**Date:** 20240910

**File:** 566-20-44290

**Citation: 2024 FPSLREB 123**

*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

**E.F.**

Grievor

and

**DEPUTY HEAD**
**(Canadian Security Intelligence Service)**

Respondent

Indexed as
*E.F. v. Deputy Head (Canadian Security Intelligence Service)*

In the matter of an individual grievance referred to adjudication

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

**For the Grievor:** Brendan Harvey, counsel

**For the Respondent:** Christine Côté, counsel

Decided on the basis of written submissions, filed May 24 and June 14 and 21, 2024.

**REASONS FOR DECISION**

## I. Overview

[1] This decision pertains to a preliminary objection to the jurisdiction of the Federal Public Sector Labour Relations and Employment Board ("the Board") to hear this matter. At issue is a grievance referred to adjudication by an employee ("the grievor") of the Canadian Security Intelligence Service (CSIS or "the respondent") who was demoted to a lower-level position after a medical assessment recommended that she be offered a position other than the one she had previously occupied.

[2] The grievance at issue was referred to adjudication under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which is the provision that pertains to a disciplinary action that has resulted in, among other things, a demotion or a financial penalty.

[3] The respondent argues that the Board does not have jurisdiction to hear and determine the grievance at issue because it does not pertain to discipline. According to the respondent, it pertains to allegations according to which it failed in its duty to accommodate the grievor. According to it, the grievor — who is not represented by the Public Service Alliance of Canada ("the bargaining agent") — attempted to alter the nature of her grievance by referring it to adjudication under the provision that applies to disciplinary matters.

[4] A hearing on the merits of the grievance is scheduled in a few months. The parties requested that the respondent's objection be decided in advance of the hearing and that the decision be based on written submissions. I agreed.

[5] Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) allows the Board to decide any matter before it without holding an oral hearing. I am satisfied that the documents on file as well as the parties' written submissions allow me to determine the respondent's objection to the Board's jurisdiction without further submissions or an oral hearing.

[6] For the reasons that follow, the respondent's preliminary objection is allowed. The Board does not have jurisdiction to decide this matter.

## II. Confidentiality orders

[7] As it routinely does in matters before the Board, the respondent requested the anonymization of the Board's file and any Board decision. It also requested that all documents that include the names of CSIS employees or that could include information that could identify CSIS employees be sealed until the documents could be replaced by redacted versions. The grievor did not object.

[8] On May 24, 2024, I granted the respondent's request on a provisional and interlocutory basis. I ordered that the grievor be identified by the initials "E.F." and that the Board's file be sealed until all documents containing the names of CSIS employees or information that could identify them had been replaced by redacted versions. At the time, I indicated that the final decision on anonymization and sealing would be made by the Board member seized of the file on its merits. Seeing as I have decided that the Board does not have jurisdiction over this matter and that the file must be closed, I must make a final determination on this issue. These are my reasons.

[9] Section 18 of the *Canadian Security Intelligence Service Act* (R.S.C., 1985, c. C-23; "the *CSIS Act*") prohibits disclosing the identities of employees who were, are, or are likely to become engaged in CSIS' covert operational activities. According to the respondent, although not all CSIS employees are engaged in such activities, disclosing their identities would hinder their ability to do so in the future. It also argues that disclosing information that could identify CSIS employees could endanger them and could compromise both their and CSIS's ability to investigate threats to Canada's security.

[10] According to the respondent, anonymizing the file and redacting information that could identify CSIS employees would allow protecting sensitive information while also respecting the open court principle as much as possible.

[11] The open court principle is well recognized in the Supreme Court of Canada's jurisprudence. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, and *Sherman Estate v. Donovan*, 2021 SCC 25, are often-cited decisions of the Supreme Court of Canada that describe the principle of open and accessible proceedings, as well as the criteria for imposing discretionary limits on presumptive court openness. The principle also applies to the Board (see *Canada (Attorney General) v. Philps*, 2019 FCA 240).

[12] In certain circumstances, it may be appropriate for a court, or a quasi-judicial tribunal such as the Board, to exercise its discretionary authority to issue an order restricting court openness to balance the right to freedom of expression with an important public interest (see *Sierra Club*; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835). The Board must exercise its authority with restraint and in a way that ensures that the open court principle is maintained (see *Sierra Club*, at paras. 48 and 53; and *Philps*, at paras. 23 to 25).

[13] As indicated in *Sherman Estate*, at para. 38, any person asking the Board to exercise its discretion in a way that limits the open court principle must establish the following:

> …
>
> *(1) court openness poses a serious risk to an important public interest;*
>
> *(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,*
>
> *(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.*
>
> …

[14] I accept that the risk described by the respondent is real. The grievance at issue involves information protected under the *CSIS Act* as well as information that could reveal employee identities, roles, and functions. Disclosing it could pose a serious risk to an important public interest, namely, protecting both the respondent's employees and its ability to investigate threats to Canada's security.

[15] The importance of that public interest is reflected in the fact that Parliament chose to provide a measure of protection for CSIS employees past and present by including a provision in the *CSIS Act* that prohibits disclosing their identities. In my view, this is a recognition that the identities of CSIS employees deserve protection in the open court context and that the security concerns related to disclosing their identities have a clear public interest aspect. I find that the respondent's requested order is necessary to address that risk. In my opinion, no other reasonable steps could be taken that would address it.

[16] The confidentiality order's impact on the understanding and intelligibility of this decision is minimal. Anonymizing the grievor's identity while allowing the publication of the decision and public access to the Board's records respects the open court principle. The benefits of anonymizing the grievor's name and redacting information that could identify CSIS employees outweigh the detrimental effects on the rights and interests of the parties and the public. I believe that this meets the proportionality criterion set out in *Sherman Estate*.

[17] The confidentiality order is granted. Any documents containing the names of CSIS employees or information that could identify them, if any, will be sealed until they are replaced by redacted versions. Once that information has been completely redacted from the Board's file, any unredacted documents will be returned to CSIS, and the redacted file will be unsealed.

[18] As noted, the grievor will be identified by the initials "E.F." Those initials do not correspond to her name.

**III. Summary of the facts and procedural history, as described by the parties**

[19] The issue that I must determine is whether the Board has jurisdiction to hear and determine the grievance at issue.

[20] E.F. has been employed by CSIS since 2005. Before October 31, 2019, she occupied a position classified Level 6. Her position was in western Canada. When she occupied that position, she was not a member of a bargaining unit.

[21] Traumatic events in her personal life led to the grievor being diagnosed with a serious medical condition, which the stressful nature of her work aggravated. In July 2019, she went on sick leave. In or around September 2019, she provided the respondent with a medical assessment that recommended that she not return to work in the position that she occupied before her sick leave. Discussions between her and the respondent began about accommodating her in a different position.

[22] The grievor was scheduled to return to work in early November 2019. On October 31, 2019, she was offered an accommodation in a lower-level, lower-paying Level 4 position in another sector of the respondent's operations in western Canada. Because the transfer to a lower-level position was for medical reasons, she was offered salary protection for 12 months. In its written accommodation offer, the respondent

indicated that there were no vacant Level 6 positions that met her restrictions as they were described in her medical evaluation. According to her, she later learned that Level 5 and 6 positions were available at the time.

[23] The grievor was given 2 days to respond to the offer. She accepted it. According to her, before accepting it, the respondent told her that other Level 6 positions would arise before the end of the 12-month period of salary protection, which would result in no permanent demotion or financial loss.

[24] The terms and conditions of employment of the grievor's new position were governed by a collective agreement between CSIS and the bargaining agent. She was unaware that her new position was subject to a collective agreement. For that reason, she was not aware that she could request her bargaining agent's assistance in the accommodation or grievance process.

[25] When the grievor's sick leave ended, she returned to work in her new Level 4 position. She requested and was granted the right to work reduced hours, with the objective of gradually returning to full-time work. According to her, shortly after returning to work, her new supervisor told her that he would not have accepted her in the role had he known that she would be on a gradual return to work. Some of her colleagues allegedly made comments about the inconvenience that her gradual return to work caused them. The grievor did not feel that she was qualified for the Level 4 position.

[26] The grievor applied for an unspecified number of Level 5 and 6 positions. She was unsuccessful. In one case, several months after returning to work, she applied for a Level 6 position but was told that she could not be considered for it because she was not working full-time. In her written submissions, she indicated that after learning that her gradual return to work meant that she would not be considered for the position, she returned to work full-time sooner than originally planned. She did so to be eligible for the Level 6 position. She did not get the job, and according to her, her supervisor criticized her for returning to work full-time to be able to apply.

[27] In September 2020, the grievor went on sick leave again. Her salary protection ended in early November 2020.

[28] The grievor retained legal counsel. On December 2, 2020, her legal counsel wrote to the respondent with the stated purposes of addressing issues that had arisen with respect to the grievor's employment due to her disability and communicating concerns about the accommodation that CSIS had offered up to that point.

[29] The letter described the events that led to the grievor's 2019 departure on sick leave, her return to work in a Level 4 position for which she felt that she did not meet the job requirements, her new supervisor's displeasure about the gradual nature of her return to work and what was described as the respondent's lack of support for her in her search for Level 6 positions during the 12-month period of salary protection. Several paragraphs of the letter were dedicated to describing the nature and extent of a respondent's duty to accommodate an employee with a disability, the "adverse differential treatment" that the grievor suffered when she was transferred from a Level 6 to a Level 4 position, and the respondent's alleged failure to work with her to find a suitable accommodation.

[30] In his letter, the grievor's legal counsel described the respondent's actions as inconsistent with its duty to accommodate under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). He also indicated that a complaint had been made with the Canadian Human Rights Commission (CHRC). That complaint contained a summary of the facts previously outlined in this decision. It also included a reference to then-ongoing discussions between the grievor and the respondent with respect to her dissatisfaction with its accommodation efforts.

[31] On January 21, 2021, the respondent replied, setting out the measures that it took to accommodate the grievor's disability and to assist her when she returned to work.

[32] Between January and July 2021, the grievor's legal counsel tried to advance the grievor's request that the respondent revisit her accommodation request. He asked questions about the medical information that the respondent required to revisit the request. He also repeatedly inquired about his request to obtain the security clearance required to allow him to represent her in this matter. He either received no response or was provided partial responses that did not directly address his questions.

[33] In July 2021, the grievor's legal counsel presented the respondent with a grievance, in letter form. He indicated that the particulars of the grievance and the

corrective action sought by the grievor were set out in the December 2, 2020, letter described previously, as well as in the CHRC complaint that the grievor had made. He also indicated that "… the facts giving rise to [the] grievance are not in accordance with applicable human rights rules." The grievor received no response.

[34] In late November 2021, having not received a response to the grievance, the grievor's legal counsel sent the respondent a letter to refer the grievance to the second level of the respondent's internal grievance process. In that letter, the grievor's counsel indicated that he was writing "… further to [the grievor's] requests for accommodation …", that the respondent's failure to accommodate was ongoing, and that the grievor had experienced, and continued to experience, "… discrimination due to CSIS's failure to participate in the accommodation process." The respondent did not respond.

[35] Having once again not received a response from the respondent, the grievor's legal counsel referred the grievance to the third level of the grievance process in late December 2021. When doing so, he indicated that he was writing to the respondent "… further to [the grievor's] requests for accommodation in her employment." He attached the December 2020 letter as "background to this situation" and the July 2021 grievance letter. The grievor did not receive a response.

[36] Although the respondent did not respond to the grievance, CSIS employees wrote to the grievor's legal counsel in January and February 2022. In the first message, an employee indicated that it appeared that the grievor had not been informed that the Level 4 position that she now occupied was subject to a collective agreement and that she could seek her bargaining agent representatives' assistance at any time. The following month, the grievor's legal counsel received another message that indicated that the grievor now occupied a unionized position and that she had the right to have her bargaining agent represent her in the grievance process.

[37] The respondent's silence at all stages of the grievance process was later revealed to be, at least in part, because the grievor's legal counsel did not yet possess the security clearance required for him to participate in the respondent's internal grievance process. The grievor and her counsel were not informed of that fact until much later. Despite numerous requests for news and updates about the legal counsel's request for the required security clearance that was filed in June 2021, the security clearance verification process appears to have begun only in mid-February 2022.

[38] On February 23, 2022, having not received a response to her grievance at the third level, the grievor referred it to adjudication. She did so without bargaining agent representation. Her legal counsel signed the grievance referral form (commonly referred to as a "Form 21"). In the section of the form where a grievor is required to identify the provision of the *Act* under which his or her grievance is being referred to adjudication, s. 209(1)(b) was selected. That provision pertains to disciplinary action that has resulted in, among other things, a demotion or financial penalty.

[39] The referral to adjudication was accompanied by four documents: the July 2021 grievance letter, the December 2020 letter described previously, a document titled "Schedule A to Form 21", and a notice to the CHRC filed under ss. 92(1) and 92(1.1) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*").

[40] The summary of the facts and allegations in Schedule A repeats much of the information in the December 2020 letter. It explains the grievor's work history and the events that led to her need for accommodation. It summarizes her discussions with the respondent about accommodations, the offer of a Level 4 position, and her acceptance of that offer. It also describes her return to work in the Level 4 position, her subsequent discovery that there were Level 5 and 6 positions available when she was offered the Level 4 position, and her unsuccessful attempts at securing a Level 5 or 6 position before the end of the 12-month salary protection period.

[41] The last three paragraphs of Schedule A indicate the following:

- The respondent did not support the grievor in her attempts to be accommodated in a position that was more closely comparable to the position that she had previously occupied.
- The respondent refused to take part in discussions about the grievor's accommodation and the effect of her demotion.
- The grievor's colleagues would complain that her accommodations were "difficult to work around".

[42] As previously indicated, the referral to adjudication was also accompanied by a notice to the CHRC (commonly referred to as a "Form 24"), which the grievor's legal counsel signed. I will open a parenthesis to provide a brief explanation. Under ss. 92(1) and (1.1) of the *Regulations*, a party to a grievance that intends to raise an issue involving the interpretation or application of the *CHRA* in the context of the adjudication of a grievance must file a notice with the CHRC and the Board. That

notice requires the filing party to provide a description of the issues that it intends to raise pertaining to the interpretation or application of the *CHRA*, to identify the prohibited grounds of discrimination that are alleged to be in play, and to indicate the corrective action sought.

[43] In her Form 24, the grievor identified disability as the prohibited ground of discrimination. Under the heading "Corrective action sought", she indicated that she sought the "[c]essation of the discriminatory measures", reinstatement to a position consistent with her former position, compensation for lost wages, and compensation for pain and suffering as well as for "wilful and reckless discrimination."

[44] In the section of her Form 24 where the grievor was required to describe the issues that she intended to raise pertaining to the *CHRA*, "See attached Schedule A" is indicated. I can assume only that she intended to rely on the summary of events and allegations in the Schedule A to Form 21 described previously for both her grievance and her notice to the CHRC. No other Schedule A was provided to the Board.

[45] The respondent raised a preliminary objection to the Board's jurisdiction, arguing that the Board is without jurisdiction because the grievor failed to exhaust the internal grievance process. It later withdrew that objection but raised a new one, arguing that the grievance is not related to a disciplinary action against the grievor but rather exclusively raises discrimination allegations, based on disability. To summarize the respondent's objection, the subject matter of the grievance cannot be referred to adjudication under s. 209(1)(b) of the *Act*, and the grievor's attempt to characterize the subject matter as disciplinary offends the principle established in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

## IV. Analysis

[46] The Board does not have inherent jurisdiction. Section 209 of the *Act* sets out the nature of the grievances that can be referred to adjudication. This decision focuses on ss. 209(1)(a) and (b) because grievances involving CSIS cannot be referred to adjudication under ss. 209(1)(c) and (d). For the purposes of s. 209(1)(c), CSIS is not part of the core public administration as defined by the *Financial Administration Act* (R.S.C., 1985, c. F-11; see Schedules I to IV). It is also not an organization designated by the Governor in Council for the purposes of applying s. 209(1)(d) of the *Act* (see *C.D. v. Canadian Security Intelligence Service*, 2024 FPSLREB 22 at paras. 16 and 17).

[47] A grievance pertaining to the interpretation or application of a provision of a collective agreement, including the no-discrimination clause in that agreement, can be referred to adjudication, provided that the grievor is represented by his or her bargaining agent (see ss. 209(1)(a) and (2) of the *Act*).

[48] Bargaining agent representation is not required to refer a grievance related to a disciplinary action resulting in termination, demotion, suspension, or financial penalty (see s. 209(1)(b) of the *Act*).

[49] If the true nature of the allegations that gave rise to the grievance at issue pertains to a disciplinary action — including disguised discipline — then the Board has jurisdiction to hear and determine the issues that the grievor raised (see *Bergey v. Canada (Attorney General)*, 2017 FCA 30).

[50] As previously mentioned, the grievor is not represented by her bargaining agent. Accordingly, she could not refer her grievance to adjudication under s. 209(1)(a) of the *Act*. She referred it under s. 209(1)(b). I must determine whether she was justified in doing so; that is, whether the true nature of her allegations pertains to discipline or disguised discipline. If, as the respondent argues, the true nature of her allegations pertains to discrimination, specifically a breach of the duty to accommodate, the Board does not have jurisdiction, and the file must be closed.

[51] The grievor was demoted from a Level 6 to a Level 4 position. That demotion resulted in a reduction to her salary, which she describes as a financial penalty. It is not necessary for me to decide whether a financial loss or a reduction of salary following a demotion constitutes a financial penalty to decide the respondent's objection. At first glance, one of the required elements for a referral to adjudication under s. 209(1)(b) is met; i.e., a demotion occurred.

[52] For the Board to have jurisdiction, the grievor's demotion must have resulted from a disciplinary action aimed at correcting her behaviour or punishing her (see, among others, *Chamberlain v. Canada (Attorney General)*, 2012 FC 1027 at para. 56, and *Bergey*, at paras. 36 to 38).

[53] The grievor does not deny that she was demoted for medical reasons and as part of an accommodation process. She agreed to the demotion. To ground the Board's jurisdiction, she must provide some facts capable of supporting a conclusion that the

allegations that she now raises (i.e., that her demotion for accommodation reasons was something other than what it appears to be on its face) formed part of the grievance that was originally presented.

[54] The jurisprudence has established that how a respondent characterizes its actions is not determinative of whether those actions will be found disciplinary (see *Canada (Attorney General) v. Frazee*, 2007 FC 1176 at para. 23). The same can be said about how a grievor characterizes a respondent's actions. A grievor's belief that he or she was unfairly treated does not automatically make a respondent's action disciplinary (see *Frazee*, at para. 21).

[55] It is not sufficient to describe an action as disciplinary or to check the box on the grievance referral form that relates to disciplinary matters to make it so and to give the Board jurisdiction over the matter. More is required. The grievor must — at a minimum — point to specific actions or circumstances that she alleges were disciplinary in nature for the grievance's true nature to be described as disciplinary.

[56] The grievance at issue does not mention discipline or disguised discipline. However, the failure to use those keywords is not determinative. A grievance must be interpreted liberally, to identify its true nature, although it is important to be careful not to distort the grievance that the grievor filed (see *Boudreau v. Canada (Attorney General)*, 2011 FC 868 at paras. 18 and 19).

[57] In *C.D.*, the Board dismissed a jurisdictional objection like the one raised in the present case. In that case, the grievor, who was not represented by a bargaining agent or legal counsel, challenged his demotion by presenting a grievance. He eventually referred his grievance to adjudication under s. 209(1)(c)(i) of the *Act*, which allows an employee employed in the core public administration to refer to adjudication a grievance about, among other things, a demotion for insufficient performance. As previously indicated, CSIS is not part of the core public administration. Its employees cannot refer a grievance to adjudication under s. 209(1)(c). CSIS argued that the Board does not have jurisdiction under s. 209(1)(c) and that the grievance could not be characterized as one that pertains to a disciplinary action because the grievor was demoted for performance-related issues, not disciplinary issues. The grievance did not contain explicit references to discipline or disguised discipline.

[58] In that case, the Board concluded that on reading the grievance, the respondent knew or ought to have known that the grievor alleged that his demotion was disguised disciplinary action. In his grievance, the grievor had described a personality conflict with a new manager. He had also described how a series of events involving that manager left him feeling targeted and penalized. He had alleged that the performance issues raised to justify his demotion were a pretext. The Board held that it had jurisdiction to hear the grievance under s. 209(1)(b) of the *Act*.

[59] The grievance at issue in no way resembles the situation described in *C.D.* It is impossible for me to interpret the grievance at issue as raising discipline allegations. It contains no allegations that the grievor was disciplined. The concerns expressed in it exclusively pertain to alleged discrimination and a failure of the duty to accommodate.

[60] The grievance at issue more closely resembles the situation described in *Wong v. Deputy Head (Canadian Security Intelligence Service)*, 2010 PSLRB 18 (see paragraphs 35 to 38). In that case, the former Board dismissed a grievance that had been referred to adjudication under s. 209(1)(b) of the *Act* by a grievor who alleged that her employment had been terminated as a result of disciplinary action. According to the Board, the grievor's written submissions during the grievance process as well as her written arguments filed with it did not refer to disciplinary action or intent. Rather, the grievor was found to have, in her own words, described her case as pertaining to discrimination.

[61] In the present case and as previously described, the particulars of the grievance and the corrective action that the grievor seeks were contained in two other documents, her December 2020 letter to the respondent and her complaint to the CHRC. The content and tone of both documents is similar. I have reviewed and considered both. However, the December 2020 letter is more detailed. I will focus on it for the purposes of this analysis.

[62] In her written submissions, the grievor describes the December 2020 letter as "… a letter to the respondent requesting accommodation and asking for a response within 10 days." That is an accurate description of the letter. Its overarching themes are discrimination and the respondent's duty to accommodate. The stated purpose of the letter was to "… encourage and invite CSIS to join us in a mutual effort to find a

reasonable accommodation for [the grievor].” It refers to the *CHRA* and the respondent’s legal obligations under that Act.

[63] In that letter, the grievor addressed issues that had “… arisen with respect to [her] employment due to … disability and the accommodation that [had been] offered …”. On reading the letter, it is clear that she was dissatisfied with the financial and professional consequences that followed her demotion, specifically the lack of support she received from the respondent to help her return to a Level 6 position and the reactions of colleagues and of a supervisor to her gradual return to work. The letter identifies this pressing question: “… whether [the respondent] has made reasonable accommodation efforts.”

[64] Also in the December 2020 letter, the grievor described her demotion as an accommodation measure. There was no suggestion that she was demoted to a Level 4 position to correct her behaviour or to punish her. By her own words, her disagreement with the respondent pertained to discrimination.

[65] The grievor’s letters referring her grievance to the second and third levels of the grievance process also do not allege that she had been disciplined or subjected to disguised discipline.

[66] The November 2021 letter referring the grievance to the second level of the internal grievance process indicated that a failure to accommodate was ongoing and that the grievor continued to experience discrimination because of the respondent’s failure to participate in the accommodation process.

[67] The letter referring the grievance to the third level of the grievance process, sent in December 2021, was brief in comparison to the previous correspondence. It merely referred to the grievor’s previous letters and the respondent’s failure to provide a response or decision.

[68] The first time that the grievance was explicitly characterized as pertaining to discipline was when the grievor or her legal counsel checked the box on the grievance referral form that relates to referrals under s. 209(1)(b) of the *Act*. That alone is insufficient to give the Board jurisdiction over the matter.

[69] In her written submissions, the grievor acknowledges that her grievance involves the consideration of human rights principles and remedies but argues that

her grievance "… relates to a series of disciplinary actions resulting in a demotion, as well as financial penalty …". She submits that the respondent has continuously and repeatedly subjected her to disciplinary treatment in response to, and as punishment for, her accommodation requests. According to her, the demotion and financial penalty form part of a multi-year pattern of "icing [her] out" of the CSIS for seeking accommodations. That pattern is alleged to have included negative verbal feedback to her about her accommodations, failing to allow her to resume a Level 6 position, and willfully ignoring her before and during the grievance process.

[70] It is not contested that the grievor accepted a demotion as an accommodation measure. It is also not contested that she was subsequently unsuccessful in obtaining a Level 5 or 6 position. Even were I to accept as true her allegations that the respondent was not supportive of her efforts to secure a Level 5 or 6 position and that her colleagues and supervisor commented on her gradual return to work or were displeased with that fact, before she referred her grievance to adjudication, the grievor consistently characterized those allegations as pertaining to the adequacy of the respondent's accommodation process and its respect of its duty to accommodate.

[71] The grievor's claim that the respondent "… continuously and repeatedly subjected [her] to disciplinary treatment …" for having requested accommodation did not form part of her original grievance or subsequent correspondence. Prior to the referral of her grievance to adjudication, she did not allude to a "series of disciplinary actions" that she now claims led to her demotion or to a financial penalty. Nor did she claim that her demotion was part of a multi-year pattern of reprisal for seeking accommodation.

[72] The negative verbal feedback just referred to appears to have occurred after the grievor's demotion, not before or contemporaneous to it. Similarly, most of her allegations pertaining to the respondent's failure to support her efforts to secure a Level 5 or 6 position relate to a period well after her demotion. While not determinative, these allegations are not indicative of a disciplinary intent before and as of the demotion. However, they are consistent with how the grievor has framed the issues all along, as a breach of the respondent's duty to accommodate.

[73] It is important to note that although she was not represented by her bargaining agent, the grievor was represented by legal counsel throughout the grievance process

and to this day. It is reasonable to assume that if her allegations really pertained to disciplinary action, disciplinary intent, or disciplinary action on the part of the respondent, it would have been explicitly or implicitly mentioned in the grievance itself or in her correspondence throughout the grievance process. It is certainly reasonable to expect that discipline would have been mentioned before the referral to adjudication. It was not.

[74] Although she referred her grievance to adjudication under s. 209(1)(b) of the *Act* and included, in her written submissions, vague allegations of a disciplinary intent by the respondent, the grievor did not — in her grievance or during the grievance process — expressly or implicitly allege that she had been subjected to overt or disguised disciplinary action. Her allegations according to which the respondent subjected her to disciplinary treatment as punishment for her accommodation request were not included in the grievance or in her several written communications during the grievance process.

[75] The respondent argues that the grievor seeks to alter the true nature of her grievance by referring it to adjudication under the provision that applies to disciplinary matters, to cloak the Board with jurisdiction. I agree.

[76] A single consistent theme was raised throughout the grievance process, up to the referral to adjudication. That theme is the respondent's breach of its duty to accommodate.

[77] The Board's jurisdiction must be assessed in light of the grievance as it was originally presented. It is not open to a grievor to recharacterize his or her grievance so that it may become subject to adjudication. That principle, often referred to as "the *Burchill* principle", is well established (see, among others, *Burchill*; *Schofield v. Canada (Attorney General)*, 2004 FC 622; *Shneidman v. Canada (Attorney General)*, 2007 FCA 192; and *Mutart v. Canada (Attorney General)*, 2014 FC 540).

[78] The reason for the *Burchill* principle is simple. The rules of procedural fairness dictate that a respondent should not be required to defend itself against allegations that are substantially different from those presented during the grievance procedure (see *Boudreau*, at para. 19, and, more recently, *Canada (Attorney General) v. Gallinger*, 2022 FCA 177 at para. 59).

[79] Unlike the facts at issue in *Burchill*, the respondent in the present case did not respond to the grievor's allegations during the internal grievance process. It did not provide a response or decision. It remained largely silent throughout the grievance process and until the grievance was referred to adjudication. It is highly unfortunate that it did. Open and ongoing communication helps foster harmonious labour relations.

[80] Although the respondent has not yet had to defend itself against the grievor's allegations, the *Burchill* principle applies nonetheless. It was not open to the grievor to present discrimination allegations in her grievance and in correspondence at the different grievance process levels but then substantially change the nature of those allegations when referring the grievance to adjudication.

[81] I have concluded that the true nature of the grievor's allegations pertains to discrimination based on disability, specifically to her dissatisfaction with the respondent's accommodation process. She cannot seek to alter the true nature of her grievance by referring it to adjudication under the provision that applies to disciplinary matters.

[82] Although the grievor feels that she has been wronged by the respondent and that it did not adequately support her when she returned to work, I lack the jurisdiction to hear and determine those issues.

[83] As the Board does not have jurisdiction over this matter, the grievance is dismissed.

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

*(The Order appears on the next page)*

## V. Order

[85] The respondent's jurisdictional objection is allowed.

[86] The grievance is dismissed.

September 10, 2024.

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