

**Date:** 20210624

**File:** 566-03-12322

**Citation:** 2021 FPSLREB 74

*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

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BETWEEN

**BLAIR CARON**

Grievor

and

**CANADIAN NUCLEAR SAFETY COMMISSION**

Employer

Indexed as

*Caron v. Canadian Nuclear Safety Commission*

In the matter of an individual grievance referred to adjudication

**Before:** David Olsen, a panel of the Federal Public Sector Labour Relations and  
Employment Board

**For the Grievor:** Himself

**For the Employer:** Marc Séguin, counsel

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Heard at Ottawa, Ontario,  
December 10 to 14, 2018, June 3, 4, and 6 and October 28 to 31, 2019, and January 20  
to 24, 2020, and by videoconference November 16 to 20, 2020.  
(Written submissions filed January 18 and March 1 and 29, 2021.)

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**REASONS FOR DECISION**

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**I. Request before the Board**

[1] Blair Caron (“the grievor”) was employed as a financial systems analyst at the Canadian Nuclear Safety Commission (“the employer”) in its Financial Resources Management and Systems Division (“the division”).

[2] By letter dated November 16, 2015, Daniel Schnob, Director General of Finance and Administration at the employer, advised the grievor that his employment was terminated for unsatisfactory performance. He was advised that a review of his overall performance indicated that he did not meet the requirements of his position as a REG 5 financial systems analyst, even though he had been clearly advised of the performance deficiencies and had been provided with extensive support to improve his performance to a satisfactory level. The essential requirements of his position that he did not meet included the overall quality of his work, showing initiative and ownership, time management, and working independently.

[3] The letter recited that he had been informed of his job expectations through numerous meetings and written communications and that in letters dated August 14 and October 21, 2015, he had been advised of the deficiencies and the consequences of not improving his performance to a satisfactory level.

[4] The letter recited that despite the efforts that had been made to help him by the implementation of an action plan, assigning him a special project (“CPMRS BI”), and providing him with timely feedback, he had not demonstrated the ability to bring his performance up to an acceptable level.

[5] The letter acknowledged that although he had recently made progress in terms of productivity, unfortunately, the overall quality of his work remained unsatisfactory, and the involvement required from management in his daily work still went beyond what was reasonable and acceptable.

[6] On December 17, 2015, the grievor grieved his dismissal pursuant to clause 23.02 of his collective agreement. He claimed that the letter of dismissal lacked any specifics or proof; that it was unsubstantiated, unwarranted, and lacking in natural justice and therefore issued in bad faith; and that it appeared to be disguised discipline.

[7] He claimed that during the six months before his termination, he had been subjected to several forms of harassment. He alleged that no genuine effort was made to supply him with proper training in the areas in which the employer claimed he was lacking. He believed that he was dismissed for reasons unrelated to performance.

[8] By way of corrective action, he sought reinstatement to the termination date, with all pay and benefits.

[9] The employer replied at the final level of the grievance process on February 25, 2016, denying the grievance and asserting that the decision to terminate the grievor's employment was justified and based solely on unsatisfactory performance.

[10] On March 30, 2016, the grievor's bargaining agent referred his grievance to adjudication under s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2), alleging disciplinary action resulting in termination, demotion, suspension, or financial penalty. He was self-represented at adjudication.

[11] 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* ("the Act"). Note that in this decision, "the Board" also refers to all predecessors of the current Board.

## **II. Background**

[12] Mr. Caron graduated from Carleton University with a degree in economics and business in 2001. In March 2005, he was hired by the National Roundtable on the Environment and Economy as a financial and administration officer at the FI-01 level, the entry level for finance professionals. In 2007, he made a lateral move to the employer. He was appointed as an indeterminate employee classified REG 5, which is equivalent in salary to an FI-02.

[13] Bruce Nichol was the team lead in the financial systems group when Mr. Caron was hired. The number of employees in the group varied. Initially there were two, him and Jeff McCambley. Then two more were hired. The Corporate Performance Management Reporting System (CPMRS) was started, and an additional three persons were hired, resulting in a team of seven. It was reduced to five when the project ended.

[14] The CPMRS took information from three financial systems reporting on business information using Cognos software.

[15] Mr. Caron's position was that of a financial systems analyst, and his duties and responsibilities were to support financial systems as part of a group.

[16] Every department had financial management systems. The employer's was called FreeBalance. It also had a system named Performance Budgeting for Human Capital (PBHC). The revenue system, which was in-house, was called Louis.

[17] Under the CPMRS, Mr. Caron's specific duties related to a ticket system dealing with requests for new reports and resolving discrepancies within the financial system.

[18] Performance Budgeting for Human Capital system was very delicate. It involved importing salary data.

[19] The employer developed a ticket system for the financial group. If an issue could not be resolved within 15 minutes, a ticket was created and sent to a member of the group or to Mr. Nichol. The system was received very well. Usually, Mr. Nichol assigned the ticket.

[20] Initially, there were no issues with Mr. Caron's work performance. Subsequently, however, management alleged that he had issues with closing tickets and that his performance usually but not always needed improvement. Problems with his tardiness and attendance were also alleged. Mr. Caron's performance impacted the team.

[21] On May 10, 2012, Mr. Nichol issued an instruction letter to Mr. Caron, the purpose of which was to express concerns about his absenteeism and tardiness that impacted work performance. The letter also contained presence-at-work instructions relating to hours of work, lateness, and leave-application procedures. It also stated that all personal business, including phone calls, was to be completed outside work hours.

[22] Other allegations were about performance management and especially about Mr. Caron's lack of attention to detail in his work.

[23] Jeff McCambley became the chief team lead when Mr. Nichol retired in June 2013. At that time, the team comprised five employees, including Mr. Nichol, who was rehired as an alumnus, Mike Dorris, Pascale Charpentier, Mr. Caron, and a student.

[24] Normally, Mr. Caron was responsible for FreeBalance. He had used it at his previous job. It was one of the reasons that he was hired.

[25] In terms of Mr. Caron's performance, it was alleged that the main issue was his attention to detail.

[26] In June 2014, the employer hired a new director general, Mr. Schnob. He realigned the Finance and Administration Directorate. In September 2014, the financial systems group was reassigned to Nancy Sigouin. At that time, she became Mr. Caron's director. He was in his REG 5 position within the financial systems group. She did not supervise any of his work.

### **III. Change to assignments**

[27] Mr. McCambley was away on language training in the fall of 2014. When he came back from it in January, he had to change assignments, as Ms. Charpentier and Mr. Caron had had issues.

[28] Mr. Caron had been responsible for FreeBalance, and Ms. Charpentier, the PBHC and the salary management system. Mr. Caron was classified REG 5; Ms. Charpentier, REG 4. She complained that she performed more work as a REG 4 than Mr. Caron did as a REG 5.

[29] Mr. McCambley had two REG 5s. He decided to assign the PBHC to Mr. Caron. He decided to give FreeBalance to the other REG 5, Mr. Dorris. This was done in mid-February.

[30] Over the course of the next six weeks until the fiscal year end, Mr. Caron's sole responsibility was to learn the PBHC. The rest of the team was there to help him. They did not want him going to Ms. Charpentier.

[31] Mr. Caron requested banked time to complete his tasks. Employees are required to put in 7.5 hours per workday. Banked time allows employees to work hours in excess of a normal workday that then may be used as leave with pay, subject to operational requirements.

[32] Mr. McCambley refused the request as Mr. Caron should not need to work excess hours in a day to accomplish his work. Mr. McCambley stated that Mr. Caron had only one responsibility, the PBHC, which was not a full-time position at the employer and never had been. Mr. McCambley stated that he made it a full-time job so that Mr. Caron could learn the PBHC. This was important in terms of timing, as the fiscal year end was coming and was to be his sole responsibility.

[33] Mr. Caron went on vacation. However, significant errors in his work for the fiscal year end were alleged, and other team members had to redo the year-end process over an Easter holiday weekend. As a result, his year-end performance evaluation reflected that he had to improve in all categories.

[34] Management contemplated reassigning Mr. Caron to FreeBalance. But it decided to put him on a performance management plan in an attempt to provide him with an opportunity to improve his performance with respect to either the work he was performing or a special project.

[35] The strategic roadmap of the group included a phase 3 plan for the CPMRS, which was to switch from Microsoft Access databases to a reporting tool.

[36] The CPMRS was the employer's internal reporting system. When it was implemented in 2008, the fields from the financial systems had to be put into one reporting system. However, not all the fields were placed into the CPMRS; some were missing.

[37] Management thought that it would be a good project for Mr. Caron as it was suited to his competencies, given that he had worked with FreeBalance and the Access databases and a little with Louis. He would be focused on all the reporting.

[38] Mr. Caron was given the option of continuing with his regular work for the purpose of the performance management plan or the special project. He elected to do the special project. The starting date for it was July 6, 2015. The deadline was December 31, 2015.

[39] Action-plan meetings to review progress were normally held every two weeks with the director, Ms. Sigouin, and Mr. Caron. In addition, Mr. McCambley and Mr. Caron also had regular weekly meetings to discuss technical issues. Following each action-plan meeting, Ms. Sigouin provided Mr. Caron with comments on his progress over the previous two weeks.

[40] On August 14, 2015, and again on October 21, 2015, Ms. Sigouin provided Mr. Caron with a letter about his performance issues. She advised him that he had made only minimal progress on the special project, which was insufficient to meet the December 31 deadline, and that his performance remained unsatisfactory. The letters also formally advised him that if he failed to meet the expectations and objectives, it could result in the termination of his employment for unsatisfactory performance.

[41] By letter on November 16, 2015, Mr. Schnob, the director general of Finance and Administration, advised Mr. Caron that his employment was being terminated for unsatisfactory performance.

#### **IV. Three objections to the Board's jurisdiction**

[42] At the outset of the case, the employer made three objections to the Board's jurisdiction; the first about its jurisdiction to assess the reasonableness of the employer's opinion that the grievor's performance had been unsatisfactory, the second about its jurisdiction to hear allegations that the employer harassed him in the six months leading to his termination, and the third about its jurisdiction to hear allegations that the employer failed its duty to accommodate him on the basis of disability, under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[43] For the reasons that follow, I uphold the employer's three objections to the Board's jurisdiction.

[44] The sole issue before the Board is whether Mr. Caron was the subject of disguised discipline, which would clothe the Board with jurisdiction to determine whether his discharge was for cause.

[45] I will deal with these objections at the outset of the reasons.

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**A. Whether the Board has jurisdiction to assess the reasonableness of the employer's opinion that the grievor's performance had been unsatisfactory**

**1. The employer's argument**

[46] The employer made its first objection on the following grounds.

[47] Under order in council PC 2000-1135, dated July 22, 2000, the employer's president was given the Treasury Board's powers with respect to personnel management. Those powers are set out in the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*). Section 12(1)(d) provides that the employer can terminate employment for unsatisfactory performance. Under that authority, the employer terminated the grievor's employment for unsatisfactory performance.

[48] Section 209(1) of the *Act* provides that an employee may refer to adjudication an individual grievance related to the following:

*209(1)(c) ... in the case of an employee in the core public administration,*

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

...

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

[49] Section 209(3) provides that the Governor in Council may, by order, designate any separate agency for the purposes of s. 209(1)(d).

[50] Employees of the employer are not employees in the core public administration as defined in s. 2(1) of the *Act*, which has the same meaning as s. 11(1)(a) of the *FAA*. The employer is not listed in Schedules I or IV to the *FAA*.

[51] The employer is not designated under s. 209(1)(3) of the *Act* for the purposes of s. 209(1)(d). Only the Canada Revenue Agency and the Canadian Food Inspection Agency are so designated.

[52] The employer is not within the purview of the Board's power under s. 230 of the *Act* to assess the reasonableness of its decision to terminate an employee for incompetence.



[53] The Board has jurisdiction under section 209(1)(b) of the *Act* to determine whether the employer used disguised discipline.

[54] In the employer's view, the grievor's allegations that it used disguised discipline are unsubstantiated. The evidence that the Board heard indicates that the decision to terminate his employment was based on unsatisfactory performance.

## **2. The grievor's position**

[55] Mr. Caron stated that he agreed that the Board does not have jurisdiction under s. 230 of the *Act*.

## **3. Conclusion**

[56] Section 230 of the *Act* provides the following:

*230 In the case of an employee in the core public administration or an employee of a separate agency designated under subsection 209(3), in making a decision in respect of an employee's individual grievance relating to a termination of employment or demotion for unsatisfactory performance, an adjudicator or the Board, as the case may be, must determine the termination or demotion to have been for cause if the opinion of the deputy head that the employee's performance was unsatisfactory is determined by the adjudicator or the Board to have been reasonable.*

[57] The employer in this case is a separate agency that has not been designated under s.209(3) of the *Act*. Accordingly, I conclude that the Board does not have jurisdiction to assess or review the reasonableness of the employer's opinion that Mr. Caron's performance was unsatisfactory under s. 230.

## **B. Whether the Board has jurisdiction to hear allegations that the employer harassed the grievor in the six months leading to his termination**

### **1. The employer's argument**

[58] The employer argued that the Board is without jurisdiction to hear the harassment allegations.

[59] Article 6 of the collective agreement between the employer and the Professional Institute of the Public Service of Canada (PIPSC) (expired on March 31, 2018; "the collective agreement"), which is the no-discrimination clause, deals in part with harassment. It reads as follows:

*6.01 There shall be no discrimination, interference, restriction, coercion, **harassment**, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, gender identity and expression, family status, marital status, mental or physical disability, conviction for which a pardon has been granted or membership or activity in the Institute.*

[Emphasis added]

[60] To pursue a harassment allegation at adjudication, an allegation is required that article 6 of the collective agreement was contravened, which would require that the grievance was referred to adjudication under s. 209(1)(a) of the *Act*. That provision relates to the interpretation or application of a provision of a collective agreement or arbitral award. Also required is the bargaining agent's agreement to represent the grievor at adjudication, as required under s. 209(2).

[61] The grievance was referred to adjudication under s. 209(1)(b) of the *Act*, which deals with discipline cases. The grievance was not also referred under s. 209(1)(a), which relates to the interpretation or application of a provision of a collective agreement or arbitral award. In addition, the grievor's bargaining agent withdrew its support to represent him in the referral to adjudication under s. 209(1)(b), with respect to discipline.

## **2. The grievor's argument**

[62] The grievor did not present any argument on this issue.

## **3. Conclusion**

[63] I am satisfied that the Board does not have jurisdiction to hear and determine harassment allegations. As argued by the employer, there has been no allegation of a violation of Article 6 of the collective agreement; further, the bargaining agent has not provided its support for a referral to adjudication of a grievance relating to this provision. However, I ruled that I would hear factual evidence that was arguably relevant, irrespective of how it was labelled, to the issue of whether the employer engaged in disguised discipline.

**C. Duty to accommodate, and discrimination – Does the Board have jurisdiction to hear allegations that the employer failed its duty to accommodate him on the basis of disability, under the CHRA**

[64] During the course of the hearing, the grievor sought to introduce doctors' notes and his own in person testimony into evidence that gave rise to allegations of discrimination and an alleged failure by the employer to accommodate him under the duty to accommodate. The parties were given an opportunity to make both oral and written submissions on the issue.

**1. The employer's argument**

[65] The employer argued that the Board should focus on disguised discipline, a sham, or a camouflage as opposed to discrimination. Discrimination is a legal test. Disability is a legal test. It cannot be a factor in disguised discipline. The grievor would have to go through the analysis and establish a *prima facie* case, and if he established one, the burden would shift to the employer to accommodate him to the point of undue hardship. This is a legal test, not a sub-factor of discipline.

[66] There is no discrimination allegation in the grievance. There is no reference to discrimination in the wording. Discrimination is based on article 6 of the collective agreement. The grievor does not have union support. This grievance was not referred to adjudication under s. 209(1)(a) of the *Act*.

[67] It is clear that the duty to accommodate is not before the Board.

[68] The decisions in *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115; *Chamberlain v. Attorney General of Canada*, 2015 FC 50 ("*Chamberlain FC*"); and *Remtulla v. Treasury Board (Public Health Agency of Canada)*, 2013 PSLRB 132, stand for the principle that the Board does not have an inherent right to interpret and apply human rights legislation in the absence of an arbitrable dispute.

[69] Section 226 of the *Act* gives the Board the authority to apply the *CHRA* in the context of a proper grievance, but there is no inherent right to come before the Board.

**2. The grievor's argument**

[70] The following is a summary of and extracts from the grievor's written submissions.

[71] The grievor began by referencing s. 241(1) of the *Act*, which states that no proceeding under the *Act* is invalid by reason only of a defect in form or a technical irregularity. There should be no issues that remove his rights and arguably relevant evidence supporting his allegations of the employer's failure to accommodate him, of harassment, and of disguised discipline. The relevant law and Acts in the proceeding before the Board and the jurisprudence following them should be given due weight.

[72] He also made submissions with respect to *Chamberlain*. He first wanted to clarify the decisions related to Ms. Chamberlain. More on the duty to accommodate, including disability, there are 11 prohibited grounds of discrimination under the *CHRA*. An employer's failure to accommodate needs related to any of these grounds, knowingly or unknowingly, is effectively considered discrimination. As the *CHRA* explains, employers need to examine how workplace rules and procedures affect employee's rights, to ensure that they are preventing discrimination.

**a. Analysis: *Burchill* objection**

[73] The most apt articulation of the principle in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), and its consistency with the principles articulated by the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, 2003 SCC 42, is found in the Federal Court's decision in *Boudreau v. Canada (Attorney General)*, 2011 FC 868, in which the Court stated at paragraph 18 as follows:

*18. The court notes that the arbitral decisions referred to by the Supreme Court in Parry Sound, above, establish that "the grievance should be liberally construed so that the real complaint is dealt with" (Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners [sic] of America, Local 2486, (1975) 8 OR (2d) 103 (CA) at page 108) and, as stated by the Supreme Court of Canada in Parry Sound, above, at para 69, reflect the view that procedural requirements should not be stringently enforced in those instances in which the employer suffers no prejudice. The Court sees no inconsistencies with these principles and what the Federal Court of Appeal has decided in Burchill, above, as long as the referral to adjudication under section 209 of the Act does not change the nature of the grievance originally filed by an employee or the bargaining agent under section 208 of the Act or the collective agreement.*

[74] Mr. Caron objected to the application of the *Burchill* principle in this case. He submitted that his disability and family status were characteristics protected from

discrimination under the *CHRA* and that there was no question that he experienced an adverse impact with respect to employment by being terminated.

### 3. Conclusion

[75] On December 20, 2019, I issued an interim decision in writing on the issue, as follows:

*Having carefully reviewed the parties [sic] submissions, the Board determines that any issues pertaining to discrimination and the duty to accommodate do not form part of the grievance before the Board. Discrimination and the duty to accommodate are not raised on the face of the grievance. The grievance was referred to the Board under section 209(1)(b) of the Federal Public Sector Labour Relations Act which provision deals solely with disciplinary action. Provisions with respect to discrimination and the duty to accommodate are incorporated into the collective agreement. Section 209(1)(a) of the Act deals with grievances relating to the interpretation and application of the collective agreement. The Act provides that before referring an individual grievance, concerning matters relating to the interpretation or application of a collective agreement to adjudication, the employee must obtain the approval of his bargaining agent to represent him in the adjudication proceedings. The bargaining agent has not provided support for the grievance as required under the law. The Board does not have an inherent right to interpret and apply human rights legislation without an appropriate grievance before it.*

[76] The Federal Court authoritatively decided this issue in *Chamberlain FC*, when it determined that the adjudicator did not err in determining that he did not have jurisdiction to deal with human rights allegations because he did not have jurisdiction over the grievance in the first place.

[77] In that case, Ms. Chamberlain, an employee excluded from collective bargaining and thus not covered by a collective agreement, claimed that the workload related to her position was excessive and that the director general to whom she reported was difficult and aggressive. She further claimed that she was subjected to harassment.

[78] Her allegations were investigated, but she was not satisfied with several aspects of the investigation's conclusions.

[79] Ultimately, she filed a grievance. When it was denied at the final level of the grievance process, she referred it to adjudication under s. 209(1)(b) of the *Act*, alleging disciplinary action resulting in termination, demotion, suspension, or financial penalty.

The grievance also raised human rights issues; namely, the employer failed to accommodate her, and she had been subjected to discrimination under the *CHRA*.

[80] In response to the employer's objection to jurisdiction, the adjudicator dismissed the grievance on the basis that it was not covered by s. 209(1)(b) because it did not relate to disciplinary action. The adjudicator failed to deal with the human rights issue. The Federal Court remitted that issue back to him to determine whether Ms. Chamberlain's allegations of breaches of the *CHRA* were adjudicable under the *Act*.

[81] The adjudicator had to determine whether s. 226(1)(g) of the *Act*, now s. 226(2)(a), which specifically provides that an adjudicator has the power to interpret and apply the *CHRA*, granted him jurisdiction to entertain Ms. Chamberlain's allegations of *CHRA* violations.

[82] The adjudicator determined that s. 226(1)(g) did not attribute jurisdiction to an adjudicator with respect to grievances that raise standalone *CHRA* violations and that it would apply only once a grievance was first properly referred to adjudication under a. 209(1) and if interpreting and applying the *CHRA* were required for to resolve the issue raised in the grievance.

[83] Ms. Chamberlain applied to the Federal Court for judicial review of the adjudicator's decision that he did not have jurisdiction to deal with her allegations of *CHRA* violations.

[84] The Federal Court dismissed the application. In its reasons for decision, the Court stated at paragraphs 39 to 41 as follows:

*[39] The legislative scheme adopted by Parliament in relation to the grievance processes applicable to public service employees is very specific, and it is different from those generally seen in the private sector. Parliament chose to provide a "right to grieve" on several matters related to employment conditions to all public servants, including those not represented by a bargaining agent and not covered by a collective agreement....*

*[40] However, Parliament also chose to limit the types of grievances that employees could refer to adjudication. Section 209 of the PSLRA circumscribes and limits the types of grievances that can be referred to adjudication....*

*This decision will determine whether the PSLRA provides a right to an employee to refer a grievance alleging a violation of the CHRA arising independently of the collective agreement. Is a grievance*

*adjudicable on the sole basis it alleges a violation of the CHRA and in the absence of a factual determination that would give rise to adjudication pursuant to paragraph 209 (1) (a) of the PSLRA?*

*[41] Section 209 does not encompass individual grievances filed by employees who are not covered by a collective agreement and which raise stand-alone CHRA violation issues. In my view, section 209 is the only provision of the PSLRA that attributes jurisdiction to a grievance adjudicator. Section 226 does not create another category of grievances that can be referred to adjudication....*

[85] In *Remtulla*, applying the decision in *Chamberlain*, the Board determined that in the case of a grievor who had alleged in her grievance a violation of article 6, the no-discrimination clause of the collective agreement at issue, and a failure to accommodate by the employer, it did not have jurisdiction to hear the grievance as the grievor did not have her bargaining agent's approval, as required by s. 209(2) of the Act. Consequently, her grievance was not referable to adjudication under s. 209(1)(a). I find the same analysis applies here. The grievor did not refer the matter as a collective agreement dispute. Even if it could be accepted that he had, the grievor does not have the support of his bargaining agent and so by virtue of s.209(2), it would not be properly before me. Accordingly, I do not have jurisdiction to hear allegations of discrimination and a failure to accommodate in this case.

#### **D. Conclusion - the jurisdiction issues**

[86] In light of the foregoing analysis, the Board was without jurisdiction to hear this grievance unless the grievor could demonstrate that his termination was disguised discipline.

#### **V. The sole issue before the Board: Was Mr. Caron subjected to disguised discipline?**

[87] The sole issue before the Board is whether Mr. Caron was subjected to disguised discipline, which would clothe it with jurisdiction to determine whether his discharge was for cause.

[88] The Federal Court of Appeal has provided guidance on how the doctrine of disguised discipline is to be applied. In *Bergey v. Attorney General of Canada*, 2017 FCA 30, the Court reviewed the statutory background as well as the jurisprudence relevant to the development of the notion of disguised discipline, under which the Board characterized certain decisions that the employer claimed were non-disciplinary

and therefore not adjudicable, as being in fact disciplinary in nature, which clothed the Board with jurisdiction to hear and determine the cases.

[89] The Court notes at paragraph 34 of that decision that both it and the Federal Court have recognized the legitimacy of this approach, citing *Basra v. Canada (Attorney General)*, 2010 FCA 24; *Canada (Attorney General) v. Frazee*, 2007 FC 1176; and *Chamberlain v. Canada (Attorney General)*, 2012 FC 1027.

[90] The Court reviewed the principles arising from the case law on how to distinguish between disciplinary and non-disciplinary employer action, commencing at paragraph 37, as follows:

*[37] The case law recognizes that distinguishing between a disciplinary and a non-disciplinary employer action requires consideration of both the employer's actual (as opposed to stated) intentions in taking the action and of the impact of the action on the employee's career. As I noted in Chamberlain at paras. 56-57:*

*Determination of whether an act is disciplinary is a fact-driven inquiry and may involve consideration of matters such as the nature of the employee's conduct that gave rise to the action in question, the nature of the action taken by the employer, the employer's stated intent and the impact of the action on the employee. Where the employee's behaviour is culpable or where the employer's intent is to correct or punish misconduct, an action generally will be viewed as disciplinary. Conversely, where there is no culpable conduct and the intent to punish or correct is absent, the situation will generally be viewed as non-disciplinary (Lindsay v. Canada (Attorney General), 2010 FC 389 at para 48, 369 F.T.R.64]; [Frazee at paras. 23-25]; Basra v Canada (Deputy Head - Correctional Service), 2008 FC 606 at para 19, [2008] FCJ No.777).*

*Some situations are obviously disciplinary; these would include, for example, situations where the employer overtly imposes a sanction (like a suspension or termination) in response to an employee's misconduct. Others are more nuanced and require assessment of the foregoing factors to determine whether the employer's intent actually was to discipline the employee even though it may assert it had no such motive. Justice Barnes explained the requisite inquiry in the following terms in Frazee at paragraphs 21-25:*

*[T]he issue is not whether an employer's action is ill-conceived or badly executed but, rather, whether it amounts to a form of discipline [...] an employee's feelings about being unfairly treated do not convert administrative action into discipline [...]*



*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 [...]*

*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 the necessary controlling consideration which allows an adjudicator to look behind the employer's stated motivation to determine what was actually intended. [...]*

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

*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 [...]*

*[citations omitted]*

*[38] Donald J.M. Brown and David M. Beatty, in their leading work on labour arbitration, Canadian Labour Arbitration (4<sup>th</sup> ed.) (Toronto: Thomson Reuters, 2006) [Brown & Beatty], similarly recognize the foregoing as the requisite inquiry in distinguishing disciplinary from non-disciplinary actions, stating at paragraph 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 employer's part by punishing the employee in some way. An employer's assurance that it did not intend its actions 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.*

...

## VI. Overview of the grievor's submissions

### A. Analysis

[91] To recap, I have determined that the Board does not have jurisdiction over the following:

- to review the reasonableness of the employer's assessment that the grievor's performance was unsatisfactory;
- to hear the harassment allegations;
- to hear and determine allegations that the employer failed its duty to accommodate him under the *CHRA* without a grievance supported by the bargaining agent alleging a contravention of the no-discrimination provisions of the collective agreement; and
- to hear the grievance unless he could demonstrate that his termination was due to disguised discipline, which would clothe the Board with jurisdiction to determine whether his discharge was for cause.

[92] I referred to the Federal Court of Appeal's decision in *Bergey* for guidance on the application of the doctrine of disguised discipline.

[93] I will summarize the factors to apply to distinguish between disciplinary and non-disciplinary employer actions.

[94] These are the factors to apply when considering both the employer's actual (as opposed to stated) intentions in taking the action and of the impact of the action on the employee's career (See *Bergey*, para. 37):

*Determination of whether an act is disciplinary is a factual inquiry.*

*Factors*

*The nature of the employee's conduct giving rise to the action*

*The nature of the action taken by the employer*

*The employer's stated intent*

*The impact of the action on the employee*

*Where the behaviour was culpable or where the employer's intent is to correct or punish misconduct, an action will generally be viewed as disciplinary*

*Where there is no culpable conduct and the intent to punish is absent, the situation will generally be viewed as nondisciplinary [sic]*

*Obvious disciplinary situations*

*The employer overtly imposes a sanction like a suspension or termination in response to an employee's misconduct.*

*Nuanced situations*

*Requires assessment of the factors to determine whether the employer's intent actually was to discipline the employee even though it may assert it had no such motive*

*the requisite inquiry*

*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 [...] An employee's feelings about being unfairly treated do not convert administrative action into discipline.*

*The question to be asked is whether the employer intended to impose discipline and whether it's [sic] impugned decision was likely to be relied upon in the imposition of future discipline.*

*How the employer chooses to characterize its decision cannot be by itself a determinative factor.*

*An adjudicator is allowed to look behind the employer's stated motivation to determine what was actually intended.*

*Where the impact of the employer's decision is significantly disproportionate to the administrative rationale being served, the decision may be viewed as disciplinary.*

*The 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.*

*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*

[95] In *Canadian Labour Arbitration*, authors Brown and Beatty state this:

...

*In deciding whether an employee has been disciplined or not, arbitrators look at both the purpose and effect of the employer's action in determining whether an employee has been disciplined or not.*

*The essential characteristic of disciplinary action is an intention to correct bad behaviour on the 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...*

...

[96] The case law is clear that the grievor bears the onus of establishing that on a balance of probabilities, it is more likely than not that the employer engaged in disguised discipline.

[97] The grievor identified a number of incidents that he claimed constitute disguised discipline.

[98] I will endeavour to assess the evidence in light of the overlapping factors that the case law indicates are relevant considerations.

## **VII. Summary of the evidence**

[99] With the concurrence of the employer, the grievor called his evidence first. He testified and called as a witness Harold Marcotte, an employee of the employer and a PIPSC representative.

[100] The employer called four witnesses, Mr. Nichol, Mr. McCambley, Ms. Sigouin, and Mr. Schnob.

[101] Mr. Nichol was the team lead in the Financial Systems Group until his retirement in June 2013. He returned to work under the Alumni Program, under which retirees could be called back to work three days a week until December 31, 2019. Mr. Caron reported to Mr. Nichol from 2007 to 2013.

[102] Mr. McCambley was the chief of the Financial Systems Group and became the team lead when Mr. Nichol retired. He started working for the employer in 2001 as a financial advisor. He worked with Mr. Nichol and the systems team for 15 years. Mr. Caron also worked on the systems team. Mr. McCambley was Mr. Caron's direct supervisor from June 2013 to December 2015.

[103] Ms. Sigouin held was the director on an acting basis and the director of the Financial Management Service Group. She was employed by the employer for a total of 11 years. In September of 2014, she became responsible for the Financial Systems Group. Mr. McCambley reported to her.

[104] At all material times, Mr. Schnob was the employer's deputy chief financial officer, a position he held for six years until his retirement in 2020. He was accountable for the employer's finance and financial management, along with all aspects of security and contracting. On the finance side, he was responsible for all

aspects of accounting operations, financial management, and accounting management. Ms. Sigouin reported to him as the director for the entire time he was employed by the employer. Mr. Schnob made the decision to terminate Mr. Caron's employment and authored the letter of termination.

[105] For coherency, I will assemble the relevant evidence and endeavour to present it in accordance with issues to be resolved in chronological order. It should be noted that the hearing of the evidence in this case proceeded over a number of weeks and years. As the grievor was self-represented, he was provided with latitude to establish his case, and he called evidence not strictly relevant to the issues. I have endeavoured to limit the evidence recited solely to the issues that must be resolved.

**A. The nature of the employer's action and its stated intent**

[106] On November 16, 2015, Mr. Schnob, the director general, advised the grievor in writing that his employment was being terminated for unsatisfactory performance and that a review of his overall performance indicated that he did not meet the essential requirements of his position as a REG 5 financial systems analyst.

[107] The essential requirements were maintaining the overall quality of his work, initiative and ownership, time management, and working independently.

[108] The letter referred to an action plan having been implemented to help him bring his performance up to a satisfactory level; however, he had not demonstrated that ability.

[109] In his testimony, Mr. Schnob stated that for a number of years, the grievor had not been performing adequately, that a director and a previous director had warned him that Mr. Caron's performance was not up to par, and that clients had complained. Colleagues had come to him in tears and had stated that they would leave the team.

[110] He described the policy instrument outlining the termination-of-employment process in cases of incompetence. He understood that the employee must be asked to show improvement, does not improve, and is advised of this both orally and in writing. There is an expectation that the employee will be provided support and direction and will be given the opportunity to show improvement. The employee must be warned that he or she could be terminated or reassigned.

**B. The employer's evidence supporting Mr. Schnob's contention that the grievor had not been performing adequately for a number of years**

[111] Mr. Nichol stated that initially, when Mr. Caron joined his team in 2007, there were no performance issues. However, issues arose with closing tickets, and his performance usually but not always needed improvement. He began closing issues without completion dates or solutions; they were switched from open to closed. They were solved, but no resolutions were stated, and no precedents were listed on how they were resolved.

[112] Furthermore, he usually missed work deadlines, and tickets were not closed on time. He did not meet deadlines that could not be extended, such as with respect to software enhancements, which required shuffling resources to assign others to help.

[113] Tardiness and attendance problems came up. He would be up to a half hour late for work. He would improve, coast some, and then relapse.

[114] On February 14, 2012, Mr. Nichol wrote to Mr. Caron, outlining his reasons for requesting that Mr. Caron obtain a fitness-to-work evaluation. He recited statistics for August 2011 to January 2012, 6 months in which he recorded that the grievor had been sick 5 days, had left early or arrived late on 26 days, and had 7 medical appointments.

[115] Mr. Caron testified that he had never heard of a fitness-to-work evaluation before then. He thought that the request was hostile. He said that the contributing factors were that he was a problem, he was insubordinate, and he was challenging the employer.

[116] Mr. Nichol also referred to the dispositions of 33 tickets assigned to Mr. Caron during the same period. Of them, 5 had been reassigned, 4 were still active, 2 were presumed completed on due dates but were not determinable, 2 had been completed before their due dates, 9 had been completed past their due dates from 11 to 115 days late, and of the remaining 11, 18% were completed before their due dates, and 82% were completed late.

[117] Mr. Caron did not want to undergo a fitness-to-work evaluation. He refused it twice.

[118] Mr. Nichol provided Mr. Caron with a list of his expectations; namely, all his medical and dental appointments were to be preapproved in accordance with the Human Resources (HR) manual; all banked and personal leave had to be entered in the personnel system and had to be preapproved subject to operational requirements; the night manager was to receive all notices of the grievor's absences due to illness by 9 a.m. on the days of the absences; all his sick, medical, and dental needs had to be entered in the personnel system within 24 hours of his return; all his personal phone calls had to be completed outside work hours; and he had to confirm that he had set his work hours as 9 a.m. to 5 p.m.

[119] The following expectations were for how he was to deal with team tickets:

*Maintain ticket details regularly with progress; maintain the "portion completed" of the ticket.*

*Upon completion*

*Replace estimated effort with actual effort; Ensure the portion completed is set to 100%; fill in the completed date.*

[120] He had to set boundaries, as once, Mr. Caron had been absent for a week, and the employer did not know where he was. Other times, he would say that he was off sick or the employer would not receive any information at all.

[121] Mr. Caron referred to an email dated January 31, 2011, to Mr. Nichol entitled, "Re Whereabouts". In it, the grievor advised that he had been sent to a hospital's emergency department because he had experienced chest pains, and he was to undergo further tests. It was a heads-up as to why he had been missing for so long.

[122] On February 24, 2012, at a weekly meeting, Mr. Nichol confirmed that the core hours of work were from 9 a.m. to 3:15 p.m. and that the collective agreement stated that employees were expected to be at work during that time. In addition, discussed was how the teams' tickets were to be handled with respect to due dates.

[123] On March 8, 2012, Mr. Nichol wrote to Mr. Caron with respect to an error with something termed the "BC MS" import. The introduction to the lengthy email states that he wrote it because performance issues were still a problem, and he referred to previous occasions on which he spoke to the grievor about the need to improve his problem-solving skills.

[124] Mr. Caron's performance affected the team. Ms. Charpentier had an issue with him. Two other members said that they had concerns that he was getting away with things even though they were doing their best to help him raise his performance to where it had to be.

### **1. The May 10, 2012, instruction letter**

[125] On May 10, 2012, Mr. Nichol sent the instruction letter to Mr. Caron concerning his absenteeism and tardiness over the past several months, noting his failure to respect the core hours of work, including the lunch break and the requirement to work full days. Mr. Nichol advised him that the situation could no longer be tolerated as it was interfering with the employer's operations. Mr. Nichol noted that the situation had impacted the grievor's work performance and that training and meetings had been cancelled, which had impacted the team's effectiveness. Mr. Nichol also communicated his expectations when dealing with tickets, particularly with respect to deadline compliance.

[126] As a result, Mr. Nichol provided instructions that he expected Mr. Caron to follow with respect to his work attendance, as follows:

*I formally advise you that failure to follow instructions regarding presence of work could result in administrative or disciplinary measures.*

*The Presence at work Instructions expectations read as follows:*

*The hours of work are from 9 to 1715 and you are expected to work 7.5 hours per day.*

*The core hours are from 9 AM to 1515 p.m. All employees are expected to be at their jobs for this period unless their absences are authorized. The leave request application procedure must be followed at all times; meaning that all leaves [annual, personal, bank time, medical, competence a tour, etc.] Ask you requested and authorized in advance via PIP.*

*Late arrival at work or early departure from work must be requested directly to Bruce Nichol via email (or telephone) or to his replacement if applicable. You are hereby advised that future late arrivals will be deducted from pay.*

*Lunch period shall consist of 45 minutes taken between 1130 and 1330 hrs.*

*Rest period shall consist of 15 minutes in the morning and afternoon.*



*All unplanned absence from work for medical reason [sick leave] must be reported directly to Bruce Nichol or to his replacement if applicable via email or telephone before 9 AM*

*A medical certificate signed and dated by a medical doctor must be provided to substantiate all sickleave's and medical appointments*

*medical and dental appointments leave applied only in case of routine, periodic check up or appointment related to a particular complaint in accordance with article 4.5.6 of the human resources manual.*

*Outlook agenda must be explicit and transparent during working hours.*

*All personal business including phone calls are to be completed outside work hours.*

*[Sic throughout]*

[127] Mr. Nichol stated that this was the last step in determining whether Mr. Caron's performance issue was physical.

[128] During cross-examination, Mr. Caron confirmed that Mr. Nichol had outlined and noted statistics on his attendance and tardiness. He did not take issue with the them.

[129] The grievor was asked about his statement that he was refused banked time. He was asked how it was relevant to disguised discipline. Mr. Caron was referred to page 76 of the collective agreement, which deals with banked time. He was asked if the employer had any other policy that dealt with it. He replied that there were synergy documents.

[130] He confirmed that he had been a unionized employee. He was referred to a memorandum of understanding between management and the union with respect to banked time. He was asked if it required a manager's approval. He replied that that is what it said. It also said that banked time was being implemented on a trial basis and that the employee would be required to accumulate sufficient leave.

[131] He was asked if that was how it was administered. He stated that early on, he could make up time the following day. He could simply communicate with the supervisor and state that he had leave early and would make up the time the next day. It was not policy.

[132] Mr. Caron stated he was given the instruction letter because he was in a hostile environment. Period.

[133] During Mr. Nichols' cross-examination, Mr. Caron referred to the instruction letter and asked Mr. Nichol whether its expectations were accommodating or corrective. He replied that he did not like using the term "corrective" as it could be given the connotation of discipline. It was a statement of work-etiquette expectations. He stated that they were neither accommodating nor corrective. They were not punitive because the grievor was reimbursed if he had proof of a medical appointment.

[134] The instruction letter would be the first step in a performance improvement process. Mr. Nichol was asked whether the grievor was ever disciplined. Mr. Nichol replied that he had never disciplined him and that nothing was ever put in his file.

[135] Although the strict requirements for providing a medical certificate were lifted temporarily in 2014, the instruction letter remained in force for the balance of the grievor's employment.

[136] Mr. Caron stated that at the relevant time, he was going through a depression. Mornings were challenging, and he was looking for a flexible accommodation of his depression. He had requested to change his start time to 9:30 a.m. He stated that he was not a specialist but that he suffered from anxiety and a lack of motivation and confidence. He was asked if he had still been able to come into work. He replied that he had been but that on some days, he did not feel able to or came in later in the day.

[137] He was asked if he had still been able to pursue extracurricular activities. He said that sports and exercise are good for you. Bartending is the opposite of what was done in the office; it is easy. Doctors recommend all those things, to focus on the positive.

## **2. The grievor's submissions**

[138] The grievor argued that the instruction letter was excessively harsh. He queried whether it infringed the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act, 1982*, 1982, c. 11 (U.K.)) with a double-jeopardy effect and constituted unwarranted harassment. In this case, the employer never disciplined him for any of these absences.

[139] Although the instructions with respect to medical certificates were modified, the instruction letter remained in effect for the balance of his employment. He referred to the toxic environment involving leave. He said that the employer was very uncomfortable with leave. Management thought that he abused his leave privileges. The bargaining agent thought that he was within his rights. Other employees seemed to have flexibility and were granted liberties.

[140] Mr. Caron stated to Ms. Sigouin in cross-examination that she had the opportunity to discipline him when he arrived late to work. She replied, "You expected me to discipline you when you came in late?" He then asked her why she did not discipline him. She stated that she tried to work with him so that he could come in early.

### **3. The employer's submissions**

[141] The employer submitted that Mr. Caron's testimony and submissions were based on a feeling of being treated unfairly. For example, he testified at length about unfair treatment with respect to leave requests and the unfair application of banked time. As the Board has held, an employee's feelings about being unfairly treated do not convert administrative action into discipline. See *Garcia Marin v. Treasury Board (Department of Public Works and Government Services Canada)*, 2006 PSLRB 16 at para. 85.

### **4. Analysis**

[142] Mr. Nichol stated that it was not his intention to discipline Mr. Caron by issuing the instruction letter. The instructions all relate to Mr. Caron's terms and conditions of employment. Mr. Caron was a unionized employee. His terms and conditions were set out in the collective agreement.

[143] Article 7 of the collective agreement deals with hours of work. Clause 7.01(a) states this:

*7.01 (a) The normal work week shall consist of thirty-seven decimal five (37.5) hours over a five-day period, and the scheduled workday shall be seven decimal five (7.5) consecutive hours, exclusive of a meal period. All employees, unless the employee is taking authorized leave or is otherwise advised by the Employer, are expected to be at work from at least 9:00 to 15:15 from Monday to Friday inclusive.*

[144] Clause 7.04, on banked time, states this:

*7.04 At the request of an employee and with prior approval of the Employer, an employee may elect to work in excess of his or her normal hours of work either on a normal work day or on a day of rest or designated holiday and to accumulate these extra hours on a straight-time basis. Such accumulation of extra hours shall be on productive work.*

[145] Article 13 deals with sick leave. Clauses 13.02 and 13.03 read as follows:

*13.02 Sick leave with pay shall be granted when an employee is unable to work because of illness or injury provided that:*

*(a) the employee satisfies the Employer of this condition in such a manner and at such a time as may be determined by the Employer,*

*and*

*(b) the employee has the necessary sick leave credits.*

*13.03 Unless otherwise informed by the Employer, a statement signed by the employee stating that because of illness or injury the employee was unable to perform the employee's duties shall, when delivered to the Employer, be considered as meeting the requirements of clause 13.02 (a).*

[146] As a result of the instruction letter, it was Mr. Caron's evidence that he had filed, with the support of his bargaining agent, grievances alleging a violation of the collective agreement. However, the bargaining agent did not refer them to adjudication. In such a case, the employer's response at the final level of the grievance process would be final.

[147] In some organizations, especially in production environments, lateness and excessive absenteeism may be considered misconduct, and disciplinary action in the form of letters of reprimand and suspensions may be imposed on employees with the intention of correcting or punishing such behaviour.

## **5. Conclusion**

[148] In the circumstances of this case, I am not persuaded that the employer's intent was to punish the grievor or to correct his behaviour. In my view, it instructed him to live up to his part of the employment bargain and to comply with the terms and conditions of the collective agreement, such as reporting to work on time, putting in a full days' work, and accounting for absences such as medical appointments.

[149] The collective agreement gave management wide discretion in determining how an employee could satisfy it of the employee's medical condition. In this case, failing to do so did not result in a disciplinary response but rather a reduction in pay for the work time not accounted for. I conclude that Mr. Caron's evidence was based solely on his belief that he was treated unfairly. As noted, such a belief standing on its own does not transform administrative action into disciplinary action.

[150] I find there is no evidence to support the allegation that the instruction letter was a form of disguised discipline. As the instruction letter continued to govern the terms and conditions of the grievor's employment until his termination this analysis also applies going forward.

### **C. Performance issues**

[151] Mr. Nichol was referred to an email dated May 22, 2012, to Mr. Caron listing items discussed at a Friday, May 11, 2012, bilateral meeting. Mr. Caron was in charge of a software upgrade that gave rise to a number of performance issues, including testing being completed later than scheduled, little communication on the project's status, staging being upgraded before a sign off, staging data being refreshed thus wiping out six months of data, and work that another team member had already completed being duplicated.

#### **1. Further issues relating to attendance, tardiness, and work hours**

[152] Also referenced were events that occurred in the office during the grievor's absences, such as testing meetings not being scheduled, questions arising that could not be answered because information was locked in his cabinet, and questions requiring immediate answers when he was not yet there.

[153] Mr. Nichol again referred to the core hours of work and to the expectation that the grievor was expected to be in the office during those hours. He again advised Mr. Caron that if a medical reason was behind his actions, management recommended that he complete a fitness-to-work evaluation, which would allow it to work with him to accommodate all identified health issues. However, if no such evaluation was requested, then his attendance would be considered a performance issue and would be addressed in the future, in writing.

[154] On August 9, 2012, Mr. Nichol wrote to Mr. Caron summarizing their discussion that day about the lack of thoroughness in his work and his absenteeism.

[155] A second instruction letter, of April 3, 2014, written by Pierre Souigny, then Mr. Caron's director, removed the requirement to provide a medical certificate in all instances, but the expectations in the May 10, 2012, instruction letter still remained.

**2. Mr. Nichol's retirement, and Mr. McCambley becoming the chief of financial systems**

[156] After Mr. Nichol retired, Mr. McCambley became the chief of financial systems.

[157] In terms of Mr. Caron's performance, Mr. McCambley testified that attention to detail was the main issue. If a ticket came in and was assigned to Mr. Caron, then at the end of the process, whatever he had created had to balance with FreeBalance, but it was not done completely. This did not happen regularly, but it happened often enough. In addition, some of the requests were time sensitive.

[158] He referred to Mr. Caron's performance management document for 2013-2014, which he signed. The performance expectations for the mid-year cycle state that Mr. Caron needed to improve his attention to detail. At year end, it stated that Mr. Caron was good at dealing with clients, was professional, and had to review financials once completed but that his overall performance was good.

[159] However, Mr. McCambley referred to a number of documented incidents of Mr. Caron's performance shortcomings.

[160] Mr. McCambley referred to mistakes with respect to a report on overdue travel-expense claims in May 2013. The Chief of Accounting Operations had found that the grievor's report was not correct. She had asked for a completion overdue date of April 15, 2013, but some of the trips were for June 2013, so they were not late and should not have been in the report.

[161] He referred to his email to Mr. Caron dated October 3, 2013, concerning an incomplete ticket that had been sent to a client.

[162] He referred to a series of emails dated from December 17 to 23, 2013, with respect to an overdue travel report.

[163] The Chief of Accounting Operations had requested help to export a particular report in Excel. Mr. Caron provided an unhelpful response well past the service standards, which was documented.

[164] Mr. McCambley referred to an email dated February 14, 2014, as another example of a ticket that missed its completion date and that was not helpful. He was provided 121 pages of screenshots when he wanted an analysis.

[165] Mr. McCambley was on language-training leave in the latter part of 2014. Mr. Caron testified that Mr. McCambley's return was a deliberate step by management to terminate his employment.

### **3. Change to assignments - the PBHC**

[166] Mr. McCambley testified that in January 2015, he had to change assignments as issues had arisen between Ms. Charpentier, another member of the team, and Mr. Caron. She complained that as a REG 4, she performed more work than a REG 5, which was Mr. Caron's position. Mr. Schnob had testified that she had threatened to leave the team over the issue.

[167] Mr. McCambley decided that he would assign the PBHC, the salary management system, to Mr. Caron. He assigned FreeBalance, which Mr. Caron had been handling, to the other REG 5, Mr. Dorris. This came into effect in mid-February.

### **4. The grievor's submissions**

[168] Mr. Caron said that he was one of the few members of the team who had rarely worked on the PBHC and that he had little experience testing it. Ms. Charpentier, with whom he had the conflict, was efficient with it. He was told not to contact her but to contact Mr. Dorris to answer questions. He stated that he was also surprised by some of the changes to his duties. He had a good working relationship with the contracting group. He was put into a hostile environment. He had been in a positive environment and was moved to another unrewarding workplace that was hostile. He thought that it had more of a negative than a positive focus. He said that he was being set up for failure, which supports his contention of disguised discipline.

**5. Analysis: Review of Mr. McCambley's evidence**

[169] Mr. McCambley testified that over the next six weeks until the year end, Mr. Caron's sole responsibility was to learn the PBHC, with the support of the rest of the team. He thought that Mr. Caron would accept the challenge, but it did not motivate him.

[170] Mr. Caron stated that on May 14, 2015, he was to leave for his holidays. He was not caught up on the PBHC for the new fiscal year. The sign off for the new year was not expected until May 29. He thought that everything should be fine.

[171] Going into the new fiscal year over the Easter weekend while Mr. Caron was on vacation, other team members almost had to redo the fiscal year-end process as he had made many errors.

[172] As a result, Mr. Caron's final performance review reflected that he needed improvement in all categories. The review reflected that as a REG 5, he was expected to manage the financial system, the PBHC. Key requirements for managing it were timely, relevant, and reliable and reconciled data. Ultimately, all of management used the data to forecast salary requirements.

[173] While it was acknowledged that Mr. Caron was given the PBHC in February 2014, he had been working with the employer in its financial systems for more than eight years. However, by not paying attention to detail, the 2014-2015 year-end fiscal process had multiple errors that required a complete redo by another team member. It was noted that with a small team, if one person does not perform, then the whole team feels the burden. It was also noted that his attendance, presence at the office, and time-management skills on how to process day-to-day tasks required immediate attention.

[174] In the context of Mr. Caron seeking banked leave, he was referred to an email he received, dated April 10, 2015, from Mr. McCambley.

[175] Mr. Caron was advised that he was not authorized to work banked time. In the email, Mr. McCambley states, "Let me remind you that last Thursday I did authorize you to work 1.0 hour of banked time, so don't be telling me that you always get the same responses to your requests or that I am not fair." Mr. Caron confirmed that it probably happened. The rest of the email reads as follows:



*Currently you have one responsibility PBHC year-end. Your other deliverable which was opened last October is long overdue and should have been delivered months ago. I will not be letting you use the excuse of the BMO issues to authorize banked time for your one other responsibility.*

*Are you telling me that you cannot meet your one deliverable for PBHC year-end? You are expected to perform at an RL five level and should be able to learn quickly and adapt to your new responsibility of managing the PBHC system. I understand that there is a learning curve, but I have tried to set you up for success here by telling you that PBHC is your number one priority; I have not asked you to do anything else but PBHC and I have also provided you with Mike at your beck and call to assist you with any issues. The one thing I am not authorizing you to do is to work extra time, because I do not feel that it is warranted with your current tasks.*

*You do see Bruce, Mike and I working extremely hard day in and day out, but you should not worry about what others on the team are doing, but how you can contribute to the success of the team...*

*In regards to PBHC, let me be very clear, unless there is an extreme circumstance, no banked time will be approved from now until the year-end tasks are completed. I will be evaluating your performance on this task, and there should be no reason why you cannot complete this priority by working 7.5 hours per day.*

*As always, I am available to discuss any concerns you may have.*

[176] Mr. Caron was referred to the second paragraph, about his one deliverable, the PBHC year-end, and was asked if that was correct. He replied that it was not necessarily correct, to the best of his knowledge. He did not keep all his sheets with respect to tickets. It was most likely that he did not have a sheet for one deliverable. He did have other things to do.

[177] The email referred to him being able to reach out to Mr. Dorris for assistance. He was asked if he had done so for the PBHC and if so, how often. He stated that they were a team and that he would reach out if Mr. Dorris was available. He stated that Ms. Charpentier was the subject matter expert but that he was not allowed to talk to her. His first source was Mr. Dorris, and if he was not available, next up was Mr. Nichol. Mr. McCambley knew the PBHC; however, he was the supervisor. He was asked if he could go to any of those three. He said that he would ask Mr. Dorris, who in turn would ask Ms. Charpentier.

[178] During cross-examination, Mr. Caron was referred to Mr. McCambley's notes of a meeting with him on June 4, 2015, relating to the PBHC discussions. The notes read as

follows: "... he was a little ticked off that Pascale had to redo all of his work for the new year PBHC and he said that maybe he should file a grievance against her for doing his work." He was asked whether it was a fair statement. He said that he had not been mad. He stated, "Was I a little bit ticked off that she filed a grievance? Yeah maybe." He was asked why Ms. Charpentier had finished his work. He stated that he asked Mr. McCambley if he could stay and continue working on banked time. That was denied. He was working on it. He was scheduled for vacation. He wanted flexible time to work on it.

[179] During cross-examination, he acknowledged making some mistakes.

[180] He was asked if he thought management was wrong. He stated that management was not reasonable.

## **6. Mr. Caron's submissions**

[181] Mr. Caron stated that no formal training was provided, that documentation was missing steps, and that the error details were not brought to his attention. He was under the assumption that salary management was closed and that everything had been reconciled.

[182] Mr. Caron argued that the final performance management form (PMF), in which he failed all six of his performance objectives, was too harsh and resembled punishment or procedural unfairness. He stated that the PBHC was not on his beginning PMF or on the mid-cycle one.

[183] He argued that Labour Relations commenting on a draft of the PMF final review for management constituted unfair treatment and was part of the campaign against him and that it raised doubts about the honesty of the operation. He also argued that the reference in the PMF that he had to work on his attendance and presence in the office was an act of bad faith in an attempt to document and mislead the Board and to misrepresent him by spreading misinformation.

## **7. The employer's submissions**

[184] Mr. McCambley testified that the grievor was provided support when he was newly tasked with the PBHC year-end process. Mr. McCambley emailed Mr. Caron, stating, "... I have tried to set you up for success here by telling you that PBHC is your

number one priority; I have not asked you to do anything else but PBHC and I have also provided you with Mike at your beck and call to assist with any issues.”

[185] Mr. Caron’s 2014-2015 PMF raised several areas in which improvement was necessary. For example, Mr. McCambley testified that improvement was required with respect to general information technology (IT) processes, paying attention to details, updating tickets on a regular basis, and late start times. Before he signed the PMF, Mr. McCambley held a meeting in which he explained to the grievor why the PMF had a negative rating. Mr. McCambley testified that the grievor told him during that meeting that “It can be a struggle to get in and come to work because he is not excited about coming to work. He would like more project type of work, interesting work to be involved in costing.”

#### **8. Analysis and conclusion on this issue**

[186] Mr. Caron had been advised that he had just one deliverable, the PBHC year end. He was a finance professional. My understanding of his evidence is that because he was denied banked time and because he had scheduled a vacation, he did not finish his work, leaving it to others to complete, as it had to be delivered on time. There is no doubt in my mind that it was a performance failure, the consequence of which was a less-than-satisfactory performance evaluation. I am not persuaded that there was any intent to discipline; nor do I find that the evaluation was so harsh that it resembled punishment.

[187] Mr. McCambley stated that Mr. Caron continued to manage the PBHC until May or June 2015, when initially he was reassigned to FreeBalance, following which he was placed on an action plan. Management was not satisfied with the PBHC results. As it had to do with salary, it had to be correct. It was a high-level piece of information management, and management could not risk having years pass without reviewing it with a fine-toothed comb.

#### **D. Failure to permit union representation at a meeting**

[188] In March 2015, Mr. Caron requested Ms. Sigouin’s approval to use banked time. He stated that he was attempting to finish his work on time; however, management was restricting him from doing so. He was advised that he should be able to manage his workload within normal business hours. He stated that others had flexibility, and he believed that management was being unreasonable.

[189] On March 26, 2015, Ms. Sigouin scheduled a meeting with him to discuss the emails he had sent with respect to his request for flexibility. He asked for an agenda. He was advised that the meeting would be about general basic work requirements, hours of work, and leave time sheets. He advised her that he was waiting for a response from the union, which had agreed to sit in on the meeting. He was advised that he could consult with the union afterwards. He replied that all the issues involved the union and that it was not a good working environment.

[190] Ms. Sigouin told him to come see her. She did not want the union involved. She was not empathetic about his hostile work environment. On March 27, 2015, he readied himself to prepare a grievance with respect to being denied union representation. He did not file it.

[191] On March 30, 2015, he wrote to Ms. Sigouin with respect to a letter of expectations that she had asked him to prepare. The union was involved at the time. He thought that Mr. Marcotte had a conversation with her.

#### **1. Mr. Marcotte**

[192] Mr. Marcotte is an employee of the employer. He is a PIPSC union representative. In 2015, he was a union steward.

[193] Mr. Caron had received a request for a meeting. Mr. Caron asked Mr. Marcotte if he would attend. Mr. Caron expected that the meeting would involve discipline. Mr. Marcotte agreed to attend and advise him.

[194] Mr. Marcotte went to the meeting. Ms. Sigouin was visibly upset. He was not welcome. She was angry and told Mr. Caron that he was wrong, that he was escalating, and that if he was escalating, she would too. She stated that she would not hold the meeting. Mr. Marcotte stated that he was taken aback, and he thought that he should talk to a more experienced steward. He believed that he called Labour Relations, which advised him that he should not have attended the meeting.

[195] He asked a more experienced steward if he would attend subsequent meetings if called. He understood that things did not go well. They sought the help of PIPSC's employee relations officer.

[196] According to the union, if one of its members seeks the support of a steward when dealing with management, the steward should be allowed to attend.

[197] Ms. Sigouin said that the meeting scheduled for March 27, 2015, was not related to performance. Mr. Caron had said that it was related to performance.

[198] Mr. Marcotte remembered a heated discussion about working hours. He stated that he believed that he had provided a union document on working hours to Mr. Caron. He also remembered coaching Mr. Caron on trying to stay within the bounds of being a good employee.

[199] Mr. Marcotte provided an overview of the union's understanding of working hours for its members. The core hours were from 9 a.m. to 3:15 p.m. There was some flexibility before and after the core hours as long as employees worked during those hours. The lunch break was 45 minutes. There was an afternoon break that was not in the collective agreement. Employees had flexibility as long as they stayed within these bounds.

[200] He called Ms. Sigouin to explain the union's role. He tried to de-escalate the situation. He explained that when a union representative comes to a meeting, it is not to disrupt but to listen and ensure that members are treated fairly and to take notes.

[201] He thought that the discussion went well. He wanted to let her know that he was not a threat and that he did not seek to escalate things. He tried to build a relationship.

[202] At the time, he did not know the result, which was that Mr. Caron's employment was terminated.

[203] During the discussion, they did not talk about Mr. Caron's case.

## **2. Cross-examination of Mr. Marcotte**

[204] Mr. Marcotte was elected as a steward in 2015. The union was certified around 2005. Before his election, he had no steward experience. Most of his career had been in management. Before 2015, he was not involved with Mr. Caron.

[205] After the meeting, he tried to carry out counselling with Mr. Caron. The nature of the discussion was that management seemed to have an issue with his performance. Mr. Marcotte coached Mr. Caron on how to avoid being in the crosshairs of

management with respect to discipline. He also coached Mr. Caron on timekeeping and advised him to show up on time and to let the employer know he had arrived. At the time, he thought that those were the issues.

[206] Mr. Caron had concerns, although he did not really recall them. Performance was his recollection. He thought that he might be in a bit of trouble.

### **3. Mr. Caron's submissions**

[207] Mr. Caron argued that Ms. Sigouin did not want the union involved. She was not allowed to deny union representation.

### **4. Analysis**

[208] Mr. Caron argued that Ms. Sigouin was not allowed to deny union representation. A review of article 25 of the collective agreement indicates that employees are entitled to have a representative attend meetings that they are required to attend on disciplinary matters. Article 23 provides that an employee may be assisted and represented when using the grievance process.

[209] The meeting, as I understand it, was about hours of work, leave time sheets, and Mr. Caron's request for flexibility. There was no evidence that it was to be disciplinary in nature; nor did it relate to the filing of a grievance.

[210] There is no general right in the collective agreement for representation by the union in all circumstances in which a manager meets with an employee.

[211] In any event, I fail to see a nexus between not wanting the union involved in a manager-employee meeting that is not disciplinary and disguised discipline.

### **E. Letter of reprimand**

[212] On June 30, 2015, the grievor was given a letter of reprimand with respect to an inappropriate email he had sent to Mr. McCambley and Ms. Sigouin on June 10, 2015. A meeting was held on June 18, with his union representative attending, during which Mr. Caron apologized, stating that the email was an emotional response as it was the first time he had ever been told that he did not meet the qualifications of a REG 5. As a result, he was given a formal letter of reprimand, which was to be placed on his personnel file for a two-year period.

**1. Mr. Caron's submissions**

[213] Mr. Caron observed that this is the completion of a formal disciplinary process, his first. There was misconduct, a notice of discipline, a hearing initiated by management, an option to bring a union representative, and a fact-finding meeting resulting in a letter of reprimand.

[214] He argued that all the other instances of misconduct mentioned in the grievance and documented in the PMFs, such as timekeeping, the employer's directive on hours of work and leave, personal business, and personal phone calls, should have been subjected to disciplinary action. The absence of discipline when it would be the appropriate response can be an indicator of a disciplinary situation being camouflaged to appear administrative.

**2. Analysis**

[215] A situation in which the employer overtly imposes a sanction, like a letter of reprimand in response to an employee's misconduct, is clearly disciplinary. However, the employer did not rely upon this incident as a ground for terminating Mr. Caron's employment. I have already dealt with the issues of timekeeping, the directive on hours of work and leave, and personal business and have concluded that providing a letter of expectations in adherence with the provisions of a collective agreement, absent some disciplinary motive, does not constitute disguised discipline.

**F. Performance management action plan**

[216] Ms. Sigouin testified that after learning that Mr. Caron's performance was lacking in terms of his regular work following his 2014-2015 final appraisal, management wanted to give him the opportunity to try something different. The hope was that the employer could take advantage of his abilities by putting him on an action plan by which he would be given the opportunity to increase his performance.

[217] He was given the choice of either continuing the work he was doing or undertaking a project to evaluate a new business intelligence tool. Mr. Caron decided to take on the project work as he had experience with some of the programs.

[218] Ms. Sigouin testified that the project was scheduled for completion in December 2015 but that it was terminated in November as Mr. Caron had completed only a low percentage of the work, many errors were found, and attention to detail was missing. It

was decided that he would not complete the project on account of both the percentage of work completed and the lack of quality.

[219] Mr. McCambley had developed the action plan as a way to assess Mr. Caron's performance. The CPMRS was the employer's internal reporting system. When it was implemented in 2008, the fields from financial systems had to be entered into it. However, for one reporting system, not all the fields were placed into the CPMRS; some were missing. The CPMRS was part of the strategic plan.

[220] Mr. McCambley outlined the different items in the project.

**G. New fields from FreeBalance and Louis to be placed into the CPMRS - expected time frame: 4 weeks**

**1. Access database review - expected time frame: 3 weeks**

[221] IT's ultimate goal was to have the access databases integrated into the CPMRS. It was to be achieved by creating a list of all Access databases.

**2. Dashboard review - expected time frame: 3 days**

[222] This required a one-page summary of several reports to determine what was working and not working or if anything was missing.

**3. Manager reports review - expected time frame: 4 weeks**

[223] There were many reports in the CPMRS. There was a requirement to identify the reports and databases that were to be created in a new reporting system and the ones that should be removed.

**4. Time reports review - expected time frame: 1 week**

[224] The time-reporting system came from Louis. There was a requirement to document each report, validate it, and determine its usefulness and whether it should be removed, modified, or left as-is and to create a central repository for all report documentation.

**5. FSG query review - expected time frame: 3 weeks**

[225] There was a database of queries. The requirement was to document each query, validate it, and determine its usefulness and whether it should be removed, modified, or left as-is.



**6. Business intelligence (BI) relational package (dimensions, facts, and measures) review - expected time frame: 4 weeks**

[226] BI relationships is a package within the CPMRS. There was a need to identify if any fields were missing or to add to it.

[227] As Mr. Caron worked through the action plan and it was determined that the expected time frame was insufficient, deliverables could be removed from the plan.

[228] Mr. McCambley testified that the project was suited to Mr. Caron's competencies as he had worked with FreeBalance and Access databases. He had done some work with Louis. He would be focused on all the reporting. He could focus on one thing.

[229] On June 8, 2015, an ad-hoc meeting took place with Mr. Caron and Ms. Sigouin during which they discussed the fact that his PMF was late, his performance review for 2014-2015, and the action plan. The joint text, including Ms. Sigouin's notes and Mr. Caron's highlighted notes with respect to the action plan, reads as follows:

*CPMRS project very important to the CNSC. It is a project as part of the FAD strategic plan:*

*Nancy: further to you(r) interest in a stretch assignment, I am proposing two options for the action plan: one. Status quo, current responsibilities or two special project (described below).*

*1. Current responsibilities*

*The action plan will be to evaluate your current responsibilities which are management of PPHC system and ITAS*

*Creating CPMRS reports per client requests*

*And more tasks need to be added as a REG 5 should be doing more than only manage one system*

*2. CPMRS project*

*very important to the CNSC. It is a project as part of the FAD strategic plan.*

*This project will allow the CNSC to be prepared for the phase three of the CPMRS advancement which is the integration of databases and additional fields within CPMRS -something the CSP VP is looking for)*

*three projects wrapped into the special project: 1-review current reporting databases to integrate in BI, 2-review what is on the dashboard, where is information coming and fix-it, 3-review and validate CPMRS to the source systems (RC managers reports and FSG queries.)*

*This project would allow you to show your dedication, attention to detail, initiative and so much more.*

*Nancy: provided Blair with a copy of the project for his review.*

*Blair: I see this project as an opportunity*

*Blair: I have done this before and it should be easy. In the past I worked on compliance coefficient reports and also the Direct Deposit report.*

*BC: I have done similar work and depending on the expectations of management I should be able to be successful in this project. In the past I have produced reports for directors including compliance coefficient, finance forms, automated financial statements, direct deposit programming and more.*

*BC: more information on expectations will be needed as working with IMTD will create barriers and extended time requirements.*

*Nancy: I am under the impression that most of the work (analysis, gathering of data, providing recommendations) can all be done individually without the involvement from IMTD-at least not until there are actual changes done to the system*

*BC: it is not 100% clear at this point however working with other stakeholders and clients usually creates time delays*

*Blair: yes I think you are right*

*Blair: what level of work is this? :*

*Nancy: REG5*

*Blair: can it be a REG six level... For the experience and not the pay?*

*Nancy: it will all depend on your performance... You could actually be performing at the REG 4 or REG 6 depending on the level of effort you intend to put into this. We expect you to work at the REG 5 level.*

*BC: It would be great to have the elements and competencies that qualify this project as either a REG4, REG5 or REG6.*

*Nancy: Jeff will be available to answer questions to ensure understanding of the requirements.*

*BC: it is important that we all work together to be successful in this project.*

*Nancy: ask Blair to consider the options and provide a confirmation of the method he prefers (ad hoc or special project) by the end of day Wednesday. He needs to provide written (email) confirmation by end of day Wednesday, June 10.*

*BC: Done. "I am interested in working on the CPMRS project. The criteria and elements of this project need to be clarified if being used as a tool to assess human resources and competencies however.)"*

*Nancy the rest of the week, I will be working with HR to finalize the action plan and have it presented to Blair. Further meetings will take place.*

*BC: as of June 23 I have not yet been provided or consulted on an action plan. No meetings have been set up as of yet for discussion.*

*Blair: mentioned that he does not feel that he will be considered for promotion at the REG 6 level here at the CNS C therefore he needs to be successful in the action plan to get good references.*

*BC: I would like to be successful working on the CPMRS project and use the work as a reference for any competition that I am in to better myself and my career.*

*Nancy: indicated to Blair that he would be moving into cubicle TE 04-225.*

*Blair seemed happy about this.*

*BC. I was not happy. I don't feel this is a positive move for the financial systems team however I will move if this is what is best.*

*Blair: when can I move my things.*

*Nancy: I need to communicate with the administration so maybe end of next week but will keep you updated.*

*Nancy: indicated to Blair that he will be reporting to me directly during this evaluation. I will be supported by Jeff for all technical aspects of the project. I will be approving timesheets.*

*Blair said he felt privileged as he will be working directly with the director.*

*BC: there is no question reporting directly to a director is a privilege as a REG5. I hope to resolve any outstanding HR issues quickly and be efficient and effective in my time working alongside my director.*

*[Sic throughout]*

[230] During cross-examination, Mr. Caron was asked if he agreed to take on the CPMRS. He said that he had somewhat agreed. It was presented to him. He was asked if he had accepted it. He stated that it was offered to him and that he accepted it. He said that he was given two options. He did not recall why he chose that option.

[231] On July 7, 2015, a meeting was held, to present the action plan. Present were Mr. McCambley, Mr. Caron, and Ms. Sigouin, who presented the plan.

[232] An action plan sets out the objectives and competencies provided to an employee for the level and the position the employee is employed for. In this case, it set out overall what the grievor was being evaluated on. The identified work objectives and competencies included showing initiative and being action oriented, quality of

work, time management, and working independently. Specific areas of improvement for each objective were noted, as well as performance indicators.

[233] In terms of progress, there were four boxes to tick: “On track to succeed”, “Results to date indicate the need for improvement”, “Work objective no longer required”, and “N/A”.

[234] A meeting with him on the action plan was to be held every two weeks. Between them was to be a meeting with Mr. McCambley. The grievor was being met with every week.

[235] Ms. Sigouin emailed Mr. Caron on July 7. She sent him the bullet points that she had used in the introduction to the action plan, which explained its purpose and the four competencies that would be evaluated through regular meetings scheduled in advance about every two weeks and stated that the action plan contained performance indicators. She invited him to review the performance indicators and to set up a meeting the following day to go over his questions. Mr. McCambley was identified as the technical lead on the project. The grievor was informed that if he had technical questions, he could meet with Mr. McCambley. She reiterated that the purpose of the process was to help and support him.

[236] Mr. Caron stated that when he was shown the action plan, his focus was on “SMART” criteria, meaning whether the plan was specific, measurable, achievable, realistic, and timely. He stated that he and the union found very little SMART criteria built into the plan.

[237] The grievor believed that the requirement to adhere to the employer’s directives on hours of work was not related to performance but was discipline.

#### **H. Attendance and hours of work brought into an action plan**

[238] Ms. Sigouin stated that Mr. McCambley had a discussion with Mr. Caron about the hours of work and attendance being brought into the action plan as those issues went back to 2012. Mr. Caron thought it was unreasonable.

[239] After becoming the director, when she met with Mr. Caron at a meet-and-greet event, he advised Ms. Sigouin that he had a busy life, given that he bartended at night.

[240] With respect to coming into the office before 9 a.m., he advised her that he was not a morning person, he needed to rest, and it was good for him. He also advised her that during the day, he often had to leave work to meet with clients, because he was also a mortgage broker. Throughout the years, it had been an ongoing issue, so it was included in the action plan. He should have been in the office during core business hours.

[241] When he was not in the office, he would often say that the absence was for medical reasons. Ms. Sigouin thought it unusual for an employee to have medical appointments every week. There was a requirement to provide a medical certificate. When he delayed providing one, it meant that management had to keep track of all the times he was absent, and at the end of a given month, Mr. Caron would dispute whether he had been in the office. After a couple of emails, he would acquiesce, and the absence would be tracked and noted on the time sheet.

[242] Ms. Sigouin stated that the employer could have been more efficient had it not had to support Mr. Caron that way. Mr. McCambley had to outline and restate the requirements that the grievor had to be present during core business hours, from 9 a.m. to 3:15 p.m.

[243] Mr. Caron testified that the requirement to work independently conflicted with the objective related to the quality of the work, which requires feedback from clients. In this case, his client was Mr. McCambley, which was not good.

[244] The start date for the action plan was July 6, 2015. On that date, Mr. McCambley and Mr. Caron met to discuss it. Mr. Caron was advised that he would no longer have any regular duties. He indicated that if he had questions, he would book another meeting with Mr. McCambley to discuss the project.

[245] On July 14, 2015, Mr. Caron asked Ms. Sigouin if he could have union attendance at the action-plan meetings. She advised him that she was unable to approve his request as she felt that he was undermining the seriousness of the meetings.

[246] On July 17, 2015, Mr. McCambley wrote to Mr. Caron, noting that as he had not received a meeting request, he assumed that everything was going well. Mr. Caron replied by asking what he meant by that and stating that he had not accepted a meeting request for the next Wednesday as it was not clear to him that he would be

ready to review the project with its relationship to an HR action plan and that he was still researching and receiving consultations on it.

[247] Ms. Sigouin replied the same day. She wanted to know whom he was consulting with respect to the action plan and noted that consulting with a union representative was within his rights but that it was to be done on his own time. She also noted that given that he was not yet working on the special project, he had done nothing other than review the action plan. She noted that the fact that he was extensively reviewing the plan did not show any commitment on his part to make the plan work and that meetings had already been scheduled to evaluate his progress and to ensure that he received proper support.

[248] He replied by advising her not to assume that nothing had been done and that he had been sick; nevertheless, he had spent time reviewing the project and understanding the plan and how it was linked to Treasury Board policies on performance management programs for employees.

[249] Ms. Sigouin and Mr. Caron met on July 20, 2015. She recalled the meeting. After an action-plan meeting, she would make notes in an electronic document and could provide updates. A new work objective was added at the meeting; she did not recall who proposed it. She prepared most of the comments unless they were technical, in which case Mr. McCambley prepared them. July 23, 2015 was the date of the first action-plan meeting. On July 30, 2015, the grievor received the following written feedback:

*Showing initiative and being action oriented*

*Blair's start date for this project was July 6, 2015. From the time of the start date to the action plan meeting Blair had 13 full [7.5 hours] working days to work on the project. Although Blair did do some review for the project, the majority of his time was spent reviewing the action plan. Blair should have shown the initiative and motivation to work more on project while reviewing the action plan. After 13 days we should have received a project plan and not just a project overview.*

*Quality of work*

*All of Blair's work to date has just been doing reviews. Blair did provide a project overview which is not sufficient enough to evaluate the quality of work, evaluation will identify that it is N/A as there were really no details for an evaluation.*

*Time management*

*Blair did attend the first action plan follow-up meeting, but has not yet enrolled in a time management course. Blair said that he needed to review the action plan and did spend several days and hours doing so and seeking consultation, but he completely ignored a specific detail in the action plan regarding the Time management course.*

*Blair regularly still continues to not respect the CNSC directive on hours of work and leave and shows up after 9 AM. Blair does however stay in the office until the required time of 515.*

*Appointments are being taken during work hours and Blair is encouraged whenever possible to book appointments outside of working hours and especially in advance.*

*Medical certificates are required, and Blair is still missing two medical certificates for July 7 and July 15.*

*Blair did provide a medical certificate that was very vague when it came to the period that it would be covering. HR will be consulted to see if this letter will be sufficient for future appointments at this particular doctor.*

*On July 14 Blair was reminded that he still has to submit his June timesheet. He did not meet the action plan requirement which is to submit three business days after month end. Blair has been asked to limit the amount of needless emails challenging leave requests and CNSC policies as this is extremely time-consuming and not efficient.*

*Blair has provided Nancy with full calendar access, but has yet to provide Jeff with full access. This was required months ago and a reminder was sent to Blair June 24 Blair is now to provide Jeff full access to his calendar. Blair's absence from his desk during the day has improved.*

*Work independently*

*Blair will need to work independently on the CPMRS VI advancement project. To date only reviews have been completed on this project.*

*As Blair had 13 full days to work on the project, we would have expected Blair to provide more [work] from the project.*

*New Work objective added at July 23 meeting*

*Blair will provide a weekly update to Jeff and Nancy on what he has worked on in the past week plus a few bullets of what he anticipated working on in the upcoming week.*

*[Sic throughout]*

[250] Ms. Sigouin explained that the employer is mostly financed by revenue and that each employee has to have a monthly time sheet, so that an invoice can be prepared.

[251] Mr. Caron provided his feedback. With respect to the work objective of showing initiative and being action oriented, he commented as follows:

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

*I am confirming that Nancy did present the action plan to me in a meeting on July 6, 2015, from 1 PM to 2 PM. It is incorrect to say that I had 13 full days at 7.5 hours to begin this project. I was sick on July 7 and 15<sup>th</sup> and had an important medical appointment Friday afternoon on July 17.*

*I feel I was responsible with my time reviewing this large projects items and information available at startup. I reviewed the BIA improvement tasks items, the action plan and related TBS policies, material and documents on the CNSC network. After compiling all this information, I prepared a project overview which defined project objective and link to FAD strategic plan, defined project deliverables, and detailed scope and risks to this project. I feel I did an excellent job initiating this project and was motivated to organize and plan the work forward. I feel I am on track to successfully complete this project.*

*[Sic throughout]*

[252] With respect to the work objective of the quality of the work, he stated this:

*It is incorrect stating that "all of my work to date has been just doing reviews". At the first meeting July 23, I provided 1) project overview document. 2) report-access databases and requested information. At the meeting I asked if this information would meet the objective. I was told that Nancy/Jeff would have to review the material provided. After the meeting I provided Jeff McCambley with 1) summary of list of work I communicated at the meeting 2) project overview 3) access to report. Further, at the meeting I asked for feedback on what is expected at the REG5 level for this stage of the project and no information or details have been provided as of yet-July 30. I received management's feedback July 29, 4 working days after the first action plan meeting and 5 days before the next action plan meeting. No details of what was expected of a Reg five in the first two weeks of the project as yet to be provided.*

*Recap: I reviewed the BIA improvement tasks items, the action plan and related TBS policies all this information I prepared a project overview which defined project objective and link FAD strategic plan, defined project deliverables and detailed scope and risk to this project I also produced report for access database reviews and information requested.*

*[Sic throughout]*

[253] With respect to the work objective of time management, Mr. Caron commented as follows:

*The action plan states employee should enroll in a time management course during the second quarter. During the meeting I was told that this is mandatory. The message that this training is mandatory was not clear. I was not told to update my*



*ILP with this course. I would like to discuss this and other training for myself further.*

[254] With respect to the work objective of adhering to the employer's directive on hours of work and leave, Mr. Caron commented as follows:

*During the meeting Nancy said that I met the CNSC directive on hours of work and leave showing up by 9 AM and on a couple of occasions a couple of minutes past. I always work past 5:15 PM....*

*My emails regarding the clarification of CNSC policies and their interpretations are important. I will be efficient and direct in my communications forward [sic].*

[255] With respect to the work objective relating to calendar access for Mr. McCambley and absence from workstations, Mr. Caron commented, "Jeff was provided access to my calendar months ago however this was done incorrect(ly) I have since clarified the technical process and added Jeff."

[256] With respect to the work objective of working independently, Mr. Caron commented with this:

*Recap: I reviewed the BIA improvement tasks items, the action plan and related TBS policies, material and documents and the CNSC network. After compiling all this information, I prepared a project overview which defined project objective and linked to FAD strategic plan, defined project deliverables and detailed scope and risks to the project. I also produced report for access database reviews and information requested.*

[257] Ms. Sigouin testified that needless emails were sent requesting and challenging leave requests that the grievor thought he was entitled to. At one point, she had to involve HR. He was using all the leave he could. She also required medical certificates as he was meeting with doctors every week.

[258] On July 30, 2015, Mr. Caron wrote to Mr. McCambley with respect to questions about the project and the estimated amount of time it should take to reconcile data fields. Mr. McCambley had estimated it should take four weeks. Mr. Caron was concerned that it would take considerable time to reconcile every data field and its related measures; definitely, more than four weeks.

[259] On August 7, 2015, Mr. Caron provided a weekly status update for the CPMRS BI project to Mr. McCambley and Ms. Sigouin.

[260] On August 13, 2015, Ms. Sigouin advised Mr. Caron that unexpectedly, Mr. McCambley would be absent for a few weeks and that she had arranged for technical support for him so as to not delay the project. The technical experts were Mr. Nichol, Mr. Caron's previous manager, and Mr. Dorris, another REG 5 who was there to backup Mr. Nichol. She stated that she made sure that he had sufficient support.

[261] The same day, Mr. McCambley advised Mr. Caron that December 31 should be considered as the final date by which the project should be finished. Nevertheless, he believed, and Mr. Caron had confirmed that it was feasible and realistic to think that the project would be completed before that.

[262] December 31 was an educated guess as the project began at the beginning of July, and six months were more than enough for a REG 5 to complete the project. Management thought that that date was realistic.

[263] In an email dated August 13, 2015, Ms. Sigouin provided comments from the action-plan follow-up meeting of August 12, 2015. The email also noted that for the next follow-up meeting, scheduled for September 9, 2015, management had requested that the grievor have the action plan completed and have some of the elements from the project plan show substantial progress or completion.

[264] At the action-plan meeting held on August 12, 2015, the following comments were made:

*Showing initiative and being action oriented*

*This project has been in progress for 5.5 weeks and at this point Blair has provided a project overview and listing of databases which is not enough to evaluate him on being proactive as we are not seeing any results.*

*Blair did show initiative and changing [sic] database names for some databases. Although this shows initiative it was not a correct assumption on his part and could have had an impact on his clients. Blair was asked to change the database names back to the original and was informed that he should seek the client's approval before doing any other type of change like this in the future.*

*Blair did provide documents 20 minutes before the action plan meeting which is not sufficient time to be able to review the reports and evaluate him on them as of August 12, 2015.*

*Quality of work*

*Blair has provided a project overview and a listing of databases, which is not enough to evaluate him on as of August 12, 2015. Blair did provide documents 20 minutes before the action plan meeting which is not sufficient time to be able to review the reports and evaluate him on them.*

#### *Time management*

*Blair has attended every bilateral meeting to date. Blair has not enrolled in a time management course even though at the last action plan meeting it was clearly identified that he must enrol in this course. Blair says he has done some research on the course but has not selected one. Blair clearly indicated that he does not feel or agree that he should have to take a time management course. Nancy clearly stated that at the next action plan meeting that Blair must have a course selection to present for approval. Blair will then amend his ILP to include the change.*

*Adhere to the CNSC directive on hours of work and leave.*

*Blair regularly still continues to not respect the CNSC directive on hours of work and leave and shows up after 9 AM. Blair does however stay in the office until the required time of 515.*

*Appointments are being taken during work hours and Blair is encouraged whenever possible to book appointments outside of working hours and especially in advance. The month of July was a very difficult process with Blair with the back-and-forth and Blair is to simplify this process and reduce the many emails that are sent.*

*Medical certificates are required and Blair was asked if he had a medical certificate for his absence on August 11. Blair said that he could provide one and Nancy asked if he had one and Blair said he could provide one. This went back-and-forth until Blair finally went to his office to get the medical note for Nancy. Blair said he has a specific routine in regards to his filing and leave and did not have time to do this process before giving Nancy the certificate and that is why he was hesitant in providing the medical certificate right away.*

*Blair has provided Jeff full access to his calendar, but Blair needs to be more diligent in putting absences from his office in his calendar so that we are informed where he is. At the last action plan meeting it was noted that Blair's absences from his desk have improved. At this action plan meeting it was mentioned that Blair has reverted back to being noticeably more absent from his desk.*

#### *Work independently*

*Although Blair is working independently on this project we have not had any real results in order to be able to evaluate him on the work he is actually doing. Blair did provide documents 20 minutes before the action plan meeting which is not sufficient time to be able to review the reports and evaluate him on them as of August 12, 2015.*

*New work objective added at July 23 meeting*

*Blair has provided a weekly project update. It was mentioned that Blair needs to provide more details in the update so that we have a better understanding of what has been done. Blair is to provide e docs to any documents in the update.*

*Jeff mentioned that he would like to have access to the e docs [read-only], so that he could review them when he gets a chance Blair was very defensive on this and only wants to provide a document every Friday for Jeff to review instead of providing e access. When asked why, Blair said it was because he wanted to avoid getting asked questions on work in progress items. Jeff mentioned that questions are going to be asked regardless.*

[265] Ms. Sigouin was referred to the summary, which reads as follows:

*It has been determined that you are not meeting the work objectives and/or not demonstrating the competency or competencies [expected behaviours] outlined above. This action plan documents the work objectives and competency or competencies for which improvement is required to correct unsatisfactory performance. This action plan has been developed following discussion with you concerning expected performance improvement and the time period in which to achieve this improvement. During this time you must demonstrate that you have the ability to perform all of the responsibilities of your current position.*

[266] Mr. Caron reviewed his notes of August 12, 2015. He stated that he tried to have deliverables inserted into the action plan. Mr. McCambley rejected this request and said that it involved adding lists to the action plan. Mr. McCambley advised him that the deliverables were not met and were not what he wanted.

[267] After the meeting, Mr. Caron had him agree to a project timeline of December 31, 2015. On August 12, 2015, Mr. Caron emailed Mr. McCambley to confirm December 31 as the completion date. McCambley replied that December 31 should be considered as the final date but that it was feasible and realistic that the project could be completed before then.

[268] During the meeting, Mr. McCambley and Ms. Sigouin wanted a thorough analysis. In Mr. Caron's opinion, they were not transparent; they did not share with him.

[269] Mr. McCambley wanted fields for the CPMRS as soon as possible reporting on which databases were still being used and what fields were required. He requested a project plan by the next meeting, set for September 21, 2015.

[270] There was frustration between Mr. McCambley and the grievor over the deliverables for the action plan.

[271] Mr. Caron stated that he was looking for deliverables. He had seen situations of documentation for failures. At the meeting, he asked questions, such as: What are the deliverables? What is the due date? There was significant frustration. Mr. McCambley raised his voice to an uncomfortable level to say, “data fields”. Mr. Caron stated that he proposed a project plan by doing research on the Treasury Board’s website. Mr. McCambley said that he wanted a project plan by the next meeting.

[272] Mr. Caron’s frustration was that he had provided information; however, the focus was on the documentation for failure rather than deliverables.

[273] It was a long meeting; it lasted about an hour.

#### **I. The performance letter**

[274] On August 14, 2015, Ms. Sigouin wrote to Mr. Caron with respect to his performance. He was advised that a review of his overall performance indicated that he was not meeting the expectations of his position, which impacted the effectiveness and efficiency with which the division met its organizational responsibilities. She referred to the project as providing him with a fresh start, which enabled him to focus on one specific area while providing him with an opportunity to demonstrate his competencies.

[275] She identified the areas needing improvement and the fact that the employer had invested considerable time, resources, and effort to help him improve.

[276] She formally advised him that his failure to meet the objectives and expectations of his position and to perform at a satisfactory level could result in the termination of his employment for unsatisfactory performance.

[277] She made the comments with assistance from Labour Relations. Mr. McCambley was involved not in the writing but in the thought process. They were worried, as they saw no progress in a month-and-a-half. The last paragraph formally advised the grievor that he was not performing at a satisfactory level, which could result in his termination for unsatisfactory performance. This was raised at the beginning of the process. They were supporting him, but they advised him that there would be consequences.

[278] Mr. Caron stated that he was not happy. He filed a grievance alleging that the process was arbitrary and not being done in good faith and that it did not use SMART material. He requested to meet with Ms. Sigouin. He felt that she did not meet with him within a reasonable time.

[279] Mr. McCambley testified that he discussed performance issues with Mr. Caron in August 2015, which was well into the process. He said that the progress was very slow, as by then, the project had run for five weeks. Some work had been done. He expected that a lot more would have been done.

[280] Ms. Sigouin was referred to an email from Mr. Caron to her, dated September 4, 2015, in which he wrote that with Mr. McCambley away for another week, he had not had much feedback on his work as yet, and that positive and constructive feedback was imperative to the success of the project. Ms. Sigouin stated that she advised Mr. Caron that Mr. McCambley would be away and that in his absence, the grievor could receive support from Mr. Nichol, who understood the work and the project, and from Mr. Dorris, who was in the office every day and could provide support and move the project forward.

[281] Mr. McCambley emailed Ms. Sigouin on September 18, 2015. He provided a summary of his meeting with Mr. Caron that day. He referred to the second paragraph of the email, which states as follows:

*Blair first asked where I thought he should be at this point in the project. I explained that after two months on the project I should be able to see various database fields that he has found that needed to be added to CPMRS, reconciliations to RC manager reports and a finalized project plan.*

[282] He stated that he explained that after two months, he expected that more work would have been done on the project. The project plan was still not completed.

[283] She was referred to an email dated September 25, 2015, which she sent to Mr. Caron and that included comments from the action-plan follow-up meeting of September 21, 2015. She was asked how the plan was progressing after 11 weeks. She read these extracts from the comments section:

*Showing initiative and being action oriented*

*This project has been in progress for 11 weeks and at this point Blair has progressed in providing a draft of a project plan, some*

access database field names and some RC manager report reconciliations. As the ultimate goal of this project is to provide a listing of required database fields to IMTD, the priority is to work on identifying the database fields required from the access databases [mentioned at August 12 action plan meeting].

To date Blair has identified 56 access database reports that require a review of the database fields and he has only looked at nine according to Blair's reconciliation folder. Blair has also looked at 15 RC manager reports of 26, where he is supposed to reconcile these reports to the source system.

Unfortunately, in the RC manager reports reconciliations that were reviewed, Blair did not acknowledge or identify issues that were with a specific report. As a REG5 and working in financial systems for the past eight years Blair should be asking more analytical questions to find a solution. With the RC manager reports Blair did not show initiative or motivation to perform at his level.

Expectations would have been that Blair would have much more work completed on (the) identifying the access database fields. With 15 weeks remaining in the project and based on what has been accomplished to date it is unclear if Blair will be successful in meeting the December 31 deadline.

Blair will need to focus on priorities and pay close attention to detail if he aims to succeed.

#### *Quality of work*

For this action plan meeting Blair was being evaluated on the quality of the RC manager report reconciliations that have been reviewed. At this point in time two RC manager reports had been reviewed, the budget status summary and the regular salary budget status. Blair had identified in the feedback meeting [September 17] that if there was a "yep" at the end of the E-report that it meant the report was reconciled. Blair was asked twice at this meeting if the "yep" meant that the report was reconciled and he confirmed that this is what it meant.

When reviewing the "budget status-summary" report was quickly identified but Blair did not reconcile the report, in fact only a little piece of the report was looked at.

When reviewing the "regular salary budget status" report the reconciliation was nonexistent, screenshots were provided in a manual process of going through the screenshot and identify what numbers to add need to be done and compared to another screenshot. A summary tab did exist that simply had a statement at the top of the report "Reconciled as expected".

This is not the level of service that should be expected from a REG5 level.

It was mentioned to Blair that his work should be easily reviewed and he should ensure that he creates his files in an efficient way

*for review purposes. There is no point for the reviewer to have to redo the work already done by Blair to ensure reconciliation.*

*Time management*

*Blair has attended every bilateral meeting to date. Blair has provided options for a time management course. Nancy mentioned that she has done her own research and is looking at options to present to Blair as well.*

*Adhere to the CNSC directive on hours of work and leave*

*Further to an email sent to Blair on September 17, Blair was reminded that he will no longer be receiving reminders to provide a medical certificate and that it is his responsibility to provide this documentation to Nancy the morning after he has taken leave. If Nancy does not receive the medical certificate the day after the leave was taken, the time away from the office will be considered as leave without pay.*

*Blair did submit his latest timesheet in a timely manner.*

*Calendar access and absence from workstation*

*Blair was reminded that any union business must be done on his own time and not on CNSC's time.*

*Blair regularly is absent from his workstation or is on his cell phone.*

*Work independently*

*Blair has been working independently but requires guidance on doing tasks that he should know how to complete without being told that there was a problem. For example it should not have to be brought to Blair's attention that he needs to reconcile a report at all organizational levels of the CNSC (CNSC-Branch-Directorate-RC) for or all Budgetary Items (Salary-O&M-Grants and Contributions)*

*it was mentioned to Blair that during the next two weeks his independent work will be reviewed more closely.*

*This evaluation could provide Blair with the needs improvement because of the reason above, but an N/A will be given until the next evaluation to provide more time to review more files.*

*New work objective added at the July 23 meeting*

*Blair has provided a weekly project update. It was mentioned that Blair needs to provide more detail in this update so that we have a better understanding of what has been done.*

*Blair is to provide e-doc#'s to any documents in the update, and ensure Jeff and Nancy have access to the file.*

*[Sic throughout]*

[284] Ms. Sigouin commented on the progress of the work. She stated that there was a need for improvement after 11 weeks and that it was unclear if the grievor would



succeed. Barely a scratch had been made on the total amount of work, which is why the performance letter was written.

[285] Mr. Caron gave his perspective on the meeting. He stated that he believed that he was succeeding in the project. Ms. Sigouin stated that improvement was required. She said that he had mortgage items in his calendar. Mr. Caron stated that he had an appointment with a realtor. Mr. McCambley stated that he needed more time to determine if the work objective to work independently was on track. Mr. Caron alleged that Mr. McCambley raised his voice a number of times during the meeting. Mr. Caron tried to have management sign off. It resisted. It was stuck at the cosmetic stage of the report's look and feel. Mr. McCambley advised the grievor that there were problems with the way he was marking it up, and he was reminded that union business had to be done on his own time.

[286] Ms. Sigouin was referred to a series of emails dated September 23 to 25 entitled, "Re-hockey tournament on September 23, 2015". Mr. Caron wrote to her, advising her that the Government of Canada Workplace Charitable Campaign (GCWCC) hockey fundraiser tournament was scheduled for the next week and that he had been asked to play, that there would be three games over three days that week, and that he had updated his calendar accordingly. He asked if she had any issues with it. She replied on September 24, agreeing that the fundraiser was for an important cause and stating that if he believed that his current workload could allow him to be absent from the office for three days, she had no issues with him attending the tournament.

[287] Mr. Caron emailed Ms. Sigouin again on September 24, advising her that the Friday of the next week was the playoffs and stating that he recommended moving the action-plan meeting scheduled for that date to the following week.

[288] She replied on September 25, advising him that considering that his objectives and the action-plan evaluations still required improvement, she would not recommend moving the scheduled action-plan meeting of October 1. She stated that the meeting would remain scheduled as planned.

[289] She was asked to set out the issue. She stated that the timing of the hockey tournament was the issue because Mr. Caron thought that the hockey games were more important than his work performance. Even though the tournament was for a charitable cause, in the circumstances, it was debatable whether the cause was more

important. He wanted to move the action-plan meeting to a later date. It was late September, and management was not seeing progress. Management wanted to continue supporting Mr. Caron. She had offered to meet with him before the hockey game, yet he refused to attend an early meeting. She had proposed a meeting between 8:30 a.m. and 9:30 a.m. on October 1, which would have been earlier than his usual start time. He declined. The meeting did not occur.

[290] She was referred to her email to Mr. Caron on October 1, 2015. In it, she stated that it was not unreasonable to expect a person to ensure that his or her participation in the hockey tournament would minimize work absences. She observed that she was not comfortable and that she found it unreasonable that he had been absent between 9 a.m. and 1:40 p.m. to play in one hockey game, while many employees had been able to be back in the office by 1 p.m., and some had been in the office before the game. She observed that it was another situation in which his lack of commitment to work was shown by his absence and actions.

[291] She stated that it was evidence of an obvious lack of commitment. She and other managers spent considerable time trying to determine his whereabouts, and his absences recurred.

[292] She was referred to an email to her from the grievor dated October 1, 2015, and entitled, “re- Action plan follow-up”, which reads in part as follows:

*... You have rescheduled this action plan meeting for 8:30 AM Friday morning till 9:30 AM knowing that I have a GCWCC fundraising event at 1015 that requires me to leave the office at 9:15 AM. My start time is also 9 AM.*

*Considering these action plan meetings are causing me a lot of unnecessary stress and I don't feel well after them-and we often exceed our allotted 60 minutes during these action plan meetings-I cannot accept this meeting date and time you have rescheduled the meeting at.*

*You have not made any indication that I would be rewarded for coming in early tomorrow or that this meeting will be positive and fun. I would appreciate if this meeting could be rescheduled next week when you return to the office.*

[293] Ms. Sigouin commented that the purpose of the meeting was to support Mr. Caron. She was not certain what a reward would be given that he was absent two or three days to play hockey.

[294] During cross-examination, Mr. Caron said that he was unable to attend the action-plan meeting that had been scheduled for that day during his hockey game. He was asked whether at that time, he was on an action plan. He confirmed it.

[295] It was pointed out to him that he had missed Monday, Tuesday, Wednesday, and Friday of that week and was asked whether it had been the best time to participate in those activities, given that he was on an action plan. Put differently, he was asked whether it would have been better to work on the project than to put effort into a hockey tournament.

[296] Mr. Caron stated that it was a great question. Was his job important? Yes. His environment was one of harassment and documenting.

[297] He wanted to contribute to charity. He said that there is a time code for it. Senior management supports this charitable initiative. He questioned why Ms. Sigouin scheduled a meeting during the hockey tournament. He was asked why he was to play hockey when she scheduled the meeting. He said that he was doing the best he could, given what was going on.

[298] He was asked for his understanding of “action plan”. He said that it is a correctional tool management uses to get an employee back on track or a tool for success.

[299] Ms. Sigouin was referred to her email to Mr. Caron dated October 2, 2015. In it, she stated that even though she had recommended not postponing the meeting scheduled for October 1, considering that his objectives in the action plan still required improvement and that he did not attend the meeting and declined invitations to reschedule it, she sent written feedback on his performance to ensure that he received regularly and timely feedback on his action plan.

[300] She stated that as of October 2, the need for improvement remained, and insufficient progress had been made. Each review area should have seen significantly more work. He was not prioritizing the action plan. Some of the deliverables had not been looked at or had not progressed. She referred to the action plan at page 4, for September 28 to October 2, which states, “for the week of September 28 to October 2, Blair’s work on this project has been very minimal”. She stated that the comment had been made in light of the fact that he had been absent.

[301] The comments on the performance improvement plan read as follows:

*Showing initiative and being action oriented*

*Some access database field names and one completed reconciled RC manager report reconciliations.*

*Since the last action plan meeting on September 21 there has not been a lot of progress made in advancing on this project.*

*As the ultimate goal of this project is to provide a listing of required database fields to IMTD, the priority is to work on identifying the database fields required from the Access databases a.*

*To date Blair has identified 56 access database reports that require review of the database fields and he has only identified database fields in six of these reports. Blair has also looked at 15 RC managers reports of 26, where he is expected to reconcile these reports to the source system. To date only one report has been reconciled.*

*As a Reg five and working in financial systems for the past 8-9 years Blair should be able to clearly provide a simple reconciliation comparing results from two datasets.*

*Expectations would have been that Blair would have much more work completed on the identifying the access database fields. As it stands, progress on the project is minimal and it is unclear if Blair will be successful in meeting the December 31 deadline.*

*Blair will need to focus on priorities and pay close attention to detail if he aims to succeed.*

*Quality of work*

*Blair's main priority at this point in time of the project is to complete the database fields listing for all access database reports. Blair has identified the reporting databases and the reports within these databases that need to be looked at. Out of the 56 reports identified by Blair only six have been reviewed and have had database fields identified. It has been mentioned in two separate quality management meetings that Blair needs to work on his reconciliation for the database fields as well as the RC manager reports.*

*Currently the reconciliations are not being done to the level of service that would be expected from a reg five level.*

*In previous discussions, Blair has been made aware, that his work should be easily reviewed, and he should ensure that he creates his files in an efficient way for review purposes. There is no point for the reviewer to have to redo the work already done by Blair to ensure the report reconciles.*

*Time management*

*Blair was unavailable and did not attend the current action plan meeting as he was participating in a GWCC activity. The meeting*

*was scheduled with three possible times, one-time Blair decided to see a doctor during working hours [a non-planned appointment] and two other times Blair declined due to a GWCC activity. It was clearly indicated to Blair that with the current action plan it may not be the best time to participate in this GWCC event, but Blair chose to participate.*

*For the week of September 28 to October 2 Blair's work on this project has been very minimal.*

*Adhere to the CNSC directive on hours of work and leave*

*Blair continues to have last-minute appointments, i.e.*

*October 1, 2015, in which a 12:45 PM you informed me that you had to check in with your doctor in light of the meeting you had at Slater from 11 o'clock to 12 o'clock.*

*Calendar access and absence from workstation*

*Blair remains to be absent from his desk on a regular basis, where he is receiving and managing calls on his personal cell phone.*

*Work independently*

*We have not seen a significant improvement in the results that Blair is providing. Blair has been given instructions on what is required for this project. Blair is the sole person working on this project and it is his only priority. Based on the review of Blair's work and since the last action plan meeting with identifying the database fields as his number one priority, we would've expected a significant improvement into the amount of database fields provided.*

*A number of discussions were held to provide specific directions and guidance on the requirements of the advancement of the project. These discussions are well beyond the level of involvement that should be sought.*

*Considering that the project remains at its initial stage, it is difficult to assess if Blair is capable to work independently. As it stands, Blair may not be able to meet the project deadline of December 31st.*

*New work objective added that the July 23 meeting*

*Blair continues to provide a status update email once a week*

*[Sic throughout]*

[302] Mr. Caron responded by email on October 6, 2015, to Ms. Sigouin, stating that on reading the performance improvement plan, there was a lack of positive statements. He asked if management purposely focused on negative issues and had written statements in a negative manner as a means of motivating or improving him.

[303] Mr. Caron described his email as evidence of insubordination. He should not have communicated to management that way. He was frustrated, and it was because of

how he felt that there was a lack of positive statements and a focus on negativity. His view was that he was being documented for failure. He supported the GCWCC and ran into challenges. He felt that management made errors in its documentation; he had worked on seven, not six, database reports. The references to him being a REG 5 with eight to nine years of experience and to the fact that he should have been able to provide a simple reconciliation he did not think were accurate as in his view, it was not a simple reconciliation as some of the reports had drill-down capability. He was not advised that there were errors. He was just told to reconcile thousands and thousands of data fields.

[304] Ms. Sigouin stated that management was providing facts. Management was not seeking to demotivate him. He evaluated words rather than working on the databases. He seemed surprised to hear that very little work had been done. He referred to management not being clear as to whether it supported the GCWCC, which was the subject of a number of emails. Management was concerned as to whether it was the best use of his time when he was being evaluated. Mr. Caron decided to participate in the GCWCC. Ms. Sigouin has always supported charitable campaigns. Her experience is that employees work harder to make up for lost work so that they may participate. The action plan was developed for his benefit.

[305] On October 8, 2015, Mr. Caron emailed Mr. Schnob and Anik Laflamme, from Labour Relations. He advised them that he was just reviewing some documentation on action plans.

[306] The grievor had reviewed some material on SMART criteria. He talked about establishing a panel to review the action plans so that employees could succeed. He looked into accommodations, to encourage a positive workforce. He had not been provided with any deadlines. It was supposed to be a two-way communication process. The action plan was not consistent with what others and the union had told him. In his view, it was a sham performance plan, and it was punitive.

[307] On October 14, 2015, Mr. Caron emailed Mr. Schnob to express his interest in discussing and making suggestions for collective-agreement labour relations issues and in particular on issues such as banked time, flex time, medical appointments, medical certificates, work-from-home options, PMFs, action plans, and performance as

the existing programs did not make much sense and were not being applied to him properly.

[308] On the same day, he emailed Ms. Sigouin and Mr. McCambley. He expressed interest in a stretch assignment as he would appreciate any opportunities to build on his experience in a financial management role or a special project preparing for the transition to SAP software "... as the completion of these [sic] CPMRS BI advancement project becomes more clear, it would be great if we can begin discussions for work remaining in the 15/16 fiscal year."

[309] The fifth action-plan meeting occurred on October 15, 2015. Ms. Sigouin emailed Mr. Caron on October 16, 2015. She attached a summary of the action-plan follow-up meeting. She stated that at the progress review, Mr. Caron needed to improve in all areas. She read through these comments:

*Showing initiative and being action oriented*

*This project has been in progress for 15 weeks and since the last action plan documentation from the meeting that was scheduled on October 2 there has been some progress in identifying database fields from six access database reports previously to 13 access database reports out of 56 database reports.*

*As the ultimate goal of this project is to provide a listing of required database fields to IMTD, the priority is to work on identifying the database fields required from the access database. Expectations would have been that Blair would have much more work completed on the identifying the access database fields 15 weeks into the project. Although some progress has been made since the last action plan meeting the progress on the project is still minimal and it is unclear at Blair will be successful in meeting the December 31 deadline.*

*Quality of work Blair's main priority at this point in time of the project is to complete the database fields listing for all access database reports.*

*Blair has identified the reporting databases and the reports within those databases that need to be looked at. Out of the 56 reports identified by Blair 13 have been reviewed and have had database fields identified.*

*Currently the reconciliations are not being done to the level of service that would be expected from a Reg 5 level.*

*In previous discussions, Blair has been made aware, that his work should be easily reviewed, and he should ensure that he creates his files in an efficient way for review purposes.*

*The reconciliations are lacking explanations and user-friendly items such as hangers. Blair has asked me to review a sample reconciliation that he had completed and provide comments. I have provided feedback to Blair indicating some items that should be in the reconciliation. In regards to data fields existing in CPMRS, there are CPMRS data fields that are being referred to as “maybe” they exist. This should not be the case because if you identify an item as a “maybe” then you need to go further and test data field results with the source system. If it is still determined that you are not sure as to where the source of the data field is coming from and we need to create a list and ask the questions to IMTD.*

*The overall quality of the work accomplished to date is currently not satisfactory.*

*Time management: As previously indicated, Blair’s main priority at this point in time of the project is to complete the database fields listing for all access database reports and the deadline of December 31 may not be achieved.*

*As a result, time management is an ongoing concern, as Blair spends extensive periods of time on unrelated matters to the special project, (grievances and on his cell phone).*

*Adhere to the CNSC directive on hours of work and leave.*

*Employee has difficulty adhering to the CNSC directive on hours and leave. Employee often delays leave requests until the end of the month causes a tedious reconciliation process which the employee often disputes.*

*Calendar access and absence from workstations*

*Blair has communicated that he does update his calendar on a regular basis.*

*Work independently*

*Blair has been given instructions on what is required for this project. Blair is the sole person working on this project and it is his only priority.*

*A number of discussions were held to provide specific directions and guidance on the requirements of the advancement of the project. These discussions are well beyond the level of involvement that should be sought. Blair needs to show more independence in the advancement of the project.*

*Blair should be able to translate the project plan into concrete work activities without being provided detailed step-by-step guidance. Furthermore, once the feedback is given, i.e. Reconciliations, Blair should apply the feedback or lessons learned into subsequent work. This is not the case, as Blair has been provided the same feedback on various occasions. Blair needs to show that he controls the quality of his own work.*

*New work objective added at the July 23 meeting*

*Blair continues to provide a status update email once a week.*



[Sic throughout]

[310] In summary, Ms. Sigouin stated that he was having difficulty progressing the work.

[311] Mr. McCambley was asked how the project was moving along in October 2015. He stated that at the time the project was planned, he thought that it would be completed by October or early November. He did not know whether Mr. Caron was able to grasp certain concepts.

[312] Mr. Caron stated that he felt that he was close to completing the action plan. He came in early and prepared a presentation before the action-plan meeting. At that point, it was not clear to him that the action plan was disguised discipline. He populated a board outlining the items on the project and what had been achieved. He felt that he was moving along on the project really well and that he was making an effort to be successful. He was doing a decent job.

[313] He stated that Ms. Sigouin advised him that she was leading the meeting, not him. The presentation he had prepared was disregarded.

[314] Mr. Caron commented that he did not see any parameters.

[315] Mr. Caron stated that feedback from clients was an important part of the project. Ms. Sigouin stated that the factors she was looking for were work quality and quantity, along with independence. Mr. McCambley stated that he looked for quality over quantity because he had to review the material. Mr. Caron asked Ms. Sigouin what would make her happy. She replied that it would be him following the action plan. He stated that he was trying to get deliverables inserted into the plan. The response was that he had to do his work as outlined in the plan.

[316] Ms. Sigouin was referred to Mr. Caron's email to her dated October 16, 2015, entitled, "re-2015 soccer player recruitment". By email, copying Ms. Sigouin, Mr. Caron had advised an organizer that he was interested in participating in a GCWCC soccer game, and he asked that his name be put on a particular team roster.

[317] Ms. Sigouin advised him by email that she was unable to approve his participation in the soccer game scheduled for November 10, 2015.

[318] She had given him the option of participating in the hockey tournament. However, it had not been a success because of the extended time he was absent from the workplace and because the action plan did not move forward. She decided that he could not participate in the soccer tournament because he needed to work on the action plan.

[319] During cross-examination, he was asked about wanting to participate in the soccer tournament. He said that it was a way of meeting people and of networking. He was asked if he agreed that he was still being performance managed at the time. He agreed.

[320] With respect to the issue of adhering to the directive on hours of work and leave, Ms. Sigouin stated that when she first became responsible for the financial systems group, she held a meet-and-greet event and scheduled a meeting with each employee. Without fail, each one talked about his or her work goals.

[321] Ms. Sigouin wrote to Mr. Caron on October 21, 2015, with respect to his performance issues. The letter read in part as follows:

*The overall quality of your work remains unsatisfactory and continues to affect the level of effectiveness and efficiency to ensure our Division meets its responsibilities. Furthermore, your ability to improve h him [sic] as yet to be demonstrated.*

*As a result, I formally advise you that failure to meet the objectives and expectations of the job and perform a satisfactory level by November 20, 2015 will result in termination of your employment for unsatisfactory performance.*

*As per the expectations outlined in the action plan provided to you on July 6, 2015, Jeff McCambley and I will continue to monitor your performance and provide feedback on the advancement of the special project by email and through our biweekly meetings, hoping for a positive outcome. It is imperative that you focus on the directions provided to you in the action plan and subsequent feedback sessions, and that you ensure that significant progress towards them is achieved.*

[322] Mr. McCambley provided input into the letter. He met with Ms. Sigouin to discuss whether Mr. Caron would meet the deadline. Mr. Caron's work was unsatisfactory. Based on the work done, Mr. McCambley did not think that the project was as far along as it should have been. Much more input was required of Mr. Caron. Given Mr. Caron's level, he should have been significantly more independent. One report required input from the IT group, but it did not hinder the entire project.

[323] He was asked what prevented Mr. Caron from making greater progress. He said that he did not want to say that it was his work ethic. He did not think that the grievor focused on the project. He was all over the place. He struggled to stay on track. Mr. McCambley and Ms. Sigouin met with him every two weeks about the action plan. The meetings could take an hour or two. In between them, Mr. Caron and Mr. McCambley would meet with respect to the technical aspects of the project.

[324] Ms. Sigouin stated that still, progress was not visible at the level required of the position. Management was worried that if things continued, Mr. Caron would not succeed. The letter sought to clarify the facts and to formally advise him that if he failed to meet the objectives at a satisfactory level by November 20, 2015, the result would be the termination of his employment for unsatisfactory performance. Management had invested significant time, and by October 21, 2015, results were not visible. It was hard on everyone as Mr. Caron had been relieved of his other tasks. Ms. Sigouin and Mr. McCambley had much work of their own. It was becoming obvious that he would not succeed. They had hoped that with review and guidance, he would succeed. Without progress, the project would end in November.

[325] Mr. Caron had been an employee for many years, during which issues had been documented.

[326] On October 26, 2015, Mr. Caron emailed Ms. Sigouin, seeking approval to participate in another employer hockey game, scheduled for November 17, 2015. She replied that for the same reasons as in her email of October 16, 2015, she was unable to approve his participation. She explained that he was to prioritize the action plan.

[327] The grievor stated that he provided a level of flexibility in that he would have been absent only from 12:00 p.m. to 3:30 p.m. It was an opportunity to network. Two hundred staff were to attend. The hockey team was the tournament champions. He had been the leading scorer. He questioned whether he was being isolated and stated that he should have been allowed to attend.

[328] Ms. Sigouin emailed Mr. Caron on November 2, 2015, providing a summary of the evaluation given to him on October 29, 2015, at the action-plan meeting. The comments read as follows:

*Showing initiative and being action oriented*

*This project has been in progress for 17 weeks and since the last action plan meeting on October 15 database fields have been identified in 50 of the 56 reports and reconciliations of database fields have been provided for 48 of the 56 reports. As a result, significant improvements have been made in terms of productivity between October 15 and now.*

*Nevertheless, there are still issues surrounding some of the reconciliations that will need to be addressed and discussed at a quality management meeting with Blair.*

*Blair still needs to demonstrate that he can show initiative and take action to develop client solutions. It is still apparent in Blair's work that he does not go further to investigate an issue and provide a full client solution.*

*To provide an example, one of the reports that Blair has attempted to reconcile, he indicates that the report does not work in Access and that is the end of his response. Blair should be investigating this further to [1] verify the client still requires the report and [2] if the client does require the report then Blair should be looking into the problem himself for a solution or open a ticket with FSG to investigate. This action plan is to assess Blair not only in the production aspect of the tasks but more importantly how he is doing the tasks. Although much improved progress has been made since the last action plan meeting, Blair should demonstrate further initiative and problem-solving skills to obtain client solutions that meet their needs.*

*Blair's focus will be returning to the reconciliations of the CPM RS reports. Blair should ensure he pays attention to detail with these reconciliations and that he completes them efficient and timely upon final submission and goes beyond what he has been doing currently in order to provide a meaningful solution.*

*The December 31 deadline is still questionable and we will know more the next action plan meeting in November.*

#### *Quality of work*

*Through this action plan process we have been trying to provide Blair with feedback and comments identifying areas of concern with this work such as paying attention to details. We have also identified what we would expect at a reg five level from the times that Blair is doing on the CPMRS BI Advancement project.*

*Comments from Jeff as the client and technical authority:*

*Blair continues to not provide the quality of work that would be expected at a REF 5 level. A recent example is when Blair was providing a reconciliation format for approval to move forward on the CPMRS report reconciliations.*

*I have identified as his client on many occasions during our quality management meetings what I was looking for in these reconciliations, which was a summary showing me that both systems are balanced with each other. Blair struggled finding a*

*format until I had identified one that he could use. Blair then took this format and literally used it for every field in the report including coding blocks, dates and descriptions. What was provided was an "R" for reconciled and an "X" for not reconciled. As the client this information is not meaningful or effective and it is not an efficient use of Blair's time. While performing tasks as a financial systems analyst, Blair should be asking himself questions such as will my client find this useful, and does it make sense it is this meeting my clients needs?*

*I was also surprised that Blair was reconciling non-numerical data fields. Blair has worked in FSG for over eight years and we have never balanced against the source system in the manner that he did. This is showing me that Blair is not paying attention to detail when we are having our quality management meetings or ad hoc discussions.*

*As well Blair should be going further to investigate issues that he is finding to this project. To that end, very minor movement has been made despite many discussions with Blair on this aspect. The overall quality of the work still requires improvement and the December 31 deadline is still questionable.*

#### *Time management*

*At this point as mentioned previously it is unclear if the December 31 deadline will be met. Most of the time Blair has been respecting his hours of work. Improvement is still needed in regard to his start time.*

#### *Adhere to the CNSC directive on hours of work and leave*

*in terms of providing a medical certificate, follow-ups were required from management up until October 22. More recently, this week Blair has been providing the required information without requiring follow-ups. Medical appointments continue to be scheduled during working hours and are still reoccurring between once or twice and average per week*

#### *calendar access and absence from workstation*

*Blair has communicated that he does update his calendar on a regular basis.*

#### *Work independently*

*Blair has been given instructions on what is required for this project. Blair is the sole person working on this project and it is his only priority.*

*A number of discussions were held to provide specific directions and guidance on the requirements of the advancement of the project. These discussions are well beyond the level of involvement that should be sought. Blair is being supportive biweekly action plan meetings, biweekly quality management meetings, ad hoc quality management meetings in various emails.*

*Blair needs to show more independence in the advancement of the project.*

*Blair should be able to translate the project plan into concrete work activities without being provided detailed step-by-step guidance. Furthermore once the feedback is given, i.e. Reconciliations, Blair should apply the feedback or lessons learned into subsequent work. This is not been the case, as Blair has been provided the same feedback on various occasions.*

*Blair is expected at a Reg five level to exercise sound judgement and propose meaningful solutions to clients. Blair's judgement with recent decisions on the reconciliation format is questionable because with his experience he should know what would be required. Blair needs to ensure that he controls the quality of his own work.*

*New work objective*

*Blair continues to provide a status update email once a week.*

*[Sic throughout]*

[329] She was asked how hopeful she was at the end of October that the action plan would be completed. She stated that some progress on the reconciliations had been made but that the quality was not there and that some parts of the action plan had not been started.

[330] On October 29, 2015, Mr. Caron reported to the union with respect to his success on the project. He stated that he had completed 95% of the Access data fields and that he had achieved 40% completion of the CPMRS report reconciliation. However, management was holding it up because it had not signed off on a presentation design template. He referred to management's response as "clown shoes".

[331] He reported to Mr. McCambley that at 17 weeks, 50 of 56 reports were done and 48 reconciled, which was a significant improvement. However, he found issues. There was still room for improvement. When a report did not work, he investigated further. He minimized supervisor involvement. Significant productivity improvements were made between October 15, 2015, and the report.

[332] Mr. Caron testified that he was terminated two weeks later.

[333] He saw a discrepancy between what was on paper and what he was told, which he found intimidating. Mr. McCambley also advised him that he continued to not provide the quality of work expected from someone at the REG 5 group and level. Ms. Sigouin also advised him that she was not sure if he would meet the

December 31, 2015, deadline as after 17 weeks, he should not have required so much supervisor support.

[334] Large gaps appeared between the achievements and management's goal. In terms of working independently, it did not feel that he should be asking so many questions.

[335] Mr. Caron stated that he observed that Mr. McCambley seemed somewhat happy, while Ms. Sigouin pushed for more.

[336] Ms. Sigouin said that the overall quantity was good, that the quality was not good, and that his time management was questionable. His leave was better. He did not add value if others had to review, correct, or redo his work. A REG 5 must work independently, manage time, produce quality work, and be motivated. Mr. McCambley said that he spent 45 minutes at Quality Management (QM) meetings and almost a day reviewing reconciliation documents. Ms. Sigouin said that a supervisor cannot spend 7½ hours every week with every employee.

[337] On November 2, 2015, Mr. Caron emailed Ms. Sigouin, advising her that he did not yet have the seventh action-plan review meeting in his calendar.

[338] On November 5, 2015, she responded, advising him that because of the second quarter Management Committee presentation the next Friday, her calendar was busy, and she would like to schedule something for November 16, 2015.

[339] Mr. Caron responded, requesting that management find time to provide him with the necessary feedback to help him reach a satisfactory performance level.

[340] She responded on November 6. She stated that her first available time was on November 16, 2015, and that he had been provided with necessary feedback on October 29, 2015. In addition, Mr. McCambley remained available to answer any technical questions. Ms. Sigouin stated that she was not available because of the mid-year management committee presentation to the executive. Mr. McCambley was available. Mr. Caron felt that he needed support; however, they had been providing him with support since the beginning of July.

[341] On November 13, 2015, Mr. Caron emailed Ms. Sigouin and Mr. McCambley this update:

*I have been working through the CPMRS report says[sic] my top priority. Work completed and ready for evaluation is the following:*

*19 CPMRS reports analysed and reconciled. [In completed folder]*

*6 CPMRS reports analysed with variances observed and investigating [in CPMRS report reconciliations folder]*

*2 CPMRS reports variances found [in CPMRS report and reconciliations folder]*

*one CRF prepared [in completed folder]*

*if you have any questions for clarification please let me know*

[342] The same day, he emailed Ms. Sigouin and Mr. McCambley with respect to the weekly update, stating this:

*Quality management meeting November 5*

*analysing RC manager reports and data fields. Updating working files.*

*Worked with Zafrus on CPMRS report specification details.*

*Next week*

*prepare for action plan meeting*

*prepare for quality management meeting*

*continue my work reconciling RC manager reports with approved reconciliation template design.*

*Start time reporting reconciliations if time permits*

*project plan administration*

*reference files*

*first picture printscreen of CPMRS report reconciliations completed folder.*

*2<sup>nd</sup> picture printscreen of CPMRS report reconciliations folder*

[343] From November 13, 2015, on, it was apparent to Mr. McCambley that Mr. Caron would not meet his deadlines. Many reconciliations had to be done. The dashboard had not been done, and little work had been done on the time reports. The BI relationship package had not been started. Based on everything that had been done to that point, he did not see how the deadlines could be met.

[344] Mr. McCambley's assessment was that 35% of 7 deliverables have been completed. He had prepared a document to assess how much work had been completed. It read as follows:

*CPMRS BI Advancement Project Plan Deliverables*



<i>Deliverable</i>	<i>% complete</i>	<i>Notes</i>
<i>1)MS Access Database Review Report</i>		<i>100% Complete</i>
<i>2)New fields From Access Reporting Databases</i>	<i>97%</i>	<i>one report is 0% complete as an investigation required on functionality</i>
<i>3)CPMRS RC managers reports analysis document</i>	<i>20%</i>	<i>out of 26 canned reports within CPMRS, Blair has developed 65 various reports because of hierarchy levels.</i> <i>34 reports are 0% complete</i> <i>2 reports are 10% complete</i> <i>2 reports are 15% complete</i> <i>7 reports are 25% complete</i> <i>19 reports are 50% complete</i> <i>1 report is 100% complete</i>
<i>4)CPMRS Dashboard Analysis Document</i>	<i>0%</i>	<i>not started</i>
<i>5)CPMRS time reports analysis document</i>	<i>25%</i>	<i>started analysis with providing screenshots and identifying items that need to be worked out with IMTD representative</i>
<i>6)BI Relational Package Analysis Document</i>	<i>0%</i>	<i>not started</i>
<i>7)CPMRS FSG Query Analysis Document</i>	<i>N/A</i>	<i>identified as low priority in [sic] removed from the</i>

*project  
deliverables*

*8)Recommendation Report for 0%  
new CPMRS fields*

*not started*

-----  
*Overall Project Completion*

*35%*

[345] Mr. McCambley explained each line. He detailed how he calculated the percentages of completion.

#### **J. The termination letter**

[346] On November 16, 2015, Mr. Schnob wrote to Mr. Caron, advising him of the termination of his employment.

[347] Ms. Sigouin was involved in the decision to terminate Mr. Caron's employment. After going through the action plan since July and seeing no improvement, even though numerous letters were sent to him and he had received significant support; seeing no changes in his behaviour or an increase in the quality of his work; and given the heavy burden of managing it all on an ongoing basis personally, it was a hard decision.

[348] To ensure that the team succeeded, a decision had to be made as Mr. Caron's job expectations were not being met.

[349] Ms. Sigouin informed Mr. Caron of the termination of his employment. She provided the letter to him on the morning of November 16, 2015. She was fairly certain that Ms. Laflamme from Labour Relations was present at the meeting.

[350] Ms. Sigouin had been nervous. It was not a goal that she had wanted to achieve, given her values and ethics.

[351] The grievor provided no feedback. He did not appear shocked. He asked how much money she was giving him for it. She advised him that he was being paid to the end of the week.

[352] Security escorted him out. He did not seem affected by it. He smiled. She thought that she was significantly more affected than he was.

[353] Mr. Caron stated that management's underlying behaviour was not supportive, that he had been isolated, and that he was not provided with flexible time. He described management's behaviour as very punitive.

[354] During cross-examination, Mr. Caron put to Ms. Sigouin whether because he had a better knowledge than she did of financial systems, it had been a sham evaluation. She replied that it had not been a sham and that she worked with technical experts, so she did not have to be an expert. She required sufficient understanding to manage.

[355] She was asked whether she thought that Mr. Caron's improvement process and discipline had been administered fairly. She stated that she did not know about discipline but that the performance management had been done fairly.

[356] She was asked if tardiness and absenteeism are forms of misconduct. She stated that they are, in part.

[357] She was asked if she ever received training in applying discipline. She stated that she has never received it.

[358] She was asked how a director disciplines employees. She said that she did not take a leadership position to discipline employees.

[359] She was asked whether when a staff member fails a PMF, the person is put on an action plan. She responded that doing so is not automatic. In his case, it had been going on for years and involved showing up late, being absent, and underperforming as well as showing a lack of quality.

[360] She was asked if there were performance management guidelines. She stated that the employer has guidelines as a separate employer. It must follow its directives.

[361] She was asked to confirm that she did not allow Mr. Caron to complete the work on the CPMRS action plan as December 31, 2015, was the completion date. She did not think that sufficient work had been done on it.

[362] Mr. McCambley was asked whether he thought that Mr. Caron was insubordinate at times. He agreed. He was asked whether attendance was a form of misconduct, to

which he agreed. He was asked whether he thought that Mr. Caron stole time. He replied that it was not so much that as not following the rules.

[363] Mr. McCambley was asked whether he had ever had training on progressive discipline. He stated that he had not had it so much on discipline but instead on action plans. He had no responsibilities when it came to disciplining staff, which was the director's responsibility.

### **1. Mr. Caron's understanding of disguised discipline**

[364] During cross-examination, Mr. Caron stated that essentially, there was disciplinary misconduct, and that instead of applying progressive discipline, the employer decided on termination.

[365] He was asked why there would have been disguised discipline. He thought that he had been insubordinate in an email. He had been frustrated because the employer had been coming after him aggressively. It was a hostile work environment. He had years of special treatment under the instruction letter, instead of an accommodation. The employer wanted to push him out.

[366] He was asked why the employer wanted to push him out. He said that he did not know. He did not have a theory.

[367] He was asked why he thought he had engaged in misconduct. He referred to an email dated March 11, 2014, which he sent to his then-director, Mr. Souligny, with respect to an alleged shouting incident with Ms. Charpentier. He said that he had been having issues with a team member, who had freaked out. The email reads as follows:

*I probably should have mentioned something earlier however left it up to my supervisors to see this coming and communicate it-until now. Just about an hour ago a member of my team, Pascale, got really angry and yelled at me. Neighbouring cubicles would have heard this loud and clear as witnesses and I'm pretty sure this is not the kind of environment we want. Why did she yell at me? I made a mistake, sort of. I'm not going to get into the mistake just yet and really that's irrelevant. You don't get angry and yell at someone because they made a mistake. I'm pretty sure we're supposed to review the situation and provide solutions. We are professionals.*

*This instance is not the initial onset. Anytime I make a mistake Pascale is there at my desk: asking me why I did what I did, what I was thinking telling me I'm wrong-all of which are in a very*

*condescending tone. It's been bothering me for some time. Bruce allowed it. Jeff apparently talked to Pascale about it. Mike is too new.*

*The error that set her off today was Matilde called her saying she couldn't import files into free balance. Pascale knew the error was at my desk. We've been discussing issues with Win 7 for almost 2 weeks now. New Windows policy states we can't write to C:/program files. This policy applies to my computer and a few others however most are still able to write to C:/program files. I cannot. In order for me to complete one of my tasks I need to change the global parameters in the Control Panel of free balance financials. Friday when I changed this Emily Armstrong reported errors while trying to create SPS files. I changed the global parameters back once I completed my tasking. Today Matilde reported errors. My bad, I forgot to change the global parameters back yesterday. I'm pretty sure Pascale knew exactly what was wrong but she still came to my desk to ask why what I did, what I was thinking, telling me I'm wrong. Today I said "no big deal, I made a mistake"... Then she started yelling at me. Saying I don't care, I can't make mistakes like this, yelling "why didn't you change it back" [global parameters].*

*In addition to the instance this morning last week during our team meeting Pascale told Mike, our new supervisor, he doesn't have time for training. My eyes nearly popped out of my head. Career development is important. I believe nobody is perfect and everybody should work to better themselves.*

*On that note like to move this over to both of you. There is a part of me that doesn't want to communicate with Pascale anymore but there is another part of me that would like to see Pascale had to leave situations better. I will discuss these communications with the union to see what they recommend as well.*

*[Sic throughout]*

[368] Mr. Souigny replied the same day, with this: "Okay Blair the incident is noted I will get back to you... I will see if I can discuss with Lorraine ASAP".

[369] On February 20, 2015, Mr. Caron forwarded the email to Ms. Sigouin and Mr. McCambley, stating, "If Pierre didn't brief you here is [sic] the incident details from last March."

[370] He did not understand why he was being attacked. He stated that he thought that he had engaged in misconduct. He stated that after this, there was a strong case of management not wanting to deal with an employee that acts that way. He was asked whether this was speculation. He said that it was.

[371] Mr. Caron was asked whether only one employee had been aggressive. He stated that Ms. Charpentier had approached him unprofessionally a number of times. He was asked when. He replied that it was all documented.

[372] The grievor was referred to an email exchange between himself and Ms. Charpentier. He was asked if he had still been able to exchange emails with her. He replied that he had been and that it showed that they worked together. He was asked if there were other examples of him working with her. He was not certain. Most of it would be documented because they did not really talk.

[373] Mr. Caron stated that his supervisor, Mr. McCambley, was unfair and aggressive. He was asked what he meant by “aggressive”. Mr. Caron replied that Mr. McCambley had been first a colleague and then a supervisor. He said that there was a gap between how Mr. McCambley dealt with him in person and by email. He stated that Mr. McCambley’s emails were aggressive. He used different fonts. He was documenting the grievor for failure.

[374] Mr. Caron was asked how Mr. McCambley was aggressive to him. He thought that Mr. McCambley undermined his performance at times. Sometimes, he noticed that he felt that Mr. McCambley tried to document his performance for failure. Mr. McCambley would whisper to other team members that there was a meeting but would not remind the grievor. There was some exclusion and isolation.

[375] He stated that sometimes, when mistakes were made, Mr. McCambley was very aggressive and made a strong case for documenting for failure.

[376] The grievor was asked whether he made mistakes. He stated that he did. He was asked if he had taken an inordinate amount of leave. He said that he had been sick and that the union had told him that the amount of leave he took was not excessive.

[377] The grievor stated that it was a sham performance plan that documented for failure. He was asked if he had evidence that it was a deliberate sham. He stated that at the time, he would not have called it deliberate. This is in hindsight. He was asked what it had been based on. He replied that it was a sham performance plan.

[378] When Mr. McCambley returned from language training, the grievor thought that he had been called back because of the grievors misconduct. Ms. Charpentier and he

had a fight. He made a statement. Things became aggressive when Mr. McCambley returned; things were uncomfortable.

[379] The grievor was referred to his work calendar for July 2, 2015, which reads, “Come in early and leave late. Be good for a while.” He was asked whether he had been bad. He stated that it was a reminder to give a little extra.

[380] Mr. Caron made a reference that “Anik” was behind everything. The union asked him what he had done to anger Ms. Laflamme. He stated that the first time he met her was at a meeting about leave in 2011. He said that his supervisor, directors, and everyone had changed. She had his personal file. He should have asked her for it; he asked everyone else for it.

#### **K. The CPMRS**

[381] The grievor was asked if he produced work in that six months and what the project entailed.

[382] Mr. Caron stated that he provided weekly updates to management. The action-plan meetings were held, at which they talked about the work to be produced. There were also quality-management meetings with Mr. McCambley.

[383] The grievor stated that he produced work documents, project plans, reconciliations, and analyses.

[384] He was asked what Mr. McCambley complained about. He stated that it was all documented. If an error arose, there was an email to correct it.

[385] The grievor was asked who was present at the quality-management meetings. He stated that mostly, him and Mr. McCambley. When Ms. Sigouin and Mr. McCambley went on vacation, he did not recall whether Mr. Nichol attended.

[386] He was asked for the purpose of the quality-management meetings. He replied that they dealt with questions and answers about the project and biweekly updates. He was asked if some weeks, they did not meet. He said that an email was sent every Friday about the project to Ms. Sigouin and Mr. McCambley. He did not recall any structure in it.

[387] He was asked if quality-management meetings were held separately from the weekly updates. The purpose of those meetings was to deal with questions and answers on the project with Mr. McCambley.

[388] Feedback was provided during the action-plan meetings.

[389] The grievor was asked whether Mr. McCambley ever complained to him about his work on the project. He replied that Mr. McCambley would comment on the action plan and that the grievor tried to take corrective measures.

[390] He mentioned to the union that Mr. McCambley shouted. He was uncomfortable.

[391] He was asked why Mr. McCambley complained. He replied that it was for some reason. He was asked if it could have been Mr. Caron's lack of attention to detail. He replied, "Sure."

[392] The grievor was asked whether Mr. McCambley talked about his lack of commitment. He replied, "So, in the meetings verbally if he ever went there."

[393] The grievor was advised that in an email, Mr. McCambley had mentioned the grievor's lack of commitment in the context of the hockey tournament. He commented that not much project work had been done and that his priority was the project. Mr. Caron stated that it was probably more Ms. Sigouin's concern.

[394] He was asked how he evaluated his work on the project and whether he thought that he had done a good job. He stated that his perception was that he had done not such a bad job.

[395] The grievor set up the structure for the project, which had not been done before. He created an infrastructure. When providing updates, he created a project plan to share that had more clarity. He created folders and provided access to them to his supervisor or chief, and he reviewed the work with his supervisor. He then said that his perception was that he had done a good job as he had provided an opportunity for corrective measures so that it could be more efficient with his and others' time.

[396] He stated that in reality, he knows that the employer has the right to manage performance as it wishes to.



[397] He was advised that his supervisor and director had a different perception with respect to the evaluation of his work.

[398] He was referred to an email from Mr. McCambley to Ms. Sigouin and Ms. Laflamme entitled, “re-PMF meeting with Blair held on June 5, 2015”.

[399] In his report, Mr. McCambley notes the following:

*The overall theme of the meeting was that improvement was needed on “attention to detail”, I had to have mentioned this at least 10 times throughout this meeting, I was very repetitive on this. He said that he understands that he has to pay closer attention to detail, but that in our type of work there were going to be errors. I agreed with him that nobody is perfect but we have to minimize the errors as much as we can in order to give our clients accurate and timely information.*

*As part of our PBHC discussion and paying attention to detail, he was a little ticked off that Pascale had to redo all of his work for the new year PBHC and he said that maybe he should file a grievance against her for doing his work. He said that he wanted to work through the issues. I indicated that just because he is away on vacation we do not stop working we still have deadlines to meet.*

[400] Mr. Caron agreed that Mr. McCambley might have said that. The grievor was asked whether he agreed that it was a source of concern during the course of his employment.

[401] He said that he was employed by the employer for 10 years. Mr. McCambley was there before he was hired. Mr. McCambley was not the chief, but errors create extra work. The employer did not have flexibility for errors. He felt that Mr. McCambley’s role was to motivate him to reduce errors.

[402] He stated that he happens to know that the error rate was 10%, as compared to industry, which has a 25% error rate. He did not think his error rate was that bad. No one ever calculated it.

[403] He was asked if Mr. Nichol ever mentioned concerns with the grievor’s lack of attention to detail. He said that he was not sure that Mr. Nichol would have said that. Accounting is a precise profession.

[404] The grievor was referred to the instruction letter from Mr. Nichol dated May 10, 2012, which references concerns about poor compliance to due dates. He was asked whether he agreed with it.

[405] He stated that the financial systems team used an Access database, which included tables in which each employee had his or her tickets. When the form was designed, a default date to complete a ticket within one week was inserted. In his documentation, he noted that he had a meeting with the director general. Mr. McCambley said that default dates are not reviewed.

[406] The grievor said that he had reduced capacity in 2012 and that recovery takes time.

[407] He was referred to an email exchange between him and Mr. McCambley on August 12 and 13, 2015, with respect to the project plan's deliverable date. Mr. Caron asked Mr. McCambley to confirm that December 31, 2015, was the final delivery date they were agreeing to for the main deliverables.

[408] Mr. McCambley replied that the December 31 should have been considered as the final date by which the project should have been finalized; nevertheless, he believed and Mr. Caron confirmed that it was feasible and realistic that the project could have been completed before that date and that the deadlines would be adjusted in light of Mr. Caron's progress.

[409] Mr. Caron stated that the director general had a work plan that included all the work plans, including for the CPMRS. He stated that as an FI-2, he could have finished the work before December 31 if the reference was to the director general's work plan. He was asked whether he had agreed to change to a finalization date before December 31. He stated that there is no record of him agreeing to an earlier finalization date. His employment was terminated before that date.

[410] He was referred to the CPMRS BI advancement-plan project plan that he prepared dated September 3, 2015, and that is entitled, "Initial presentation and work in progress". Mr. Caron stated that it would have been updated as he went along or if management asked him to update it.

[411] He was referred to the "Finance and Administration Strategic Roadmap 2015-16 to 2018-19" in evidence. Mr. Caron stated that the original is a much larger document. It does not address known errors.

[412] The CPMRS was scrapped the first time. The second system had many errors. His job was to find the errors by reviewing all the fields in the CPMRS and by

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identifying new fields. He was to create new mock-up reports. The most important ones were the first three listed in the roadmap: “Review all fields used in CPMRS; Identify new fields required from Free Balance/Louis and PBHC and Identify reporting databases that could be replaced [sic] CPMRS reports.”

[413] The Director General stated that a year-and-a-quarter would be required to complete the project. Mr. McCambley also worked on it, from July to November 2015. The grey and black on the roadmap are about the level of effort. The roadmap was last updated in March 2015.

### **1. The grievor’s submissions on the CPMRS project**

[414] The grievance was referred to adjudication under s. 209(1)(b) (demotion for disciplinary reasons) of the *Act*, not s. 209(1)(d), a separate-agency demotion for any reason that does not relate to a breach of discipline or misconduct.

[415] From when the conflict arose, the employer prepared sham performance evaluations. The failed PMF and the failed performance improvement plan were established with the intention of terminating the grievor’s employment.

[416] In *Kashala Tshishimbi v. Social Sciences and Humanities Research Council*, 2020 FPSLRB 83 at para. 212, the adjudicator quoted paragraphs 23 to 25 of *Frazee*, as follows:

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

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

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

*corrective and whether the employer's action had an immediate adverse effect on the employee....*

[417] The impact of the employer's decision was significantly disproportionate to the stated administrative reason. Therefore, the decision must be considered disciplinary. This standard was met since the employer's imposed measure cannot be viewed as a reasonable response to honestly held operational considerations.

[418] At paragraph 216, *Kashala Tshishimbi* referenced *Morrisette v. Treasury Board (Department of Justice)*, 2006 PSLRB 10. In situations such as this, the employer must show the following:

...

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

[419] The evidence heard at adjudication was similar to that in *Kashala Tshishimbi*: mental health, impossible-to-meet objectives, no training, and not enough time to improve or finish a project, and the grievor felt that the performance improvement plan or action plan was imposed on him with the intention of documenting failures and terminating him.

[420] In *Kashala Tshishimbi*, the adjudicator found a serious lack of openness towards the grievor in that case, which raised doubts about the honesty of the employer.

[421] The grievor argued that he called evidence that showed irregularities in the employer's documentation and testimonies, communications problems, and a serious lack of openness toward him, among other things, and that on a balance of probabilities must raise doubts about the honesty of the employer and lead to the conclusion that it resembles a sham.

[422] On the balance of probabilities, the grievor submitted that the Board should find that the employer's action was in fact disguised discipline resulting from bad faith and a lack of procedural fairness as set out in *Bergey*.

[423] There was a serious lack of equality towards the grievor, which raises doubts about the honesty of the operation. The employer's underlying actions and behaviour were in fact disguised discipline resulting from bad faith, which hindered procedural fairness.

[424] Evidence was adduced that colleagues came to Mr. Schnob crying and stating that they would leave the team.

[425] Mr. Caron argued that the one-on-one meeting was the first meeting between the director general and Ms. Charpentier, the only female member of the team, and that she cried at the meeting. He asked that the credibility of this testimony from Mr. Schnob be assessed and be given due weight. He argued that Ms. Charpentier consistently complained through informal or improper methods. He argued that the underlying actions and behaviours were in fact disguised discipline resulting from bad faith, which hindered procedural fairness.

[426] He argued that all other instances of misconduct mentioned throughout this grievance and documented in the PMFs as "timekeeping", "CNSC directive on hours of work and leave", personal business, personal phone calls, etc. should have been subject to disciplinary action. The absence of discipline, when it would be the appropriate response, can be an indicator of the disciplinary situation being camouflaged to appear administrative.

[427] He argued that that process provides a fair opportunity to both the employer and employee to correct misconduct, behaviours, and actions.

#### **L. The PMF and the performance management plan**

[428] The grievor prepared a weekly update for both Ms. Sigouin and Mr. McCambley. He observed that Mr. McCambley forwarded to Ms. Laflamme in Labour Relations that "not a whole lot of project work done this week". That was the week the grievor participated in the GCWCC hockey tournament. He found that the employer's underlying actions and behaviours were in fact disguised discipline resulting from bad faith, which hindered procedural fairness.

[429] He argued that Exhibit 180, dated November 13, 2015, and Exhibit 181, dated November 16, 2015, provide a good summary of the work that he completed before his termination. Mr. McCambley's or the employer's summary shows that the work was 35% complete. He prepared an analysis of that document, which showed that he had reached 80%-plus complete. He outlined the analysis in his argument.

[430] He also argued that the employer terminated his employment before the agreed-upon deadline of December 31. He found that the employer's inconsistencies and actions were in fact disguised discipline resulting from bad faith, which hindered procedural fairness.

[431] The grievor requested that his grievance be allowed, that he be reinstated in his position effective the date of his termination with all pay and benefits adjusted accordingly any other relief deemed necessary, and that he be made whole in every way.

### **1. Summary of the employer's submissions**

[432] The Board is without jurisdiction to hear the grievance unless the grievor could demonstrate that his termination was disguised discipline.

[433] The Board's role is not to determine whether the employer or the grievor was right on the issue of incompetence but rather to decide whether that is the real issue before it; see *Agbodoh-Falschau v. Canadian Nuclear Safety Commission*, 2014 PSLRB 4 at para. 25.

[434] In a disguised-discipline case, the burden of proof is on the grievor. See *Lindsay v. Canada (Attorney General)*, 2010 FC 389 at para. 46, citing *Peters v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 7 at para. 309, in which the adjudicator described the onus this way:

*... a grievor who alleges disguised discipline has an onus to show that the employer identified a culpable deficiency or an act of malfeasance on the part of the grievor and then undertook disguised disciplinary action to address this deficiency or act ... a case for disguised discipline depends on the grievor demonstrating that the employer had the intent to discipline the grievor for a specific reason or reasons, but disguised its disciplinary action in a different form which nevertheless had the equivalent effect of correcting or punishing the grievor.*

[435] *Agbodoh-Falschau* follows the same reasoning at paragraph 29 as follows: “In general, the case law indicates that an employer’s intention is central to determining whether a disciplinary measure is at issue.”

[436] In *Frazee*, at paras. 20 and 22, the Federal Court held as follows:

*[20] ... 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....*

...

*[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....*

[437] Mr. Caron was terminated for reasons of incompetence on November 16, 2015. The letter of termination indicates the following:

*... despite the efforts made to help you by implementing an action plan, assigning you a special project, providing timely feedback, specific instructions and guidance in monitoring your work regularly you have not demonstrated the ability to bring your performance up to an acceptable level.*

[438] Mr. Caron’s testimony and submissions were based on the feeling of being treated unfairly. He testified at length with respect to unfair treatment involving leave requests, the unfair application of banked time, unfair treatment with respect to participation in GCWCC events, and the management of a conflictual situation. An employee’s feelings about being unfairly treated do not convert administrative action into discipline.

[439] The alleged actions of disguised discipline were unsubstantiated. The grievor was never able to connect the situations to an intent by the employer to discipline him. The evidence clearly demonstrated that his termination was based solely on unsatisfactory performance.

[440] *Frazee* indicates that the problem of disguised discipline can also be addressed by examining the effects of the employer’s action on the employee. When the impact of a decision of the employer is significantly disproportionate to the administrative rationale being served, the decision may be viewed as disciplinary. However, this threshold will not be reached if the employer’s decision is seen to be a reasonable (but not necessarily the best) response to honestly held operational considerations.

[441] The employer's decision was rationally connected to its actions and operational considerations. The evidence showed that numerous performance issues had been identified since 2012. After the 2014-2015 performance management exercise, the employer put an action plan into place and gave the grievor two options. The CPMRS BI advancement project was linked to the Finance and Administration Directorate's strategic plan. The progress on that special project being monitored through biweekly updates and regular feedback meetings with Mr. McCambley, as the project's technical lead, and action-plan meetings being held with the grievor, who was given an instruction letter outlining the consequences of failing to meet the objectives, were specific actions connected with managing his performance. The decision to terminate his employment for poor performance arose from those actions. It was a reasonable response, all things considered.

[442] The employer submitted that the grievor failed to meet the onus of demonstrating that it engaged in disguised discipline. Its objection should be upheld.

### **VIII. Analysis**

[443] As discussed, in the circumstances of this case, the Board's jurisdiction is limited to assessing whether the grievor's purported termination of employment for unsatisfactory performance was in reality a disguised-disciplinary discharge in response to his culpable behaviour or misconduct.

[444] For the reasons already given, I have concluded that certain actions of the employer, which the grievor relied upon, were not disciplinary in nature, namely, the May 10, 2012, instruction letter with respect to hours of work, attendance, and certifying leave; the failed PMF of 2014-2015, relating to the PBHC year end; and the failure to permit union representation at a meeting with his director in June 2015.

[445] I have also concluded that Mr. Caron was disciplined for insubordination on June 30, 2015, when he was given a letter of reprimand for insubordination. I am not persuaded that the employer relied on that misconduct when it terminated his employment in November 2015.

[446] The employer relied upon alleged performance failures throughout Mr. Caron's career, which culminated in a failed performance action plan from June through



November 2015 as the grounds for terminating his employment for reason of incompetence.

[447] The grievor contended that the employer's action of terminating his employment was disguised discipline.

[448] I have referred to the factors to apply when distinguishing between disciplinary and non-disciplinary employer action. It is a factual inquiry. Factors such as the nature of the employee's conduct, the nature of the employer's action, the employer's stated intent, and the impact of the action on the employee are all relevant.

[449] If the behaviour is culpable, or if the employer's intent is to correct or punish misconduct, generally, an action will be viewed as disciplinary. When there is no culpable conduct, and the intent to punish is absent, generally, the situation will be non-disciplinary.

[450] On November 16, 2015, Mr. Schnob, the director general, advised the grievor in writing that his employment was terminated for unsatisfactory performance and that a review of his overall performance indicated that he did not meet the essential requirements of his position as a REG 5 financial systems analyst.

[451] The letter referred to an action plan having been implemented to help the grievor raise his performance to a satisfactory level. However, he had not demonstrated the ability to do that.

[452] Mr. Schnob stated that the grievor had not been performing adequately for a number of years, that a director and a previous director had warned him that his performance was not up to par, and that clients had complained. Colleagues had said that they would leave the team.

[453] The policy instrument outlining the termination-of-employment process for incompetence provides that the employee has been asked to show improvement, that the employee has not shown improvement, and that the employee must be advised of this both orally and in writing. There is an expectation that the employee will be provided support and direction and will be given the opportunity to show improvement. The employee must be warned that he or she could be terminated or reassigned.

[454] Clearly, the ostensible nature of the employer's action and its stated intent is that the grievor's employment was terminated for administrative reasons, namely, a lack of performance. He contended that the employer's underlying actions were disciplinary.

[455] Also relevant is the nature of the employee's conduct. The employer contended that for the grievor, it related to performance. He contended that he should have been disciplined for insubordination several times in his career.

[456] I recited Mr. Nichol's evidence. He detailed the grievor's performance issues back to 2012 further to a number of emails and letters about the grievor's ongoing performance issues such as lack of initiative, attention to detail, problem-solving skills, and independence.

[457] The May 10, 2012, letter, discussed earlier in this decision with respect to absenteeism and tardiness, highlighted Mr. Caron's poor compliance with due dates. It also advised him that failing to undergo a fitness-to-work evaluation would be considered a performance issue.

[458] On August 9, 2012, Mr. Nichol met with Mr. Caron to discuss the lack of thoroughness in his work.

[459] When he became the chief, Mr. McCambley identified Mr. Caron's performance shortcomings as a lack of attention to detail. Specific examples related to shortcomings in overdue travel-expense claims, a change to accounting operations reporting, and missing due dates.

[460] Mr. Caron's 2014-2015 PMF, discussed earlier, referred to several areas that required improvement, notably IT processes, paying more attention to details, and updating tickets regularly.

[461] As noted, a formal performance improvement plan was put in place on July 6, 2015. Recall that Mr. Caron was given two options for the plan. He could have been assessed on the basis of his then-current duties or through a special project, the CPMRS BI. He chose the special project. He stated that he saw it as an opportunity and that it should have been easy. He had a background in the area because of his work on FreeBalance. Mr. Caron had no tasks to perform other than to focus on the special project.

[462] The joint notes of the July 7, 2015, meeting, of Ms. Sigouin and Mr. Caron, confirmed that the purpose of the action plan was explained, that the four competencies upon which he would be evaluated were discussed (showing initiative and being action oriented, quality of work, time management, and working independently), that Mr. McCambley would be the technical lead for the project, and that questions could be addressed to him.

[463] Action-plan progress meetings were scheduled for every two weeks with Ms. Sigouin and Mr. Caron. In addition, biweekly meetings were held on the off weeks with Mr. Caron and Mr. McCambley at which Mr. Caron could discuss technical issues. Management provided written feedback after the action-plan meetings. For example, the feedback stated that as of August 13, 2015, management was not seeing any results from which it could evaluate him on the work.

[464] On August 14, 2015, the grievor was provided a letter about performance issues, advising him that he had failed to demonstrate both engagement and commitment and that if he failed to meet the objectives and expectations of the position and to perform at a satisfactory level, it could result in the termination of his employment.

[465] As of October 2015, he was advised that the expectations were that he would have completed much more work, that the quality was not to the level expected of a REG 5, and that he should be able to translate the project plan into concrete work activities without being provided step-by-step guidance.

[466] On October 21, 2015, he was provided another letter about performance issues, advising him that as of October 15, 2015, the progress made had been minimal and clearly had not been sufficient to meet the December 31 deadline, and that his performance remained unsatisfactory. Again, he was advised that if he failed to meet the objectives and to perform at a satisfactory level by November 20, 2015, it would result in the termination of his employment for unsatisfactory performance.

[467] As of November 2, 2015, management was of the view that the overall quality of his work was not satisfactory. Although significant improvements in terms of productivity had been made, Mr. Caron continued to not provide the quality of work expected from someone at the REG 5 group and level.

[468] Management was concerned that Mr. Caron had failed to demonstrate a commitment to the special project. It referred to his participation in the hockey tournament and his desire to participate in a soccer game and another hockey game.

[469] In addition, it referred to his failure to attend an action-plan meeting on October 2, 2015, because he was at a hockey game. The meeting had been rescheduled to accommodate him.

[470] Mr. McCambley testified that approximately 35% of the project had been completed as of the beginning of November 2015. On November 16, 2015, the grievor's employment was terminated for lack of performance.

[471] Based on the evidence, I am unable to find anything that would lead me to conclude that the employer camouflaged anything or that it attempted to conceal disciplinary measures when it terminated Mr. Caron's employment for poor performance.

[472] Recall that the grievor was cross-examined about disguised discipline. Other than stating that he should have been disciplined for one or two insubordinate emails on occasion, he could not identify any reason or ground that the employer would have engaged in disguised discipline.

[473] Mr. Caron also argued that the impact of the employer's decision was significantly disproportionate to the administrative rationale being served and therefore that the employer's decision was disciplinary.

[474] The employer argued that its decision was rationally connected to its actions and the operational considerations. It argued that the decision to terminate the grievor's employment for poor performance arose from those actions and that it was a reasonable response, all things considered.

[475] Based on the evidence, I conclude that the employer's decision to terminate the grievor's employment for poor performance was rationally connected to operational considerations.

[476] The grievor relied heavily on the Board's decision in *Kashala Tshishimbi*, in which it referred to the decision in *Morrisette*. He argued that in cases such as this one, the employer must show that it acted in good faith; that it set appropriate

standards of performance that were clearly communicated to the employee; that it gave the employee the necessary tools, training, and mentoring to achieve the standards in a reasonable time; that it warned the employee in writing that if the employee failed to meet the standards by a reasonably set date, it would lead to the termination of the employee's employment; and finally that the employee failed to meet the standards within the set time.

[477] He argued that the evidence at the adjudication was similar to that in *Kashala Tshishimbi*.

[478] In that case, the grievor was demoted by two levels. He claimed that his demotion was an attempt at disguised discipline. The employer claimed that the demotion was administrative and objected before the hearing that it was not within the Board's jurisdiction. Relying upon its decision in *Morrisette*, the Board found that the demotion was in fact disguised discipline that had resulted from bad faith, which had hindered procedural fairness. The adjudicator found that the demotion was not a reasonable response to honestly held operational considerations.

[479] In *Morrisette*, the grievor grieved the employer's decision to terminate her employment for non-disciplinary reasons, for poor performance. She was an employee of the Department of Justice.

[480] The *FAA* had been amended to provide that disciplinary action against and the termination of employment or demotion of any person pursuant to paragraph 2(f) or (g) of that Act shall be for cause.

[481] Once clothed with jurisdiction to determine whether a termination or demotion for incompetence was for cause, the Board determined that in cases of termination for cause due to incompetence, the employer must show that it acted in good faith; that it set appropriate performance standards that were clearly communicated to the employee; that it gave the employee the necessary tools, training, and mentoring to achieve the standards in a reasonable time; that it warned the employee in writing that if the employee failed to meet the standards by a reasonably set date, it would lead to the termination of the employee's employment; and finally that the employee failed to meet the standards within the set time.

[482] Unlike the situation in *Morrisette*, for reasons already articulated, in the circumstances of this case, the Board does not have jurisdiction to review the merits of terminations for cause of employees who have been terminated for incompetence. The criteria developed by the Board and repeated in *Morrisette* is pertinent only to a review of a termination for incompetence on the merits assuming the Board has jurisdiction.

[483] See *Canada v. Rinaldi*, 1997 CanLII 16721 (FC). In that case, an employee who had been laid off grieved his termination. The employer objected to the Board's jurisdiction to hear the case. The adjudicator decided that she had jurisdiction to hear the grievance insofar as the respondent satisfied her that his layoff was a subterfuge to terminate his employment. The adjudicator ruled as follows:

...  
*If you establish that the termination of the appointment was not a genuine layoff but rather a decision made in bad faith, a ruse, a disciplinary dismissal in disguise, then I would be willing to say that subsection 92(3) of the Public Relations [sic] Staff Relations Act does not prevent me from having jurisdiction....*

...  
[484] The employer applied for judicial review of the decision. The Federal Court rejected the application but commented upon the adjudicator's statement that the grievor could allege bad faith to establish that his termination was not a genuine layoff. The Court stated as follows:

...  
*I want to emphasize that in so far as the action or termination of employment occurred under section 29, a simple demonstration of bad faith or malicious intent on the employer's part (such as proof of an obvious desire to get rid of the employee at the first opportunity) would not confer jurisdiction on the Adjudicator since, whether or not there was bad faith, the grievance would still be a grievance with respect to a termination of employment under the Public Service Employment Act, which subsection 92(3) of the Public Service Staff Relations Act excludes from the Adjudicator's jurisdiction....*

*In conclusion the Board does not have jurisdiction to adjudicate Mr. Caron's termination of employment for poor performance.*

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

*(The Order appears on the next page)*

**IX. Order**

[486] The grievance is denied.

June 24, 2021.

**David Olsen,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**