Date: 20210302

File: 566-02-10379

Citation: 2021 FPSLREB 20

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

RÉJEAN LEMIEUX

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Lemieux v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: François Ouellette, counsel

For the Respondent: Alexandre Toso, counsel

Heard by videoconference,
October 27 to 29, 2020.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

[1] On August 20, 2014, Réjean Lemieux ("the grievor") filed a grievance challenging his suspension without pay.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board 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*, every proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continued under and in conformity with the *Public Service Labour Relations Act* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[3] On December 2, 2014, the grievor referred his grievance to adjudication.

[4] 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. It changed the name of the Public Service Labour Relations and Employment Board and the title of the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board") and the *Federal Public Sector Labour Relations Act* ("the *Act*").

[5] The grievor worked for Correctional Service of Canada ("the Service") as a primary worker at the Joliette Institution for Women. He was part of a bargaining unit represented by the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent"). The employer with which the bargaining agent entered into a collective agreement (with an expiry date of May 31, 2014) was the Treasury Board, but for the purposes of this decision, the term "employer" refers to the Service, to which the Treasury Board delegates employer powers.

[6] On July 16, 2014, the grievor was charged with five counts of sexual assault, some of which occurred when the alleged victim was of minor age and the grievor was in an alleged position of authority. The facts underlying the charges dated from 1976 to 1987.

[7] As of July 17, 2014, the grievor was suspended without pay while the employer investigated the situation. On August 20, 2014, he filed a grievance against his suspension without pay, which read as follows: "[translation] I contest the employer's decision to suspend me starting on July 17, 2014. I also contest that the suspension is unpaid." As remedy, the grievor sought reinstatement and pay that had been due since July 17.

[8] The employer objected to the grievance and argued that it was not adjudicable because in its view, the suspension was administrative and not disciplinary. The employer submitted that the grievance could not be referred to adjudication under s. 209 of the *Act*. I indicated to the parties that I needed evidence to rule on the objection. Therefore, the hearing was held. I will deal with the objection in my analysis.

II. Summary of the evidence

[9] To facilitate the hearing by videoconference, I asked the parties to prepare in writing the main testimony of the witnesses so that the hearing would be used for cross-examination and re-examination, if necessary. At the hearing, each witness solemnly affirmed the veracity of his or her testimony, written and oral.

[10] The employer called three witnesses, Sonya Forget, Assistant Warden, Operations, at Joliette Institution from 2007 to 2019; Josée Brunelle, Deputy Warden of the Federal Training Centre from 2008 to 2016; and Geneviève Thibault, Warden of Joliette Institution from September 2012 to April 2015. The grievor testified and called two additional witnesses, Melissa Tremblay and Luc Blackburn, both union representatives.

[11] Overall, the testimony was not contradictory and was based on documentary evidence that was filed on consent. Thus, I will summarize the facts as presented in the testimonies and documentary evidence without attribution, except as necessary.

[12] The grievor worked in the Quebec correctional system from 1990 to 2008. From 1990 to 1998, he was a correctional officer responsible for ensuring dynamic security

and monitoring the progress of the inmates whose cases he was responsible for. From 1998 to 2008, he was a senior manager, responsible for supervision and administrative and advisory duties.

[13] In October 2008, the employer hired him as a primary worker at Joliette Institution, a women's penitentiary. The Service's policy is to have only primary workers classified at the CX-2 group and level as correctional officers in women's institutions. Primary workers have two main roles, ensuring the dynamic security of the institution, and supervising a few inmates in their rehabilitation process.

[14] In her testimony, Ms. Forget described the particular context of women's institutions, in which the focus is on the helping relationship that primary workers must nurture with the inmates. In particular, she pointed out as follows how male primary workers are recruited to work with the inmates:

> [Translation]
>
> …
>
> *12. Male correctional staff are allowed to work in a women's institution but under a recruitment method different from that for men's institutions. All potential employees must undergo a specific staffing process to assess their ability to work with women. All PWs* [primary workers] *are carefully selected to ensure that they can provide a high capacity for intervention and are positive role models in the female inmates' lives. They must be able to set clear boundaries with those inmates, who may sometimes develop an intimate relationship or paternal bond with a male PW.*
>
> …

[15] In 2011, the grievor was appointed as a correctional manager (at the CX-4 group and level) on an acting basis. During that time, he reported to Josée Campeau, then the deputy warden of Joliette Institution. He claimed that he had a difficult relationship with her during that period. He also claimed that he did not obtain a permanent correctional manager position because of her strong opposition.

[16] The grievor also described having a difficult relationship with Ms. Forget, which she denied at the hearing. He recalled specific incidents in which he had made suggestions or explanations that she refused to hear. As will be seen, she wrote the analyses behind the suspension.

[17] On July 16, 2014, the grievor appeared at the Joliette police station in response to a call from the Sûreté du Québec. He was then informed that charges would be laid against him due to a denunciation from someone claiming to be a sexual assault victim. The allegations covered a period from 1975 to 1987. During that time, the grievor would have been in a position of authority over the alleged victim. The charges covered the period from 1976 to 1987; the grievor turned 18 in 1976.

[18] Before the police, and later in the employer's disciplinary investigation, the grievor acknowledged that he knew the alleged victim. He always contended that the charges were not founded. He was released on a promise to appear with three conditions, which were to not possess firearms, to not contact the alleged victim, and to notify the Sûreté du Québec of any address change.

[19] On July 17, 2014, the employer telephoned and sent a letter to the grievor to inform him that he was suspended without pay "[translation] … pending the outcome of an investigation".

[20] A Disciplinary Board of Investigation was established on July 18, 2014. Ms. Brunelle led the investigation, with Daniel Melançon, Regional Security Intelligence Coordinator, as a member of that board. The grievor attended the interview with the investigators on July 24, 2014, accompanied by two union representatives.

[21] During the interview, the grievor informed the investigators of the charges and the expected proceedings and stated that he would plead not guilty. On his counsel's advice not to discuss the charges, he refused to provide further details on the facts of the allegations.

[22] The employer sent him two letters, one dated July 25, 2014, which reinstated his salary from July 17, 2014, and the other dated July 31, 2014, which confirmed the initial decision to suspend him without pay as of July 17, 2014.

[23] At the hearing, Ms. Thibault (then the warden of Joliette Institution) explained those contradictory decisions through an analysis of the situation, which confirmed to the employer that the suspension without pay was correct from the start.

[24] At the hearing, Ms. Forget (the assistant warden, operations, at the time) explained that on July 14, 2014, the Sûreté du Québec informed her of the five charges that would be laid against the grievor. The allegations covered the period from 1975 to

1987, the alleged victim had been a minor, and allegedly, the grievor had been in a position of authority over the victim. Ms. Forget explained the employer's response as follows:

> [Translation]
>
> …
>
> *24. The institution's management was very concerned by the seriousness and number of charges laid against the grievor in addition to the period over which the alleged acts continued. The seriousness of these charges revealed to us a side of him that we did not know and that had not been disclosed to us when he was hired. This explains the speed with which we took action to obtain a convening order to start an investigation. At the same time, management considered the risks associated with his presence in the institution, given the Correctional Service's responsibility to a fragile and vulnerable clientele as well as its responsibility to its other employees.*
>
> …

[25] According to the convening order that Ms. Thibault made to form the Disciplinary Board of Investigation, the board was tasked with providing a complete account of the circumstances of the grievor's charges. Ms. Brunelle clearly pointed out that the disciplinary investigation was not part of a disciplinary process. The investigation results could have led to disciplinary action, but it was not the board's role to recommend them, let alone impose them. That decision fell entirely to Joliette Institution management.

[26] On July 23, 2014, as part of its investigation, the Disciplinary Board of Investigation met with a Sûreté du Québec investigator (who replaced the lead investigator, then on vacation). The investigator confirmed the charges (sexual assault) and provided some more detail about the alleged victim. The facts were reported to have occurred between 1975 and 1987, the alleged victim was four years younger than the grievor, and reportedly, he had been in a position of authority. The charges involved events from 1976 onward because the grievor was still a minor in 1975.

[27] The police investigator added that the grievor was not known to police before the alleged victim's denunciation, that the he had no other files, and that up to then (July 2014), there had been no media coverage of the charges. However, in his view, the case could attract media attention, given the grievor's job.

[28] The Disciplinary Board of Investigation met with the grievor the following day. Two union representatives accompanied him. At the meeting, he denied the charges but did not want to provide further details. In this respect, Ms. Brunelle made the following comment in her testimony: "[translation] … a position that the [Disciplinary Board of Investigation] deemed otherwise legitimate due to the criminal proceedings underway against him".

[29] In its August 7, 2014, report, the Disciplinary Board of Investigation found, in Ms. Brunelle's words, "[translation] … that the grievor had committed misconduct that could harm the Correctional Service's image". She explained the finding as follows:

> [Translation]
>
> *… The charges were serious and involved facts that spanned several years. In addition, the evidence gathered by the police investigation was deemed sufficient to warrant an arrest and filing charges by the Crown prosecutor. Given his peace officer status and his correctional officer role, the grievor's conduct was likely to tarnish the Correctional Service's image.…*

[30] I note that the grievor was not arrested. He was asked by telephone to report to the police station. After his interview, he went home on a promise to appear.

[31] In cross-examination, Ms. Brunelle maintained her position. Despite the presumption of innocence to which the grievor was legally entitled, the fact that serious charges had been laid showed that in her view, the allegations had something to them. According to her, neither the police nor Crown prosecutors take things lightly; hence, her finding that being charged involved a breach of the Service's *Code of Discipline* and the *Values and Ethics Code for the Public Service*.

[32] The disciplinary investigation report states that the grievor's alleged acts began in 1975, according to the alleged victim, but the charges were only from 1976, when he reached the age of majority. The police investigator indicated that the alleged victim was four years younger than the grievor and that at the start, allegedly, he had a certain relationship of authority with the alleged victim.

[33] The disciplinary investigation report found the following:

> [Translation]
>
> *In light of the information gathered during this investigation, the board finds that Mr. Réjean Lemieux violated the following rules:*

> ***Code of Discipline (8c): "act, while on or off duty, in a manner likely to discredit the Service".***
>
> ***Professional Standards, (2): Conduct and Appearance: "Behaviour, both on and off duty, shall reflect positively on the Correctional Service of Canada and on the Public Service generally. All staff are expected to present themselves in a manner that promotes a professional image."*** *In the text of the Standards, the role model factor for offenders is also mentioned.*
>
> *In addition, on the basis of the same factors, the board finds that Mr. Lemieux breached the Values and Ethics Code for the Public Sector* ***with respect to integrity-related values: "Public servants shall act at all times with integrity and in a manner that will bear the closest public scrutiny, an obligation that may not be fully satisfied by simply acting within the law" (3.1). In 3.4: "Acting in such a way as to maintain their employer's trust."***
>
> *As set out in the earlier "Analysis" section, the board finds that the criminal charges laid against Mr. Lemieux are violations of the rules stated earlier. Although the judicial process provides for the presumption of innocence, it appears that the seriousness of the charges harmed the image of the* [Service] *and the* [Service's]*relationship of trust with its employee. Given his peace officer status and his correctional officer role, he is likely to tarnish the* [Service's] *image.*
>
> [Emphasis in the original]

[34] Ms. Brunelle acknowledged that it was impossible for the Disciplinary Board of Investigation to determine whether the grievor was indeed guilty of the alleged acts. In her testimony, she added the following:

> [Translation]
>
> *… As a result, the spectre of a conviction continued to hang over his employment relationship with the Correctional Service, and with it, the associated range of significant reputational consequences, namely, with respect to the public, offenders, employees, and the Correctional Service's partners.…*

[35] The grievor filed a grievance against his suspension on August 20, 2014. He said that up to then, he had no disciplinary record, which was not contradicted.

[36] The grievor received the Disciplinary Board of Investigation's report in early September. He was called to a disciplinary hearing for September 19, 2014. He did not appear at it but was under the impression that a union representative would attend. The representative did not testify at the hearing. However, he sent a letter to the employer dated September 26, 2014, in which he requested the grievor's reinstatement and the payment of his salary.

[37] According to the employer's witnesses, the suspension without pay and the disciplinary investigation process were two completely separate steps. The disciplinary investigation sought to establish whether misconduct had occurred, in which case discipline would be imposed.

[38] Ms. Brunelle referred to the rest of the disciplinary investigation, which consisted only of following the course of the criminal proceedings. The Service did not seek any further information on the allegations. Ms. Brunelle spoke to the Sûreté du Québec's investigator assigned to the case in March 2015, who stated that there had been no media attention during the court appearances. The preliminary investigation took place in November 2015. The grievor resigned in July 2015.

[39] According to the employer's witnesses, the suspension without pay was not related to the disciplinary investigation but to the fact that criminal charges had been laid against the grievor and that therefore, the employer had to determine whether it could keep him in his duties (or offer him other ones), given the seriousness of the charges and the potential repercussions on the Service.

[40] The imposition and maintenance of a suspension without pay in circumstances in which criminal charges have been laid against an employee are governed by an analysis based on what are known as the *Larson* criteria (from *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9). I have cited as follows the relevant part of *Larson* since the employer claimed that it relied on that criteria to suspend the grievor and to maintain his suspension until his resignation in July 2015:

> …
>
> *[161] The main issue to be determined here deals with an indefinite suspension pending the outcome of criminal proceedings. Although neither counsel referred specifically to the tests set out by the arbitrator in* RE: Ontario Jockey Club and S.E.I.U. Local 528 *(1977), 17 L.A.C. (2d) 176 (Kennedy) these tests are widely accepted in the jurisprudence and were quoted as recently as September 2000 in* RE: Hamilton Regional Cancer Centre and Canadian Union of Public Employees, Local 3566 *(2000), 91 L.A.C. (4th) 333.*
>
> *The tests as set out at pages 178 and 179 of the former decision are as follows:*
>
> 1. The issue in a grievance of this nature is not whether the grievor is guilty or innocent, but rather whether the

> presence of the grievor as an employee of the company can be considered to present a reasonably serious and immediate risk to the legitimate concerns of the employer.
>
> 2. The onus is on the company to satisfy the board of the existence of such a risk and the simple fact that a criminal charge has been laid is not sufficient to comply with that onus. The company must also establish that the nature of the charge is such as to be potentially harmful or detrimental or adverse in effect to the company's reputation or product or that it will render the employee unable properly to perform his duties or that it will have a harmful effect on other employees of the company or its customers or will harm the general reputation of the company.
>
> 3. The company must show that it did, in fact, investigate the criminal charge to the best of its abilities in a genuine attempt to assess the risk of continued employment. The burden, in this area, on the company is significantly less in the case where the police have investigated the matter and have acquired the evidence to lay the charge than in the situation where the company has initiated proceedings.
>
> 4. There is further onus on the company to show that it has taken reasonable steps to ascertain whether the risk of continued employment might be mitigated through such techniques as closer supervision or transfer to another position.
>
> 5. There is a continued onus on the part of the company during the period of suspension to consider objectively the possibility of reinstatement within a reasonable period of time following suspension in light of new facts or circumstances which may come to the attention of the company during the course of the suspension. These matters, again, must be evaluated in the light of the existence of a reasonable risk to the legitimate interest of the company.
>
> …

[41] *Larson* also involved a correctional officer facing criminal charges. In that case, the employer also argued that the suspension was administrative, but the adjudicator found that in reality it was disciplinary, as it was punitive because of its length and because the criteria had not been satisfied. In other words, if it was not excessively long and the criteria were satisfied, it could be determined that the suspension was in fact administrative.

[42] Ms. Thibault testified that she did not rely on the Disciplinary Board of Investigation's reasoning to maintain the suspension without pay. Rather, it was done

to preserve the Service's reputation. She believed that if the media caught wind of the case (which did not happen, except at the grievor's acquittal), the Service would have been tarnished by maintaining the salary of an employee accused of sexual assault in a context, according to the alleged victim, of a relationship of authority.

[43] Ms. Forget periodically carried out the *Larson* criteria analysis. Ms. Thibault then revised and signed it until she left in April 2015. The warden who replaced Ms. Thibault in April 2015, Cynthia Racicot, signed the final analyses. Ms. Forget testified that the seriousness and nature of the charges, given the vulnerable population of Joliette Institution, did not allow keeping the grievor in the institution. The general public, female inmates, coworkers, and community partners would not have agreed with keeping an alleged sex offender in his position. Neither Ms. Forget nor Ms. Thibault explained how persons other than management would have reached that conclusion.

[44] As follows, in her testimony, Ms. Forget summarized the employer's reasoning for imposing, reinstating, and then maintaining the suspension without pay:

> [Translation]
>
> …
>
> *36. Even though there were charges and no conviction, they were so serious that given the Correctional Service's mandate, management could not afford to keep the employee on duty at Joliette or any other institution. Management deemed that sending him to another institution would simply have shifted the problem to that other institution and would not have reduced the risk to the Correctional Service's image or the confidence of diverse stakeholders and partners.*
>
> *37. Management considered the possibility of reassigning the grievor to clerical duties, to positions without contact with female inmates, or to increase the level of oversight and supervision of him. However, those ideas did not overcome the problem of the Correctional Service's image and mandate as they relate to retaining an alleged sex offender in his position who had been in a position of authority over a minor. As a law-enforcement agency, the Correctional Service did not want to continue allowing someone to access to institutions who could be convicted of such abuses over a 12-year period.*
>
> …

[45] Also according to Ms. Forget, the suspension without pay conformed with the "Global Agreement" between the bargaining agent and the Service beside the collective

agreement. In her written testimony, Ms. Forget cited the following excerpt from section III-C of the Global Agreement:

> …
>
> *2. However in circumstances where local management is satisfied that the continued presence of an employee presents a serious or immediate risk to staff inmates [sic], the public, or the reputation of* [the Service], ***the employee can be suspended without pay until the conclusion of the investigation and a decision has been rendered on the status of the employee.***
>
> …
>
> [Emphasis in the original]

[46] The parties filed in evidence the 13 *Larson* criteria analyses and the ensuing 16 suspension letters. In principle, the analysis had to be redone every 3 weeks, but it appears that sometimes, it was not done.

[47] According to the evidence, the 16 suspension letters are dated July 17, 25, and 31, September 10, October 2 and 20, and December 1 and 22, 2014, and January 9 and 30, February 20, March 13, April 10, May 25, and June 11 and 30, 2015.

[48] The 13 analyses are dated July 25, August 19, September 3, October 1, and December 1 and 22, 2014, and January 9 and 30, February 20, March 13, April 10, May 25, and June 11, 2015. As can be seen, a suspension letter usually followed an analysis. It can also be seen from the letters and analyses that after December 2014, they changed very little.

[49] The first suspension letter, dated July 17, 2014, announced an investigation "[translation] into alleged misconduct on your part", which was the charge. The letter reads as follows:

> [Translation]
>
> …
>
> *The analysis of the situation leads us to conclude that your presence at an institution poses a reasonably serious and immediate risk to the employer's interests. We believe that the nature of the allegations makes you unfit to perform your duties properly and that it has a detrimental effect on the organization's credibility.*
>
> *Therefore, you are suspended without pay as of July 17, 2014, for an indeterminate period.…*

…

[50] As stated earlier, the July 25, 2014, letter reversed the suspension without pay and reinstated the grievor's salary. The July 31, 2014, suspension letter reinstated the suspension without pay retroactive to July 17, 2014.

[51] According to the evidence, 12 of the 16 suspension letters followed the *Larson* criteria analyses. The first analysis is dated July 25, 2014.

[52] A *Larson* criteria analysis is done by reviewing the following five criteria:

1) Does the employee's presence present a reasonably serious and immediate risk to the Service's legitimate concerns? The form that the Service uses specifies that the risk must be clearly established.
2) The Service must establish that the nature of the charge will create a risk to its reputation, will render the employee unable to perform duties, or will have a harmful effect on the Service's employees or clients.
3) The Service must show that in fact it investigated the criminal charge to assess the risk of keeping the grievor in his functions. The burden is lower if police investigated the matter and laid the charge.
4) The Service must show that it looked at whether it was possible to mitigate the risk by assigning the grievor to another position.
5) The Service remains responsible for considering the possibility of reinstating the grievor in a position.

[53] In the analysis, the Service adds a sixth point, which is whether the employee should be suspended with or without pay, considering the Global Agreement.

[54] In the July 25, 2014, analysis, Ms. Forget responded to these questions mainly by citing the risk of media coverage, which could have seriously damaged the Service's reputation.

[55] The analysis stated that the charges were such that the relationship of trust between the Service and the grievor was broken, given the vulnerable population for which Joliette Institution is responsible. Reassignment to another institution was ruled out, given the risk of media coverage.

[56] According to the *Larson* criteria, the Service's obligation to investigate was reduced by the police investigation and charge. Nothing could have reduced the reputational risk had the charges received media coverage. The analysis states, "[translation] The [Service] has no fear of a repeat of the alleged criminal act, but

keeping the employee within its ranks breaks the bond of trust between the public, employees, partners, and the [Service]." In response to the criterion that the Service must always consider reinstatement, the analysis indicated that the file would be reviewed every three weeks.

[57] With respect to the decision to suspend the grievor with or without pay, the analysis states the following: "[translation] In light of the preceding, and because the allegations do not involve an offender managed by the Service, the recommendation is to suspend the employee without pay."

[58] That comment from the analysis refers to the Global Agreement, but in fact, the collective agreement provides compensation with pay when an employee has been suspended pending a disciplinary investigation, if the alleged incident involves an inmate (Appendix G(1)). Instead, the Global Agreement (article III-C, paragraph 2) provides as follows:

> *2. However in circumstances where local management is satisfied that the continued presence of an employee presents a serious or immediate risk to staff inmates [sic], the public, or the reputation of* [the Service]*, the employee can be suspended without pay until the conclusion of the investigation and a decision has been rendered on the status of the employee.*

[59] The suspension letter dated September 10, 2014, begins as follows:

> [Translation]
>
> …
>
> *By this, I inform you that your suspension without pay will be maintained until the disciplinary process is complete.*
>
> *The analysis of the situation leads us to conclude that your presence in the institution poses a reasonably serious and immediate risk to the employer's interests. We believe that the nature of the allegations makes you unfit to perform your duties properly, has a harmful effect on the organization's credibility, and broke the employer's bond of trust with you.*
>
> *Thus, you are now suspended without pay starting on July 31 [sic], 2014, for an indeterminate period.…*

[60] The September 10, 2014, suspension letter was the first after the disciplinary investigation report was issued. The report could not determine that misconduct had occurred, since it was only an allegation of misconduct based on the charge. As a result, it was not clear how the Service intended to fulfil its obligation to periodically

reassess the grievor's suspension without pay and to complete its disciplinary investigation before the criminal proceedings against him concluded.

[61] The September 10, 2014, suspension letter came after two *Larson* criteria analyses, one on August 19, and one on September 3, 2014. The August 19, 2014, analysis spent a fair amount of time as follows on the risks presented by the possible media coverage of the charges, even were the grievor reassigned to other tasks:

> [Translation]
>
> …
>
> *… A reassignment to duties with no client contact still presents a risk of a harmful, detrimental, or adverse effect on the* [Service's] *reputation and will tarnish its overall reputation if the situation is publicized. The nature of the charges, the fact that the victim was a minor, the fact that Mr. Lemieux had a relationship of authority with the victim, and the duration of the reproached actions (12 years) show that the situation was not isolated. Maintaining the employment of someone with such a profile would tarnish the* [Service's] *reputation and its ability to provide an environment conducive to the rehabilitation of its clients (employees must be moral, social, and ethical role models).*
>
> …

[62] Not only did the Service never consider the presumption of innocence but also, the analysis continued based on Mr. Lemieux's past behaviour, despite the absence of discipline in his record. The following is stated in the paragraph after the last one:

> *In addition, the context currently known about the offences in which Mr. Lemieux was in a position of authority over the victim shows some capacity to abuse his authority, which is a risky situation for the clientele. It must also be considered that in 2010, Mr. Lemieux was removed from his duties as a correctional manager on an acting basis due to his attitudes (being inflexible, imposing his ideas as certainties, not cooperating with colleagues, showing arrogance, not looking at or responding to staff). He also failed the personal suitabilities (awaiting information from the employee file) … during an advertised process for a correctional manager position. We have here a parallel between the context of the assaults and the profile presented at work. We even find that Mr. Lemieux could abuse his relationship of authority with clients.*
>
> …

[63] Ms. Forget wrote those lines. However, at the hearing, the grievor testified that he had disputes with her about minor things in which he made suggestions that she

categorically dismissed. I received no evidence that his behaviour was a problem. There were only the allegations mentioned in the *Larson* criteria analysis.

[64] The September 3, 2014, analysis repeated that of August 19, 2014, entirely, except that it clarified the grievor's failure in the advertised process for the correctional manager position. The last sentences of the paragraph just mentioned read as follows:

> [Translation]
>
> …
>
> *He also failed the personal suitabilities of management excellence, engagement, and strategic thinking during an advertised process for a correctional manager position. We have here a parallel between the context of the assaults and the profile presented at work. This makes us think that Mr. Lemieux could abuse his relationship of authority with clients.*

[65] The September 3, 2014, analysis also included a note from Headquarters endorsing Joliette Institution's decision to keep the grievor on suspension without pay by applying the *Larson* criteria.

[66] The October 2, 2014, suspension letter begins as follows:

> [Translation]
>
> …
>
> *I reviewed your situation, and I maintain that your presence in the institution poses a reasonably serious and immediate risk to the employer's interests. We believe that the nature of the allegations makes you unfit to perform your duties properly, has a harmful effect on the organization's credibility, and broke the employer's bond of trust with you.*
>
> *Thus, I inform you that your suspension without pay is maintained.*
>
> …

[67] That suspension letter followed the October 1, 2014, analysis, which continued to stress the risk of media coverage in connection with the legal proceedings. Under point 1, "[translation] … a reasonably serious and immediate risk to the [Service's] legitimate interests …", the analysis included the following:

> [Translation]

…

> *… In addition, in the current political context, the risk of media coverage increases with each court appearance to be held by the end of the legal proceedings (we anticipate several court appearances since from the first court appearance on September 16, 2014, a postponement was granted until December 10, 2014). It seems likely to us that in the event of media coverage, given the nature of the alleged offences (sexual abuse and assault of a minor continuing in adulthood in a context of authority), the* [Service's] *image would be tarnished more were the employee kept in the position, regardless of the nature of the tasks performed, due to his peace officer status (administrative tasks, no client contact, etc.)*
>
> …

[68] That analysis repeated the contents of the one before, including the parallel between the charges and the failure in the staffing process. However, the following was added to the last sentence of that paragraph: "[translation] We even find that Mr. Lemieux could abuse his relationship of authority with clients; hence, a breach of trust." With respect to the reinstatement review, mentioned was the letter received from the union on September 26, 2014, which requested reinstatement, but the initial analysis to maintain the suspension without pay was confirmed "[translation] … until a decision is made about discipline."

[69] No *Larson* criteria analyses were made between October 1 and December 1, 2014, despite the obligation in the Global Agreement to conduct an analysis every three weeks during a suspension without pay and despite the following, the employer's engagement in all *Larson* criteria analyses: "[translation] The [Service] will continue to review the case every three weeks to ensure that the employee's reinstatement opportunities have been assessed." The employer's witnesses had no explanation for the omission, except to suggest that the analysis might have been carried out and misplaced.

[70] The October 20, 2014, suspension letter starts as follows:

> [Translation]
>
> …
>
> *You have already been informed of an investigation into alleged misconduct on your part, namely, on July 16, 2014, the Sûreté du Québec arrested you with respect to sexual assault allegations, and you were formally charged with sexually assaulting someone of*

> *minor age between 1975 and 1987. On July 16, 2014, after your arrest, you were released on a promise to appear. The investigation's mandate was shared with you, and you met with the board of investigation members on July 24, 2014.*
>
> *Today, October 20, it appears that the board of investigation was unable to determine whether misconduct occurred, as it has so far been impossible to obtain the necessary information on file. For these reasons, the disciplinary process will be suspended until the criminal proceedings end.*
>
> …

[71] The December 1, 2014, suspension letter is identical to the October 2, 2014, letter, except for the date and a nuance in the wording. According to the letter, the nature of the allegations did not "[translation] break" the bond of trust but "[translation] weakened" it. The suspension without pay was maintained.

[72] The December 1 and 22 analysis were identical to the one of October 1, 2014.

[73] The December 22, 2014, January 9, and January 30, 2015, suspension letters were all identical to the December 1, 2014, letter, except for the date.

[74] The January 9, 2015, analysis was about the same as the last three that came before it, except for mentioning a new court appearance on January 28, 2015. The January 30, 2015, analysis mentioned another update on the court appearances in the following terms:

> [Translation]
>
> *… A postponement was granted on January 28, 2015. On that date, the Crown's evidence was shared with the defence, and the new court date was set for March 25, 2015. To date, Mr. Lemieux has not informed us of any of these dates, despite the fact we have told him in writing more than once that he must keep us informed of all developments. However, we obtained this information through the police service or through our presence at the court hearings.*
>
> …

[75] At the hearing, the grievor explained that he did not see the point of sending the dates of the purely procedural court hearings to the employer because the legal proceedings would in no way have changed the employer's analysis, as long as the charges remained unresolved.

[76] It appears that at one point, the grievor became tired of always receiving the same suspension letter; according to him, the repetition verged on harassment. So, he emailed the employer, dated January 28, 2015, asking it to stop sending the letters if the suspension decision had not changed. Notably, he wrote the following:

> [Translation]
>
> …
>
> *I point out that have received close to 10 notices that I have been suspended without pay. Unless I am mistaken, in which case I invite you to tell me so, I believe that the* [Service] *will wait until the proceedings are completed before making a decision. Thus, I would be grateful if you would stop sending me these letters every three weeks.*
>
> …

[77] That same day, Ms. Thibault replied as follows:

> [Translation]
>
> …
>
> *Finally, when an employee is suspended without pay, the employer must review the situation every three weeks. The employer must look at whether new factors may influence the decision to suspend you without pay. Once the reassessment is done, the employer must inform the employee of it. Therefore, you will continue to receive the assessment results every three weeks. I want to make it clear that you have been suspended during the employer-mandated investigation and that we are not awaiting the outcome of your criminal proceedings.*
>
> …

[78] Since the misconduct investigation was concluded on August 7, 2014, it is not clear what "employer-mandated investigation" it meant. When she was questioned about it at the hearing, Ms. Thibault replied that the employer was still looking for information that could cause it to change its position.

[79] The suspension letters of February 20, March 13, April 10, May 25, and June 11, 2015, were again identical to the December 1, 2014, letter, except for the date, and starting on May 25, 2015, the new warden, Ms. Racicot, signed them.

[80] The February 20, March 13, and April 10, 2015, analyses were identical to the January 30, 2015, analysis.

[81] The May 25, 2015, analysis contained only one new fact, which was that the court appearance date was postponed until June 3, 2015, because the grievor had changed counsel. The one from June 11 was the last *Larson* criteria analysis. It was identical to the earlier ones, except that it added this additional fact with respect to the legal proceedings: "[translation] The *pro forma* investigation took place on June 3, and the preliminary investigation was scheduled for November 10, 2015."

[82] The June 30, 2015, suspension letter is the last one (the grievor resigned on July 6, 2015). It differed slightly from the others in that the first paragraph was shortened to read as follows:

> [Translation]
>
> …
>
> *I reviewed your situation, and I maintain that your presence in the institution poses a reasonably serious and immediate risk to the employer's interests.*
>
> …

[83] The change was not explained.

[84] Despite Ms. Forget's written testimony that the employer considered other positions for the grievor, for her part, Ms. Thibault stated that the employer did not consider placing him in another position; nor did it consider paying him a salary while he was suspended. According to Ms. Thibault, the *Larson* criteria analysis fully justified the employer's actions. It was impossible to keep the grievor in a position with pay or suspended with pay, as it would have tarnished the Service's reputation and undermined the confidence of employees, female inmates, and community partners (for example, the Elizabeth Fry Society, which defends the interests of female inmates and promotes their reintegration into society).

[85] In an email to management dated February 20, 2015, Ms. Thibault spoke of a meeting on March 3, 2015, "[translation] … to discuss a possibility of work reinstatement". This was not followed up, as the employer maintained its position. At the hearing, Ms. Thibault added that it would have been impossible to offer a position, even administrative, to the grievor since any position would have given him access to confidential information on the Service and female inmates, which risk was deemed

unacceptable due, once again, to the nature of the charges. This concern does not appear anywhere in the written documentation, including the *Larson* criteria analyses.

[86] The grievor took steps to find another job, but his efforts were unsuccessful, which he attributed to his status as an employee suspended without pay. He received Employment Insurance benefits for several months until June 2015. At that time, having no other source of income, he decided to retire early. The pension benefits were reduced because he retired before age 60, at 57.

[87] Ms. Tremblay and Mr. Blackburn testified that it was possible to place employees who, for some reason, could not have contact with inmates, in administrative or telework jobs. Ms. Tremblay, who also works at Joliette Institution as a primary worker, testified that she had not heard of any charges laid against the grievor until an article about his acquittal was published in the local newspaper.

III. Summary of the arguments

A. For the employer

[88] Basically, the Board would not have jurisdiction to hear this grievance because the suspension was administrative. Section 209 of the *Act*, which provides for the referral of grievances to adjudication, does not cover administrative suspensions.

[89] The grievor failed to demonstrate that the suspension was other than administrative. The employer did not impose discipline as it could not determine any misconduct by him, due to a lack of information. It imposed the suspension to address a real and immediate risk of harm to its reputation and to the confidence of its clients, employees, partners, and the public.

[90] The suspension was without pay, as permitted by the Global Agreement, in accordance with the *Larson* criteria. No collective agreement provision or any other obligation required the employer to pay the grievor a salary while he was suspended from his duties. It was not possible to offer him another position, given the risks to the Service's reputation and the security risks of him having access to confidential data.

[91] According to the employer, a suspension is administrative if it is imposed after a reasonable analysis based on the *Larson* criteria; if the criteria are followed reasonably, the Board cannot intervene. The employer cited *King v. Deputy Head*

(Correctional Service of Canada), 2011 PSLRB 45. I will return to the jurisprudence in my analysis.

[92] *Canada (Attorney General) v. Frazee*, 2007 FC 1176, of the Federal Court, sheds light on what constitutes a disciplinary suspension. The employer agreed that it is not sufficient to say that a suspension is administrative but argued that there was no disciplinary nature to the suspension imposed on the grievor.

[93] The employer insisted that an employer's decision to suspend without pay does not have to be perfect, just reasonable.

[94] The employer distinguished *Basra v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 70 ("*Basra 2007*"), in which the adjudicator determined that an administrative suspension was in fact disciplinary. In that case, the disciplinary investigation was flawed, and Mr. Basra was not entitled to procedural fairness. In *Basra 2007*, the person responsible for the suspension decision was not called to testify.

[95] The facts are quite different in this case. The grievor met with the investigators and saw the disciplinary investigation report. The reasons for the suspension were clearly explained to him, and the employer called to testify the contributors to the decision.

[96] The employer also noted the seriousness of the charges in this case. They weighed heavily in its analysis. Again, to distinguish *Basra 2007*, it also specified that the suspension was not indefinite but was renewed every three weeks, as provided for in the Global Agreement.

[97] The employer regularly conducted a careful *Larson* criteria analysis. The five criteria were satisfied, namely, the risk to the Service's legitimate interests was reasonably serious and immediate, the harmful effect on the Service's reputation, the Service's sincere and honest investigation, the inability to reduce the risks, and the regular reassessment of the situation to verify whether reinstatement was possible.

[98] If the Board finds that the suspension was in fact disciplinary, the employer argued that nevertheless, it was justified. The review would then be based on *Wm. Scott & Co.* [1977] 1 Can. LRBR 1, [1976] B.C.L.R.B.D. No. 98 (QL) ("*Wm. Scott*"), which established the following principles for assessing a disciplinary decision: 1) Did the

grievor's conduct warrant discipline being imposed? 2) If so, was the imposed discipline excessive? 3) If so, what should be substituted for it?

[99] In *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers International Union, Local 9-670*, [1967] O.L.A.A. No. 4 (QL) ("Millhaven"), misconduct occurred outside working hours; therefore, it was a matter of assessing its impact on the working relationship. The employer argued that in this case, the risk to its legitimate concerns was sufficient to justify disciplinary action.

[100] According to the employer, and contrary to the presumption of innocence to which the grievor was legally entitled, the employer had evidence suggesting that the allegations were true, in the absence of a response from him. However, the allegations had a harmful effect on the Service's reputation and its relationship with its clients, partners, employees, and the public.

[101] Finally, the employer believes that the concept of constructive dismissal does not apply in this case. The grievor resigned, and it accepted his resignation. As in *Stevenson v. Treasury Board (Department of Employment and Social Development)*, 2016 PSLREB 17, the Board does not have jurisdiction over a termination of employment under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13). The employer cited the following from *Stevenson*:

> …
>
> *121 The grievor argued that she was forced to retire for financial reasons. This reason was considered by the former Board and the Federal Court in their* Mutart *decisions. Section 211 of the* Act *specifically denies me jurisdiction over any termination of employment under the* PSEA*. The acceptance of the grievor's resignation and application for retirement was a function of the deputy head's authority under section 63 of the* PSEA*, which is not subject to my review.*
>
> …

[102] In addition, the *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), decision applies in this case. According to that judgment, a party cannot change the nature of the grievance referred to adjudication. The grievance challenges the suspension without pay; it makes no mention of the termination of employment. Therefore, the grievor could not argue that it was a constructive dismissal.

B. For the grievor

[103] The grievance seeks to remedy the damages the grievor suffered from the suspension without pay. He was deprived of a salary for 11 months and ultimately was forced to retire earlier than planned due to financial obligations. His pension benefits were reduced by the penalty that applied to him because he retired before age 60.

[104] The grievor submitted that the issues are as follows:

1) Was the suspension without pay administrative or disciplinary?
2) Did the employer show that the suspension without pay was justified considering the applicable caselaw?
3) After the indefinite suspension that had already lasted 11 months, was the grievor's resignation equivalent to constructive dismissal?
4) What would the correct remedy be under the circumstances?

[105] According to the grievor, clearly, the measure was disciplinary. According to *Frazee*, it is important to consider the employer's intention when it imposes a suspension and not just the term used to describe it. If the action is disproportionate in its effects, it may also be deemed disciplinary. The grievor cited *Toronto East General & Orthopaedic Hospital Inc.* (1989), 8 L.A.C. (4th) 391, [1989] O.L.A.A. No. 96 (QL), for the concept that an action that was initially reasonable can become unreasonable, and punitive, if it lasts too long.

[106] The grievor drew a parallel with *Basra 2007*, in which the adjudicator found that the length of the suspension without pay had made it punitive and therefore disciplinary. He also cited *King* as a synthesis of the law on discipline in relation to administrative actions. A suspension that initially was administrative may, over time, become disciplinary.

[107] The grievor argued that a suspension without pay that has a disproportionately negative impact based on the employer's intended objective becomes punitive and should be described as disciplinary.

[108] The employer's position is contradictory. The Disciplinary Board of Investigation's report found that the grievor breached the *Code of Discipline*. However, management sent him a letter informing him that the board could not determine whether misconduct had occurred. He contrasted the situation in *King*, in which the employer, which had been unable to find misconduct, reinstated Mr. King's pay retroactively after suspending him without pay during an investigation.

[109] The disciplinary investigation found a breach, and therefore, misconduct had occurred. Management decided to maintain the suspension without pay as a result of the report. That action, which deprived the grievor of his salary, was punitive. He argued that the misconduct finding in the disciplinary investigation report underpinned the decision to maintain the suspension without pay.

[110] The grievor cited an excerpt from the *Larson* criteria analysis dated December 22, 2014, which seems to confirm the employer's disciplinary intention, depicting the charge as if it were a proven fact, "[translation] … the context currently known about the offences in which Mr. Lemieux was in a position of authority over the victim shows some ability to abuse his authority …" and noting his attitudes at work, namely, "[translation] … inflexibility, imposes his ideas as certainties …". The excerpt finds "[translation] … a breach of trust". The very mention of "breach of trust", a term often used to justify discipline or even dismissal, is a strong indicator of the employer's intention.

[111] The disproportionate effect of being deprived of salary for 11 months was in itself punitive. The employer did not justify its decision not to offer the grievor administrative work or telework. Everything was focused on possible media coverage, but the employer did not demonstrate the additional risk of carrying out telework rather than being suspended without pay. The Service still employed him. The risk of media coverage would also not have been greater had the suspension been with pay. The disproportionate nature of the action when compared to the true risk made it a disguised disciplinary action.

[112] According to the grievor, the employer did not discharge its burden of proving that the suspension without pay was justified according to the *Larson* criteria.

[113] The employer had two concerns, the risk to its reputation, and the risk presented by the grievor's presence in an institution with a particularly vulnerable clientele.

[114] The risk to the employer's reputation was speculative. The grievor argued that it was only the assumption of the investigator's colleague and nothing more. In fact, there was no media attention until the acquittal. In March 2015, Ms. Brunelle followed up with the investigator, who informed her that no media interest had arisen. However,

this fact was never included in the *Larson* criteria analysis, which continued to raise the spectre of media coverage.

[115] The risk of the grievor's presence at Joliette Institution was also not substantiated. In addition, the employer never seriously considered reassigning him to administrative duties or to telework if it considered the risk so serious.

[116] Finally, the employer never considered reinstatement to terminate the suspension. On the contrary, it sought to justify continuing the suspension without pay. It made no effort to discuss with the grievor or bargaining agent ways to reduce the risk it perceived.

[117] The grievor referred to the statements of the Federal Court of Appeal in *Canada (Attorney General) v. Bétournay*, 2018 FCA 230, and *Basra v. Canada (Attorney General)*, 2010 FCA 24 ("*Basra 2010*"), according to which if disciplinary action has been taken, it should be analyzed according to the teachings of *Wm. Scott*, namely: Was there misconduct? Was the discipline excessive? If so, what would be the appropriate action?

[118] However, it is difficult to state that misconduct occurred in this case. It appears that according to the Service's investigators, being charged is itself misconduct, which position is contrary to the presumption of innocence. The investigators had no evidence to determine that the grievor failed to meet his obligations under the *Code of Discipline* or the *Values and Ethics Code for the Public Service*.

[119] The grievor argued that his resignation, after the 11-month suspension without pay, was constructive dismissal. On that point, he cited the decisions *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55, and *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10.

[120] It is clear that the two branches of the constructive dismissal test are present in this case. By taking away the grievor's salary indeterminately, the employer violated a fundamental condition of an employment contract, which violation was serious enough to constitute constructive dismissal. According to the Global Agreement and *Larson*, a suspension without pay is allowed, but it must be reasonable and honestly reassessed, which was not done in this case.

[121] The second branch consists of employer actions that would lead a reasonable person to conclude that it no longer intended to be bound by the employment contract. In this case, the employer effectively did indicate its intention not to be further bound by the employment contract by maintaining the grievor for 11 months without pay. It made no effort to try to offer him a position. When it reassessed the situation, it never considered the impact on him of the suspension without pay.

[122] The grievor is entitled to reinstatement in his duties, along with his salary and benefits, retroactive to July 17, 2014. He would have retired without penalty on January 1, 2019; therefore, he asked for his salary up to that date.

[123] The grievor also seeks moral and punitive damages, given the financial difficulties he suffered as a result of being deprived of his salary and a reduced pension because it was taken early. He relied in particular on the decisions in *Lloyd v. Canada Revenue Agency*, 2015 PSLREB 67, and *Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70.

[124] The grievor argued that the employer showed bad faith to him by relying on evidence that did not exist to punish him, by not considering any alternatives to allow him to earn a salary, by not offering him any opportunity for reinstatement after the acquittal, and by being completely indifferent to his distress during the months of the suspension.

IV. Confidentiality order

[125] The parties asked me to seal some of the exhibits filed at the hearing, specifically Tab 26 of Exhibit J-1, the T-4 statement for Employment Insurance benefits; Exhibit F-4, a notice of assessment; and Tabs 32 and 33 of Exhibit J-2, post orders.

[126] The Board's hearings and files are public to ensure that the proceedings are transparent. However, the Board may order that certain parts be sealed, in accordance with the principles set out in the decisions *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, *R. v. Mentuck*, 2001 SCC 76, and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. The *Dagenais/Mentuck* test is essentially as follows: Is there a real and substantial risk that justifies protecting specific information in a proceeding, contrary to the public's constitutional right to access that information?

[127] Our Board has often found that the protection of personal information, as well as security reasons, can warrant a confidentiality order. The intended documents fall into these two categories. The grievor's personal information does not add to the intelligibility of the decision, but its disclosure could harm him some. Similarly, it is not useful to disclose post orders for the purposes of this decision, as disclosing them to the public could pose a security risk to the penitentiary.

[128] As a result, the requested confidentiality order will be included in the order of this decision.

V. Anonymization request

[129] At the end of the hearing, the grievor asked me to anonymize the decision and to not include his name in its title.

[130] The request was based on the grievor's alleged right to privacy and on the protection of his good reputation. The employer objected to this request because it is contrary to the principle of transparent and open justice and because it would be a departure from the Board's usual practice.

[131] I must agree with the employer on this point. Only very rarely will the Board grant an anonymization request. (see *Olynik v. Canada Revenue Agency*, 2020 FPSLREB 80). The grounds for anonymization are based on a concern to protect interests that are broader than damage to reputation; for example, public safety (see *A.B. v. Treasury Board (Royal Canadian Mounted Police)*, 2016 PSLREB 23), the risk of double victimization (see *Doe v. Treasury Board (Canada Border Service Agency)*, 2018 FPSLREB 89), or the risk of infringing the rights of a third party that is not involved in the matter before the Board (see *Grievor X v. Canada Revenue Agency*, 2020 FPSLREB 74).

[132] That is not so in this case. The anonymization request is all the less justified since the grievor's name has already been published in the context of his acquittal. It is difficult to understand how a labour law decision, in his favour, would hurt his reputation. However, I assured him that the Board has adopted a protocol that ensures that any Internet name search will not reveal a Board decision.

[133] Therefore, the anonymization request is denied.

VI. Analysis

A. The grievance

[134] The employer argued that the Board does not have jurisdiction to hear the grievance as it challenges an administrative and not a disciplinary suspension. The grievor agreed that I must find that the suspension was disciplinary to have jurisdiction to adjudicate the grievance. Section 209 of the *Act* provides three circumstances for referring a grievance to adjudication, which are an interpretation or application of a collective agreement, a disciplinary action, and a demotion or termination.

[135] The grievor argued that the suspension was disciplinary in effect and because of the employer's true motivations. It did not in reality assess the danger he posed if he continued to carry out his duties or receive his salary.

[136] The first issue is whether the suspension was truly administrative or instead disciplinary.

[137] The jurisprudence under the *Act*, as well as that of the Federal Court and the Federal Court of Appeal, provide insight as to the distinctions to be made when determining whether an action termed administrative is in fact disciplinary.

[138] As the Federal Court indicated in the following excerpt from the *Frazee* decision, the fact that the employer described the action as administrative is insufficient:

> …
>
> *[23] It is accepted, nonetheless, that how the employer chooses to characterize its decision cannot be by itself a determinative factor. The concept of disguised discipline is a well known and a necessary controlling consideration which allows an adjudicator to look behind the employer's stated motivation to determine what was actually intended. Thus in* Gaw v. Treasury Board (National Parole Service) *(1978) 166-2-3292 (PSSRB), the employer's attempt to justify the employee's suspension from work as being necessary to facilitate an investigation was rejected in the face of compelling evidence that the employer's actual motivation was disciplinary: also see* Re Canada Post Corp. and Canadian Union of Postal Workers *(1992) 28 L.A.C. (4th) 366.*
>
> *[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: see* Re Toronto East General & Orthopaedic Hospital Inc. and Association of Allied Health Professionals Ontario *(1989) 8 L.A.C. (4th) 391 (Re Toronto East General). 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.*
>
> …

[139] In *Gaw v. Treasury Board (National Parole Service)*, PSSRB File No. 166-02-3292 (19780220), the contested suspension was with pay, but nevertheless, the adjudicator found that it was disciplinary due to the employer's obvious motivation. At the beginning of the hearing, Mr. Gaw's employer conceded that the suspension had been unwarranted.

[140] Mr. Gaw worked for the National Parole Service. He was suspended during the investigation of certain allegations about him, including his conduct toward junior employees. He was sent a series of letters about the allegations, both during and after the investigation. The suspension lasted 10 days. The adjudicator found that the suspension went far beyond a mere administrative action. Mr. Gaw had been humiliated by being kept from his office and his duties unnecessarily.

[141] In *Association of Allied Health Professionals Ontario v. Toronto East General & Orthopaedic Hospital Inc.* (1989), 8 L.A.C. (4th) 391, a laboratory technician, who had made an error, had to take additional training. Before receiving it, he could not carry out standby and callback hours because he could not work alone. The lost opportunities represented a considerable amount of money. The arbitration board found that depriving the technician of his additional income for three weeks, the time for training, would have been reasonable. In fact, it took nine months to provide the training. The initial administrative ban became punitive after three weeks and thus was disguised discipline. The arbitration board awarded the technician the amount he would have earned had he been on the standby and callback list.

[142] In the *Frazee* decision, the Federal Court determined that Dr. Frazee's suspension with pay, which temporarily kept him away from his inspection duties at a slaughterhouse because of customer complaints, was not disciplinary. His employer acted reasonably to verify whether the complaints were founded. There was no blame. The Court wrote at paragraph 33, "In the absence of evidence that the [Canadian Food

Inspection Agency] managers were acting for some contrary or ulterior motive, the conduct of Dr. Frazee does not appear to have been under scrutiny as blameworthy."

[143] Therefore, in *Frazee*, the action was not disciplinary. However, in its conclusion, the Federal Court did not rule out the possibility that once another adjudicator had examined all the facts, it might be found that "disguised discipline" occurred.

[144] The Court arrived at the following conclusion in its decision:

…

> *[36] In this case, there has also been no clear determination on the facts as to whether the* [Canadian Food Inspection Agency]*'s decision to remove Dr. Frazee's inspection responsibilities was so disproportionate, unnecessary or ill-conceived that an adjudicator might find it to be a form of disguised discipline. It is also not beyond the realm of all possibility that an adjudicator might find the* [Canadian Food Inspection Agency]*'s actions to be punitive such that they would overwhelm an ostensibly innocent administrative intent in the same way that was of concern in* Re Toronto East General*, above.*

…

[145] The parties cited the *King* decision, but I do not think that it applies for the purposes of this analysis.

[146] In *King*, the warden of an institution initially suspended the employee because of allegations with respect to his behaviour. She ended the suspension without pay as soon as she was satisfied after reading the disciplinary investigation report that no misconduct had occurred and that the employee's presence did not pose a serious and immediate risk to the employer's legitimate interests.

[147] Having reviewed the undisputed facts, the adjudicator found that the suspension was administrative and not disciplinary. According to *Frazee*, the employer's motivation for imposing the suspension must be sought, among other things. However, in *King*, it could have been concluded that the employer's intention was preventive, pending the investigation's outcome. Once the investigation was complete, the institution's warden reinstated the employee to his duties, with the retroactive payment of his salary. The *King* decision is useful for distinguishing between administrative and disciplinary action. However, the finding of no misconduct

and thus that the salary was due retroactively to the date of the suspension does not apply in this case.

[148] The facts in this case are much more similar to the facts in *Basra 2007*, in which the indefinite nature of the suspension and the absence of a search for a solution to maintain the salary were found to characterize a disciplinary action, from when the disciplinary investigation should have ended. In fact, both parties spoke at length about this decision in their arguments, the grievor to highlight its similarities to the facts, and the employer to highlight the differences.

[149] Mr. Basra was a correctional officer at the CX-1 group and level. He was charged with sexual assault. He was suspended without pay pending the outcome of his criminal trial, which took several years. The adjudicator seized of the grievance against the suspension without pay determined that after one month, the suspension had become punitive and therefore a disguised disciplinary action. The Federal Court reversed that decision, but the Federal Court of Appeal reinstated it but stated that had the penalty become disciplinary, it had to be analyzed as such, in accordance with the *Wm. Scott* test. In *Basra v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 53, the adjudicator maintained that the suspension had been disciplinary, but because there was no evidence of misconduct, and in the absence of a finding as to the charge, the disciplinary sanction was unfounded.

[150] Certainly, some striking parallels exist between Mr. Basra's situation and that of the grievor for the purposes of this analysis. I quote below some excerpts from *Basra 2007*:

> …
>
> *[48] In June 2006, Mr. Brown said that he conducted a more formal review of Mr. Basra's status as a suspended employee. This resulted in a memorandum to Mr. Basra's disciplinary file (Exhibit E-13). Mr. Brown concluded that Mr. Basra's presence inside Matsqui Institution or any other CSC facility represented a reasonably serious risk to the CSC, damaged the reputation of the CSC and rendered Mr. Basra unable to perform his duties.*
>
> *[49] In particular, Mr. Brown said that the police had already investigated the matter and acquired the evidence to lay the charge. Crown counsel had approved charges. Early information indicated that Mr. Basra did not fully cooperate with the police investigation and that he misled them by giving a false name. Mr. Basra had been directly linked by means of DNA evidence.*

> *Further, he did not advise the* [Service] *of the charge, contrary to what he was required to do. While a* [Service] *Board of Investigation had been convened and had not yet concluded, the information received at that point disturbed Mr. Brown as to the* [Service]*'s reputation, and suggested that Mr. Basra was unsuitable for discharging care to other persons - particularly persons over whom he could have some power.*
>
> …
>
> *[53] At the hearing, Mr. Brown indicated that he would reassess the risk of Mr. Basra working at Matsqui Institution every two or three weeks based on any new information received. He also confirmed that he had not made a disciplinary decision.*
>
> …
>
> *[99] I note that paragraph 209(1)(*b*) of the* Act *uses the words "disciplinary action" and not "disciplinary decision." The word "action" is broader than "decision" and is a word capable of embracing the* [Service]*'s decision to appoint investigators and indefinitely suspend an employee as part of that investigation. The* [Service] *has suspended Mr. Basra indefinitely based on an allegation of a serious wrongdoing that the* [Service] *determined must be investigated. Clearly, the decision to suspend was part of a disciplinary process, although the* [Service] *has not yet convened a disciplinary hearing or reached a final conclusion on discipline. The respondent's documents establish that an investigator was appointed to convene a disciplinary investigation (Exhibit E-8).*
>
> *[100] Also, an indefinite suspension prevents an employee from working. It is an interruption of the employee's right to work. In this case the disruption of work, as well as the loss of wages, are penalties; they are disciplinary actions that flow directly from the* [Service]*'s decision to convene an investigation and suspend Mr. Basra without pay*: Massip v. Canada *(1985), 61 N.R. 114 (F.C.A.)*; Lavigne v. Treasury Board (Public Works), *PSSRB File Nos. 166-02-16452 to 16454, 16623, 16624 and 16650 (19881014)*; *and* Côté v. Treasury Board (Employment and Immigration Canada), *PSSRB File Nos. 166-02-9811 to 9813 and 10178 (19831017).*
>
> …
>
> *[133] Clearly, the criminal charge that Mr. Basra faces is serious, and the manipulative aspects of the alleged offence are a concern. The safety of inmates and staff is a legitimate interest. In my view, given the 18 months during which Mr. Basra continued to work after the alleged offence occurred, there is little risk to staff or visitors. Risk is often dissipated by time:* Clarendon Foundation.
>
> …

[151] In *Clarendon Foundation (Cheshire Homes) Inc. v. O.P.S.E.U., Loc. 593*, [1995] O.L.A.A. No. 86 (QL), 50 L.A.C. (4th) 17 ("*Clarendon Foundation*"), a caregiver at a home

for persons with disabilities was charged with sexual interference by one of the clients. Instead of investigating, management contacted the police to investigate. Charges were laid against the attendant but ultimately were withdrawn about two years after his suspension without pay began.

[152] The facts in *Clarendon Foundation* are quite different from those in the case at hand, but the following excerpt should be cited:

> …
>
> *24 An innocent employee has very legitimate interests in maintaining both his reputation and ability to earn an income. Those interests are not secondary or subordinate to whatever legitimate interests the employer may have. It must be emphasized that in cases of this nature, if the employer is successful in establishing that the immediate risk to its legitimate concerns are such that suspension of the employee was the only warranted recourse, the end result of the process may very well be that an innocent employee is required to shoulder the loss. Innately, such a result is an anathema in an arbitral environment steeped in principles of just cause and* [procedural] *fairness. Understandably, the onus required of the employer to demonstrate why the balancing of interests should favour it is a heavy one and must be strictly construed. Furthermore, a balancing of interests does not necessarily mean risk-free. In other words, just because the situation raises a risk to the employer's legitimate concerns does not mean necessarily that the entirety of the risk of loss is then transferred to the employee.*
>
> …

[153] Mr. Basra's story continued, and an adjudicator became seized with another grievance, about a suspension period that was still based on the criminal charge (*Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28). In that decision, the adjudicator wrote the following about the true nature of the suspension:

> …
>
> *[128] If the issue has not already been determined in earlier proceedings, then the onus is on the employer to establish that a suspension without pay was administrative and not disciplinary (see* Baptiste*, at para 325). If the employer has evidence that the grievor engaged in misconduct and it refers to and relies on that evidence in suspending the grievor without pay, then the suspension must be considered disciplinary. Considering the entire factual context, the 12-month suspension without pay reimposed upon the grievor in June 2008 had a punitive effect. The employer imposed it as a reaction to something the grievor was alleged to*

> *have done, rather than being driven by circumstances unrelated to any fault on his part, which would characterize an administrative action.*
>
> *[129] The June 2008 suspension letter specifically refers to the sexual assault and notes that the alleged offence involved deception and that the grievor allegedly concealed his identity, misled police and failed to notify the employer that he was under criminal investigation. Warden Brown stated (Exhibit 1, tab 1, page 2) that these were "huge trust issues" for him as the employer and that the lack of openness with which the grievor dealt with them had "… compromised the trust that this Employer has in [the grievor]." Thus, the employer referred not only to evidence of culpable behaviour by the grievor in the June 2008 suspension letter but also indicated that the employer had already concluded that he had engaged in culpable misconduct. This is sufficient to make the 12-month suspension without pay disciplinary.*
>
> …

[154] According to the case law, an action termed administrative can be identified as disciplinary in three ways, which are, it is intended to change the employee's behaviour, it is intended to punish the employee and therefore indicates a truly disciplinary motivation, or its impact on the employee is disproportionate. From the perspective of the *Larson* criteria analysis, an unreasonable application of the *Larson* criteria can also be added as an indicator. In all those respects, the suspension without pay imposed on the grievor appears disciplinary rather than administrative.

[155] The employer's first reaction to the grievor's charge was to suspend him without pay, then reinstate his pay a week later. The argument for an administrative action was much stronger at that time. There was no essentially remedial or punitive aspect, and the employer took time to assess the situation.

[156] However, as Ms. Thibault's documentation and testimony confirmed, the suspension without pay was reinstated retroactively six days after the first *Larson* criteria analysis. The employer felt that the risk to its reputation was such that it was entitled to deprive the grievor of his salary during the investigation, in accordance with the terms of the Global Agreement.

[157] The disciplinary investigation ended on August 7, 2014. The employer decided that from that date, no disciplinary action could be taken until the criminal trial completed. It is interesting to note that neither at that time nor throughout the 11

months of the suspension without pay was the employer concerned about the ongoing effect of depriving the grievor of his salary.

[158] From the initial *Larson* criteria analyses, factors detrimental to the grievor were accounted for to justify keeping him suspended without pay. Ms. Forget, who prepared the *Larson* criteria analyses, drew parallels between the charges and the grievor's behaviour in an appointment on an acting basis and in a staffing process. It must be noted that the first suspension letter signed by Ms. Thibault stated that the bond of trust had been broken. The employer toned down that assertion somewhat in the later letters but still spoke of a "weakened" bond.

[159] Ms. Forget believed that the charge was not laid lightly. However, there was no proven misconduct on the grievor's part. Nevertheless, he was presumed guilty because the police investigated and the Crown prosecutor laid a charge.

[160] Recall that there was nothing in the grievor's disciplinary record, that no allegations of recidivism on his part were made, and that the alleged facts in the charge dated to the period from 1976 to 1987, almost three decades earlier, before he had even started his correctional career, which began in 1990 in the provincial system. It then continued with the Service starting in 2008, almost two decades later.

[161] In her testimony, Ms. Forget stated that male primary workers are "[translation] carefully selected" and that they must pass a rigorous examination to be able to work with female inmates. Nothing indicates that the grievor did not pass this examination in 2008, on his hiring. In addition, the Service did not raise any issue regarding his behaviour with the female inmates.

[162] In other words, Ms. Forget's confidence in the grievor seems to have been undermined on the sole ground that the charge of sexual assault against a minor could have given the Service a very bad reputation.

[163] However, when the suspension without pay was reinstated, the employer knew the following facts:

1) the grievor was charged after the denunciation of someone who had waited 27 years to act;
2) the age difference between the grievor and the alleged victim is 4 years. While it is true that the alleged victim was a minor in 1976, when the grievor turned 18, the situation changed in 1980, 4 years later, and the alleged victim was of

majority age for most of the period covered by the charges. It is difficult to understand what the alleged relationship of authority could have been from then on;

3) the grievor has no criminal record, no other police record, and no record of disciplinary action by the employer; and
4) the grievor was "carefully selected" and subjected to a rigorous examination before the Service hired him.

[164] However, the employer refused to consider other duties for the grievor and did not seek a solution to maintain his salary. It maintained that it was concerned about the Service's reputation, but the *Larson* criteria analyses said otherwise. Management was ready to presume that the charges and the risk of abuse of authority were valid, given the fact that the grievor reportedly tended to impose his way of seeing things on his colleagues and subordinates while he was a supervisor.

[165] The suspension letters state that "[translation] … the nature of the allegations … broke [which later became 'weakened'] the bond of trust …". It seems to me that all these facts reveal the essentially disciplinary and unacknowledged nature of the suspension that the employer imposed. In short, the grievor was blamed for being accused, as the charge was the only fact clearly established by the employer's investigation. The *Larson* criteria analyses allege a risk of abuse of authority based on the performance of management duties (which had nothing to do with the allegations of sexual assault by a person in a position of authority). The employer's actions seem based on blame and look like punishment.

[166] The only justification that the employer put forward, damage to its reputation, was based entirely on speculation. It feared media coverage that could harm its image. However, in March 2015, when a Sûreté du Québec investigator indicated that there had been no media interest, the employer did not take it into account. It appears to have not considered a media response that would have addressed its concerns while ensuring the grievor's right to work or to maintaining his salary, such as giving him administrative duties or assigning him to telework, and if questions were asked, answering that the Service believes in the presumption of innocence and that the safety of female inmates has been assured.

[167] The employer's behaviour seems linked to the underlying blame, which led it to prematurely doubt the bond of trust necessary to continue the employment relationship. It did not persuade me of the reason it alleged to explain the

administrative nature of the grievor's suspension, which was that it was necessary to counteract, in the terms of the Global Agreement, "[translation] a serious and immediate risk" to the Service's reputation.

[168] In contrast, I accept the grievor's evidence and argument that action with fewer adverse consequences for him could have allowed the employer to acceptably manage the risk to its reputation. I find that the facts before it did not allow it to put him on administrative suspension indefinitely and the suspension was fictitious, amounted to subterfuge or camouflage, and therefore constituted disguised disciplinary action; *Canada v. Rinaldi*, Federal Court File No. T-761-96 (19770225).

[169] I also note that despite the employer's defence that it had no reprehensible or unacknowledged grounds, there are the suspension letters that followed the *Larson* criteria analyses. These clearly mentioned some of the grievor's behaviour, even though there was no real link to the charges, which had not been proven. However, the analyses led to a conclusion of a "[translation] breach of trust", an idea repeated in the suspension letters. The bond was first broken and then "weakened". The starting point for the justification that the employer alleged was the charge.

[170] I am prepared to accept that the grievor's suspension was administrative while the employer conducted its disciplinary investigation, from July 17 to August 7, 2014. However, I find that the suspension became disciplinary on August 8, 2014, especially since the employer in no way sought to complete its investigation afterward and even informed the grievor in writing on October 20, 2014, that "[translation] the disciplinary process will be suspended until the end of the criminal proceedings." In addition, the *Larson* criteria analyses were deficient in several ways. They included comments on the grievor's behaviour that had nothing to do with the risk that the employer raised, and they never considered the prolonged effect of his salary deprivation.

[171] The employer never seriously considered any other duties for the grievor. Two post orders (the Service's instructions for a particular position) were presented at the hearing that showed the dynamic security duties of a primary worker, without inmate contact. The employer sought to show that those positions could not be considered because the incumbent of the position had to be armed; however, the grievor was prohibiting from carrying a firearm as a condition of his bail. It would have been possible to consider administrative duties that he had performed in his previous job.

At the hearing, the employer's witnesses spoke of the security risk had he had access to Joliette Institution's records. That risk was never mentioned before the hearing, and I do not believe it was based on the slightest analysis. I cannot conceive of a security risk that would be due to charges in connection with events that date back three decades, when no allegations of misconduct at work were made from the start of the grievor's correctional career.

[172] The only possible risk to the employer was media coverage due to the charge, but no serious analysis was conducted to assess the risk and manage it. Despite several court appearances, the fact is that media outlets had no interest in reporting on the criminal proceedings that involved the grievor, except when he was acquitted. The employer knew that but did not take it into account. In addition, even had there been media coverage, the employer could have responded by talking about the action taken to protect the inmate population (assigning the grievor to other duties or to telework) while respecting his rights, namely, his right to a salary and the presumption of innocence.

[173] In addition, the essentially indefinite duration of the suspension had a real and disproportionate financial impact on the grievor, which made it punitive. On their own, the disproportionate financial effects of the suspension on him from the alleged risk to the Service's reputation were, in my view, sufficient under the circumstances to render his indefinite suspension disciplinary.

[174] I find from all this that the suspension without pay became disguised disciplinary action on August 8, 2014. In *Basra 2010* and *Bétournay*, the Federal Court of Appeal noted that if the Board determines that an action is disciplinary, it must then analyze it according to the tests in *Wm. Scott*; namely, has there been misconduct, and if so, was the disciplinary action excessive?

[175] However, the *Wm. Scott* analysis seems problematic to me in a context in which the employer argued that the action taken was administrative and not disciplinary. In *Jassar v. Canada Revenue Agency*, 2019 FPSLREB 54, the Board expresses the difficulty as follows:

> …
>
> *[569] At the hearing before me, the employer presented no evidence to establish that it would have had cause to impose a*

> *disciplinary action on the grievor and that termination would not have been excessive in the circumstances. Furthermore, it presented no arguments to the effect that it would have had any cause to terminate his employment for disciplinary reasons. I therefore have before me a record that contains no evidence and no arguments from the employer that could help me in the task of determining, as requested by* Bétournay*, 2018 FCA 230, whether the criteria set out in* Wm. Scott & Co Ltd. have been met. *In my view, to require at adjudication that I determine on the sole basis of the record before me whether the termination of his employment might have been justified for another reason as a legitimate disciplinary action would raise important issues of natural justice and would run contrary to the purposes of the fair and credible resolution of matters arising in respect of terms and conditions of employment that are stated in the preamble to the FPSLRA. As an independent and impartial decision maker, I am not allowed to make a party's case on that party's behalf.*
>
> *[570] In addition, to require at adjudication that I determine on the sole basis of the record before me whether the termination of the grievor's employment might have been justified for another reason as a legitimate disciplinary action seems at odds with my functions under Part 2 of the* FPSLRA*. Those functions are to hear a grievance* de novo *and to decide on it anew. My task, as I understand it, is to determine whether the employer has discharged its burden of establishing that on a balance of probabilities, the action that it alleges it took was legitimate in the circumstances of the case.*
>
> …

[176] This is not, as in *Jassar*, a dismissal based on the revocation of reliability status, an administrative action over which the Board has full authority, as the Federal Court of Appeal confirmed in *Canada (Attorney General) v. Heyser*, 2017 FCA 113. In this case, to have jurisdiction, the Board must determine that the suspension was a disciplinary action, which I did. However, the difficulty highlighted in the *Jassar* decision remains the same in this case, in that the employer argued throughout the hearing that the action was administrative. It cannot now establish that that action was instead disciplinary since it denied its existence and presented no evidence of a disciplinary justification. As the Federal Court of Appeal highlighted in *Heyser*, "… it is not open … for the employer to change its tack …" and to argue that a disciplinary action was in fact warranted when it did not present any evidence to that effect. Having received no evidence of misconduct by the grievor, I must find that no disciplinary action can be justified in the circumstances.

B. Constructive dismissal

[177] The grievor's grievance challenged the suspension without pay. At the hearing, he asserted that since the grievance was filed, he retired so that he could acquire an income. Given how the employer managed and constantly extended the suspension in this matter, and given the grievor's age, which placed him close to retirement, it is easy to understand that retirement was just about the only option available to him to ensure a stable income.

[178] The grievor asked me to find that this was a constructive dismissal, in accordance with the *Potter* criteria. However, I do not believe it is either useful or appropriate to address this issue. It is not assumed that the concept of constructive dismissal developed in common law with respect to individual employment contracts has any application whatsoever in federal public sector labour relations. I do not have to analyze this issue in the circumstances before me, so I will not.

[179] However, since I have found that the grievor's suspension became disciplinary on August 8, 2014, and that as of that date, the employer had no administrative justification to maintain it, it follows that the suspension was invalid as of August 8, 2014. Were it not for his retirement, the grievor would have been entitled to be reinstated to his position as of August 8, 2014.

[180] In the circumstances of this case, I believe that the best solution lies in seeking appropriate remedies to put the grievor in a situation comparable to the one in which he would have been as of August 8, 2014, were it not for the disciplinary suspension that I have just invalidated.

C. Remedies

[181] The parties jointly requested that the hearing and the Board's decision deal solely with the merits of the grievance and that the Board leave it to them to agree to appropriate remedies in the circumstances and retain jurisdiction over such remedies in the absence of an agreement. I believe that the parties' request should be granted.

[182] However, I believe that it should also be clarified that the evidence I heard seems to indicate that were it not for the unwarranted suspension without pay that the employer imposed on the grievor as of August 8, 2014, he probably would not have resigned from his position on July 6, 2015.

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

(The Order appears on the next page)

VII. Order

[184] Tab 26 of Exhibit J-1, Exhibit F-4, and Tabs 32 and 33 of Exhibit J-2 are sealed.

[185] The request to anonymize the decision is denied.

[186] The objection to the Board's jurisdiction to deal with the suspension without pay is dismissed.

[187] The grievance is allowed.

[188] The Board declares the suspension without pay invalid as of August 8, 2014.

[189] The parties' request to allow them to agree to appropriate remedies in the circumstances is granted, and the Board will retain jurisdiction over such remedies for 60 days, in the absence of an agreement by the parties.

March 2, 2021.

FPSLREB Translation

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board