Date: 20220505

Files: 566-02-11308 and 11309

Citation: 2022 FPSLREB 34

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

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

KEITH HERBERT

Grievor

and

DEPUTY HEAD
(Parole Board of Canada)

Respondent

Indexed as
Herbert v. Deputy Head (Parole Board of Canada)

In the matter of individual grievances referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Himself

For the Respondent: Joel Stelpstra, counsel

Decided on the basis of written submissions, filed February 18, 19, 21 and 22 and March 12, 14, 15, 18, 25 and 27, 2022.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Keith Herbert ("the grievor") was employed by the Parole Board of Canada (PBC or "the employer") as a strategic planning analyst. By letter dated April 23, 2015, he was terminated from his position effective May 22, 2015.

[2] On April 24, 2015, the grievor grieved the decision to terminate his employment and alleged that the employer had discriminated against him with respect to his disability in an ongoing manner, violating both the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) and the collective agreement entered into between the Treasury Board (TB) and the Public Service Alliance of Canada ("the Alliance") for the Program and Administrative Services Group that was signed on March 1, 2011, and that expired on June 20, 2014. His request for relief included the following:

> …
>
> • *that he be reinstated immediately;*
>
> • *that he be accommodated in accordance with the* CHRA *and the TB's* Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service *("the DTA policy");*
>
> • *that he be compensated for all losses, including pay and benefits and any additional expenses that resulted from the termination;*
>
> • *that he be compensated $20 000 for pain, suffering, and psychological and physical damages, due to the employer's neglect, and that he receive an additional $20 000 for the reckless and wilful discrimination he has suffered;*
>
> • *that the employer be responsible for any tax implications resulting from any award made pursuant to the grievance; and*
>
> • *that he be made whole.*
>
> …

[3] 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* (S.C. 2013, c. 40, s. 365), the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2), and the *Public Service Labour Relations Regulations* (SOR/2005-79) to, respectively, the Federal Public

Sector Labour Relations and Employment Board ("the Board", which also refers to any of its predecessors), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

[4] Before his termination, the grievor had referred to the Board (or to one of its predecessors) other grievances for adjudication that I heard at the same time as the termination grievance. After the evidence portion of the hearing and at the outset of the arguments, he withdrew the following grievances represented in these Board file numbers: 566-02-8688, dated August 2, 2012; 566-02-8689, dated October 12, 2012; 566-02-9976, dated December 20, 2013; and 566-02-11310, dated December 19, 2014. In addition to the termination grievance (files 566-02-11308 and 11309), those withdrawals left the following grievances outstanding:

1. file 566-02-8829, dated February 14, 2013;
2. file 566-02-8830, dated August 2, 2012; and
3. file 566-02-10258, dated August 22, 2014.

[5] The parties requested that the hearing be bifurcated and that the remedy be dealt with after I had determined if there was liability. I agreed to the request.

[6] The matter proceeded before me on January 4 to 8 and 17, August 8 to 10, and November 1 and 2, 2016. On September 11, 2018, I issued a decision with respect to the liability issues in all the grievances before me. I dismissed the grievances in files 566-02-8829, 8830, and 10258, and I allowed the grievance in files 566-02-11308 and 11309 (see *Herbert v. Deputy Head (Parole Board of Canada)*, 2018 FPSLREB 76).

[7] Files 566-02-11308 and 11309 deal with the same grievance, which was against the termination of the grievor's employment. As set out at paragraph 383 of 2018 FPSLREB 76, this grievance was referred to adjudication on two separate grounds, one against the decision to terminate his employment (under s. 209(1)(c)(i) of the *Act*), and the other being the employer's failure to accommodate his disability, which breached articles 17 and 19 of the collective agreement (under s. 209(1)(a) of the *Act*).

[8] No application was made to the Federal Court of Appeal (FCA) for judicial review of 2018 FPSLREB 76.

[9] This decision addresses the grievor's most recent request to postpone the continuation of the hearing that is currently scheduled for May 9 to 10, 16 to 20, and July 11 to 22, 2022.

[10] In his several documents forwarded to the Board's chairperson since February 18, 2022, the grievor has set out the following six reasons for a postponement of the scheduled hearing dates:

- a member of the media may wish to attend;
- the grievor has spoken to the Canadian Civil Liberties Association, which may wish to become an intervenor;
- the grievor's court reporter is not available before September of 2022;
- the grievor wishes to obtain a fitness-to-work evaluation (FTWE);
- the grievor is disabled; and,
- the grievor no longer has legal counsel.

A. Background

[11] During the hearing before me in 2016, the grievor was represented by legal counsel retained by the Alliance.

[12] During the course of the grievor's cross-examination in August of 2016, counsel for the employer asked him some questions about being on disability benefits before he started working at the PBC. The grievor stated that in or about 2007, he was off work and on disability benefits from the employer's disability insurer for about a year. He said that he understood that to return to work, he had to be fit to return to work, and as such underwent an FTWE conducted by Health Canada.

[13] At paragraph 425 of 2018 FPSLREB 76, I ordered the parties, within 15 days of the date of the issuance of that decision, to consult each other and provide the Board's registry with mutually convenient dates for an additional hearing to address the outstanding issue of remedy.

[14] The parties were left to discuss their mutual availability along with production and witness issues. On October 24, 2018, counsel for the grievor emailed the Board's registry, stating that he and counsel for the employer had spoken about the matter, sought and obtained instructions from their clients, and determined that it was necessary to continue with the remedy portion of the hearing. In the email, he stated

that it was difficult to estimate the amount of time that would be required to complete the hearing; however, three to five days should suffice.

[15] A case-management conference (CMC) was held by telephone on November 2, 2018. The scheduling of the continuation of the hearing was discussed. It was left to the parties to discuss potential hearing dates and to get back to the Board's registry. Unfortunately, no mutually convenient dates could be agreed to, and the process of finding those dates continued into the new year, including a second CMC, which was held on February 22, 2019.

[16] On February 22, 2019, and again on March 8 and 14, 2019, the Board's registry offered hearing dates to the parties in May, September, and October of 2019. On March 25, 2019, the Board's registry confirmed with the parties their mutual availability to schedule the remedy portion of the hearing for September 30 through October 2 and for October 21 to 23, 2019.

[17] On June 27, 2019, the grievor made a complaint against his bargaining agent, alleging a failure of the duty of fair representation ("the DFR complaint"). While that complaint was later withdrawn by the grievor on July 19, 2019, the complaint cites as an allegation for the complaint that the bargaining agent had failed to request an interim decision of the Board on the matter of an FTWE to be completed by Health Canada.

[18] In July of 2019, the grievor contacted the Board's registry and made inquiries with respect to the continuation of the hearing and about proceeding with the continuation without counsel, as arranged by his bargaining agent. The Board's registry responded to these inquires on July 22, 2019, stating in part, as follows: "If you are considering not proceeding to your hearing with the counsel assigned by the bargaining agent, I encourage you to obtain independent legal advice."

[19] On August 13, 2019, counsel for the grievor requested that summonses be issued for two potential witnesses, the grievor's treating psychologist and psychiatrist. They were issued and sent to the grievor's counsel. Attached to the request was a brief statement as to the evidence these two healthcare professionals were going to testify about.

[20] On August 30, 2019, a "Notice of Hearing" was issued for the hearing dates of September 30 through October 2, 2019, and was sent to the parties. On September 12, 2019, the Board's registry received correspondence from Howard Markowitz, a lawyer in Toronto, Ontario, indicating that he was now acting as counsel for the grievor and requesting a postponement of the September and October 2019 hearing days.

[21] After that request, I instructed the Board's registry to canvass potential times and dates for a further telephone CMC. On September 19, 2019, the parties were advised of my potential availability, and the CMC was set for September 25, 2019, at 11:30 EDT or 08:30 PDT, as I was hearing a matter in British Columbia that week.

[22] On September 24, 2019, at 18:07 and 18:09, respectively, Mr. Markowitz forwarded via email and fax two documents, totalling 54 typed, single-spaced pages, which were entitled, "REQUEST THAT JOHN JAWORSKI RECUSE HIMSELF And REQUEST TO HAVE MY REMEDY HEARING PROFESSIONALLY RECORDED" ("the recusal request"), and "The Litany of Errors Justifying the Request for the Recusal of John Jaworski Prior to my Remedy Hearing and to have Keith Herbert v. Deputy Head (Parole Board of Canada), 2018 FPSLREB 76, Recorded by a Certified Court Reporter During Said Remedy Hearing" ("the litany of errors").

[23] The CMC proceeded on September 25, 2019, at the appointed time. It was confirmed at that time that although Mr. Markowitz was representing the grievor in the continuation of his grievance, he had not received the grievor's file from the Alliance. I granted the request to postpone the hearing that was scheduled to start on September 30, 2019.

[24] The hearing was rescheduled to May 5 to 8, 2020.

[25] On January 21, 2020, Mr. Markowitz wrote to the Board and among other things asked that the Board issue an interim order requiring the employer to carry out an FTWE and to take steps to reinstate the grievor's security classification.

[26] On March 16, 2020, I issued a decision denying the grievor's recusal request; see *Herbert v. Deputy Head (Parole Board of Canada)*, 2020 FPSLREB 28. No application was made to the FCA for judicial review of 2020 FPSLREB 28.

[27] At about the same time that I issued 2020 FPSLREB 28, the country entered into a lockdown due to the COVID-19 pandemic. As a result, the Board cancelled all the

hearings that had been scheduled to that point (March through July of 2020). Included in these cancellations was the continuation of the grievor's hearing that had been scheduled for May 5 to 8, 2020.

[28] The Board began to hear cases again in late August and early September of 2020 by way of the videoconference platforms Zoom and Microsoft Teams. As of the issuance of this decision, the Board has not yet recommenced hearing matters in person.

[29] Discussions were held between the parties and the Board with respect to rescheduling and continuing the hearing, and on June 30, 2020, new hearing dates were scheduled for October 26 to 30, 2020.

[30] On July 15, 2020, the grievor sent to the chairperson of the Board a further request for my recusal. The chairperson at that time, Catherine Ebbs ("the former Chairperson"), responded to that request by letter dated August 6, 2020, denying it ("the Aug. 6 letter decision"). She stated in the final paragraph as follows: "However, unless directed otherwise by the Federal Court of Appeal, Mr. Jaworski will remain seized of the remaining matters at issue in this case. Any questions related to the conclusion of this matter should be directed to his attention."

[31] No application was made to the FCA for judicial review of the Aug. 6 letter decision.

[32] On August 13, 2020, the grievor brought an application to have the Aug. 6 letter decision filed with the Federal Court under s. 35(1) of the *Federal Public Sector Labour Relations and Employment Board Act*. This application was dealt with by the then vice-chairperson, Margaret Shannon, and was denied in *Herbert v. Deputy Head (Parole Board of Canada)*, 2020 FPSLREB 89. No application was made to the FCA for judicial review of 2020 FPSLREB 89.

[33] On September 9, 2020, Michel Girard, who had been counsel for the employer throughout this matter, wrote to the Board and counsel for the grievor, advised that he was no longer counsel for the employer, and requested that the hearing dates of October 26 to 30, 2020, be postponed to allow new counsel to become familiar with the matter. The grievor objected to the postponement request, stating that the delay would result in him claiming aggravated damages and costs. I determined that a short

postponement in the circumstances would be appropriate and granted the postponement, rescheduling the hearing for December 1 to 4 and 7 to 10, 2020, and January 5 to 6, 2021. Joel Stelpstra was the new counsel for the employer.

[34] For the continuation of the hearing, the grievor had requested that the Board permit a certified court reporter to be present and in attendance, at his cost. That request was granted.

[35] On November 9, 2020, counsel for the employer forwarded to the panel of the Board a letter dated November 6, 2020, requesting an order for the production of certain documents related to the grievor's disability file with the Sun Life Assurance Company of Canada ("Sun Life"; "the Nov. 9 production request"). Included in the material filed with the request were copies of earlier letters dated August 31, 2020, and October 28, 2020, from counsel for the employer to counsel for the grievor with respect to the production of documentation about the continuation of the hearing, including earlier requests for the Sun Life disability file.

[36] Included in both the August 31, 2020, and October 28, 2020, letters was a request by counsel for the employer for updated medical information from healthcare professionals that the grievor was either seeing or had been seen by, as well as the Sun Life disability file. Relevant statements contained in all those letters are as follows:

> [August 31, 2020, letter:]
>
> …
>
> ***i. Sun Life***
>
> *It is our understanding that Mr. Herbert is still receiving disability benefits. We had received a copy of his Sun Life file from his previous counsel up to and until April 10, 2019. Please provide us with a copy of his updated Sun Life file that would include all information after April 10, 2019.…*
>
> …
>
> [October 28, 2020, letter:]
>
> …
>
> ***1. Sun Life***
>
> *In our August 31, 2020 request, we requested an updated copy of the Sun Life file pertaining to your client, including all medical information. In response we received one letter, dated April 1, 2020, wherein Mr. Herbert was advised by Sun Life that he would*

> *no longer be in receipt of benefits after June 7, 2020. There is no further material.…*
>
> …
>
> [November 6, 2020, letter:]
>
> ***1. An Order for the production (or a subpoena duces tecum) against Sun Life Assurance Company of Canada to produce its complete disability file in relation to Keith Herbert for the period from April 1, 2019 to present.***
>
> *The grievor has made clear that he intends to argue he should receive retroactive pay to the date of termination. His fitness to work and his status vis-à-vis long term disability benefits will be clearly at issue in determining the appropriate remedy. Further, the reasons for Sun Life's recent determination to discontinue such benefits will be relevant and material to establishing the Employer's liability for damages.*
>
> …
>
> ***2. An Order for the production against Keith Herbert of complete medical records from Dr. Moustgaard, Dr. Browne, Appletree Medical Clinic, and any other medical records not already provided to the Employer.***
>
> *The records sought are relevant and material to determining the grievor's fitness to work at all times since his termination, as well as determining the basis for any medical opinions about such fitness, including the Sun Life determination on the discontinuance of disability benefits.…*
>
> …
>
> [Emphasis in the original]

[37] In response to the Nov. 9 production request, the grievor's counsel wrote to the Board on November 10, 2020 ("the Nov. 10 letter"), the relevant portion of which states as follows:

> …
>
> ***ISSUE #2 – Production order.***
>
> …
>
> *Rather, PBC's reinstatement obligation was the same regardless as to whether Mr. Herbert was currently fit for work or not. Rather, PBC was obligated to reinstate Mr. Herbert to his pre-termination employment status regardless.*
>
> …
>
> [Emphasis in the original]

[38] Attached and forming part of Nov. 10 letter was an email from the grievor to Mr. Markowitz dated the previous day at 09:32; the relevant part of that email states as follows:

> …
>
> *I completed a follow up with Sun Life two minutes ago,*
>
> ***On April 29, 2020 I made an access to information request for my full file of*** [name of Sun Life representative removed].
>
> …
>
> *As you know my disability benefits ended on June 7, 2020. You know this in that I asked you if there was any merit to requesting that they be extended. You indicated that I can't be fit to return to work and continue to receive disability benefits.*
>
> …
>
> [Emphasis in the original]

[39] On November 13, 2020, I made two orders with respect to the production of documents. The first required the grievor to produce to the employer any and all medical records that might exist and that had not been previously disclosed, including but not limited to those of his treating psychologist, treating psychiatrist, and healthcare professionals, and the second was an order to Sun Life to provide to counsel for the employer its entire disability file related to the grievor.

[40] The hearing recommenced on December 1, 2020. After a delay starting due to technical issues that seemed to be plaguing counsel for the grievor, and after counsel for the grievor and the grievor met and had some discussions, the hearing began, and I asked the parties if there were any preliminary matters. At this time, counsel for the grievor requested that the hearing be adjourned (postponed) for a number of different reasons, to which the employer objected. One of the reasons was that the grievor anticipated an FTWE to occur anytime. A brief adjournment was then requested by the grievor, and he and his counsel again met and had a discussion, after which the request for a postponement was withdrawn.

[41] Counsel for the grievor then brought forward a motion with respect to the scope of the continuation of the hearing as it related to remedy, identifying the motion as one to revisit evidence and issues already decided. After hearing submissions on this, I adjourned the hearing for the day and returned the next day, at which time I gave a brief oral decision stating that the motion was denied and that the reasons for denying

the request would be set out in the written decision that would be rendered at the completion of the hearing.

[42] After delivering my decision, the grievor and his counsel requested and received a brief adjournment, to discuss matters. They returned to request that the hearing be postponed such that they could consider seeking judicial review of my decision on the motion that had been denied. Counsel for the employer asked for a brief adjournment to discuss the request with his client and after reconvening indicated that the employer did not object. I adjourned the hearing for a brief period to consider the request and returned to grant the postponement.

B. January 26, 2022, and forward

[43] The grievor sought judicial review of my decision on the scope of the evidence (see FCA File No. A-3-21). It was heard by the FCA on January 18, 2022, and dismissed by that Court with reasons on January 24, 2022 (see *Herbert v. Canada (Attorney General)*, 2022 FCA 11).

[44] On January 26, 2022, the Board's registry emailed the parties' counsel, seeking their availability with respect to the continuation of the hearing for the months of February, March, April, and May of 2022. They were given a deadline of February 2, 2022, at 16:30 (EST), to respond. In the interim, the Board scheduled the continuation of the hearing for the weeks of July 11 to 22, 2022.

[45] As neither party responded by the deadline, on February 3, 2022, at 11:22, the Board's registry emailed the parties' counsel again, reminding them that their responses had been due the previous day. Mr. Stelpstra responded immediately at 11:35, providing the employer's availability. Nothing was received back from Mr. Markowitz on behalf of himself and the grievor or from the grievor. As I will outline later in this decision, the grievor's counsel had in fact forwarded the Board's correspondence of January 26, 2022, to the grievor on the same day.

[46] Having not heard from the grievor or his counsel after two emails requesting their availability, the Board therefore scheduled earlier hearing dates based on the availability of both the panel of the Board and the employer. In addition to the July 2022 dates, May 9 to 10 and the week of May 16, 2022, were set for the continuation of the hearing.

[47] On February 10, 2022, counsel for the employer advised that it had seen the Board's scheduled dates for July of 2022 and requested that they be moved to September of 2022 as they were not convenient. No specifics as to why those dates were not convenient were provided. The panel of the Board declined to change the dates.

[48] On February 11, 2022, at 11:25, the Board's registry wrote to the parties, stating as follows:

> …
>
> *The Board member assigned to these cases has instructed me to inform the parties of the following:*
>
> *On **January 26, 2022**, the parties were asked to provide their availability in the months of February, March, April and May of 22 [sic] for the continuation of the hearing on remedy in the above noted cases. Parties were given a deadline of **February 2, 2022**.*
>
> *The Board received the Employer's availability on **February 3, 2022**. The Board did not receive any response from the grievor's representative.*
>
> *The Board had, in the interim, scheduled the weeks of July 11 and 18, 2022, pending a response from the parties.*
>
> *On **February 10, 2022**, counsel for the employer wrote and advised that the July 2022 dates were not convenient for either counsel or witnesses.*
>
> *As counsel for the employer had indicated availability in May of 2022, the Board is prepared to move the dates forward to May 9-10, 2022, and May 16-20, 2022. The Board is not prepared at this time to release the July dates. However, it is prepared to reconsider the request to change the July dates once more information is provided by the parties.*
>
> *The parties are reminded that in our correspondence of January 26, 2022, they were also asked to advise what, if any of the remedial issues that were outstanding with respect to these grievances have been resolved, and what remain outstanding.*
>
> …
>
> [Emphasis in the original]

[49] On Friday, February 11, 2022, at 17:32, Mr. Markowitz advised the Board and counsel for the employer that he was no longer representing the grievor. This email appears to have been copied to the grievor at the email address that the Board's registry has for the grievor and through which the registry has communicated

successfully with the grievor. Attached to Mr. Markowitz's February 11 email was a copy of the Board's email to the parties of that same day that had been sent at 11:25.

[50] Unbeknownst to the panel of the Board until April 4, 2022, was that on January 26, 2022, by email at 16:00, Mr. Markowitz had provided to the grievor the email from the Board's registry dated January 26, 2022 (informing the grievor of the request for his availability for hearing dates in February, March, April, and May of 2022), and advising the grievor that he was no longer representing him. This came to the Board's attention on April 4, 2022, as this material formed part of material enclosed in documents delivered to several staff at the Board's registry, via email, in what appears to be a written motion by the grievor to the FCA, seeking an order to extend the time to file a judicial review application with respect to the Board's scheduling of the hearing and my February 16, 2022, email, in which I did not postpone the hearing.

[51] Mr. Markowitz's January 26, 2022, email forwarding the email from the Board's registry dated January 26, 2022, stated as follows:

> …
>
> *Please see below/attached from the Board.*
>
> *I'll be proceeding to advise them that I'm unfortunately not representing you any further in this remedy hearing – and that you'll therefore require a much longer time-frame [sic] to retain new counsel or self-represent, along with securing your own/independent FTWE.*
>
> …

[52] On Saturday, February 12, 2022, counsel for the employer wrote to the Board, advised as to what they believed were the outstanding issues with respect to remedy, and advised that they were available for the May 2022 hearing dates but wished to have the July 2022 dates moved to September 2022. With respect to what the employer believed were the outstanding issues with respect to remedy, it stated as follows:

> …
>
> *The employer submits the outstanding remedial issues are quite narrow. At the time of his termination, Mr. Herbert was unfit for work. Shortly thereafter, he was approved for Disability Insurance, and subsequently, CPPD benefits. Health Canada recently assessed Mr. Herbert and advises that he is unable to return to work in any capacity, and that his disability is likely permanent. Consequently, there is no live issue with respect to reintegration or lost wages.*

> *The only remaining question is the appropriate quantum of damages pursuant to the* Canadian Human Rights Act.
>
> *We anticipate that Mr. Herbert is not in agreement with our position, including that we are advised Mr. Herbert disputes Health Canada's prognosis for a return to work.*
>
> …

[53] Both Mr. Markowitz's February 11, 2022, email and the letter of February 12, 2022, from Mr. Stelpstra would have been received and reviewed by the Board's registry on the next working day, Monday, February 14, 2022, at which point they would have been brought to my attention.

[54] On February 15, 2022, at 11:50, at my instruction, the Board's registry wrote to the grievor and Mr. Stelpstra, confirming that it had received notice that Mr. Markowitz was no longer representing the grievor, and as such, it forwarded to them the most recent correspondence received by the Board from counsel for the employer on February 10 and 12, 2022, as well as the Board's correspondence of February 11, 2022. The parties were reminded that the hearing was scheduled to proceed on May 9 to 10 and 16 to 20 and July 11 to 22, 2022.

[55] On February 15, 2022, the grievor sent two emails to the Board, the first at 13:09, and the second at 13:16. The email timed at 13:09 stated, among other things, his response to the February 12, 2022, letter from counsel for the employer and that he had not received certain documents with respect to a FTWE that had apparently been conducted by Health Canada. With respect to Mr. Markowitz's February 11 email, he stated that he had not "fired" Mr. Markowitz and said that he had left voice messages for him. The last line of the email was as follows: "Given the above factors it is premature to schedule the dates proposed by my employer and by the Board."

[56] The second email from the grievor on February 15, 2022, at 13:16 ("the Feb. 15, 13:16 email"), appeared to be the grievor forwarding the earlier email of 13:09, with the following addition:

> …
>
> *With regard to the email below, I am requesting Mr. Markowitz contact me on my landline. Also with regard to the email below, given the logistics of my case I am requesting dates in September. Should the logistics be resolved before then I will contact the tribunal.*

…

[57] The panel of the Board interpreted the Feb. 15, 13:16 email as a request to postpone the hearing dates. On February 16, 2022, at 15:22, the Board's registry emailed the parties and provided my response to the grievor's request to postpone the hearing dates. That email stated as follows:

…

> *The request to postpone the hearing dates for the continuation of the hearing to September of 2022, like the earlier request of the employer, is denied.*
>
> *As the parties are aware, the panel of the Board issued it's decision on the liability portion of the grievances on September 11, 2018, some 41 months ago.*
>
> *Prior to the issuance of the decision on September 11, 2018, during the course of the hearing days, the parties had asked the panel of the board to bifurcate the matter and address remedy at a later date, once liability had been determined. The panel was advised by the parties that this request was made to give the parties an opportunity to fashion a remedy of their own, failing with the matter would return to the panel for determination of the remedy.*
>
> *Paragraph 425 of the decision ordered that the parties were to consult with one another within 15 days of the date of the decision and provide the Board with mutually convenient dates to reconvene and deal with the remedy portion.*
>
> *While the Board understood the parties did consult with one another, it appeared that a mutually agreeable solution was not arrived at and as such the Board and it's registry engaged the parties in arranging mutually convenient dates to continue to the hearing and address remedy.*
>
> *In March of 2019, dates were scheduled for late September and October of 2019. On September 12, 2019, the Board's registry was advised that the grievor was no longer represented by his bargaining agent and their solicitors, and that he had retained his own counsel, Mr. Markowitz. Mr. Markowitz requested that the hearing dates in late September and October of 2019 be postponed given his recent retainer. The postponement was granted.*
>
> *New hearing dates were scheduled for May of 2020. Those dates were postponed as a part of the Board wide cancellation of all hearing dates between the middle of March and the end of July of 2020 due to the initial wave of the Covid-19 pandemic.*
>
> *New hearing dates were scheduled for October 26-30, 2020, however counsel for the employer changed and, at their request, a brief postponement was granted and the matter was rescheduled to be heard December 1-4 and 7-10, 2020 and January 5-6, 2021.*

> *On December 1, at the outset of the continuation of the hearing the grievor sought to postpone the matter but then withdrew that request. He then brought forward a motion to expand the scope of the evidence to be allowed with respect to the remedy being addressed. The Board heard arguments and denied the motion, indicating that reasons would be set out in the written decision on remedy. The grievor then sought a postponement of the hearing to pursue a judicial review of that interlocutory decision. The employer did not object to that request and the request was granted. The grievor's judicial review application was made, and was heard by the Federal Court of appeal on January 18, 2022. That judicial review application was dismissed on January 24, 2022.*
>
> *The May and July dates are sufficiently in the future for the parties to be ready to proceed, given the significant period of time that has passed, and it would appear that the same issues with respect to remedy remain outstanding.*
>
> *The parties are reminded that the* Federal Public Sector Labour Relations and Employment Board Act *permits the panel of the board to make orders with respect to the production of documents.*
>
> *Additionally, the parties may avail themselves of the services of the Board's dispute resolution services (DRS) to assist the parties in reaching a mutually agreeable settlement of the outstanding issues.*
>
> *In addition, the parties may wish to have a settlement conference, presided over by another member of the Board, prior to the hearing, again to try and assist the parties in reaching a settlement.*
>
> *If the parties wish to either avail themselves of the Board's mediation services or have a settlement conference, they are urged to make that request as soon as possible as the hearing dates set shall not be postponed to allow those steps to proceed.*
>
> …
>
> [*Sic* throughout]

[58] On Saturday, February 19, 2022, at 07:00, the grievor sent an email to the Board's registry that appeared to forward an earlier email dated Friday, February 18, 2022, and timed at 17:33. The Board's registry does not have a record of the February 18, 2022, email coming in on the Friday at 17:33; the only record of that email is it being attached to the February 19, 2022, email at 07:00. Also on Saturday, February 19, 2022, at 12:33, the grievor sent a further email that also forwarded the earlier email sent at 07:00 in its entirety, including the email ostensibly sent Friday, February 18, 2022, at 17:33. For the purpose of simplicity in these reasons, I shall refer to that email as "the February 18 email". Whether the February 18 email came in on the Friday at

17:33 or on the Saturday is irrelevant, as none of them would have been looked at or forwarded until Monday, February 21, 2022.

[59] In all the emails sent on Saturday, February 19, 2022, including the February 18 email, the grievor began asking the Board's registry to direct his correspondence to the current Chairperson of the Board, Edith Bramwell ("the Chairperson").

[60] The February 18 email is quite lengthy, while the two emails forwarding it are themselves quite short. The February 18 email states many things, among which is the grievor confirming that he is aware that the hearing is scheduled for May 9 to 10 and 16 to 20 and July 11 to 22, 2022. He also states as follows:

> …
>
> *I am requesting that you personally read this email and respond to it so that you get a sense at the grassroots level as to what is occurring within your organization.*
>
> ***I would ask that you also audit my hard copy file and get a sense as to how your subordinates have handled my case.***
>
> *With this email I acknowledge receipt of the email from the tribunal dated February 17, 2022.*
>
> *As noted on the tribunal's site, when a party is requesting a postponement of hearing dates they are to provide clear, compelling and cogent reasons. These are those reasons:*
>
> *With this email I am also respectfully requesting hearing dates after September for the reasons contained herein.* ***I am requesting later hearing dates, however at this juncture I really can not be more specific than what is directly above in that there are many administrative tasks that have to be addressed before I can commit to hearing dates with certainty.***
>
> *As you may know, these are the hearing dates as per the most recent email from the Board, May 9- 10; May 16 – 20, July 11 – 22, 2022.*
>
> *As my employer's counsel pointed out, it is aware that the letters produced by Health Canada are fundamentally flawed.*
>
> *In fact what was produced by Health Canada does not even meet the requirements of an FTWE as per the specifications of my employer in its FTWE request letter.*
>
> *This is the first reason that I can not commit to hearing dates.*
>
> *Mr. Markowitz also informed my employer that I will be seeking a bona fide FTWE in that it is my right according to case law to have a bona fide FTWE in place prior to going in front of the tribunal.*
>
> *This is the second reason that I can not commit to hearing dates.*

> *By auditing my file the Director will see that I was granted permission to hire a certified court reporter for my remedy hearing. Also by reading my submissions to my hard copy file, the reasons that I asked for permission to hire a certified court reporter will become readily apparent.*
>
> *…*
>
> *To be able to hire a court reporter, my hearing dates will have to occur in September or later. I know this given the fact that when I initially hired the court reporter, the service made it clear that it is not immediately available. Hearing dates at the beginning of May and probably even July would not be able to be met by the court reporter service.*
>
> *Prior to even countenancing the idea of hiring a court reporter I will have to have a bona fide FTWE in place and not what was produced by Health Canada.*
>
> *Another logistical consideration is the fact that after every decision produced by the tribunal, I spoke to a local journalist on the phone about what had been produced. I would like to invite him to my remedy hearing in keeping with the "open court principle."…*
>
> *…*
>
> *Additionally, before Christmas I spoke to the Canadian Civil Liberties Association about my case. I would like to coordinate my hearing so that they may be afforded the opportunity to provide submissions on an intervenor status basis if they so wish.*
>
> *I did not previously provide the logistics with regard to my right to avail myself of the formal redress mechanisms listed within this email in that all of these would be known to the parties and as such I would have thought that my request for September hearing dates would be accommodated.*
>
> *To phrase that another way, as the wrongfully terminated employee I though [sic] that the process would commence in a legitimate fashion by first asking me when I could attend my hearing.*
>
> *However I am providing the logistical considerations now to request hearing dates which will likely have to be scheduled after September 2022.*
>
> *…*
>
> [Emphasis in the original]

[61] The emails of Saturday, February 19, 2022, at 07:00 and 12:33, which forwarded the February 18 email, provided no additional reasons with respect to his request for postponing the hearing other than attaching the February 18 email.

[62] On February 21, 2022, at 14:22, the grievor wrote a further email addressed to the Chairperson; however, this email dealt largely with the scope of the continuation of

the hearing and did not add anything to the request for postponement that was contained in the February 18 email. The only reference with respect to his postponement request was the following lines near the end of that email:

> …
>
> *These requests are being made in that with the original hearing dates being proposed, Mr. Jaworski has contacted the Director with hearing dates. Those hearing dates are not feasible for me for the reasons that I have conveyed in a clear, compelling and cogent manner.*
>
> …

[63] In a letter dated March 4, 2022, and emailed to the grievor that same day at 15:30, the Chairperson told him that she had received his emails and pointed out to him that I had considered his submission for postponement and denied it. She confirmed to him that decisions made on his grievance are done so by the panel of the Board assigned to hear it. She further referenced the grievor's interest in having a court reporter at the hearing and told him that this was also up to the panel of the Board conducting the hearing. She acknowledged that this request had been previously made (at his cost) and that it had been granted and told him that the Board might be able to arrange and pay the cost of a court reporter at the hearing if the request were made to the panel of the Board and if I were to determine that it was appropriate in the circumstances.

[64] On Sunday, March 6, and Monday, March 7, 2022, the grievor emailed the Chairperson. The only difference between the two emails is that it appears that counsel for the employer was left off the email of March 6, 2022. In these emails, the grievor discussed a number of things; however, he did not raise the issue of the postponement request or the request for a court reporter.

[65] On Friday, March 11, 2022, at 15:48, the grievor emailed the Board's registry, as well as the Chairperson's executive assistant, and asked that the email and the appended document be conveyed to the director of the registry and the Chairperson. The document was entitled, "Response to the email of the Director of the Registry dated March 9, 2022." The only correspondence sent to the grievor on March 9, 2022, was an email at 09:18 to the parties at my instruction, which dealt with a request by the Board to the parties to provide their availability to attend a CMC. The email quite simply asked the parties to provide their availability during the weeks of March 14 to

18, March 21 to 25, and March 28 to April 1, 2022. It further requested that the parties provide their availability no later than 16:00 on Friday, March 11, 2022.

[66] I had, before that time, canvassed the parties for their availability with respect to a CMC, since the grievor had raised having one in an email on February 17, 2022, sent at 12:11. In that email, he wrote about what appeared to be the dissolution of his solicitor-client relationship with Mr. Markowitz. With respect to having a CMC, he stated as follows:

> …
>
> *Given the above I am wondering if it is in the purview of the Board to convene a case management conference either via MS Teams or by telephone that the parties including Mr. Markowitz must attend so that issues for my remedy hearing including representation are ironed out.*
>
> …

[67] An email had been sent to the parties on that same day (February 17, 2022) in response to the grievor's request for a CMC, inviting them to provide their availability over the coming two weeks (February 21 through March 4, 2022). In addition, the email from the Board's registry seeking the availability of the parties for the CMC stated as follows:

> …
>
> *The panel of the board [sic] seized with this matter is prepared to convene a case management conference to discuss the process of the continuation of the hearing.…*
>
> *With respect to the issues the grievor has raised about his solicitor-client relationship with Mr. Markowitz, the Board does not have authority over such matters, and they are not within its jurisdiction.*
>
> *Neither the Board nor the Board's registry can provide him with any advice with respect to that relationship.*
>
> *As Mr. Markowitz has informed the Board that he is no longer representing the grievor he shall not be invited to any case management conference convened.*
>
> …

[68] In response to the initial request for availability for a CMC, the employer's counsel provided the employer's availability, but the grievor did not respond, thus creating the need for the follow-up email on March 9, 2022.

[69] On Saturday, March 12, 2022, at 07:51, the grievor emailed the Board's registry, referring to the earlier March 11, 2022, email and attachment and again attaching a copy of what appeared to be the same document attached to the March 11, 2022, email, entitled, "Response to the email of the Director of the Registry dated March 9, 2022."

[70] The document entitled "Response to the email of the Director of the Registry dated March 9, 2022" comprises nine single-spaced pages. While the grievor raises a number of topics in the course of this document, and he does reference his request for a postponement, he does not provide any additional information as to why that postponement should be granted above and beyond the information he provided in the February 18 email. The grievor does speak about process steps in requesting a postponement and refers to the Board's policies on requests for postponements, which are set out on the Board's website. The grievor then refers to the Board's policy on accommodation and states that he suffers from a disability due to a major depressive disorder and generalized anxiety disorder.

[71] On the fifth page of this document, at the fifth paragraph, the grievor then states as follows:

> …
>
> *As Mr. Jowarski [sic] knows, I need a bona fide fitness to work evaluation (FTWE). It will take time to acquire a bona fide FTWE. This is an additional reason that I am requesting a postponement, so that a legitimate FTWE is completed on me.*
>
> *I note that my disability is currently held in abeyance so that my level of functioning is good.*
>
> …

[72] The grievor further stated that he was in the midst of attempting to secure representation and that as he felt that being told to attend a hearing that he was not prepared for had the potential to exacerbate his disability, he requested a postponement of his hearing as an accommodation measure. He then requested a postponement until after September of 2022, "in consideration of the fact that it is going to take that amount of time so that a legitimate FTWE is in place."

[73] On page 6 of the "Response to the email of the Director of the Registry dated March 9, 2022", at paragraph 6, the grievor accuses me of not operating or wanting to

operate within the parameters of conducting a fair and just hearing and as such requests as an accommodation that this matter be reassigned to another member. The grievor then raises again his original recusal request and his recusal request directed to the former Chairperson. On page 9 of the document, paragraphs five and six state as follows:

> …
>
> ***I am also requesting that the Chairperson provide a response to my request for a postponement to accommodate my disability and due to the fact that hearing dates earlier than after September 2022 due to the logistical considerations that must be addressed will likely result in an exacerbation of my disability.***
>
> ***Due to my history with Mr. Jaworski and the fact that he ignored the clear, compelling and cogent reasons for my request for a postponement when I conveyed those reasons, with the goal of having me attend a hearing that is not feasible, I am requesting that the Chairperson provide an answer to my request that my hearing be reassigned to another member so that my disability is not exacerbated.***
>
> …
>
> [Emphasis in the original]

[74] On Monday March 14, 2022, the grievor forwarded a number of emails to the Chairperson's executive assistant as well as the Board's registry, advising that he understood that the proper vehicles to convey his requests for a postponement, adjournment, and an accommodation of his disability were motions. His initial email stated that he would be conveying such motions later that day. He then stated that after receiving the motions, the Chairperson could contact him with any questions she had. The grievor then sent further emails, forwarding his motion in both Word and PDF formats, indicating in his cover email for the PDF one that he was doing so, so that he could both sign it and ensure that no one could alter it. The grievor's motion material, be it in Word or PDF format, was a little over 23 single-spaced pages ("the March 14 motion material").

[75] In distilling down the March 14 motion material, at the section the grievor has identified as "PART VI - Orders Sought", he has 12 (or 13, depending on how you read them) paragraphs, in which he states that he is seeking a postponement of the hearing that is currently scheduled for May 9 to 10 and 16 to 20 and July 11 to 22, 2022. Much of the motion material is directed at a request that the Chairperson reassign the file to

another Board member, and much of what he states appears to be tied to that being a reason for granting a postponement of his hearing, as he believes that I am biased and that I have taken some form of reprisal action against him. The material also extensively speaks to an issue of accommodation due to a disability. In the material, he suggests that both of these are also reasons to postpone the hearing.

[76] On March 15, 2022, the Chairperson wrote to the grievor, acknowledging his previous email correspondences to her dated March 6, 7, 9, 10, 11, and 14, 2022. She stated as follows with respect to the grievor's request that she review my decisions and assign someone else to his case:

> …
>
> *In the emails, you request that the decision by Board member John Jaworski denying your postponement request, which was sent to you in an email from the Board's registry, be published on the Board's website so that you can apply to the Federal Court of Appeal for a judicial review of the decision. Decisions on postponement requests are not ordinarily published on the Board's website. In addition, Board decisions do not need to be published to be judicially reviewed by the Court.*
>
> *You also request several times in your emails that I review Mr. Jaworski's decisions and orders in your case, including on postponement requests, and that I assign someone else to your case. As the former Chairperson of the Board, Catherine Ebbs, wrote to your lawyer, Howard Markowitz, on August 6, 2020, orders and decisions of the Board are final. If a party is dissatisfied with a decision or order of the Board, it may seek judicial review before the Federal Court of Appeal (please see the copy of the former Chairperson's letter, which I have attached). In addition, I see no basis to reassign another member to your case, especially given that Mr. Jaworski has already issued the decision on the merits of your grievances and that the upcoming hearings he has scheduled relate to the remaining question of remedies.*
>
> *Simply put, as Chairperson, I cannot review or overrule decisions or rulings made by a Board member hearing a case. Any further requests that I revise, correct or otherwise alter Board member Jaworski's decisions and rulings in your case or that I assign someone else to hear it will receive the same reply. Any motions in respect of your case must be directed to Mr. Jaworski for his consideration.*
>
> …

[77] On March 15, 2022, the grievor sent three further emails to the Chairperson through the Board's registry and the Chairperson's executive assistant and again made

reference to his motions. In his first of the day at 07:59, he again attached a copy of the March 14 motion material and requested that decisions on his motions be put on "the Tribunal's" letterhead and not posted on the Board's website. The second of the day, at 11:55, asked that the Chairperson, not a subordinate or designate, provide a reply to his motions. He sent a final email that day at 12:15, reiterating his request that the Chairperson provide decisions.

[78] On Friday, March 18, 2022, a CMC was held by videoconference. At this time, the grievor confirmed that there were no documentary issues outstanding. During the course of the CMC, the issue of his motions sent to the Chairperson came up. During the discussion, the grievor advised that he did not have the Chairperson's March 15, 2022, letter. I read it to him. I told the grievor on more than one occasion that the Chairperson would not deal with his motions. I also instructed the Board's registry to resend the Chairperson's March 15, 2022, letter to him and to confirm that he received it. This happened, and the Board's registry confirmed that the grievor had received the Chairperson's March 15, 2022, letter sometime between the end of the CMC (which ended at 10:00) and early afternoon. I also told him more than once during the CMC that I would be happy to hear and determine his motions; however, he stated that he did not wish me to.

[79] Also, during the course of the CMC, the grievor alluded to the issue of his legal representation, stating more than once, "you know how difficult it is to find an honest lawyer". He did not provide any further information as to what if any steps he had taken to secure legal counsel.

[80] On March 18, 2022, after the CMC and after the registry had forwarded the Chairperson's March 15, 2022, letter, the grievor emailed the Chairperson's executive assistant, asking her to bring this email to the attention of the Chairperson. In this email, the grievor talks about emails he had received, and he appears to muse on which emails and letters were considered decisions or orders and enforceable or subject to judicial review. He then made requests that certain earlier emails sent to the grievor from the Board's registry be resent to him, marked with the date of March 18, 2022, or March 21, 2022, and with my name. He then stated as follows:

…

> ***With regard to my request that the decision be forward dated to today or Monday, I am making the request in that as I noted in***

> ***the document conveyed last Friday, when I received any of the first two documents listed above, the member had not taken into account my clear, compelling and cogent reasons requesting a postponement and adjournment.***
>
> ***Prior to that however I would like the member to actually take in to** [sic] **account the clear, compelling and cogent reasons that I am requesting a postponement or adjournment.***
>
> *I mentioned that today as well during the case conference with the member.*
>
> ***With regard to the above and not taking in to account the reasons that I requested a postponement or adjournment, the member has denied me my right to be heard and as a result contravened the tribunal's two enabling statutes.***
>
> ***To distill this to its essence he has contravened the rule of law.***
>
> …
>
> [Emphasis in the original]

[81] On Saturday, March 19, 2022, the grievor emailed the Chairperson's executive assistant as well as the Board's registry twice (at 11:05 and 13:52), and in those emails, he also forwarded the email of March 18, 2022. On Sunday, March 20, 2022, at 12:27, the grievor again emailed the Chairperson's executive assistant and the Board's registry. That email also attached the earlier March 18 and 19 emails. Again, he asked that the emails be brought to the attention of the Chairperson. In that email, while he raises a number of things with respect to the March 14 motion material, he also states the following:

> …
>
> ***With regards to the Motions that were sent to the Chair, the Act is clear that they are within her purview, however she has indicated that she will not answer my request for the Orders sought.***
>
> ***I state that with all due respect.***
>
> ***As was discussed with member Jowarski** [sic] **during the case management meeting, I don't want him to provide a response to the Motions, in that the Chair should have responded to them.***
>
> …
>
> [Emphasis in the original]

[82] On Monday March 21, 2022, at 07:10, the grievor emailed the Board's registry and the Chairperson's executive assistant and attached a copy of his earlier emails of March 18, 19, and 20, 2022. This email again talks about a number of things but does

not address any new reasons for a postponement. A little later, at 07:16, the grievor again emailed the Board's registry and the Chairperson's executive assistant and forwarded the earlier emails of 07:10 and of March 18, 19, and 20, 2022. This email did not add anything with respect to the postponement request.

[83] On March 24, 2022, the Chairperson sent the grievor a third letter. It was forwarded to him by email. The relevant portions of that email, with respect to his postponement request, state as follows:

> …
>
> *On March 15, 2022, I sent you a response to several email messages received between March 6 and 14, 2022. Most of these emails reiterated the same points, or repeated concerns to which I had already replied in my letter to you of March 4, 2022.*
>
> *As I explained to you again in my March 15, 2022 letter, I cannot review or overrule the decisions of the panel of the Federal Public Sector Labour Relations and Employment Board that is currently hearing your case, comprised of Board member John Jaworski. Any motions or other requests about your ongoing case must be addressed to him for his consideration, including requests for postponements.*
>
> …
>
> *• I cannot rule on your request for a postponement or any other request in this case. You must address those requests to the Board member, Mr. Jaworski. He is in receipt of a copy of my responses to you.*
>
> …

[84] On Friday, March 25, 2022, and again on Sunday, March 27, 2022, the grievor emailed the Board's registry and the Chairperson's executive assistant a total of five times, four of which were on March 27, 2022, at 11:28, 11:55, 12:27, and 14:25. Each email often attached any previous emails sent that day, such that the last email, sent at 14:25, also contained all the previous emails sent. The only reference to the postponement issue contained in these emails was in the email of 11:55, and that reference is as follows:

> …
>
> *I also note that with regard to the member's decision on the scheduling of hearing dates, he has denied me my right to be heard, he has contravened two Acts of Parliament and the Values and Ethics Code for the Public Sector and he has done so twice with one decision on the matter of the scheduling of hearing dates.*

…

[85] On Monday, March 28, 2022, at 11:44, the grievor sent a further email to the Board's registry and the Chairperson's executive assistant, which contained a copy of his March 25, 2022, email and the March 27, 2022, at 11:55, email.

[86] On March 29, 2022, the grievor emailed the Board's registry five times and left a voice message. Some of the emails were also sent to the Chairperson's executive assistant. None provided any further submission with respect to the grievor's request for a postponement.

[87] On April 7, 2022, I ordered that the Board retain a court reporting service to participate in the hearing, and the parties were advised of this on that day.

[88] The employer has not provided any response to any of the grievor's material.

II. Reasons

[89] The Board is not obliged to grant postponements.

[90] The Board has a policy with respect to postponements. It is set out on the Board's website and states as follows:

> *This policy outlines the procedure for requesting the postponement of a scheduled hearing.…*
>
> …
>
> ***REQUESTING A POSTPONEMENT***
>
> *Ideally, a request for postponement should be made as soon as possible once hearing dates have been provided. As proximity to the scheduled date(s) increases, so will the Board's scrutiny of any request for the postponement. Any postponement request must be supported by clear, cogent and compelling reasons.*
>
> …
>
> *4. The party asking for the postponement must set out clear, cogent and compelling reasons to support their request. The other party or parties (to the hearing) can consider the request and determine whether they wish to take a position. The Board* ***will*** *then determine whether or not to grant the postponement request.*
>
> …
>
> ***GROUNDS***

> *The Board will only grant a postponement where clear, cogent and compelling reasons exist. As guidance to parties, the following will generally* ***NOT*** *be considered sufficient cause to grant a postponement:*
>
> - *The parties' mutual desire for a postponement*
> - *The fact that the matter has not previously been postponed*
> - *That the parties indicate that the case will probably settle if a postponement is granted*
> - *If a witness, party or counsel is unavailable (without exceptional circumstances) after being provided with due notice*
>
> …
>
> [Emphasis in the original]

[91] The phrase "clear, cogent and compelling" gives guidance to the party seeking to postpone the hearing. The words "clear and cogent" indicate that the reason must be conveyed such that the Board understands the reason for the requested postponement. Compelling, on the other hand, addresses the significance to be given to the reason; in short, to be compelling, the reason being put forward must be persuasive and convincing to postpone the hearing.

[92] For example, a party requesting a postponement of a hearing that is to proceed for a week may state that it needs the postponement because it has something else scheduled at the time the hearing is to proceed. This is not a clear and cogent (leaving aside compelling for the time being) reason to postpone a hearing. Still, if the same party stated that it has a dental appointment on the morning of the first day of the hearing, it would be both clear and cogent; however, it may not be compelling. If the dental appointment is for a cleaning and could be easily rescheduled, it would not meet the test of compelling. If, however, the appointment is for emergency surgery because the person took a hockey puck to the mouth the day before and has significant damage to the jaw, teeth, and mouth, it would likely meet the test for compelling.

[93] It is trite to state that each reason put forward for a postponement of a hearing has to be assessed based on its merits in the circumstances of the case.

[94] In his several documents forwarded to the Chairperson, since the February 18 email, the grievor has set out the following six reasons for a postponement of the scheduled hearing dates:

- a member of the media may wish to attend;
- the grievor has spoken to the Canadian Civil Liberties Association, which may wish to become an intervenor;
- the grievor's court reporter is not available before September of 2022;
- the grievor no longer has legal counsel;
- the grievor wishes to obtain an FTWE; and
- the grievor has a disability.

[95] Before addressing these reasons, I want to address two allegations made by the grievor with respect to the scheduling of the hearing dates, which are as follows:

1. that the Board did not give the grievor the opportunity to provide his availability with respect to the scheduling of the hearing dates; and
2. that the Board ignored the grievor's clear, cogent, and compelling reasons in his initial postponement request.

A. The Board did not provide the grievor with the opportunity to provide his availability with respect to the scheduling of the hearing dates

[96] The Board is not required to consult any parties on hearing dates and the majority of its hearings are scheduled without their input.

[97] Section 102(1) of the *Regulations* provides that the Board must provide the parties with a notice of hearing at least 7 days before the day that is fixed for it. In this case, the grievor has been provided 87 days' notice. The practice of the Board is to provide the official Notice of Hearing that sets out the particulars of the hearing 30 days before the first day of the hearing.

[98] Despite not being required to seek the parties' availability for the scheduling of the continuation of the hearing, on January 26, 2022, by email, the Board' registry sought the availability of the parties for the continued hearing of the matter during the months of February, March, April, and May of 2022. In the interim, the Board scheduled hearing dates for two weeks in July of 2022, as that was the schedule the Board was working on at the time.

[99] The parties were given a week to respond. Neither party responded by the deadline of February 2, 2022. By email on February 3, 2022, the parties were reminded that the deadline had passed. The employer's counsel responded immediately, providing dates that the employer was available and unavailable. Nothing was heard from the grievor or his legal counsel, and as such, on February 9, 2022, hearing dates of May 9 to 10 and the week of May 16, 2022, were scheduled, in addition to the July

2022 dates. These dates were conveyed to the parties by email on February 11, 2022, at 11:25.

[100] On February 11, 2022, at 17:32, Mr. Markowitz advised the Board's registry that he was no longer representing the grievor. Unbeknownst to the Board until April 4, 2022, Mr. Markowitz had actually advised the grievor that he would not be representing him by email on January 26, 2022, at 16:00, when he also forwarded to the grievor the email of that same date from the Board's registry, asking the parties for their availability.

[101] The grievor has stated in more than one piece of correspondence to the Chairperson that the Board, be it me as the panel of the Board or the Board's registry on my behalf, did not seek his input into the scheduling of the continuation of the hearing; this is blatantly false.

[102] The Board sought that input by email sent to the grievor's counsel on January 26, 2022. It was incumbent on the grievor's counsel to address this with him. It appears from documents produced recently by the grievor that the grievor's counsel did in fact provide the grievor with this request as of January 26, 2022. The Board's registry provided the parties with a deadline within which to reply; neither the grievor nor his counsel replied. Indeed, the grievor's counsel did not advise the Board's registry that he was no longer representing the grievor until after the hearing dates were set and provided to the parties, and in response to the February 11, 2022, email that the Board's registry sent to the parties, advising them of the hearing dates. This was 16 days after the parties were asked for their input and indeed after the grievor was also aware, as his counsel had advised him of the request in an email that same day and coincidentally had also advised him that he would no longer be representing him. The fact that he knew of the Board's request, was not conveyed to the Board's registry, the Chairperson, or me until he produced this as a part of a written motion record for the FCA, provided to the Board's registry more than two months after the fact on April 4, 2022.

B. The Board ignored the grievor's clear, cogent, and compelling reasons in his initial postponement request

[103] In his numerous emails sent to the Chairperson, which included requests for her to postpone the hearing dates, the grievor has stated that I failed to consider the clear,

cogent, and compelling reasons he had submitted to me in favour of granting his initial postponement request. This is false.

[104] On February 15, 2022, the grievor sent two emails, one at 13:09, and a second at 13:16. In these emails, he does not actually ask for a postponement; he simply states that it is premature to schedule the hearing.

[105] The first issue the email at 13:09 talks about is an FTWE, and it seems to indicate that he is at odds with respect to conclusions set out in it. There is no other information about this FTWE, which I can only conclude had been conducted at some date that is unknown to the Board and with the grievor's consent. The other is that the grievor appears to be having a dispute with his lawyer. In the email at 13:16, the grievor then states that due to the "logistics of [his] case [he is] requesting dates in September." I interpreted this as the grievor's request for a postponement.

[106] The grievor's request is far from clear or cogent. It is at best vague, alluding to a potential issue with his legal counsel. In the email, at this time, he is disputing that the relationship with Mr. Markowitz has been dissolved. This fact situation is far from one that is clear, and it is not at all compelling. If the relationship was not dissolved, as the grievor is alluding to, then that certainly is not a reason not to proceed with the hearing.

[107] With respect to the grievor's allusion to a dispute over the FTWE, again, the information conveyed by the grievor does not provide me, as a panel of the Board seized with his matter, sufficient information to conclude that there is a clear, cogent, and compelling reason for the postponement of the hearing. At best, what little information that has been provided is that there may be a dispute with respect to an FTWE in a case that, as will be explored in more detail later, is and has largely been about the grievor's fitness to work since as far back as 2012.

C. The grievor's post-February 18, 2022, reasons for requesting a postponement

1. A member of the media may wish to attend

[108] The Board adheres to the open court principle. Its hearings are open to the public. Any member of the public or media is entitled to attend if that person so chooses. This is no different in the grievor's case. However, the Board is not going to

schedule a hearing for the convenience of a member of the media or the public; nor does it have an obligation to. This is not a compelling reason to postpone a hearing.

2. The grievor suggests that the Canadian Civil Liberties Association may wish to become an intervenor

[109] If the Canadian Civil Liberties Association wants to become an intervenor in the grievor's case, it is up to that organization to take the steps it deems necessary to do so. The potential future application of a person or organization to be an intervenor to a proceeding is not a compelling reason to postpone a hearing. As of the date of this decision, no party has applied to be an intervenor in this matter.

3. The grievor's court reporter is not available before September of 2022

[110] Board hearings do not, as a rule, involve the use of court reporting services. While the Board operates its hearings in a quasi-judicial manner, it has not in the past and does not currently, as a rule, use court reporters to record verbatim the oral evidence presented. The panel of the Board hearing a matter and the parties make their own notes.

[111] After I issued 2018 FPSLREB 76, before the continuation of the hearing in this matter in December of 2020, and coincidental to the time the grievor brought his first application for my recusal (September of 2019), he requested that the Board permit the continuation of his hearing with a court reporter, at his cost. I granted that request. When the hearing recommenced on December 1, 2020, present was a court reporter whom the grievor had retained.

[112] In the February 18 email, the grievor states this: "To be able to hire a court reporter, my hearing dates will have to occur in September or later … hearing dates at the beginning of May and probably even July would not be able to be met by the court reporter service." The grievor did not provide any actual evidence as to the ability or non-availability of court reporter services. That said, and in any event, the Chairperson indicated to the grievor that if he made a request to me about a court reporter, I would be obliged to deal with it.

[113] As I had already allowed the grievor to retain a court reporter at his cost, as he requested, I would maintain that this could continue to be the case; however, proceedings before the Board should not be unduly delayed due to the limited resources of the grievor to pay for that court reporter. In these circumstances, I have

determined that to facilitate the hearing proceeding and so that it will not be held up due to the idiosyncrasy of any particular court reporting service or the grievor's limited financial resources, the Board shall arrange for and see to the payment of the court reporting service at no cost to the grievor or employer. This decision was conveyed to the parties on April 7, 2022.

4. The grievor wishes to obtain an FTWE

[114] After his termination of employment, the grievor applied for and began receiving disability benefits from the employer's disability insurer, Sun Life.

[115] On January 26, 2022, the Board's registry emailed the parties, asking two questions, one of which was about what remedial issues remained outstanding. Counsel for the employer responded in a letter dated February 12, 2022, stating as follows:

> …
>
> *The employer submits the outstanding remedial issues are quite narrow. At the time of his termination, Mr. Herbert was unfit for work. Shortly thereafter, he was approved for Disability Insurance, and subsequently, CPPD benefits. Health Canada recently assessed Mr. Herbert and advises that he is unable to return to work in any capacity, and that his disability is likely permanent.…*
>
> …
>
> *We anticipate that Mr. Herbert is not in agreement with our position, including that we are advised Mr. Herbert disputes Health Canada's prognosis for a return to work.*
>
> …

[116] The grievor responded with the Feb. 15, 13:16 email, stating the following:

> …
>
> *Mr. Stelpstra states that at the time of my wrongful termination I was "unfit for work." He knows that his assertion is inaccurate in that the two annual appraisals prior to my wrongful termination were positive and there were no medical reports congruent with his assertion.*
>
> *This factors in to determinations on remedy and damages awards.*
>
> *As Mr. Stelpstra also knows, my employer had wrongfully terminated me for purported "unsatisfactory performance" and my employer had not [wrongfully] terminated me due to being unfit for work, as he claims.*

…

> *Mr. Stelpstra is however correct in his assumption that [sic] was produced by Health Canada is fundamentally flawed in that Mr. Markowitz pointed this fact out to him.*
>
> *As such despite Mr. Stelpstra's assertion, there is a live issue with respect to reinstatement ("reintegration" as he states in his letter) and lost wages.*

…

[117] In the Feb. 15, 13:16 email, the grievor stated, "As the employer's counsel pointed out, it is aware that the letters produced by Health Canada are fundamentally flawed." I have not seen and the Board has not been provided with the Health Canada report that Mr. Stelpstra has referred to. All I have seen and what has been forwarded to the Board's registry is the February 12, 2022, letter in which the employer states that it (a recent Health Canada report) exists and that it asserts that the grievor is unable to return to work in any capacity and that his disability is likely permanent.

[118] I have not been privy to any correspondence or discussions between counsel for the employer and the former counsel for the grievor on this matter. I have not seen any documents that the grievor has stated in the Feb. 15, 13:16 email suggest that the employer's counsel has pointed out that the letters produced by Health Canada are fundamentally flawed.

[119] The grievor also stated in the Feb. 15, 13:16 email as follows: "Prior to even countenancing the idea of hiring a court reporter I will have to have a bona fide FTWE in place and not what was produced by Health Canada."

[120] The grievance against the termination of his employment and those grievances that were dealt with by me in 2018 FPSLREB 76 had their genesis in a difficulty identified by the employer of the grievor in carrying out tasks related to his substantive position as far back as the 2011-2012 fiscal year or in short, his fitness to do the tasks of his position. As a result of what the employer saw as some problems, the grievor was moved into a PM-03 position while retaining his substantive group and level pay.

[121] In August of 2012, a letter was produced to the employer by the grievor from his psychologist identifying a mental-health issue that might require an accommodation. During the course of the hearing in 2016, a significant amount of

evidence was led with respect to the assessments being carried out, the grievor's health, the grievor's ability to carry out the tasks related to his substantive position, and the issue of accommodation.

[122] What eventually led to the grievor's termination of employment was a series of events that had, as its starting point, his disagreement between January and August of 2015 with the conduct of a health assessment. While there was a dispute over exactly what type of assessment or examination this was to be, the evidence clearly disclosed that the grievor was initially against the request; later, he agreed with it and consented to it, and later still, he grieved it. The employer in turn allowed his grievance, which led to an alternative process in which the grievor was responsible for demonstrating his ability to satisfactorily carry out the duties and responsibilities of his substantive position, which the grievor failed and that ultimately led to his termination of employment (see 2018 FPSLREB 76).

[123] In a nutshell, this case, since its start, has been about, in some way, shape, or form, the grievor's ability to carry out the tasks of his position, and the termination grievance was specifically fought over the failure of the grievor to participate in a medical assessment. The grievor's fitness to work, or accommodation measures by the employer to address the grievor's difficulties at work, has been at the heart of the grievances that came before me at the start of this hearing in January of 2016, and the facts date back as far as fiscal year 2011-2012.

[124] At paragraphs 411, 412, 417, and 418 of 2018 FPSLREB 76, I stated as follows:

> ***411*** *In the end, rather than conduct a robust and fulsome FTWE, the employer yielded to the grievor's grievance, and, rather than gathering the medical and accommodation information it required, (which, at the hearing it admitted it had needed) it determined that it would make a determination on the grievor's employment and accommodation based on outdated medical information and his contribution of a self-assessment of his skills and competencies. This process was deeply flawed and doomed to fail.*
>
> ***412*** *The grievor fought against a further FTWE in the form of an IME or neuropsychological assessment and filed a grievance against having to undergo one. That said, he suffered from the major depressive disorder that the employer was well aware caused him significant cognitive issues. I have no doubt that given the mental health issues that afflicted him, the grievor was likely not the best person to judge what he could and could not do or his*

> *level of competency. Yet the employer did just that, in the face of this and of stating that it could not assess the grievor's competencies and accommodation without another specialist evaluation.*
>
> …
>
> ***417*** *It is impossible to assess whether the grievor could have returned to his substantive SPA position, with or without some accommodation, or could have filled some other vacancy or position at the PBC, because the employer acquiesced to the grievance against having a further FTWE (in whatever form it may have taken) in the face of knowing that the information it had on file was insufficient for it to make the necessary decisions to address his employment and accommodation needs (if any). Rather than do what was necessary, it took the easy way out.*
>
> ***418*** *Perhaps the grievor could have returned to the SPA position, or perhaps his disability is such that he just would not have been able to do the work required in that position or in any position at the PBC. However, that question could not be answered because the process was not followed; as such, the employer failed in the accommodation process.*
>
> …

[125] Not only was it the reason behind his termination, but also, the failure of the employer to conduct the assessment in the spring of 2015 was what the grievor argued was the employer's failure that should lead me to find in his favour. As part of 2018 FPSLREB 76, I summarized both parties' arguments. With respect to the grievor's arguments on his termination of employment, I summarized those arguments, in part, at paragraphs 273 and 274, which state as follows:

> ***273*** *In January of 2015, the employer wanted the grievor to participate in a further FTWE [IME], which he did not agree was necessary. He filed a grievance against the employer, which in turn acted in bad faith and determined that it would forgo the assessment and make determinations based on the information it had on hand.*
>
> ***274*** *Ms. Gaudet's evidence on this point is critical. She stated that the employer could not make a determination on accommodation without the new FTWE [IME], which was never completed.…*

[126] At the outset of the hearing, in his opening statement, counsel for the grievor stated that the grievor is seeking damages in lieu of reinstatement and asking for those damages to be assessed from the date of termination to the date of his expected retirement from the public service. This point was reiterated to me by counsel for the employer during the course of his closing argument. Sometime after I issued 2018

FPSLREB 76, and as early as January of 2020, the grievor, through his legal counsel, requested the Board order the employer to carry out an FTWE.

[127] On November 9, 2020, in preparation for the hearing continuing on December 1, 2020, counsel for the employer asked for a production order with respect to the grievor's disability file with Sun Life. In support of that request, counsel for the employer attached three letters (dated August 31, October 29, and November 6, 2020) sent by that counsel's office. Counsel for the grievor responded to the Board by letter dated November 10, 2020 (the Nov. 10 letter) and emailed to the Board that day. The relevant portions of those letters, which were set out earlier in this decision, clearly disclose that the grievor's fitness to work and disability benefits arising from either his fitness (or lack thereof) to work were front and centre for the parties as far back as the summer of 2020, the grievor having stated to his counsel in an email dated November 9, 2020, as follows: "As you know my disability benefits ended on June 7, 2020. You know this in that I asked you if there was any merit to requesting that they be extended. You indicated that I can't be fit to return to work and continue to receive disability benefits."

[128] What can be gathered from the wording of this email is that as far back as before the termination of the disability benefits, in at least June of 2020, the grievor was discussing the strategy of applying for extended disability benefits in the face of what that would mean with respect to his fitness to work.

[129] As of February 11, 2022, when the parties were advised of the May 2022 hearing dates, more than 40 months (almost 3.5 years) had passed from the date I had issued my liability decision (2018 FPSLREB 76). During this entire period, the grievor was represented by senior legal counsel. The grievor's fitness to work and the conduct of an FTWE have been at or near the forefront of this matter since it started. It is crystal clear that the grievor and his legal representation, at whatever point in time, based on what little material the grievor has brought forth, decided not to take the step of obtaining his own FTWE.

[130] There was nothing that stopped the grievor from obtaining his own FTWE. By having Health Canada conduct an FTWE, the employer would have required consent from the grievor and would have had to provide background information with respect to the history of the problem, as well as information about the job and work

environment. These are items that are often issues of contention and negotiation during the FTWE process. The grievor could have used this information to obtain his own FTWE. Instead, it appears that he was content to await the outcome of the employer's FTWE.

[131] Perhaps they were hopeful that a further FTWE that the employer obtained would be favourable to him; however, they should have considered that there was a chance that the assessment might not be favourable, especially in light of the history involved in this case and the evidence already brought forward during the course of the hearing in 2016 that led to 2018 FPSLREB 76.

[132] In addition, while the grievor has stated that he needs a further FTWE, he has not provided the Board with any information that would suggest that an FTWE was feasible at all or feasible within the time frame within which he was seeking to postpone the hearing. Based on little to no information in this respect, if the Board acquiesces to the request, and no FTWE is completed by September or October of 2022, it will inevitably lead to yet a further request to postpone to some further unknown date in the future. In addition, there is nothing to suggest that if the Board further postpones the hearing, in consideration of the grievor seeking to obtain a further FTWE, and if that evaluation is not satisfactory to him, this would again generate a further postponement request by him.

5. The grievor has a disability

[133] On page 11 of the March 14 motion material, the grievor states that he suffers from a "Major Depressive Disorder recurrent and a Generalized Anxiety Disorder". He goes on to state that I know that he suffers from this. He also states that he no longer suffers from an alcohol-use disorder and then states that his depression and anxiety disorder are being held in abeyance.

[134] As set out in 2018 FPSLREB 76, I had been provided with a significant amount of evidence in the form of medical reports and records as well as oral testimony from healthcare professionals about the grievor's health issues that shape his disability. Having a disability, however, does not in and of itself necessarily require an accommodation and one's condition may change over time. As the grievor stated in his March 14 motion material that his depression and anxiety are in abeyance, there does

not appear to be any accommodation measure that is required at this time and as such none shall be ordered.

[135] Moreover, the grievor is seemingly using this request involving his disability as a pretext to removing me as the panel of the Board responsible for continuing to hear and determine the grievance I am seized with.

[136] As set out earlier in this decision, on September 24, 2019, the Board was forwarded by the grievor's counsel at the time, Mr. Markowitz, the recusal request and the litany of errors (54 typed, single-spaced pages). This led to 2020 FPSLREB 28. After that, the grievor forwarded more documents, emails, and letters to the former Chairperson, requesting that she remove me from continuing with this matter, which resulted in the Aug. 6 letter decision. He has now, since the February 18 email, sent the current Chairperson a significant number of documents, covering a variety of different subjects, not the least of which has been his request to her to remove me from continuing the hearing in this matter. The current Chairperson has written to the grievor 3 times since February 18, 2022, and has told him that she is not interfering.

[137] Contained in much of this material is a narrative that the grievor has created, repeatedly suggesting that I am biased against him and that I am carrying out what he has described as a campaign of reprisal against him. This is the same narrative that was prevalent in his recusal request (which led to 2020 FPSLREB 28) and in his previous request to the former Chairperson (which led to the Aug. 6 letter decision). It is in the vein of this narrative that the grievor is now requesting that he be accommodated due to his disability. He states that his disability will be exacerbated if the hearing proceeds before me and is not postponed.

[138] The grievor has not brought forward evidence and arguments that would support this claim that his condition will worsen. Moreover, the alleged basis for his bias claims were rejected in 2020 FPSLREB 28. He attempted to revisit that recusal process by asking the former Chairperson to reassign this matter, which she denied in the Aug. 6 letter decision. The grievor had the option of judicial review, which is an option that he chose not to exercise. He again asked the current Chairperson to reassign this matter, and she also declined. He did not judicially review her decision. It appears that he is now invoking his disability to again demand my removal after his

earlier efforts using the appropriate processes were not successful. This latest effort is also without merit.

[139] The request to postpone the hearing on the basis of the grievor's disability is denied.

6. The grievor is no longer represented by legal counsel

[140] In *Sioui v. Treasury Board (Correctional Service of Canada)*, 2008 PSLRB 16, the issue of postponement requests specifically related to the legal representation before the Board was addressed. In that matter, the adjudicator stated as follows:

> …
>
> *27 The principles that apply to the right to counsel also apply to a request for a postponement to retain counsel. That right is not absolute. As with the right to representation, courts have a great deal of discretion (see* Meunier c. Luc Jean, Extermination 7/24, *[2000] D.T.T.Q. no. 118).*
>
> *28 The courts have often been faced with requests for postponement related to the right to representation by counsel. In his work entitled* Droit public et administratif, *Collectioin de droit 2004-2005, Ecole du Barreau du Québec, vol. 7, 2004 (cited in* Mario Boily c. Armoires Orléans, *2005 QCCRT 609), Denis Lemieux states the following:*
>
> *[Translation]*
>
> *…*
>
> A person may request a postponement or suspension from the body to obtain a reasonable period within which to fully exercise his or her right to a full and complete defence. That request may be based on the need to review certain new facts, to seek assistance from counsel, or to summon witnesses or retrieve documents. An administrative organization will have the discretionary authority to grant or deny such a postponement. However, the denial of a postponement may be unlawful if it leads to irreparable harm for the person concerned, where such harm does not stem from **negligence on the part of that person or that person's counsel.**
>
> *…*
>
> *[Emphasis in the original]*
>
> *29 I agree with J. Handman in A*utobus scolaire Fortier Inc. c. Syndicat des chauffeurs d'autobus scolaires, region de Québec *(CSD), [2000] D.T.T.Q. no. 118, concerning the reasonable limits of the right to postpone for the purpose of retaining counsel:*
>
> *[Translation]*

> *18 The right to representation by counsel, on the other hand is not absolute. It is up to the court to assess, based on the circumstances and nature of the case, whether a postponement is necessary to a full and complete defence, or whether it amounts to nothing more than a delaying tactic. A lower court, which is master of its own house, has discretion in that regard. Only the arbitrary denial of postponement can result in a denial of justice and justify legal intervention.…*
>
> *30 Consequently, given that the right to representation by counsel is not an absolute right, I must consider how serious are the reasons justifying the request for postponement, including whether it is a tactic designed to delay the process, time constraints, the parties entitlement to a swift and effective process, and the general framework of the* Act*.*
>
> …
>
> [Emphasis in the original]

[141] In *Chow v. Treasury Board (Statistics Canada)*, 2006 PSLRB 71, the Board also addressed the issue of postponement requests, which also touched on the issue of the change of legal representation, stating as follows:

> …
>
> *[55] An adjudicator has discretionary authority to control and determine procedures for the adjudication process, subject to the imperative of providing a fair hearing to the parties. This authority includes the authority to grant a request for an adjournment (*Canadian Labour Arbitration*, Third Edition, by Messrs Brown and Beatty, at 3:2300). In the context of the former* Act*, an adjudicator's authority to determine hearing procedure is subsumed under the broad grant of authority given under subsection 96.1:*
>
> > ***96.1*** *An adjudicator has, in relation to the adjudication, all the powers, rights and privileges of the Board, other than the power to make regulations under section 22.*
>
> *[56] Various factors weigh upon the exercise of an adjudicator's authority to postpone a hearing, but the principal task is to weigh the prejudice to both parties of granting, or not granting such a request (*Canadian Labour Arbitration*, 3:2340).*
>
> *[57] At the heart of the grievor's argument in favour of postponement is the proposition that she deserves the benefit of legal advice and/or legal representation in this hearing. Should I reject her requests, she alleges that I will, in effect, deny her access to the legal advice and/or representation that she feels she needs and is owed by right, for the hearing of February 20-21, 2006. The possibility of prejudice to the grievor is apparent. In the jurisdictional objections before me, there may be issues of law and*

> *other complexities that may be demanding for an unrepresented grievor, and possibly outside that grievor's abilities. In such circumstances, I believe that an adjudicator should exercise special caution, and require an unrepresented employee to proceed only where there are strong reasons for doing so.*
>
> *[58] Having recognized this requirement, it is nonetheless crucial to acknowledge that there are two parties involved in this case. Making a decision on the grievor's request requires that I understand and evaluate the possible prejudice to each party of delaying or not delaying, and weigh the interests and rights of both parties in deciding how we are to proceed. I believe that I also should incorporate into my decision the public interest objective of insuring [sic] that the grievance redress procedure provided under the former* Act *works without undue delay, and that it not be held in disrepute.*
>
> *[59] … My analysis cannot ignore the extensive record of correspondence, procedural submissions and decisions, beginning in 2002, on the grievor's references to adjudication, which establishes the context for the hearing. In this record and in the arguments of the parties before me, I find reason to deny the grievor's request for a postponement.*
>
> …

[142] This is not the first time the grievor has had a parting of the ways with his legal counsel. The first was in mid-September of 2019, just before the continuation of the hearing that had been scheduled for late September and early October of 2019. At that time, the Board granted the grievor a postponement, one of the reasons being that Mr. Markowitz, the grievor's new counsel, although he had been retained, did not have the grievor's file.

[143] However, while that was the actual first break the grievor had with legal counsel, it is important to understand that relationship. That relationship was not a straightforward, direct solicitor-client relationship between the grievor and his lawyers. The grievor was actually represented by his bargaining agent, the Alliance, which in turn retained Mr. Stehr and later Mr. McGee, both of whom attended for the first part of the hearing that led to 2018 FPSLREB 76. While that relationship officially ended sometime in September of 2019, before that time, the grievor had made the DFR complaint against the Alliance on June 27, 2019, which he withdrew on July 19, 2019. Indeed, after he made and then withdrew that complaint, he inquired of the Board's registry about acting on his own in the continuation of the hearing.

[144] The second break with his legal representation appears to have happened on January 26, 2022. That is 102 days before the start of the continuation of the hearing, which is scheduled for May 9, 2022. While the Board was not aware of the termination of the relationship at that time, the grievor certainly was, as was Mr. Markowitz, and it was incumbent on them to advise the Board. Neither did until Friday, February 11, 2022, when Mr. Markowitz emailed the Board's registry at 17:32.

[145] The grievor, as of the time of this decision, has had in excess of 90 days to retain new counsel. The grievor has provided no information with respect to his actions in attempting to retain new legal representation. The grievor suggested that the hearing should be postponed until after September of 2022. What if the grievor has no legal representation at that time or fails to ever secure legal representation? This is the same circular reasoning that the grievor has brought forward with respect to the FTWE.

[146] The grievance dates back close to seven years. The first part of this hearing started more than six years ago. I rendered my decision with respect to liability close to four years ago. The grievor has clearly had difficulties with his representation throughout this process, having now parted ways with two separate sets of legal counsel. I acknowledge that as set out in *Chow*, there may be issues of law and other complexities that may be demanding for an unrepresented grievor and possibly outside that grievor's abilities. However, there have been significant delays in dealing with the completion of this case, delays that the grievor has accused me in his request for recusal of creating on purpose, to cause him harm. This matter has been postponed four times; albeit, no party was responsible for the postponement due to the pandemic. Based on all the reasons that the grievor has put forward to postpone this hearing, the evidence discloses that his actions are nothing more than a further attempt to delay it, and the request to postpone to retain new legal representation is nothing more than a further guise in that manner.

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

(The Order appears on the next page)

III. Order

[148] The request to postpone the hearing is denied.

May 5, 2022.

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board