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

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

BETWEEN

C.D.

Grievor

and

CANADIAN SECURITY INTELLIGENCE SERVICE

Employer

Indexed as
C.D. v. Canadian Security Intelligence Service

In the matter of an individual grievance referred to adjudication

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Kim Patenaude, counsel

For the Employer: Marc Séguin, counsel

Heard at Ottawa, Ontario,
January 15 to 19 and 23, 2024.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Grievance referred to adjudication

[1] Performance expectations are high for the polygraphists of the Canadian Security Intelligence Service ("the Service" or "the employer"). The requirements that they must meet are also high, and with reason. The Service is an intelligence agency that was created to protect the national security of both Canada and Canadians (see the preamble to the *Canadian Security Intelligence Service Act* (R.S.C., 1985, c. C-23; "the *CSIS Act*").

[2] C.D. ("the grievor") worked for the Service from 2001 to 2023. He held a polygraphist position (classified at level 9) in the Service's Polygraph Unit ("the Unit") from January 2009 to August 2016. On August 12, 2016, he was demoted to level 7 and transferred to a position in another Service branch. After his demotion, and until he left his Service employment in 2023, the grievor did not work as a polygraphist.

[3] The employer cited the grievor's performance as a reason for his demotion. He filed a grievance challenging that action. After the employer denied it, he referred it to adjudication under s. 209(1)(c) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). As will be explained later in this decision, the Board heard his grievance under s. 209(1)(b). On reading it, the Board found that he had alleged that his demotion was disguised disciplinary action.

[4] For the reasons that follow, I find that the grievor's demotion was in fact disguised disciplinary action. I allow the grievance.

II. Sealing order, and anonymization

[5] The employer requested the anonymization of this file. It also requested that all documents be sealed that could include Service employees' names or information that could identify Service employees until they could be replaced by redacted versions. As the employer stated in its request, "[translation] … disclosing information [that could identify Service employees] endangers employees and compromises the Service's ability to investigate threats to Canada's security and to protect its operating methods and investigative techniques …". The grievor did not object to the request.

[6] In April 2023, I granted the employer's request on a provisional and interlocutory basis. I also informed the parties that a final decision as to

anonymization and sealing would be made when the grievance was decided on the merits. I must now make a final decision on the employer's request.

[7] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, the Supreme Court of Canada set out the test to grant a confidentiality order that restricts the open court principle. It was reformulated in *Sherman Estate v. Donovan*, 2021 SCC 25. The test is as follows:

> …
>
> *[38] … the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:*
>
> *(1) court openness poses a serious risk to an important public interest;*
>
> *(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,*
>
> *(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.*
>
> …

[8] I find that this case meets the parts of the test just described.

[9] As noted earlier, the Service was created to protect the national security of Canada and that of Canadians. The legislator wanted to protect the identities of these employees. It provided in the *CSIS Act* that it is prohibited to disclose the identity of a Service employee who was, is, or is likely to become engaged in covert operational activities. Uncontested is that the grievor's identity, those of the two other people who testified at the hearing, and those of the employees whose names appear in documents admitted into evidence are covered by s. 18(1) of the *CSIS Act*, which provides as follows:

> ***18 (1)*** *Subject to subsection (2), no person shall knowingly disclose any information that they obtained or to which they had access in the course of the performance of their duties and functions under this Act or their participation in the administration or enforcement of this Act and from which could be inferred the identity of an employee who was, is or is likely to become engaged in covert operational activities of the Service or the identity of a person who was an employee engaged in such activities.*

[10] Disclosing information that could identify Service employees poses a serious risk to an important public interest, namely, protecting both the Service's employees and its ability to investigate threats to Canada's security. I find that the employer's requested order is necessary to address that risk. In my opinion, no other reasonable steps could be taken that would address that risk.

[11] The confidentiality order's impact on the understanding and intelligibility of this decision is minimal. I believe that this meets the proportionality criterion set out in *Sherman*.

[12] Accordingly, an order will be issued. Unredacted documents in the Board's file will be sealed and replaced with redacted versions. The grievor will be identified by the initials "C.D.".

[13] In this decision, initials will be used to identify those who testified at the hearing. Initials will also be used to identify any other person working for the Service whose identity is relevant to this case. The initials that will be used in this decision do not correspond to the names of the persons concerned.

III. The Board's jurisdiction to hear the grievance

[14] A few days before the hearing, the employer raised an objection to the Board's jurisdiction to hear this grievance.

[15] The grievor filed his grievance in August 2016. In late October 2016, the employer denied the grievance without holding a hearing or otherwise giving the grievor an opportunity to explain or clarify, if necessary, the nature of his allegations. In December 2016, he referred his grievance to adjudication. The notice of referral contains a text, the wording of which is very similar to that of the grievance. However, the notice of referral contains some additional statements.

[16] The grievor referred his grievance to adjudication under s. 209(1)(c)(i) of the *Act*, which allows an employee employed in the core public administration to refer to adjudication a grievance about, among other things, a demotion for insufficient performance. However, as the employer correctly argued, since the Service is not one of the organizations listed in Schedules 1 and 4 to the *Financial Administration Act* (R.S.C., 1985, c. F-11), it is not part of the core public administration. The Board does

not have jurisdiction to hear a grievance referred to adjudication under s. 209(1)(c) if the grievance involves the Service as an employer.

[17] The Service is also not an organization designated by the Governor in Council for the purposes of applying s. 209(1)(d) of the *Act*, which allows an employee of a designated separate agency to refer to adjudication a grievance about a demotion "… for any reason that does not relate to a breach of discipline or misconduct".

[18] According to the employer, the Board can have jurisdiction to hear the grievor's grievance only if it was referred to adjudication under s. 209(1)(b) of the *Act*; that is, if it alleges that his demotion was disguised disciplinary action. The employer submitted that the grievance contains no such explicit or implicit allegation. According to it, the only indicators that could possibly suggest that the grievor alleged that he was subjected to disguised disciplinary action is in the notice of the referral to adjudication, not in the grievance itself. He was prohibited from arguing a new ground when he referred his grievance to adjudication (see *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.)). The employer cited *"A" v. Canadian Security Intelligence Service*, 2013 PSLRB 3 (*"A" vs. CSIS*), *Caron v. Canadian Nuclear Safety Commission*, 2021 FPSLREB 74, and *Shneidman v. Canada (Attorney General)*, 2007 FCA 192, to support its position.

[19] The grievor argued that he was not represented by a bargaining agent when he drafted his grievance. He did his best to describe the nature of his allegations. Although he checked the box on the Board's referral form that corresponds to s. 209(1)(c) of the *Act*, he argued that his grievance implicitly alleged that his demotion was disguised disciplinary action. In his opinion, referring his grievance to adjudication under s. 209(1)(c) was merely a defect in form that does not deprive the Board of jurisdiction to hear this grievance.

[20] According to the grievor, even though his grievance does not contain the words "discipline" or "disguised discipline", the employer could understand from reading it that he alleged that he was subjected to disguised disciplinary action (see *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 at paras. 68 and 69 ("*Parry Sound*"), and *Canada (Attorney General) v. Heyser*, 2017 FCA 113 at para. 80). In his opinion, hearing the grievance pursuant to s. 209(1)(b) of the

Act would not alter its nature (see *Boudreau v. Canada (Attorney General)*, 2011 FC 868 at para. 18).

[21] On the first hearing day, I heard the parties' arguments on this matter. After hearing their arguments and reviewing the case law that each party cited, I dismissed the employer's objection, with reasons to follow. Here they are.

[22] Two important principles emerge from *Parry Sound*. The first is that a grievance must be interpreted liberally so that the true grievance can be dealt with. The second principle is that a grievance should not be denied because of a defect of form but because of its merits (see *Parry Sound*, at para. 68). In fact, in s. 241 of the *Act*, the legislator expressly provided that by itself, a procedural defect does not invalidate a grievance. As noted in *Perron v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 109 at para. 18, it is impossible to conclude that an adjudicator would not have jurisdiction to determine a grievance for the sole reason that a grievor supposedly did not complete a grievance referral form as required. Procedural requirements should not be stringently enforced when the employer would suffer no prejudice (see *Boudreau*, at para. 18).

[23] It was clear from the parties' submissions that they both agreed that if the grievor's grievance provided sufficient information to support a disguised-discipline allegation, the Board would have jurisdiction to hear it under s. 209(1)(b) of the *Act*.

[24] The grievor argued that I could — and should — consider the texts of both the grievance and the referral to adjudication as part of this analysis. The employer disagreed. According to it, my decision on this objection had to be based solely on the grievance's text.

[25] The grievor added certain supplementary statements to the notice of the referral to adjudication that clarified the nature of his allegations. In my opinion, the statements did not constitute a change to the true nature of his grievance. However, I do not consider it necessary for me to decide whether the Board can rely on the notice of the referral to adjudication to make a conclusion as to its jurisdiction. I have concluded that I have jurisdiction to hear this grievance under s. 209(1)(b) of the *Act* based solely on the grievance's wording.

[26] The grievor was not represented by a bargaining agent when he prepared his grievance. He was also unrepresented when he referred it to adjudication. He is not a lawyer. He has no expertise or significant labour relations experience. He explained, to the best of his ability, the history of the events that led to his demotion and why he felt that his demotion was unfair and unjustified.

[27] The grievor did not use the words "discipline" or "disguised discipline" in his grievance. However, he was not required to. The failure to use those keywords is not determinative. As I noted earlier, a grievance must be interpreted liberally, to identify its true nature, although it is important to be careful not to distort the grievance that the grievor filed (see *Boudreau*, at para. 18).

[28] The issue that I had to decide when the hearing started was whether the grievor alleged in his grievance that his demotion was disguised disciplinary action. In other words, I had to decide whether the grievance's true nature alleged that disguised disciplinary action had been imposed.

[29] On reading the grievance, I found that the employer knew or should have known that the grievor alleged that his demotion was disguised disciplinary action.

[30] In his grievance, the grievor described how the arrival of a new manager turned his professional life upside down. He described how, shortly after the manager's arrival, he felt like he had gone from an employee who was perceived and treated as competent and professional to one who was perceived and treated as incompetent. He stated that he felt targeted by the new manager. He described his clear impression that the manager "[translation] no longer wanted/did not want" him in the Unit. He stated that he was treated unfairly compared to his colleagues because of a personality conflict with his manager. He alleged that he suffered "[translation] … the consequences of relentless and undue pressure by a significant pay cut …". He also stated that he was "[translation] penalized" because of someone who behaved inappropriately with him — his manager.

[31] I read the grievance and am satisfied that the employer knew or ought to have known that the grievor alleged that his demotion was disguised disciplinary action. It is clear that he alleged that his demotion was an approach taken by a manager with whom he had a personality conflict. An allegation clearly arises from the grievance that states that purported deficiencies in his performance were used as a pretext to remove

him from the Unit. The grievance was sufficiently detailed to enable the employer to understand its true nature.

[32] The fact that the grievor did not use the words “discipline” or “disguised discipline” and the fact that he checked a box that corresponded to s. 209(1)(c) of the *Act* on the referral form are defects of form that under s. 241(1) do not invalidate the referral to adjudication (see *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 31 at para. 142).

[33] Although the employer raised an objection to the Board’s jurisdiction, it did not at any time argue that it would suffer any prejudice were the grievance heard under s. 209(1)(b) of the *Act*.

[34] For the reasons set out earlier, I dismiss the employer’s objection.

IV. Summary of the evidence

A. The witnesses

[35] Three witnesses testified at the hearing. Two testified for the employer, namely, the grievor’s manager, who recommended the grievor’s demotion, and an independent polygraphist who, at the manager’s request, participated in implementing an action plan to address deficiencies in the grievor’s performance. The grievor was the third and final witness.

[36] In this decision, I will use the initials “E.F.” when referring to the grievor’s manager. At the time relevant to this grievance, E.F. was the head examiner of the Unit (“the unit head”). I will use the initials “G.H.” when referring to the independent polygraphist.

[37] G.H. is not and has never been a Service employee. He has been working for it on a contract basis since 2013. Among other things, he is called on to provide an independent opinion on the quality of the Unit’s polygraphists’ work. His duties are twofold and are relevant to this grievance.

[38] He conducts quality-control reviews of polygraph examinations that the Unit’s polygraphists conduct. On an ongoing basis and every day, he reviews the polygraphists’ assessments of examinees’ psychophysiological responses during polygraph examinations. He does that to confirm whether the polygraphists made fair

assessments of psychophysiological responses. G.H. does it by examining only the data on an examinee's psychophysiological responses and the polygraphist's digital assessment of that data.

[39] The second part of G.H.'s tasks is to assess the completeness of some polygraph examinations that polygraphists conducted. G.H. conducts the review based on the data on the examinee's psychophysiological responses, the polygraphist's digital assessment, and audio and video recordings of the polygraph examination. This kind of assessment is referred to as a quality assurance assessment and is not to be confused with the quality-control reviews described in the last paragraph. G.H. conducts a quality assurance assessment of approximately four polygraph examinations per year for each of the Unit's polygraphists. He can also do it at the unit head's request.

B. Description of polygraphy

[40] The employer identified the grievor's performance as a polygraphist as the administrative reason for his demotion. For that reason, a brief description of what constitutes a "polygraph examination", the polygraphist's role, and the requirements and standards that a polygraphist must meet in a polygraph examination are required before describing the facts relevant to this grievance.

[41] The following description was drawn primarily from G.H.'s testimony. Detailed evidence was presented at the hearing on the polygraphists' methods and strategies. I considered it in my analysis, but I will provide only a brief overview of the factors necessary to understand this decision.

[42] A polygraphist conducts polygraph examinations. Long and intensive training is required to become a polygraphist that includes, among other things, technical training and training in questioning techniques.

[43] In the polygraphy world, a "polygraph examination" means the entire meeting between a polygraphist and an examinee (the person who is the subject of the polygraph examination). Polygraph examinations consist of three parts: the part that precedes collecting the psychophysiological data, the collection of data, and the part that follows the collection. The portion of the polygraph examination in which the examinee is connected to the device that captures and records their

psychophysiological responses is only very small. The rest of the polygraph examination is equally important.

[44] The polygraph device consists of several components, sensors, and devices that capture different psychophysiological responses that are unconsciously induced in an examinee in response to questions asked as part of a polygraph examination. A psychophysiological response is triggered when an examinee lies in response to a question that they are asked.

[45] Psychophysiological responses are recorded as data, which the polygraphist then analyzes and assesses. The polygraphist measures and assesses the psychophysiological responses to conclude whether the examinee lied to one or more of the questions that they were asked. It is a comparative exercise of psychophysiological responses to several questions on different subjects.

[46] Different polygraph examination formats are recognized and accepted in Canada. They vary in complexity, and some are better suited for simpler and more focused polygraph examinations. The Service recognizes and uses some of these examination formats. Distinguishing one format from another is the number of question sequences asked and the number of questions asked in each sequence. In all cases, the order in which the questions are asked is predetermined.

[47] For all examination formats, certain types of questions must be asked. A polygraphist can use recognized methods to ask certain types of questions. In Canada, there are two accepted and recognized methods. Both have the same objective, which is to compare an examinee's psychophysiological responses when they tell the truth and when they lie. However, the technique that a polygraphist uses is different. For the purposes of this decision, it is important to remember that one of the methods is relatively new in the polygraphy world. It was not widely accepted in Canada for a good number of years, and it was not part of the teaching curriculum when the grievor took his polygraph training. However, at the time relevant to this grievance, the "new method" had largely replaced the method that he had learned as part of his polygraphist training.

[48] Polygraph examinations that the Unit's polygraphists conduct include sequences of questions that address themes that were identified and deemed relevant, due to the Service's mandate. Themes addressed in a polygraph examination done for operational

purposes differ from themes addressed in one done for administrative purposes. Operational examinations involve human sources. They are more complex and difficult examinations for a polygraphist to carry out. The stakes are higher. Administrative polygraph examinations do not involve human sources. At the Service, they are conducted as part of renewing employee security clearances, which is a process that all Service employees must submit to.

[49] Regardless of the polygraph examination format, a polygraphist must take and respect very specific approaches and methodologies at the different stages of a polygraph examination, either before, during, or after collecting the psychophysiological data. Guidelines govern the polygraph methodologies that the Unit's polygraphists use. According to G.H., although a polygraphist may use their professional judgment to deviate somewhat from prescribed methodologies when necessary, consistency, neutrality, and uniformity are important objectives. Methodologies are prescribed, among other things, to ensure that the examinee understands the process and the questions that they are asked, to confirm that the polygraph device is working well, to give the examinee an opportunity to prove that they are telling the truth, and first and foremost, to ensure the reliability and accuracy of the polygraph examination results.

[50] Conducting polygraph examinations is difficult and stressful work that requires preparation. The polygraphist must necessarily listen to the examinee and be attentive to psychophysiological responses, to be able to adjust accordingly.

[51] A polygraphists' choice of words is important. According to G.H., a polygraphist must use clear and precise language to ensure that the examinee understands how the polygraph examination will be conducted, how psychophysiological responses are captured, and how polygraphy works. There are recognized and commonly accepted ways to explain certain concepts to an examinee, including the concept of a lie. The order in which the explanations and instructions are provided during the examination and the order in which the polygraphist takes certain steps during it are also important.

[52] Four possible outcomes may result from a polygraph examination. The first is that the examinee did not have a significant psychophysiological response that could indicate that he or she lied when asked one or more questions related to one or more

themes. A second possible outcome is when an examinee has had a significant psychophysiological response to one or more questions related to one or more themes. It is also possible to obtain an inconclusive result, which means that the polygraphist is unable to conclude, based on assessing the psychophysiological responses, whether the examinee had a significant response. The last of the four possible outcomes is that the polygraphist is unable to reach a conclusion as to the outcome of the polygraph examination. According to G.H., the last outcome usually occurs when, for a reason related to the examinee's physiology, the amount of valid psychophysiological data captured and recorded is insufficient.

[53] Some results may require a follow-up, either by the polygraphists themselves as part of the examination or after it. Sometimes, a follow-up interview or an additional polygraph examination may be required.

[54] After a polygraph examination, a Unit polygraphist assesses the psychological responses captured and recorded as part of the examination and prepares an administrative report that sets out its results, the examination format used, the questions asked, the polygraphist's comments and observations as to how the interview went, and any issues that occurred during the examination. The administrative report is shared with the unit head. The polygraphist also keeps a record of all the examinations that he or she has conducted that has an entry for each examination. For each one, the polygraphist indicates, among other things, the examination format used, the reason for the examination, and the result obtained. The polygraphist also adds comments and observations on any question or issue about the examination's conduct and outcome.

C. The chronology of the events relevant to this grievance

[55] The testimony took place over four days, and a significant number of documents were admitted into evidence. I considered all the evidence presented to me at the hearing. However, for the sake of brevity, I will describe only the evidence that I consider most relevant to the issues that I must decide in this grievance.

[56] The Service hired the grievor in 2001. Before starting in his polygraphist job, he completed intensive and demanding polygraph training offered by an organization specialized in it. He then completed an internship with the Unit.

[57] In January 2009, he was appointed to a polygraphist position in the Unit that was classified at level 9.

[58] From 2009 to 2012, the grievor's performance was satisfactory. He met his position's objectives. The evaluations of his performance during that period were positive and described him as a competent and professional polygraphist who was open to feedback and who changed his way of doing things based on feedback. His work was described as being of good quality. One of the performance evaluations indicated that he adhered to the professional standards that guide the Unit's polygraphists, while another one described his ability to adapt to and to tolerate ambiguity in polygraph examinations.

[59] The performance evaluations for that period indicate that as early as his first year as a polygraphist, the grievor had already conducted complex polygraph examinations and a larger number of polygraph examinations than was the standard. In his early years in the Unit, he participated in mentoring colleagues and, on a manager's recommendation, he led a polygraphy course offered by the same organization at which he took his polygraphist training.

[60] Three different managers prepared performance evaluations corresponding to that period. Everything indicates that the grievor's performance was entirely satisfactory.

[61] At that time, the grievor and E.F. were colleagues. The grievor was appointed to a polygraphist position just over one year after E.F. was appointed to one. The grievor was one of two polygraphists who had not previously held an intelligence officer position. All the other polygraphists, including E.F., had been intelligence officers before becoming polygraphists. According to the grievor, there was some tension within the Unit between polygraphists who had and did not have intelligence officer experience.

[62] E.F. testified that he got along with the grievor at that time. He stated that he had no bad memories of their interactions. The grievor, for his part, stated that their relationship when they were co-workers was professional. He described an event involving E.F. that allegedly took place shortly after he took up his duties. He claimed that E.F. questioned him, in an abrupt and very direct way, about the number of polygraph examinations that he had conducted that week. He stated that he was

surprised and puzzled as to why E.F. was abrupt and as to why a colleague was so interested in the number of examinations he had conducted. E.F. testified that he had a vague recollection of asking him questions. Their evidence demonstrates that while their relationship when they were colleagues was not conflictual, it still was not warm or friendly.

[63] In the grievor's 2012-2013 performance evaluation, deficiencies were identified in his performance for the first time. I.J., the unit head at that time, prepared it but did not testify at the hearing.

[64] When he began as the unit head, I.J. was not a polygraphist. It is uncontested that for some time, I.J. relied heavily on E.F. and another experienced polygraphist. E.F. testified that he did not participate in the grievor's 2012-2013 performance evaluation but that it would not have been unusual for I.J. to ask him about the grievor's performance as part of the 2012-2013 performance evaluation exercise.

[65] The 2012-2013 evaluation indicated that the grievor met six of the eight objectives that the employer had identified. He met two objectives in part. The evaluation indicated that concerns about some of the examinations that he conducted were raised as part of quality assurance assessments conducted by an independent polygraphist who worked for the Service on contract. To avoid any confusion, I would like to clarify that at that time, G.H. was not an independent polygraphist for the Service. Another person, who has since passed away, conducted the quality assurance assessments in question.

[66] The independent polygraphist reviewed three polygraph examinations that the grievor carried out, which were two administrative examinations and one operational examination. The performance evaluation indicated that on some occasions, apparently, he had difficulty adhering to the standards governing the Service's polygraph examinations. There were also supposedly shortcomings in the structure of his polygraph examinations and in the application of core polygraph methodologies. The performance evaluation also identified deficiencies in the administrative reports that he prepared, including with respect to syntax and consistency.

[67] No evidence was presented to me that could shed light on the concerns described in the 2012-2013 performance evaluation. It is uncontested that an independent polygraphist conducting quality assurance assessments of the work

always described their findings and conclusions in a brief written report. Their reports were not presented in evidence. The employer did not retain them. The grievor's administrative reports that were criticized in the performance evaluation were also not presented in evidence. The employer did not retain them.

[68] After the 2012-2013 performance evaluation, the grievor was authorized to conduct only administrative polygraph examinations. I.J. decided that he would not be allowed to conduct operational polygraph examinations until he completed approximately 30 administrative examinations. An independent polygraphist randomly selected three of them for a quality-control review. If that person found that the grievor's examinations met the Service's standards and expectations, he could have gradually begun conducting operational polygraph examinations.

[69] The grievor testified that after the concerns expressed in his performance evaluation were discussed with him, he conducted a dozen administrative examinations, 2 of which were subjected to a quality-control review. According to him, the independent polygraphist was satisfied with the quality of his work. According to the grievor, he then conducted 8 additional administrative examinations that were supposedly subjected to a quality-control review. He stated that the quality-control review process stopped before he reached the 30 examinations described earlier. According to him, I.J. apparently informed him that the quality-control reviews were favourable, that he achieved the desired objectives, and that he could gradually start conducting operational examinations.

[70] Shortly after that, I.J. went on extended leave. No documentary evidence corroborates or contradicts the grievor's assertion that he allegedly met I.J.'s expectations and objectives and that I.J. allegedly told him that he could gradually start conducting operational examinations.

[71] E.F. occupied the unit head position on an acting basis during I.J.'s leave. Shortly after that, he wrote to the grievor to inform the grievor that he had reviewed an operational examination that the grievor had conducted. E.F. stated that he wanted to know how many examinations the grievor had conducted using the new method for asking questions. According to E.F., he recalled being aware of a directive that I.J. issued the month before that stated that the grievor was not to conduct examinations using that method until informed otherwise. According to E.F., he was surprised when

he found out that the grievor had conducted an examination using that method and wanted to know why.

[72] The grievor replied that I.J. informed him that the directive in question no longer applied since the polygraph examinations that had been subjected to a quality-control review were found satisfactory. At the hearing, he stated that when I.J. told him that he could resume conducting operational examinations, I.J. did not state that the grievor was not to conduct examinations using the new method.

[73] E.F. sent two emails in response. In the first , he stated that he had not been informed that the directive that I.J. had issued no longer applied. The next day, he wrote to the grievor again. This time, he stated that he had contacted I.J. and learned that the quality-control review process implemented as a result of the 2012-2013 performance evaluation and described earlier was incomplete. He informed the grievor that he had to continue the process.

[74] Shortly after that, E.F. informed the grievor that he had to conduct 30 administrative polygraph examinations, of which 3 to 5 would be subjected to quality-control reviews. The evidence set out that the 30 were in addition to the 20 examinations that the grievor previously conducted at I.J.'s request.

[75] The grievor testified that he felt that once again, E.F. imposed a performance management process on him that he had already successfully complied with and that had been completed. He felt like he was being asked to start over again for no reason. He felt that E.F. scrutinized his work and looked for negative things. He felt that E.F. looked for errors in his work, to discredit him as a polygraphist.

[76] In August 2013, the grievor went on sick leave due to stress and anxiety.

[77] In January 2014, E.F. was appointed the unit head of the Unit, and the grievor's sick leave ended.

[78] E.F. testified that on his arrival to the Unit in 2008, he noted, in his opinion, a lack of rigour and consistency in how the polygraphists conducted polygraph examinations. As soon as he became the unit head in January 2014, he made significant changes to the Unit. He terminated the contracts of polygraphists conducting polygraph examinations as freelancers. He developed and adopted detailed guidelines for the polygraph methodology for the Unit's polygraphists to use. He

improved the polygraphists' training. According to E.F., the Unit's work had to be impeccable. The polygraphists had to demonstrate irreproachable rigour. He stated that he was accountable and that if he saw a performance issue, he had to act.

[79] In early January 2014, 2 days after the grievor returned from sick leave, he attended a meeting with E.F. to discuss his return to the Unit. At that meeting, E.F. reiterated that the grievor would be required to conduct 30 examinations, of which 3 to 5 would be randomly selected and subjected to a quality-control review, as discussed before his sick leave.

[80] E.F. also informed the grievor that until the quality-control reviews were completed and his performance was deemed satisfactory, he could conduct only administrative polygraph examinations, in a simple format and only in French. He had to conduct five per week. An email that E.F. sent him after the meeting stated that the requirement to conduct all his examinations in French was a measure to enable him "[translation] to get back on track" after a six-month absence.

[81] All the witnesses acknowledged that English is the language commonly used in the polygraphy world. Polygraphist training is provided in English, and the resources that polygraphists must refer to daily are in English. Most of the Service's polygraph examinations are conducted in English. Both the grievor and G.H. testified that it is more difficult and complex for a polygraphist to conduct a polygraph examination in French than in English, regardless of whether the polygraphist's mother tongue is French. E.F. did not deny that fact. The grievor agreed to do what E.F. asked of him, although he stated at the hearing that he felt that E.F. tried to put so much pressure on him that he would eventually leave the Unit.

[82] According to the grievor, at the meeting described earlier, E.F. also informed him that he had to review the polygraph examinations that he had conducted in the past, to reacquaint himself with polygraph methodologies after a long absence. He testified that he found it strange that E.F. criticized him for unsatisfactory performance in the polygraph examinations that he conducted but that E.F. asked him to review his own examinations, to reacquaint himself with the methodology to use.

[83] The grievor's next performance evaluation, for the March to July 2014 period, was very negative. It was the first performance evaluation that E.F. signed, and the comments in it were related, in part, to the results of the quality-control reviews of the

30 examinations mentioned earlier. Comments on the polygraph examinations were related to 5 that the grievor conducted. Although it had previously been stated that he would be evaluated based on randomly selected examinations, 3 of the examinations in the evaluation are described as files that had been brought to E.F.'s attention, while the other 2 examinations are described as having been randomly selected and submitted to G.H. for review. However, in his testimony, G.H. stated that E.F. asked him to review 4 polygraph examinations and an audio recording of an interview that the grievor conducted. According to G.H., E.F. described all these examinations as problematic and asked him to confirm whether there were any deficiencies in the examinations and the interview. At least 2 of the examinations identified in the performance evaluation as having been brought to E.F.'s attention were among the files provided to G.H. for review.

[84] The grievor failed or partially passed 9 of the 11 objectives listed in this performance evaluation.

[85] In his written comments in the section of the performance evaluation reserved for that purpose, E.F. stated that clearly, the grievor's examinations contravened established standards, that the grievor demonstrated "[translation] obvious difficulties formulating appropriate questions", and that he demonstrated "[translation] serious deficiencies in his ability to conduct an in-depth interview". E.F. also indicated that the grievor apparently lacked judgment, rigour, and reliability by using an examination format that the Service did not recognize. He was allegedly "[translation] insubordinate" and "[translation] disrespectful" with E.F. by using that examination format, which E.F. had prohibited a few weeks earlier, "thus demonstrating [difficulty] with his interpersonal relationship skills".

[86] At the hearing, the grievor testified that national polygraphist associations accepted the examination format that he used and that it was taught as part of polygraphist training. According to him, he used that examination format because, as an experienced polygraphist, he determined that it was necessary for him to use it in the particular circumstances of the examination in question; that is, when the Service's approved examination formats had already been used in earlier polygraph examinations with the same examinee. In his cross-examination, G.H. acknowledged that in circumstances similar to those that the grievor described at the hearing, it may be necessary for a polygraphist to use an alternate examination format. In his

testimony, E.F. stated that had that been so, the grievor had to consult him before using an unapproved format.

[87] E.F.'s comments in the grievor's performance evaluation described two more examinations in greater detail. The subjects of all the witnesses' testimonies were the two polygraph examinations. G.H. reviewed them at E.F.'s request. I will describe them briefly.

[88] In the first examination, E.F. claimed that the grievor influenced the outcome of a polygraph examination by calling the examinee back to order, to ensure that she focused on the examination in progress. E.F. claimed that the grievor's intervention would have produced a result that was not a lie to a question for which the examinee had physiological responses indicating a lie result when she was asked a similar question earlier. According to E.F., it was a lack of judgment, professionalism, and integrity that could have had significant consequences for the Service. In the performance evaluation, E.F. described the grievor's action as "[translation] ethically reproachable".

[89] At the hearing, the grievor explained that the situation was not as E.F. described in his performance evaluation or in his testimony. The grievor explained that the examinee had already undergone polygraph examinations. The notes on file about the examinee's behaviour in previous examinations led the grievor to conclude that in the particular circumstances of that examination, a verbal intervention on his part was required, to avoid a false-positive result; that is, a result indicating the presence of a lie when it was not actually so.

[90] The second examination described in detail in the performance evaluation was, in fact, a second additional review; that is, a polygraph examination to validate lie results from two earlier polygraph examinations. The examination took place over two days in a region. A very long interview took place between the grievor and the examinee on the first day, and psychophysiological data was collected and recorded on the next day. Among other things, the performance evaluation indicated that the grievor should not have conducted a polygraph examination of an examinee who was not in a physical condition conducive to a polygraph examination. It was also indicated that the grievor lacked structure and preparation in his examination.

[91] The grievor conducted that polygraph examination at E.F.'s request or invitation. G.H. testified that conducting a polygraph examination to validate lie results from two earlier polygraph examinations is a very complex and difficult task. The grievor testified that he was aware of the complexity of an examination of this nature and that since his performance was being closely evaluated, he would not have agreed to conduct the examination had he not felt obligated to. He stated that he felt that his situation was precarious and that he did not want to exacerbate it by refusing to conduct the examination.

[92] With respect to the examination's structure and preparation, the grievor testified that he submitted his polygraph examination plan to E.F. before travelling to the region to conduct the additional examination. E.F. approved the plan. In his cross-examination, E.F. stated that he remembered that he found that the grievor's plan was well prepared and structured.

[93] As for his decision to collect psychophysiological data despite the examinee's condition, the grievor testified that after the first day, he called E.F. to express his opinion that he should not continue the polygraph examination the next day. He reportedly informed E.F. that the interview with the examinee had been lengthy and unsuccessful and that nothing indicated that continuing it the next day would lead to a result that could or could not corroborate the examinee's past results. According to the grievor, E.F. would have insisted or strongly suggested that he continue the polygraph examination the next day to justify the expense incurred to travel to the region. He testified that he felt obligated to conduct the polygraph examination.

[94] E.F. stated that he remembered the phone call in question. According to him, he left the decision as to whether to move ahead with the polygraph examination to the grievor's discretion. He testified that the grievor lacked judgment when he moved ahead with it.

[95] As noted earlier, in the written comments in the grievor's performance evaluation, E.F. stated that he asked G.H. to evaluate other randomly selected examinations that the grievor had conducted. The examinations that G.H. reviewed apparently revealed problems related to question construction and the structure of some portions of the polygraph examinations. The quality-control review reports that G.H. prepared for four of the grievor's examinations were admitted into evidence.

[96] The performance evaluation for the period of March to July 2014 provided that before the grievor's reinstatement to the Unit could be considered, he was to successfully complete a three-phase action plan. At the hearing, the concept of his "reinstatement" to the Unit was described as meaning when he could once again perform all of a polygraphist's duties.

[97] Phase 1 of the Action Plan was to include 3 days of theoretical training provided by G.H., followed by a written exam. Phase 2 was to consist of 36 polygraph examinations conducted under G.H.'s supervision, while in Phase 3, 25% of the first 40 polygraph examinations that the grievor was to conduct were to be subjected to a quality-control review.

[98] At the hearing, E.F. stated that he had an interest in seeing the grievor's performance improve as quickly as possible. The Unit had a high workload, and had the grievor been able to resume all of a polygraphist's duties, the Unit would have benefited from it.

[99] In June or July 2014 and a few months before the performance evaluation described in the last paragraphs was signed, E.F. sought and received approval from the Service's senior management to implement an action plan. In the context of email exchanges between E.F. and a member of the Service's senior management about the action plan's development, the member wrote the following:

> [Translation]
>
> *… We will have to demonstrate that* [the grievor] *had already been informed that there was an issue with respect to the quality of his examinations and that he was given the opportunity to correct his behaviour (coaching/mentoring - if we can prove it) and that he did not… A review of his polygraph examinations will have to be done ….*

[100] Just over 30 minutes after receiving the email described in the last paragraph, E.F. responded to the member of senior management. He forwarded his email exchange with the grievor, described earlier, namely, the exchange with respect to their disagreement as to whether the performance improvement process that I.J. imposed had been completed. When he forwarded the email, E.F. added this: "[translation] I invite you to review this email that I found … I was the acting head at the time and caught [the grievor] not following the instructions that [I.J.] had given him …".

[101] In November 2014, after reviewing the performance evaluation that indicated that he would be subjected to an action plan, the grievor made a harassment complaint against E.F. The grievor was removed from the Unit while his complaint was under investigation and until the employer decided its merits. In July 2015, his complaint was declared unfounded.

[102] In September 2015, the grievor returned to the Unit. On his return, E.F. presented the action plan to him that was expected to be spread over a little more than three months, from September 21 to December 31, 2015.

[103] A document describing the action plan identified six objectives that "[translation] were to be met for the employee to successfully complete their training". The objectives were related to the following themes: judgment, professionalism, communication, the ability to promote good interpersonal relationships, rigour and reliability, basic knowledge, and reasoning and analysis. Each objective was described in more detail. However, the outcome that the grievor had to achieve in each action plan phase to be deemed to have "[translation] met" all objectives was not set out. If he succeeded in the action plan's three phases, he could resume performing all of a polygraphist's required tasks; specifically, he could resume conducting operational polygraph examinations. The document did not indicate the possible consequences if he was found not to have successfully completed a phase of the plan or if he was found not to have achieved the plan's objectives.

[104] The grievor agreed to participate in the action plan. He testified that he felt like he had no choice. However, he hoped that he could pursue his passion, which is polygraphy, and he could see no option other than to do what he was asked. He had no energy to resist.

[105] In Phase 1, the grievor completed three days of theoretical training provided by G.H. The grievor explained that it was a "[translation] lesson in humility" to have to go "[translation] back to school" after having been a polygraph mentor and instructor. He achieved a mark of 100% on the written exam. At the hearing, G.H. stated that the grievor had a very good understanding of polygraphy's theoretical principles.

[106] In Phase 2, the grievor conducted 36 polygraph examinations under G.H.'s supervision. G.H. watched and heard everything that took place in the polygraph examination room from an adjacent room. He had access to the examinee's

psychophysiological data and the grievor's digital assessments of it, including the conclusions that the grievor reached with respect to the examination's outcome. The only source of information to which G.H. did not have access in Phase 2 was the administrative report that the grievor prepared after each polygraph examination. According to E.F., only he and the grievor had access to those reports.

[107] The grievor conducted 36 consecutive examinations between September 28 and December 21, 2015. They were the first polygraph examinations that he had conducted in more than 15 months, which was since he made his harassment complaint and was temporarily removed from the Unit while the investigation was underway.

[108] After each polygraph examination, G.H. provided verbal feedback to the grievor. He evaluated 11 components of the examination and indicated whether the grievor had achieved, exceeded, or failed to achieve a performance that met commonly accepted polygraph standards and that was taught to aspiring polygraphists. The same day, G.H. prepared a report that outlined the accomplishments of and areas of improvement for each examination. Regardless of whether the grievor's examinations were considered satisfactory, G.H.'s reports included lists of points to improve on. According to G.H., he identified points that while not deficient or not compliant could have been improved, to enhance the quality of polygraph examinations.

[109] At the hearing, when he described the issues with the grievor's examinations at the beginning of Phase 2, G.H. described the grievor as an easy-to-approach polygraphist who adopted a friendly style in examinations. The grievor tended to talk too much about himself and to tell too many anecdotes, to put the examinee at ease. He tended to make unnecessary comments and did not focus enough on the examinee. Sometimes, his questions were unclear or confusing. According to G.H., the grievor lacked structure; that is, he did not follow up sufficiently on the examinee's answers, which led to an examination in which the polygraphist appeared to ask his questions blindly, with no specific objective. According to him, the grievor's choice of words, particularly in English, was sometimes deficient.

[110] The evaluation reports set out that G.H. found 27 of the grievor's 36 examinations satisfactory, and 9 were found unsatisfactory. G.H.'s evaluation reports set out that for 5 of them, the grievor almost achieved a standard performance on 1 of the 11 components of the examination. In 3 examinations, he almost achieved a

standard performance on 2 components. In the last examination found unsatisfactory, he almost achieved a standard performance on 3 of the examination's 11 components. According to G.H., had an error by the grievor invalidated a polygraph examination's results, he would have noted it in his report. His reports contain no notes to that effect.

[111] Most of the examinations found unsatisfactory were conducted at the beginning of Phase 2. Very few unsatisfactory examinations took place in the last weeks of Phase 2.

[112] According to G.H., the grievor's performance improved as he conducted examinations, received feedback from G.H., and implemented that feedback. The last examinations conducted in Phase 2 were very satisfactory. According to G.H., by the end of the 36 examinations, the grievor had greatly improved and was on the right track. The last examination that he conducted was found entirely satisfactory.

[113] After Phase 2, G.H. prepared a report providing his overall evaluation of the grievor's performance for the 36 polygraph examinations. The report contains G.H.'s overall evaluation of the strengths, areas of improvement, and weaknesses that arose from all the examinations. G.H. stated that the grievor demonstrated an improvement in the quality of his examinations and that he implemented most of the suggestions made to him. He changed how he interacted with examinees. The examinations were more focused on the examinee. He improved the structure of his examinations, in accordance with the feedback that he received.

[114] Among the areas of improvement, G.H. identified the grievor's English. In his opinion, the grievor sometimes used "[translation] clumsy language" that could have undermined his credibility as a polygraphist or led to a lack of understanding by the examinee. According to G.H., the grievor still lacked the structure to allow him to make the necessary follow-ups for an examinee's psychophysiological responses. The grievor's confidence was also identified as an area of improvement. It is indicated that he displayed some insecurity and difficulty adapting to unforeseen circumstances when a problem arose during an examination.

[115] On the English language issue, I pause to note that the grievor holds a position with a CBC linguistic profile. French is his mother tongue. He has an exemption for the component that corresponds to oral communication in English. G.H. provided

examples of "clumsy language" used by the grievor. According to him, among other things, the grievor informed an examinee that a sensor should be placed "**in** the inside of the hand" instead of "**on** the inside of the hand". Apparently, he also used the verb "cook" instead of "bake" when describing the action of baking a cake.

[116] The only negative point identified in G.H.'s post-Phase 2 report was the grievor's ability to accept criticism. The overall evaluation report that G.H. prepared indicated that the grievor's "[translation] different reactions" in response to criticism created "[translation] some discomfort" during conversations that were intended to give him feedback. In his testimony, G.H. repeated what he had written in his report without clarifying further.

[117] G.H. expected the grievor to move to Phase 3. In his opinion, the grievor successfully completed Phase 2. He no longer had any major concerns with the grievor's examinations.

[118] After receiving G.H.'s report, the grievor reacted to the comment about his level of confidence. He wrote to E.F. that in Phase 2, he complied with E.F.'s requests. According to the grievor, E.F. told him to avoid as much as possible using more complex examination formats, while G.H. asked him to conduct more complex examinations using the new method of asking questions. He complained that G.H. interpreted his hesitation in a more complex examination as indicative of a lack of confidence. At the hearing, he stated that he also found it unfair that he was criticized for a lack of confidence in a performance evaluation process in which all his actions and words were observed and criticized.

[119] E.F. described the grievor's performance in Phase 2 as showing "[translation] slight" or "[translation] some" improvement. According to him, it was important to contextualize the progress that was made. According to him, many challenges remained. At the hearing, he pointed out that G.H.'s report indicated that the grievor's performance still had significant issues. Among them, E.F. identified the grievor's spoken English, which, according to him, was not always at the level it should have been. The grievor still lacked structure in his polygraph interviews. He was not confident and still had difficulty accepting feedback.

[120] E.F. testified that after reviewing G.H.'s overall evaluation report after Phase 2, he intended to begin Phase 3 of the action plan, of which he informed the grievor. He

also informed the grievor of his expectations for Phase 3; namely, the grievor would improve on the areas that G.H. identified in his overall evaluation report.

[121] However, E.F. then changed his mind. According to him, in January and February 2016, deficiencies in two examinations that the grievor conducted during Phase 2 were brought to his attention. In his testimony, E.F. stated that the deficiencies demonstrated that the grievor had developed bad habits that he could not break. He concluded that the grievor could not move on to Phase 3 of the action plan.

[122] I will briefly describe the two examinations in question. According to E.F., third parties at the Service brought concerns to his attention about the examinations. G.H. did not identify the examinations as problematic or unsatisfactory in Phase 2. According to E.F., it was because the deficiencies in them could have been noticed only by reading the grievor's administrative reports, considering information that he had received from third parties.

[123] With respect to the first examination, E.F. indicated that apparently, a third party informed him that the grievor did not note in his administrative report relevant information that the examinee would have disclosed during their polygraph examination. The grievor apparently also did not ask follow-up questions with respect to that information. At the hearing, E.F. stated that he accepted as true what the third party told him, which was that relevant information had been disclosed as part of the polygraph examination that the grievor conducted. He stated that he did not recall whether he reviewed the recordings of the examination to confirm that the examinee disclosed the information in question. According to the grievor, the information in question was not disclosed as part of the examination. Therefore, it would have been impossible for him to mention it in his report or to ask follow-up questions. According to him, had the information been disclosed, he would have entered a note to that effect in both his record and his administrative report. The employer retained neither that record nor that report.

[124] E.F. also stated that on reading the administrative report about that polygraph examination, he found that the grievor used an examination question that was contrary to the Unit's guidelines. G.H.'s reports do not mention that a question contrary to the guidelines was asked in Phase 2.

[125] With respect to the second polygraph examination, E.F. stated that a third party informed him that in his administrative report, the grievor stated that the examinee made a confession when it was not so. According to E.F., after he asked the grievor to review the file to confirm whether a confession was made, the grievor apparently replied that he had inferred from several of the examinee's answers that raised doubts as to the truthfulness of their responses that they knew more than they had indicated. According to E.F., although the grievor attempted to contextualize the contents of his administrative report in an email that was admitted into evidence, the grievor still wrote that a confession was made, which was unfounded.

[126] At the hearing, the grievor indicated that in his record and administrative report, he would have written the reasons that he would have described as a confession a series of ambiguous responses and comments from the examinee. The employer retained neither the grievor's record nor his administrative report.

[127] According to E.F., the deficiencies in those two examinations were very problematic with respect to several fundamental qualities that a polygraphist must have, including among others judgment, rigour, and reliability. In cross-examination, and when he was asked about G.H.'s statement that he no longer had any concerns about the grievor's performance, E.F. stated that he reached his own conclusion about the grievor's performance. As a manager, he was interested in different aspects of the grievor's performance.

[128] The grievor's 2015-2016 performance evaluation cites, in its entirety, the overall evaluation report that G.H. prepared after Phase 2. The evaluation indicates that the grievor failed Phase 2 of the action plan. Of the seven performance objectives listed in the evaluation, he failed four of them, namely, judgment, rigour and reliability, basic knowledge, and reasoning and analysis. He achieved partial success in terms of the objectives related to problem-solving skills, promoting good interpersonal relationships, and professionalism.

[129] E.F.'s comments in the performance evaluation were similar to his testimony at the hearing. According to him, Phase 2 led to "[translation] slight" progress and "[translation] minor improvements", but some major challenges remained. Nine of the grievor's Phase 2 examinations did not comply with the standards. Comments in the

performance evaluation also describe the two examinations set out in the preceding paragraphs.

[130] As for the grievor's oral communication, in the performance evaluation, E.F. stated that 18 of the 36 evaluation reports that G.H. prepared contained comments on the grievor's oral communication in English. The performance evaluation also indicated that the grievor had to significantly improve his ability to accept feedback. It is indicated that the grievor had difficulty accepting feedback from G.H. as part of the action plan and from E.F. in general.

[131] The 2015-2016 performance evaluation ends by indicating that E.F. concluded that it was no longer possible to move on to Phase 3 of the action plan, that the grievor no longer met certain requirements of the polygraphist position, and that the Service "[translation] no longer had confidence in the [grievor]'s ability to act as a polygraphist". The evaluation stated that searches would be done to find him a new position.

[132] On August 12, 2016, the grievor was demoted by two classification levels. He was transferred to an interviewing officer position, in which, from then on, he conducted security interviews involving service providers.

[133] The grievor's performance evaluations after his demotion were positive. Again, he was described as a competent and professional person. The evaluations mentioned his ability to maintain good interpersonal relationships and his openness to feedback. They described a person who, because of his demotion, had very little self-confidence, but who, over time, had regained confidence. He once again became a mentor and a leader.

V. The parties' arguments

[134] The employer submits that the grievor was demoted for an employment-related reason, which was his unsatisfactory performance. By imposing the action plan that led to the grievor's demotion, E.F. did not seek to punish the grievor or to correct his behaviour. He continued the performance management actions that his predecessor, I.J., had implemented and added an action plan, to enable the grievor to improve his performance.

[135] The employer submits that the evidence does not support concluding that the grievor would have been demoted to correct his behaviour or to punish him. E.F. had no negative memories of his relationship with the grievor and was interested in the grievor successfully completing all the action plan's phases.

[136] The employer submits that the evidence demonstrates that after Phase 2 of the action plan, E.F. began planning Phase 3, as planned. However, significant performance issues were identified, and E.F. had to reconsider his decision. Due to the Service's mandate, E.F. decided that — based on the grievor's overall performance, not just his performance in Phase 2 — the ongoing performance issues meant that there was no need to move on to Phase 3. E.F.'s decision was reasonable and justified. The grievor's feeling that he was treated unfairly does not transform the employer's administrative action to address a performance issue into disciplinary action. According to the employer, the grievor did not meet his burden of proving that his demotion was disguised disciplinary action.

[137] The grievor submits that the totality of the circumstances of this case demonstrates that the process that led to his demotion was disguised disciplinary action tainted by bad faith.

[138] The grievor submits that his performance was satisfactory before and after the period during which E.F. was responsible for, or had the ability to influence, his performance evaluations. E.F. is the common denominator in the alleged performance issues. According to the grievor, E.F. tried to use unsatisfactory-performance allegations to remove him from the Unit due to their personality conflict. He did so by taking a series of performance management actions against the grievor, to ensure the grievor's failure.

[139] The grievor argues that when E.F. became the acting head of the Unit, he took significant additional performance management actions against him, in addition to the actions that I.J. took and that were completed successfully. The subsequent evaluations of the grievor's work were not done randomly, and E.F.'s ensuing comments were highly critical. According to the grievor, E.F. seemingly used language that revealed disciplinary intent. The comments' nature demonstrates that E.F. was closed-minded and that it was impossible for the grievor to succeed with respect to the performance measures that were imposed.

[140] The grievor argues that E.F.'s disciplinary intent did not stop there. On the grievor's return from sick leave, E.F. took a performance management action against him that only increased the complexity and difficulty of his work, without providing him support or training. A 3-phase action plan was added shortly after that. After he made a complaint against E.F., and after a 15-month absence, E.F. immediately imposed a demanding and intensive action plan on him, without performance indicators or information as to what would signify success or failure. According to the grievor, the evaluations' very critical and picky nature conducted under the two performance management actions demonstrate that that action was taken not in good faith but instead to ensure that the grievor could be removed from the Unit.

[141] According to the grievor, the culmination of E.F.'s efforts to remove him from the Unit was his demotion after he met the requirements of Phases 1 and 2 of the action plan. E.F. relied on two polygraph examinations that G.H. found satisfactory to claim that there were deficiencies in the grievor's performance that could not be remedied. The grievor argues that the employer did not present any evidence that could demonstrate that his performance was truly unsatisfactory. In addition, he submits that the employer did not present any evidence that it made efforts to minimize the impact of its decision on him, which supports a conclusion that it had disciplinary intentions.

[142] The grievor asks the Board to make an adverse finding because the employer did not call I.J. as a witness and did not retain many documents relevant to this case. I will return to this request later in my reasons.

VI. Reasons

[143] The Board derives its jurisdiction solely from the *Act*. It has no inherent jurisdiction. For this grievance to be eligible for adjudication, I must conclude that the grievor's demotion was disguised disciplinary action. If I find that it was an administrative action, then the Board will not have jurisdiction to decide the grievance, and it will have to be denied.

[144] As part of this analysis, I must rely on the evidence on the record. How the employer characterized the demotion is not in itself a determinative factor. An employee's feelings about being unfairly treated do not convert an administrative

action into discipline (see *Canada (Attorney General) v. Frazee*, 2007 FC 1176 at paras. 21 and 23).

[145] An employer that argues that a contested action that it took was administrative must first provide minimal evidence that can demonstrate that the action was related to employment and not to another reason (see *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529; see also *"A" v. CSIS*, at para. 187, and *Kashala Tshishimbi v. Social Sciences and Humanities Research Council*, 2020 FPSLREB 83 at para. 241). In this case, the employer had to provide minimal evidence that could demonstrate that the demotion was related to the grievor's performance. Once it provided that evidence, the burden of proof would have shifted to the grievor to demonstrate on a balance of probabilities that he was subjected to disciplinary action; that is, a demotion. In other words, he had to prove that the employer took disguised disciplinary action against him that resulted in his demotion.

[146] The parties identified several decisions of the Board and the federal courts to support their arguments. I will mention only those that I believe are the most relevant to my analysis and findings.

A. The administrative reason provided for the demotion

[147] As noted earlier, the employer must first demonstrate that the grievor's demotion was done for an employment-related reason. At this stage, the Board's role is not to second-guess the employer as to the sufficiency of that reason (see *Rukavina v. Treasury Board (Department of Western Economic Diversification)*, 2023 FPSLREB 4 at para. 50).

[148] I will focus only on whether the employer presented minimal evidence that can demonstrate that the contested action was employment-related.

[149] I find that the employer provided minimal evidence that the demotion was related to the grievor's performance. Unsatisfactory performance, specifically an employer's right to take administrative action to address it, is an employment-related reason.

[150] The employer introduced into evidence the grievor's performance evaluations, some of which set out deficiencies in his performance. I.J. completed a performance evaluation that identified performance issues when he was the grievor's manager. At

face value, it can be used to demonstrate that E.F. was not the only one who identified some performance issues.

[151] The employer also presented evidence that Service polygraphists are required to meet many requirements when they conduct polygraph examinations. Not respecting them may have significant consequences for not only examinees but also, among other things, the Service's reputation in Canada and abroad. Some of the deficiencies that G.H. identified in his quality-control reviews were, at face value, related to the grievor's performance. The deficiencies that E.F. apparently identified in two polygraph examinations that the grievor conducted during Phase 2 of the action plan were also, at face value, related to his performance.

[152] The employer cited "*A" v. CSIS* to support its argument that it demonstrated an employment-related reason. In *"A" v. CSIS*, the Board found that the Service demonstrated that it terminated a grievor's employment for an employment-related reason, which was unsatisfactory performance. The Board did not accept the grievor's discrimination and harassment allegations to support her position that she had been subjected to disguised disciplinary action.

[153] In my opinion, several important differences between "*A" v. CSIS* and this case are worth highlighting. However, I believe that it is best to point out the differences in my analysis of whether the grievor demonstrated that his demotion was disguised disciplinary action. I will return to "*A" v. CSIS* later in my reasons.

B. The allegation of disguised disciplinary action

[154] As noted earlier, to establish the Board's jurisdiction to decide this grievance, the grievor had to prove that the employer took disguised disciplinary action against him that resulted in his demotion (see *Wong v. Deputy Head (Canadian Security Intelligence Service)*, 2010 PSLRB 18 at para. 34).

[155] At this stage of its analysis, the Board must examine all the criteria set out in *Frazee* and summarized in *Bergey v. Canada (Attorney General)*, 2017 FCA 30. *Bergey* states that distinguishing between an action that is disciplinary and one that is not requires considering both the employer's true — as opposed to stated — intention by taking the action and the action's impact on the employee's career (see *Bergey*, at para. 37). That is a fact-based analysis.

[156] As part of its analysis of the *Frazee* criteria, notably, the Board must seek to identify the employer's true intent by imposing the contested action, specifically whether it intended to correct the grievor's behaviour or to punish the grievor. The Board must consider the action's impact on the grievor's career prospects. It must also consider whether the demotion had an immediate adverse effect on the grievor and whether the demotion's effect was significantly disproportionate to the employer's stated administrative reason. Finally, the Board must consider whether the demotion was likely to be relied on in a disciplinary action (see *Frazee*, at paras. 22 to 25).

[157] An examination of those criteria serves to equip the Board to answer the following question: is it more likely than not that the grievor's demotion was disguised disciplinary action?

[158] As stated in *Lemieux v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 20 at para. 154, whether an action that the employer stated was administrative was truly disciplinary can be determined in three ways, which are, "… it is intended to change the employee's behaviour, it is intended to punish the employee and therefore indicates a truly disciplinary motivation, or its impact on the employee is disproportionate."

[159] Before considering further the criteria set out in the case law, I would like to make two clarifications.

[160] The first is that to decide this grievance, I need not make a conclusion as to the grievor's performance. I accept that the Service has an important mandate. I also accept that the quality of its polygraphists' work may impact its activities that support that mandate and its reputation. However, I need not decide whether the grievor's performance was satisfactory based on perceived deficiencies in his performance. But I must determine whether it is more likely than not that his demotion was disguised disciplinary action.

[161] The second clarification that I would like to make is of the limitations of the evidence in this case. The grievor had the burden of proving that his demotion was disguised disciplinary action. However, in a grievance referred to adjudication involving the Service, as in this case, the relevant documentary evidence is mostly, if not entirely, in the employer's possession or under its control. Information security constraints in a work environment such as that of the Service result in a grievor not

being able to retain the documentary evidence that is relevant and necessary to the adjudication of their grievance. In such circumstances, the employer's actions taken — or not taken — to retain documentary evidence may have an impact that is not negligible on a grievor's ability to present evidence, to demonstrate the presence of disguised disciplinary action.

[162] As noted earlier, at the hearing, the grievor asked me to make an adverse finding against the employer because it failed to retain the evidence and to call I.J. as a witness. In its oral argument, it did not address this issue, leaving the grievor's request unanswered.

[163] The employer was not required to call I.J. as a witness. It chose not to. However, nothing prevented the grievor from calling I.J. to testify. He did not. In such circumstances, I will not make an adverse finding because the employer did not call I.J. as a witness.

[164] I find the employer's failure to retain the documentary evidence much more worrisome.

[165] The grievor's grievance, which was presented to the employer in August 2016, indicates that as of that date, he had already requested copies of certain documents relevant to this case. He never received them. In 2016, the employer knew that his grievance had been referred to adjudication.

[166] The evidence presented at the hearing set out that the employer retained certain documents, including the grievor's records for the years before the period relevant to his grievance and the quality-control review reports that G.H. prepared as part of the plan's Phase 2. However, it did not retain other highly relevant documents, including the grievor's records for the entire period relevant to this grievance and his administrative reports, including those that according to E.F. would have identified deficiencies so significant that they resulted in his demotion. The records and administrative reports that he prepared would have included his comments and observations on examinations in which the employer criticized his performance. The employer did not provide any explanation to clarify to the Board why the documents in question were not retained or why some were retained while others were not.

[167] It is curious that the only records of the grievor that the employer retained were those for the period from 2009 to 2011, which was before it began criticizing him for performance issues. In addition, the records that were disclosed and admitted into evidence were incomplete or apparently had been altered.

[168] All the witnesses stated that at the time relevant to this grievance, a polygraphist's record would have included a column in which a polygraphist could record their comments and observations with respect to the conduct of a polygraph examination. Some columns of the records that were admitted into evidence, including the column in which the grievor would have recorded his comments and observations with respect to the conduct of each of the polygraph examinations that he carried out, no longer appear.

[169] According to the grievor, he would include in his records any relevant information that he could use as a reminder for the examination, its conduct, and the result achieved. He testified that he would write down in his record any unusual event that occurred during an examination and any moment when he relied on his professional judgment as a polygraphist to deviate from the Unit's guidelines. This evidence was not contradicted.

[170] The employer did not provide any explanation that could help the Board understand why columns were removed — inadvertently or otherwise — from the grievor's records.

[171] Having assessed all the circumstances, I consider that an adverse finding must be made against the employer, which despite knowing that the grievor's grievance had been referred to adjudication, destroyed evidence of significant quantity and relevance. It provided no explanation for its failure to retain the evidence. A failure to provide an adequate explanation in suspicious circumstances may justify an adverse finding. In these circumstances, I must infer that had that evidence been filed with the Board, it would have been adverse to the employer (see *Arena v. Treasury Board (Department of Finance)*, 2006 PSLRB 105 at para. 104, and *Gagné v. Deputy Head (Correctional Service of Canada)*, 2020 FPSLREB 114 at para. 148).

[172] However, my analysis cannot stop there. I must still review the *Frazee* criteria to determine whether the grievor met his burden.

[173] I will not address the *Frazee* criteria in the order in which they were listed earlier, as some of them were not the subjects of any real debate at the hearing. I will address the criteria that were not seriously challenged in the first place.

[174] The grievor's demotion had an immediate effect on him. As a result of the employer's action, he no longer held the polygraphist position. He no longer worked in the Unit. He was demoted from a position classified at level 9 to one classified at level 7, without salary protection. His annual salary decreased significantly, by approximately $25 000. He is the father in a single-parent family. He has three children. The salary decrease significantly affected him and his family.

[175] The parties did not provide any arguments as to whether the grievor's demotion was an action that could form the basis of future disciplinary action. Therefore, I will give this criterion very little weight in my analysis.

[176] Clearly, a demotion can impact the career prospects of the person concerned. The employer did not claim otherwise. In this case, the grievor was demoted two classification levels. He was transferred to an interviewing officer position. From then on, he conducted security interviews involving service providers.

[177] Although in its letter denying the grievor's grievance, the employer stated that it reviewed Human Resources' approach to transfer him to a position for which he was qualified and that it concluded that the Service had conducted a thorough search, no evidence to that effect was presented at the hearing. Based on the evidence presented, I find that the demotion had an impact on his career prospects and that no steps were taken to minimize its impact.

[178] I will now turn to the criterion of whether the effect of the grievor's demotion was significantly disproportionate to the employer's stated administrative reason.

[179] The criticisms of the grievor's performance were related to administering polygraph examinations. The documentary evidence and the testimonies of G.H. and E.F. do not indicate that the alleged performance issues were of a nature or magnitude that would suggest that the grievor could not have held a position classified at level 8 elsewhere in the Service. The employer demonstrated that there was no position classified at level 8 in the Unit. However, it did not submit any evidence as to why it would not have been able to find him a position classified at level 8 in the Service. If

there were no positions classified at level 8 for which he was qualified, the employer could have demonstrated as much. It did not. Nothing explains why he was demoted two levels instead of one.

[180] And although the employer's counsel argued that E.F. apparently decided to terminate the action plan and recommend the grievor's demotion based on the grievor's entire performance record, this is not what emerged from the documentary evidence and E.F.'s testimony. Instead, E.F.'s testimony demonstrated that the two examinations that he identified as problematic were the triggers that resulted in suddenly abandoning the action plan and recommending the grievor's demotion. If, as the employer argues, his demotion was an administrative action taken because of unsatisfactory performance, a two-level demotion due to unsatisfactory performance in two polygraph examinations would have been, in my opinion, an action with a disproportionate effect to the stated reason.

[181] In the absence of any evidence or explanation from the employer, I accept the grievor's argument at the hearing that a two-level demotion may reveal a punitive intent. I have to conclude that a two-level demotion was an action that had an impact disproportionate to the stated administrative reason.

[182] When the impact of an employer's action is significantly disproportionate to the stated reason for it, the employer's decision can be considered disciplinary. However, as stated in *Frazee* (at paragraph 24), this threshold will not be met if the grievor's demotion is considered a reasonable response to honest operational considerations. The employer's true intent must be examined.

[183] The case law states that the essential characteristic of a disciplinary action is an intention to correct an employee's misconduct by disciplining or punishing them in some way. The grievor must demonstrate that the employer intended to take disciplinary action against them, to punish them or to correct their behaviour, but that the employer disguised the disciplinary action by giving it a different form (see *Peters v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 7).

[184] In some cases, it can be concluded that an employer had disciplinary intent based on the totality of the circumstances; that is, based on several indicators that

together demonstrate that it is more likely than not that the employer's true intent was to correct the grievor's behaviour or to punish them.

[185] I will now return to *"A" v. CSIS*. As noted earlier in this decision, the Board found that the Service demonstrated that it terminated a grievor's employment because of her unsatisfactory performance. The Board did not accept her allegations that she had been subjected to disguised disciplinary action.

[186] In "*A" v. CSIS*, the Board stated that the employer presented seven witnesses who were unanimous in their evaluations of the grievor's work. It also stated that several reports, emails, and other documents abundantly supported the employer's evidence on the matter.

[187] Unlike "*A" v. CSIS*, the evidence presented at the hearing in this case was not unanimous with respect to the grievor's performance.

[188] Although G.H. testified that sometimes, significant deficiencies arose in some of the polygraph examinations that the grievor carried out before the action plan was implemented, he also stated that the grievor successfully completed Phase 1 of the action plan with a result of 100%. G.H. also stated that the grievor's performance gradually improved during Phase 2 of the action plan. The evidence sets out that the grievor accepted G.H.'s feedback and that he made the corrections that were proposed to him. His performance improved. By the end of the plan's Phase 2, G.H. no longer had concerns about the grievor's polygraph examinations. According to him, the grievor successfully completed the plan's first two phases and was to move on to the third phase. Although the grievor had performance issues before the action plan was implemented, G.H.'s opinion was that his performance was no longer problematic.

[189] E.F. is the only witness who described performance issues that he felt might have warranted a demotion, despite the grievor's successes in Phases 1 and 2 of the action plan. E.F. testified that he decided to demote the grievor because of significant deficiencies in two polygraph examinations that the grievor conducted during the plan's Phase 2. Both examinations in question were conducted under G.H.'s supervision. G.H.'s reports for them did not mention those deficiencies, and G.H. stated that he did not know why the action plan was abandoned between Phases 2 and 3.

[190] According to E.F., he identified those deficiencies when he read the grievor's administrative reports that were prepared after the two polygraph examinations. He stated that G.H. could not have identified the deficiencies because G.H. did not have access to the grievor's administrative reports. However, the employer did not retain those reports. E.F.'s evidence as to the nature and extent of the errors of which the grievor was accused cannot be corroborated using the reports.

[191] E.F. testified that the nature and extent of the deficiencies that he identified in the two polygraph examinations led him to conclude that the grievor could never be fully reinstated as a polygraphist. According to him, the deficiencies demonstrated a significant lack of judgment and rigour by the grievor.

[192] The grievor explained that in the first examination, the information that he was criticized for failing to include in his administrative report was not disclosed in the polygraph examination. He could not have recorded information in his administrative report that had not been disclosed to him. With respect to the second examination, he explained that he exercised his judgment and that he inferred from an examinee's ambiguous responses and comments that the examinee was aware of the information that he tried to conceal. The documentary evidence contains an email from the grievor, which was prepared at the time relevant to this grievance and refers to that explanation. It is consistent with his testimony.

[193] Not only did the employer not retain the administrative reports on which E.F. based this finding but also, it did not retain the grievor's records for the period at issue; that is, it did not retain the tables in which he apparently recorded his notes, comments, and observations from conducting the two polygraph examinations in question.

[194] The employer submitted that I.J. also identified issues with the grievor's performance. According to it, E.F. simply continued the performance management processes that his predecessor had initiated. He did not intend to punish the grievor or correct his behaviour.

[195] Although an evaluation of the grievor's performance indicated that I.J. had identified some performance issues, steps were taken to give the grievor an opportunity to improve his performance. He stated that he complied with I.J.'s actions taken against him. He participated in a quality-control review process that an

independent polygraphist conducted, and he made the necessary corrections. He improved his performance to I.J.'s satisfaction. I.J. apparently told him that the quality-control review process was complete and that the grievor could resume conducting operational polygraph examinations. For his part, E.F. stated that that was not so and that he contacted I.J., who supposedly told him that efforts to improve the grievor's performance were still incomplete. The testimonies of the grievor and E.F. contradicted each other.

[196] As noted earlier, I.J. did not testify at the hearing. The documentary evidence does not contain any writings from I.J. that could corroborate or contradict the testimonies of the grievor and E.F. The employer did not retain the quality-control review reports prepared by the independent polygraphist who reviewed the grievor's work at I.J.'s request; that is, the reports on which I.J. likely would have based his evaluation of the grievor's performance.

[197] The parties greatly emphasized I.J.'s performance management actions. The grievor described that E.F. likely influenced those actions in some way. In his opinion, they were the first in a longer series of actions through which E.F. sought to use unsatisfactory-performance allegations to remove the grievor from the Unit. The evidence is insufficient to allow me to make such a conclusion.

[198] For its part, the employer described I.J.'s performance management actions as evidence that could demonstrate that E.F. had no disciplinary intent and that E.F. only continued the steps that I.J. had initiated. Even if I were to accept that the grievor had performance issues when I.J. was his manager and that I.J.'s actions were administrative, it would not mean that any action that arose from it or that E.F. then took would also be administrative. My opinion is that I.J.'s findings with respect to the grievor's performance in the 2012-2013 performance evaluation are not determinative.

[199] The grievor cited *Kashala Tshishimbi* to support his position. In my opinion, the facts of this case are very similar to those in *Kashala Tshishimbi*. That decision, in my opinion, is of greater relevance to this case than is "*A" v. CSIS*, which the employer cited.

[200] In *Kashala Tshishimbi*, the Board allowed the grievance of a grievor who claimed that his two-classification-level demotion was disguised disciplinary action and that it was not a reasonable response to honest operational considerations. The employer

cited unsatisfactory performance as the reason for the grievor's demotion. As is the Service in this grievance, the employer in *Kashala Tshishimbi* was not covered by ss. 209(1)(c) and (d) of the *Act*. The grievance was heard under s. 209(1)(b).

[201] The fact situation in *Kashala Tshishimbi* is described as follows. The grievor in that case had fully satisfactory performance until he started working for a new manager, who was not satisfied with his performance. She mostly gave him bad news about the shortcomings in his work. For the first time, his next performance evaluation identified performance issues. Tension gradually developed between him and his manager. He felt as though his job was at risk. He felt that his manager's objective was to evaluate him negatively, to make him lose his job. He felt harassed. The manager then decided to implement a performance improvement plan for him. Shortly after learning of it, he went on sick leave. On his return, he was subjected to the plan. He felt trapped. He felt that the plan would lead to a guaranteed failure. It included an entirely subjective evaluation measure and a requirement that he achieve 100% for each objective. He had the distinct impression that the plan was being used only to document his alleged failures and that it did not record his improvements. After the plan, the grievor was demoted two classification levels.

[202] In *Kashala Tshishimbi*, the Board concluded that among other things, the evidence set out inconsistencies in that grievor's performance evaluations and a lack of recognition of his progress. The evidence also set out significant deficiencies in the performance improvement plan, including its duration, the short period given to the grievor to apply the concepts received through feedback, and its arbitrary performance standards. According to the Board, the employer had no genuine interest in helping the grievor and enabling him to adjust to his manager's new expectations of him. It perceived his reactions and disagreements as misconduct that it wanted to correct. The Board found that the decision to implement the improvement plan and later to demote the grievor on performance grounds concealed disciplinary intentions.

[203] As in *Kashala Tshishimbi*, the grievor's performance was completely satisfactory for several years. His performance evaluations from 2009 to 2012 were very positive; so were those after his demotion. He met or exceeded, without exception, the intended objectives. He was cooperative. He was open to feedback and had good interpersonal relationships. With the exception of the performance evaluations that E.F. prepared, the grievor was described as competent and professional.

[204] Although I.J. identified some performance issues with respect to the structure of polygraph examinations and to applying some core methodologies, the grievor's 2012-2013 performance evaluation indicated that all the same, he achieved six of the eight objectives and that he partially achieved the other two. It was indicated that he had difficulty adhering to the standards governing the Service's polygraph examinations and that shortcomings with respect to applying core polygraph methodologies and to some polygraph examinations' structure had been identified. Comments on improvement needs were constructive and neutral in tone. The performance evaluation did not suggest that the grievor had difficulty accepting criticism or maintaining good interpersonal relationships.

[205] Although the evidence is insufficient to allow me to conclude that E.F. would have influenced the 2012-2013 performance evaluation's content in any way, and my opinion is that I.J.'s findings with respect to the grievor's performance are not determinative, I still agree with the grievor's suggestion at the hearing that his conflictual relationship with E.F. appears to be a common denominator in the unsatisfactory-performance allegations and the actions that led to the grievor's demotion.

[206] As soon as he became the unit head, E.F. made significant changes to the Unit. He wanted to ensure that its work was irreproachable. Specifically, he wanted the polygraphists to be impeccably rigorous. He immediately took steps to address what he described as a lack of rigour and consistency in the Unit. He was not satisfied with the grievor's performance. The evidence as a whole demonstrates that the grievor was not rigorous enough to meet E.F.'s expectations.

[207] The grievor's performance evaluation for the period from March to July 2014 was E.F.'s first evaluation. It indicated that the grievor failed 8 of the 11 objectives listed in it.

[208] The tone that E.F. used in his evaluation of the grievor's performance was very negative. The description of the grievor's performance was not in any way similar to past evaluations. The evaluation indicated that he had been "[translation] insubordinate" and "[translation] disrespectful" to his manager by using a polygraph examination format that E.F. had prohibited in the Service a few weeks earlier. It is noted that the grievor lacked judgment, rigour, and reliability by using an

unrecognized polygraph examination format at the Service and that he had displayed difficulties maintaining good interpersonal relationships.

[209] The evaluation also indicated that the grievor lacked integrity and professionalism. It was noted that he demonstrated a lack of basic knowledge of polygraphy and a "[translation] blatant and worrisome" lack of reasoning and analysis. E.F. criticized the grievor for taking an "[translation] ethically reproachable" action. The evaluation identified, for the first time, a problem with the grievor's oral communication in the context of polygraph examinations conducted in English. The comments on his performance were not constructive. They were not intended to help him improve his performance.

[210] In addition, the evaluation of the grievor's performance was to be done based on randomly selected polygraph examinations. The evidence shows that that was not done. In his cross-examination, G.H. stated that he had been asked to evaluate examinations that E.F. had already identified. These are the polygraph examinations that were discussed and criticized in the performance evaluation.

[211] I agree with the grievor that the language that E.F. used in this performance evaluation demonstrated frustration and impatience with the grievor and that it suggests the presence of disciplinary intent.

[212] At a time that generally coincides with the action plan's development, E.F. forwarded an email to a member of senior management, stating that he had "[translation] caught the grievor not following instructions" that he had been given. I wish to emphasize that the email was sent a few minutes after E.F. received an email from a member of senior management. He responded to an email that stated that it was necessary — for a reason not indicated in the email — to demonstrate that the grievor had been informed previously of an issue with his performance, that he had been given the opportunity to "[translation] correct his behaviour", and that he had not done so. Although the two emails are not determinative in themselves, statements of having "[translation] caught" the grievor and of having to give him the opportunity to "[translation] correct his behaviour" may be additional indications of a disciplinary intent of the employer.

[213] From November 2014 to April 2015, the grievor was removed from the Unit while his harassment complaint was investigated. He worked in another area of the

Service. His performance evaluation during that period was positive. It indicated that he accepted feedback and that he made the necessary corrections. The evaluation noted his ability to maintain good interpersonal relationships.

[214] On his return to the Unit, the grievor was again given a very negative performance evaluation. The evaluation of his performance for the period from September 2015 to February 2016, which is the one that notes E.F.'s intention to recommend his demotion, is also very critical. The comments about him were not constructive.

[215] The evaluation had nine objectives, two of which corresponded to Phases 1 and 2 of the action plan. It was noted that the grievor passed Phase 1 but that he failed Phase 2. With respect to the seven other objectives, he failed four of them, being judgment, rigour and reliability, basic knowledge, and reasoning and analysis. The evaluation indicated that he partially achieved objectives related to problem solving, communication skills, and maintaining good interpersonal relationships, along with professionalism.

[216] Again, E.F.'s tone was negative in his evaluation of the grievor's performance. In his testimony, as in this evaluation of the grievor's performance, E.F. downplayed the progress that the grievor had made. Even though G.H. concluded that the grievor's performance had greatly improved and that after Phase 2 he no longer had any concerns with the grievor's examinations, E.F. characterized the grievor's improvements in Phase 2 as "[translation] minor" or "[translation] slight" improvements that still left major challenges unaddressed.

[217] As in *Kashala Tshishimbi*, and contrary to *"A" v. CSIS*, I find that the evidence presented at the hearing did not set out that the employer truly sought to help the grievor improve his performance. Rather, my opinion is that he was right to fear that the performance improvement actions that E.F. imposed on him were doomed to failure.

[218] Although E.F. took performance management actions against the grievor three times, I will focus particularly on two of them.

[219] Two days after the grievor returned from a six-month sick leave, E.F. informed him that until the action plan was implemented and completed, he was required to

conduct polygraph examinations only in a simple format and only in French. He had to conduct a minimum of five per week. E.F. was to evaluate them and determine whether the grievor's performance was sufficient to enable him to conduct more complex examinations.

[220] E.F. explained that the objective of that approach was to enable the grievor to "[translation] get back on track" after a long absence. However, G.H. and the grievor testified that a polygraphist who has been away for an extended time may require a certain adjustment period before regaining their polygraphist rhythm and reflexes. The grievor was offered no such period. He was offered no coaching or training. Additionally, the evidence is unanimous that a polygraphist's work is done mostly in English and that conducting polygraph examinations in French is a more complex and difficult task. Although E.F. stated that he wanted to make the grievor's life easier by asking him to conduct examinations in his mother tongue, G.H.'s testimony clearly indicated that the effect would have been the opposite. And it is curious that E.F., who was so critical of the grievor's performance in a performance evaluation completed a few months earlier, supposedly asked the grievor to review his own polygraph examinations, to refamiliarize himself with the methodology to follow. In my opinion, the evidence did not demonstrate that those actions were truly intended to help the grievor resume his duties and improve his performance.

[221] Moving now to the three-phase action plan, as I noted earlier, E.F. stated that it was simply a continuation of the performance management actions that his predecessor, I.J., had initiated. Regardless of whether the action plan was a new action by E.F. or a continuation of actions that I.J. initiated, I cannot describe the plan as an approach to truly help the grievor improve his performance and resume all of a polygraphist's duties.

[222] The 3 phases were to be completed in just over 3 months. Phase 1 took 3 days. Phase 2 comprised 36 polygraph examinations carried out live and under G.H.'s supervision. Everything indicates that the grievor conducted the 36 examinations consecutively and immediately after a 15-month absence from the Unit. He did not have much time to review G.H.'s feedback and to change his approach to implement it before moving on to the next polygraph examination.

[223] The action plan had specific objectives. Only Phase 1 had an evaluation methodology that could be described as objective. However, no pass marks were established. Phases 2 and 3 involved subjective evaluation methods and measures. Again, no performance scale or indicators were established to help the grievor understand what would constitute success or failure.

[224] The action plan's description that was admitted into evidence does not indicate the consequence or consequences that could result from failing. It emerged from the evidence presented at the hearing that the grievor was told that if he met the three phases' requirements, he could resume all of a polygraphist's duties.

[225] It is true that G.H. found 9 of the grievor's 36 polygraph examinations in Phase 2 not compliant. However, due to the progressive improvement in his performance in Phase 2 and his satisfactory results for the last polygraph examinations in the series of 36, G.H.'s opinion was that the grievor successfully completed Phase 2. E.F. disagreed.

[226] In fact, success in the action plan was a moving target. The evidence demonstrates that E.F. recommended the grievor's demotion based not on his performance in the action plan but on two reviews that were deemed satisfactory under that plan. The action plan did not state that his performance would be evaluated based on those administrative reports. It was certainly not planned — or foreseeable — that examinations that the independent polygraphist responsible for evaluating the grievor's performance under the action plan deemed satisfactory could be relied on to recommend his demotion.

[227] A final similarity remains between this case and *Kashala Tshishimbi* that requires further discussion. In *Kashala Tshishimbi*, the grievor expressed his disagreement with his manager's comments on his performance. He was somewhat resistant to complying with his manager's requests when the manager asked him to change how he did things. He criticized the nature of the performance improvement plan, specifically the subjective nature of the evaluation and the requirement that he achieve 100% for each objective. The Board stated that the employer perceived the grievor's reactions and disagreements as misconduct that it wished to correct.

[228] In this case, the grievor expressed his disagreement with E.F.'s criticisms and comments. He criticized E.F. for choosing words and adjectives that exaggerated alleged performance problems and that ignored his successes. He described a written

communication from E.F. as using "[translation] incendiary" vocabulary. He challenged E.F.'s decisions. He expressed his dismay at the criticism that G.H. made to him about his confidence in Phase 2 of the action plan while the grievor was conducting polygraph examinations in accordance with E.F.'s instructions. He sought to explain why, in his opinion, the deficiencies in the two polygraph examinations on which E.F. relied to conclude that the grievor had failed Phase 2 were instead examples of the exercise of his professional judgment in very particular circumstances. The documentary evidence indicates that he refused to sign the two performance evaluations that E.F. prepared. He made a harassment complaint against E.F., which was based largely on the steps that E.F. took as part of managing the grievor's performance.

[229] However, the grievor complied with E.F.'s requests when in January 2015 and on his return from sick leave, E.F. insisted that he stop conducting polygraph examinations in English. He also did not resist when E.F. imposed the action plan on him on his return to the Unit after an absence of more than a year. He testified that he was exhausted, that he no longer had the energy to "[translation] fight", and that he saw no other choice but to comply with E.F.'s requests. First and foremost, he was afraid of compounding the situation even more by expressing his disagreement with his manager's proposed actions.

[230] The grievor submitted that he and E.F. had a personality conflict that supposedly was the reason that he was subjected to the performance management actions that led to his demotion. According to him, the employer's true intent was to punish him and to remove him from the Unit.

[231] The evidence presented at the hearing set out that shortly after the grievor took office, his relationship with E.F. was professional. I will not describe it as warm or friendly, but it was not conflictual or tense at that time.

[232] Although it may be difficult to accurately define or characterize an interpersonal relationship based on testimony provided several years after the facts that gave rise to the grievance and on emails and documents exchanged in the course of work, I accept the grievor's evidence presented at the hearing that their relationship worsened after E.F. became the acting head, and especially after he was appointed as the head indeterminately. The tone and content of the emails and documents that E.F.

wrote at the time relevant to the grievance are consistent with the grievor's evidence that their relationship had become tense. It also appears from at least one of the grievor's performance evaluations that E.F. prepared that the alleged deficiencies in the grievor's ability to maintain good interpersonal relationships were primarily intended to describe his interpersonal relationship with his manager.

[233] E.F. did not contradict the grievor's evidence that their relationship had become tense. Although at the hearing, E.F. stated that he had no bad memories of his interactions with the grievor, he stated that in response to a question that was part of his exchange with the employer's counsel with respect to when E.F. and the grievor were co-workers. E.F. did not testify as to the nature of his relationship with the grievor during the period when he was the grievor's manager. In light of all the evidence that was presented to me, I find that there was — between the grievor and his manager — a conflictual relationship.

[234] The grievor also pointed out that because of the conflictual relationship, his manager worked hard to identify deficiencies in his performance and to take the performance management actions against him that led to his demotion. He contended that his performance was just a pretext that hid an intention to remove him from the Unit.

[235] As I noted earlier, I need not decide whether the grievor's performance was satisfactory based on his perceived performance deficiencies. My analysis must seek to conclude whether on a balance of probabilities, he demonstrated that the performance reasons that the employer relied on concealed another intention, in this case the intention to remove him from the Unit due to a personality conflict.

[236] The issue to be decided in a case such as this is not whether the employer's action was exclusively disciplinary or whether it was exclusively a performance management issue. An employer's action may be tainted by disciplinary motivations and therefore may not be a purely administrative action based on performance (see *Sproule v. Treasury Board (Department of Consumer and Corporate Affairs)*, PSSRB File No. 166-02-250 (19710520) at 14; see also *Valadares v. Treasury Board (Health and Welfare Canada)*, PSSRB File Nos. 166-02-19596 and 19597 (19910312)).

[237] As I noted earlier, sometimes, it is possible to infer that an employer had disciplinary intent based on several clues that together demonstrate that it is more

likely than not that its true intention was to correct a grievor's behaviour or to punish him or her. That was so in *Kashala Tshishimbi*, and it is also so in this grievance.

[238] This case has numerous clues. Many of them were described as part of my analysis. I will not repeat them all. I will relist only some of them.

[239] Among the clues, I accept that among other things, the grievor was demoted once he completed the first two phases of the action plan to G.H.'s satisfaction. G.H. was the person responsible for evaluating his performance as part of the action plan. His demotion was based on polygraph examinations that G.H. deemed satisfactory and on alleged deficiencies in his administrative reports. However, the action plan did not state that his performance could be evaluated based on those administrative reports.

[240] I also note the significant difference between the grievor's performance evaluations when E.F. was his manager and those from before and after that period, the negative and unconstructive tone of E.F.'s vocabulary in the grievor's performance evaluations, and E.F.'s use of vocabulary that may reveal disciplinary intent (among others, references to insubordination, disrespect, misbehaviour, and of having "[translation] caught [the grievor] not following instructions").

[241] To these clues are added the imposition of a performance management action that apparently increased the complexity and difficulty of the grievor's work. The employer also developed and implemented a very demanding action plan that included subjective evaluation methods and measures, without indicating what the grievor had to do to meet the employer's expectations. The action plan and the subsequent performance evaluation gave the impression that the plan was not truly intended to help the grievor improve his performance. The employer looked for errors that he made and for examples of deficiencies. It gave only very little weight to the positive aspects of his performance. G.H.'s evaluations as part of the action plan were surprisingly thorough. Nevertheless, an examination that was considered entirely satisfactory was generally subjected to many suggestions of areas to improve.

[242] In my opinion, the resulting performance evaluation also demonstrates that the grievor was justified to fear that no matter what he did, it would have been impossible for him to meet the employer's requirements. He was criticized when he exercised his judgment. He was also criticized when he did not exercise his judgment out of fear of being criticized. He was criticized for a lack of confidence in examinations conducted

in circumstances in which all his actions and words were scrutinized. His successes were significantly downplayed.

[243] The choice of words, particularly the grievor's oral communications when he spoke English, was considered and emphasized to a surprising extent. I acknowledge that a polygraphist's choice of words may be important and that it is important for a polygraphist to communicate clearly. However, the employer's witnesses did not demonstrate how the examples of "[translation] clumsy language" that G.H. provided at the hearing could have affected a polygraph examination's results in terms of accuracy or reliability, an examinee's understanding, or the Service's mandate.

[244] The clues listed — if they were examined individually and out of context — would likely be insufficient to found a conclusion that the employer had disciplinary intent. However, when the clues are considered together and in the context of a conflictual relationship between the grievor and his manager, a worrying picture emerges. The evidence as a whole demonstrates that it is more likely than not that the actions that led to the grievor's demotion were tainted by disciplinary intent and that they were not a reasonable response to honest operational considerations.

[245] On the basis of the evidence on the record as a whole, I find that the grievor met his burden of demonstrating that on a balance of probabilities, he was subjected to disguised disciplinary action.

[246] In light of the adverse finding described earlier and my findings that the grievor's performance was used as a pretext to remove him from the Unit by demoting him, I find it unnecessary for me to dwell on whether the disciplinary action taken could still have been justified (see *Bergey*, at para. 36). The employer did not make any submissions on that issue. I find that based on the evidence as a whole, the employer acted in bad faith by using the grievor's performance as a pretext. In these circumstances and in light of the significant deficiencies in the evidence, I cannot conclude that the employer's action, which was to demote the grievor, could still have been justified.

VII. Remedy

[247] The grievor does not seek reinstatement. He asked that the employer be required to pay him the salary and pension to which he would have been entitled had

it not been for his demotion from a position classified at level 9 to one classified at level 7. As noted earlier, the salary gap between the two levels is approximately $25 000 annually.

[248] In light of my finding that this grievance has merit, the employer must pay the grievor all the remuneration, benefits, and unpaid entitlements that he would have had the right to, were it not for his demotion, from the date of his demotion to the date on which he left the Service. He did not ask the Board for interest on the amount owed to him as lost salary.

[249] The grievor also requested moral (aggravated) damages because of the psychological distress that he suffered from the disguised disciplinary action taken against him. When he testified, he stated that he suffered as a result of the stress and anxiety that the employer's actions against him caused him, along with the incessant criticism of him. He had heart palpitations. He went on sick leave. He felt threatened. I accept his evidence that the performance management actions that led to his demotion made already demanding and stressful work even more difficult emotionally. He described as enormous the pressure that he experienced.

[250] The grievor asked the Board to award him $20 000 in moral damages or to give the parties an opportunity to reach an agreement on an appropriate amount.

[251] The grievor also requested damages for obstruction of justice. He cited *Tipple v. Canada (Attorney General)*, 2012 FCA 158, to support his request. He submitted that the hearing was originally scheduled to take place in July 2023 but that it was postponed due to the Service's failure to disclose the documents required for the hearing in a timely manner. According to him, the hearing's postponement caused him to incur additional costs. He also submitted that the employer did not complete its disclosure of relevant documents at the hearing until the Board issued a disclosure order in November 2023. Finally, he submitted that the employer should be ordered to pay him damages for obstruction of justice, to condemn its failure to retain many documents relevant to this grievance.

[252] The employer made no submissions on the grievor's moral-damages claim. However, it submitted that the fact that it did not retain documents relevant to the proceedings does not meet the very high threshold for awarding damages for obstruction of justice. It also stated that it provided updates on timelines in the

disclosure process and that it disclosed documents after the Board's order, issued in November 2023.

[253] I will deal first with the grievor's moral-damages claim. In *Mattalah v. Treasury Board (Department of Foreign Affairs, Trade and Development)*, 2018 FPSLREB 13, the Board referred to *Honda Canada Inc. v. Keays,* 2008 SCC 39, noting that the principles that the Supreme Court of Canada set out in that decision are also useful for determining whether moral damages should be awarded in the context of grievances unrelated to a dismissal. The Board clarified that "… any unfair, bad faith, untruthful, misleading, or unduly insensitive conduct on the part of the employer …" must be considered.

[254] The grievor suffered psychological distress from the employer's actions and his powerlessness in the face of constant criticism from his manager. The evidence presented at the hearing that he suffered stress and anxiety was not contested. He lived in uncertainty for many months. He always felt that it would be impossible, despite all his efforts, to meet his employer's requirements. I have no doubt that the situation described in these reasons was very difficult to cope with. I find that the grievor is entitled to moral damages due to the employer's bad-faith conduct and the resulting effects on him.

[255] Since the grievor asked the Board to give the parties an opportunity to try to agree to an appropriate amount, and the employer did not oppose the request, I will do so. However, I will remain seized of the moral-damages issue for a period of 90 days should an agreement not be reached.

[256] With respect to the grievor's request for damages for obstruction of justice, I cannot conclude that the employer deliberately obstructed or delayed the adjudication process. Its conduct cannot be described as abusive or as attempting to obstruct the opposing party (see *Tipple*, at para. 29). Although it did not explain its failure to retain documents, the evidence is insufficient to allow me to conclude that it deliberately destroyed or altered evidence, in an attempt to obstruct the opposing party. As for the time limits in the adjudication process, it informed the opposing party and the Board of disclosure delays, although belatedly. It is unfortunate that it was necessary for the Board to make a disclosure order to ensure that the disclosure was made in a timely manner, to avoid a second postponement of the hearing. However, when the disclosure

order was made, the employer complied and disclosed certain documents. I accept that the hearing had to be postponed once due to the employer's delays in disclosing documents. However, I cannot conclude that the postponement was necessary because of deliberate behaviour on the employer's part. Furthermore, no evidence was presented at the hearing that could have demonstrated that the grievor incurred additional legal costs because of the hearing's postponement.

[257] In the circumstances of this case, I find that the employer's conduct did not meet the high threshold established in *Tipple*.

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

(The Order appears on the next page)

VIII. Order

[259] The grievance is allowed.

[260] I order the employer to pay the grievor all remuneration, benefits, and unpaid entitlements because of the demotion, less any deductions required by law, for the period from the date of his demotion to the date on which his Service employment ended.

[261] The grievor is entitled to moral damages, to address the psychological distress that he suffered. I invite the parties to agree to an appropriate amount in this case, failing which I could decide the issue based on written arguments.

[262] The employer's request to anonymize file 566-20-13419 is granted.

[263] The Administrative Tribunals Support Service of Canada is ordered to seal all unredacted documents in this file and to replace them with redacted copies (that do not contain any information likely to identify the persons involved, including the names and contact information of Service employees), which the Service is to provide.

[264] I shall remain seized for 90 days of any question relating to the implementation of this order.

February 15, 2024.

FPSLREB Translation

Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board