**Date:** 20240617

**File:** 566-02-42508

**Citation: 2024 FPSLREB 81**

*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

**PATRICK COWMAN**

Grievor

and

**DEPUTY HEAD**
**(Department of Transport)**

Respondent

Indexed as
*Cowman v. Deputy Head (Department of Transport)*

In the matter of an individual grievance referred to adjudication

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

**For the Grievor:** Himself

**For the Respondent:** Peter Doherty, counsel

Heard at Edmonton, Alberta,
November 21 to 24, 2023.

**REASONS FOR DECISION**

## I. Summary

[1] Patrick Cowman ("the grievor") resigned from his position as a civil aviation inspector employed by Transport Canada (TC or "the employer") based in Edmonton, Alberta. Approximately one week later, the employer accepted his resignation. Shortly after that, he learned that he had a grave illness, and he sought to rescind his resignation. His former employer declined.

[2] A differently constituted panel of the Federal Public Sector Labour Relations and Employment Board ("the Board") granted the grievor's request to extend the deadline for filing a grievance that was otherwise 51 months past the 25-day deadline, in *Cowman v. Treasury Board (Department of Transport)*, 2021 FPSLREB 36. He then requested and was granted a postponement of the hearing on the merits of the grievance that had been scheduled in 2021.

[3] In his grievance, the grievor alleged many things, including that he did not resign but rather that the employer terminated him for disciplinary reasons. He also alleged that if he did resign, he lacked mental capacity, which should vitiate the resignation. He added that the employer violated the collective agreement between the Treasury Board and the Canadian Federal Pilots Association for the Aircraft Operations group that expired on January 25, 2015 ("the collective agreement"). Two case management meetings, comprising several hours in total, were held with the grievor and the employer's counsel to offer every reasonable opportunity to orient the grievor in the Board's hearing process and to answer his many procedural questions about his grievance's referral to adjudication before the Board.

[4] The evidence clearly established that the grievor began in a new position as a director of regulatory affairs with a private airline. The grievor had filed a conflict of interest (COI) disclosure outlining the proposed new employment through the employer's COI process and hoped for a ruling that would grant him permission to take this new position during a one year leave of absence which he had also requested.

[5] However, the grievor did not wait for the COI ruling and proceeded to commence his new employment while still employed by TC. The grievor ignored his

employer's repeated requests to cease the new employment, until a final decision was made with respect to what it perceived to be a real COI.

[6] After his manager demanded verbally and in writing that he cease the new employment until the COI issue was fully considered, the grievor wrote that he would resign if the employer would not act itself to approve his COI declaration. The employer then waited six days before accepting the resignation. In the interim, it again cautioned him to cease his private employment until there was a decision on the COI and reminded him of his access to its employee assistance plan.

[7] The grievor alleged that the employer coerced him into resigning by delaying the COI decision. The grievor also sought to establish that he lacked the mental capacity to resign due to his heavy use of a narcotic pain medication. However, the evidence did not support either finding.

[8] The grievance is denied for lack of jurisdiction because the grievor resigned from his employment. The allegations involving the collective agreement required representation by his former bargaining agent, which never occurred during the grievance or adjudication processes. As such, the collective agreement allegations are statute barred and will not be addressed in this decision.

## II. Issues and analysis

### A. Did the grievor resign?

[9] The employer replied to the grievance's referral to adjudication by making a motion to have it denied because the Board lacks jurisdiction.

[10] The employer argued that the grievor voluntarily resigned from his employment and that there was no evidence of related coercion or bad faith, so the statutory provisions below do not allow the Board to accept the grievance's referral to adjudication, and it should be denied accordingly. The grievor replied that there was no clear communication of an unequivocal resignation, so it should be determined that no resignation occurred.

[11] The *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13) states as follows:

… […]

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| ***63*** *An employee may resign from the public service by giving the deputy head notice in writing of his or her intention to resign, and the employee ceases to be an employee on the date specified by the deputy head in writing on accepting the resignation, regardless of the date of the acceptance.* | ***63*** *Le fonctionnaire qui a l'intention de démissionner de la fonction publique en donne avis, par écrit, à l'administrateur général; il perd sa qualité de fonctionnaire à la date précisée par écrit par l'administrateur général au moment de l'acceptation indépendamment de la date de celle-ci.* |
| … | […] |

[12] The employer argued that the Board's jurisdiction to accept the referral of an individual grievance to adjudication that is related to a loss of employment is limited to the disciplinary actions set out under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which states as follows:

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|---|---|
| ***209 (1)*** *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to* | ***209 (1)*** *Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un* membre, *au sens du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada, *peut renvoyer à l'arbitrage tout grief individuel portant sur :* |
| … | […] |
| ***(b)*** *a disciplinary action resulting in termination, demotion, suspension or financial penalty ….* | ***b)*** *soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire* […] |

[13] It also noted that for greater certainty, the *Act* states this:

| | |
|---|---|
| … | […] |
| ***211*** *Nothing in section 209 or 209.1 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to* | ***211*** *Les articles 209 et 209.1 n'ont pas pour effet de permettre le renvoi à l'arbitrage d'un grief individuel portant sur :* |

| | |
|---|---|
| ***(a)** any termination of employment under the* Public Service Employment Act *….* | ***a)** soit tout licenciement prévu sous le régime de la* Loi sur l'emploi dans la fonction publique […] |
| … | […] |

[14] The grievor led evidence to try to establish first that he did not resign and second that if he did, he lacked the mental capacity to make the decision to resign. He stated further that an email from his manager threatened disciplinary action against him if he did not cease his new private airline job. He argued that that demonstrated that TC's actions with respect to his departure from its employ were in fact disciplinary, which thus gives the Board jurisdiction to receive the referral of his grievance to adjudication under the noted statutory authority.

[15] On June 9, 2015, the grievor submitted a Declaration of Conflict of Interest and Post-Employment form indicating his intention to take a one-year leave of absence without pay for personal reasons to relocate to Calgary and help his wife with her efforts to care for her mother after the death of her father. The grievor also declared that, during his leave, he intended to work for a private airline.

[16] The employer called Mathieu Lemire to testify. He was the TC values and ethics advisor who was assigned the file once the grievor completed the COI declaration form. He explained that he was a file process facilitator. He said that he had no role in decision making on the matter, but rather, management made all the decisions, and the final written decision was to come from the deputy minister.

[17] The grievor testified that he had an initial discussion with Mr. Lemire and that he was left with the impression that the employer would receive his COI disclosure favorably. Mr. Lemire confirmed this discussion in his testimony but added that he had cautioned the grievor that his comments were not authoritative, as the deputy minister would provide the ultimate decision, in writing.

[18] The grievor testified to being buoyed by the optimism that he thought he heard from Mr. Lemire. And he testified to other examples that he said he knew of over the years of other TC staff members who had sought and received leaves of absence and COI waivers to take on other work. Jamie Melo, the grievor's manager, testified that he listened to the grievor argue that the other examples should support his request, but he said that he replied by telling the grievor that the other examples were not relevant.

[19] In his cross-examination, Mr. Melo acknowledged speaking with the grievor about the fact that some years before these events, the grievor had been a pilot with an aviation operator in Canada's north. Mr. Melo explained that that arrangement was done under a contract between TC and the private operator to allow the grievor to fly while still in his TC inspector position and continuing to be paid by TC. Mr. Melo added that TC accrued benefits from that particular contractual relationship.

[20] Unfortunately for the grievor, none of those examples involved a real and direct COI, such as his situation posed, and therefore were of no assistance to him in convincing the employer that his request should also be approved.

[21] Feeling optimistic, the grievor emailed Mr. Melo, on June 17, 2015, and stated this: "As your [*sic*] aware it is difficult to take a leave without a source of income. That being said I was offered a position with Enerjet last week which I intend to accept on July 15, 2015."

[22] Mr. Melo testified and confirmed in an email to other staff dated June 22, 2015, that he spoke to the grievor, that he told him to wait for the employer's decision on his COI disclosure, and that he also "… cautioned him on having two employers at the same time before he got an official response from the COI declaration." Mr. Melo also testified that he spoke with the grievor about other TC positions and cited a more policy-oriented aviation standards position as an option. But Mr. Melo said that the grievor replied that he preferred to continue doing flight-operations work and not move into administrative-type duties.

[23] The employer emailed the grievor (Wayne Loe, Team Lead) again on June 26, 2015, cautioning him to wait for the final decision on his COI declaration and telling him this: "… I do not believe employment can commence with an air operator while on TC approved leave."

[24] Despite these warnings not to start his new job, the grievor emailed TC's Calgary, Alberta, office on July 14, 2015, to inquire about a pilot-licensing matter on behalf of his new employer, Enerjet, and signed the letter with a footer stating, "Pat Cowman, Manager Regulatory Affairs, Flight Operations, Enerjet … Calgary, AB …".

[25] Having been informed of the grievor's email from his new employer, Mr. Melo emailed TC staff on the same day and directed them not to share any government information with the grievor until his Enerjet employment situation was resolved.

[26] Mr. Melo also emailed his human resources (HR) advisor and also director, Jean-Stéfane Bergeron ("JS"), on July 14, 2015, to inform them that he had just spoken to the grievor on the phone and that he had informed the grievor that his leave-of-absence request was still under review but that likely, it would be approved. And he stated that the Calgary TC office had informed him that the grievor had received an email stating that he was now Enerjet's manager of regulatory affairs. He added that the grievor confirmed that indeed he was now that manager. He added that he warned the grievor not to hold two jobs at once before receiving the response on the COI. And he added that the grievor said that he was left with no choice due to how long it was taking to obtain TC's ruling on his COI request. Mr. Melo then wrote that with that information and the grievor's confirmation of his new job, he thought that that was enough to take disciplinary action.

[27] Mr. Melo repeated his reference to considering taking disciplinary action against the grievor in an email to Mr. Bergeron dated July 15, 2015.

[28] Based upon those references to discipline in the emails from his manager, Mr. Melo, the grievor argued that the employer took disciplinary action by dismissing him or by refusing to rescind his resignation, which will be analyzed later in this decision.

[29] After consulting HR and Mr. Bergeron, Mr. Melo testified that he phoned the grievor on July 17, 2015. Mr. Melo's email, sent at 4:06 p.m. that same day, confirmed the call, in which he shared the good news that the leave without pay (LWOP) was approved but then explained that the employer believed that the grievor's Enerjet employment caused a real COI. He added that the risk to the federal government that arose from that employment and COI could not be mitigated. He then told the grievor that thus, the grievor was directed to immediately cease his Enerjet employment.

[30] Mr. Melo also told the grievor (and confirmed as much to him in writing in an email that day at 2:53 p.m.) this: "I will require confirmation that you are in compliance with this direction by end of day today. Failure to comply with this direction may result in disciplinary measures being taken, up to and including termination."

[31] In his cross-examination, Mr. Melo acknowledged making that demand of the grievor but denied that it was a last-minute and rushed threat. He explained that the grievor had been warned repeatedly over several weeks that his new employment with Enerjet could not continue while he remained in his TC inspector position.

[32] Mr. Melo testified that the grievor replied that he would discuss the letter with his lawyer but that he could not do what was being asked, as it would leave him with no income. He then asked Mr. Melo on the phone if Mr. Melo just wanted him to quit (his TC job). Mr. Melo replied that he told the grievor to read the letter that was to be sent and to make a careful decision.

[33] Mr. Melo's email summary of the call then states that the grievor said that he understood the fact that his access to TC networks and information had to be restricted while he was employed by Enerjet.

[34] The grievor replied to their phone discussion the same afternoon. He testified to the exchange and acknowledged emailing Mr. Melo on Friday, July 17, 2015, at 6:02 p.m., as follows:

> *Hi Jamie,*
>
> *As you are aware I gave notice to JS in Ottawa about four weeks ago and explained my intentions for leave and starting the new job in July.*
>
> *At that point I had contacted the* [COI] *people and outlined what I was planning. I know at the point it was passed on to JS it was positive.*
>
> *I do realize it needed to go through a couple of additional steps and understand it is just about completed.*
>
> *As soon as I advised JS I advised Duncan that I would not be doing anything with Enerjet approvals to avoid any* [COI].
>
> *I have been up front on everything and last week you recommended I put comp leave in until the leave without pay was approved.*
>
> *At this point I do not have* [access] *to TC systems to approve anything or delegation from my perspective.*
>
> *It is my intention to have an option to return to TC and I explained that for personal health reasons I needed a break.*
>
> *This opportunity came up and it coincides with family related issues.*

> *At this point I am not given much of a choice.* ***As such I will have to resign effective immediately if your not prepared to wait for the*** **[COI]** ***results****.*
>
> *Regards,*
>
> *Pat*
>
> [Emphasis added]
>
> [*Sic* throughout]

[35] The grievor referenced the email in his cross-examination of Mr. Melo and asked him if the final line, emphasized in bold, was actually a question. Mr. Melo replied that it was not a question and that rather he read it as a clear statement of intent by the grievor to resolve the direct COI by resigning from his TC position.

[36] The grievor also noted unsigned meeting notes that stated, "Jamie (Melo) does not want him back, trust, move to terminate …". Mr. Melo testified that he did not recognize the notes but said that they accurately recounted what he discussed in a management meeting shortly after the grievor's resignation email was received.

[37] Mr. Bergeron testified to and referenced his email confirming it to Mr. Melo on Monday, July 20, 2015, at 10:00 a.m. He noted that immediately after the weekend that followed those last communications, he spoke on the phone to the grievor that morning. He explained that the grievor said that given his phone call with Mr. Melo the Friday before, the grievor "… had no other choice than to resign from TC, because he could not leave his employment with Enerjet …".

[38] After the call, he emailed the grievor on Tuesday, July 21, 2015, at 6:08 p.m.:

> *Good afternoon Patrick,*
>
> *I wanted to reach out to you in light of our conversation yesterday.*
>
> *As we discussed, we informed you that your current employment as Manager, Regulatory Affairs with Enerjet was a conflict of interest with your position as a Civil Aviation Safety Inspector. You were directed to cease your employment with Enerjet pending the decision of the Deputy Minister.*
>
> *In addition to the email Jamie Melo sent to your attention on Friday, July 17th, I understand that you also discussed this situation during a telephone conversation with him and again with me yesterday morning.*
>
> *It is also my understanding that over the last few weeks, you have discussed a number of leave options including "Leave Without Pay for Relocation of Spouse (temporary)" which was approved starting*

> *July 27th, 2015. However, as you know the principles of the Values and Ethics Code for the Public Sector and Transport Canada's Guidelines on Conflict of Interest & Post-Employment would still apply during that leave period.*
>
> *While I appreciate the difficult position you found yourself in, it was essential that you resolve this conflict of interest immediately.* ***You informed Jamie by email Friday evening and you confirmed during our telephone conversation that in order to resolve this conflict of interest you would resign from Transport Canada.***
>
> ***As such, we will accept your resignation effective Friday, July 17th, 2015 shortly.***
>
> *Let me know if you have any questions or concerns.*
>
> *Jean-Stéfane Bergeron*
>
> *Regional Director, Civil Aviation …*
>
> …
>
> [Emphasis added]

[39] When asked about that communication in his examination-in-chief, Mr. Bergeron denied the suggestion that he left the grievor with no options and that he forced the grievor out of his TC job. Mr. Bergeron explained that both he and Mr. Melo told the grievor several times not to begin any new employment. Later, once they found out from TC staff that he had already started his new employment, they cautioned him to cease it immediately, to protect his TC position. Also, other options within TC had been discussed with the grievor so that he could retain his TC employment.

[40] In cross-examination, Mr. Bergeron was also asked why there was no cooling-off period. Impliedly suggesting that TC should have waited longer before accepting the grievor's resignation. In somewhat of an admission against interest, the grievor acknowledged during this line of questioning that after he sent his resignation email, he went to Florida to take flight-simulator training as part of his new employment. That, as the employer's counsel noted, suggests that indeed, he was aware of his actions of resigning and assuming new employment and that his mind must have been sound enough for him to travel and undertake the highly technical cognitive functions of commercial-pilot flight simulation.

[41] Mr. Bergeron replied that he believed that the period from July 17 to 23 was a prudent time in which to prepare the HR file to process the grievor's resignation and to give him any opportunity he wished to make further communications, which did in

fact occur, as Mr. Bergeron said that he had two phone conversations with the grievor during that period, which confirmed his new employment and that he wished to resign.

[42] When pressed by the grievor to say that he accepted the fact that Mr. Melo gave the grievor only one hour to decide whether he would cease his new employment or resign from TC, Mr. Bergeron said that the grievor had been warned for weeks not to accept new employment and then to cease it once it began. Mr. Bergeron confirmed that the one-hour notice demanded of the grievor was reasonable, given the serious risk to the federal government and to the integrity of civil aviation oversight caused by the grievor's self-made COI. He added that TC often issues directions requiring immediate compliance when it is important.

[43] Mr. Bergeron explained his decision to accept the grievor's resignation. He testified that he found the resignation voluntary and that several days had passed since the receipt of the email in which the grievor said that he had no option but to resign. He said both he and Mr. Melo explained the implications to the grievor of his decision to begin to work with an aviation operator that TC regulated.

[44] Mr. Bergeron said that he sought HR's review and advice and that it was his duty to accept the resignation, as it was not for him to refuse to delay such matters, and any delay could cause the grievor complications with his finances or the COI matter.

[45] When Mr. Bergeron was asked in his examination-in-chief if he knew of the grievor's injury or illness and his heavy use of narcotic painkillers, he said that he did not know of them. And he added that had he known of the grievor's narcotics use, he would have had a duty to report it to the TC medical examiner, as it might have meant suspending the grievor's pilot licence, for safety reasons.

[46] Unfortunately for the grievor, by Saturday, July 25, 2015, he was in a hospital. He received MRI results that informed him that he had suffered a serious back injury and that he had what appeared to be a gravely serious illness independent of the back injury. He immediately began phoning and emailing TC officials.

[47] At 1:18 a.m. that day, the grievor emailed several TC officials, including Mr. Melo and Mr. Bergeron. He wrote: "I apologize for this but **I need to contact JS urgently to see if I can cancel my resignation**" [emphasis added]. After he received replies that morning asking him to please wait through the weekend and that he would

be contacted on Monday once the office opened, at 10:06 a.m., he emailed Mr. Bergeron and included this statement: "**I have made a huge mistake and need to try and retain my benefits**" [emphasis added].

[48] And on July 28, 2015, the grievor wrote this: "As this situation was under **investigation prior to my resignation** I need to access my benefits" [emphasis added]. When asked about this email in his cross-examination, he acknowledged it and agreed that he had called it a resignation.

[49] In his examination-in-chief, the grievor described how he felt that he was being threatened by Mr. Melo, who the grievor said wanted him out of the inspections branch. He further stated that when he was given the ultimatum to quit cease his new job or resign from TC, he felt that he had no option, as he expected the COI to have been processed before then. When he discussed it with Mr. Bergeron on July 21 in an email exchange while taking the flight-simulator training in Florida, he was told that Mr. Bergeron was preparing to accept his resignation. He explained that he wanted the final decision rendered on the COI because he knew that he would then have 30 days to appeal it. But TC forced him to resign by delaying his COI decision, to force him out.

[50] The grievor attempted to adduce into evidence workers' compensation (WC) documents that confirmed that he sought medical treatment for his back injury that spring, which he said he suffered from slipping on ice while exiting a taxi for TC work travel. He claimed that TC purposely delayed processing what was required for the injury to be investigated and that it was a factor in the delay of his diagnosis for his subsequent illness, which ultimately led him to seek to rescind his resignation.

[51] The employer's counsel objected to the WC documents and line of testimony, on the ground of relevancy. After listening to the grievor describe the relevance of the matter, I asked him to move on from the WC-related questions and declined to accept the documents while sustaining the objection.

[52] The grievor testified that looking back at the times in question, he could not explain what he did or why. He said that he understood that he could not simultaneously hold two jobs but that he felt that TC "jammed" him and gave him no option by delaying his COI decision and by dragging its feet on his WC claim.

[53] The grievor also explained that he never told Mr. Melo or Mr. Bergeron that he was resigning but rather that he said that he could not go on LWOP with TC as he needed the money to support his family. He added again that Mr. Melo threatened him, which caused him to feel agitated.

[54] The grievor explained that he had to move to Calgary and that he felt that he had no other options for income but to commence his new job there with Enerjet. He testified that he never said that he would resign but rather that he was being threatened and that due to that pressure, he said that he would resign. Again, looking back at all this, he added this: "I don't know what I was thinking or doing."

[55] During his cross-examination, the grievor confirmed all the previously noted events, including that he was indeed aware of the values and ethics code, which prevented him from being in a COI. And he added that he began his employment with Enerjet while he was still a TC inspector. He explained that he knew that he had an issue with his new employment but that he thought that he had a 30-day appeal period to have the "COI problems dealt with." The grievor also confirmed that he was in Florida taking flight-simulator training as part of his Enerjet employment during the period that his resignation was being considered by TC. He added that it was during that training that he was called about the test results from his spinal MRI and that he had to urgently return home to seek medical treatment.

[56] When pressed in cross-examination to admit that he had resigned or that he had intended to in July 2015, the grievor admitted that he had. When presented with his email dated July 28, 2015, counsel suggested that he had written a highly cogent and detailed letter about his claim to access health benefits and insurance from his former employer. The grievor agreed that he wrote that detailed and cogent email.

[57] In its submissions, the employer noted the decision in *Stevenson v. Treasury Board (Department of Employment and Social Development Canada)*, 2016 PSLREB 17, which addressed the matter of what the Board has determined constitutes a valid retirement and resignation, as follows:

…

> ***68*** *To determine if a retirement was voluntary, one must look at the employee's intent from both objective and subjective perspectives (Brown and Beatty,* Canadian Labour Arbitration*, 4th edition, at para. 7:7100). Both an objective act and a subjective*

> *intent are required; did the employee really mean what was said? Putting in writing one's intention to retire demonstrates an objective intent to retire. There was no duress, no coercion, and no evidence that the grievor was medically incapable of making the decision, which would have negated her stated intention (see* Hassard v. Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 32 at paras. 163 and 164). She had counsel present who was very involved with her throughout the process. The grievor testified that she was sick of the situation and that she wanted to be done with it. How that occurred was her choice. She never withdrew her decision to retire. She testified that it was a logical decision for her and that she does not want her job back. If her resignation is ineffective, the only remedy open to her is reinstatement (see* Motorways Direct v. Teamsters Union, Local 880 *(1988), 35 L.A.C. (3d) 11). The grievor had time to reflect on her decision; she made her choice and took steps to implement it.*
>
> …
>
> ***121*** *The grievor argued that she was forced to retire for financial reasons. This reason was considered by the former Board and the Federal Court in their* Mutart *decisions. Section 211 of the* Act *specifically denies me jurisdiction over any termination of employment under the* PSEA*. The acceptance of the grievor's resignation and application for retirement was a function of the deputy head's authority under section 63 of the* PSEA*, which is not subject to my review.*
>
> …

[58] The employer also cited *Hassard v. Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 32, as an authority for the proposition that the Board treats retirements and resignations in the same manner with respect to examination and validity and that "… to [the adjudicator's] mind there is no substantive difference between a resignation and a retirement, at least where both are voluntary. Both sever the employment relationship" (see paragraph 198). Additional decisions consistent with the outcome in *Stevenson* were cited and included *Mutart v. Deputy Head (Department of Public Works and Government Services)*, 2013 PSLRB 90, and *Charron v. House of Commons*, 2002 PSSRB 90, which concluded as follows:

> …
>
> *[69] Unfortunately, I have no jurisdiction to remedy the mistake in judgment that led an employee to leave her job voluntarily. Ms. Charron is solely responsible for her actions. When she followed suggestions and advice that she had gathered from here and there and everywhere, Ms. Charron's actions were hers and she must bear the consequences of them.*
>
> …

[59] The employer cited the decision in *Coulter v. Public Service Alliance of Canada*, 2014 PSLRB 53, as follows, as an authority where the Board was not swayed by a claim of confusion or duress in submitting a resignation:

> …
>
> ***57*** *In her submission of February 14, 2014, the complainant attached a copy of her email of resignation dated April 23, 2013, and Ms. Della Costa's email of that same day accepting her resignation. It is very clear to me that the complainant knew exactly what she was doing and why and that she had contemplated this step. As such, the time to grieve this action, if she felt it was forced or under duress, would have been within 25 days from the date she tendered her resignation, which was April 23, 2013. Indeed, in the material provided to the Board, there is nothing that would suggest that the employer was acting in a manner which involved disciplining the grievor, or for that matter that it considered terminating her employment. Neither in the complaint dated December 5, 2013, nor in the particulars filed December 24, 2013, does the complainant make any mention of her resignation as disguised discipline by her employer.*
>
> …

[60] In his submissions, the grievor said that he felt an overwhelming sense of urgency to make decisions, to relocate to Calgary and help his wife with her efforts to care for her mother after the death of her father.

[61] He said that on June 9, he told the employer that he wished to relocate to Calgary, and he inquired about options to work with TC there. He said that he told TC that his wish was to stay employed with it in the long term after he decided to take a job with Enerjet for what he thought would be a one-year leave of absence from TC. He said that with what he thought was a positive initial response from TC to his COI declaration, he accepted the Enerjet job and began his relocation to Calgary.

[62] However, by July 17, no COI decision had been made, and Mr. Melo then threatened him about resigning or being disciplined. He said that his bargaining agent refused to assist him, he felt that he had no options, and TC offered him no options. And finally, he submitted that Mr. Melo simply wanted him gone from TC.

[63] The grievor stated in argument that he was unjustly dismissed from his TC employment because Messrs. Melo and Bergeron referred to his quitting only as an option but provided no other options and did not engage in any meaningful way.

[64] In his impressive research of the jurisprudence, the grievor noted the tort law decision in *Kieran v. Ingram Micro Inc.*, 2004 CanLII 4852 (ON CA), which supported his assertion that a resignation must be clear and unequivocal. He suggested that his email that mentioned resignation was actually a response to the employer to further engage in the COI matter. The noted decision reads in part as follows:

> …
>
> *[27] A resignation must be clear and unequivocal. To be clear and unequivocal, the resignation must objectively reflect an intention to resign, or conduct evidencing such an intention:* Skidd v. Canada Post Corp.*, [1993] O.J. No. 446 (Gen. Div.), aff'd [1997] O.J. No. 712 (C.A.).*
>
> …
>
> *[29] Similarly, Mr. Kieran's conduct and its implications are fact-driven. The issue is whether Ingram was entitled, at law, to treat Mr. Kieran's statements as clearly and unequivocally amounting to his resignation.*
>
> *[30] Whether words or action equate to resignation must be determined contextually. The surrounding circumstances are relevant to determine whether a reasonable person, viewing the matter objectively, would have understood Mr. Kieran to have unequivocally resigned.*
>
> …

[65] While neither party made submissions on the applicability of tort law jurisprudence from civil courts to the Board's federal collective-agreement based jurisprudence, I distinguish *Kieran* on its facts as the resignation at issue in that case stated that Mr. Kieran would resign if a named individual became president of his company. Discussions ensued after that about Mr. Kieran possibly moving to a new division of the company.

[66] The Ontario Court of Appeal (ONCA) found as follows:

> …
>
> *[31] Mr. Kieran did not plainly state that if his competitor was chosen as president he would leave. Had he done so, such a statement may well have amounted to an unequivocal statement of an intention to resign. Instead, however, he said that if Mr. Schofield were chosen as president, he required an international transfer. He made this statement knowing he was a valued employee, that Ingram representatives had, in the past, confirmed the availability of international positions for him, and in the belief that Mr. Rodek could and would arrange such a position.…*

…

[67] No such clear conditions and subsequent actions and discussions over new positions to accommodate Mr. Kieran if the new person was indeed installed as president took place. To the contrary, the grievor was told clearly that he had to cease his COI and that if he did not resign from his new job, disciplinary actions could be taken. As the ONCA noted, each case is fact driven, and the context of the facts are very important. In this case, the grievor made many declarations of his intent to leave TC, and he acted to begin a new job. This context is completely different from *Kieran*.

[68] The grievor also cited the decision in *Toronto District School Board v. C.U.P.E., Local 4400 (Calhoun)*, 2003 CanLII 89635 (ON LA), which reads in part as follows:

> …
>
> *What is significant in the cases is that when assessing whether there is a confirmatory objective intent to quit, arbitrators have realized that the emotional basis for an employee indicating an intention to quit may continue over a period of time. This element of time becomes important in assessing a subjective intention to quit and has always been part of evaluating objective intent. Thus, arbitrators have looked at other conduct in order that a more objective appraisal may be made. The search for a true intent or a continuing intent also explains why some Boards have reinstated employees even after they have changed their minds. Implicit in these cases is the understanding and recognition by arbitrators that resigning or uttering of the words "I quit" may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such is not to be taken as really manifesting an intent by the employee to sever the employment relationship. Boards of arbitration have then looked to other conduct and the course of events over time in order to establish a more objective basis to determine whether the grievor intended to sever the employment relationship.*
>
> …
>
> *I conclude from these cases that in "quit" situations arbitrators will consider an employee's state of mind and assess that state over a reasonable period in order to ascertain whether an employee really intended to sever the employment relationship.*
>
> …
>
> *In summary, I determine that while the grievor did have some understanding he was resigning and his circumstances in life would be altered as a result of it, his emotional state was such that he acted in an irrational manner. I am unable to conclude that the grievor who loved his job and who seemed to be a good employee really intended to quit his job in all these circumstances. I find his*

> *conduct was an attempt by him to resolve a situation in which he felt that his family honour had been slurred, and it was not his true and continuing intention to quit his employment. Within a very short period of time he sent out e-mails to resolve the problem and then indicated to the Union that he wanted his job back. This was not a very lengthy period of time, and, accordingly, I find there was not a true or continuing intent to sever the employment relationship. His actions resulted in a meeting in which the clear purpose was to have the grievor reinstated to his employment.*
>
> *In all of the circumstances of this case, I determine when the Board decided it would not permit the grievor to rescind his resignation it effectively terminated him without just cause. Accordingly, the grievor is to be forthwith reinstated to his employment, but in the circumstances without compensation.*

[69] The grievor also noted the decision in *University of Guelph v. Canadian Union of Public Employees, Local 1334*, 1973 CanLII 2062 (ON LA), in which a dispute arose over medical notes explaining an absence. The grievor in that case was overcome by emotion, and during an outburst, he threw things on the floor and said that he was quitting. Again, no such spontaneous emotional outburst caused the grievor in this case to spontaneously claim that he was resigning his position.

[70] The grievor noted correctly that that arbitration case included a submission by that grievor that he should be allowed a cooling-off period within which he could successfully rescind his stated intent to resign.

[71] However, again, I distinguish that case on its facts, as the grievor in it never stated a desire to resign until he became overcome with emotion in a moment of heated emotion arising from a decision of his employer, which he felt questioned a family member's integrity. That caused him to reluctantly resign for the purpose of defending his family member. Within one week, the grievor admitted that he had calmed his emotions. He told his employer that he had never really wanted to resign.

[72] While I distinguish *Toronto District School Board (2003)* on its facts, I must clarify that there is no general rule as to a cooling-off period (or its duration) as suggested by the grievor. Rather, as the ONCA noted in *Kieran*, in each case such as this one, in which a resignation is later refuted and requested to be rescinded, the facts and context must be carefully examined. In *Toronto District School Board (2003),* the facts clearly established that the grievor in that case was overcome by emotion and that he made a heated declaration in haste that he did not really intend to carry out

and that he acted quickly to clarify and rescind. Contrary to this, the facts in this case set out the grievor's stated intent to resign, his detailed reasons of having to move to Calgary for family reasons, and his repeated intent to want to make a new career start. It was slowly acted upon over a period of many weeks by him starting a new job, and even after he resigned, it was confirmed repeatedly, as he had to return his TC credentials and stamp. Additionally, the evidence demonstrated that the employer spoke to him after he sent his email stating that he would have to resign and that it allowed a week to pass before accepting the resignation.

[73] The grievor also argued that the employer was aware of his health problems in the days and weeks leading up to his resignation and that it should have made an effort to discuss solutions with him.

[74] In the facts of this case, there is no evidence that the grievor requested accommodation or that his back injury was a factor in his resignation. When I asked him why he did not just obtain a doctor's note that stated that he required medical leave for health reasons and that he was unable to work, he replied that on looking back, he did not know why he did not do that. Rather, the grievor's stated reason for his leave of absence was to relocate to Calgary to help care for his family. At the same time, he wanted to maintain an income. The employer offered him other policy-oriented job options, which he declined in favour of the job with Enerjet because he preferred to continue doing flight-operations work and not move into administrative-type duties.

[75] And finally, to support the arguments that I just noted, the grievor submitted that immediately, he responded to the resignation package, asking that it be cancelled. However, this submission is not supported by the evidence. One week passed after he sent his email stating that he would resign, during which time TC communicated with him, including via a detailed phone call and a follow-up email from Mr. Bergeron stating that his resignation would be accepted shortly. The grievor, not yet aware of his dire medical condition, made no effort to walk back his oft-stated desire to resign.

[76] Following the approach stated in *Stevenson* and examining both the grievor's objective and subjective intent, I note that the grievor in this case did indeed submit his resignation in writing. I reject his claim that he asked a question. I find that it was a

clear statement that given the instruction to cease his new job while awaiting a decision on the COI declaration, he was submitting his resignation.

[77] As for subjective intent, I find that his repeated statements to both Mr. Melo and Mr. Bergeron noted earlier that he had to resign, to relocate to Calgary, and that he needed a break from TC satisfy this condition. His email of July 17, 2015, stated this: "**As such I will have to resign effective immediately if your** [*sic*] **not prepared to wait for the [COI] results**" [emphasis added]. It is a clear statement of his intent.

[78] I reject the grievor's argument that that statement was unclear and conditional. By that date, as documented earlier, he was well aware of the need to be patient and to await the deputy minister's COI decision. Also, Mr. Bergeron had told him that he had put himself in a very bad position due to the COI. By the date of the email statement of resignation, I find that he was writing to the effect that TC was not approving his COI, so he would resign. He also admitted in cross-examination that by then, indeed, he was aware that the outcome of the COI process was highly likely to be negative.

[79] To add certainty to the email that states that he chose to resign, the employer noted these several follow-ups to the email in which he confirmed his resignation:

- July 20, 2015 — according to Mr. Bergeron's testimony, he identified an email of that date that he wrote confirming the same. He had just spoken on the phone with the grievor, who explained that he had no choice but to resign from his TC position, as he felt that he could not leave his new job at Enerjet. He stated further that in the call, the grievor told him that he expected to receive a negative decision on his COI waiver request; therefore, his resignation would resolve the COI issue.

- July 21, 2015 — the grievor emailed TC to prepare to return his TC inspector airport access credentials and his identification badge and explained that he was "… starting the new job as a pilot …".

- July 21 and 22, 2015 — the grievor sent second and third emails to TC in which he again arranged to find and return his inspector's stamp.

[80] And finally, the grievor's objective action of choosing to continue his employment with a private-sector aviation operator could not have been a clearer statement of his intent to resign from his TC position.

[81] I also note that consistent with the finding in *Coulter* (at paragraph 57), an emailed resignation is perfectly acceptable as a valid means of notice to an employer.

[82] And consistent with *Charron*, the grievor at bar made a decision that he has lived to unfortunately regret. None of his very sad misfortune was the responsibility of his former employer or its managers, who dealt with him in a professional and fair manner during the difficult time at issue.

[83] I have no hesitation and no doubt concluding that based on the very clear and compelling evidence noted previously, the grievor began a new job, provided a written resignation and finally followed through on that resignation from TC by continuing to work in that new job. He confirmed this upon finding out that he was gravely ill, when he emailed his former employer and said that he had to rescind his resignation.

[84] The evidence leads to no other conclusion than that the grievor knowingly resigned from his position and that he regretted his decision to leave TC only upon learning of his grave illness and that at that time, he undoubtedly began to place more value on his former employment benefits and insurance rather than what otherwise had been his desire, which had been evident for at least three months, to make a new start with a new employer in a different city, due to family priorities.

[85] I also reject the grievor's argument that the employer acted in haste when it accepted his resignation or that it was required to wait longer than it did. In that respect, it is noted that Mr. Bergeron waited until July 23, 2015, to write to the grievor and notify him that his resignation was accepted. This was six days after the July 17 email resignation was sent and three days after the grievor's July 20 phone call with Mr. Bergeron. The grievor had six days after sending his resignation email. He had no second thoughts and did not protest to the employer when Mr. Bergeron spoke to him on the phone about his resignation.

**B. Was the grievor pressured or coerced to resign?**

[86] The grievor argued that the employer delayed the final decision on his COI declaration "to jam" him. He testified that when Mr. Bergeron emailed him on June 21 to say that he was preparing to accept the resignation, the grievor did not see the email as he was in Florida taking the flight-simulator training.

[87] The grievor explained that he was aware of a 30-day period in which he could essentially appeal the COI decision, which he admitted he knew would most likely be unfavourable after his meeting with Mr. Bergeron, as noted previously. He stated in his

examination-in-chief that he did not plan to hold 2 jobs at the same time but that TC continued to delay the decision on his COI, and he knew that even if it was an unfavourable decision, he had 30 days to appeal it and have a rejection overturned. He added that he knew of another TC employee who had followed the appeal process, so he thought that he could do the same thing and be fine.

[88] When asked in his examination-in-chief if he understood the "right and wrong" of starting in the new position at Enerjet while he was still employed as a TC inspector, the grievor replied that looking at it now, he could not explain why he emailed TC as Enerjet's director of regulatory affairs while he was still responsible for those same issues as a TC inspector but that it was only a title and that he planned to work as a pilot for Enerjet. He added that he never intended to be in both jobs at the same time but blamed the delays that he said that TC caused. He also admitted that he did not inform TC that he had started duties at Enerjet on July 15.

[89] Also on July 14, the grievor emailed Mr. Melo and expressed frustration with the time it was taking to obtain a ruling on his COI request and repeated the fact that he had begun new employment. He wrote the following:

> …
>
> *With respect to the* [COI] *issue I had started that process on June 8th. As soon as I had a response from them that was looking positive I contacted JS. Since then I know they had another meeting but I have had no response.*
>
> *I have taken all the steps I can to expedite the response and advised the new job started a few days ago.*
>
> …

[90] On July 21, 2015, the grievor wrote to a TC official to enquire about returning his TC inspector credentials, which had been lost, and again confirmed this: "As I am starting the new job as a pilot I would like to get the pass issue taken care of ASAP."

[91] Mr. Lemire said that the grievor emailed him on June 23, 2015, requesting a copy of the draft COI response, which he said he declined to provide, and he replied that it was still being worked on. The grievor adduced in evidence a copy of the draft that had been prepared without the input of senior TC officials and noted that the draft stated that the negative impacts of the COI declared by the grievor could be mitigated. Mr. Lemire acknowledged the document but stated that he explained to the

grievor the fact that he managed the process for COI rulings but that management would provide the final value-added subject expertise to what would in the final analysis be the recommendation to the deputy minister, who made the final decision.

[92] Mr. Bergeron also testified to the grievor's overly optimistic perspective of the COI declaration. Mr. Bergeron explained that the grievor contacted him and said that they would both be in Ottawa, Ontario, and agreed to meet there on June 18, 2015. Mr. Bergeron testified that the grievor informed him at their meeting that he had made a COI declaration for a new job working as a pilot with a private operator outside TC. The grievor told him that TC's feedback seemed positive and that he hoped to receive the final decision in the immediate future, as he was under some time pressure. Mr. Bergeron testified that immediately, he became concerned while listening to the grievor, as he said that there were significant problems with the notion that the grievor could join a private aviation operator while keeping his position as a TC aviation inspector. Mr. Bergeron said that he expressed strong concerns to the grievor and that he provided detail as to why he thought that the COI was real and that it would be very problematic for the federal government. He also said that he urged the grievor to wait for the deputy minister's final decision before taking on any new employment.

[93] The deputy minister sent the final decision on the COI on July 24, 2015. It directed the grievor not to continue with his proposed course of employment because it was a real COI. The letter states, "This assessment was completed in order to ensure that this situation does not in any way jeopardize public confidence and trust in the integrity, objectivity and impartiality of government." And it adds this: "The risk can't be mitigated and therefore you must refrain from engaging in this outside activity."

[94] The letter relied in part upon advice provided by Mr. Bergeron, who, in an internal email on this matter dated June 18, 2015, wrote that he was concerned about the prospect of the grievor being an inspector who left TC for one year to work with a private aviation operator that was subject to his regulation while with TC. Mr. Bergeron opined that the grievor's return to TC would then risk making it appear to other private-industry aviation operators that TC inspectors may not vigorously enforce regulations so as to not risk potential future lucrative employment opportunities with the aviation operators that they inspect. He also wrote that there would be an appearance of conflict arising from the grievor's personal relationships with his former TC colleagues and managers. When he noted that some other staff left for private-

sector employment, he said that they did so after ending their TC employment. And he opined that there was no way to mitigate the risks of these real or perceived COIs.

[95] Mr. Melo stated that for the federal government to maintain public trust in the safety of Canada's aviation operators, TC inspectors must be strictly separated from regulated operators. He said that inspectors' full independence is critical to public trust in the regulatory system.

[96] Mr. Melo added that by taking a job with a private aviation operator while still employed as a TC inspector and by seeking to return after one year to his inspector position, the grievor risked giving an advantage to an aviation operator, which could have gained inside information from him and later might have expected leniency from him if he returned to his TC position. Mr. Melo also noted the risk that other operators would perceive the COI as benefitting one operator, the one that employed the grievor.

[97] The grievor argued that the COI decision was purposely delayed, which led him to be in his two-job position. Thus, the employer forced him to resign from his TC position. He said that but for the delay, he would have taken advantage of the 30-day period to appeal the rejection of his requested COI waiver. There is no evidence that the employer deliberately delayed its decision.

[98] Consistent with *Coulter*, I reject the argument that TC pressured or coerced the resignation. In reality, the grievor was the only person putting pressure on himself as he chose to put himself into a bind by starting new employment that put him into a real and direct COI with TC before receiving the deputy minister's COI ruling. He was led by a false hope that he would be granted a COI approval, and further that after the COI ruling, he would have 30 days to appeal it.

[99] The grievor also argued that TC's actions in accepting and failing to rescind his resignation were motivated by discipline. He pointed to the fact that his manager threatened disciplinary action against him if he did not cease his new private airline job, and pointed to meeting notes indicating that his manager was considering terminating him. This evidence is not sufficient to establish that the acceptance of his resignation, was in any way, shape or form motivated by some disciplinary intent on the part of the employer.

[100] While the grievor's actions before resigning could certainly have attracted some form of disciplinary action, and which some of the email exchanges alluded to, no such process was initiated before the grievor resigned. Further, as indicated earlier, the employer did not act in haste when it accepted his resignation. The grievor had six days after sending his resignation email. He had no second thoughts and did not protest when Mr. Bergeron spoke to him on the phone about the resignation.

[101] More than the mere possibility or probability of disciplinary action is required to establish a disciplinary motive (see *Robertson v. Deputy Head (Department of National Defence)*, 2014 PSLRB 63 at para. 55; and *Canada (Attorney General) v. Assh*, 2005 FC 734). Similarly, as the adjudicator stated in *Mangat v. Canada Revenue Agency*, 2010 PSLRB 86 at para. 29: "… the fact that the resignation is given when it is clear that termination is the alternative does not in itself constitute coercion …". The situation in *Mangat* involved allegations of misconduct and the employer had concluded that the grievor should be terminated. The grievor was given the letter of termination and the option of resigning, which he did. In that case, the grievor failed to prove that the conduct of the employer amounted to deception or coercion to resign. In the present case, termination was not necessarily a clear alternative and the grievor did not establish that his resignation was improperly obtained through coercion or disciplinary intent.

[102] Likewise, having found that the grievor did not establish that his resignation was improperly obtained, there is no basis to continue examining the grievor's claim that failing to rescind his resignation was also disciplinary. On the evidence before me and given my finding in this decision that the grievor resigned his position, I am without jurisdiction to consider whether the employer improperly declined the subsequent request by the grievor to rescind his resignation.

**C. Did the grievor lack the mental capacity to resign?**

[103] In addition to arguing that he did not resign from his position, the grievor argued that he lacked the mental capacity to make a truly voluntary decision about resigning, and this fact should vitiate the resignation if he is found to have resigned.

[104] The grievor testified to taking prescription Percocet narcotic painkillers to treat the symptoms of a painful back injury during the spring of 2015 and during the times of the events at issue. He also explained that he took a large amount of the medication

that went beyond what was prescribed to him. He explained that he obtained prescriptions from several physicians and that he obtained a large volume of narcotic painkillers that were discovered in a deceased relative's home.

[105] He testified that he also mixed the potent painkillers with over-the-counter (OTC) medications such as muscle relaxants in efforts to ameliorate constant pain. In his testimony describing how he felt approximately eight years earlier during the events at issue, the grievor said that he was not himself.

[106] The grievor called his wife, Misty Cowman, to testify. She explained that approximately 1000 Percocet pills were recovered from her parents' home after her father died. She said that the grievor's back pain was becoming worse and that he was taking 12 to 16 Percocet pills per day, plus muscle relaxants. She said that his personality had become different and that he had become aggressive, angry, confused, and irritable. She also said that he would forget their discussions and that he would experience mood swings depending on whether he had taken medication or required more of it. She said that at some point during the events, the last of the narcotics that they had taken from her deceased father's supply were thrown away.

[107] She said that she was incredibly concerned but that she did not consider it a matter of his safety. But she admitted that she knew that it could be a work issue for his medical pilot certificate. She said that they were very difficult times, due to his "ugly moods". She admitted during cross-examination that despite the fact that the grievor took large amounts of medication, he was at work with TC during most of the times at issue, other then when he used sick leave related to his injured back.

[108] The grievor called Dr. Michael Geoghegan ("the doctor") to testify. He was a specialist in family medicine and a medical board-certified specialist in aviation medicine, and he worked as a consultant to TC. He was not the grievor's family doctor, but through years of aviation-licensing medical consultation, he had seen the grievor regularly and said that he acted in the capacity of a family doctor for the grievor.

[109] He described his introduction to the grievor's medical problems at the times at issue. The grievor contacted him as part of his efforts to obtain the approvals necessary to start working as an Enerjet pilot. The grievor told him that he was experiencing back pain and that he was taking painkillers as a means to cope. Dr. Geoghegan explained that he immediately became concerned about the grievor's health

and that more than a sore back was at issue. He also testified that he refused to prescribe the grievor more narcotics, as his research into a medical database set out that the grievor had obtained narcotics from a dietician and that he was concerned about any further use of them. He also explained that using narcotics was prohibited for anyone holding a pilot licence because they impair cognitive and motor skills.

[110] When asked in his examination-in-chief about Percocet's effects upon a person's ability to function, he explained that it causes cardiac and respiratory depression, slows the central nervous system such that the ability to mentally process things such as sights and sounds is slowed, slows executive mental functions through its sedative function, and can cause some memory loss, depending upon the dosage and the cumulative effects. Specifically, it causes amnesia, sedation, and impaired cognition, judgement, and reactions in an aviation environment. He concluded that his opinion was that the grievor did not appreciate the seriousness of his medical condition.

[111] The doctor was also asked about the grievor's use of OTC muscle relaxant medication in addition to the narcotic painkillers. The doctor replied that mixing such OTC medications with narcotics could overwhelm the central nervous system.

[112] He also confirmed that as part of his professional duties, he wrote to TC's senior regional aviation medical officer (Dr. J.A. Danforth) to report the grievor as being unable to perform his pilot duties due to using narcotics, which led TC to suspend the grievor's pilot licence. He added that the grievor should have known that his drug use had to be reported immediately when he began using it.

[113] In response to being asked how he had observed the grievor's behaviour during the time at issue, the doctor replied that he noted some erratic communications with multiple phone calls, messages, and emails during a very brief period.

[114] The doctor also confirmed that he had a copy of a July 31, 2015, letter from Dr. Danforth. Dr. Danforth was not called to testify to what he wrote in the letter, which addressed the grievor's narcotic use, confirmed that his pilot licence privileges were still suspended, and included that following: "I note that you have been using narcotic analgesics for some time to control your discomfort and that this could have affected your judgement and that you continue to control your pain in this fashion."

[115] While the doctor's testimony about the effects of narcotic painkillers upon a person was entirely credible, I note that the evidence before the hearing did not set out that Dr. Danforth had ever personally examined the grievor during the period that led to and included his resignation. Therefore, Dr. Danforth's hearsay statement in the letter just noted about the grievor's judgement has limited probative value in my assessment of the state of the grievor's mind when he elected to resign.

[116] In a March 27, 2017, letter, which in cross-examination the doctor confirmed he wrote at the grievor's request to support his litigation challenging the fact that he resigned, he states as follows:

> …
>
> *… The pain was such that he was regularly exceeding the stated dosage of the narcotic in an effort to relieve his pain* [from a gravely serious spinal injury and illness]. *The drug itself even in therapeutic quantities can cause fatigue, memory loss and delirium which is why he was advised as a pilot not not fly a plane in the first case.*
>
> *Further to this Mr. Cowman stated to me that he was taking more than the stated maximum permissible daily dose of this narcotic ….*
>
> *Fortunately the treatment has been successful but he is now in negotiations with his former employer one the loss of his job, benefits and pension as a result of the course of actions that he undertook while under the effects of high potency narcotics to address the pain arising from his spinal cord tumour.*
>
> …
>
> [*Sic* throughout]

[117] The employer's counsel objected to me accepting this letter as an exhibit as it was written nearly two years after the events at issue. I accepted it and indicated that I would be cautious about the weight assigned to it.

[118] During his cross-examination, the doctor admitted that his many statements about how the drugs that the grievor took could have affected his health were not from his direct observations. He said that he did not examine the grievor during the days leading up to and including the resignation. Rather, he candidly stated that his comments about the effects of the drugs were based upon well-accepted medical knowledge and a product monograph from Percocet or Oxycontin, as it is also labelled. As such, he admitted that he had no direct and personal medical knowledge of the grievor's actual state of health and state of mind when he decided to resign.

[119] The doctor said that after the grievor began his new position at Enerjet and then resigned from TC, he saw the grievor at his office on July 15, 2015, and when asked, said that indeed, he had assumed that the grievor was alone and had driven himself to the medical appointment. The doctor also stated that he observed no visible cognitive impairment of the grievor during this and another consultation he had in person with the grievor on July 27, 2015. He also admitted that he did not perform a cognitive function assessment of the grievor, as he said that a specialist would have had to do it. He also stated that he did not offer a medical opinion on the grievor's mental or cognitive functioning at any time during July 2015 when he saw the grievor.

[120] When challenged on this point in cross-examination, the doctor confirmed that at no point did he perform a psychological evaluation of the grievor. Rather, he explained that he provided known information about the side effects of drugs and the quantities that the grievor told him that he had consumed. The doctor added that in addition to sharing the side effects, he personally observed erratic behaviour through the grievor's phone calls and emails to his clinic in late June and July. And in his opinion, the grievor failed to take the potentially very serious risks of his pain symptoms seriously, as he did not seek diagnostic tests in a timely manner. Specifically, the doctor mentioned what he considered was an irrational delay of three weeks during that time that the grievor took to seek an MRI, which eventually diagnosed a spine injury and a gravely serious illness.

[121] When asked again to explain his conclusion as to the grievor's irrational behaviour, the doctor said that in his opinion, the grievor's three-week delay seeking an MRI and downplaying the seriousness of his pain was not normal behavior.

[122] The grievor also drew attention to a letter dated July 17, 2015, which he received from Dr. Danforth, the senior regional aviation medical officer whom had been contacted by Dr. Geoghegan in a letter dated July 2. The grievor was cautioned about his reported use of a narcotic to treat the pain from his back injury. The letter suspended his pilot licence, as the *Canadian Aviation Regulations* (SOR/96-433) (at s. 404.06) do not allow pilots to consume such medications due to their effects upon a person's mind and physical reflexes, as was testified to by Dr. Geoghegan.

[123] In anticipation of this issue being put forward by the grievor, the employer's counsel asked detailed questions of Mr. Melo and Mr. Bergeron about their interactions

with the grievor during the times at issue. Both witnesses acknowledged that they had meetings and several phone calls and that they exchanged email correspondence with the grievor during the weeks of the spring and early summer of 2015. Both stated that they made no observations whatsoever of anything unusual about the grievor in their interactions with him. Both also stated that they knew the grievor and that they would have noticed and remembered anything that seemed unusual about him.

[124] In his closing submission on the matter of his capacity, the grievor pointed to the arbitral decision in *Great Atlantic & Pacific Co. of Canada Ltd. v. U.F.C.W., Locals 175 & 633*, 1994 CanLII 18619 (ON LA)("*Great Atlantic*"), as an authority for the assertion that his state of health was such that it should not be found that he was able to form the proper mental intent to resign from his position.

[125] *Great Atlantic* deals with a grievor whose marriage had dissolved and who claimed to be "seriously affected" by it. His symptoms were found to include insomnia, depression, and the inability to make decisions (at page 386). His stress rose to the point that he arrived for his shift one evening and felt as if he were having a heart attack. He testified that at that moment, God told him that it was alright to quit his job (at page 386). He went to his workplace and informed a manager that he was quitting. After attempting to clarify if he really wanted to quit and after asking if he had a plan to earn a living, to which he replied that he did not, the grievor proceeded to quit his job. Shortly after that, he picked up his last paycheque and then went home and did nothing. Weeks turned into months, and he began to seek medical treatment for his stress due to not working, having no money, and depression.

[126] Approximately 9 months later, he obtained a doctor's note that set out that when he quit his job, he was under "… considerable external stress causing him to become ill." He was responding well to treatment, and his prognosis was very good. He asked for his former job back (at page 389). At around the same time, the grievor began part-time employment with his former employer but sought reinstatement in his full-time position. Approximately 11 months after his resignation, he grieved his employer's refusal to reinstate him in his full-time position (at page 397).

[127] On pages 406 to 411, the arbitration panel in *Great Atlantic* found the following:

*Indeed, the following list of physical and emotional consequences his disastrous situation had on him and his social life between the date of his actual separation up to October 17, 1992, can be made:*

*(1) he became ashamed of his marriage breakup;*

*(2) it became difficult for him to face his co-workers;*

*(3) he lost weight;*

*(4) he suffered from insomnia;*

*(5) he cut his involvement with his church group;*

*(6) he stopped seeing his friends;*

*(7) he stopped seeing his children;*

*(8) as he became increasingly isolated, he would retrieve in his bedroom at his mother's house and do nothing;*

*(9) he was unable to take simple decisions such as to determine which vehicle he should buy;*

*(10) as he arrived at work at the end of September he felt he was going to have a heart attack;*

*(11) he started having what can only be considered as delusions such as "God telling [him] to quit his job";*

*(12) during the week preceding his resignation which was, according to him, a holiday Mr. Arbuthnot had granted him, he stayed at home in his bedroom and did nothing.*

*The grievor's testimony on these symptoms could not easily be verified or contradicted by the employer because many of them lie within Mr. Robinson's sole knowledge. However, having seen the grievor in testimony and cross-examination, it is difficult not to believe that he was anything but candid. All of these symptoms are consistent, furthermore, with Dr. Murphy's assessment that the grievor was "under considerable external stress". The grievor's testimony that "He was not himself" is supported, moreover, by the pattern of his conduct in October, 1992. Indeed, the fact of his resignation, in and of itself, made no sense when measured in light of his personal circumstances. As arbitrator H.A. Hope wrote in* Re Alcan Smelters, supra, *at p. 421: "In fact, the decision was so profoundly contrary to his interests that the very fact of the quit was sufficient to call his judgment into question."*

*The same applies here especially when one keeps in mind the near 20 years of seniority the grievor had accumulated, his pension fund, etc. Quitting his job compounded a disastrous set of personal circumstances and was more consistent with the signs of depression that characterized his behaviour at the time rather than the deliberate act seen by the employer.*

*I find that all of the above create a presumption to the effect that at the time of his resignation, the grievor "was not himself" and that he was* ***subject to such stress as to call into question the voluntariness of his action****.*

…

*In an ordinary case, these indicia could be considered, with others, as confirmatory of a true intention to quit. In the instant case, however, I find that the weight of these indicia taken as a whole is not sufficient to overturn the presumption to the effect that the* ***symptoms the grievor suffered from affected his judgment to the point of calling into question the rationality of his thought process at the relevant time****. In the course of a 10 to 15-minute conversation, a person may appear calm and relaxed but the sole appearance is certainly not sufficient evidence of that person's state of mind. This is so, especially when, as in the instant case, during the conversation,* ***that person takes an action which makes no sense in light of its personal circumstances and is profoundly contrary to its interests****.*

*I am satisfied that the weight of the evidence introduced by the employer on the pre-resignation actions of the grievor is not sufficient to overturn the presumption to the effect that on October 17, 1992, the symptoms the grievor suffered from affected his judgment to the point of calling into question the rationality of his thought process.*

…

*The grievor's behaviour, his symptoms and medical problems after October, 1992, all appear to be in line with those that affected him starting in July, 1992, and to be a continuation of those symptoms. The fact that in January, 1993, he was referred to a psychiatrist is noteworthy because it sustains the presumption that* ***the grievor's thought process was impaired to such a degree as to require professional help****. Since such problems do not usually develop overnight, it is safe to assume that they existed prior to January, 1993. They also continued after that date as is evidenced by the grievor's hospitalization a week before his return to work, the prescription of antidepressants and by his treatment by his psychiatrist starting in May, 1993. Furthermore,* ***the grievor's behaviour in not trying to find work or even applying for U.I.C. is inconsistent with that of a person whose thought process functions normally. His inaction, again, cannot make sense in light of his personal circumstances****.*

…

*In short, I find that the grievor's actions between October, 1992, and his return to work in May, 1993, occurred during a period where he continued to suffer essentially from the same symptoms that prompted his resignation in the first place. These actions or inactions cannot be viewed, therefore, as confirmatory of an original intent to quit his job.*

…

*In conclusion, I find that all of the* ***objective acts of the grievor*** *that occurred after October 17, 1992, cannot be considered as confirmatory of an original intention to quit his full-time job. The*

> *weight of these acts, in the balance of the whole of the evidence, do not overturn the presumption to the effect that the grievor's state of mind on October 17, 1992, as a result of the "considerable external stress" he was under was such that the* ***rationality of his thought process and the voluntariness of his resignation must be seriously doubted****. As a result, on the whole of the evidence, I hold that Mr. Robinson did not intend to quit his full-time job on October 17, 1992.*
>
> …
>
> [Emphasis added]
>
> [*Sic* throughout]

[128] The grievor in this case paid special attention to this passage at page 403, which states the following:

> …
>
> *… In other words, in cases where an employee has handed in his resignation, orally or in writing, the initial burden of evidence is on that employee to prove that he did not truly intend to quit. The more the evidence that* ***his thought process was impaired at the time of his resignation*** *is convincing, the more it becomes incumbent on the employer to produce evidence of confirmatory objective actions by the employee.* ***However, if these actions occurred while the employee continued to suffer from the same illness that prompted his resignation, the evidence of these subsequent actions will carry little or no weight****.*
>
> …
>
> [Emphasis added]

[129] Commenting upon that passage, the grievor at bar noted his testimony in which he said that on looking back at the week in question leading up to his resignation, he could not explain why he did what he did and that he just was not himself then.

[130] He also pointed to the doctor's testimony, who explained the product monograph of the Percocet that the grievor was heavily dosing himself with, said that poor judgement, impaired cognitive function, and irrationality were all side effects of it, and said that I should decide this case the same as *Great Atlantic*, given the grievor's cognitive impairment and how it vitiated the voluntariness of his actions.

[131] Thus, it appears that the arbitral panel in that case rested its decision largely upon a finding that what the grievor had done made no sense in light of his personal circumstances and its contrariness to his interests, and that later, medical evidence

that demonstrated that the grievor suffered from a mental illness confirmed that his thought process was impaired and put in doubt the voluntariness of his resignation.

[132] Counsel for the employer responded and submitted that the test for mental incapacity sets a very high threshold for such a finding. Counsel said that there was no direct evidence of the grievor's actual mental acuity during the times at issue and that even if his judgement was impaired, it failed to meet the test of mental incapacity.

[133] Counsel pointed to the jurisprudence of the Board in *Reid v. Deputy Head (Library and Archives of Canada)*, 2021 FPSLREB 104, which cites *Topping v. Deputy Head (Department of Public Works and Government Services)*, 2014 PSLRB 74. *Reid* states the following:

> …
>
> *[99] The threshold for setting settlements and contracts aside is understandably very high. Otherwise, there would be a chilling effect on the settlement process, which would be contrary to both the public interest and the administration of justice. In the case of* Topping v. Deputy Head (Department of Public Works and Government Services)*, 2014 PSLRB 74 at para. 126 (employer's book of authorities, Tab 8), the Board indicated that it is on the grievor to establish that he did not have the capacity to enter into the agreement:*
>
> > 126 I agree with the reasoning in *Karaim* at paragraph 29, which is that "a deal is a deal unless there are compelling labour relations reasons to set the agreement aside." Clearly, one party not having the required mental capacity when the agreement was made would be a compelling labour relations reason, and the agreement would be set aside. It is not sufficient for a party merely to state that it did not have the mental capacity to enter into the agreement. Evidence that can be tested on an objective standard must be produced at the hearing.
>
> …
>
> *[102] At paragraph 101,* Topping *refers to* Karaim v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-85*, BCLRB No. B24/2008, as follows:*
>
> > **101** … it was policy not to look behind settlement agreements. At paragraphs 29 and 30 of Karaim, the arbitrator stated the following:
> >
> > *29.*
>
> …

> … **"[A] deal is a deal" unless there are compelling labour relations reasons to set the agreement aside.**
>
> *30. Where a party enters into an agreement under duress or as a result of undue influence, the agreement was not entered into voluntarily and therefore will not be enforceable against that party. Not all forms of pressure or stress constitute duress or undue influence. In the labour relations context, the test for undue influence and duress is very high. As noted in* Jennifer MacDonald*, BCLRB No. B315/2002, at para. 55:*
>
> **In law, a party will not be held to an agreement it has entered into under duress or as a result of undue influence. For an agreement to be binding, it must be entered into freely**. However, this does not mean that any form of pressure will render an agreement voidable. Agreements, particularly in labour relations matters, are not made under sterile or laboratory conditions. It is completely unrealistic to suggest that anyone is entitled to decide to enter into an agreement free of any pressure whatsoever. Like it or not, pressures are part of life. Most decisions, particularly significant ones, are made under pressure, sometimes pressure so overwhelming that it could be said that the person had no real choice but to act as s/he [sic] did. The real question is not whether there was pressure, but whether it was undue or improper in the circumstances.
>
> …

*[103] The employer argued that the threshold for overturning an agreement on the basis of incapacity is subject to the same very high threshold that applies to duress. The contract must not be overturned unless there is clear and compelling evidence of incapacity.*

*[104] The Alberta Court of Queen's Bench, in* RMK v. NK*, 2020 ABQB 328 (employer's book of authorities, Tab 6), had occasion to address the issue of capacity. It stated as follows at paragraphs 130 to 133:*

> 130 Whether an individual has the requisite capacity for the decision being made is a question of fact to be determined in all of the circumstances. The assessment is a highly individualized and fact-specific inquiry ….
>
> 131 There is a presumption in law that an adult has the capacity to contract. The burden or onus is on anyone attempting to show a lack of capacity on a balance of probabilities … If the Court concludes that the evidence is ambivalent or equivocal or does not reach the standard of proof of balance of probabilities, then the Court will make a finding against the party who bears the burden of proof ….
>
> 132 The case of *Bank of Nova Scotia v. Kelly* (1973), [1973 CanLII 1289 (PE SCTD)] 5 Nfld. & P.E.I.R. 1, 41 D.L.R. (3d) 273

> (P.E.I. S.C.) [*Kelly*] set out a test for determining capacity to contract which has been followed by other Canadian Courts. For the contract to be valid, both parties must have: (a) the ability to understand the nature of the contract; and (b) the ability to understand the contract's specific effect in the set of circumstances to which it pertains. The question is not whether the contracting party whose capacity is in question failed to understand the nature and effect of the contract; rather, the question is whether the person was *capable* of understanding it ….
>
> 133 … a person is, in law, mentally incompetent when they are, by reason of their mental state, unable to understand the nature and terms of the contract and of forming a rational judgment of its effect upon their interests ….
>
> …
>
> [Emphasis in the original]

[134] From that concise statement of the law as to capacity to contract in Canada, I note with emphasis the passage from the Alberta Court of Queen's Bench's decision in *RMK v. NK*, 2020 ABQB 328, cited with approval by the Board in *Reid*, which found, "The question is not whether the contracting party whose capacity is in question failed to understand the nature and effect of the contract; rather, the question is whether the person was **capable** of understanding it …" [emphasis in the original].

[135] Therefore, the grievor had the burden to adduce clear and convincing evidence that he lacked the mental capacity to be able to understand the effect of his resignation. However, the evidence established that his state was impatient, hasty, and stubborn. He argued that he felt pressured and left with no option by TC.

[136] Nothing in the evidence indicates that he was unable to understand the nature and terms of his resignation or forming a rational judgment of its effect. In fact, relocating to Calgary and maintaining an income through his new job with Enerjet were exactly the grievor's stated interests.

[137] It is only when he was diagnosed with a gravely serious illness that the grievor's priorities changed, and he decided that moving to Calgary to help his wife help her mother was less important than staying in his TC inspector position in Edmonton.

[138] But for the unfortunate news of his illness, the evidence suggests that he would have continued his plan with his new job in Calgary, to support his family needs, as he deemed was his priority.

[139] After a careful review of the cases provided on this point by both parties, I find that the facts in this case fit properly within the Board's decision in *Reid* and are consistent with the *RMK* decision that it relied upon.

[140] In this case, I reject any notion that I should be swayed by whether I find the grievor's decision to seek employment in Calgary for family reasons irrational or against his best interests. Such analysis would be paternalistic as it does not fit with the facts at bar or the *ex post facto* events that have had such an unfortunate impact on the grievor.

[141] The grievor formulated the opinion on his own that a career change and a move to Calgary was best for him and his family. He acted on it over a period of several weeks, and even after submitting his resignation, he confirmed his intent to move to a new job, as he communicated with TC about his need to return his badge and stamp.

[142] He had no regrets and no second thoughts. Apparently, his decision was satisfactory to him and only doubted his decision when he found out that he had a grave illness. This is a completely different set of facts than in *Great Atlantic*.

[143] I also note the important fact in this case that is lacking in the other cases cited by the grievor, which is that he undertook a course of action by starting new employment that not only provided objective evidence of his subjective intent, as noted in those cases, but also, importantly, was completely in conflict with the interests of his former employer, such that it made his return highly problematic, as the employer reasonably concluded that his new employment would risk public confidence in the inspection and safety of civil aviation in Canada. This distinguishing fact was foreshadowed in *Canada Post Corp. v. C.U.P.W. (1991)*, 21 LAC (4th) 59 at 70:

> …
>
> *"The act of quitting a job has in it a subjective as well* [as] *an objective element. An employee who wishes to leave the employ of the Company must first resolve to do so and he must then do something to carry his resolution into effect. That something may consist of notice, as specifically provided for in the Collective Agreement or* ***it may consist of conduct, such as taking another job, inconsistent with his remaining in the employ of the Company."***
>
> …
>
> [Emphasis added]

[144] The evidence clearly established that the grievor had sufficient capacity to know the implications of his actions. Was he himself? Was his judgement clouded? Was he impatient and irritable? The evidence suggests yes and quite likely so to all those behaviours. However, I conclude that his ability to negotiate and secure a new job, which included being a civil-aviation pilot, and his travel to Florida and participation in pilot flight-simulator training, as well as his clearly written and eminently cogent emails to TC, all demonstrate that he was functioning at a level of mental capacity and cogency such that he easily was capable of comprehending the gravity and outcomes of his actions of starting new employment and resigning his TC position.

**D. Did TC violate the collective agreement?**

[145] The grievor alleged that the employer's refusal to rescind his resignation violated the management-rights article of the collective agreement. Sections 208(4) and 209(2) of the *Act* requires a grievor's bargaining agent to carry any allegation involving the interpretation of or a breach of the agreement. That was not so in this grievance or in the referral to adjudication. As such, the collective agreement allegations were not properly before the Board.

**III. Conclusion**

[146] For the reasons explained in this decision, I conclude that on the clear and cogent evidence before me, the grievor had the mental capacity to understand the effects of his actions and that he resigned voluntarily, without any coercion or duress and without any disciplinary actions by the employer. As such, I am without jurisdiction, and the grievance is denied.

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

*(The Order appears on the next page)*

## IV. Order

[148] The grievance is denied.

June 17, 2024.

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