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

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

BETWEEN

A.B.

Grievor

and

TREASURY BOARD
(Department of National Defence)

Respondent

Indexed as
A.B. v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

Before: Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Ronald A. Pink KC, and Sophie Pinot, counsel

For the Respondent: Joel Stelpstra, counsel, Treasury Board Legal Services

Heard at Halifax, Nova Scotia,
May 7 to 9, 2024.

REASONS FOR DECISION

I. Introduction

[1] This is a termination case. In 2019, A.B. ("the grievor") was convicted of a serious offence under the *Criminal Code* (R.S.C., 1985, c. C-46). The acts for which he was convicted happened when he was off duty, did not involve any of his co-workers or managers, and took place years before the charges were laid against him that resulted in his conviction.

[2] The employer terminated him on September 26, 2019. It said that the acts for which he had been convicted breached its *Standards of Conduct* and the *Values and Ethics Code for the Public Sector* ("the PSC Code"). It said that those standards and code were principles by which employees carried out their roles and responsibilities when both on and off duty. It said that they were part of the terms of conditions of his employment. It said that his "willful behaviour" was unacceptable and that it could be neither condoned nor tolerated.

[3] The question before me is whether the conviction — or the offence for which he was convicted — warranted discipline and, if so, whether termination, instead of some lesser penalty, was appropriate. The answer will lie in an analysis of the principles laid down in *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers International Union, Local 9-670*, [1967] O.L.A.A. No. 4 (QL) ("*Millhaven Fibres*").

[4] Based on the facts and reasons that follow, I have decided that the termination was not justified and that the grievor should be reinstated, on certain terms.

[5] I should also note that given the nature of the criminal offences for which the grievor was convicted in 2019, and my decision to return the grievor to the workplace, I have decided to anonymize the names of some of the witnesses, as well as that of the grievor. The parties will be provided with a legend to enable them to disclose those names if it becomes legally necessary in court or administrative proceedings. I have also decided for the same reason that the entire record, including all exhibits, should be subjected to a sealing order.

II. The hearing and the evidence

[6] The parties proceeded by way of an agreement statement of facts ("ASF"; Exhibit A1), which was supplemented by testimony from a number of witnesses. The

statements in the ASF represent the bare bones of the matter. The witness testimony and the documents attached to the ASF provided context for its statements.

[7] The grievor introduced a book of documents (Exhibit U2). The employer introduced a supplementary book of documents (Exhibit E3).

[8] The employer operates Fleet Maintenance Facility Cape Scott ("FMF-CS" or, more generally, "Cape Scott"), which is a dedicated repair and maintenance facility of the Royal Canadian Navy located at HMC Dockyard in Halifax, Nova Scotia (ASF, Tab 2).

[9] On the employer's behalf, I heard the evidence of the following witnesses:

> 1) Captain David Benoit (retired), who served as Cape Scott's commanding officer between 2018 and 2020 and made the recommendation in 2019 that the grievor be terminated;
> 2) Margaret Miller, who was the work centre manager at all material times and whose responsibilities included staffing and attending meetings with staff and extended to and covered the Support Systems Shop at Cape Scott, where the grievor worked;
> 3) "JK", who spent 30 years in uniform in Canada's military before retiring and returning as a civilian employee and who at all material times served as the work centre supervisor in the Support Systems Shop, which employed a group of electronic systems specialists (ESS), including the grievor;
> 4) "CD", a co-worker of the grievor in 2015;
> 5) "EF", another co-worker of the grievor in 2015; and
> 6) "GH", an electronics technician ("ET") who has worked in the Support Systems Shop since October 2020 and who did not know and had never met the grievor but testified to his concerns about the possibility of the grievor returning to work were the grievance allowed.

[10] I heard the grievor's evidence on his behalf.

[11] I note that the parties had little dispute as to the facts that are not in the ASF. The disagreements, such as they were, had more to do with the inferences or legal consequences to be drawn from those facts. The witnesses' testimonies were often presented more to substantiate the inferences that one party wished me to draw than to support any major dispute. That being the case, I will intersperse the statements in the ASF with my findings of fact based on the testimony and documents and will refer to specific testimony or exhibits only when necessary to explain a particular finding.

III. Overview of the facts and background

A. The workplace facts

[12] The grievor's terms and conditions of employment were governed by the collective agreement between the Federal Government Dockyard Trades and Labour Council (East) ("the bargaining agent") and the Treasury Board that expired on December 31, 2022 (ASF, Tab 1).

[13] The grievor began employment with the employer as a ship repair apprentice in 2009. He was subsequently appointed as an ET in 2011, and as an ESS in 2015 (ASF, Tab 3). Per the letter of offer, the grievor was at all relevant times subject to the Department of National Defence ("DND") and Canadian Armed Forces' ("CAF") *Code of Values and Ethics* ("the DND-CAF Code") and the PSC Code (ASF, Tab 19, and ASF, Tab 2).

[14] At the material times, roughly 10 to 12 ESSs worked in the Support Systems Shop ("the shop"). An ESS required a security clearance. In the event of an incident or knowledge that might impact that security clearance, management prepared a document known as a "Change of Circumstance Report" ("CCR") and sent it for review. The CCR was then reviewed, and a decision was made as to whether the ESS's security clearance should be revoked.

[15] With respect to an ESS's duties and responsibilities, they included spending roughly 20% of working time in the shop, where duties would be assigned, or aspects of the assigned tasks might be worked on. The majority of time would be spent working on the electronic systems and equipment onboard navy vessels.

[16] While onboard a ship, the ESSs tended to work in pairs, for two main reasons. The first had to do with safety. The ESSs worked with high-voltage electronic and electrical systems. They worked in tight, possibly isolated, quarters. Having a partner provided a measure of safety if an ESS got into trouble. The second reason had to do with performance. The question of how to install, repair, or upgrade a particular electronic system or piece of equipment does not always have a simple answer. Thus, two heads are better than one. As well, working as a pair meant that a more experienced ESS could mentor and train an apprentice.

[17] One other aspect of the tendency to work in pairs was that over time, an ESS tended to work with the same partner or partners. This is not surprising. Personalities, interests, and working styles differ to some degree. However, the ultimate decision as to whether any two ESSs should or should not work together on a task was not theirs to make — their supervisors made it.

[18] Finally, given the relatively small group of ESSs and the fact that they worked closely together, it is not surprising that secrets or confidences were hard to keep. Equally, however, the impact of divulging such information on the listener varied with his or her personal views and opinions.

B. The grievor's background, and his first conviction under the *Criminal Code*

[19] When the grievor began working as an apprentice for the employer in 2009, he was involved in a common law relationship with a woman who had three children that had started in early 2006. At the beginning of their relationship, the children were aged about one, four, and five. The grievor lived with his partner and provided economic and emotional support to her and her children.

[20] Sometime in the latter part of the period from 2009 to 2014, some incidents of inappropriate conduct by the grievor occurred involving the daughters of his partner. They first came to light when the then-13-year-old daughter reported to her mother some inappropriate touching over her clothes during a tickling episode. The daughter reported these incidents to her mother in mid-August 2014. The mother then reported it to the police. The police interviewed the mother, the daughter, and the grievor. All were described as having been open and very co-operative. The grievor admitted to the incidents and apologized to the mother. At the time, the police decided that there was not enough evidence to pursue criminal charges and closed the investigation (ASF, Tab 4).

[21] The grievor and the mother broke up as a result. He left the home. In September 2014, the daughter then reported further incidents of inappropriate conduct by him, including touching over the clothes that made her feel uncomfortable and him walking in on her while she was taking a shower. As well, a friend of the daughter reported touching by the grievor in ways that made her feel uncomfortable while she and the daughter were at the beach and playing in the water. The grievor was interviewed. He admitted to the incidents but denied inappropriate intent on his part. The police

charged him with two counts of sexual interference, contrary to s. 151 of the *Criminal Code* (ASF, Tab 4).

[22] The grievor reported the charge to the general manager. It was not clear when exactly the report was made. However, it is clear that it was made before the grievor pleaded guilty to the two charges. I can say this because a representative of the employer attended court in late 2015 and took detailed notes of the incidents for which the grievor had been charged. The notes also included the facts that the grievor admitted to and accepted full responsibility for the incidents, apologized to the court, and promised to continue his counselling and never do anything like it again (ASF, Tab 4; Exhibit U2, Tab 4, is a more complete copy of the employer's notes of the court appearances).

[23] The counselling referred to (with a psychologist who specialized in the field) had started before he pled guilty, and had continued after that point. He had been assessed as a low risk to reoffend when compared to other sexual offenders and as motivated to improve his impulse control. The Crown had also acknowledged that the grievor had pled guilty, had accepted responsibility, and had spared the victims of the trauma from a trial. It also acknowledged that the incidents were on the low end of seriousness for this type of offence, if such a scale exists for crimes against minors (Exhibit U2, Tab 4).

[24] In November 2015 he grievor was sentenced to 180 days in custody, 90 days for each offence, and probation for 24 months (ASF, Tab 5, and ASF, Tab 4). He was placed in the National Sex Offender Registry for life, had to provide a DNA sample, and during his probation, he was not to have direct contact with females under the age of 16 (Exhibit U2, Tab 4).

C. The grievor's return to the workplace in the spring of 2016

[25] After his release (and while on probation), the grievor returned to the workplace (ASF, Tab 7).

[26] Ms. Miller testified that before he returned, management had discussed the factors set out in *Millhaven Fibres*, which will be set out later in this decision. She recalled that the factor that created the most concern related to the willingness of the grievor's co-workers to work with him.

[27] Perhaps because of that concern, the employer held a meeting in late March or early April 2016 with the grievor's co-workers in the shop, which management attended. Ms. Miller was there, along with representatives of the Employee Assistance Program ("EAP"). She testified that two of the grievor's co-workers (EF and CD) felt betrayed by his behaviour and refused to work with him (see also Exhibit E3, Tab 4). Two others were upset by his conduct but would work with him if required, although they would have nothing to do with him after hours. Two — LM and OP (his shop steward) — felt that the grievor had done his time for the offences and that he should be given a second chance (Exhibit E3, Tab 4). (And indeed, in Ms. Miller's words, LM took the grievor "under his wing" on the grievor's return to work).

[28] Ms. Miller, JK, and CD testified about the meeting. Their testimonies as to the employer's position were to the same effect: the grievor was to return to work, and his co-workers were "not to name call and to behave themselves" (in CD's words). If they required assistance coping with his return, they could seek it from the EAP. Ms. Miller testified that management did not want the co-workers to get in trouble for things they might do or say to the grievor when he returned — it wanted to be supportive of their concerns but wanted to head off any potential problems.

[29] Management's concerns about possible issues with the co-workers did not materialize. Following the grievor's return in or about March 2016, he worked without incident. He continued to work in pairs with some of the other ESSs, including LM, but not with others, like CD, who refused to speak with him other than if necessary for work. CD and EF testified that they asked not to be assigned to work with the grievor, which it appears their supervisor, JK, agreed to. Ms. Miller recalled that CD and EF were the only co-workers who had significant issues with the grievor's return to work. His work performance remained excellent. (Ms. Miller testified that he is an excellent technician and that he had no behavioural issues while at work).

[30] I should note that eventually, CD and EF both left the shop after the grievor returned to work. One went into management, and the other moved to another department. From CD's testimony, which Ms. Miller's testimony corroborated, I was satisfied that both he and EF expressed their desires to make those moves some time before the grievor's troubles became known. Accordingly, I was satisfied that while their reluctance to work with the grievor on his return might have accelerated their respective departures from the shop, it did not cause them.

[31] Ms. Miller also testified to some concern on her part about high school students who occasionally came to Cape Scott to observe the work being done there. She advised that it was part of the employer's desire to spark interest in the work and in trades. The tours happened in groups and tended to take place in spaces or meeting rooms separate from the grievor's work areas. There was no evidence to suggest that he ever came in contact with those groups.

[32] I should also note that while the grievor's charge and conviction were reported in a CCR, it did not result in a revocation or modification of his security clearance status.

D. The second conviction, in January 2019

[33] In October 2018, the grievor was charged again with two counts under ss. 151 and 271 of the *Criminal Code*. The evidence before me was clear and was not contested by the employer's witnesses that the incidents that gave rise to the charges occurred during the same period as those that gave rise to the 2015 conviction. They involved the same types of complaints and the same complainants. They did not happen with different complainants. They did not happen after the grievor's relationship with the mother ended in 2014 (see, in general, ASF, Tab 5).

[34] On February 6, 2019, the grievor informed the employer of the charges against him and of his subsequent conviction (ASF, Tab 9).

[35] On February 14, 2019, Captain Benoit reported that he had been informed of the charges late that day. He noted that the grievor had informed his supervisor of them and that they had stemmed "… from an earlier event that occurred in … [2014]." He added that the grievor had been convicted and that he had served 90 days for that earlier offence. Captain Benoit went on as follows:

> …
>
> *This incident occurred during the original time period, with a second victim who only came forward to police later.* [The grievor] *was found guilty and will be sentenced … All of these events were conducted off-duty and not on DND property.* [The grievor] *started working for FMF in 2009 and has no other disciplinary issues.*
>
> *We have engaged LR to determine the appropriate way forward.*
>
> *Since the trial is already concluded, I expect no to low media interest, however, as the sentencing date draws nearer, it may cause interest to rise.*

…

[36] I note that no evidence of any actual media interest, other than a passing reference in a local paper that did not mention the employer, was introduced at the hearing. I take from it that the grievor's conduct, his identity, and his employment with the employer escaped the notice of the public and the media.

[37] On March 4, 2019, the employer issued a "Notice of Misconduct" to determine if disciplinary action should be taken (ASF, Tab 10, and ASF, Tab 6). (I note that no such notice was issued to the grievor as a result of the 2015 conviction.) As well, a CCR with respect to the grievor's security clearance was prepared and sent — and, as in 2016, it did not result in the revocation of his clearance (see Exhibit E3, Tab 3).

[38] On March 6, 2019, the employer convened a meeting with the grievor to discuss the criminal charges and related investigation (ASF, Tab 11, and ASF, Tab 7).

[39] To support his position in the investigation, the grievor submitted a letter on his behalf and letters from his immediate supervisor, JK; his shop steward, OP; and his treating psychologist, Dr. Angela Connors (ASF, Tab 12, and Exhibit U2, Tabs 10 to 13).

[40] In a letter dated March 6, 2019, JK described the grievor as an extremely bright and talented ESS, which made him a valuable asset in the shop and for the employer. He explained that the grievor worked "very well" with his fellow technicians. The grievor had his "complete trust" to carry out all work in an excellent fashion (Exhibit U2, Tab 11).

[41] OP, in a letter dated March 7, 2019, stated that he had worked with the grievor for roughly 10 years and described him as "… a conscientious worker and a respectful and friendly colleague." He added that he knew that the grievor had had "… some difficulties and that he has faced the consequences." He believed that the grievor was "… genuinely remorseful and has worked hard to change" (Exhibit U2, Tab 13).

[42] In a letter dated March 7, 2019, Dr. Connors, the program leader of the Forensic Sexual Behaviour Program of Nova Scotia Health's Mental Health and Addictions Services, noted that the grievor had been involved with the program since September 2016, that he had been in weekly treatment for almost nine months, and that he had remained voluntarily involved in a monthly support program, to help others. She

added that he had been working diligently on his problem areas, was open to change, and had been forthright about his history and behaviour. He was, in her words, "… considered a treatment success." She concluded by stating that there had "… never been a point that [she] would consider him a risk in the workplace, or in the community" (Exhibit U2, Tab 12).

[43] In her testimony, Ms. Miller acknowledged that at the meeting, she told the grievor and his bargaining agent representative that there was a new commanding officer and that the rules of conduct "now" were much stricter that they had been in 2015, in part due to Operation Honour, which had become part of DND's ethics policy (see also ASF, Tab 7). Operation Honour was the product of high-profile allegations and reports of sexual misconduct in the Canadian Armed Forces. It was intended and designed to address and remedy sexual misconduct and to foster "… a culture where everyone is treated with dignity and respect" (Exhibit E3, Tab 6).

[44] The grievor was sentenced to serve 8 months in custody. He was also ordered to undergo a subsequent 30 months' probation (ASF, Tab 13). An employer representative attended the hearing and took notes that were subsequently provided to Ms. Miller, who then conveyed the information to Captain Benoit (Exhibit E3, Tab 3).

[45] The grievor was incarcerated.

[46] Just after his release, the employer terminated the grievor's employment for disciplinary reasons (ASF, Tab 15). As already noted, the letter stated that by reason of his conviction, he had breached its *Standards of Conduct* and the PSC Code. It added that the standards and code were principles by which employees carried out their roles and responsibilities and that they were terms of conditions of their employment. It stated that his "willful behaviour" was unacceptable and that it could be neither condoned nor tolerated.

E. The employer's reasons for the termination

[47] Vice-Admiral A. G. McDonald, the commanding officer of the Royal Canadian Navy (RCN), signed the termination letter. His responsibilities included the authority to terminate civilian employees. Captain Benoit testified that he had recommended the decision to terminate the grievor to Vice-Admiral McDonald. He made his

recommendation and drafted the letter for the Vice-Admiral's signature in consultation with his staff.

[48] Captain Benoit testified in cross-examination that he had served as the commanding officer at Cape Scott between 2018 and 2020. He became aware of the earlier events in 2015 as a result of the investigation in 2019. He testified that when he made the recommendation to terminate the grievor, he understood that the grievor returned to work after his first conviction in 2015, worked well after returning, and was on the Joint Occupational Health and Safety Committee and that no one had raised any concerns with him about the grievor's presence in the shop before the 2019 conviction. He agreed that in the three years between the grievor's return to work in March 2016 and his second incarceration in 2019, no issues arose and no complaints were made as to his presence or work in the shop, and that the employer suffered no loss of public reputation from the grievor's 2016 conviction. However, he added that at that time, he did not know that the 2019 conviction had arisen from the same set of circumstances that led to the 2016 conviction. (I note that Captain Benoit must have forgotten his February 14, 2019, email.) He agreed that the grievor had paid his debt to society by reason of his convictions and incarceration. He agreed that no reputational loss arising out of the 2016 conviction had been reported to him. He acknowledged that the grievor's security clearance had not been revoked or amended as a result of either conviction and added that had a concern arisen, it would have been reported to him.

[49] Despite all that, Captain Benoit concluded that the grievor's off-duty conduct represented a serious breach of the PSC Code. As a result, the employer's trust had been irrevocably broken, which warranted terminating the grievor.

[50] Captain Benoit was asked to point to the particular provisions in the PSC Code that he thought the grievor breached. In direct examination, he testified that he would have gone through the DND's document entitled, *Standards of Civilian Conduct and Discipline* (DAOD 5016-0), and that he would have suggested that paragraph 3.10 would have applied to the grievor's conduct. It reads in part as follows:

> ***3.10*** *DND employees must:*
>
> *a. comply with all applicable conduct requirements set out in:*
>
> *i. legislation and regulations;*

> *ii. departmental policies and directives;*
>
> *iii. Treasury Board policies; and*
>
> *iv. the* Values and Ethics Code for the Public Sector*;*
>
> *b. act in a manner that is:*
>
> *i. consistent with departmental interests;*
>
> *ii. consistent with the public interest; and*
>
> *iii. non-partisan with respect to political activity participation pursuant to Section 33 of the* Public Service Employment Act *….*

[51] Captain Benoit also relied on the DND-CAF Code to support his recommendation. When asked in cross-examination as to what part of that code he was referencing, he pointed to tables 1 ("Ethical Principles of DND and CF") and 2 ("Values and Expected Behaviours of DND Employees and CF Members"), which read as follows:

TABLE 1 - ETHICAL PRINCIPLES OF DND AND CF	
ETHICAL PRINCIPLES	***EXPECTED BEHAVIOURS***
1. RESPECT THE DIGNITY OF ALL PERSONS	*At all times and in all places, DND employees and CF members shall respect human dignity and the value of every person by:* ***1.1*** *Treating every person with respect and fairness.* ***1.2*** *Valuing diversity and the benefit of combining the unique qualities and strengths inherent in a diverse workforce.* ***1.3*** *Helping to create and maintain safe and healthy workplaces that are free from harassment and discrimination.* ***1.4*** *Working together in a spirit of openness, honesty and transparency that encourages engagement, collaboration and respectful communication.*
2. SERVE CANADA BEFORE SELF	*At all times and in all places, DND employees and CF members shall fulfil their commitments in a manner that best serves Canada, its people, its parliamentary democracy, DND and the CF by:* ***2.1*** *Making decisions and acting at all times in the public interest.* ***2.2*** *Performing their duty or their responsibilities to the highest ethical standards.*

	2.3 *Avoiding or preventing situations that could give rise to personal or organizational conflicts of interests.* ***2.4*** *Providing decision-makers [sic] with all the information, analysis and advice they need, always striving to be open, candid and impartial.*
3. OBEY AND SUPPORT LAWFUL AUTHORITY	*At all times and in all places, DND employees and CF members shall uphold Canada's parliamentary democracy and its institutions by:* ***3.1*** *Respecting the rule of law.* ***3.2*** *Carrying out their duty and their duties in accordance with legislation, policies and directives in a non-partisan and objective manner.*

TABLE 2 - VALUES AND EXPECTED BEHAVIOURS OF DND EMPLOYEES AND CF MEMBERS	
SPECIFIC VALUES	***EXPECTED BEHAVIOURS***
1. INTEGRITY	*DND employees and CF members shall serve the public interest by:* ***1.1*** *Acting at all times with integrity, and in a manner that will bear the closest public scrutiny; an obligation that may not be fully satisfied by simply acting within the law.* ***1.2*** *Never using their official roles to inappropriately obtain an advantage for themselves or to advantage or disadvantage others.* ***1.3*** *Taking all possible steps to prevent and resolve any real, apparent or potential conflicts of interest between their official responsibilities and their private affairs in favour of the public interest.* ***1.4*** *Acting in such a way as to maintain DND's and the CF's trust, as well as that of their peers, supervisors and subordinates.* ***1.5*** *Adhering to the highest ethical standards, communicating and acting with honesty, and avoiding deception.* ***1.6*** *Being dedicated to fairness and justice, committed to the pursuit of truth regardless of personal consequences.*
2. LOYALTY	*DND employees and CF members shall always demonstrate respect for Canada, its people, its parliamentary democracy, DND and the CF by:*

	2.1 *Loyally carrying out the lawful decisions of their leaders and supporting Ministers in their accountability to Parliament and Canadians.* ***2.2*** *Appropriately safeguarding information and disclosing it only after proper approval and through officially authorised means.* ***2.3*** *Ensuring that all personnel are treated fairly and given opportunities for professional and skills development.*
3. COURAGE	*DND employees and CF members shall demonstrate courage by:* ***3.1*** *Facing challenges, whether physical or moral, with determination and strength of character.* ***3.2*** *Making the right choice amongst difficult alternatives.* ***3.3*** *Refusing to condone unethical conduct.* ***3.4*** *Discussing and resolving ethical issues with the appropriate authorities*
4. STEWARDSHIP	*DND employees and CF members shall responsibly use resources by:* ***4.1*** *Effectively and efficiently using the public money, property and resources managed by them.* ***4.2*** *Considering the present and long-term effects that their actions have on people and the environment.* ***4.3*** *Acquiring, preserving and sharing knowledge and information as appropriate.* ***4.4*** *Providing purpose and direction to motivate personnel both individually and collectively to strive for the highest standards in performance.* ***4.5*** *Ensuring resources are in place to meet future challenges.*
5. EXCELLENCE	*DND employees and CF members shall demonstrate professional excellence by:* ***5.1*** *Continually improving the quality of policies, programs and services they provide to Canadians and other parts of the public sector.* ***5.2*** *Fostering or contributing to a work environment that promotes teamwork, learning and innovation.* ***5.3*** *Providing fair, timely, efficient and effective services that respect Canada's official languages.*

[52] Ms. Miller, unlike Captain Benoit, was in management when the grievor returned to work in 2015 (and during the employer's actions that followed). She agreed in cross-

examination that had the incidents involved in the 2019 conviction been included in the 2016 convictions, the grievor might still be at work.

[53] On October 18, 2019, the bargaining agent filed this grievance, challenging the termination. On September 18, 2020, the employer denied it at the final level (ASF, Tab 16).

[54] On October 8, 2020, the bargaining agent referred the grievance to adjudication (ASF, Tab 17).

[55] The grievor had no record of prior discipline (ASF, Tab 18).

F. The employer's poll of employees in the Support Systems Shop in 2023

[56] JK testified that if the grievance were to be allowed and the grievor were returned to work, he would have some personal misgivings. However, his experience, training, and responsibilities as a supervisor include doing what is necessary. If the grievor were to return, he would work with him and his co-workers, to make sure that the return would be successful.

[57] I note that this grievance was originally scheduled for a hearing in the fall of 2023. Before the hearing date, the employer asked JK to conduct a poll of the shop to determine what concerns, if any, might exist. He conducted an informal one and found that three employees had no issue on the basis that the grievor had done his time. Two newer members of the shop, who had not worked with the grievor, expressed some misgivings.

[58] GH, the newest member, testified that he had never met the grievor and that he knew only that the grievor had worked there in the past. He testified that he had learned the details of the grievor's convictions from a website (which he could not identify) and that based on that information, he would find it very uncomfortable to work with the grievor, would refuse to work with the grievor, and would ask to be moved to another work area.

[59] I should note that I was satisfied that GH's testimony had to be discounted. He had never met the grievor. He had never worked in the shop while the grievor was there. More importantly, I learned as a result of subsequent discussions with counsel for the employer and the grievor that when the employer first contacted him, GH had

been unsure as to whether he wanted to testify. However, CD (who had long ago left the shop) called him to provide him with an electronic link to the employer's book of documents. Those documents included the employer's trial notes from 2015 and the court decision in 2019 and hence included information that GH would not generally have known.

[60] I concluded that GH's testimony had been tainted by the animus that CD bore toward the grievor, which resulted in CD providing GH with information that he would not, in normal course, have had. Had GH been left with only the information that he had at the beginning, which was that the grievor had been convicted of a crime, he might not have had the concerns that he alleged he developed after CD's intervention.

IV. Summary of the submissions

A. For the employer

[61] Counsel for the employer commenced by noting that the facts were simple — the parties' differences laid in emphasis and consequence. He submitted that the grievor's conviction for sexual interference with a minor made him unfit for continued employment. The grievor's conduct would have had a significant impact on his victims.

[62] Counsel for the employer emphasized the fact that the grievor's return to work in 2015 was not easily managed. Some of his co-workers had expressed concern about working with him; two had in fact refused to. The fact that the employer found a way to make the grievor's return work does not mean that the result was ideal.

[63] Counsel for the employer then went through the *Millhaven Fibres* principles. In doing so, he addressed why it was that the grievor was able to return to work in 2015 but not in 2019. He pointed to the existence of a new commanding officer. In particular, the employer's work culture had shifted. It was no longer prepared to turn a blind eye to reports of sexual misconduct. Operation Honour was an expression of that new culture and attitude. The employer's reputation could potentially have been harmed had it become known that it was employing a convicted sexual offender. There was, too, the fact that some of the employees were so concerned that they searched court files to learn what exactly the grievor had been convicted of. That led to workplace gossip, and had that entered the public domain, the employer's reputation would have suffered.

[64] Counsel for the employer submitted that members of the public service, whether civilian or military, are held to a higher standard than are ordinary members of the public. The PSC Code and the DND-CAF Code applied to the grievor at all times, both at work or offsite and off duty. It formed part of the terms and conditions of his employment. Accordingly, he was bound by its provisions.

[65] Counsel for the employer submitted that the fact that the grievor's conduct did not become public (meaning that the employer's reputation did not suffer damage) was irrelevant. It was enough that the conduct was such that **had** it become public, the employer's reputation would have suffered. An employer — most particularly, this employer — is entitled to dissociate itself from abhorrent conduct, to avoid the possibility of reputational risk. As it did with Operation Honour, the employer should be allowed to state that it was no longer prepared to turn a blind eye to such conduct. In 2019, it was not bound to follow the same path that it followed in 2015. The grievance should be dismissed.

[66] When he made his submissions, counsel for the employer relied on the following decisions: *Tobin v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 76; *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28; *Munroe v. Treasury Board (Department of National Defence)*, 2021 FPSLREB 136; *CEP Atlantic Communications Council, Local 2289 v. Bell Aliant Regional Communications L.P.*, [2010] C.L.A.D. No. 419 (QL)("*CEP Atlantic*"); *City of Toronto v. Toronto Professional Fire Fighters' Association, Local 3888* (unreported, November 12, 2014); *International Alliance of Theatrical Stage Employees, Local 210 v. Oilers Entertainment Group*, 2020 CanLII 29409 (AB GAA)("*Oilers*"); *Unifor, Local 892 v. Mosaic Potash Esterhazy Limited*, 2018 SKQB 68; *Ontario Public Service Employees Union (Richard) v. The Crown in Right of Ontario (Ministry of Transportation)* (unreported, January 30, 2013); and *Ontario (Transportation) v. Ontario Public Service Employees Union*, 2013 ONSC 7227.

B. For the grievor

[67] Counsel for the grievor commenced by making it clear that the grievor had abandoned any claim for retroactive pay or damages in the event that his grievance were allowed.

[68] The grievor's counsel submitted that the employer's decision, and the case before me, turned solely on the employer's change in mindset and culture during the

Operation Honour program. The incidents that formed the basis of the 2019 conviction happened at the same time and to the same population as those that resulted in the 2016 conviction. Had they been included in the 2016 conviction the termination would not have happened. Moreover, the grievor had done his time, had paid his debt to society, and had worked diligently to rehabilitate himself and had done so. The fairness of the employer's decision to terminate him should be assessed against only the *Millhaven Fibres* factors, not Operation Honour.

[69] The grievor's counsel also submitted that this case involves questions of fairness. He suggested that there was evidence of witness tampering by one witness who was motivated by self-righteous and punitive attitudes toward the grievor.

[70] With respect to Operation Honour, counsel for the grievor submitted that it represented a change — however laudable — in the employer's culture that had to be applied going forward, not backward. It would be unfair and unjust to apply it to events that had happened before it came into effect.

[71] Counsel for the grievor submitted that cases involving an employer's right to terminate an employee for off-duty conduct are fact-dependent. He noted that the facts in cases like *Oilers* were more extreme than those before me. They also involved a far greater risk to the employer's reputation. That is particularly important, given that the employer was unable to point to any public reaction to, concern about, or even knowledge of the grievor's convictions. Nor could it point to any damage to its reputation. And as far as any impact on co-workers is concerned, the only two who departed the shop had already made plans to leave for different positions before the grievor's conviction in 2015. The others had been willing to work with him after 2014. The only current employee who had indicated any reluctance to work with him — GH — had been tainted by CD's efforts to turn GH against the grievor.

[72] Counsel for the grievor emphasized the following facts within the context of a *Millhaven Fibres* analysis: no new criminal acts were committed after 2014, the grievor did his time and engaged and continued to engage in rehabilitation, and he was remorseful and understood and acknowledged the harmful impact of his conduct on his victims. All those facts distinguish his case from those that the employer relied on.

[73] In his submissions, the grievor's counsel distinguished the cases that the employer relied on and referenced the following cases: *Guillemette v. Deputy Head*

(Correctional Service of Canada), 2023 FPSLREB 12; Brown and Beatty, *Canadian Labour Arbitration*, 5th ed., at paragraph 7:15 ("Off-duty Behaviour"); Palmer and Snyder, *Collective Agreement Arbitration in Canada*, 6th ed., at 12.117; *Port Moody (City) v. C.U.P.E., Loc. 825*, 1997 CanLII 22648 (BC LA); *Ottawa-Carleton District School Board v. O.S.S.T.F., District 25* (2006), 154 L.A.C. (4th) 387; *Nova Scotia Teachers' Union v. Nova Scotia Community College*, [2003] N.S.L.A.A. No. 14 (QL); *Kativik Regional Government (Transport) v. Kativik Regional Government Employees' Union*, 2006 CanLII 205 (CA LA); *Coquitlam Library Board v. Canadian Union of Public Employees, Local 561*, [1997] B.C.C.A.A.A. No. 337 (QL); *Moloney Electric Inc. v. Unifor, Local 55N* (2015), 256 L.A.C. (4th) 113; *Ontario (Workers' Compensation Board) v. Canadian Union of Public Employees, Local 1750* (1995), 45 L.A.C. (4th) 257; and *Turner v. Treasury Board (Canada Border Services Agency)*, 2006 PSLRB 58.

[74] Counsel for the grievor concluded by asking that the grievance be allowed. He repeated that the grievor would not seek any retroactive pay were the grievance allowed.

C. The employer's reply

[75] Counsel for the employer submitted that the employer is entitled to use the PSC Code and the DND-CAF Code to consider or reconsider an employee's past conduct. The fact that it decided one way on a given set of facts did not preclude it from revisiting its response when the same set of facts were put before it. He submitted as well that the PSC Code and the DND-CAF Code applied both on the job and to off-duty conduct.

[76] Counsel for the employer also submitted that society and its concern over conduct such as the grievor's have evolved. Some of the decisions that the bargaining agent relied on — such as the *Port Moody (City)* case — might not be good law now. Those older decisions, if decided today, might not be decided the same way.

V. Analysis and decision

[77] The employer's argument comes down to this: its decision to terminate the grievor was justified by the following reasons:

> 1) He committed a serious offence under the *Criminal Code*, which damaged its reputation.
> 2) His co-workers would be disturbed if he returned to work.

3) His off-duty conduct violated the terms and conditions of his employment established by the PSC Code and the DND-CAF Code.

[78] The first two justifications arose from the *Millhaven Fibres* case.

A. Issue A: *Millhaven Fibres*

[79] *Millhaven Fibres* is old. It is also somewhat problematic in its reasoning.

[80] The facts in *Millhaven Fibres* were as follows. A strike took place. Some employees crossed the picket lines. The strike ended with a settlement, which included the agreement that "… no reprisal action will be taken against any employee for participating or not participating in the strike" (see paragraph 5). Despite the agreement, the grievor in that case (who had participated in the strike) threatened two of the employees who had crossed the picket lines, and further, in a second incident, he damaged their property. The police questioned the grievor but ultimately did not charge him. He admitted that he had committed the damage, said that he had been intoxicated at the time, and made restitution. The employer terminated him.

[81] The arbitration board that heard the grievance consisted of three members. In his decision, the board's chairperson referenced (without naming) a number of arbitration cases, from which he extracted the principles that he suggested applied to off-duty conduct. At paragraph 19, he stated, "Generally speaking, it is clear that the right of management to discharge an employee for conduct away from the Plant, depends on the effect of that conduct on Plant operations." He then suggested that to sustain a termination on the basis of off-duty conduct, the employer has "an onus" to demonstrate the following, at paragraph 20:

…

(1) the conduct of the grievor harms the Company's reputation or product

(2) the grievor's behaviour renders the employee unable to perform his duties satisfactorily

(3) the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him

(4) the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees

(5) places difficulty in the way of the Company properly carrying out its function of efficiently managing its Works and efficiently directing its working forces.

[82] Based on that analysis, the chairperson concluded that the termination was justified. He upheld the dismissal but nevertheless recommended that the employer hire the grievor in some other capacity. Another arbitration board member (Storie) agreed that the grievance should be dismissed but did not agree with the recommendation. Another member (Storey) dissented. He pointed out that the evidence did not support a finding with respect to any of those five factors. Nothing set out that the employer's operations had been affected, that the grievor's co-workers would not work with him, and that the employer's reputation or products had been damaged. Nor was there any breach of the *Criminal Code*, inasmuch as no charges had resulted from the grievor's conduct.

[83] These concerns with the chairperson's reasoning had some merit.

[84] Arbitrators and adjudicators have observed that factors 2, 3, and 5 overlap. They are to a large extent expressions of the same thing — off-duty conduct that disorders the employer's operations **on site**.

[85] Second, factors 1 and 4 elide two distinct ways in which an employee's off-duty conduct might harm an employer's reputation or that of its products.

[86] The first type of off-duty conduct involves an employee's public criticism of the employer's character or reputation or the quality or safety of its products. Such criticism may damage the employer's reputation. Whether it does may depend upon the nature of the criticism, the context in which it is made, and the employee's intent. If the employee knew or ought to have known that the criticism would or could damage the employer's reputation, there would be grounds to consider discipline for such off-duty conduct.

[87] The second type of off-duty conduct involves employee actions that attracts social or moral outrage or the attention of the police and the justice system. Such conduct, even though the employee does not intend it as a direct comment about the employer's reputation, may still damage it. It may foster a reasonable concern on the employer's part that the public may think less of it for employing such a person.

[88] The difficulty in this type of conduct is that for an employer to act on such concern requires that it assume that the public's reaction is well grounded, reasonable,

and free of prejudice or bias. That is not always a safe assumption, particularly in the current age of virtue signalling on social media. The resulting concern has led arbitrators and adjudicators to develop a more general, objective test, which is whether a reasonable and fair-minded member of the public would think, if apprised of all the facts, in particular whether the continued employment of the employee would so damage the employer's reputation as to render that employment impossible or untenable: see, for example, *Ottawa-Carleton District School Board*, at para. 17; *Munroe*, at para. 119; and *Oilers*, at para. 75.

[89] The second type of off-duty conduct also may require balancing or at least considering competing social policy issues and values. So, for example, terminating an employee who has been charged but not yet found guilty of a crime — whether serious or not — goes against the presumption of innocence. And even if that employee is found guilty, one may wonder whether refusing to employ them after they have served their time conflicts with the principles of rehabilitation; see the discussion in *Phillips Cables Ltd. v. United Steelworkers of America, Local 7276* (1974), 5 L.A.C. (2d) 274, cited in *CEP Atlantic*, at para. 19.

[90] Finally, as the dissenting arbitration board member noted in *Millhaven Fibres*, I also note that no authority was provided for factor 4 — a serious breach of the *Criminal Code*; see point 4 in paragraph 48. Nor was there any discussion of just what kind of breach, or what type of *Criminal Code* offence, would satisfy this factor. Would any breach of the *Criminal Code* count? Or would only serious offences count, such as murder? Yet, it is difficult to see how a conviction for an off-duty assault in a bar-room brawl that involved no member of the employer's operations would have any impact on those operations.

[91] Moreover, it is not known whether the chairperson in *Millhaven Fibres* had in mind conduct that had a nexus to the employer's workplace and operations or conduct that was entirely unrelated to that workplace and those operations. If it was the former, then the reference to the *Criminal Code* was unnecessary. The need for some nexus between the off-duty conduct and the employer's operations has been recognized as a necessary justification for discipline; see, for example, *Munroe*, at paras. 116 and 124; and Brown and Beatty, at paragraph 7:15. But if the latter was intended, then one is left with all the unanswered concerns about how and when and under what circumstances an employer is entitled to bend to public outrage, whether

actual or feared. (The arbitrator in *CEP Atlantic* posed similar doubts and questions at paragraph 50.) The fact that such questions are not answered is all the more concerning because there was no need in *Millhaven Fibres* to go beyond the facts — the grievor had verbally harassed and damaged a co-worker's property, which was conduct that fell clearly within the "nexus" principle.

[92] In the end, then, the five factors in *Millhaven Fibres* are really a distraction from what I see as the one and only question when it comes to whether off-duty conduct could justify discipline: did the conduct have — or could it reasonably be expected to have had — a damaging impact on the employer's reputation, its product or services, or its operations? If it did, then discipline up to and including termination may be warranted. But if it did not, then as the chairperson noted in *Millhaven Fibres*, at paragraph 25, "… an employer does not become the guardian of every personal act of the employees …"; see also *Munroe*, at para. 113; and *Moloney Electric Inc.*, at paras. 44 and 45.

[93] Nothing is added to the analysis by breaking it down into a consideration of the five factors listed in *Millhaven Fibres*. It is better then to analyze the question of whether off-duty conduct can justify discipline not by referring to those five factors but rather against a single question: what impact, if any, can it reasonably be said that the off-duty conduct — whether criminal or not — would have had on the employer's business and operations?

[94] Turning to the facts before me, I was not persuaded that the grievor's conviction in 2019 for the off-duty conduct in question was sufficient to warrant any discipline, let alone termination. This is for a number of reasons, based on the facts and on the authorities that the parties relied on.

[95] First, dealing with the employer's operations, nothing set out that the grievor's off-duty conduct before 2015 (for which he was convicted in 2019) had any demonstrable impact on the employer's operations. The actions for which he was convicted had nothing to do with the workplace. He worked as an ESS on electrical equipment, with adults. He did not teach or work with or have close contact with children. He was not a transportation enforcement officer working with female officers at night who, during his off-duty hours, repeatedly flashed, and masturbated in front of, young women, as in *Ontario Public Service Employees Union*. He was not a

consulting psychologist working with women offenders who had stalked and harassed a former partner and who, as a result, was terminated, as in *Tobin*. He was not a corrections officer working in a corrections facility who had been convicted of rape, as in *Basra*. He was not an employee who pled guilty to the sexual interference of a minor far more serious and disturbing than that of the grievor and who worked in the same facility as the minor's father, as in *Oilers*. All those cases were examples of **off-duty** conduct that would cause a reasonable member of the public, possessed of the facts in those cases, to conclude that such conduct was incompatible with the employee's work duties and responsibilities.

[96] Second, nothing in the evidence suggested that the grievor's conviction in 2019 in fact interfered with the employer's operations. He was not, for example, an employee whose conviction for a gun offence, and his aggressive conduct in general, led to his co-workers' concern for their safety, as in *Munroe*. The fact that some of his co-workers were discomforted by his conviction in 2015 was not enough on its own to warrant termination; see, for example, *Moloney Electric Inc.* or *Port Moody (City)*. That is particularly true given that the grievor's return to work in 2016 was not accompanied by any disruption to the employer's work operations.

[97] Nor was there any evidence to support a conclusion that a return to work now would interfere with the employer's operations, particularly given that the grievor had worked with his co-workers after 2015 without incident and without any adverse impact on the shop's work. On this point, I note that the employer's 2023 poll of the workplace revealed no more than mild misgivings on the part of some (for reasons already given, I have discounted GH's testimony on that point).

[98] To conclude this part of the analysis, then, I was not persuaded that — and the onus was on the employer to persuade me — the 2019 conviction justified discipline, let alone termination. The grievor's off-duty conduct had not become known to the public at large. Even if it had (and that was unlikely, given that minors had been involved), nothing suggested that a fair-minded member of the public would think that the grievor should not be given a second chance to return to his old employment. He had been convicted for offences that happened long before 2019. He had not repeated that conduct. He had paid his debt to society and had continued to pursue, of his own volition, counselling for such conduct. He had acknowledged and regretted the impact of his conduct on his victims. He would not be working with minors. All those are

positive factors that would weigh in the grievor's favour in the mind of a fair-minded member of the public possessed of all the facts. Nothing in those facts could support a conclusion that the grievor's off-duty conduct would or could damage the employer's reputation or its ability to conduct its operations.

[99] That leaves the question of whether the off-duty conduct breached the terms and conditions of the grievor's employment because it breached the PSC Code and the DND-CAF Code.

B. Issue B: the alleged violation of the PSC Code and the DND-CAF Code

[100] The termination letter of September 26, 2019, referred to breaches of the employer's *Standards of Conduct* and the PSC Code. It did not specify the standards or values that had been breached. Captain Benoit pointed to the passages already cited. But with respect, the statements in them are too vague, subjective, and general to provide guidance as to whether any particular **off-duty** conduct should be sufficient to warrant discipline, let alone termination. At best, the statements are aspirational rather than directory.

[101] Given the employer's position that those standards and the PSC Code were part of the grievor's terms and conditions of employment, I would have expected to see a Notice of Misconduct investigation of the grievor's conduct after the 2015 conviction if they had truly been the source of the employer's concerns. There was none.

[102] I note as well Ms. Miller's testimony that as of the grievor's 2015 conviction, the employer was concerned about *Millhaven Fibres*. Indeed, almost all its evidence and submissions focussed on the *Millhaven Fibres* test, not on the PSC Code and the DND-CAF Code. That being the case, I was not persuaded that the grievor's conduct violated that code or if it had that any such violation added anything contrary to or in addition to the *Millhaven Fibres* analysis.

C. Confidentiality Order

[103] At the beginning of these reasons I noted my decision, following the request of both parties, to anonymize the names of the grievor and of some of the witnesses as well as to seal the record. The parties made this request jointly, namely with the objective of protecting the identify of the minor victims referenced in the criminal complaints. I must explain my reasons for that decision because the Board is subject to

the open court principle. Requests for confidentiality orders, which limit court openness, are subject to the test as enunciated by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 ("*Sierra Club*") and *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75 ("*Sherman Estate*").

[104] The court in *Sherman Estate* emphasized that there is a strong presumption in favour of the open court principle. That means that there is a strong presumption in favour of open and public access to the evidence and proceedings of quasi-judicial bodies like the Board. The fact that such access may afford some personal inconvenience, upset or embarrassment of the parties is not in itself sufficient to justify a departure from the open court principle (*Sherman Estate*, at para. 32). At para.38 of *Sherman Estate* the court presented three criteria that a person or party seeking an exception to the open court principle has to establish:

> *(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.*

[105] The court nevertheless recognized that there could be privacy interests that went beyond the merely personal, and which engaged an important public interest. Important public interests could include the general commercial interest of preserving confidential business information; the proper administration of justice in ensuring the fairness of a trial; anonymizing the names of young offenders in the interest of encouraging their personal rehabilitation; information relating to stigmatized medical conditions; sexual orientation; subjection to sexual assault or harassment; or where the information that would otherwise be open to public view is part of the person's core identity and dignity. In short, and as Kasirer JJ. for the court observed at para.73:

> *... protecting individuals from the threat to their dignity that arises when information revealing* ***core aspects of their private lives*** *is disseminated through open court proceedings* ***is an important public interest for the purposes of the test****.*
>
> [Emphasis added]

[106] As he went on to state at para.76:

> *… Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific….*

1. Court openness poses a serious risk to an important public interest

[107] I find that court openness in this case poses a serious risk to a number of important public interests, including the dignity of the minor victims, the grievor, and other third parties.

[108] The protection of minors can be an important public interest for the purposes of limiting court openness (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 SCR 567, at para. 17). Although the fact that information concerns minors, on its own, is not enough to rebut the presumption of court openness (*Sherman Estate*, at para. 92), it is in the current case where the information concerns acts of a sexual nature committed against them. There is a recognized important public interest in protecting individuals who have been subjected to sexual assault or harassment (*Sherman Estate*, at para. 77, citing *Fedeli v. Brown*, 2020 ONSC 994, at para. 9). Even more so when these individuals were minors at the time of the commission of the acts. This information strikes at what the Supreme Court of Canada has called "biographical core information", information that consists of "intimate or personal details about an individual" (*Sherman Estate*, at para. 75). Dignity is at serious risk "… where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public" (*Sherman Estate*, at para. 71). Court openness in the current case poses a serious risk to dignity of the minor victims involved.

[109] Court openness also poses a serious risk to the grievor's dignity: "Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress …" (*Sherman Estate*, at para. 72). Given the nature of the offences for which the grievor was convicted, publicity would expose him to public scrutiny that would go to the very core of his dignity as a person. Naming the grievor would also expose him to possible negative treatment in the workplace (as evidenced by what happened after his second conviction): see, for e.g., *A.B. v. Canada Revenue Agency*, 2019 FPSLREB 53 at para.152, as explained in

Matos v. Treasury Board (Canada Border Services Agency), 2024 FPSLREB 7 at para.24. Given that I am ordering the reintegration of the grievor, there is an interest in allowing him to successfully reintegrate without suffering harm to his dignity.

[110] The dignity interests of other third parties are also at serious risk, such as that of the grievor's current partner (with whom he has had a long-standing relationship) and her child (now young adult): see, for example, *Grievor X v. Canada Revenue Agency*, 2020 FPSLREB 74 at para.111.

[111] I am satisfied that in the particular circumstances of this case it would be appropriate to anonymize the names of the grievor and some of the witnesses.

2. The confidentiality order is necessary

[112] I find that both orders requested, anonymization and sealing of the record, are necessary measures because there are no reasonable alternatives.

[113] Refusing to grant anonymization of the grievor's name would lead by inference to the identification of third parties not involved in this matter, including the minor victims. It is also necessary to the protection of his own dignity to not associate him with the nature of the infractions. Where sensitive information can simply not be included in a decision, anonymization may not be necessary. However, in the case at hand, an examination of the infractions is necessary to the resolution of the grievance. There are no reasonable alternatives to anonymizing the grievor's name. As to the necessity of the anonymization of the witnesses, given the relatively small workplace, anonymizing some of the witnesses is necessary to withhold the grievor's name.

[114] I find that the sealing order is necessary on the entire record. Redaction would not have been a satisfactory alternative measure. The record contains a complex mix of documents, notes and correspondence that intermingle various types of personal or factual information which could lead to the identification of the grievor or the third-party complainants. It would have been too complex a task to attempt to locate and carve out all the various types of information that could lead to identification, especially given that an inadvertent omission to redact some information could lead to identification anyway. The order is proportional.

[115] Confidentiality orders require balancing the open court principle with the important public interest in protecting individuals' dignity. Given what precedes, I find

that the benefits of granting the confidentiality order outweigh the infringement of the open court principle.

[116] I am accordingly satisfied that it is appropriate to anonymize the names of both the grievor and some of the witnesses as well as to seal the entirety of the record, including all the exhibits.

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

(The Order appears on the next page)

VI. Order

[118] The grievance is allowed.

[119] The grievor is to be returned to work two weeks after the date of this decision without retroactive pay for any period before that date but without loss of seniority.

[120] I order the grievor's name anonymized as AB in the decision and in the style of cause.

[121] I order the names of witnesses CD, EF, GH, and JK to be anonymized as such in the decision.

[122] I order the entirety of the record (Board file 566-02-42167) and all included exhibits sealed.

[123] The Board will retain jurisdiction over issues arising from the implementation of this decision for 60 days following its release.

November 12, 2024.

Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board