Date: 20210914

Files: 566-08-38083
566-08-38084

Citation: 2021 FPSLREB 105

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

LORNE PRICE

Grievor

and

NATIONAL FILM BOARD

Employer

Indexed as
Price v. National Film Board

In the matter of individual grievances referred to adjudication

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Erik Mackay, Professional Institute of the Public Service of Canada

For the Employer: Chris Hutchison, counsel

Heard via videoconference,
May 25 to 28, 2021.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Lorne Price ("the grievor") was the head of Sales and Market Development with the National Film Board (NFB or "the employer") when his position was abolished on March 23, 2017, as part of a fiscally motivated restructuring.

[2] He filed a grievance with respect to this on April 7, 2017. The grievor claimed that the abolishment of his position was a sham and constituted disguised discipline.

[3] As part of the restructuring, the position of Director, Distribution and Market Development was redefined, incorporating some of the duties previously falling to the grievor's position. The grievor applied for that position, which would have been a promotion for him, but he was not successful. On July 18, 2017, the NFB announced that someone other than the grievor had been appointed. On August 22, 2017, the grievor grieved that appointment, stating he should have been considered for the position.

[4] His grievances were denied, and they were referred to adjudication.

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

[6] The matters were heard by way of videoconference, with parties participating from Montreal, Quebec, and Ottawa, Ontario, from May 25 to 28, 2021, inclusively.

[7] For the following reasons, neither grievance can be upheld. The abolishment of the grievor's position was part of a legitimate restructuring, and I found no evidence of disguised discipline. It was an administrative exercise on the part of the employer, over which I have no jurisdiction.

[8] With respect to the second grievance, the grievor was, in fact, considered for the promotion but was found not to possess the experience and qualifications the employer was looking for. This grievance is denied.

II. Summary of the evidence

[9] Throughout the relevant period encompassed by these grievances, Jerôme Dufour was the NFB's director general of distribution, communication, and marketing.

[10] Mr. Dufour testified to the many fiscal challenges the NFB has faced in recent years. Ninety percent of its revenue consists of federal government funding, which has not been indexed since 1996. Especially since 2012, certain aspects of the film industry have been in decline, which has negatively affected the NFB. Allocating funds and resources is a constant preoccupation for its senior management.

[11] Restructuring and reallocating resources, and in some cases, abolishing positions, have been an unfortunate fact of life for the NFB for some time. Mr. Dufour referred to a spreadsheet listing all the positions, as of April 8, 2021, which have been abolished since 2015. The grievor's position is one of 47 abolished in that period.

[12] In an effort to keep pace with changes in the film industry, characterized by falling audiovisual revenues (among many other factors), Mr. Dufour turned to the Director, Distribution and Market Development, James Roberts, to assist with a review of his directorate, with an eye to cutting costs. In December of 2016, Mr. Roberts began a comprehensive review, and in conjunction with other stakeholders within the NFB, proposed three scenarios in which certain positions would be abolished. Some duties were to be de-emphasized, some assigned to other positions, and some were to be added to the existing set of duties carried out by Mr. Roberts in his capacity as the Director, Distribution and Market Development.

[13] Mr. Roberts was the grievor's immediate supervisor. The abolishment of the grievor's position was an option in two of the three scenarios described in the first draft of Mr. Roberts' report.

[14] A later iteration of the report contained only two scenarios, both of which called for the abolishment of the grievor's position.

[15] Mr. Dufour tasked Mr. Roberts, who did not testify at this hearing, with consulting all necessary internal stakeholders, including Finance, Human Resources, and bargaining agent representatives, to arrive at the different options, which senior management would then discuss. Mr. Dufour testified to being satisfied with Mr. Roberts' report. He was satisfied that the necessary stakeholders had been consulted and was confident that the options presented had been carefully and thoroughly researched.

[16] Mr. Dufour specifically referred to the analysis done by the Director of Finance, who recommended abolishing the grievor's position. Some of the duties of the grievor's position would be transferred to other departments, but most would be assumed by the Director, Distribution and Market Development, who would take on an enhanced role. The plan was for Mr. Roberts to assume those duties in the short term. Since he was transitioning into retirement in a year, a search would be conducted for suitable candidates to take over from him in the newly expanded role of the Director, Distribution and Market Development. A so-called "headhunting" firm was engaged from the private sector to assist in this search.

[17] Throughout the relevant period, Claude Lord was the local president of the Professional Institute of the Public Service of Canada. He was made aware of the plans to restructure this unit in December of 2016 and was a stakeholder in the restructuring process. He had been privy to a number of restructuring exercises; the previous one took place in 2012.

[18] Mr. Lord and Mr. Dufour testified to the NFB's practice of making positions available to those whose positions have been abolished, to maintain continuity in the organization and to be fair to those adversely affected. They also testified to this practice being in compliance with clause 26.01 of the relevant collective agreement, which reads as follows:

> ***26.01*** *The employer shall continue past practice in giving all reasonable consideration to continued employment in the Employer's service of employees who would otherwise be laid off because of the elimination of their positions due to lack of work, technological changes, structural changes, changes in the work process or contracting out.*
>
> *The Employer wishes to keep the number of lay-offs to a minimum, and shall make a reasonable attempt to offer a suitable position to any employee who has been laid off.*

[19] The process surrounding layoffs followed in the 2017 restructuring was the same process followed in 2012. In an organization-wide message, the following was conveyed:

> …
>
> *Please find below a clarification of the staffing process for positions posted between now and September. This is the procedure that will be followed as we make every effort to place priority candidates (i.e., continuous employees affected by the layoffs) in other positions at the NFB.*
>
> *For any given posting:*
>
> - ***If there is only one priority candidate who, based on his or her resumé, meets the minimum requirements of the job, and if it is a position of the same level or lower than his or substantive position**, he or she will be selected for the position. There may be a confirmation interview. Non-priority candidates will not be invited for an interview.*
> - ***If there is only one priority candidate who, based on his or her resumé, meets the minimum requirements of the job, and if it is a position of a higher level than his or her substantive position**, there will be an interview process that includes non-priority candidates.*
> - ***If there is more than one priority candidate who, based on his or her resumé, meets the minimum requirements of the job, or if qualifications are to be verified**, there will be an interview process. Non-priority candidates may be invited for an interview.*
> - ***If there are no priority candidates who, based on their resumés, meet the minimum requirements of the job**, there will be an interview process for non-priority candidates, unless there is only one qualified candidate.*
>
> …
>
> [Emphasis in the original]

[20] Mr. Dufour testified to the increased complexity of the role of Director, Distribution and Market Development, under the reorganization. The stakeholders consulted in the restructuring analysis, along with NFB senior management, followed Mr. Roberts' recommendation, articulated in his report as follows:

> *… that the new director* [of Distribution and Market Development] *recruited to replace me upon my retirement . . . have a business development profile, strong knowledge of and currently selling into the television market, a proven capacity to develop partnerships (increase audiences in Canada through strategic partnerships with*

> *broadcasters), experience in the consumer market, and a good network of contacts.…*

[21] Mr. Dufour added that another reason senior management had to look outside the NFB to fill this position is that it felt that it was appropriate, given the climate in the industry at the time, to find someone with "a new and fresh perspective, a new way of operating."

[22] Mr. Dufour expressly mentioned in his testimony that senior management had turned its mind to the NFB's existing staff, which numbered approximately 400, and that it could not identify anyone with the necessary experience and the qualifications.

[23] The grievor applied for the new position, which he acknowledged was at a higher level than his current position. He did not apply for a position at an equal or lower level than his current one.

[24] Referring to a document entitled, "General conduct - 2017 restructuring", Mr. Dufour testified to the grievor being specifically considered for this position. He did not find the grievor suitable for the position.

[25] The grievor testified to his conviction that he fit the profile. He felt he would have been an ideal candidate for the new position. He had been with the NFB for a long time, starting in 2003 as a sales assistant. In August of 2005, he branched into home consumer market sales and was the coordinator of sales team. He handled sales to Asia and the United States of America. From August to December of 2008, he temporarily filled the position of head of sales. In April of 2012, he became the head of digital distribution, until 2014, at which point he took on the position of Head of Sales and Market Development. He remained in that position until the restructuring.

[26] Since the grievor had already been performing much the same job for many years, he felt that he already possessed most of the necessary experience and qualifications and that he either could be trained or would quickly develop the skills he was missing. He resented not only not being called for an interview but also not receiving any form of acknowledgement other than a receipt for his application.

[27] In fact, testified the grievor, the restructuring exercise was a sham. It was a way for senior management to get rid of him because it did not hold him in high regard. It was a camouflaged way of disciplining him for an earlier workplace incident in late

April of 2016 ("the April 2016 incident"), in which he displayed inappropriate behaviour.

[28] The fiscal challenges that Mr. Dufour testified to and that were documented in the restructuring reports, according to the grievor, were either non-existent or exaggerated. He took issue with the revenue figures and projections in Mr. Roberts' report. He stated that the numbers for the projected decline in revenue could not be quantified because, after all, they were only projections. In his estimation, the industry was not in the dire condition the report indicated. The result was a negatively exaggerated overview. According to him, the report was done to provide spurious justification for the decision to eliminate his position.

[29] The grievor testified that in a meeting with Mr. Roberts on November 29, 2016, Mr. Roberts told him that senior management did not think highly of him. In notes that he made about this meeting on the following day, the grievor wrote:

> …
>
> *-James said that my reputation up top is not very good. That* [François] *Tremblay, Jerôme* [Dufour] *and Claude* [Lord] *were not fans of mine. They think I am assertive. When I mentioned that I believed re: Jerôme and Tremblay but was not so sure about Claude, James admitted that he never heard such from Claude but I should realize that Jerôme and Tremblay is [sic] who Claude speaks with.*
>
> …
>
> *James said that Tremblay and Jerôme had no intention of allowing me to grow within the organization. If I wanted [sic], something from me would need to change.…*
>
> …

[30] Mr. Tremblay did not testify. Neither Mr. Lord nor Mr. Dufour was questioned on the witness stand about senior management's attitude toward the grievor.

[31] The grievor referred to unflattering comments that had been made about him, which he obtained after the fact in a series of access-to-information requests. For example, Mr. Roberts requested detailed information from the grievor about specific aspects of his work, to assist with the transition to an expanded scope of responsibilities in his (Mr. Roberts's) position. The grievor testified to supplying the information requested and was disappointed to learn that Mr. Roberts was not

appreciative of his efforts. In an email dated March 24, 2017, Mr. Roberts wrote to Mr. Dufour:

> [Translation]
>
> *I receive many emails with work to do. I will make a list of his tasks for the transition. He said that he wants to cooperate, but in his usual way, no context, dumping, etc. I will take the time to look at all this, and on Monday, I will have a better idea of its feasibility. He does not seem to want to talk to me and refuses to meet with me alone. Yesterday, he said that he intended to be at the assistant's office.*

[32] The grievor provided what he felt was another example of Mr. Roberts's negative attitude toward him in the form of an email exchange from April 10, 2017. In response to a request for information, the grievor wrote a detailed email that covered over two full pages, single-spaced. Mr. Roberts replied with one word, "Noted". The grievor questioned the appropriateness of such a curt response, given the amount of work he had put into the emailed report.

[33] On a different occasion, on January 9, 2017, the grievor was looking for Mr. Dufour, wanting to share some positive feedback he had received. Mr. Roberts emailed him: "I understand you are trying to see Jérôme about something and that you may be perturbed about something. Anything you want to share with me?"

[34] The grievor responded, "Really? Not at all. Not sure why he would think that. Wow, news travels fast even when it doesn't exist," to which Mr. Roberts replied, "OK, it didn't come from him. If there's no problem then all is well." The grievor responded, "Well I would like to know who it came from. I find this quite upsetting. I really do not like how I am being portrayed at every instance." Mr. Roberts ended with, "I recommend you don't overblow this. Someone saw you apparently looking perturbed trying to get a meeting with Jérôme. If that is not the case then we can just drop it." The grievor forwarded this entire email chain to his union representative, with the note, "See below. This is ridiculous already. I can't sneeze the right way."

[35] The grievor testified to this as an example of senior management's lack of patience with him. He said that it was proof they considered him a nuisance and wanted him out of the organization. Other options were available. Management could have created a new position for him but did not. In fact, testified the grievor, a certain

individual who used to be subordinate to him eventually received a promotion to a new position; it could have been given to the grievor, but it was not.

[36] In a letter dated March 23, 2017, the grievor was advised of the abolition of his position:

> …
>
> *As the National Film Board of Canada has clear and specific objectives related to its strategic plan, important decisions have been taken in support of the organization's vision and goals. Regrettably, some of these decisions involve difficult choices with direct impacts on our new organizational structure as well as on some positions.*
>
> *Consequently, we regret to inform you that the position of Head, Sales and Market Development that you occupy in the Distribution, Marketing and Communication Division will be abolished as of April 21, 2017. This notice will provide you with the details pertaining to the end of your employment.*
>
> *As of June 23, 2017, you will be laid off, and you will have to choose among the following three options:*
>
> *a) During the 6-month notice period, you will remain on payroll and you will be assigned to work in functions similar to those of your current position based on operational needs;*
>
> *b) During the 6-month notice period, you will remain on payroll but not be required to report to work. You will continue to receive your salary and benefits during this period.*
>
> *or*
>
> *c) You will cash-out immediately a lump-sum amount in lieu of notice. You will receive a lump-sum equivalent to six (6) months' salary based on your regular rate of remuneration for the entire notice period, severance pay for the lay-off, as well as any other advantages provided in the applicable collective agreement.*

[37] The grievor chose the second option, (b).

[38] On the day the grievor was told about the abolition of his position, he was approached by someone in Security and was told to hand in his security pass by April 21, 2017. This was before he had decided what he would do, and he found it presumptuous that management simply assumed he would not return to the building after April 21, 2017. He took great offence to this.

[39] Many of the grievor's peers expressed their surprise and disappointment at the elimination of his position and sent him messages to that effect.

[40] The crux of the matter, according to the grievor, is that the restructuring exercise was nothing more than disguised discipline. It was a way for management to discipline him for the April 2016 incident.

[41] The grievor described the April 2016 incident as follows: in late April of 2016, the grievor was discussing a work-related topic with a colleague. He testified to having been quite passionate about the subject and admitted to having raised his voice at one point. The matter came to management's attention, and further information was sought. This resulted in an email dated June 10, 2016, carrying the caption, "summary of a lively discussion".

> [Translation]
>
> …
>
> *As requested, here is a brief summary of the impromptu visit from our colleague Lorne Price at the end of April.*
>
> *Early that morning, I was in Pierre's office for a discussion of a certain file, when Lorne appeared at the office door. He told us that he was unhappy with the difficulty of selling our films when things are missing. He also began to complain that apparently, we have significant problems delivering files that are accepted spontaneously, either by aggregators or directly with some of our customers. In short, he began speaking agitatedly and stated that we are unable to properly deliver what is requested, and the more he spoke, the more he raised his voice, to a level that was no longer at that of a normal collegial discussion. His comments were more like a client expressing frustrations than constructive dialogue aimed at resolving certain situations.*
>
> *He spoke so loudly that colleagues in surrounding corridors heard everything in the lively exchange. Some were also quite far from the incident and even came to inquire as to what was happening and whether Pierre and I were OK! Pierre and I do not usually raise our voices, and we felt very uncomfortable in that situation. Fortunately, this aggressive tone from our interlocuter* [*sic*] *is very rare at the NFB, but nonetheless, it is inappropriate.*
>
> *We heard him tell us that he would stop selling because we were unable to deliver to his clients. This does not reflect our opinion or the reality at all.*
>
> *For my part, I remain troubled by the incident, which reminded me of my certain industrial workplace of the past, where it was common practice for people to shout at one another. I certainly did not expect a colleague to shout at me here at the NFB.*

[42] The April 2016 incident was still a subject of discussion months later. It was suggested that the grievor could apologize, which he did. His apologies were accepted on July 20, 2016.

[43] On November 3, 2016, Mr. Roberts wrote the following to the grievor:

…

> *This note is a follow-up to our discussion of yesterday and our meeting of June 22nd, during which Cynthia Miller and I shared that it had come to our attention that you had demonstrated disrespectful behaviour toward* [J.P.] *in the last week of April 2016. It was agreed that you would take some time to share your comments in response to what was presented following the meeting, which you did in a subsequent meeting with Cynthia on July 13th. Following that meeting, you sent an email to* [J.P.] *on July 19th, apologizing for your behaviour and highlighting that you would not repeat such behaviour.* [She] *accepted your apology.*
>
> *Given that you have recognized that your behaviour toward* [J.P.] *and* [P.F.] *was inappropriate, that you have apologized to* [J.P.], *and the that there has been a significant delay in this file -- we were awaiting the outcome of your grievance related to an earlier disciplinary measure (letter dated October 28, 2015), which was in progress and at the 3rd step of the grievance procedure -- I will not proceed with a more significant reprimand in this particular case and there will not be a note added to your employee file regarding this matter. However, I take this opportunity to remind you that disrespectful behaviour is not tolerated at the NFB and that such behaviour can lead to further disciplinary measures.*
>
> *As discussed at our meeting, I would like to suggest that you enroll in training or coaching in non-aggressive communication techniques. We can look at the availability and scheduling of this in the next several weeks.*
>
> *Finally, I take this opportunity to remind you that the NFB has an Employee Assistance Program, which is available free-of-charge 24/7 by calling ….*

…

[44] The grievor testified to having previously been disciplined for a similar incident. On May 29, 2015, he was issued a written reprimand that read, in part, as follows:

…

> *… This memorandum constitutes written notice concerning inappropriate workplace behaviour that has been previously brought to your attention.*

> *As you will recall, I advised you in writing of this issue and the steps I expected you to take to remedy the situation on November 7, 2014 (e-mail) and verbally on March 2nd, 2015* [meeting notes]*. I pointed out to you that you were to use respectful language in your exchanges with colleagues. At the Acquisitions Meeting on Friday, May 1st, with 3 colleagues, you demonstrated an unacceptable attitude toward the team and me. Your attitude was disrespectful, your tone was negative, you were not engaged in the discussion, and your body language was inappropriate. Given that I have already raised this issue with you, and given that you once again displayed disrespectful and inappropriate workplace behaviour, I am compelled to conclude that the behaviour exhibited on May 1st was insubordination.*
>
> …

[45] The letter was amended on June 30, 2015, and again later, and yet again, on October 28, 2015. The grievor testified that the amendments were made in an effort to avoid having the matter be grieved. He grieved anyway because he did not feel that the letters were fair or just, and he did not want this on his personnel file. His grievances were denied, and this particular [2015] matter was not referred to adjudication.

[46] The grievor testified that the April 2016 incident once again raised concerns at the management level, resulting in a growing animosity towards him.

[47] The grievor testified that the restructuring exercise was meant only to camouflage management's true intent, which was to get rid of him.

III. Summary of the arguments

A. For the grievor

[48] The grievor argued that both claims made in his grievances should be upheld. He argued he was not even considered for the promotion, not because he was not qualified but because senior management no longer wanted him in the workplace. The restructuring exercise was disguised discipline and a way to punish him for the April 2016 incident. Rather than follow a long and drawn-out disciplinary process, management chose a quick and easy way by simply abolishing his position.

[49] The grievor argued that with few exceptions, he met the majority of the qualifications necessary for the position of Director, Distribution and Market Development. Indeed, he had been doing much of the job for many, many years. His peers had recognized him for his many accomplishments at the NFB. He had been

instrumental in striking deals for the NFB with NetFlix and YouTube and had been responsible for a separate NFB channel being offered on Air Canada flights via the in-flight entertainment console.

[50] Many of the grievor's peers expressed their surprise and disappointment at the elimination of his position, which the grievor argued is an indication that the abolishment of his position was an unnecessary exercise.

[51] There was no evidence of any of the tools used to evaluate the grievor. The simple observations about his lack of qualifications do not provide any evidence that he was even considered. He was given no feedback on his application.

[52] There is a risk, argued the grievor, of viewing the April 2016 incident as trivial. It is difficult to reconcile management's claim that no further discipline would be forthcoming with the sheer volume of messages sent, the many drafts of the reprimand, and Mr. Lord's observation that the resolution of the April 2016 incident took an inordinate amount of time.

[53] The organizational charts, when viewed before and after the restructuring, reveal that other possibilities were present. It is apparent that one individual, who used to be subordinate to the grievor, received a promotion following the restructuring. Why was this particular position not offered to the grievor? Given his experience and corporate knowledge, could management not have said, "We are going to create a new digital platform sales position; you used to be the head, and you were an innovative force at the NFB in digital distribution. Even though it is a lower-level position, you would be salary protected; are you interested?" No such offer was made.

[54] Management did not deal with the grievor the same way it dealt with Mr. "C.D." (his name is anonymized in this decision), who was at least offered a position, but in another city. Ultimately, Mr. C.D. chose not to transfer to a new city and province and left the NFB, but this option was not even offered to the grievor.

[55] These failures by management to honour past practice and to do as Mr. Dufour claimed, namely, "we try to place our people", are the most compelling indications that the restructuring exercise was nothing more than a sham and that it amounted to disguised discipline for the April 2016 incident.

[56] The cases of *Bergey v. Canada (Attorney General)*, 2017 FCA 30, and *Canada (Attorney General) v. Robitaille*, 2011 FC 1218, established the Board's jurisdiction in disguised discipline cases. Paragraphs 34 and 35 of *Bergey* read as follows:

> *[34] At the same time as these principles were being developed, the Board developed the notion of disguised discipline, under which the Board characterizes certain decisions that the employer claims are non-disciplinary – and therefore non-adjudicable – as being in fact disciplinary in nature, which then clothes the Board with jurisdiction over such decisions and permits it to review them for cause. This Court and the Federal Court have both recognized the legitimacy of this approach:* Basra v. Canada (Attorney General), *2010 FCA 24, 398 N.R. 308 [*Basra*];* Canada (Attorney General) v. Frazee, *2007 FC 1176, 319 F.T.R. 192 [*Frazee*];* Chamberlain v. Canada (Attorney General), *2012 FC 1027, 417 F.T.R. 225 [*Chamberlain*].*
>
> *[35] Thus, through the doctrine of disguised discipline, the PSLREB (and prior iterations of the Board) were and are able to review employer decisions that the employer claims are shielded from review by the Board. For example, the Board has jurisdiction to review demotions if it determines that what in fact transpired was a disciplinary decision to demote the employee as, for example, occurred in* Robitaille v. Deputy Head (Department of Transport), *2010 PSLRB 70 at paras. 228-230, 103 C.L.A.S. 9 (affirmed on this question in* Canada (Attorney General) v. Robitaille, *2011 FC 1218 at para. 34, 219 A.C.W.S. (3d) 202 and appealed on unrelated grounds in* Canada (Attorney General) v. Robitaille, *2012 FCA 270, 230 A.C.W.S. (3d) 348). Similarly, the Board, both previously and currently, has jurisdiction to review decisions that result in termination, suspension or financial penalty claimed to be of an administrative nature if the Board finds that such decisions are in fact disciplinary in nature as occurred, for example, in* Grover v. National Research Council of Canada, *2005 PSLRB 150, 85 C.L.A.S. 57 (affirmed by this Court in* Canada (Attorney General) v. Grover, *2008 FCA 97, 377 N.R. 239),* Salter v. Deputy Head (Correctional Service of Canada), *2013 PSLRB 117, 116 C.L.A.S. 221 and* McMullen v. Canada Revenue Agency, *2013 PSLRB 64, 115 C.L.A.S. 65.*

[57] Since the employer's actions amounted to disguised discipline, argued the grievor, the Board has jurisdiction to hear the matter and allow the grievances.

[58] The case of *Olson v. Canada (Attorney General)*, 2008 FC 209, stands for the proposition that the reasonableness of the employer's actions can be reviewed. The grievor maintained that in the present matter, the employer's actions can be objectively shown to be unreasonable. Other options were available to management

but were not taken. The spirit of the collective agreement was ignored because the grievor was not offered a new position.

[59] In *Chênevert v. Treasury Board (Department of Agriculture and Agri-Food)*, 2015 PSLREB 52, a workforce adjustment situation was under scrutiny. At issue was whether the employer abused its discretionary power when it refused the alternation of the grievor's position. Paragraphs 169, 170, and 176 refer to the substantive rights conferred upon the employee by a collective agreement, as follows:

> ***169*** *… The employer agreed that clauses 6.4 and 6.2.6 of the WFAA confer substantive rights on employees.*
>
> ***170*** *Those clauses form the WFAA's objectives, which include continuing employment as much as possible. I note that clauses 6.2.4 and 6.2.6 state that it is up to the employer to decide whether the grievor meets the requirements of the position in question.…*
>
> *…*
>
> ***176*** *As mentioned earlier in this decision, the authority to grant alternation rests with management, which must evaluate an applicant's qualifications. Ms. Gagné testified that she decided whether an alternation could occur. However, according to the evidence, I find that she did not consider the grievor's application with an open mind; consequently, her decision to refuse him the alternation was unreasonable. Certainly, the employer's position was that he did not meet the requirements of the position, and I do not question the sincerity of that position. However, the grievor was entitled to have management treat him transparently and with an open mind. It is true that following Ms. Huard's intervention, Ms. Gagné granted a second interview. However, I cannot ignore the evidence that she told Mr. Cogné what the result of the second interview would be before it even took place.*

[60] The grievor argued that this is precisely what transpired in his case. Management did not treat his application to the position of Director, Distribution and Market Development, transparently and with an open mind. The rejection of his application was a foregone conclusion.

[61] *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, is a case of termination on probation. It reaffirmed the principle that an adjudicator has jurisdiction over a grievance pertaining to an administrative action that is found, on the evidence, to amount to disguised discipline. This case emphasized the importance of good faith on the employer's part when exercising administrative discretion.

[62] In the present case, argued the grievor, the employer used an unnecessary restructuring exercise as a means of getting rid of an unwanted employee. For all these reasons, the grievances should be upheld.

B. For the employer

[63] The employer maintained that there is no evidence supporting the grievor's belief that it disciplined him. Mr. Dufour's testimony on this point was unequivocal; nothing of a disciplinary nature was a factor in the decision to abolish the grievor's position. Mr. Dufour was not cross-examined on this point. Nor was he cross-examined on the issue of the grievor's stature in the organization as far as senior management was concerned.

[64] The employer argued that it would be improper, following the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), to use evidence not put to Mr. Dufour on the witness stand to impeach his credibility on these points. Had Mr. Dufour been shown the emails the grievor referred to, which the grievor feels betray some animosity on the part of senior management, then Mr. Dufour would have had an opportunity to explain what might have been meant by the comments. As it stands, the issue of the grievor's popularity with senior management, or lack of it, is purely conjecture on his part. Furthermore, argued the employer, it is conjecture without any logical or evidentiary basis.

[65] The grievor's notes of November 30, 2016, about a meeting the previous day with Mr. Roberts, provided a perfect opportunity for cross examination that was never seized. The grievor made notes about Mr. Roberts having said "… Jerôme … [was not a fan] of mine." Why not put those notes to Mr. Dufour directly and at least ask him whether it was true or whether he said these things to Mr. Roberts?

[66] The abolition of the grievor's position had nothing to do with discipline or his standing with senior management. On the contrary, argued the employer, an abundance of evidence indicates the financial constraints that the NFB faced at the time. Industry trends, a decline in revenue, and the advantages and disadvantages of restructuring were analyzed. The unchallenged evidence of both Mr. Dufour and Mr. Lord was that restructuring and the resulting layoffs are unfortunately all too common at the NFB.

[67] The grievor had the burden of proving that disguised discipline occurred. Paragraphs 18 to 25 of *Canada (Attorney General) v. Frazee*, 2007 FC 1176, read as follows:

> *[18] The issue before the Adjudicator was whether the CFIA's decision to remove Dr. Frazee from performing condemnation inspections for six weeks was administrative or disciplinary in nature. That was an issue of mixed fact and law which required an examination of both the purpose and effect of the employer's action. It required the Adjudicator to apply the largely undisputed evidence of what took place to a set of accepted standards or legal principles which define discipline in the employment context.*
>
> *[19] Whether an employer's conduct constitutes discipline has been the subject of a number of arbitral and judicial decisions from which several accepted principles have emerged. A useful summary of the authorities is contained within the following passage from Brown and Beatty, Canadian Labour Arbitration (4th ed.) at para. 7:4210:*
>
> […]
>
> *In deciding whether an employee has been disciplined or not, arbitrators look at both the purpose and effect of the employer's action. The essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part by punishing the employee in some way. An employer's assurance that it did not intend its action to be disciplinary often, but not always, settles the question.*
>
> *Where an employee's behaviour is not culpable and/or the employer's purpose is not to punish, whatever action is taken will generally be characterized as non-disciplinary. On the basis of this definition, arbitrators have ruled that suspensions that required an employee to remain off work on account of his or her health, or pending the resolution of criminal charges, were not disciplinary sanctions. Similarly, transfers and demotions for non-culpable reasons, the revocation of a civil servant's "reliability status", financial levies that were compensatory rather than punitive, shift assignments designed to facilitate closer supervision, and deeming an employee to have quit his or her employment, have all been characterized as non-disciplinary. For the same reason, counselling and warning employees about excessive but innocent absenteeism have [sic] generally not been regarded as disciplinary. On the other hand, it has been held that even where an employee falls ill during the course of serving a disciplinary suspension and is in receipt of sick pay benefits for part of the time he or she is off work, that hiatus will not alter the disciplinary character of the employee's suspension.*

> *A disciplinary sanction must at least have the potential to prejudicially affect an employee's situation, although immediate economic loss is not required. Suspensions with pay, which have the essential objective of correcting unacceptable behaviour, for example, would still be regarded as disciplinary even though they do not sanction the employee financially.*
>
> *[Footnotes omitted]*

[20] The authorities confirm that not every action taken by an employer that adversely affects an employee amounts to discipline. While an employee may well feel aggrieved by decisions that negatively impact on the terms of employment, the vast majority of such workplace adjustments are purely administrative in nature and are not intended to be a form of punishment. This point is made in William Porter v. Treasury Board (Department of Energy, Mines and Resources) *(1973) 166-2-752 (PSLRB) in the following passage at page 13:*

> *The concept of "disciplinary action" is not sufficiently wide to include any or every action taken by the employer which may be harmful or prejudicial to the interests of the employee. Certainly, every unfavourable assessment of performance or efficiency is harmful both to the immediate interests of the employee and his prospects for advancement. In such cases, it cannot be assumed that the employee is being disciplined. Discipline in the public service must be understood in the context of the statutory provisions relating to discipline.*

[21] The case authorities indicate that the issue is not whether an employer's action is ill-conceived or badly executed but, rather, whether it amounts to a form of discipline involving suspension. Similarly, an employee's feelings about being unfairly treated do not convert administrative action into discipline: see Fermin Garcia Marin v. Treasury Board (Department of Public Works and Government Services Canada) *2006 PSLRB 16 at para. 85.*

[22] It is not surprising that one of the primary factors in determining whether an employee has been disciplined concerns the intention of the employer. The question to be asked is whether the employer intended to impose discipline and whether its impugned decision was likely to be relied upon in the imposition of future discipline: see St. Clair Catholic District School Board and Ontario English Catholic Teachers Association *(1999) 86 L.A.C. (4th) 251 (*Re St. Clair*) at page 255 and* Re Civil Service Commission and Nova Scotia Government Employees Union *(1989) 6 L.A.C. (4th) 391 (*Re Civil Service Commission*) at page 400.*

[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) 336.*
>
> *[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.*
>
> *[25] Other considerations for defining discipline in the employment context include the impact of the decision upon the employee's career prospects, whether the subject incident or the employer's view of it could be seen to involve culpable or corrigible behaviour by the employee, whether the decision taken was intended to be corrective and whether the employer's action had an immediate adverse effect on the employee: see* Re St. Clair*, above, and* Re Civil Service Commission*, above.*

[68] The employer pointed to senior management's extensive reviews of the financial restraints, changing industry trends, and possible responses to those challenges as clear evidence of its good faith in conducting a legitimate restructuring exercise. It is not reasonable to suggest these efforts were designed as a cover-up to justify getting rid of the grievor.

[69] *Green v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2017 PSLREB 17 at para. 347 (*Green*), stated as follows: "Actions can be taken in an employment relationship that are both foreseeable and that have a financial impact on an employee but that do not equate to a financial penalty."

[70] Just because an action has a financial impact on an employee does not equate it with discipline. Paragraph 350 of *Green* describes the need for a logical link as "… some link between the appraisal process and filing the complaint." In the present case, the grievor had to show some sort of link between the April 2016 incident and the restructuring. There is no link. The April 2016 incident was over and done with, as far as everyone was concerned.

[71] More than just the grievor's perceptions must be in play. In the case of *Ho v. Deputy Head (Department of National Defence)*, 2013 PSLRB 114, the adjudicator had to decide whether the decision to advance sick leave, which had a financial impact upon the grievor in that case, amounted to disciplinary action. The adjudicator stated as follows at paragraph 56:

> ***56*** *Again, while I appreciate that this whole matter was not a happy experience for the grievor, one needs to offer more, when it comes to meeting a burden of proof, than his or her perceptions. In this case, there is no corroborating evidence that supports the grievor's allegations that the reason that the respondent did not want him back on February 25, 2008, was to punish him. I therefore conclude that I am without jurisdiction to hear the grievance.*

[72] Similarly, argued the employer, the grievor did not produce any evidence corroborating his theory that the NFB's restructuring was disguised discipline.

[73] *Lindsay v. Canada (Attorney General)*, 2010 FC 389, states as follows at paragraph 46:

> *[46] In fact, it is clear when analysing the recent jurisprudence of this Court that the decision of the Adjudicator was not only reasonable, but correct, as the record discloses no evidence that would lead to an inference that the employer had a disciplinary intent in terminating the applicant. After all, it is the Applicant's burden to establish "disguised discipline": see* Peters v. Treasury Board (Department of Indian affairs and Northern Development), *2007 PSLRB 7, at para. 309;* Stevenson v. Canada Revenue Agency, *2009 PSLRB 89, at para. 18.*

[74] There is no evidence in the present matter, argued the employer, of any intent other than the legitimate restructuring of the grievor's department.

[75] *Olson v. Canadian Food Inspection Agency*, 2007 PSLRB 24 at para. 84, stated as follows:

> *[84] In this case, the grievor challenges a work force adjustment decision, alleging bad faith and disguised disciplinary reasons. I am satisfied that despite some differences in the labour relations regime, decisions such as* Rinaldi, *although not binding, are persuasive in establishing the burden of proof for reviewing the Agency's decision whether the grievor has been successful in training. In other words, the grievor must establish his allegation*

> *that the Agency merely alleged a layoff to disguise what is really a disciplinary termination of employment.*

[76] The employer maintained that neither of the claims made by the grievor can be upheld; the restructuring was a legitimate administrative exercise over which the Board has no jurisdiction, and the grievor was properly considered for the position to which he applied, but was found to lack the necessary qualifications.

IV. Decision and reasons

[77] A joint application was made to seal some of the exhibits per the test articulated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and *R. v. Mentuck*, 2001 SCC 76 (*Dagenais/Mentuck*).

[78] In these two cases, the Supreme Court of Canada formulated the test referred to as the *Dagenais/Mentuck* test, to be applied when considering a discretionary confidentiality order, in this case, the sealing of certain exhibits to prevent disclosure of information. Recognizing the importance of the open court principle, the test holds that confidentiality measures should be ordered only in case of the following:

- Such an order is necessary to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not do, and

- The salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[79] At issue is personal (mostly financial) information pertaining to a colleague or colleagues of the grievor's. The information in question is contained in tables and charts and other documents assembled as part of the NFB's analysis into restructuring scenarios, and the implications upon the grievor's position.

[80] Several witnesses had occasion, in the course of their testimony, to refer to the documents in question when testifying about the costs associated with the various restructuring scenarios that were under consideration within the NFB. Some of the testimony had to do with salaries of NFB employees and other personal information.

The documents containing this information were marked as Exhibit E-1 in these proceedings, and absent a sealing order, this information is subject to public access and exposure.

[81] The representatives agreed to request a sealing order on Exhibit E-1 and to replace it with a redacted document which does not disclose the information in question. I find this to be a minimal and reasonable compromise to the open court principle. The information in question in Exhibit E-1 was important to these proceedings, but none of this information needs to be disclosed publicly. The public interest is satisfied with the assurance, in this decision, that the personal information that will be subject to the sealing order was carefully considered.

[82] A second exhibit, marked as E-2 in these proceedings, pertained to the abolition of a second position as part of this same restructuring exercise. This exhibit consists entirely of personal information pertaining to the individual affected by the restructuring, and it cannot be redacted. The entirety of E-2 must be kept confidential.

[83] I therefore order the sealing of exhibit entered as E-1 in these proceedings, retained electronically as "Employer's Book of Documents-Price FINAL". To minimally compromise the open court principle, this exhibit is to be replaced by the electronic version entitled "E-1 (Price) Sealing Order in Place – REDACTED.

[84] I also order that the entirety of exhibit E-2 be sealed.

[85] Returning to the merits of the grievances, I agree with the adjudicator in *Ho*, who stated as follows at paragraph 50:

> ***50*** *I should point out that, in this case, the employer's characterization that its action was merely administrative has no bearing on me. In a case like this, one has to go beyond how an action is labelled; it is important to understand all the facts surrounding the events before reaching a conclusion.*

[86] I do not accept at face value the employer's contention that this was a legitimate restructuring exercise. By the same token, I do not accept the grievor's simple assertion that the restructuring exercise was a sham, meant to cover up the employer's true intentions of ridding itself of an unwanted employee. My conclusions must be based on evidence, not mere assertions.

[87] I also agree with the standard of proof that must be brought to bear upon my analysis. *Peters v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 7 at para. 304, states as follows:

> *[304] … I am persuaded that adjudicators under the* PSSRA *have normally applied a "balance of probabilities" test to assess whether discipline has occurred, without necessarily saying so explicitly. This is the same standard that they have applied to most other evidentiary situations. They asked, in short, "is it more likely than not that the challenged actions of the employer constitute disguised discipline?" In this case, I am comfortable that I have adequate evidence before me to determine the jurisdictional issue of whether the employer imposed a disciplinary financial penalty, directly or by disguise. I believe, accordingly, that the "balance of probabilities" standard underlying the approach taken in many other decisions is appropriate in these circumstances.*

[88] I will be explicit in my application of the balance-of-probabilities test. I will go one step further and state that this proof must be made by way of sufficient clear, convincing, and cogent evidence, as the Supreme Court of Canada articulated in *F.H. v. McDougall*, 2008 3 SCR 41.

[89] I find clear, convincing, and cogent evidence of a legitimate restructuring exercise. Both Mr. Dufour and Mr. Lord were an integral part of it, and for that matter, so was the grievor. He was instructed to provide a detailed accounting of everything that he was working on to aid Mr. Roberts in his transition. The consultations with stakeholders, the reports that were generated, and the resulting impact upon the workplace are overwhelming proof that the restructuring exercise was legitimate. The Director of Finance conducted a financial analysis, and according to Mr. Dufour, her input was essential to considering the different restructuring scenarios.

[90] The impact of the restructuring was felt further than in the grievor's office. One of his colleagues lost his job as well.

[91] The suggestion that the extensive analysis involving many levels of senior management, the deliberate elimination of a similar position, and the fabrication or exaggeration of the financial effects of industry trends, all to provide an artificial mechanism to discipline the grievor for raising his voice in a colleague's office a year earlier, is simply preposterous.

[92] I found no corroboration for the grievor's belief that disguised discipline took place. Had the NFB's 2017 restructuring exercise really been a sham, one might have expected the architect of the scheme, Mr. Dufour, to have been put to the test on the witness stand about it. He was not. The grievor's witness, Mr. Lord, who was also part of the restructuring exercise, was likewise not questioned about the possibility of disguised discipline.

[93] The employer brought forward the case of *Peters*, which I find contains a passage directly applicable to the present matter, found as follows at paragraph 258:

> *[258] … My mandate as an adjudicator does not extend to a review of all instances of discipline, only those that result in a suspension or a financial penalty. Where the link between an alleged disciplinary event and the alleged financial penalty is distant in time, tenuous or otherwise indirect or merely speculative, it becomes difficult, if not impossible, to find that the discipline that allegedly occurred itself resulted in a financial penalty. In my view, there can be no presumption that the employer intended to impose a financial penalty as a result of a specific disciplinary event or infraction if the penalty is not reasonably proximate in time to the event and demonstrably linked to that event in the employer's thinking and actions.*

[94] The decision in *Tudor Price v. Deputy Head (Department of Agriculture and Agri-Food)*, 2013 PSLRB 57 at para. 49, lends weight to this point, as follows:

> *49 The grievor referred to the shortcomings outlined in Exhibit G-19, which specifically raised alleged failures on his part to meet a number of fundamental expectations for executives and alleged that the resulting effect, namely, the assignment of a succeeded-(minus) rating, amounted to a disguised disciplinary action resulting in a financial penalty. His allegation was based on the fact that the shortcomings in question pertained to culpable and corrigible conduct and were relied upon by the employer to penalize him financially. Unfortunately, he presented no compelling evidence to substantiate his claim.*

[95] I find no demonstrable link between the restructuring and the April 2016 incident. It was a minor incident in which voices might have been raised and an assertive tone might have been used. Arguably, it was not even culpable conduct and was more of a performance than a disciplinary matter. Indeed, at the end of the day, nothing came of it. No letter was placed on his file. The April 2016 incident had nothing to do with the restructuring exercise. Mr. Roberts made it clear to the grievor

that the April 2016 incident was over and done with, as far as management was concerned. I find no evidence indicating otherwise.

[96] I do not find any ulterior motive behind management's actions following the issuance of the March 23, 2017, letter advising of the abolition of the grievor's position. He was offered options for how he intended to have matters play out. He chose option (b), to be paid for six months but to not show up to work. It does not matter that after the fact, management had nothing available had he chosen option (a) (namely, to continue working in a different position).

[97] The grievor being asked to turn in his security pass was an unfortunate but understandable aspect of the restructuring. The timing might have been handled more tactfully, but in and of itself, this incident does not betray anything sinister.

[98] I accept the jurisprudence offered by both parties as establishing my authority to determine jurisdiction in such a case as this. To quote from and add to the words of the adjudicator in *Ho*,

> …
>
> *… while I appreciate that this whole matter was not a happy experience for the grievor, one needs to offer more, when it comes to meeting a burden of proof, than his or her perceptions. In this case, there is no corroborating evidence that supports the grievor's allegations that the reason that* [the employer abolished his position] *… was* [that it did not want him around, and that it wanted] *to punish him.*
>
> …

[99] Like the adjudicator in *Ho*, I find no disguised discipline. Therefore, I conclude that I am without jurisdiction to hear this particular grievance.

[100] With respect to the second grievance, pertaining to the employer's failure to appoint the grievor to the position of Director, Distribution and Market Development, I disagree with the grievor's contention that he was not considered.

[101] The grievor was a known commodity in the NFB. Mr. Dufour testified to knowing him as well as he knew all his personnel. He testified that no one among the approximately 400 NFB employees at the time fit the bill. Mr. Dufour testified that it was obvious that management would have to look outside the organization. More was at stake than simply saving money, according to Mr. Dufour. It was a response to

perceived changes in the industry. Mr. Dufour was not challenged on his observations, and I accept them as proof that the grievor was duly considered, but was found wanting.

[102] This is corroborated by the notations appearing on the restructuring reports mentioning the grievor by name (and elsewhere by his initials) and stating explicitly that he did not fit the profile.

[103] Although it is true that one of the grievor's former subordinates eventually received a promotion, I do not accept the argument that this position could have been made available to the grievor. Doing so would merely have displaced the problem. I find that the research and analysis were a legitimate exercise, the result of which was that the grievor's position, not that of the former subordinate, was affected.

[104] The grievor could have received greater attention and could possibly have remained with the NFB by applying for a position at a level equal or lower to his own, in keeping with the provisions of the collective agreement. He could have done so at the same time as he applied for the promotion. He chose not to.

[105] There is no obligation on the employer to create a new position for the grievor. I find that the employer honoured the terms of the collective agreement.

[106] The second grievance is also dismissed.

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

(The Order appears on the next page)

V. Order

[108] The grievances are dismissed.

September 14, 2021.

James R. Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board