**Date:** 20240304

**File:** 561-02-00887

**Citation: 2024 FPSLREB 29**

*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

**MICHAEL HURLEY**

Complainant

and

**TREASURY BOARD**
**(Department of National Defence)**

Respondent

Indexed as
*Hurley v. Treasury Board (Department of National Defence)*

In the matter of a complaint made under section 190 of the *Federal Public Sector Labour Relations Act*

**Before:** Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Christopher Perri, counsel

**For the Respondent:** Chris Hutchison, counsel

Heard via videoconference,
September 27 to 29 and October 25, 2022.

**REASONS FOR DECISION**

## I. Summary

[1] This decision is the third in a series of the Federal Public Sector Labour Relations and Employment Board ("the Board", which in this decision refers to both the current Board and any of its predecessors) ruling upon complaints and a grievance that all arose from the discord between the senior administration of the Royal Military College in Kingston, Ontario ("the College"), the Canadian Military Colleges Faculty Association ("the Association"), and Professor Michael Hurley ("the complainant"), in particular. The main protagonists in the events at issue have long since retired.

[2] The Association, and in particular the complainant, who was an English literature professor at the College, actively litigated before the Board to have a past memorandum of agreement with a previous College principal recognized and enforced. It would provide College faculty members a very generous path to retirement, with extra raises, sabbatical leave, and no teaching for a period of time once they submit a signed retirement notice.

[3] Unfortunately for them, when the complainant was planning to begin his preparation for retirement in 2014, a new College principal was appointed. Also at that time, the Treasury Board and the Department of National Defence ("the respondent") both launched audits and value-for-money reviews of the College and returned to the new principal with highly critical findings of inefficiency and lack of value for money.

[4] Two separate hearings before the Board, in 2016 and 2017, ensued. In each, several matters related to benefits, collective bargaining, and in particular Mr. Hurley's retirement preparation were challenged. This decision deals with this unfair-labour-practice complaint, in which the complainant alleged that those hearings led to reprisals against both him and the Association.

[5] By function of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), the filing of this complaint is deemed to be proof of the allegations in it such that the respondent had the burden to disprove the motive behind the actions allegedly taken in reprisal. The occurrences of the alleged acts of reprisal are not at issue. Therefore, this decision is focused solely upon the intent and motivating factors underlying the three impugned acts.

[6] Having carefully considered the evidence adduced at the hearing and the well-prepared arguments of both parties' counsel, I find the evidence is clear and cogent that on a balance of probabilities, none of the three impugned actions of the respondent were linked to retaliation or retribution as a result of the complainant exercising his rights under the *Act*.

## A. Background and previous litigation

[7] Both parties addressed what they said were the relevance and importance of the complaints and grievance that were referred to adjudication before the Board as related to this matter. For the complainant, the complaints and grievance formed the subject matter by which he exercised his rights under the *Act* for what he alleged were the College administration's later retaliatory acts.

[8] The respondent submitted that the complainant's actions that led to those complaints and grievance inform and explain what he and the Association did later with respect to the problem created by his lack of teaching, which led to the impugned acts before the Board in this case.

[9] Then Board Vice-Chairperson Olsen captured the essence of the grievance and some relevant background to the origins of this aspect of the discord between the parties in *Hurley v. Treasury Board (Department of National Defence)*, 2018 FPSLREB 35, as follows:

> …
>
> ***1*** *Dr. Michael Hurley ("the grievor") has been a university teacher at Royal Military College of Canada (RMC) in Kingston, Ontario, since 1988. Teaching has been a great passion of his. On three occasions, the cadets at RMC have nominated him for teaching excellence awards.*
>
> ***2*** *Dr. Hurley had been thinking about retirement for some time. He wanted to coordinate his retirement with his daughter's graduation from the University of Toronto. He had heard of a protocol between the Canadian Military Colleges Faculty Association (CMCFA; "the bargaining agent") and RMC to the effect that if a faculty member provided as much notice as possible of retirement, certain benefits would accrue to him or her. He did not know the exact details.*
>
> ***3*** *He consulted with his bargaining agent representative, Dr. Helen Luu. In turn, she referred him to Dr. Jean-Marc Noël, the CMCFA's president.*

***4*** *Drs. Hurley and Noël met on January 26, 2015, and mapped out several iterations of a retirement plan. According to Dr. Hurley, the plan included three key parts, namely, double salary increments based on satisfactory performance for the last three years of his employment, a six-month sabbatical, and six months of course relief on his return and immediately before his retirement, to round off his scholarly duties ("the three-part plan"). During that six-month period of course relief, he would be relieved from his classroom teaching duties.*

***5*** *His plan assumed that his six-month sabbatical would start in January 2017 and that for the six months from the end of June 2017, he would be on course relief until his retirement in January 2018.*

***6*** *He and Dr. Noël decided to meet with Dr. Harry Kowal, the RMC's principal, to alert him to the grievor's retirement plan.*

***7*** *A meeting took place on April 27, 2015 ("the April 2015 meeting"). Present were Dr. Noël, Dr. Hurley, Dr. Kowal, and Dr. Philip Bates, the vice-principal academic at RMC, and Kathleen Hope from human resources.*

***8*** *There is no consensus on what was discussed at the meeting among those present or on how it concluded. It led to the grievance that was referred to adjudication and assigned to this panel of the Federal Public Sector Labour Relations and Employment Board ("the Board").*

***9*** *Drs. Hurley and Noël claimed that they clearly laid out the elements of the three-part plan, while Drs. Kowal and Bates recalled that the only issue discussed was retirement and a memorandum of agreement (MOA) dated July 1, 2007, dealing with double increments and signed by a former principal and a former president of the bargaining agent. Dr. Kowal was not familiar with the MOA. To the best of their recollection, sabbaticals and course relief were not discussed.*

***10*** *Dr. Hurley and Dr. Noël said that Dr. Kowal stated that he was not going to abide by past practice or the MOA because he did not think the MOA was binding on him as he had not signed it. In contrast, Dr. Kowal and Dr. Bates characterized the meeting as an initial discussion of Dr. Hurley's retirement plans and stated that as of the end of the meeting, no decision had been reached.*

***11*** *On June 15, 2015, Dr. Hurley filed his grievance alleging violations of the MOA, of a past practice under article 8 of the collective agreement between the Treasury Board and the bargaining agent for the University Teaching (UT) group, which expired on June 30, 2014 ("the collective agreement"), section 107 of the* Public Service Labour Relations Act *(S.C. 2003, c. 22, s. 2;* PSLRA*), and any other related policy, directive, statute, regulation, or provision.*

…

***17*** *The bargaining agent stated that this case is about a past practice of the parties. According to the bargaining agent, if a UT provides three years of notice of retirement, the parties have agreed to implement the three-part plan, composed of the following:*

> *1. a revised performance evaluation scheme tied to pay resulting in double increments for the last three years of employment;*
>
> *2. sabbatical leave; and*
>
> *3. course relief following the sabbatical*

*…*

***80*** *Article 18 provides that sabbatical leave is granted at the employer's discretion and that it shall not be unreasonably denied.*

***81*** *UTs granted sabbatical leave are required to sign a written commitment to return for a period of employment equal to their period of leave. If a UT fails to, then he or she will be required to repay the allowance received during the sabbatical.*

*…*

***84*** *When a UT goes on sabbatical, the Treasury Board finances the allowance he or she is paid. The UT is required to sign a return-to-work agreement obligating him or her to return to duty for a period equivalent to the time he or she was on sabbatical. If a UT is away on sabbatical for six months, then he or she is required to return to work for six months.*

*…*

***423*** *At the commencement of the hearing, I understood the* ***bargaining agent's position to be that Dr. Hurley was entitled to, and RMC was obligated to provide****, the benefit of the three-part plan as outlined in Dr. Sokolsky's 2010 letters, namely, double increments, sabbaticals, and course relief, in accordance with article 8 of the collective agreement.*

***424 In final argument, the bargaining agent took the position that it was not saying that RMC was obligated to give Dr. Hurley course relief under any circumstances, at any cost****, regardless of the state of departmental resources.…*

*…*

***432*** *Is the entitlement to course relief to a UT returning from sabbatical inconsistent with the collective agreement?*

***433*** *In my view, such an unqualified entitlement would be contrary to clause 13.08(b), which states that course relief will be granted only if reducing the teaching workload can be accommodated within departmental resources.*

***434*** *Is the entitlement to course relief to a UT returning from sabbatical reasonable?*

> ***435*** *In my view, the parties have already addressed this issue in the collective agreement as they have provided that course relief will be granted only if it can be accommodated within departmental resources.*
>
> ***436*** *Therefore, I conclude that course relief is not a past practice in accordance with article 8 of the collective agreement and is not incorporated into the collective agreement.*
>
> …
>
> ***510*** *As I have concluded that the MOA has been incorporated into the collective agreement it follows that the arbitral rules concerning the interpretation of provisions of the collective agreement apply to the interpretation of the MOA.*
>
> ***511*** *As noted previously the operative provision of the MOA is paragraph 5. It reads as follows:*
>
> > Given the realization that maintaining high performance in the three years prior to retirement requires extra effort, faculty members who have already executed the forms which establish a retirement date and who are within three years of that date shall be evaluated overall as "superior", provided that their performance in each of teaching, research and service, assessed separately, is satisfactory or better.
>
> …
>
> ***522*** *The grievance as it pertains to the MOA is dismissed as the condition precedent to the entitlement of double increments, namely the execution of the retirement form, has not been fulfilled.*
>
> …
>
> [Emphasis added]

[10] The Board considered similar subject matter regarding the complainant's retirement and the benefits that he asserted were owed to him in *Canadian Military Colleges Faculty Association v. Treasury Board (Department of National Defence)*, 2019 FPSLREB 45. In that decision, I determined that matters related to Mr. Hurley's claim for retirement-related and other benefits were not denied in what was allegedly a violation of the statutory freeze provisions of the *Act*; nor did the related actions or lack of them constitute bad-faith bargaining. I wrote as follows:

> …
>
> ***17*** *For background, Mr. Noël described at the hearing how he had negotiated the Retirement Evaluation MOA in 2007. He testified that the motivation behind it was the recognition that the average performance of faculty members diminishes in the three years before retirement as they decline in energy, ease off in voluntary*

> *activities, and are reluctant to take on new or unfamiliar tasks. Under this MOA, if a faculty member has signed the forms establishing a retirement date within three years, the member is guaranteed a performance rating of superior, and accordingly, a double pay increment, in each of their final three years of work. That rating is guaranteed as long as their work in teaching and research continues to be of at least satisfactory quality.*
>
> …
>
> ***21*** *I did not hear any direct evidence from Mr. Hurley as he did not testify. Instead, only his grievance form was submitted at this hearing. While the resolution of this complaint is not dependent upon the Hurley retirement grievance's outcome, I note that his grievance was denied at adjudication before the Board (*Hurley v. Treasury Board (Department of National Defence),*2018 FPSLREB 35). While the Board did declare the MOA effective July 7, 2007, a past practice, which is incorporated into the 2011 collective agreement under article 8, it denied the grievance as it found a condition precedent to the entitlement claimed had not been met (see paras. 521 and 522).*
>
> …
>
> ***40*** *The Hurley grievance was presented as relevant background to the matter of the MOUs being raised by Mr. Noël. Counsel for the complainant argued that it was not necessary for me to make a finding on the Hurley retirement matter to uphold the complaint. As such, I make no finding on the retirement matter.*
>
> …

## II. The law

[11] There was no dispute between the parties as to the law, the reverse onus upon the respondent and the Board's decisions interpreting it. However, the respondent objected to the complainant's Association being a party to this complaint and argued that it has no standing under the *Act* to claim that it suffered a reprisal.

[12] For the reasons stated later, I need not determine if the Association is a complainant in this matter as the impugned act they pursued and the proposed remedy of the Board ordering an allocation of resources and hiring of a teacher in the English department of the College are moot.

[13] The relevant provisions of the *Act* state as follows:

… […]

***185*** *In this Division,* **unfair labour practice** *means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*

***185*** *Dans la présente section,* **pratiques déloyales** *s'entend de tout ce qui est interdit par les paragraphes 186(1) et (2), les articles 187 et 188 et le paragraphe 189(1).*

***Unfair labour practices — employer***

***186 (1)*** *No employer, and, whether or not they are acting on the employer's behalf, no person who occupies a managerial or confidential position and no person who is an* officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or who occupies a position held by such an officer, shall*

***(a)*** *participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or*

***(b)*** *discriminate against an employee organization.*

***(2)*** *No employer, no person acting on the employer's behalf, and, whether or not they are acting on the employer's behalf, no person who occupies a managerial or confidential position and no person who is an* officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or who occupies a position held by such an officer, shall*

***(a)*** *refuse to employ or to continue to employ, or suspend, lay off, discharge for the promotion of economy and efficiency in the Royal Canadian Mounted Police or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate,*

***Pratiques déloyales par l'employeur***

***186 (1)*** *Il est interdit à l'employeur ainsi qu'au titulaire d'un poste de direction ou de confiance, à l'*officier, *au sens du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada, *ou à la personne qui occupe un poste détenu par un tel officier, qu'ils agissent ou non pour le compte de l'employeur :*

***a)*** *de participer à la formation ou à l'administration d'une organisation syndicale ou d'intervenir dans l'une ou l'autre ou dans la représentation des fonctionnaires par celle-ci;*

***b)*** *de faire des distinctions illicites à l'égard de toute organisation syndicale.*

***(2)*** *Il est interdit à l'employeur, à la personne qui agit pour le compte de celui-ci ainsi qu'au titulaire d'un poste de direction ou de confiance, à l'*officier, *au sens du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada *ou à la personne qui occupe un poste détenu par un tel officier, qu'ils agissent ou non pour le compte de l'employeur :*

***a)*** *de refuser d'employer ou de continuer à employer une personne donnée, ou encore de la suspendre, de la mettre en disponibilité, de la licencier par mesure d'économie ou d'efficacité à la Gendarmerie royale du Canada ou de faire à son égard des distinctions illicites en matière d'emploi, de salaire ou d'autres*

| | |
|---|---|
| *threaten or otherwise discipline any person, because the person ….* | *conditions d'emploi, de l'intimider, de la menacer ou de prendre d'autres mesures disciplinaires à son égard pour l'un ou l'autre des motifs suivants :* |
| … | […] |
| ***(iv)** has exercised any right under this Part or Part 2 or 2.1;* | ***(iv)** elle a exercé tout droit prévu par la présente partie ou les parties 2 ou 2.1;* |
| ***(b)** impose, or propose the imposition of, any condition on an appointment, or in an employee's terms and conditions of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Part or Part 2 or 2.1; or* | ***b)** d'imposer — ou de proposer d'imposer —, à l'occasion d'une nomination ou relativement aux conditions d'emploi, une condition visant à empêcher le fonctionnaire ou la personne cherchant un emploi d'adhérer à une organisation syndicale ou d'exercer tout droit que lui accorde la présente partie ou les parties 2 ou 2.1;* |
| ***(c)** seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of an employee organization or to refrain from* | ***c)** de chercher, notamment par intimidation, par menace de congédiement ou par l'imposition de sanctions pécuniaires ou autres, à obliger une personne soit à s'abstenir ou à cesser d'adhérer à une organisation syndicale ou d'occuper un poste de dirigeant ou de représentant syndical, soit à s'abstenir :* |
| ***(i)** testifying or otherwise participating in a proceeding under this Part or Part 2 or 2.1,* | ***(i)** de participer, à titre de témoin ou autrement, à une procédure prévue par la présente partie ou les parties 2 ou 2.1,* |
| … | […] |
| ***(iii)** making an application or filing a complaint under this Part or Division 1 of Part 2.1 or presenting a grievance under Part 2 or Division 2 of Part 2.1.* | ***(iii)** de présenter une demande ou de déposer une plainte sous le régime de la présente partie ou de la section 1 de la partie 2.1 ou de déposer un grief sous le régime de la partie 2 ou de la section 2 de la partie 2.1.* |
| … | […] |

[Emphasis in the original]

[14] The complainant noted that the Board has found that when Parliament enacted s. 186(2) of the *Act*, it was concerned about protecting the interests of individual employees by listing the actions that employers may not take against employees and that constitute unfair labour practices. He also noted that an employer cannot be motivated in whole or in part by some aspect of retaliation in its actions to discriminate, threaten, or somehow discipline an employee (see *Hughes v. Department of Human Resources and Skills Development*, 2012 PSLRB 2 at paras. 364 and 396).

[15] The complainant also noted the Board's decision in *Choinière Lapointe v. Correctional Service of Canada*, 2019 FPSLREB 68, which found as follows:

> …
>
> *[16] In turn, the complainant referred me to* Quadrini*, at paras. 25, 28, 45, and 47. Paragraph 25 reads as follows:*
>
> > [25] The reverse onus contemplated by subsection 191(3) of the new Act is unusual in the framework of the statute and a clear exception to the normal expectation in proceedings before the PSLRB that the party who alleges a violation must prove it. The presence of the provision strongly suggests that the legislator believed that actions arising under subsection 186(2) would involve an exceptional situation where a different approach to burden of proof would be required to level the playing field between the parties.
>
> …

[16] Both parties cited the decision of *Hager v. Statistical Survey Operations (Statistics Canada)*, 2011 PSLRB 79, included in the respondent's book of authorities which stated as follows with respect to setting out the aspects of legal analysis in reprisal complaints:

> …
>
> *114 Cases of this type often involve indirect evidence, an evaluation of context and a search for underlying patterns. Looking behind the stated reasons for a decision to discover whether other factors or influences were actually at play is always challenging. In the charged scenario in which complainants allege that management retaliated against a bargaining agent, its members or its representatives, the task can be particularly difficult.*
>
> …

## III. Allegations and analysis

[17] Both parties addressed the matter of whether the respondent had the authority to make the decisions that it did with respect to the three alleged acts of reprisal. Counsel for the complainant conceded as much in his opening statement but asserted that nevertheless, the motivation and intent should be found to sustain a finding that the *Act* was violated.

[18] The complainant noted the respondent's following three alleged acts of reprisal, which he submitted make out this unfair-labour-practice complaint under s. 186 of the *Act*.

### A. Denial of course relief to the complainant

[19] The complainant alleged that the respondent's decision to deny his request for course relief when he returned from sabbatical leave to then be followed by a term with no teaching assigned to him should be considered retaliation which is prohibited by the *Act*.

[20] The respondent replied to this allegation and argued that teachers have no absolute right to demand and receive course relief. It noted the Board's decision in *Hurley*, which found that the right to course relief depends upon it not having a detrimental impact upon departmental resources. Paragraphs 432 to 435 of *Hurley* read as follows:

> ***432*** *Is the entitlement to course relief to a UT returning from sabbatical inconsistent with the collective agreement?*
>
> ***433*** *In my view, such an unqualified entitlement would be contrary to clause 13.08(b), which states that course relief will be granted only if reducing the teaching workload can be accommodated within departmental resources.*
>
> ***434*** *Is the entitlement to course relief to a UT returning from sabbatical reasonable?*
>
> ***435*** *In my view, the parties have already addressed this issue in the collective agreement as they have provided that course relief will be granted only if it can be accommodated within departmental resources.*

[21] The parties then undertook an accounting exercise to examine witnesses and departmental budgets, to support their positions that the requested course relief was or was not, respectively, allowed under the agreement between the Treasury Board and

the Association for the University Teaching group that expired on June 30, 2018 ("the collective agreement"), depending upon the budgetary impact.

[22] The complainant pointed to the fact that extra teaching sections of his courses had already been booked to be taught by contracted sessional instructors. The respondent replied by seeking to adduce evidence that the extra sections were false constructs setup by the English department to facilitate what it knew in advance was the complainant's final term of teaching without actually having to teach. And it opined that he was required by a sabbatical contract to return to work and teach. The contract stated in part as follows:

> …
>
> *7. Upon completion of the sabbatical leave referred to in Clause 1, the Sabbaticant shall return to the CMC at the Royal Military College of Canada or to such other place of employment as may be designated by the Minister, and shall thereafter complete no less than one month of employment for every month spent on sabbatical leave.*
>
> *8. Should the Sabbaticant*
>
> > *a) fail to complete in a satisfactory manner, as determined by the Minister, the sabbatical goals slated in the application for sabbatical leave, or*
> >
> > *b) fail to resume his or her employment as provided for in clause 7, or*
> >
> > *c) fail to complete the period employment stipulated in clause 7, document.*
>
> *the Sabbaticant shall repay to the Receiver General of Canada all monies paid to him or her, or paid on his behalf, during the sabbatical leave, except that the Minister in his or her discretion may agree to the repayment of a lesser sum.*
>
> …

[23] The respondent pointed to the testimony of College Principal and Brigadier General Harry Kowal, who said that he tried to protect the complainant by pushing for the enforcement of the contract's terms. While this sounded odd, it made more sense when he was asked to explain how denying course relief helped the complainant.

[24] Mr. Kowal stated that given the close scrutiny of the College at that time by both the Treasury Board and the respondent department, he was concerned that the complainant would be pursued to repay all his sabbatical financial benefits if he did not return to work and fulfil his obligations under the contract.

[25] The respondent also noted the evidence that the College's English department was carrying on the "drive for five" which was intended to reduce the amount of work for teachers by reducing the normal course load from six to five. The respondent argued that this was intended to usurp courseload assignment authority from management. It argued that as part of it, the complainant decided that he would not teach anymore, regardless of the litigation before the Board contesting it.

[26] The respondent also argued that the evidence established that the three courses scheduled for the complainant to teach when investigated by management resulted in him teaching no courses, which would have violated the equal distribution of courseload set out in clause 13.01 of the collective agreement.

[27] The respondent drew attention to a draft course plan for the fall term at issue and noted that no teaching at all was assigned to the complainant for the stated reason that he had "Fall leave; Winter retirement". Vice-Principal Academic Philip Bates testified to this matter when asked why he denied the course relief that the English department was to grant. He said that he regularly reviewed course plans and that in this case, he noted that the complainant was not assigned to teach. He also explained that the normal teaching load was six courses but that some faculty, including in the English department, resisted that and sought instead a teaching load of only five courses (the drive for five). Whether five or six courses, Mr. Bates pointed to a draft course plan and noted that the complainant had the equivalent of only three courses made up of alternate work that did not include any teaching.

[28] Mr. Bates continued to explain how this apparent pre-retirement leave plan with no teaching was before the Board for a grievance adjudication ruling. He stated that he found it unacceptable to approve a course plan based upon a series of benefits that was being contested and that could have been denied at adjudication.

[29] When speaking to the whole continuance of events of the sabbatical agreement, the need to return to work and teach, the collective agreement clauses on an equal teaching load, and the requirement that each teacher teach six courses, Mr. Bates said that these were all his responsibility. He had to ensure that the rules were followed, including agreements, which is what he did when he directed that course relief for the complainant not be allowed. He denied that the grievance and complaints had any role whatsoever in this decision.

[30] While the reverse-onus provision in the *Act* does not require the complainant to establish proof, in rebuttal of the respondent's submissions, the complainant's counsel submitted that, the evidence established that no additional resources were required to approve the course-relief request. And also that the teaching course plan drafted by Department Head Huw Osborne was valid and normally was approved without scrutiny or intervention by senior management. He submitted that the after-the-fact and late intervention to insist on changes for the complainant was evidence of the senior management's desire to disadvantage him and seek retribution for him having grieved its denial of benefits to him.

[31] The complainant noted Mr. Osborne's testimony. He said that he was concerned and that he managed the risk that if the Board upheld Mr. Hurley's retirement grievance, the complainant could possibly have left his teaching post in the middle of the term, which would have created an untenable situation for the students. He said that this risk justified him planning to have sessional contract lecturers teach the courses that might otherwise have been assigned to the complainant.

[32] Mr. Osborne also pointed to emails that sought to clarify that the sabbatical agreement required the complainant to return to his "employment" and that it did not state that he had to return to "teaching". Thus, it undermined the respondent's assertion that it simply tried to hold the complainant to his agreement, as it was argued that being on leave was a valid part of employment and thus complied with the sabbatical agreement Mr. Osborne also noted that the complainant had intended to continue to work on a book that he intended to publish while on course relief for the fall term, which was a valid academic endeavour that should also have been considered as complying with the sabbatical agreement (see the Dean of Arts' email dated September 4, 2017).

[33] Counsel for the complainant also traced senior management's stated reasons for denying the course relief. He argued that the reasons evolved over time, which should be seen as undermining the credibility of the explanations being *bona fide* management decisions; rather, it is evidence of them simply being intended to hide retaliation against the complainant.

[34] Counsel noted the following:

- Mr. Bates first stated that the denial of course relief was done in compliance with clause 13.01 of the collective agreement, which required the equal assignment of courseloads.
- Mr. Bates then said that the decision was made so that proper course plots would be in place as the English department's prepared draft was unacceptable.
- Both Messrs. Bates and Kowal testified to their desire to enforce the return-to-work clause in the sabbatical agreement.

[35] In rebuttal of this final point of the sabbatical agreement, counsel for the complainant submitted that if this was the real reason, management could have and should have talked to the complainant to ascertain his wishes and risk tolerance if in fact he could have faced an effort to recover the public funds granted to him for his sabbatical. And in the same respect, counsel noted that no evidence was tendered to support Mr. Kowal's assertion that in fact, the respondent or the Treasury Board was considering pursuing the repayment of the sabbatical funds and that this was only a theoretical concern on the part of Mr. Kowal.

[36] This same argument was also relied upon when Mr. Osborne's testimony was noted. He said that all these matters before the Board were discussed with the Dean of Arts before he approved them at the departmental level. Counsel for the complainant also submitted that there were inconsistencies in the evidence about whether the Dean of Arts had approved course relief and addressed other work in lieu of teaching versus Mr. Bates denying that he had directed that a course plan be revised and had added writing centre duties to the complainant's term teaching plan. Counsel argued that this should be seen as undermining the respondent's testimony and as supporting his assertion of senior management's mal-intent to the complainant.

[37] The complainant also pointed to his cross-examination of Mr. Bates who admitted that he would have considered course relief for the complainant if there had been valid supporting reasons stated for it. Counsel also pointed to evidence that established that other teachers had recently been granted course relief in support of the argument that the complainant was being treated unfairly.

[38] The complainant also pointed to a footnote written by Mr. Kowal during discussions about benefits and the alleged retirement benefit plan. The footnote written on a document suggested that Mr. Kowal was prepared at that earlier time to approve course relief as part of the complainant's retirement path. The complainant

added that the ultimate rejection of course relief must be seen as motivated by the desire for retribution for the grievance and complaints made against the College.

[39] And finally, the complainant pointed out Mr. Kowal's remarks after he was released from the witness stand after his testimony had concluded. Mr. Kowal made the rather unusual move to ask permission to make brief remarks. He stated that he had always worked very hard to treat everyone he worked with and all College faculty with respect and admiration. He stated that he was offended by the allegations made against him at the hearing and demanded an apology.

[40] The complainant noted these remarks and argued that they were further evidence of how extremely offended and upset Mr. Kowal must have been when the grievance and complaints were filed, given that he was still so upset that he felt compelled to speak out in a highly unusual manner before the Board and express his being offended, and demand an apology at the hearing that took place years later.

[41] The complainant argued that management's decision to deny him course relief is evidence that he was treated differently and penalized for exercising his rights under the *Act*. The Board should accept that on its own or as part a pattern with the other two impugned acts as justifying a finding that the no-reprisal provision of the *Act* was violated.

**B. Cancellation of vacation leave**

[42] Counsel for the complainant submitted that the respondent was "hell-bent" on denying the complainant what he sought in his grievance. The details of this, namely, his preferred path to retirement, were documented earlier. For the purposes of this analysis, the complainant arranged with the College's English department to use up his accumulated vacation leave to avoid teaching in what would have been his final fall term upon his return to work from the sabbatical. Whether he had enough vacation leave is not at issue.

[43] The parties asked many questions in examination and made submissions to the effect of whether the complainant returning from sabbatical and immediately going on extended leave violated his sabbatical agreement. The parties made arguments about whether leave qualifies as being at work. However, I ascribe no probative value to these

lines of inquiry as they shed no light on the respondent's motives, which are the point of this decision.

[44] The evidence established that the complainant had begun his leave and that he intended to stay on it through the duration of the fall term so that he would be able to begin his retirement without teaching again after his sabbatical ended. However, management ordered his leave cancelled and that he return to teaching two days after the fall-term classes had begun.

[45] Counsel for the complainant submitted that the head of the English department had the authority to approve the leave. And he further submitted that Mr. Osborne's uncontradicted testimony was that it was his well-established and common practice to approve such leave requests without requiring any further approval or review from the senior administration.

[46] The complainant also noted that Mr. Kowal made a note on a document when the parties tried to resolve matters related to the complainant's retirement before it came before the Board. He also pointed out that the note indicated that at that time, Mr. Kowal seemed prepared to approve the requested leave, which would have allowed the complainant to avoid teaching again before retiring. When asked about the note, Mr. Kowal responded that it was part of a negotiation proposal that the parties never upon. He also pointed out that it stated that it was "[w]ithout prejudice to future decisions on related issues …".

[47] When challenged in cross-examination to defend his decision to cancel the leave after it had been approved and had already begun, Mr. Kowal stated that he was very concerned not to set a bad example that the College would regret later if teachers were allowed to miss entire terms of teaching, especially upon returning from sabbaticals and with a contractual requirement in place to teach.

[48] Mr. Kowal also commented upon an email from the Interim Dean of Arts dated June 16, 2017, and the attached course plan for the fall term at issue, which showed the complainant not teaching any courses. He testified that this was not acceptable as the complainant's sabbatical agreement required him to return to work and teach. When asked about the Interim Dean's apparent approval of it, Mr. Kowal testified that if the Interim Dean approved it, it should not have been approved, as all such approvals had to comply with the collective agreement, and in his view, the

complainant's fall-term leave did not comply. He added that ultimately, it was his responsibility to ensure such compliance with the collective agreement.

[49] The complainant noted that exchange and argued that the fact that the Interim Dean had proposed no teaching for him demonstrated that it must have already received senior management's approval and was evidence of Dr. Kowal's malintent to intervene and rescind the approval. The complainant also noted testimony that stated that such an intervention was highly unusual and that the respondent's failure to call the Interim Dean as a witness should cause me to take an adverse inference.

[50] The complainant also pointed to Mr. Osborne's testimony and the meeting notes of September 11, 2017, dealing with the direction to revoke the complainant's leave after the fall term had begun. Mr. Osborne testified that he would have required two weeks to prepare and execute the changes necessary to return the complainant to the classroom. He added that it would have been extremely disruptive for the students involved. He also opined that the College would have not saved any money by forcing the complainant back to the classroom.

[51] Counsel for the respondent replied that it was uncontradicted testimony from Mr. Bates that vacation leave was not to be taken if it interfered with teaching duties. He then noted that the complainant was bound by his sabbatical agreement to return to work and teach and that it required actual teaching as opposed to leave. He also noted Mr. Osborne's testimony when he admitted that it was unusual for a faculty member to take leave for a full term.

[52] Counsel for the respondent also submitted that leave was to be approved only if it could be taken within the existing resources and noted Mr. Osborne's testimony in cross-examination in which he stated that two additional contract term teachers had been hired and that only those additional resources hired at additional cost to the College made it so that he could allow the complainant to take leave for the full term. He also stated that while he had never refused a leave request, he acknowledged that senior management had the right to rescind it.

[53] Counsel also noted that it had been established in evidence that the English department had set up two additional course sections that he submitted were never intended to be filled to justify hiring the extra teachers. This was all done on the assumption that the complainant never intended to return from sabbatical to teach.

[54] Counsel for the respondent argued that this course of action was not principled; nor was it a proper administration of resources. Counsel noted that Mr. Osborne testified that he was upset when senior administration cancelled the complainant's leave, which he had approved, after it had already begun and then submitted that the whole problem of the leave was the English department's making.

[55] Counsel for the respondent also drew attention to clauses 13.01 and 13.08 of the collective agreement and said that both are engaged in the matter of the complainant's leave being cancelled. They state that the teaching workload should be consistent with the normal average teaching workload with teachers in the same department and that it may vary, depending upon administrative duties and the level of productive scholarly activity.

[56] The respondent submitted that its actions were justified and that in fact, they were required to compel the complainant to comply with the collective agreement and to ensure an equal teaching workload within the English department. It was also noted that Mr. Kowal testified that the grievance and complaints made during the time of the events at issue in this matter played absolutely no role in his decisions being challenged in this matter.

[57] When presented with the Interim Dean's letter to the complainant dated September 7, 2017, informing him that the vacation leave for the full fall term had been approved in error and that he was required to report to work by no later than September 11, 2017, Mr. Kowal testified that September 8 was the start of the academic teaching term but that he did not consider the complainant's return to work on September 11 as a risk and a disruption to students as the English department had planned for the complainant not to teach.

[58] When presented with a copy of the complainant's note from a doctor dated August 22, 2017, stating that he should be exempted from teaching duties for medical reasons, Mr. Kowal testified that he did not know of it when he dealt with the leave issue and that had he known, the College would have worked on proper accommodations for the complainant from the start.

**C. Cancellation of a replacement hire for the complainant's teaching position**

[59] The complainant noted that the College's senior management intervened after the funds had been approved to fill the vacant position in the English department created by his departure within weeks of him going on vacation which then became sick leave in fall 2017. He pointed to evidence which established that the English department sought to fill the vacant teaching position left by the departure of the complainant. However, Mr. Kowal intervened to take that same position and transfer it to be used to staff a new writing support service that had been identified as a new priority for the College. This despite a funding mechanism having already been identified through other means for this new service.

[60] Mr. Osborne testified to the fact that a staffing request that confirmed that funds were authorized to fill the position that the complainant was to vacate was signed on July 25, 2017. He then noted the email chain from Mr. Kowal stating that the vacant position would not be funded and that this excess capacity would be used to move the teaching position to the writing centre. Mr. Osborne stated that he did not believe that the English department had any excess capacity. He added that in a subsequent meeting to discuss the position being moved, Mr. Bates said that it was all about the elephant in the room. He added that that referred to the complainant, and he opined that the decision to rescind filling the vacancy that the complainant created only one week after rescinding his leave certainly showed that the matter to be one of retribution.

[61] Mr. Osborne also testified that once the approval to fill the English department's vacancy was rescinded, all the department heads met and agreed to share the burden of providing staffing resources for the writing center but that senior management vetoed that agreement. He opined that this was retribution against the complainant.

[62] When counsel for the complainant introduced this allegation, he acknowledged that the College's management has the right to allocate resources. However, he submitted that moving the complainant's position from the English department was part of a clear pattern of bias and retribution against the complainant and the department. He pointed to notes from September 11, 2017, from a meeting at which the Dean of Arts met with the complainant and a union representative and argued that the notes demonstrate that the English department had no excess teaching capacity. He also cited an email chain between Mr. Kowal and the Dean of Arts dated September

28, 2017, in which Mr. Kowal stated that he agreed with accepting the Dean's recommendation to use an English department teaching position to create a dedicated resource in the new writing centre. The Dean replied and denied any such recommendation and then stated that he did not say that the English department had excess capacity.

[63] The complainant pointed to this contested matter of whether the English department supported giving up a teaching position for the new writing center in the email exchange and said that it is evidence of something suspicious and untoward by Mr. Kowal.

[64] When asked more generally about the fact that the College was undergoing reviews by both the respondent and the Treasury Board, Mr. Kowal testified that he was very concerned as he also responded to a critical finding by the Auditor General and feared that the College would be closed due to it being seen as not using public funds efficiently, thus causing a lack of value for money to the federal government. He also testified that the Auditor General had singled out the English department for attention. Mr. Bates also testified to this and explained that the respondent had conducted a review of program effectiveness at the College and had found that students were unprepared for competent written communications and that adequate support for such student assistance was lacking. He added that the writing centre was unanimously supported across faculty and was seen by the College's administration as a solution to that important challenge.

[65] Mr. Kowal also provided lengthy testimony to the effect that he received direction from his superiors for changing priorities and that he faced competing challenges for resources within the College. He explained that the previous Commandant, to whom he reported and who had budget authority, had rejected using a teaching position to staff the writing centre but that the new commandant was sympathetic to the idea. He also explained that he had a long-term plan for the English department to use sessional contract lecturers as an interim solution, pending the retirement of another faculty member, who would then be replaced with a full-time hire. He stated that there were eight positions in the English department before the complainant and another teacher retired and eight positions when he retired.

[66] So, Mr. Kowal said there was no net loss of English department teaching positions under his tenure. He also repeated his serious concern that the Auditor General had reported on a lack of value for money at the College and had said that cost reductions were required. And finally, he stated that the English department's ability to properly conduct its full course load with the complainant's departure was proof that it had excess capacity.

**IV. Analysis and reasons**

[67] By function of the *Act*, the respondent carried the burden to establish upon clear and cogent evidence that it was not motivated, even in part, by a desire to punish the complainant and treat him unfairly due to his having exercised his rights under the *Act* to grieve and file complaints against the respondent.

[68] Both parties relied upon the previously noted text from *Hager* (paragraph 136) in their submissions as to how I should find intent as informed by the context of the impugned actions of the respondent and surrounding events. The complainant submitted that each impugned act had a concealed mal-intent linked to the grievance and complaints previously filed with the Board. And that taken together, the three acts showed a clear and deliberate pattern of behaviour motivated at least in part by a desire to treat the complainant in an unfair manner due to his exercise of his rights under the *Act*. He also argued that the management rights rationale proffered by the respondent in justifying its actions was an attempt to conceal the truth.

[69] The respondent pointed to what it said was the critical context established by evidence of the English department resisting the legitimate wishes and decisions of senior management and submitted that any frustration exhibited by senior management was caused solely by the department's efforts to thwart the legitimate directions of management.

[70] In the matter of the sabbatical return to teaching and course relief, I note the evidence clearly establishes that the complainant had no automatic or guaranteed right to course relief. I am not persuaded by the arguments that the respondent's opposition to the complainant returning to work after his sabbatical and immediately going on vacation was an incorrect interpretation of the sabbatical agreement in place which was caused by a desire of management to treat the complainant unfairly due to his exercising his rights under the *Act*.

[71] I am not persuaded by the submission that the changing explanation from the respondent for denying the complainant his requested course relief was evidence of mal-intent or something untoward. The reasons cited, as noted previously, are reasonable concerns for management. Neither do I accept the complainant's assertion that all other requests for course relief were approved establishes mal-intent or discriminatory treatment.

[72] The evidence established what I find was the sincere and reasonable intent of both Messrs. Kowal and Bates to hold the complainant to their interpretation of his contract, which required him to teach upon his return from sabbatical.

[73] Whether their position on this matter rested upon an incorrect interpretation of the contract or not, I accept their testimonies that they legitimately feared for the College as it had just been criticized by the Auditor General and was under further review by the respondent to assess its value for money.

[74] Facing such scrutiny, senior management would reasonably be concerned about teachers honouring their contracts that required them to teach. I am also convinced by their stated concern that it was generally understood that teachers would take their vacation in a manner that did not interfere with their teaching duties. And further that they wished to avoid setting a bad example for the College due to other teachers potentially seeking to miss entire teaching terms by going on vacation.

[75] More specifically, I am not persuaded that regardless of the matter of contractual compliance that the direction from senior management for the complainant to return to teaching is proof of mal-intent or discriminatory treatment. Rather, the evidence showed that concerns existed with equitable distribution of teaching loads and the expectation of management that the fall term would be taught with existing resources and not with a need to hire contract teachers. These are legitimate management concerns, especially given the context of the concerns identified in the audit and value for money review conducted by the Treasury Board and the Principal's superiors.

[76] In regard to the complainant's allegation that the complainant's former teaching position was removed from the department out of a desire to seek retribution and to punish it for the grievance and complaints noted previously, I agree with the

respondent who noted that budgeting and setting priorities related to allocation of resources is a clear right of management.

[77] Few actions cut to the heart of management rights more than setting budgets and allocating resources to meet organizational priorities, which can change over time.

[78] Both Messrs. Kowal and Bates testified to what I find are eminently reasonable organizational reasons to support reprioritizing a staff year from the English department to support the writing centre, which I add was agreed by all witnesses as a worthy effort within the College.

[79] I am not swayed by the complainant's submission that it demonstrated a pattern of ill will and retribution toward him when it was decided to choose to move his vacant position. Nor am I moved by the contested issue of the Association being a named complainant in this matter, along with the complainant. Counsel argued that naming it in an addendum to the complaint should give it standing to argue on the English department's behalf, to seek the reinstatement of the teaching position with a Board order to force the College to hire another English professor.

[80] I decline the request of the complainant to make an adverse inference of the respondent choosing not to call the Dean of Arts to testify regarding the matter of Mr. Kowal thanking the department for offering the vacant position to be reallocated. A suggestion which was rebutted by the Dean. Finding such an adverse inference would have no bearing upon the conclusion that the allocation of resources is a fundamental part of senior management rights to manage the institution and that the matter of the complainant exercising his rights under the *Act* played no role whatsoever in the decision to use the vacant position for a new priority within the College.

[81] The respondent opposed both the Association being a party to this matter and more so, any notion that the Board could possibly order the Treasury Board to fund a particular position in the English department at the College. Counsel argued that there is no precedent for that and that the Board has no such remedial authority to order and direct any such expenditure on staffing a position under the *Act*.

[82] Given the evidence of the eminently reasonable decision to reallocate a teaching position to a new priority, the respondent has adduced clear and compelling evidence which rebuts the alleged act of reprisal. As such any further consideration of the

proposed remedy being *ultra vires* the authority of the Board is moot. The related matter of the Association having standing to bring a reprisal complaint before the Board is also moot.

[83] Perhaps the most difficult of the three impugned acts for the respondent to rebut the statutory presumption in was the direction from senior management to rescind the vacation the complainant had already begun and compel his return to teaching after the fall school term had already begun.

[84] Counsel for the complainant addressed this and noted the Board's finding in *Choinière Lapointe*, in which it noted the importance of finding the respondent's testimony as to the *bona fides* of its intent "rather questionable or improbable." (paragraph 202). I agree that the act of cancelling the vacation and trying to compel the complainant to return to teach a course in a term that had already begun, does on its own seem improbable. However, as I note below the context of the efforts to resist management direction provides a more accurate explanation than is alleged in this complaint.

[85] Counsel noted that all vacation was routinely approved by the department head. And further that the after the fact demand that the complainant return from vacation leave to teach after the term had already begun was questionable.

[86] And further, that given the evidence before the Board that it would take some time to prepare his teaching even if he returned as requested that it was quite improbable that the complainant could actually return to work after the term had begun and actually teach any courses without significant disruption to the course and the student experience.

[87] The respondent argued that any displeasure of management at the time in dealing with the matters examined were motivated by the acts of the English department itself, not the grievances and complaints referred to adjudication by the complainant and his bargaining agent.

[88] The respondent noted that Mr. Osborne testified of Mr. Bates being indignant in discovering the complainant using vacation to begin the fall term of teaching. He also acknowledged the comments of Mr. Kowal after his testimony had concluded and said both were prompted by the department's acts of trying to circumvent the normal

operations and routines of the college in forcing their will to achieve their agenda on retirement benefits and teaching loads.

[89] The respondent also stated that the hiring of contract teachers to teach new sections was in fact an added cost to the College due to the complainant not teaching and that this was of great concern to senior management given the audit findings noted previously. It also noted Mr. Osborne's testimony that the new term of courses and teaching assignments was designed on the basis of the complainant not returning to teach. This despite senior management's direction that the complainant teach.

[90] In support of this argument that no nexus existed between the impugned acts of management and the exercise of rights by the complainant, it noted the Board decision in *Sousa-Dias v. Treasury Board (Canada Border Services Agency)*, 2017 PSLREB 62, as follows:

> …
>
> ***130*** *Unlike the case of* Martin-Ivie*, in this case, there is no nexus between the work refusal and the conduct for which the complainant was disciplined. In my opinion, this situation resulted from a poor labour-management environment and from a union vice president who insisted that the respondent bend to his demands. His lack of respect for the management at the POE was the true cause of the disciplinary action taken against him. Even in his own evidence, the complainant stated that he was disciplined for expressing his opinion, which confirms that there was no nexus between the reason for the discipline and his exercise of his* CLC *rights.*
>
> …

[91] The respondent also noted the Board decision in *Hager* and drew attention to how it considered context and other factors or influences at play:

> …
>
> ***114*** *Cases of this type often involve indirect evidence, an evaluation of context and a search for underlying patterns. Looking behind the stated reasons for a decision to discover whether other factors or influences were actually at play is always challenging. In the charged scenario in which complainants allege that management retaliated against a bargaining agent, its members or its representatives, the task can be particularly difficult.*
>
> …

[92] Again, the respondent pointed to the previously noted actions of the English department and argued that these were the motivating factors that senior management was responding to in the impugned acts rather than the complaint exercising his rights under the *Act*.

[93] As was just noted in *Hager*, I conclude that the other factors and influences as submitted by the respondent offer clear and cogent evidence that on a balance of probabilities successfully rebut the statutory presumption of the allegations of the complainant being proof of themselves.

[94] The efforts of the English department as documented in this matter to thwart the legitimate management directions of Mr. Kowal and Mr. Bates were more likely than not the sole source of any ill will exhibited by the impugned acts of senior management including the otherwise improbable effort to compel the complainant to return from his vacation and begin teaching in a term that had already begun.

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

*(The Order appears on the next page)*

## V. Order

[96] I order the complaint dismissed.

March 4, 2024.

**Bryan R. Gray,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**