The Board must not consider decisions that the employer did not make, including Health Canada's requirement that all communication be done through the employer.

[268] The employer noted that the military police were independent. Col Lalonde and Maj Rhéaume testified that they could not give the military police orders. Their actions were not the basis for the employer's decision. There is no evidence of collusion between Maj Rhéaume and Col Lalonde and the military police, which decided to investigate. There is no evidence that they took on the file based on orders from Col Lalonde or Maj Rhéaume.

[269] The employer refuted the allegation that Maj Rhéaume had enjoyed talking with Sun Life and that he, together with Sun Life, had invented from scratch a story of threats and complaints to the military police. Maj Rhéaume indicated that before the incident, he did not know that Sun Life had covered the grievor during his illness. He indicated that he had never contacted Sun Life except for a call made after the fact.

[270] According to the employer, the intent was never to punish the grievor. Maj Rhéaume and Col Lalonde testified that the grievor was entitled to file grievances and that filing them had no influence on the decision to request an FTWE. The intent was to ensure that the workplace would be safe and healthy for everyone and to ensure that if the grievor needed help, he would receive it.

[271] The employer argued that it is entitled to ask an employee to submit to an FTWE if it has reason to believe that the employee may pose a risk to workplace safety. It

referred me to *Hood*, at para. 118; *Burke*; and *Campbell v. Treasury Board (Canadian Radio and Television Commission)*, [1996] C.P.S.S.R.B. No. 35 (QL), at para. 61. The employer emphasized that Maj Rhéaume testified about his experience as a commanding officer and his past as a youth educator and stated that that experience had led him to believe that the grievor was in a "[translation] spiral of confrontation" with everyone and that he needed help. The triggering event was the fact that the military police told him that the grievor had made threatening comments to a Sun Life employee. Regardless of what he said, Maj Rhéaume felt that he could not ignore his concerns and that he had to look after the well-being of all staff, including the grievor. The situation was delicate for the employer; it had to choose between letting the situation go and risking that an incident might occur or acting immediately and possibly being accused of acting too quickly if the medical assessment showed that there was no danger.

[272] The employer tried to act in the least intrusive manner possible. It first asked the grievor to see his treating physician for a medical assessment. Its requirements were clearly set out in the letter that the grievor was to give to the physician. He did not meet the requirements. The medical certificate he submitted did not respond in any way to the employer's questions. The certificate was based on information from September 2013, during a previous return to work. Between September 2013 and the March 2, 2014, letter, events occurred that led the employer to request the medical assessment; hence, the importance of submitting the letter to the physician. The grievor admitted that he did not give it to the physician (see *Campbell*, at para. 61; ("risk and peril")). His failure to comply with the employer's instructions forced it to turn to the Health Canada process.

[273] The employer emphasized the grievor's "[translation] difficult collaboration" in the FTWE process. The first consent forms did not comply with Health Canada's requirements. The grievor refused to consent to the Health Canada physician contacting another physician to obtain the medical information on file. He also testified to his objections to the consents. The employer made a final attempt with him to obtain his authorization on January 30, 2015. Ms. Simard knew that he would be laid off and that it would be better were he assessed before being laid off. The grievor never provided new consent authorizations. Regardless of why he did not want to give his consent or limit the period covered, as he testified, he caused the delays, not the employer. Each step in the file for which the employer was responsible was carried out

without delay. The employer was simply the go-between for information between the grievor and Health Canada. The delays cannot be attributed to the employer; nor can any intention or bad faith (see *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12 at para. 13).

2. The termination grievance

[274] The employer's right to lay off employees is provided for in the *PSEA* and the *Public Service Employment Regulations* (SOR/2005-334) and was part of the employment contract that the grievor accepted when he joined the public service. Layoffs occur under the *PSEA*, which provides certain remedies that are not subject to a grievance within the meaning of s. 209(1) of the *FPSLRA*. Referral to adjudication is not possible. The right of priority for one year after layoff is not consistent with the concept of termination.

[275] The employer noted that s. 208(2) of the *FPSLRA* states that an employee may not file a grievance if another administrative remedy is available (see *Brown v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 127 at paras. 13 and 14; and *Brown v. Canada (Attorney General)*, 2011 FC 1205 at paras. 28 and 29).

[276] Under s. 211 of the *FPSLRA*, the Board has no jurisdiction over any termination of employment under the *PSEA* (see *Mutart v. Deputy Head (Department of Public Works and Government Services)*, 2013 PSLRB 90 at paras. 94 to 99). The grievor could have made a complaint of abuse of authority about his layoff. Had the Board found the complaint justified, it could have set aside the layoff (s. 65(4) of the *PSEA*). The legislator provided recourse in the *PSEA* for laid-off employees.

[277] The employer claimed that the existence of recourse eliminates the doctrine of constructive dismissal in the public sector: *Hassard v. Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 32 at para. 178; *Stevenson v. Treasury Board (Employment and Social Development Canada)*, 2016 PSLREB 17 at paras. 72 and 73; *Cadbury Adams Canada Inc. v. United Food and Commercial Workers Canada Local 175* (2008), 169 L.A.C. (4th) 249 at paras. 11 to 14; and *Kershaw (Re)*, [2002] B.C.L.R.B.D. No. 32 (QL) at para. 59. The concept of a fundamental breach of an employment contract or a substantial amendment to the contract is an essential concept in the doctrine of constructive dismissal (see Howard A. Levitt, *The Law of Dismissal in Canada*, Volume 1, 3rd edition, Canada Law Book).

[278] According to the employer, the decision to abolish the grievor's position was made following reflection and consultation when the employer faced budget cuts. Col Lalonde testified that the employer's analysis had shown that the main duties of the grievor's position did not occupy all his time and that they should be assigned to the comptroller or deputy comptroller. The grievor did not contradict that testimony. He did not object to his position being abolished when he was informed of it in May 2013 or when he received the opting letter.

[279] The employer argued that the WFAD is part of the collective agreement (article 51). It must apply that agreement and has no discretion. The length of the priority period applicable to the grievor was determined by s. 5(2)(c) of the *Public Service Employment Regulations*, which reads as follows:

> ***5 (1)*** *An employee who has been advised by the deputy head that their services are no longer required but before any layoff becomes effective is entitled to appointment in priority to all persons, other than those referred to in sections 39.1 and 40 and subsections 41(1) and (4) of the Act, to any position in the public service for which the Commission is satisfied that the employee meets the essential qualifications referred to in paragraph 30(2)(a) of the Act.*
>
> ***(2)*** *The entitlement period begins on the day on which an employee is declared surplus by the deputy head and ends on the earliest of*
>
> …
>
> ***(c)*** *the day on which the employee is laid off.*

[280] The employer argued that that regulation must be read in conjunction with the WFAD, clause 6.3.1(a)(i) of which sets out what was offered to the grievor and reads as follows:

> *6.3.1 Only opting employees who are not in receipt of the guarantee of a reasonable job offer from the deputy head will have access to the choice of options below:*
>
> *(a)*
>
> *(i) Twelve-month surplus priority period in which to secure a reasonable job offer. Should a reasonable job offer not be made within a period of twelve months, the employee will be laid off in accordance with the* Public Service Employment Act. *Employees who choose or are deemed to have chosen this option are surplus employees.*
>
> …

[281] The employer asserted that it did not want to punish the grievor. In May 2013, while he was on sick leave, he was advised of the abolishment of his position. Given that situation, the process of choosing was to begin only after he returned from sick leave. Ms. Simard testified that that decision was made to not unduly punish him, because the process period began when he received the opting letter listing the choices.

[282] The grievor had the onus of bearing the burden of demonstrating that a termination took place, which he did not do. The evidence did not support the idea that the employer intended to punish wrongdoing when it decided to abolish his position. That decision was made before the events that led to his forced sick leave. The events after that should have little impact on the analysis of the employer's intent. The grievor's health problem did not result in misconduct by the employer, despite what he might have suggested in his testimony. The evidence established that the abolishment of his position was not the result of his health problems, as the employer's witnesses did not know the reason for the sick leave. It was abolished because its duties could be assigned to others. That evidence was not contradicted. Col Lalonde testified that the idea that depression does not exist in the armed forces is an old prejudice that no longer exists.

[283] Several allegations include serious accusations of collusion. Those accusations cannot be based on allegations or perceptions but on clear and convincing evidence. The accusations stemmed from the grievor's subjective perception of the events.

[284] Overall, the grievor's version is not credible and is inconsistent with the evidence as a whole. Much of his testimony was contradicted by the employer's witnesses. The consistent version that all of them recounted, supported by the documentary evidence, should be retained.

B. For the grievor

1. Witness credibility

[285] Witness credibility is a comprehensive exercise (*Casavant frères Ltée v. le Syndicat des employés de Casavant frères Ltée (C.S.D.)*, SOQUIJ AZ-86141173 (arbitration tribunal, June 26, 1986) at paragraphs 16 to 18). Testimonies in which witnesses state that they "[translation] do not remember" are not evidence that has priority over the grievor's specific testimony.

[286] The grievor argued that the employer asked the Board to carry out a cull since it wanted the Board to completely ignore all his testimony and the evidence that contradicted its witnesses and the contradictions. It also wanted the Board to ignore the facts, such as the December 19, 2013, meeting attended by the grievor, Maj Rhéaume, and Maj Martin, and the February 3, 2014, meeting to which Col Lalonde invited the grievor to inform him that he had to be evaluated.

[287] The grievor argued that the employer asked the Board to set aside the evidence by ignoring the military police reports. Those reports are official documents, prepared under oath. Preparing a false police report is a criminal offence (s. 128 of the *Criminal Code* (R.S.C., 1985, c. C-46)). It is incomprehensible that the employer would ask that the documents be set aside. If it had doubts about them, it could have called a witness to be cross-examined. The testimonies of Maj Rhéaume and Maj Martin contradicted the military police reports. With respect to Cpl Vincent Gauthier's February 25, 2014, report, Maj Martin testified that he had no recollection of items a, b, and c, as follows:

> [Translation]
>
> *a) Maj MARTIN confirmed that in the morning of February 14, 2014, he heard Mr. GARIÉPY with someone from SUN LIFE FINANCIAL;*
>
> *b) at one point in the conversation, he raised his voice, but he could not confirm whether Mr. GARIÉPY had threatened the person on the other end of the line;*
>
> *c) Maj MARTIN confirmed that Mr. GARIÉPY did not have a good work history due to his attitude;*

[288] The grievor raised the following questions. What interest would the military police have had to make up Maj Martin's comments, and what interest would Maj Martin have had by saying that he had not heard any threats? He submitted that Maj Martin did not want to contradict Maj Rhéaume and that the action was disciplinary because the grievor had an attitude problem. He raised the question of what interest the military police would have had in using the term "[translation] dismiss" in its report on the interview with Maj Rhéaume, dated February 27, 2014. The grievor referred to the fact that Maj Rhéaume had said that the Sun Life incident had triggered the termination process on the heels of all the accumulated earlier incidents. According to him, had the grievance been allowed, Maj Rhéaume would have lost face and would have had every interest in defending his theory about the case.

[289] According to the evidence, there is far from an absolute barrier between the military police and the commanding officer. On February 14, 2014, the military police informed Maj Rhéaume of the conversation with Sun Life. The grievor disputed not that the conversation took place but that he made any threats.

[290] The grievor stated that many people quickly jumped to conclusions, including Maj Anderson and Ms. Aubin before LCol Pelletier, who immediately called the military police. Ms. Aubin testified that she felt harassed by the grievor. However, she was unable to list any threatening gestures he had made. She testified that he had never been threatening toward her and that he never swore in front of her. Ms. Aubin also testified that in an email, his tone had been arrogant. However, the email was submitted to Maj Rhéaume, who did not find it arrogant. As for Maj Rhéaume, he sought to "[translation] add to his file" on the grievor. His credibility was also tainted by the fact that he testified that he did not know that Sun Life insured employees, when he had spent his career in the armed forces, which does not stand up to the credibility test.

[291] The file contains many statements by the grievor, all contemporary to the events, grievances, statements to the military police, threats from Col Lalonde, grievances to the Engineering Branch and 25 CFSD, and the meeting with Col Lalonde on February 3, 2013. The grievor wrote copiously. His written statements were consistent and coherent. He always referred to the same facts. His testimony was precise, and the employer did not contradict it.

2. The suspension grievance

[292] According to the grievor, the Board has jurisdiction to hear the grievance as the action was disciplinary. Clearly, it was a suspension, because the employer deprived him of his right to provide work. The suspension was without pay; he was not paid after February 26, 2014. In *Basra v. Canada (Attorney General)*, 2010 FCA 24 at para. 14, the Federal Court of Appeal stated that the fact that a suspension was without pay might be sufficient to allow for the conclusion that it was disciplinary. As the grievor was unilaterally deprived of his salary by the employer, the punitive nature of the action is presumed.

[293] The grievor referred to paragraphs 23, 24, 25, and 35 of *Frazee*. The Board may look behind the employer's stated motivation to determine its true intent. The problem

of disguised discipline can also be addressed by examining the effects of the action on the employee. When the impact of the employer's decision is significantly disproportionate to the stated administrative rationale, the decision may be considered disciplinary. Paragraph 25 of *Frazee* mentions the following factor that must be considered:

> *… 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 ….*

[294] The grievor argued that in this case, in addition to the fact that the employer blocked his references, he had to sell his house, had enormous difficulty finding another job, and incurred extrajudicial expenses. Maj Rhéaume waited 12 days before acting. With respect to Col Lalonde's concern for the health and safety of employees, the grievor questioned why Col Lalonde met with him 3 weeks earlier to ask him to withdraw his grievances.

[295] According to the grievor, the Board cannot be satisfied solely with the employer's intent but must look behind the veil. A reasonable person in the same circumstances would conclude that it was disciplinary action. He referred to *Burke*, at paras. 10 and 87, in which, *a contrario*, the grievor clearly had medical problems; *Féthière v. Deputy Head (Royal Canadian Mounted Police)*, 2016 PSLREB 16 at paras. 202 to 207, which applies in the sense that the employer tried to have two grievances withdrawn; *Gauthier v. Deputy Head (Department of National Defence)*, 2013 PSLRB 94 at paras. 71 to 75; and *Finlay v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 59, which addressed the need for an investigation.

[296] Col Lalonde testified about the employer's reasons for proceeding with the suspension on February 26, 2014. He said that in the grievor's conversation with someone at Sun Life, the tone was raised, and the grievor reportedly said, "[translation] it will get nasty", or something similar. According to Maj Rhéaume's version, the grievor did not say, "it will get nasty", but reportedly used the word "[translation] bomb". Under cross-examination, the grievor's counsel asked Maj Rhéaume why Col Lalonde had not mentioned it. Maj Rhéaume replied that he had had to speak with Col Lalonde about it but that he had not mentioned a bomb to Col Lalonde. Ms. Simard did

not mention a bomb or death threats. The grievor allegedly threatened to place a bomb while on a military base, but Col Lalonde did nothing for 12 days. That makes no sense. Despite the Sun Life incident, the grievor continued to work for 12 days after it.

[297] The grievor questioned why the reference to the bomb was not in the March 4, 2014, letter to the physician. According to him, it would have been important to include it there. The reason is simple. Threats were not reported to Maj Rhéaume, Col Lalonde, or Ms. Simard because none had been made.

[298] In May 2014, the grievor learned from the Ombudsman that he had been accused of threatening to plant a bomb. The grievor questioned what happened between February and May 2014. The employer did not act quickly when he allegedly made bomb threats, which, one more time, makes no sense.

[299] In the suspension letter of February 26, 2014, the employer referred to "[translation] an accumulation of prior incidents", which shows the disciplinary nature of the suspension, as the employer referred to an escalation in incidents. In Cpl Gauthier's report dated February 25, 2014, about his interview with Maj Martin, Maj Martin refers to the fact that the grievor did not have a good work history due to his "[translation] attitude", noting that the grievor had filed grievances, that he did not respect military rank, and that he had spoken "[translation] in hotel terms". The disciplinary nature of the suspension is indicated several times.

[300] The grievor argued that according to *Canada (Attorney General) v. Grover*, 2007 FC 28 at paras. 64 and following, the Board must decide whether the employer had reasonable grounds to bypass the grievor's right to privacy. Citing *Grover*, the grievor argued that the request for an independent medical examination from Health Canada, to determine if he was fit to work, should have been considered only in clear and exceptional circumstances. Thus, if the employer does not discharge its burden of proof and the suspension remains without pay, it is sufficient to allow the grievance. According to paragraphs 17 and 18 of *Basra*, the adjudicator must determine if there were reasonable grounds for an FTWE.

[301] Maj Rhéaume and Ms. Simard did not explain why they were not satisfied with Dr. Dussault's medical certificate. Ms. Simard indicated that she had an intuition. The employer did not ask the grievor to explain himself. The employer decided to

improvise as a physician based on Ms. Simard's intuition, without giving the grievor the change to explain the medical certificate's origin.

[302] The grievor said that he had an agreement with Health Canada and that he was to provide only four consents, which the employer did not respect. In *Hood*, the employer offered to help the employee before requesting an FTWE, which was not done with the grievor. The employer never mentioned "[translation] bizarre" conduct and claimed to not know the reason for the grievor's illness before February 26, 2014. He testified that as of the suspension, Maj Rhéaume had told him that regardless of the medical note, it would not be accepted, because there would be an FTWE. Nothing that the employer in *Hood* did was done in the grievor's case. As noted at paragraph 109 of *Hood*, the fewer legitimate reasons the employer has to request an FTWE, the more it indicates that it is disciplinary.

[303] The suspension letter makes no mention of the grievor's health. The employer's witnesses stated that they did not speak with the grievor about his medical situation before February 26, 2014. Although the employer believes that the grievor had odd, even worrisome, behaviour, no facts support that claim.

[304] According to *Basra*, at paras. 17 and 18, the Board must determine whether there were reasons for proceeding with an FTWE.

[305] The grievor argued that the February 26, 2014, suspension amounted to constructive dismissal, pursuant to paragraph 72 of *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55. Citing *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, the grievor argued that the concept of constructive dismissal should apply in a unionized environment.

3. The termination grievance

[306] The grievor argued that the employer's action was disguised dismissal. According to him, there is enough information to show that it did not want him. Each time it felt that he was not acting quickly enough with the FTWE, it threatened disciplinary measures and even termination, including Col Boucher's January 30, 2015, letter requiring the grievor to consent to the FTWE forms. The word "[translation] termination" was used if he did not comply.

[307] According to the grievor, the employer wanted to get rid of him. According to Maj Marion, the grievor was a social misfit. There was a firm prejudice toward the grievor in the minds of Ms. Aubin and Maj Anderson to the effect that he was a killer. When he filed grievances, Col Lalonde told him to withdraw them or things would not go well for him. That testimony was uncontradicted. Maj Rhéaume, who has never worked with adults, testified that the grievor's behaviour was "[translation] bizarre", which was why the grievor was on forced sick leave. The employer wanted to get rid of him so much that Ms. Simard's "[translation] intuition" led her to call Dr. Dussault. She did not ask the grievor for explanations and did not keep him informed after that. The employer was waiting for him to become surplus. It did not take all reasonable steps to find him another public service job. In the fall of 2014, it was informed that there were no longer any criminal charges against the grievor, but still, it maintained its FTWE request. Nothing prevented the employer from withdrawing that request. The grievor testified that Ms. Lauzon of Health Canada had asked the employer to stop the FTWE process after the criminal charges were withdrawn, which was refused. That testimony was uncontradicted.

[308] The grievor argued that the Board had jurisdiction to hear a case involving a breach of the WFAD, under which the employer had obligations. It had to offer him a guarantee of a reasonable job offer (see clause 1.1.1 of the WFAD), which it did not do. It gave him a closed office to look for work outside the department. None of the positions sent to him were in the department. The employer set up barriers to the two positions he applied to (in the Engineering Branch and at 25 CFSD). That conduct was incompatible with clause 1.1.1 of the WFAD (see *Grover*, at para. 135). Under s. 7 of the *Public Service Employment Regulations*, the employer had the discretion to extend the priority period for someone suffering from a disability.

[309] The grievor stated that the employer "[translation] closed doors" to him in the department, and therefore, he could consider only positions elsewhere, for which the employer also created barriers by sabotaging references. He refused to provide references to Canadian Heritage and Ste. Anne's. He argued that it was not possible that there was nothing positive to mention in the references. Maj Martin chose to mention only negatives; he did not try to find positives in the grievor's performance appraisal.

C. The employer's reply evidence

[310] The grievor could have called witnesses to corroborate his testimonial evidence, but he relied solely on his testimony and the conclusions he drew from the documents that were introduced. That was not sufficient to meet his burden of proof of establishing the employer's bad faith. The employer argued that it is not very clear that in *Basra*, the Federal Court of Appeal determined that it can be assumed that a suspension without pay is disciplinary. Paragraph 17 of *Basra* states that the employer's intent must be determined, which does not mean that when an employee is suspended without pay, the suspension is automatically disciplinary. According to the grievor, if the employer had insufficient legitimate grounds, there is no other choice but to conclude that the action was disciplinary. That link cannot be made automatically. The issue is knowing whether the employer intended to discipline the grievor. To answer that, the Board must consider all the evidence.

[311] With respect to the military police report, the employer referred to specific documents, several of which its witnesses contradicted. The grievor did not call any witnesses with respect to the military police.

[312] The employer did not say that the grievor lied. However, it argued that his version represented his perception of the facts, his impressions, and his inferences, which generally were not supported by the documentary evidence. According to the employer, he tried to suggest that the documents stated something they did not state, such as the relationship between Sun Life and the employer. Accepting that example means ignoring Maj Rhéaume's testimony; he never contacted Sun Life. The Board cannot conclude that the employer and Sun Life communicated regularly. The balance of probabilities is inconsistent with the grievor's testimony. The fact that he was consistent in his statements does not make them a reality; it remains subjective.

[313] With respect to the employer's witnesses, who apparently had convenient memory lapses, the employer stated that instead, they had denied certain facts and statements. It is normal for witnesses to not remember small details, for example that Maj Rhéaume reacted to the alleged bomb incident 12 days after the alleged facts. In his examination-in-chief, Maj Rhéaume testified that when he was informed, he immediately called Ms. Simard. The next day, he met with the grievor, to place him on sick leave. That chronology is supported by the letter about the FTWE dated March 4, 2014, and signed by Col Lalonde. It refers to the meeting between the grievor, Maj

Martin, and Maj Rhéaume on February 26, 2014, and to the incident "[translation] reported to us by military police officers in the afternoon of February 25". The military police report was in Maj Martin's hands on February 25, 2014.

[314] All of the employer's witnesses were consistent, and their testimonies aligned. The grievor suggested answers to questions that he had raised. His answers are not evidence, for example, of why the employer waited until January 2015 for a final attempt to assess him.

[315] The WFAD was never raised in the grievances. It was raised in other grievances that the grievor filed. The employer was never informed and did not have the chance to present evidence in this respect. The interpretation of the WFAD is not relevant; the employer's obligations are set out in it. The issue is to determine whether in its decision, the employer's intention was disciplinary. As the WFAD is part of the collective agreement, this argument should normally involve the bargaining agent. The employer argued that *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), applies to this argument.

[316] With respect to the employer's obligation to offer a guarantee of a reasonable job offer within the department, Ms. Simard testified that no such offer was made at the department.

[317] As for the suspension with or without pay, the employer never tried to state that the grievor had received a salary. The fact that he was entitled to leave is not in dispute. Ms. Simard testified that the employer wanted to reduce the financial impact, meaning that it was not motivated by a spirit of revenge or malice.

[318] As for constructive dismissal, in reaction to *Cabiakman*, the employer referred to paragraph 64 of *King v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 45, in which the Board stated that a distinction can and should be made between the legislative regime in the federal public service and the one examined in *Cabiakman*. In response to *Potter*, the employer replied that the concept of constructive dismissal has no place in a unionized environment and referred to *Hassard* and *Stevenson* in that respect.

[319] Several letters from the employer to the grievor state, "[translation] otherwise … administrative or disciplinary action", which the grievor presented as a threat. That is

standard wording that appears in all the letters in his file. The Board must not conclude that the employer threatened him.

[320] With respect to performance appraisals, there is no obligation for the employer to provide a positive one. Maj Martin testified that he had never had a problem with the grievor, who testified that he had never had a problem with Maj Martin. However, Maj Martin testified that the grievor had problems adapting to the military world.

[321] The grievor drew a parallel between the letter to the physician and Dr. Dussault's certificate. He disregarded the fact that his fitness for work had been evaluated and taken from the file of September 2013, which was not contemporaneous to the employer's request. The employer checked and realized that its letter had never been given to the physician, who conducted the evaluation based on information in the file. It was not a contemporaneous evaluation of his fitness to return to work.

[322] The grievor argued that the employer should have asked him for explanations for the medical certificate (*Grover*, at para. 66). The employer provided explanations in the letter to the physician, but the grievor did not provide any. In *Grover*, the issue at the heart of the case was that the employer required that the respondent be evaluated by the employer's physician, while the employer must offer the employee the opportunity to be seen by a physician of his or her choice.

[323] With respect to the 25 CFSD incident, Ms. Aubin testified that she had been afraid, regardless of whether it was rational. She informed her superior and was interviewed by the military police, and the matter was resolved that way. The information was shared with Maj Rhéaume.

[324] With respect to the Sun Life incident, regardless of the threatening comments reported to Maj Rhéaume, important is that the military police went to Maj Rhéaume and said that they were investigating threatening comments that the grievor had uttered.

[325] The grievor testified that Ms. Lauzon at Health Canada had asked the employer to stop the FTWE process because the criminal charge had been withdrawn. The employer argued that that testimony was hearsay. The grievor testified that he had not witnessed the discussion between Ms. Lauzon and the employer.

D. The grievor's second rebuttal

[326] According to the grievor, the employer interfered with his illness when Ms. Simard immediately called Dr. Dussault, obtained the physicians' names, and sent the four letters. Maj Rhéaume insisted that the consent forms be signed before him as a witness. In terms of persons with disabilities, in the system, the grievor was on sick leave. The employer cannot have it both ways.

[327] The employer did not object to the grievor's testimony that Ms. Lauzon had asked that the FTWE process be stopped. The grievor argued that it is a matter of evidence admissibility.

[328] According to the clinic's file, the grievor was fit to work in September 2013. He testified that he saw the doctor regularly, beginning in September 2013.

[329] The grievor argued that his performance appraisal from Maj Marion was good. However, in an email, Maj Marion indicated that the grievor was a social misfit, which showed a two-faced nature. It was the same with Maj Rhéaume and the military police.

[330] According to the grievor, all the known facts are sufficient to conclude that the employer and Sun Life were connected. As such, the recording of the conversation with Dr. Bérard showed that the information provided to him could have come only from Sun Life, which was the only party that received it. Evidence by presumption of fact is just as valid as documentary or testimonial evidence.

[331] Under cross-examination, Maj Rhéaume testified that he was informed of the Sun Life incident on either February 14, 2014, or the next day. He did not explain the delay from February 14 to 26, 2014. He had no recollection of informing the military police that he wanted to dismiss the grievor, as described in the military police's report. The grievor questioned what interest the military police would have had in inventing that comment.

[332] With respect to the interpretation to be given to paragraph 14 of the Federal Court of Appeal's *Basra* decision, the punitive aspect of a suspension without pay is a presumption and is not automatic.

V. Analysis

A. Preliminary remarks on the evidence

[333] In this case, I heard many witnesses. Some of them had difficulty remembering certain facts, while others jumped to conclusions. At times, several had credibility issues. The grievor introduced several documents that included contemporaneous statements of events that in his view, were consistent and coherent, but that the employer felt were contradictory. Therefore, this matter is based largely on the credibility that I attribute to the witnesses. To address that credibility, I was guided by the following part of the oft-cited decision by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356 and 357:

> *If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility … A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.*
>
> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.…*

[334] Moreover, my task was made more difficult by the absence of many witnesses from the hearing who could have shed light on the events and who could have been cross-examined. With respect to the Sun Life incident, Ms. Morin reportedly heard the grievor's alleged threats but did not testify and did not introduce into evidence her written statement, which she reportedly gave to Cpl Belizaire on February 27, 2014, in

which she stated that the grievor had told her that she should be careful and that a bomb could go off. In addition, Ms. St-Pierre, Ms. Morin's manager, who reportedly called the military police on February 14, 2014, and who was present when Cpl Belizaire met with Ms. Morin on February 27, 2014, also did not testify. Finally, Mr. Montecino did not testify.

[335] According to the grievor, several people, including Capt Rodrigo, Mr. Provencher, and Maj Martin, heard his conversation with Ms. Morin. Only Maj Martin testified, and he denied hearing the threats mentioned in the military police report. Neither the military police nor Maj Point, whom reportedly the military police informed of the grievor's threats, testified. Moreover, criminal charges were laid against the grievor, but Ms. Morin did not testify before the Court of Quebec. Her statement was not put into evidence, and the grievor was acquitted in one minute, suggesting that there was no trial on the merits.

[336] The employer alleged that the grievor's attitude had escalated through several events. It noted a situation at the Engineering Branch. Maj Rhéaume also related Maj Marcotte's impressions of a meeting with the grievor. Neither Maj Marcotte nor Capt Kilburn, who were present at that meeting, testified. With respect to the alleged events at 25 CFSD, Maj Rhéaume mentioned exchanges with the grievor and two incidents at the guardhouse in that area of the garrison. Only Ms. Aubin testified on the exchanges. Maj Anderson did not corroborate what she said; nor did Ms. Dubois, who reportedly witnessed a telephone conversation with the grievor. Mr. Joly, who was apparently concerned for Ms. Aubin, did not testify about those concerns. With respect to the barracks guard, the employer's only witness did not testify, MWO Fleury, who was apparently concerned by the grievor's alleged comments about loaded weapons.

[337] With the exception of Maj Martin, who apparently was a direct witness to Ms. Morin's call to Sun Life, the employer's other witnesses, namely, Col Lalonde, Maj Rhéaume, and Ms. Simard, did not witness any of the events and related facts the source of which could not be validated through cross-examination. I have before me a large amount of hearsay evidence that I will assess later, based on the events, and to which I will give the appropriate weight, based on the circumstances. Section 20(e) of the *FPSLREBA* states that the Board may accept any evidence, whether or not admissible in a court of law, which the Federal Court of Appeal upheld at paragraph 21

of *Basra*. However, I am not required to accept hearsay evidence. But if I accept it, I must ensure that it is reliable.

[338] Several military police reports were introduced, but their authors did not testify. At the employer's request, the Board issued a summons to Cpl Belizaire to testify in reply evidence, but ultimately, the employer did not call him. The employer noted that the military police were independent. Thus, Col Lalonde and Maj Rhéaume testified that they could not give orders to the military police, which decides on their own investigations. Col Lalonde explained that there was almost no reporting relationship with the military police, which is a separate entity. Under cross-examination, Col Lalonde acknowledged that he did not ask the grievor for his version of the events at 25 CFSD and with Sun Life because documents reported what had happened and because the military police reports meant that he could not interfere.

[339] Moreover, military police written reports are official documents. Under s. 128 of the *Criminal Code*, as follows, it is an indictable offence for a peace officer to file a false police report:

> ***128*** *Every peace officer or coroner is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who, being entrusted with the execution of a process, intentionally*
>
> …
>
> ***(b)*** *makes a false return to the process.*

[340] Paragraph (g) of the definition of "peace officer" in s. 2 of the *Criminal Code* states that officers and members of the Canadian Forces with the following ranks are peace officers:

> …
>
> ***(g)*** *officers and non-commissioned members of the Canadian Forces who are*
>
> ***(i)*** *appointed for the purposes of section 156 of the* National Defence Act*, or*
>
> ***(ii)*** *employed on duties that the Governor in Council, in regulations made under the* National Defence Act *for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers ….*

[341] To say the least, it is troubling that the employer asked that some reports of the military police, whose members are vested with the authority of peace officers, be disregarded because it relied, at least in part, on the contents of those reports to justify its actions against the grievor. Maj Martin's testimony contradicted Cpl Gauthier's February 25, 2014, report. Maj Martin testified that he did not remember items a, b, and c. If the employer had doubts about the report, it could have called Cpl Gauthier to testify. Indeed, the question arises as to what interest the military police would have in fabricating statements by Maj Martin, and what interest Maj Martin would have in stating that part of that report is incorrect. The same type of situation occurred with Maj Rhéaume, who claimed that Cpl Belizaire stated in his February 27, 2014, report what he had wanted to understand. In any event, the accuracy of the contents of the military police reports is not in question. The only important point is that the employer relied in part on them as they were written.

B. The suspension

[342] The employer argued that the Board's jurisdiction is limited to what is specifically referred to as follows at s. 209(1)(b) of the *FPSLRA*:

> ***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*
>
> …
>
> ***(b)*** *a disciplinary action resulting in termination, demotion, suspension or financial penalty ….*

[343] The employer cited *Chamberlain* and objected to my jurisdiction to hear the leave grievance because it was an administrative and not a disciplinary action. According to the grievor, the Board has jurisdiction to hear the grievance because the leave in fact was a disciplinary suspension. I agree with the parties that my jurisdiction over leave forced by the employer is limited to disciplinary suspensions. That said, it is entirely open to me to examine not only the suspension's impact on the grievor but also the employer's true intent. For the following reasons, I find that the suspension was a disguised disciplinary action.

[344] The grievor referred me to paragraph 14 of *Basra*, as follows, and argued that because the employer unilaterally deprived him of his salary, there was a presumption of the punitive nature of the measure imposed:

> *[14] It was suggested by this Court during the course of the hearing that the fact that the suspension was without pay may have been sufficient in itself to allow for the conclusion that the measure was disciplinary in nature. That is, the withholding of the pay is* prima facie *punitive since it deprives the employee of the salary to which he or she is otherwise entitled.….*

[345] The employer argued that it is not that clear that in *Basra*, the Federal Court of Appeal found that it can be presumed that a suspension without pay is disciplinary and that instead, the employer's intent must be determined. For the employer, a suspension without pay is not automatically disciplinary. I find that intent is critical to determining the punitive nature of the leave and that the interruption of paying salary is only an indicator that the action was disciplinary.

[346] I must determine whether the employer imposed discipline by placing the grievor on indefinite leave because of his conduct at work. The leave letter, dated March 4, 2014, and signed by Col Lalonde, states the following:

> [Translation]
>
> …
>
> *This is further to your meeting with Maj Martin and Maj Rhéaume on February 26 at 10:30 at which you were informed that due to an incident that military police officers reported to us on the afternoon of February 25, which occurred during your telephone conversation with a representative of the Sun Life insurance company on February 14, 2014, we had reasons to believe that you might go so far as to take actions that would endanger the health and/or safety of other people. This is related to threatening remarks that you allegedly made during that telephone conversation. We feel that your current state of health may be the cause.*
>
> *Therefore, we confirm that as of February 26, 2014, at 11:00, we have put you on forced leave and ask that you make an appointment with your treating physician as soon as possible so that the physician may assess your fitness to work.*
>
> *To that end, please find attached a letter addressed to your physician indicating why we are seeking a medical opinion on your fitness to work and, as applicable, your temporary or permanent functional limitations.*
>
> …

[347] I must look behind the employer's stated motivation to determine its true intention. According to paragraph 23 of *Frazee*, the way the employer chose to

characterize its decision cannot by itself be a determinative factor. I am guided by these principles, from *Frazee*:

> …
>
> *[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 ….*
>
> …

[348] The Federal Court of Appeal reiterated the principles set out in *Frazee* at paragraphs 34 and 37 of *Bergey v. Canada (Attorney General)*, 2017 FCA 30. The Court stated that the Board developed the notion of disguised discipline under which it characterizes certain decisions that an employer claims were not disciplinary and therefore not referable to adjudication. When the decisions are found to be disciplinary, the Board has jurisdiction over them and can review them for cause. The Court also indicated that distinguishing between a disciplinary and a non-disciplinary action requires considering both the employer's true (as opposed to stated) intentions in taking the action and its impact on the employee's career. At paragraph 78 of *Bergey*, the Court also stated that the case law teaches that an employer's subjective intent is not determinative to deciding whether it engaged in disguised disciplinary action. I must assess the facts objectively.

[349] I must note the Federal Court's decision in *Canada (Attorney General) v. Grover*, 2007 FC 28, which the Federal Court of Appeal affirmed in *Canada (Attorney General) v. Grover*, 2008 FCA 97. In that decision, the employer imposed unpaid leave on Mr. Grover under the pretext that he refused to undergo a medical examination and that as a result, he risked his health and that of others. The adjudicator concluded that the measure was disciplinary and that the employer had attempted to change Mr. Grover's

behaviour by punishing him. At paragraph 46 of its decision, the Federal Court confirmed as follows the importance of the Board considering "the substance … rather than … form" of the employer's decision:

> *… Early on, the Courts recognized that some employers might try to avoid adjudication by attempting to mischaracterize the true nature of their actions. The Board adjudicators are required to look at the substance of an action rather than its form to determine whether they have jurisdiction.…*

[350] According to the employer, the intention was never to punish the grievor but to ensure a healthy and safe workplace for everyone and to ensure that he received help if he needed it. The employer argued that the actors must be distinguished. When determining its intent, the employer argued that I must consider those who had the authority to make decisions that would impact the grievor, rather than everyone directly or indirectly involved in the matter, whether or not they were employees. None of the remarks, actions, and decisions of Health Canada and its physicians, the military police, the HR Advisor, the Crown Attorney in the criminal case, and the employees of Sun Life or the SPVM should influence my determination of the employer's intent. Col Lalonde made the decision to suspend the grievor based on a recommendation by Maj Rhéaume and Ms. Simard. The employer argued that I must consider only its decisions and not those made by anyone else. Col Lalonde's decision to suspend the grievor was the result of a series of events. I must examine the evidence on which the employer based its decision and examine the substance rather than the form.

[351] For Col Lalonde, the Sun Life call was the culmination of an escalation in the grievor's reactions. In that context, the parties presented evidence of some other incidents that had occurred at the Engineering Branch, at 25 CFSD, and at the barracks guard and that were part of the "[translation] accumulation of prior incidents" that the employer considered in its leave letter of February 26, 2014, which thus led to the suspension. This entire context leads me to conclude that the suspension was disciplinary, not administrative, as the employer sought more to create a file to discipline the grievor, based on his conduct.

1. The Engineering Branch

[352] According to Maj Rhéaume, in the fall of 2013, Maj Marcotte contacted him because the grievor was taking steps with his organization. Maj Marcotte had an odd feeling about the grievor and had heard about him. Neither Maj Marcotte nor Capt

Kilburn, who was also at a meeting with the grievor, testified. On April 15, 2014, after the grievor's steps with Maj Marcotte had ended in December 2013, Maj Marcotte gave Maj Rhéaume, at his request, a summary of his interactions with the grievor about his application for the FI-01 position in the Engineering Branch. It is questionable why, in April 2014, Maj Rhéaume asked for a summary of the grievor's interactions from the fall of 2013. That request was made while the grievor was already on leave. The employer did not demonstrate how the meeting at the Engineering Branch was part of the "[translation] accumulation of prior incidents", as I see no incident in those circumstances.

2. 25 CFSD

[353] Before I examine the specific facts related to the 25 CFSD events, I will note the comment Maj Rhéaume made in his December 5, 2013, email to Maj Anderson that he was trying to "[translation] add to his file" on the grievor. Maj Rhéaume emailed Maj Anderson to obtain a statement or summary from Ms. Aubin about the interview and verbal or email exchanges she had with the grievor afterward. Maj Rhéaume felt that it was important to add to his file on the grievor.

[354] Under cross-examination, Maj Rhéaume acknowledged that he did not ask the grievor for his version of the 25 CFSD events because documents reported what had happened and because the military police report meant that he could not interfere. However, the military police did not follow up on the 25 CFSD incident; no criminal offence had been committed.

[355] Also in cross-examination, Ms. Simard acknowledged that she did not ask the grievor for his version of the 25 CFSD incident or of the events involving Ms. Aubin. She indicated that it had not been up to her to intervene with respect to Ms. Aubin. The fact remains that the employer conducted an investigation independent of that of the military police as Maj Rhéaume contacted Maj Anderson to add to his file but without obtaining the grievor's version. He did the same with Maj Marcotte at the Engineering Department. If the employer's investigations were related to workplace safety and the grievor's well-being, then in the interests of fairness, it should have considered his version in all its investigations.

[356] Col Lalonde testified that he was told that the grievor had an altercation with a 25 CFSD employee, that she felt threatened, and that she called the military police.

When he was asked if that led him to say that the grievor had acted oddly, Col Lalonde replied that there was an existing conflict, that he had met with the grievor, and that the grievor's behaviour would have been reported as strange. Col Lalonde did not identify anyone who reported that the grievor had acted strangely.

[357] The testimonies on the 25 CFSD incident were about the grievor's attitude. Although I was presented with extensive evidence about that incident, it was from two main witnesses, Ms. Aubin and the grievor, along with hearsay testimonies from Maj Rhéaume and Ms. Simard. I note again the absence of key witnesses and a contradiction between Ms. Aubin's testimony and the military police report. The grievor argued that Ms. Aubin and Maj Anderson had a firm prejudice against him in their minds, namely, he was a killer, but that was not established. Like him, I find that they jumped to conclusions.

[358] Ms. Aubin testified to her fears about the grievor and said that she found him aggressive. She mentioned a conversation in which he had been aggressive. Ms. Dubois, who could have corroborated Ms. Aubin's claims, did not testify. Ms. Aubin wrote to Maj Anderson and stated that she had saved the grievor's telephone messages to show how sarcastic and arrogant he was. Those messages were not put into evidence. However, the grievor did not contradict Ms. Aubin on his tone during those conversations; namely, it was aggressive, sarcastic, and arrogant.

[359] Ms. Aubin testified that she felt harassed by the grievor. However, she was unable to indicate any alleged gestures or threats from him. She testified that he had never been threatening toward her and that he never swore at her. Under cross-examination, she acknowledged that she did not end the interview and that he did not force her to continue. She also acknowledged that he did not swear at the meeting, that he did not intimidate or physically threaten her, and that he made no comments about her.

[360] In a report and in their investigation notes, the military police indicated that the guardhouse incident took place on December 2, 2013. According to Ms. Aubin's email and testimony and Mr. Sirois's written statement, who was a colleague and did not testify, it occurred on December 3, 2013. I concluded earlier in this decision that it occurred on December 2, 2013, rather than on December 3, 2013, based on the military police reports. Based on the sequence of events, it could not have occurred on

December 3, 2013. Ms. Aubin might have confused the date. Although Mr. Sirois confirmed the date that she had suggested, if her testimony and Mr. Sirois's written statement are relied on, it is not likely that the sequence of events that the military police recounted in several reports occurred on December 3, 2013. However, it is entirely possible that it took place on December 2, 2013. If I support Ms. Aubin's testimony and Mr. Sirois's written statement concerning the date of December 3, 2013, I must disregard the dates in the military police reports. I have no reason to believe that the military police, which led their investigation, made mistakes in the dates indicated in their reports. Therefore, I rely on their reports for the date in question.

[361] Ms. Aubin found it strange for the grievor to be on site, but Mr. Sirois did not pay attention to him. He simply concluded that the grievor was meeting with someone and that he had a reason for being there. Indeed, the Commissionaire at the guardhouse, the testimonies of the grievor and Mr. Gibeau, and the military police reports confirmed that the grievor met with someone. In fact, I find that Ms. Aubin effectively jumped to conclusions.

[362] There was no evidence to establish why the grievor was at the guardhouse a second time. However, it could be linked to a meeting with Mr. Gibeau, his job search, the fact that he was an employee working at the Garrison and was entitled to be in the workplace, or any other reason. The situation escalated quickly as Maj Anderson, LCol Pelletier, and the military police were involved. The employer acknowledged that it did not try to obtain the grievor's version. Had it taken the time to ask him if he had been at the guardhouse a second time and, if so, the reasons for that second visit, events could have taken a different turn, which would have been completely unrelated to the threats to Ms. Aubin, as alleged in the first incident. I tend to believe that Ms. Aubin, Maj Anders, and LCol Pelletier all jumped to conclusions.

[363] As for Maj Anderson, I find that he was influenced by past events that had nothing to do with the grievor. Maj Anderson referred to the attack on Pauline Marois on the evening of her election and on an employee at another depot who had been targeted a few years earlier. He did not know the grievor and might have wanted to do what was right by not taking any risks and by reacting to the grievor's presence. He was also influenced by Maj Marion's comment that the grievor was a social misfit. The evidence did not reveal whether Maj Anderson knew that Maj Marion had been the subject of a harassment complaint made by the grievor. I find that Maj Anderson's

assertions support the grievor's claim that Maj Anderson jumped to conclusions about him.

[364] I take from the 25 CFSD events that Ms. Aubin, Maj Anderson, and LCol Pelletier indeed jumped to conclusions. No evidence was presented concerning Ms. Aubin's harassment allegations. There is no follow-up on the military police reports. The employer made no attempt to obtain the grievor's version. I acknowledge that based on the evidence before me, the grievor might have been aggressive, arrogant, and sarcastic. However, the evidence did not establish that he uttered any threats. In fact, I see no escalation in his reactions. His behaviour with Ms. Aubin seemed the same as his with Ms. Morin at Sun Life, which I will discuss later.

3. The barracks guard

[365] The employer presented evidence of a barracks guard, but MWO Fleury, who apparently reported his concerns to Maj Rhéaume, did not testify. The grievor also did not testify on this matter. Maj Rhéaume testified to the comments he received after a barracks guard supervised by MWO Fleury, who had found it odd that the grievor had asked him if the weapons used by the barracks guard were loaded. MWO Fleury told Maj Rhéaume that had anyone else in the barracks asked him the same question, he would not have been concerned. The fact that the grievor asked it made MWO Fleury feel the need to speak with Maj Rhéaume.

[366] Under cross-examination, Maj Rhéaume acknowledged that he did not ask the grievor for his version of the loaded-weapons issue because documents indicated what had happened. However, no such documents were introduced, and no documentary or testimonial evidence showed that a complaint had been made or that the employer had followed up on it. Maj Rhéaume also acknowledged that he did not meet with the grievor about it. I take from this that the employer did not follow up on the reported facts. It did not ask the grievor for his version of the facts. The evidence in no way established that his behaviour represented an escalation in his reactions in relation to the barracks guard incident.

4. Sun Life

[367] The only direct testimonies presented to me on the Sun Life call were those of the grievor and Maj Martin. Several people supposedly heard the grievor's conversation with Ms. Morin, but neither Capt Rodrigo nor Mr. Provencher testified to corroborate

what the grievor and Maj Martin said. In fact, the military police met with the witnesses to the call and prepared reports for some of them, but the evidence did not reveal whether the military police met with Capt Rodrigo or Mr. Provencher or whether they prepared reports with statements by those two. Moreover, it seems that Sun Life recorded the grievor's conversation with Ms. Morin but that the recording was destroyed. The employer did not contradict the grievor's testimony, but the military police report contradicted Maj Martin's testimony.

[368] I conclude the following as to what was said during the Sun Life call between the grievor and Ms. Morin on February 14, 2014. He was in his cubicle with Maj Martin, Capt Rodrigo, and Mr. Provencher when he received the call on his cell phone from Ms. Morin at Sun Life. She told him that she did not have his medical note and that he would need to submit another one. The grievor apparently replied as follows: "[translation] Again, you're not going to have a heart attack at work. You are being very lax. You are doing everything to ensure that it does not work. I will have to call your boss." Ms. Morin then apparently replied, "[translation] This time, Mr. Gariépy, there will be consequences. It will not work." The grievor said that his colleagues were listening. He allegedly heard Maj Martin say to Capt Rodrigo and Mr. Provencher, "[translation] Shh … listen." According to the grievor, Maj Martin heard the conversation very well. The grievor indicated that he never threatened Ms. Morin. I note that beginning in January 2013, the grievor had significant difficulties with Sun Life about his disability benefits and that only after Ms. St-Pierre and Sun Life's ombudsman intervened was the situation resolved. This is likely why the grievor had the impression that Ms. Morin was being lax and why he needed to contact Ms. St-Pierre.

[369] Maj Martin testified that the military police met with him to inquire about what he knew about the Sun Life call. He was not aware of such a call or of any threats that allegedly had been made. Under cross-examination, he stated that he did not hear the grievor threaten Ms. Morin.

[370] According to the military police report of February 25, 2014, Maj Martin confirmed that he heard the grievor raise his voice but was unable to confirm whether the grievor made any threats. Maj Martin considered the report incorrect on the following points:

> [Translation]
>
> *a. Maj Martin confirmed that in the morning of February 14, 2014, he heard the grievor with someone from Sun Life;*
>
> *b. at one point in the conversation, he raised his voice, but he could not confirm whether the grievor threatened the person on the other end of the line;*
>
> *c. Maj Martin confirmed that the grievor did not have a good work history due to his attitude;*

[371] Under cross-examination, Col Lalonde acknowledged that he did not ask the grievor for his version of the Sun Life events because the documents reported what had happened and because the military police report meant that he could not interfere. Therefore, I am seized with that report that according to Maj Martin, is partly incorrect but on which Maj Rhéaume relied, among other military police reports. If I find Maj Martin's testimony on the alleged incorrectness of the report to be credible, it could mean that I reject Maj Rhéaume's testimony, which was based on the report. However, I do not need to determine whether the report is incorrect. The only relevant fact concerning the military police reports is that the employer acknowledged that it relied at least in part on them to force the grievor onto sick leave.

[372] Ms. Morin was the other party to the call. She did not testify at the hearing as to the grievor's alleged threats. Also not put into evidence was her written statement to the military police. Ms. St-Pierre and Mr. Montecino, who were present during Ms. Morin's interview with Cpl Belizaire, also did not testify and did not provide statements.

[373] Ms. St-Pierre called the military police at 14:07 on February 14, 2014, while the call between Ms. Morin and the grievor took place at 09:51. In the meantime, he left a message for Ms. St-Pierre at around 11:00. No explanation was provided for the delay between Ms. Morin's call with the grievor, at 09:51, and Ms. St-Pierre's call to the military police, at 14:07. Given the serious allegations against him that he had threatened to place a bomb, I wonder why Ms. St-Pierre waited over four hours to call the military police or to at least contact HR earlier in the day, since the grievor was a civilian employee, not a military member. According to the employer's argument, there was a bomb threat on a Sun Life building. Why did Sun Life wait four hours to react?

[374] Given the seriousness of these allegations, I am troubled by the fact that Ms. Morin did not testify and that her statement was not entered into evidence. Although

her statements are noted in a military police report, the facts remain that that does not indicate their truthfulness and that they were not validated or refuted by examination or cross-examination, as was the case for Maj Martin and Maj Rhéaume. As in *Faryna v. Chorny*, I have serious reservations about the compatibility of Ms. Morin's statements with the probabilities that characterize the facts of this incident, as reported by the grievor. I note that he did not deny that the conversation took place; however, he denied uttering threats. The fact that Ms. Morin's written statement was not presented to me or to the Court of Quebec, where the grievor was acquitted, raises serious questions in my mind.

[375] Others testified about the Sun Life call. All that evidence is hearsay. The employer relied on statements from people who did not testify, and the sources of such statements were not put into evidence. Col Lalonde testified that Maj Rhéaume told him that the grievor had apparently said something like, "[translation] it will get nasty", but did not indicate who made that statement to Maj Rhéaume. Under cross-examination, Maj Rhéaume stated that the question would have to be put to Col Lalonde as to whether the grievor said, "it will get nasty". Ms. Simard did not recall whether Maj Rhéaume informed her of the grievor's comments to Ms. Morin. However, Maj Rhéaume said that the comments were serious and troubling enough for Sun Life to make its complaint with the SPVM. Ms. Simard said that Sun Life's complaint had worried the employer because Sun Life compensates most employees in the federal public service. In his testimony, Maj Rhéaume said that the grievor allegedly uttered threats to Ms. Morin that included the word "[translation] bomb", that he raised his voice, that he told her to "[translation] be careful, a bomb could go off", and that allegedly, he argued throughout the call and refused to follow her instructions.

[376] Maj Rhéaume did not say where the reported comments came from. He noted that the military police's commanding officer, Maj Point, had said that the military police had informed her of the grievor's threats. Maj Point did not testify. Essentially, Col Lalonde and Ms. Simard reported what Maj Rhéaume told them. Accordingly, I will rely more on Maj Rhéaume's testimony, who ultimately did not testify as to the source of the comments reported to him, other than those of Maj Point, who did not testify. However, I give little weight to Maj Rhéaume's testimony, as he was not present during the call.

[377] The preceding is the extent of the evidence presented to me, and it does not in any way support the allegations of bomb threats allegedly uttered by the grievor. Indeed, I am satisfied that the evidence before me did not establish that he uttered a bomb threat. He questioned why no reference to the bomb was in the March 4, 2014, letter to the physician because, according to him, it would have been important to include it. He answered his own question by noting that the threat was not in the letter because no such threat was reported to Maj Rhéaume, Col Lalonde, or Ms. Simard. According to Ms. Simard, who prepared the letter, the omission was intended to spare the grievor. However, it seems that his alleged threats were the trigger for his suspension.

[378] The grievor alleged that Maj Rhéaume, with Sun Life, invented the story of the threat and the complaint to the military police. The grievor did not present any evidence of that allegation. I will not consider it for the purposes of this decision.

[379] The employer tried to convince me that it did not want to describe the grievor as a problematic employee but that it simply wanted to include as much detail as possible. Instead, I find that it sought to describe him as a problematic employee because Maj Rhéaume testified that the grievor's insubordination in 2011 was among the incidents to note to the physician. However, I have no evidence before me of the grievor's insubordination, only facts that relate to the exercise of his right to make a harassment complaint in 2011. Exercising a right does not necessarily mean that the person seeks conflict. Starting in 2011, the grievor's difficulties with Maj Marion began when Maj Anderson asked her for her opinion in November 2013, and she characterized the grievor as a social misfit. However, I note that Maj Rhéaume did not mention that Maj Marion had prepared a good performance appraisal for the grievor in 2012.

[380] The employer argued that regardless of the content of the threatening remarks reported to Maj Rhéaume, it is important to note that the military police went to him and told him that they were investigating threatening remarks that the grievor apparently had made. As I have mentioned, the evidence before me did not establish that he made threatening remarks. At most, the evidence showed that he seemed frustrated by his interactions with Ms. Morin, which could be explained by his difficulties in 2013 receiving disability benefits.

[381] The evidence did not clearly show when the employer learned of the content of the Sun Life call. According to Col Lalonde, who relied on what Maj Rhéaume and Maj Martin had said, the military police reported the Sun Life incident to them in the afternoon of February 25, 2014. That date is the same one indicated in Col Lalonde's letter dated March 4, 2014, confirming the decision to force the grievor on leave as of February 26, 2014, and in his letter of March 4, 2014, to the grievor's treating physician for the FTWE. In his examination-in-chief, Maj Rhéaume testified that when he was informed, he immediately called Ms. Simard, as she needed to act. However, under cross-examination, Maj Rhéaume seemed to contradict that testimony, as he stated that Maj Point mentioned a bomb to him on February 14, 2014. He did not explain the delay from February 14 to 26, 2014. Then, under re-examination, Maj Rhéaume testified that he could not say without a doubt when he had been informed of the Sun Life incident. Ms. Simard testified that she heard about it on February 24 or 25, 2014.

[382] The employer did not act quickly on a situation it felt was threatening, both with respect to the comments about a bomb and to any other threatening remarks. Even if it learned of the content of the comments on February 24 or 25, 2014, the fact remains that the military police had been aware of them since February 14, 2014. Moreover, Maj Point, or possibly another military member in a position of authority, must surely have been aware of the allegedly threatening situation in which a bomb could be placed at Sun Life. As many military members were very concerned about the grievor's alleged attitude, according to Maj Rhéaume, but the grievor continued to work there for 12 days after the 25 CFSD and Sun Life incidents, he must not have been as much of a threat to the health and safety of personnel at the military base as the employer sought to portray him. I reiterate that Maj Rhéaume reported what Maj Marion, Maj Marcotte, Maj Anderson, and MWO Fleury said and that none of them testified. My conclusion that it was not demonstrated that the grievor made threatening statements is supported by the fact that the military police or the employer delayed reacting and that the grievor remained in the workplace. This is an important indicator that the employer was not as concerned about the health of people in the workplace during that period of 12 days as it suggested.

[383] I agree that the employer took the alleged threats very seriously, as criminal charges were laid. However, the evidence before the Court of Quebec does not exist. The recording of the conversation with Ms. Morin on February 14, 2014, was destroyed.

Given the scope of the alleged statements, it is surprising that Sun Life did not keep that evidence, which would have shown what the grievor and Ms. Morin had said. It also seems that the Crown did not put Ms. Morin's statement before the Court of Quebec. I noted earlier that that statement was not put into evidence before me. Moreover, according to the record of proceedings from the Court of Quebec, the Court acquitted the grievor. His trial lasted just one minute, as the hearing began at 11:39 and ended at 11:40.

[384] The grievor invited me to consider the statements in the military police report that Maj Rhéaume allegedly said that he wanted to dismiss the grievor after the Sun Life incident as an indication of the employer's disciplinary intent. I note that Maj Rhéaume denied saying that. However, I do not need to decide that question, as I am of the view that without considering those statements, the facts before me show a disciplinary intent on the employer's part.

[385] It must be noted that the grievor was placed on leave for threats that were not demonstrated in this case. Nor were they demonstrated before the Court of Quebec, as the grievor was acquitted. As stated in *Frazee*, when the impact of the employer's decision, the suspension in this case, is significantly disproportionate to the stated administrative rationale, namely, workplace safety, the decision may be viewed as disciplinary. Maj Rhéaume's statements bear witness to that. I agree that normally, given a bomb threat, the employer's decision to suspend the grievor would not be considered significantly disproportionate to the employer's administrative rationale. However, in this case, there is no evidence of threats uttered by the grievor. I do not believe that the employer's response was reasonably linked to honestly held operational considerations, namely, wanting to ensure a healthy and safe workplace for people on the military base and to ensure that the grievor could receive help. The suspension had a major impact on his career prospects as it was without pay for an indeterminate period, which might have contributed to his difficulties finding another job in the public service, as he never returned to the workplace. Similar to *Frazee*, I find that the suspension was related to the grievor's conduct and that it had an adverse effect on him by depriving him of his salary while forcing him to consume his leave and collect his severance pay.

[386] Neither the employer nor the grievor presented evidence as to whether, from September 17, 2013, to February 26, 2014, or in their discussions, the employer tried

to find out if he needed help or whether it informed him that the Employee Assistance Program was available to him, as he seemed to increase the number of conflicts, according to the employer. In *Hood*, the employer offered help to the employee before requesting an FTWE. That was not done for the grievor.

[387] Based on all this evidence, I find that on a balance of probabilities, the grievor established that the leave was in fact an unjustified, disguised disciplinary suspension, not an administrative action. I also find that given the lack of evidence of his threats against Ms. Morin of Sun Life, he did not deserve a disciplinary suspension. Accordingly, I allow the suspension grievance.

C. The termination

[388] The employer argued that the termination of employment was a layoff and that it was entitled to do it under the *PSEA* and the *Public Service Employment Regulations*. According to the employer, the grievor's layoff fell under the *PSEA*, which provides certain remedies that cannot be the subject of a grievance within the meaning of s. 209(1) of the *FPSLRA* and cannot be referred to adjudication. It also argued that under s. 211 of the *FPSLRA*, the Board has no jurisdiction over any termination of employment set out in the *PSEA* (see *Mutart*, at paras. 94 to 99). It pointed out that the appropriate recourse in this case would have been to make a complaint of abuse of authority about the grievor's layoff. Had the Board allowed the complaint, it could have set aside the layoff (s. 65(4) of the *PSEA*). The employer also noted that s. 208(2) of the *FPSLRA* states that an employee may not file a grievance if another administrative remedy is available (*Brown*, 2011 FC 1205 at paras. 28 and 29).

[389] First, I note that the issues of a termination of employment under the *PSEA* and disguised disciplinary action were addressed in *Canada v. Rinaldi*, 1997 CanLII 16721 (FC). The Court stated the following:

> …
>
> *… The addition to the* Public Service Staff Relations Act *of subsection 92(3), which bars the adjudication of a grievance with respect to a termination of employment under the* Public Service Employment Act*, does not remove jurisdiction from the Adjudicator solely because such a termination of employment is relied on by the employer. Subsection 92(3) clearly bars a referral to adjudication only where there was in fact a termination of employment under that Act. The hypothesis on which the Adjudicator based her decision in fact concerns a situation in*

> *which an employer disguises an unlawful dismissal under cover of the abolishment of a position through a contrived reliance on that Act. Such a situation would clearly fall within the jurisdiction conferred on adjudicators by paragraph 92(1)(b) of the* Public Service Staff Relations Act.
>
> …

[390] That decision was rendered under the former *Public Service Staff Relations Act* (R.S.C. 1985, c. P-35), which has since been repealed. When it was rendered, there were equivalents to ss. 208(2) (formerly s. 91(1)) and 211 (formerly s. 92(3)). The old and new provisions read as follows:

91(1) *… in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance ….*	***208 (2)*** *An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act.
92(3) *Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the* Public Service Employment Act.	**211** *Nothing in section 209 or 209.1 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to* ***(a)*** *any termination of employment under the* Public Service Employment Act*; or* ***(b)*** *any deployment under the* Public Service Employment Act*, other than the deployment of the employee who presented the grievance.*

[391] The principles set out in *Rinaldi* are still valid, since the basis for those provisions exists in the current *FPSLRA*. As established in *Rinaldi*, I have jurisdiction if the layoff squared directly with a situation in which the employer disguised an unlawful dismissal characterized by bad faith, a ruse, or a disguised disciplinary dismissal through a contrived layoff under the *PSEA*.

[392] Section 209(1)(c) of the *FPSLRA* does not include layoffs, which are excluded by the effect of s. 211. Moreover, at paragraph 134 of *Heyser v. Deputy Head (Department of Employment and Social Development)*, 2015 PSLREB 70 (affirmed in *Canada (Attorney General) v. Heyser*, 2017 FCA 113), I already noted that these provisions are very specific exceptions to an adjudicator's jurisdiction with respect to terminations.

Therefore, I must determine whether the termination, in the context of an alleged termination under the *PSEA* and in light of ss. 208(2) and 211 of the *FPSLRA*, took place under the *PSEA*, namely, whether it was a genuine layoff, done under the *FPSLRA*, or a disguised disciplinary dismissal. In my analysis, I will consider ss. 280(2) and 211 of the *FPSLRA* if it is a genuine layoff.

[393] I note the principles set out in *Basra* and *Frazee* and reiterated in *Bergey*, particularly in the context of the analysis of a disguised disciplinary action, and I note the following excerpt from paragraph 36:

> *[36] Where the Board determines that the employer's actions constitute a disguised act of discipline, as this Court noted in* Basra *at paragraphs 24 to 29, the PSLREB is tasked with reviewing what occurred and deciding whether the employer possessed cause to impose the sanction or take the measure in question. If so, then the grievance will be dismissed; if not, the PSLREB will fashion a remedy, which, in the case of a termination, is usually reinstatement with back pay and reinstatement of benefits, but may also be monetary compensation in lieu of reinstatement.…*

[394] In his arguments, the grievor claimed that by suspending him, the employer forced him on sick leave and found him unfit for work. As a result, he was unable to find a new job in the public service during the imposed period. He alleged that in fact, the layoff was a dismissal. According to him, there is enough evidence to establish that the employer did not want him and that it wanted to get rid of him. I note that in his grievance, he alleged that the employer had an obligation to stop the opting-employee notice period as of the suspension on February 26, 2014, on the grounds that given the suspension, he was on forced sick leave and deemed unfit for work. He alleged that in fact, the layoff notice of January 5, 2015, was a dismissal.

[395] I do not question the employer's right to adjust its workforce and abolish duties and positions. Nor do I doubt that a workforce adjustment exercise was undertaken within the department and that the employer faced a wave of job cuts as part of that exercise, leading to the abolishment of 92 positions. The employer introduced tables of workforce reduction initiatives that were prepared based on a strategic study targeting groups, including LQFA HQ (Headquarters), the LFQA TC (Training Centre), 5 ASG, 34 CBG (Canadian Brigade Group), and 5 CMBG (Canadian mechanized brigade group) and positions and where they were located, namely, in Montreal, Valcartier, or Saint-Jean (Quebec). That evidence was easily laid out before me.

[396] The grievor's position was abolished after it was identified among those targeted at LFQA HQ. He received an affected-employee letter dated May 27, 2013.

[397] The employer claimed that the decision to abolish the grievor's position was made following reflection and consultation. Col Lalonde testified that the grievor's manager had identified his position as one to be abolished because the employer's analysis showed that its main duties did not consume all his time and could be assumed by the comptroller or deputy comptroller. The grievor did not contradict that testimony.

[398] I note that the grievor did not dispute the employer's right to declare him surplus when that declaration was made or in the wording of the grievance before me. In his grievance, he disputed the employer's actions from when he was declared surplus to what he alleged was his dismissal. While neither of his grievances challenged the fact that he was declared surplus, I find that despite his claim at the hearing, the evidence did not show that that the employer made that declaration invalidly or that it showed bad faith in that respect.

[399] The grievor tried to argue that his position was abolished because he had been ill and had returned to work part-time in September 2013. Maj Rhéaume, Maj Martin, and Col Lalonde testified that they had been informed that the grievor had been on sick leave but that they did not know the reason for it. I do not believe that the grievor's position was abolished because of his sick leave. Regardless, it was not raised in the grievance, there is no related evidence, and *Burchill* applies.

[400] In its arguments, the employer pointed out that the decision to abolish the grievor's position was made before the events that led to his forced sick leave and that the events after that should minimally impact the analysis of its intent.

[401] Although the surplus-employee declaration of October 16, 2013, was not disciplinary, it does not mean that the grievor had a good relationship with the employer then. Moreover, their relationship deteriorated further during the period covered by the grievance.

[402] According to the employer, the evidence did not support the idea that it intended to punish wrongdoing when the decision was made to abolish the grievor's

position. However, this is not the issue before me, as the grievance challenged the employer's failure to suspend his opting-employee period.

[403] The termination grievance alleged that the employer's refusal to suspend the notice period during the grievor's forced sick leave was also disguised discipline. Therefore, the grievance rests on the employer's ability to suspend the priority period. According to the employer, the *PSEA* does not provide for such a possibility. The grievor did not convince me otherwise.

[404] I found that the grievor's forced sick leave was motivated by disciplinary intent. However, I cannot conclude that the expiry of the priority period was disciplinary, given the lack of evidence that it could be suspended. The employer could have acted in a disciplinary manner only were it able to suspend the notice period and had it acted on that power. It argued that in this case, it had no choice. The evidence showed that as a result, it did not consider this issue. For the employer, the notice period expired even though the grievor was on forced sick leave. He did not present a legal basis indicating that the employer had the authority to extend the notice period and decided not to, for disciplinary reasons.

[405] According to the evidence, the grievor had the impression that the notice period was suspended during his forced sick leave because of how the employer presented the situation to him as of his first sick leave. I note that when Maj Rhéaume gave the grievor the May 27, 2013, letter, he told the grievor that its content would not take effect during his sick leave and stated that when he returned, he would have opting employee status. Ms. Simard testified that that was done to not unduly punish the grievor because, once he received the opting employee letter, the time under the workforce adjustment process would begin, and the priority period could not be postponed. It seems that the grievor understood that the workforce adjustment process worked in a certain way. However, he was surprised when he received the January 5, 2015, letter advising him of his layoff as of February 10, 2015, which led to this grievance.

[406] The employer argued that the length of the priority period applicable to the grievor was determined by s. 5(2)(c) of the *Public Service Employment Regulations* and that therefore, it had no discretion to extend it. I have reproduced that provision as follows, cited earlier in the decision, for ease of reference:

> ***5(1)*** *An employee who has been advised by the deputy head that their services are no longer required but before any layoff becomes effective is entitled to appointment in priority to all persons, other than those referred to in sections 39.1 and 40 and subsections 41(1) and (4) of the Act, to any position in the public service for which the Commission is satisfied that the employee meets the essential qualifications referred to in paragraph 30(2)(a) of the Act.*
>
> ***(2)*** *The entitlement period begins on the day on which an employee is declared surplus by the deputy head and ends on the earliest of*
>
> …
>
> ***(c)*** *the day on which the employee is laid off.*

[407] According to the grievor, s. 7 of the *Public Service Employment Regulations* grants the employer the discretion to extend the priority period for a grievor with a disability. Section 7 states that an employee who becomes disabled and who, as a result, is no longer able to carry out the duties of his or her position is entitled to appointment in priority to all persons under certain circumstances. Nothing in that provision or in the regulations explicitly or implicitly indicates that the employer may extend the priority period. The grievor also did not explain how s. 7 applied to this case.

[408] The grievor had to discharge the burden of showing that the employer acted with disciplinary intent by allowing the priority period to expire. To do so, he had to convince me that the employer had the power to extend the priority period and that it chose not to exercise it, for disciplinary reasons. No evidence established that the employer acted in bad faith. The grievor was unable to discharge his burden given the absence of a legal basis to support his position.

[409] In light of this, I find that the grievor's layoff under s. 64 of the *PSEA* was a strictly administrative action. Therefore, I do not have jurisdiction to determine the grievance, and it is dismissed.

D. Remedies

[410] Given my finding that the grievor's termination grievance is unfounded, I need not decide the remedies sought for him in it.

[411] In his arguments, the grievor claimed that he had to sell his house, that the employer blocked his references, that he had great difficulty finding another job, and

that he incurred legal costs. He sought $30 000.00 in compensatory psychological damages for stress and injury and $50 000.00 as punitive and exemplary damages. He indicated that he suffered considerable harm in his work environment, including the defamation of his professional reputation.

[412] According to the employer, the remedies sought were not part of the grievance, and *Burchill* applies (*Cameron v. Deputy Head (Office of the Director of Public Prosecutions)*, 2015 PSLREB 98 at para. 88). The employer argued that there was no evidence to support awarding compensatory psychological damages. According to *Canada (Attorney General) v. Tipple*, 2011 FC 762 at para. 58, damages are awarded for a real injury, not the likelihood of an injury. The grievor's testimony alone is not sufficient.

[413] With respect to the application for exemplary damages (*Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 62 and 68), the grievor's version is not consistent with awarding such damages. The employer argued that its decision was based on facts, which were the threat to the Sun Life employee, the lack of bad faith, and the assurance of the grievor's fitness to work. The abolishment of his position was not motivated by revenge because his duties were assigned to other employees. His application for exemplary damages was based on his subjective perception of the facts and was not consistent with the balance of probabilities. The fact that he disagreed with the employer's decisions did not entitle him to exemplary damages to deter and punish the employer.

[414] The employer argued that the Board does not have the authority to award costs; the *FPSLRA* must specifically provide for it. Contrary to *Canada (Attorney General) v. Tipple*, 2011 FC 762, and *Tipple v. Canada (Attorney General)*, 2012 FCA 158, in this case, the adjudication process was not obstructed.

[415] With respect to the employer's argument that the remedies are not part of the grievor's grievances, I note that in an email dated May 5, 2014, and addressed to Ms. Simard, copying to the Board's Registry, the subject line of which reads "[translation] Amendment to the remedies in the [suspension] grievance", the grievor made certain demands of the employer, including these:

> [Translation]

> *Pay an amount for exemplary punitive damages to compensate for the harm to my reputation due to the organization of false criminal charges plotted by Major Sylvian Rhéaume.*

[416] The employer did not object to that amendment.

[417] I find that the wording that the grievor used summarily in the suspension grievance is sufficient to be considered part of that grievance. However, I note that that grievance did not claim compensatory damages as a remedy. Moreover, the employer did not address the issue of whether *Burchill* applies to the remedies sought in this grievance or only to the nature of the grievance. Although the parties did not address those two issues, I do not need to decide them as my decision is based on another ground, as indicated in the following paragraphs.

[418] With respect to the claimed compensatory damages, the grievor did not introduce any related evidence. In his arguments, to support his claim that his forced sick leave was disciplinary and that it had an adverse effect on him, his counsel argued that the grievor had to sell his house, that the employer blocked his references, that he had great difficulty finding another job, and that he incurred legal costs. However, as noted, no related evidence was introduced.

[419] During the hearing, the grievor did not verbally and directly request that the evidence be bifurcated, that I reserve jurisdiction to receive evidence, and that I hear the parties' arguments on the damages issue, and there is no such agreement between the parties. Only on the last day of the hearing and during his arguments did counsel for the grievor submit to me a document entitled, "[translation] Remedies sought by the complainant", in which, among other things, if necessary, he asked that I reserve the grievor the right to provide additional evidence on compensatory and exemplary psychological damages.

[420] If a party believes that evidence for compensatory damages is justified, a request to bifurcate the evidence must be made during the hearing, so that the adjudicator may benefit from submissions by both parties in that respect. It is well established in law that the adjudicator is the master of his or her own proceedings. In this case, I find that the grievor's request, made at the end of the hearing, was late.

[421] During the hearing, the grievor had the opportunity to (1) submit evidence on the damages being sought, (2) request that the evidence be bifurcated, and (3) respond

when the employer argued that no evidence had been presented in support of the claims for compensatory or punitive exemplary damages. I find that the onus was on the grievor to present evidence in support of his claim for compensatory damages, which he did not do. In light of this, I dismiss that claim.

[422] With respect to the claim for punitive and exemplary damages, the grievor argued that the evidence demonstrated that the employer's conduct was arbitrary, malicious, and in bad faith with respect to his professional reputation and that it breached his rights to privacy, integrity, and dignity.

[423] As the Supreme Court of Canada stated, "… punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own" (*Keays*, at para. 62). The conduct in question must be "harsh, vindictive, reprehensible and malicious" (*Keays*, at para. 68). In this case, I find that the evidence did not demonstrate that the employer's conduct met the test for awarding punitive and exemplary damages. There is no evidence that it intended to hinder or harm the grievor by imposing the leave. Although its behaviour may be characterized as awkward, it was not harsh, vindictive, reprehensible, or malicious. Therefore, I dismiss the grievor's application for punitive and exemplary damages in the suspension grievance.

VI. Confidentiality order

[424] The grievor asked for a confidentiality order to seal Exhibit P-49. That exhibit is a USB key containing the recording of his discussion with Dr. Bérard, which took place on October 2, 2014, as part of the FTWE. The employer did not object to that request.

[425] The grievor also asked that information about his health disclosed during the hearing in the documentary evidence be sealed to avoid prejudice to his professional reputation.

[426] The grievor also asked that the decision about him be anonymized. He argued that by searching, for example on the CanLII (Canadian Legal Information Institute) site, an employer could find a decision that named him. His request would cause the employer no hardship. The Supreme Court of Canada's test is not the balance of convenience between the parties; it is not the determinative factor.

[427] The employer objected to the requests to anonymize and to seal the documentary evidence about the grievor and asked that they be dismissed on the ground that they are hypothetical. There was no evidence that the employer does the type of research that the grievor mentioned. The likelihood of it occurring was not established. The transparency of public access to legal proceedings, including access to documents, is a component of justice. The employer found no other cases in which the Board ordered the protection of all information disclosed as documentary evidence about a grievor at a hearing.

[428] The Board operates according to the open court principle, which is set out in its policy posted on its website. According to that principle, the Board conducts its hearings in public, except in exceptional circumstances. It departs from that principle and may grant a confidentiality order with respect to specific evidence when such a request is consistent with the applicable legal standards. Its policy discusses these principles as follows:

> …
>
> *The open court principle is significant in our legal system. In accordance with this constitutionally protected principle, the Board conducts its hearings in public, save for exceptional circumstances. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency in its processes, accountability and fairness in its proceedings.*
>
> *The Board's website, notices, information bulletins and other publications advise parties and the community that its hearings are open to the public. Parties that engage the Board's services should be aware that they are embarking on a process that presumes a public airing of the dispute between them, including the public availability of decisions. Parties and their witnesses are subject to public scrutiny when giving evidence before the Board, and they are more likely to be truthful if their identities are known. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.*
>
> *At the same time, the Board acknowledges that in some instances mentioning an individual's personal information during a hearing or in a written decision may affect that person's life. Privacy concerns arise most frequently when some identifying aspects of a person's life become public.…*
>
> *With advances in technology and the possibility of posting material electronically — including Board decisions — the Board recognizes that in some instances it may be appropriate to limit the concept of*

> *openness as it relates to the circumstances of individuals who are parties or witnesses in proceedings before it.*
>
> *In exceptional circumstances, the Board departs from its open justice principles, and in doing so, the Board may grant requests to maintain the confidentiality of specific evidence and tailor its decisions to accommodate the protection of an individual's privacy (including holding a hearing in private, sealing exhibits containing sensitive medical or personal information or protecting the identities of witnesses or third parties). The Board may grant such requests when they accord with applicable recognized legal principles.*
>
> …

[429] In *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at paras. 9 to 11, the Board examined in detail the applicable legal principles, which may be summarized as follows. Public access to exhibits and other documents introduced in legal proceedings is protected by the right to freedom of expression. However, occasions arise when freedom of expression and the principle of open and public access to hearings must be balanced against other important rights, including the right to a fair hearing. The Board must balance these competing rights and interests when determining whether to grant a confidentiality order. When making such a determination, it must apply the "*Dagenais/Mentuck*" criteria, as indicated as follows at paragraph 11 of *Basic*:

> *11 The* Dagenais/Mentuck *test was developed in the context of requests for publication bans in criminal proceedings. In* Sierra Club of Canada*, the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:*
>
> …
>
> 1. *such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
> 2. *the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*
>
> …

[430] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 55, the Supreme Court of Canada stated the following with respect to the public interest:

> *… in the words of Binnie J. in F.N. (Re),* [2000] 1 S.C.R. 880*, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).*

[431] The threshold for the test to ensure the confidentiality of evidence is very high, and the party requesting confidentiality bears the onus of demonstrating that it meets the requirements of the test.

[432] The grievor's discussion with Dr. Bérard lasted about two hours. In it, the grievor answered very personal questions about different aspects of his life.

[433] Clearly, the discussion with Dr. Bérard contains personal information that the grievor disclosed in confidence to a physician. Despite his death, I find that the information he disclosed in that context is of significant interest to his reputation and family. I find that to avoid the risk of the public having access to that recording, there is no option but to issue a confidentiality order. I am also of the view that there is no interest in the public having access to that recording. Having the recording remain confidential in no way changes the outcome of this decision. Moreover, it must be remembered that Dr. Bérard did not complete the FTWE and that Health Canada closed the FTWE file because the reason for it no longer existed.

[434] Therefore, I order Exhibit P-49 sealed.

[435] With respect to the request to seal information about the grievor disclosed during the hearing in the documentary evidence, I find that it is too broad and insufficiently detailed. He did not specify the parts of that documentary evidence that he felt should be sealed. The onus was on him to identify them and to provide reasons to demonstrate that his request met the confidentiality criteria. He did not convince me that sealing all the documentary evidence about him was necessary. Therefore, I dismiss this request.

[436] As for the request to anonymize this decision, as set out in the Board's policy, parties that engage its services know that they are embarking on a public process and

that the Board's decisions indicate the parties' names. However, in exceptional circumstances, the Board may grant requests to protect a person's privacy.

[437] The grievor requested that this decision be anonymized because someone searching websites could access it and the evidence on file, which could hinder his job search and stigmatize his professional reputation. In light of his death, his job search is now moot.

[438] I find that the information in this decision does not present a serious risk to the grievor's posthumous reputation and that the public interest in publishing legal proceedings must prevail in the circumstances.

[439] Therefore, I dismiss the request to anonymize this decision.

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

(The Order appears on the next page)

VII. Order

[441] The suspension grievance (file 566-02-9762) is allowed. I order the deputy head to reimburse to the grievor's estate the salary and benefits, at the FI-02 group and level, to which he would have been entitled for the period between the date of his forced sick leave on February 26, 2014, and the date of his layoff on February 10, 2015, with the usual deductions.

[442] The termination grievance (file 566-02-11009) is dismissed.

[443] I order Exhibit P-49 sealed.

[444] The Board shall remain seized of any issue related to the calculation of the amounts owed under paragraph 441 of this decision for 90 days following the date of this decision.

November 19, 2020.

FPSLREB Translation

Steven B. Katkin,
a panel of the Federal Public Sector
Labour Relations and Employment Board