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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

GILLES LAPOINTE

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Lapointe v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

Before: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: R. Mitchell Rowe, counsel

For the Employer: Andrea Baldy, counsel

Heard at Ottawa, Ontario,
September 24 to 27, 2024,
and by videoconference, November 8, 2024.
Additional written submissions received
November 7 and 29 and December 11, 2024.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] When the Canada Revenue Agency (CRA or "the employer") demoted him, Gilles Lapointe ("the grievor") had been employed as an appeals officer ("AO") at the AU-03 group and level in the International and Ottawa Tax Services Office, Appeals Division, in Ottawa, Ontario.

[2] On April 10, 2019, he was demoted to an appeals processing clerk position at the SP-03 group and level in the same Appeals Division office. That represented a 6-level demotion (based on classification levels), was 2 levels lower than the position that he had held upon being hired 19 years earlier, and represented approximately 50% less income per year.

[3] The demotion letter provided the following reasons:

> …
>
> *I have reviewed your Employee Performance Management Reports for the periods from of* [*sic*] *2012 to 2018. I am aware that your former and current Team Leaders, Jean-François Houle and Steven Guillemette, as well as your previous Manager, Suzanne Dionne, have been working with you for some time to assist you in improving your performance. In September 2013, October 2014 and September 2015, your Team Leader implemented informal Performance Improvement Plans (PIP). Formal PIPs have also been implemented in December 2016, November 2017, June 2018 and November 2018, and all have been updated following completion of each subsequent Performance Assessment. I have reviewed the results of these plans and the subsequent assessments and I note that you do not meet the performance expectations.*
>
> *I understand that meetings occurred on a regular basis with Jean-François Houle, Steven Guillemette, and Suzanne Dionne. During these meetings you were made aware of the potential consequences of not meeting the required performance expectations. You were informed in a meeting on May 31, 2018, and presented with a letter advising that if your performance did not improve, we would be considering further action including the possibility of demotion.*
>
> *The documentation which I have reviewed indicates that both Team Leaders have provided concrete specific direction to assist you in achieving your performance expectations. While there was occasionally some improvement as a result of their efforts, overall there has been no consistent, on-going achievement of required expectations.*

> *I have given this matter serious consideration, and although management has made significant efforts, I do not see the potential for you to successfully achieve and maintain the expectations required of you in your current AU-03, Appeals Officer position.*
>
> *Consequently, by virtue of the authority delegated to me by the Commissioner of the Canada Revenue Agency, under section 51. (1) (g) of the Canada Revenue Agency Act, you will be demoted to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct.*
>
> *As of Monday, April 29, 2019, you will be assigned to the SP-03, Appeals Processing Clerk position, in the Appeals Division.…*
>
> *…*

[4] The grievor grieved the employer's decision on the basis that it constituted disguised disciplinary action. It was referred to adjudication on December 22, 2021, under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

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

II. Summary of the relevant evidence

[6] The employer called five witnesses, who all had direct reporting authority over the grievor. In order of reporting, they were as follows:

- **Sunil Vijh** was, since January 14, 2019, the acting director of the employer's Toronto North Tax Services Office in North York, Ontario, and signed the demotion letter. Before that, he had reporting authority over the grievor between 2014 and 2016 when he was the chief of appeals. However, he never had any direct dealings with the grievor.
- **Manish Goel** replaced Mr. Vijh as the chief of appeals for the Appeals Division in 2016. He was located in the employer's Toronto, Ontario, office and recommended the demotion. He reported to Frank Pagnotta until January 14, 2019, when Mr. Vijh replaced Mr. Pagnotta temporarily.
- **Suzanne Dionne** was the manager of the Appeals Division in the employer's Ottawa office during the grievor's tenure as an AU-03 until her retirement in December 2018. She had been in that role since 2012.
- **Jean-François Houle** joined the Appeals Division in 2012 as an AO and became a team leader in 2014. He was the grievor's first team leader as an AU-03. He completed part of the grievor's 2014-2015 performance appraisal and all of his 2015-2016 appraisal.
- **Steven Guillemette** first became a team leader in January 2017 when he replaced Mr. Houle. He was an AO before then. He completed the grievor's 2016-2017, 2017-2018, and 2018-2019 performance appraisals.

[7] The grievor testified on his own behalf.

A. Background information

[8] The grievor has been a certified general accountant since 1999. He commenced his employment with the CRA in 2000 at the PM-02 group and level. That classification has since changed to SP-05. He was promoted several times during his career. He progressed as an income tax auditor, holding positions at the PM-03 (now SP-06), AU-01, and AU-02 groups and levels.

[9] The grievor joined the Appeals Division in April 2014 as an AU-03 in the employer's Ottawa office. AOs are responsible for reviewing taxpayers' objections to CRA auditors' assessment decisions. He explained that the AU-01 group and level had responsibility for small corporations, the AU-02 for medium corporations, and the AU-03 for medium-to-large corporations with revenues of up to $100 million.

[10] Ms. Dionne was the grievor's manager while he was an AU-03 until she retired on Dec 24, 2018. She managed a team of approximately 90 AOs at the SP and AU-01 to AU-03 groups and levels. Her team was divided into smaller teams of 8 to 10 employees, who were supervised by team leaders who reported directly to her. There were only a few AU-03 employees. The grievor was the only AU-03 on his team.

[11] Mr. Goel testified that the AU-03s were in the most senior positions on the teams and that they were responsible for appeals that often involved more complex issues. The organizations that they dealt with were often represented by lawyers and tax representatives, so it required a more sophisticated level of knowledge to complete the work. Ms. Dionne agreed that those positions dealt with more complex issues and that the dollar amounts involved were often higher.

[12] Mr. Goel stated that it took several years to acquire that skill level and that not all employees were able to achieve it. He stated that the AU-03s typically had more advanced levels of dedication. The grievor testified that he achieved a score of 90% on the substantive tax-law test to become an AU-03.

B. Performance expectations

[13] Mr. Vijh stated that when he was the chief of appeals between 2013 and 2016, the Appeals Division had a severe backlog and wanted to make sure that all the AOs

across the country performed at a high level, to bring the backlog down. He stated that the performance management process provided for an efficient set of rules to achieve the division's goals. Each year, the team leaders rolled out the goals and expectations, against which the employees were periodically reviewed. At the end of each year, the team leaders met with the employees to discuss their performance against the expectations and to discuss the areas for improvement.

[14] Ms. Dionne spoke to a document entitled, "ONTARIO APPEALS INCOME TAX Appeals Officer Expectations 2017-2018". She identified it as setting the expectations for all the AOs on her team, regardless of level. The employer's headquarters ("HQ") set the expectations annually and shared them with employees at the beginning of each evaluation cycle, which was from September 1 to August 31.

[15] The 2017-2018 expectations described these five objectives:

- Objective 1 - manage the appeals file inventory efficiently, to meet the program objectives;
- Objective 2 - achieve the timely disposal of objections;
- Objective 3 - ensure that quality work is performed;
- Objective 4 - respond to information requests and sensitive issues in a timely manner; and
- Objective 5 – support and contribute to an environment of continuous improvement.

[16] Objective 1 imposed expectations in terms of the amount of hours spent working on a file. It stated that the AOs were to resolve objections on average within the established "Standard Disposal Hours" per file. Ms. Dionne explained that HQ updated those standards annually, using the average rate over the previous three to five years. The employer's book of documents also included the standards for the 2015-2016, 2016-2017, and 2017-2018 evaluation years. None was entered into evidence for the 2018-2019 year (i.e., from September 1, 2018, to August 31, 2019), despite the grievor's demotion having occurred on April 10, 2019 — over seven months into that evaluation cycle. Ms. Dionne stated that the standard disposal hours were used only as a guideline and that they were based on an average, since some files could take longer.

[17] Objective 2 imposed an expectation as to the amount of days that a file was assigned to an employee before it was completed. It stated that the employees were to

resolve SP-05 to AU-03 regular, small, and medium-sized enterprise (SME) objections on average within 120 workable days from the assignment date to the decision date.

[18] Ms. Dionne stated that those objectives had been in place for many years, dating from before 2014. When asked whether they had changed, she replied that they had never changed, with the exception of Objective 5. However, I note that the 2018-2019 assessment period contained two important changes. Under Objective 1, it stated that the AOs were to resolve medium-complexity objections within the stated standard hours, on average. As for Objective 2, it stated that the AOs were to resolve medium-complexity objections within 170 net days from the assignment date to the decision date, on average.

[19] Mr. Houle testified that the team leaders were responsible for assigning files to their team members. Mr. Guillemette stated that the files were assigned based on a "first-in first-out" rule. He tracked the number of files assigned to each employee, and when an employee's inventory became low, he assigned them a new file. The AOs were responsible for recording the number of hours spent on a file each week. Ms. Dionne testified that a file's complexity of the file was not always known when it was assigned.

[20] In terms of the day count, Mr. Houle stated that only "workable days" were counted. A file was considered "non-workable" when an employee was waiting for instructions from another division on how to address it. Such a file could not be completed until instructions were obtained. Mr. Houle agreed that on occasion, it takes years.

C. Performance concerns

[21] Ms. Dionne stated that she first became aware of the grievor's performance issues in 2015 while his team leader was Mr. Houle. Mr. Houle described the concerns as encompassing three main points.

[22] Firstly, the grievor had a tendency to review entire files, not just the taxpayers' objections. He believed that doing so was within his right. It resulted in him exceeding the amount of time that he should have taken to complete his files. Secondly, he would add a large number of personal observations of assumptions in his reports or letters, despite repeatedly being told not to. Thirdly, he would refuse to follow other divisions' instructions when he did not agree with them.

[23] Mr. Houle stated that at its source, the problem with the grievor was that he saw scams everywhere and thought that all taxpayers were crooks. As a result, he had a tendency to reaudit all the files because he thought that the auditors had missed issues. That would result in excessive amounts of time being spent on files.

[24] Ms. Dionne stated that those concerns continued when Mr. Guillemette replaced Mr. Houle after his departure in January 2017. Ms. Dionne stated that the concerns were discussed with the grievor during his performance appraisals and that performance improvement plans (PIP) were implemented to address them. Ms. Dionne stated that the PIP process was mandatory for any employee who obtained the rating of "Mostly Meet Expectations" or "Does Not Meet Expectations" during the annual performance appraisal process.

[25] Copies of the grievor's performance appraisals and PIPs were entered into evidence. Those documents purported to describe the employer's concerns. Ms. Dionne confirmed her agreement with their contents while he was working as an AU-03. According to them, he obtained the rating of "Mostly Meet Expectations" in 2014-2015 and 2015-2016 and "Does Not Meet Expectations" in 2016-2017 and 2017-2018.

[26] Performance appraisals were also entered into evidence for earlier years when the grievor was working as an income tax auditor at the AU-02 group and level. However, none of the employer's witnesses authored those documents or had any knowledge of the grievor during those years. According to those appraisals, the grievor received the "Meet Expectations" rating in 2011-2012 and the "Mostly Meet Expectations" rating in both 2012-2013 and 2013-2014. Ms. Dionne testified that she had no knowledge of the grievor's prior performance when she hired him.

[27] In terms of the help that was provided to the grievor, Ms. Dionne stated that it was mostly coaching from his team leaders. She stated that no improvements were noted, that he provided only limited cooperation, that he did not acknowledge his shortcomings, and that he did not believe in the PIP process.

[28] The grievor confirmed that he did not believe that PIPs should apply to employees at his level.

[29] Mr. Houle stated that he met with the grievor in November 2016 to explain his first PIP. The PIP provided that the grievor was to resolve SP-05 to AU-03 regular SME

objections within 120 workable days from the assignment date to the decision date (on average), with respect to files assigned after September 1, 2015. He was to analyze and review only the issues that the taxpayer raised. His decisions were to be based only on facts, and he was to refrain from providing opinions and assumptions. He was to follow the instructions of his manager and team leader or from other CRA Divisions. He was to support the strategic resolution of objections by considering the credibility of both the taxpayers' written and verbal information, as well as the information that the CRA retained.

[30] The PIP provided that effective December 12, 2016, the team leader committed to meeting with the grievor every two weeks, to discuss his progress and to provide additional training, as required.

[31] Mr. Houle stated that he met with the grievor "throughout the year". He stated that as part of his day-to-day supervisory duties, he monitored the performance of each of his employees. When he saw that an employee was approaching the end of the allocated time, he would meet with them, to discuss where they were and what had to be done. He stated that 10 people were on his team but that the grievor took more than a tenth of his time. He stated that he did not take any notes of their discussions.

[32] The PIP was set to be reviewed after four months, on March 31, 2017; however, no evidence was provided that that was done.

[33] Mr. Guillemette testified that he replaced Mr. Houle. When he started in his new role, Ms. Dionne informed him of the concerns with the grievor's performance.

[34] Mr. Guillemette stated that as the team leader, he met with his employees, to discuss if their files would require additional time. When asked how often he met with the grievor, he replied as follows: "He was very good. He would come to me twice a week to discuss files and try to be on the same page in terms of how to manage a file." Mr. Guillemette stated that the standard disposal hours were a guideline and that when assessing performance, he considered a file's complexity when assessing whether any additional time was justified.

[35] Mr. Guillemette stated that he met with the grievor to review the performance expectations, his performance appraisals, and the PIPs. He prepared a new PIP in November 2017. It identified the same objectives as in the previous PIP and added a

fourth objective, which was to respond to information requests and sensitive issues in a timely manner. In summary, the grievor was instructed to do the following:

- ensure that objections were completed "… within 120 days from the date that they are assigned…" and, on average, within the standard hours;
- research, analyze, and review only the issues that the taxpayer raised;
- obtain approval if more than the standard hours were required or before seeking guidance from other departments;
- prepare a "lead to Audit" when new issues were detected and not extensively review or audit them;
- follow and apply the instructions received by other CRA Divisions;
- complete files based on the position agreed to with the team leader;
- prepare and issue a proposal letter before 20 hours accumulated on a file and before 60 days on a file elapsed;
- refrain from providing opinions and making personal comments about the taxpayer, representative, or other CRA employees in his letters and reports;
- focus on the facts and not rely on assumptions;
- consider the credibility of both the taxpayers' written and verbal information; and
- respond to access-to-information and privacy (ATIP) requests and ministerial correspondence within the established deadlines.

[36] The PIP provided that the team leader was to meet with the grievor every two weeks to discuss progress, provide feedback, and provide additional training, as required.

[37] Mr. Guillemette was asked if the grievor ever acknowledged his shortcomings. He replied that the grievor acknowledged that he spent considerable time on his files; however, he justified it based on the time that he believed was needed to conduct the review that he believed should be done.

[38] The PIP dated November 29, 2017, was to be reviewed after 4 months, on March 31, 2018. No evidence was presented that that was done. However, a mid-year review was held on March 21, 2018, for the period from September 1, 2017, to February 28, 2018, and it identified the same concerns. It stated that since the start of the review period, the grievor had completed 3 files, but that that had taken well in excess of the expected budgeted hours and more than the 120-day deadline. However, it added, "Hours exceeded the maximum target partly because several of [the grievor's] files deal[t] with complex issues (transfer pricing, international transactions)."

[39] It stated that the grievor had to understand that an AO's role is to review only the issues that the taxpayer raised and that "[a]ny additional concerns should be

referred to the Audit Division and reviewed by them." It stated that once the Appeals Division received a recommendation, he was to follow the provided instructions.

[40] It stated that the grievor understood that his personal comments could not be included in reports and letters. It added that he "… continues to make these comments (highlighting them in red) with the understanding that they will be reviewed by management in their review. These comments should be removed altogether."

[41] Finally, it stated that the grievor had to be mindful of the Appeals Division's policy on issuing upward assessments and that he was to discuss that potential with management before extensively analyzing it.

D. The warning letter

[42] Ms. Dionne explained that she decided to engage the Human Resources (HR) division and her manager since she saw no improvement after six years of working with the grievor. She did not engage anyone from HR before then. HR informed her that the CRA's policy on terminations and demotions required providing him a warning letter, so Mr. Goel signed one and provided it to the grievor on May 31, 2018.

[43] Mr. Guillemette stated that he drafted the letter based on Ms. Dionne's instructions. He stated that he reviewed the grievor's prior performance appraisals, to confirm that the issues had been ongoing. In cross-examination, he agreed that in the letter, he did not mention the dollar values of the files, the fact that the grievor worked on complex files, that some of those files were at the AU-04 or AU-06 levels, or that some had been referred to HQ and could have been delayed for years. Mr. Goel defended the warning letter by stating that its purpose was to express the areas that had to improve and that it was not intended to review all the grievor's performance areas, including those in which he met expectations.

[44] The letter referred to the grievor's performance since 2012, while he worked as a tax auditor at the AU-02 group and level. It stated that its purpose was to inform him that he was not meeting the requirements of his position and to inform him of the consequences if it continued.

[45] The following summarizes the concerns about the grievor's performance that were expressed in the May 31, 2018, warning letter:

- He was not meeting the expectation of completing 25 to 35 files per year and "within 120 days of assignment", on average.
- It had taken him on average 198 hours to complete files over the previous 3 years, while the standard for files at his level was 25 to 35 hours.
- He had been told numerous times that upward assessments could not be raised solely on a desk review and assumptions and that the conditions of the Appeals Division's directive had to be met.
- To review additional risk areas that were not under objection, he had to obtain management's approval or prepare a referral to the Audit Division.
- He had been asked repeatedly to remove his assumptions and personal opinions from his working papers, and once, he was asked to rewrite a referral to HQ three times before the appeals manager approved it.
- He did not follow the instructions received from the Audit Division, HQ, the Competent Authority, and the Department of Justice and instead completed additional work on their submissions.
- He declined to consider verbal representations when attempting to resolve an objection. By doing that, he did not respect the *Taxpayer Bill of Rights* and risked additional time and cost by having taxpayers file appeals that the division could have settled.
- He did not respond to ATIP requests in a timely manner and was reluctant to provide information created by another section.

[46] It added, "Finally, you made submissions to the Headquarters-Appeals Branch without obtaining proper approval. This had a negative impact on the reputation of our division and required my intervention."

[47] In terms of the efforts made to help him, the letter stated as follows:

> …
>
> *… Feedback has been provided to you on a regular basis, and you have been given opportunities to discuss goals and training needs with your manager, myself and the director. To assist in your learning needs, you have recently attended courses on tax treaties, international transactions, foreign accrual property income and cross border tax avoidance.*
>
> …

[48] The letter stated that since 2014, the grievor had received numerous opportunities to improve, and that since his PIPs were implemented in November 2016 and December 2017, he had met with his team leader on a biweekly basis. It added this:

> …
>
> *… Unfortunately you have declined to engage in this process and follow instructions provided by your team leader and manager. You have refused to review or discuss your performance*

> *appraisals and have not offered suggestions to help remedy the identified performance gaps.*
>
> …

[49] The letter concluded that no consistent or sustained improvement in his performance had been noted and that if his performance did not improve by June 30, 2018 (i.e., in 30 days), Mr. Goel might recommend that the grievor be demoted or terminated, for reasons of incompetence.

[50] In cross-examination, Mr. Goel stated that his comment as to the negative impact on the Appeal Division's reputation referred to once when the grievor had referred a file without obtaining the required approval in advance. He stated that the grievor did not follow the procedure that applied to everyone, which made the division look bad since one of its AOs did not follow the procedure. He stated that the warning letter pointed out to him that it was not correct to not follow those procedures and that doing so was wrong.

[51] Mr. Goel stated that several issues were identified in the warning letter about the grievor not following instructions, which was a very serious issue. He stated that the Department of Justice was at a higher level and that their division had to follow instructions when they were received.

[52] In cross-examination, Mr. Goel disputed that the grievor did quality work. He stated that the grievor did work that was not required and that he had been told many times that he had to obtain approval before doing all that work. He was also told to not include personal opinions and that he had to work impartially. He also refused to follow instructions that the Audit Division received. Mr. Goel stated that those were all qualitative deficiencies that result in the grievor not meeting his performance expectations.

[53] Mr. Guillemette was asked to explain the ATIP issue that was noted in the warning letter. He explained that the CRA had received an ATIP request on one of the grievor's files and that it was the AO's responsibility to comply with the request. He stated that the grievor did not agree with the decision on the file and that he declined to provide the requested information. By doing so, he did not comply with an AO's duties.

[54] The grievor testified that that incident occurred the week after he received his performance appraisal rating of "Does Not Meet Expectations". He stated that he was upset since he had much work to do to close his files. However, the ATIP request was time-consuming, since he had to go through a great volume of papers in the vault to find those with the names of the client who made the ATIP request.

[55] The grievor denied the statement that he had referred a file to HQ without obtaining approval in advance. He added that he did not hold HQ's opinions in high regard and that he did not want to use it so he would never have sent anything to it on his own. However, he stated that he had sent submissions to the CRA's commissioner, who was part of HQ. Those submissions are reviewed in greater detail later in this decision.

E. The grievor's performance after the warning letter

[56] A new PIP was provided to the grievor for the month of June 2018. Its content was essentially the same as the 2017 PIP, with the exception of the following:

> *In addition to completing his files* ***within 120 days from the date of assignment and*** *within the standard number of hours, he was to also on average, complete files* ***within 365 days of the objection being received*** *by the intake centre.*
>
> *He was told to follow the instructions in the Appeals Manual when considering and proposing upward adjustments.*
>
> *He was to meet with his team leader to discuss the progress of his files on a weekly basis.*
>
> [Emphasis added]

[57] No evidence was provided as to the origin of the requirement that he complete his files within 365 days.

[58] Mr. Goel testified that the grievor should have been able to address the performance concerns in 30 days.

[59] Mr. Guillemette prepared an assessment of the grievor's performance for the month of June 2018. It provided that he had closed 1 file and had submitted another for closing. It stated that the time spent on those files (40.5 and 42.25 hours) greatly exceeded the time normally required to close files and that it was not justified by their complexity. It added the following:

…

> *… The submissions prepared by Gilles also contained personal assumptions and comments that required significant editing. Gilles nonetheless accepted the suggested changes and only made modifications to areas requiring additional clarification. The submissions did not contain any negative comments towards the taxpayers and their representatives.*
>
> *During the month, Gilles was also asked to close a file that had been settled by external stakeholders (Department of Justice and Revenue Quebec)… Gilles submitted an analysis advising that he disagreed with the settlement and proposed an alternative method for resolving the file. The appeals manager denied the request and asked Gilles' team leader to prepare the notice of confirmation instead.*
>
> *During the month, Gilles understood that the role of an appeals officer is to review only the matter under objection. He accepted direction from the team leader to prepare to restrict his analysis and to prepare leads to have audit review other areas of concern.*

[60] An undated notation was added to the PIP that extended its application beyond the June 30, 2018, deadline.

[61] On July 5, 2018, the grievor met with Ms. Dionne, Mr. Guillemette, and Mr. Goel. Ms. Dionne stated that at the meeting, the grievor confirmed that he did not have any medical condition that impacted his work. No other evidence was provided about the meeting.

[62] Ms. Dionne testified that on November 29, 2018, she held a performance meeting with the grievor and Mr. Guillemette. The grievor was provided a copy of his 2017-2018 performance appraisal, and a new PIP. She stated that he was given the opportunity to review them but that he declined to. He stated that all his files were fraudulent, that the CRA was letting go of millions of dollars, that he was the only one seeing it, and that everyone around him was incompetent. When he exited the room, he stated this: "You can fire me; I don't care."

[63] The 2017-2018 performance appraisal for the period from September 1, 2017, to August 31, 2018, rated the grievor as "Does Not Meet Expectations". It noted that a "small improvement in performance" had been noted compared to the previous cycle; however, most of the same concerns were still present. It noted the following points of relevance:

…

… Gilles completed 9 files and submitted 2 additional files for closing. Three were classified at the AU-04 level. These were project files that were completed with the input of the Headquarters-Appeals Branch. This production is an improvement over the previous year, but remains below the expectations for someone with his experience.

For the objections that were in progress, the main issue was the amount of time spent on files. The time spent on files ranged between 200 to 500 hours, while the average is 27 to 35 hours. The total hours charged were not justified based on the complexity of the files and the issues under objection. Hours exceeded the target because Gilles did not restrict his review to the issues under objection.…

Files that were assigned to Gilles were completed within 355 to 800 days. While most files had to be placed on hold pending the outcome of referrals made to other sections, this is still well beyond the target of completing files within 120 days of assignment.

… Gilles kept his team leader up to date on the status of his files and discussed any issues. However, too often Gilles would continue doing additional analysis even after a decision had been agreed upon ….

Gilles understood that he cannot propose additional adjustments without providing adequate documentation and support. When detecting issues that may require further audit review, Gilles prepared leads to the Audit Division instead.

In many files, Gilles received instructions from the Real Estate Appraisals Section, Headquarters-Appeals Branch and the Audit Division on how to resolve his objection. Too often Gilles failed to follow the instructions and ignored the conclusions received.

Gilles did not process files that had been settled by the Department of Justice in a timely manner. Gilles must understand that one of the roles of an appeals officer is to process files settled at a higher level, even if the officer does not necessarily agree with the decision.

Too often Gilles did not write his reports in a clear, accurate and concise manner. The reports contained personal opinions that had to be deleted… It should be noted that many of Gilles' files were very technical in nature, which added to the difficulty in understanding the decision reached.

Too often Gilles failed to respond to representations brought forward by taxpayers and did not accept verbal representations.

Gilles did not respond to all Agency reports in a timely manner. Gilles must understand that providing regular status updates on project files and correct data integrity errors are part of the job responsibilities of an appeals officer at all levels in the Tax Services Office.

> *Gilles received one Access to Information Request during the period in review. Gilles did not respond … in a timely manner and was reluctant to provide information… created by another section.*
>
> …

[64] Mr. Guillemette testified that the three AU-04 files that were assigned to the grievor were project files and that they required completing very little analysis. He stated that he considered the complexity of the grievor's files and that he still felt that it did not justify the number of hours spent on them.

[65] A new PIP was prepared on November 29, 2018, for the 2018-2019 review period. It was essentially the same as the previous version, with a few exceptions. In the required corrective actions, the grievor was instructed to "[r]efrain orally or in writing from providing opinions and making personal comments about the taxpayer, representative or another Agency employee", and to "[e]nsure that no personal comments are made about other employees, taxpayers or representatives."

[66] The PIP also increased the performance indicator for completing files from 120 days to "… within **150 days** from the date of assignment …" [emphasis added].

[67] The PIP provided that in the absence of a significant and sustained improvement by the follow-up date of February 28, 2019, management would have to consider further actions that could include demotion or termination of employment for reasons of incompetence.

[68] No evidence was provided that any follow up was done on February 28, 2019, or after that. Mr. Guillemette testified that he added this comment to the grievor's performance evaluation: "We are continuing to follow the performance indicators and responsibilities."

[69] I note that the expectations in the November 2018 PIP do not align with those for the 2018-2019 period (from September 1, 2018, to August 31, 2019). According to the latter, the expectations contained a few notable changes. The objective to resolve objections on average within the established "Standard Disposal Hours" per file was modified to specify that those standards applied only to files of "medium" complexity. Further, the objective to resolve SP-05 to AU-03 regular SME objections on average within 120 workable days from the assignment date to the decision date was modified

to state that the AOs were to resolve **medium**-complexity objections within **170 net days** from the assignment date to the decision date, on average.

[70] No evidence was provided as to why those expectations were changed or why the PIP imposed on the grievor on November 29, 2018, did not reflect those new expectations.

[71] Moreover, none of the employer's witnesses provided evidence on improvements that the grievor made after August 31, 2018.

[72] Mr. Guillemette's comments were limited to stating that the grievor completed some files, so there was a slight improvement.

[73] Ms. Dionne stated that she could not recall how many files the grievor closed during the 30-day period that followed the warning letter. In cross-examination, it was put to her that during the period from the warning letter to the demotion, the grievor closed 8 files, and that 3 were at the AU-04 level. She replied that she could not speak to that. She knew that his team leader continued to work with him after the warning letter was issued, to provide coaching and to follow up. She stated that when she retired, everything was in the Labour Relations (LR) team's hands.

[74] Mr. Goel testified that he was aware that the grievor had closed a few files after he received the warning letter but did not know how many. When asked whether he was aware that the grievor's performance had improved, he replied as follows: "You would have to go to the team leader for that, I am not aware. I do not observe his performance directly; I am not his team leader. I was told that the issues persisted. What is in the document is what I was informed of. So it is what is in his performance review."

[75] Mr. Guillemette testified that he never discussed the grievor's performance with Mr. Goel.

[76] Mr. Vijh confirmed in cross-examination that his only knowledge of any improvements that the grievor made after receiving the warning letter was limited to what was included in the summary of the grievor's performance appraisals that was provided to him on February 4, 2019. The summary's contents are reviewed later in this decision.

[77] A performance appraisal was prepared in November 2019 that covered the period from September 1, 2018, to the demotion date (i.e., the 2018-2019 performance appraisal). It was prepared well after the demotion occurred; therefore, the employer did not rely on it when it made its demotion decision. The appraiser identified on it did not testify and was not referred to. So, it is unknown whether that individual had reporting authority over the grievor while he was an AU-03.

[78] It provides that the expectations were to complete medium-complexity objections within the standard hours on average and to resolve them within 170 net days from the assignment date, on average. It provides that during the period from September 1, 2018, to April 10, 2019, the grievor completed 4 files, that his time spent on files ranged from 55 to 518 hours, and that the total hours charged were not justified based on the files' complexity. It stated that he exceeded "the target" because he did not restrict his review to the issues under objection. No mention is made of the complexity level of any of his files.

[79] The grievor testified that after he received the warning letter on May 31, 2018, he worked very hard to improve his production. He referred to a document that he prepared that listed his files' statuses. He stated that between September 2018 and March 2019, he closed 8 files. He stated that in 2019, he completed 16 files. He stated that some of his completed files could not be closed, as they had been referred to HQ in 2015. Until he heard back, he was unable to receive the credit for those files. He stated that 2 of them were still active as of the hearing.

[80] The grievor stated that one group of his files could not be closed since he believed that an upward adjustment should have been applied. However, his manager would approve it. The upward-adjustments issue is discussed later in this decision. He stated that after he received the warning letter, he was afraid that he would be terminated, so he discussed the options with Mr. Guillemette. The grievor stated that he felt that he could not just turn a blind eye to what he knew was in the files. He stated that he and Mr. Guillemette reached an agreement to refer a group of his files for a criminal investigation.

[81] The grievor stated that 70% of his files could not be completed within the normal standard hours since they involved "complex international stories that never end[ed]". He stated that the strategy that those organizations used was to intentionally

make things complicated. Mr. Guillemette agreed that as the only AU-03 on his team, the grievor had files with more complex issues. However, he believed that that complexity did not justify the amount of time the grievor spent on his files.

[82] In cross-examination, Mr. Goel disagreed that the grievor had some of the most complex files on Mr. Guillemette's team. He stated that the grievor was given files that were consistent with his level. He was unaware that the grievor was the only AU-03 on Mr. Guillemette's team.

[83] No evidence was led on whether other AOs were able to perform their work within the employer's performance expectations or how the grievor compared to them.

[84] In cross-examination, Mr. Guillemette was shown a document that the grievor prepared, which purported to list the files that he had worked on, when they had been closed, and their levels. Mr. Guillemette agreed that the grievor had been working on files at the AU-04 and AU-06 levels. He stated that he was unable to confirm whether they were closed on the dates indicated in the document. Of note, he did not deny any of its content.

[85] In cross-examination, Mr. Guillemette stated that at times, he agreed with the grievor's concerns about issues that had been identified that were not part of the taxpayer's objection. He said that in those cases, he would review the amount of time to be allocated to the file. He said that the process was that if something was found, it was to be sent to the audit team for its review. He agreed that the grievor had a strong ability to interpret different sections of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) and to master complex legislation. He agreed that because of those skills, the grievor was correct in some of his disagreements with objections or recommendations.

[86] In terms of personal comments being made in reports and letters, Mr. Guillemette testified that every letter or report that the grievor presented to him had personal comments that had to be removed. He stated that when a document was submitted to him for his review, it was normal to expect some back and forth, and that he would not expect the first draft to be of the quality of being submitted at the final level. However, the grievor should have understood that his comments were not of an appropriate nature and that they should not have been communicated to the taxpayer.

[87] The employer entered five examples of letters or reports into evidence. Ms. Dionne identified that the grievor prepared the following documents:

- a draft internal document requesting the Tax and Charities Appeals Directorate's assistance, dated November 15, 2015;
- a draft internal document requesting the Tax and Charities Appeals Directorate's assistance, dated April 19, 2016;
- a draft letter to a taxpayer, dated August 31, 2016;
- a draft internal document requesting an unknown section's assistance (redacted), dated October 18, 2016; and
- a draft letter to a taxpayer, dated May 19, 2017.

[88] No samples were entered into evidence of letters or reports that the grievor prepared after he received his final warning letter.

[89] The grievor testified that the comments in the documents were intended only for his team leader and were not to be shared with the taxpayers or their representatives. He stated that that was his way of communicating his thoughts on a file with his team leader.

[90] As for the requirement that the grievor follow other divisions' recommendations, he stated that the CRA's manual provided that he was not required to follow them. He stated that the authority went by level and that his team leader or manager had the authority to overrule him. With respect to the requirement that he follow a settlement that the Department of Justice had reached, he stated that he disagreed with it, so he proposed an alternative approach. He disagreed that he was required to follow that direction.

[91] With respect to the taxpayers' representations, the grievor stated that he always considered them. However, he did not agree that he should just accept a verbal representation when it is for a large tax break.

F. The decision to demote the grievor

[92] The grievor was informed of his demotion on April 10, 2019. Mr. Vijh signed his demotion letter. The grievor stated that he considered it a seven-level demotion based on the SP-03 position being seven pay bands lower than his previous position.

[93] Mr. Vijh testified that he became the acting director for the Toronto North Tax Services Office on January 14, 2019. Before then, he had reporting authority over the grievor between 2014 and 2016 when he was the chief of appeals. During that time,

Ms. Dionne had informed him of performance concerns with the grievor. Starting in 2016 and continuing until January 2019, he was in a separate division and had no reason to be informed of the grievor's performance. He never had any direct dealings with the grievor in any of his roles.

[94] Mr. Vijh testified that it was his decision to demote the grievor and that it was made at his level due to his delegated authority. In reaching his decision, he consulted HR and Labour Relations (LR) representatives and Mr. Goel. He stated that he followed Mr. Goel's recommendation since he trusted him.

[95] To make his decision, Mr. Vijh was provided with a summary of the grievor's performance appraisals over the previous six years and a job analysis of alternative positions that were considered for the demotion. He believed that the grievor's team leader had prepared the performance summary; however, Ms. Dionne and Mr. Guillemette both testified that they provided copies of the grievor's performance evaluations and PIPs to the LR team, which in turn prepared the summary for Mr. Vijh.

[96] Those documents were provided to Mr. Vijh on February 4, 2019, in an email from an HR advisor.

[97] The performance summary purported to review the grievor's 2012-2013 to 2017-2018 performance appraisals. It is just over eight pages. It was not reproduced in its entirety, given its length. The summary provides an overview of all the concerns highlighted in this decision. However, I note that it tends to be unbalanced and that it portrays the grievor in an overly negative light.

[98] For example, it did not make mention of the more favourable comments in his performance appraisals, such as this one in his 2016-2017 appraisal, in which Mr. Guillemette noted the following:

> …
>
> *Gilles has a strong ability to interpret various sections of the Income Tax Act and master complex legislation. As a result, Gilles made decisions that were technically correct and supported by legislation. Gilles also provided technical assistance to other team members. In one instance, Gilles assisted an employee in understanding the legislation concerning allowable business investment losses and provided copies of the research he previously conducted on this topic.*
>
> …

[99] Another example of it being unbalanced can be seen in the language used. Some comments in the original performance appraisals were rewritten more negatively. For example, referring to the grievor's performance in 2016-2017, the summary stated that he "consistently" refused to accept taxpayers' verbal representations and that he "consistently" spent too much time analyzing and reviewing issues that the Audit Division did not review. By contrast, the original performance appraisal stated that he did so "[t]oo often". The summary also stated that the grievor had "[c]onsistently failed to follow the protocol concerning referral to other sections, i.e. failed to follow the opinion/recommendations from the Audit division, HQ and his immediate supervisors", while the performance appraisal did not include that.

[100] The summary also failed to mention the factors that contributed to the grievor exceeding the standard hours expected of him. It made no mention that he was assigned files from above his level (AU-04 and AU-06). It did not refer to the team leader's comments from his mid-year assessment on March 31, 2018, which were that the grievor's "[h]ours exceeded the maximum target partly because several of [his] files deal[t] with complex issues (transfer pricing, international transactions)." It did not note the team leader's comment that "many" of his files were "very technical in nature". Rather, the summary stated that the time taken was not justified by the files' complexity and the work required.

[101] The summary also contained a gross error when it referred to the grievor's 2013-2014 performance appraisal, while he was an AU-02. It stated that he obtained the rating of "Does Not Meet Expectations", despite the fact that he obtained a rating of "Mostly Meet Expectations".

[102] After summarizing the grievor's performance appraisals from 2012-2013 to 2017-2018, the summary included comments on the grievor's performance from July to October 2018. They are not in any of the performance assessments or documentation entered into evidence, and no witness spoke to them. The comments in question were the following:

…

> *On July 5, 2018, management met with Mr. Lapointe to confirm that a review of his performance would occur at a later date to discuss the ongoing performance gaps.*

In the months of July and August 2018, Mr. Lapointe was assigned three new files. Mr. Lapointe has issued proposal letters for two of the files and was in the process of proposing and preparing a lead to Audit for the third file. However, the Team Leader noted early signs of failure to complete work within established times, which continued to demonstrate there had been no significant improvement in the performance gaps.

During the month of September 2018, Mr. Lapointe did demonstrate a small improvement in understanding that he cannot propose additional adjustments, unless there is adequate support and justification to do so and that he must prepare audit referrals instead. However, no significant improvement was noted. Overall, Mr. Lapointe continued to demonstrate deficiencies in achieving a timely disposal of objections and managing his files, working well with other departments (following procedures), completing work per established CRA Policies and Procedures and completing work within established timeframes. Mr. Lapointe also failed to have any production in his workload during this month. For example, he didn't complete a proposal letter for a file even though the decision in the file had been discussed and agreed upon with his Team Leader during a meeting on September 5, 2018 and he failed to respond to a taxpayer representations that had been received at the end of August 2018.

During the month of October 2018, Mr. Lapointe demonstrated another small improvement in meeting monthly production standards by closing four files that month. Two of the four files that were closed dealt with non-complex issues and required few revisions by the Team Leader; hence a small improvement was also seen preparing reports relying only on facts at hand. However, Mr. Lapointe continued to demonstrate deficiencies in managing his files, completing work per established CRA Policies and Procedures and completing work within establish timeframes. Mr. Lapointe spent excessive time completing two of the files dealing with non-complex issues, despite the fact that the taxpayer did not make significant representations and no changes were made to the position previously proposed in the files. Mr. Lapointe spent a total of 106.50 hours to complete both files, when only a total of 54 hours was budgeted to complete both files.

On November 29, 2018, the team leader and manager met with Mr. Lapointe to discuss his performance evaluation results for the performance cycle, but Mr. Lapointe declined to read the performance review or provide any input. Mr. Lapointe was informed at this meeting that a PIP was still required, but he also declined to read the PIP or provide any input

On June 29, 2018, Mr. Lapointe presented a grievance against the warning letter issued on May 31, 2018. The grievance skipped First Level and grievance consultation will take place possibly during the month of January at Second Level.

[*Sic* throughout]

[103] The summary did not refer to the grievor's performance after October 2018.

[104] The second document that Mr. Vijh relied on was a job analysis. Ms. Dionne testified that she and Mr. Guillemette prepared it. It is undated. An email dated July 2018 refers to it, but it is unknown the extent to which it was changed after that.

[105] The job analysis contained a list of 19 positions at the SP-04 to AU-03 groups and levels and one position at the SP-03 group and level. For each position, a brief outline was made of its key activities and why the grievor was not suitable for it. Ms. Dionne stated that the analysis revealed that his performance deficiencies would remain, no matter the group and level, with the exception of SP-03. According to the job analysis, the SP-03 position did not involve making a fair and impartial review of the issues under review, and he would not have been required to write clear and concise reports. Also, the position had no or very limited contact with taxpayers or their representatives.

[106] In addition to those two documents, the HR advisor's February 4, 2019, email to Mr. Vijh contained a briefing paper on the grievor, along with recommendations. That document was not entered into evidence on the basis that it was protected from disclosure, due to LR privilege. The HR advisor suggested to Mr. Vijh that he make the regional assistant commissioner (AC) aware of the situation since a demotion is serious. Mr. Goel was copied on that email.

[107] On February 7, 2019, Mr. Goel wrote to Mr. Vijh and recommend that the grievor be demoted to the SP-03 position. On February 8, 2019, Mr. Vijh responded that he fully supported the recommendation and asked that a high-level briefing note be prepared for the AC. Mr. Goel provided the requested summary on March 15. It stated that the grievor had been provided with a formal warning letter on May 31, 2018, outlining the concerns and that despite their efforts, there had been no significant improvement in his ability to perform his duties at the AU-03 group and level. To justify the multi-level demotion, it stated the following:

> …
>
> *… All former team leaders have observed Mr. Lapointe's continued challenges in dedicating an effort to address* ***the following*** *performance gaps and to improve his performance. It is management's belief that* ***these challenges*** *would also negatively*

> *impact his performance in any of the other jobs available at the AU-03 to AU-01 level and the SP-06 to SP-04 level.*
>
> …
>
> [Emphasis added]

[108] "[T]he following", referred to in the quotation, was redacted in its entirety from the employer's exhibit on the assurance of its counsel that it was subject to LR privilege. Before the hearing, I had held that the employer could redact from its documents LR's advice and recommendations. However, I had also stated that a list of facts upon which LR relied was not subject to privilege, only the recommendations based on those facts. Unfortunately, this point was not raised during the hearing, and as a result, the content of "the following" is unknown.

[109] The summary was sent to the AC on March 22, 2019, and was approved immediately. Mr. Goel provided instructions to his HR advisor shortly after that, to finalize the demotion letter.

[110] Both Mr. Vijh and Mr. Goel testified that they followed the CRA's *Principles on Non-Disciplinary Termination and Demotion*. Mr. Goel stated that he recommended the demotion since they concluded that the grievor was unable to meet expectations and that they reached that conclusion only after each level was assessed carefully, to determine if he could perform in other positions successfully. He stated that the situation had been documented over a long period in the grievor's performance evaluations and PIPs. He stated that it was not a decision that they wanted to make but that they worked in good faith with the grievor in hopes that he would turn things around and work on addressing his performance issues. However, it could not happen because he did not want to be part of the PIP.

[111] Both Mr. Vijh and Mr. Goel testified that the demotion was based purely on performance issues and that it was not disciplinary. Mr. Goel stated that the performance issues were communicated to the grievor in his warning letter, which articulated the reasons for his demotion.

[112] When asked why he recommended demotion and not termination, Mr. Vijh stated that the decision was made because they carried out an analysis and determined that there was a position in which he could be successful and in which the issues that

he encountered as an AU-03 were not likely to be present. They were confident that he would be able to meet the SP-03 position's goals and expectations.

[113] In cross-examination, Mr. Vijh and Mr. Goel stated that they were not aware that the grievor had started his CRA career at the SP-05 group and level. Mr. Goel agreed that before the 2011-2012 performance cycle, the employer did not have any concerns with the grievor's performance and that the SP-03 position did not require a professional accounting degree.

[114] In cross-examination, Mr. Goel stated that the recommendation to demote the grievor was made before the February 28, 2019, review date indicated in the November 2018 PIP because improvements were not occurring. He stated that the due date in the PIP was not a guarantee of employment until the end of that date. It was a date that they were working toward with the grievor. However, it was very clear in the warning letter that he had to improve his performance.

[115] Mr. Goel agreed that no formal evaluation of the grievor was made against the PIP when the decision to demote him was made. He stated that "they" had a discussion as to whether he had improved, and he had not. He did not specify who "they" were. It is worth repeating Mr. Guillemette's evidence that he did not discuss the grievor's performance with Mr. Goel and that Ms. Dionne retired in December 2018.

[116] Mr. Vijh stated that the grievor's prior good performance at previous levels was not considered since they could not look at the past but had to base themselves on the grievor's performance when they made the decision. He added that it happens that employees can be good performers at one point and that for some reason, they change and no longer perform well.

G. The grievor's disagreement with Ms. Dionne over the upward adjustments

[117] The grievor testified that in his opinion, "all hell broke loose" after he first requested an upward adjustment on one of his files. He stated that he began to receive what he thought were egregious files, with unwarranted deductions.

[118] Mr. Guillemette testified that the grievor had a few files that he believed had mistakes that the auditors had not identified, so he believed that there were grounds to increase the assessment amount. Mr. Guillemette stated that that was not an AO's role. He stated that that issue was first identified when Mr. Houle was the grievor's

team leader and that it continued after that. He stated that it was brought to Ms. Dionne's attention, who did not agree with the grievor's belief. However, the grievor felt strongly about it and disagreed with her opinion.

[119] According to the job analysis, one of an AU-03's key activities is to recommend to confirm, vacate, or vary an assessment. Ms. Dionne stated that if an AO sees an error or something that could increase an assessment, they are to follow the strict criteria set in policy. Ms. Dionne had the authority to authorize those recommendations.

[120] Ms. Dionne recalled meeting with the grievor about "more than a few" cases for which he wanted to make an upward adjustment. However, she did not accept his requests because she did not agree with them. She stated that for a few, she did not see the point, since there was no documentation, only his suspicions.

[121] Ms. Dionne was shown an email dated November 29, 2017, from the grievor to Mr. Guillemette on which she was copied. The email was entitled, "Apology". It referred to the grievor saying this: "… I don't work stupid." He had said it during a meeting and wanted to explain what he meant by it. His email went on to state that CRA employees were blind to a tax scheme being perpetrated by a tax representative and that all levels of management had to work smarter. Mr. Guillemette stated that he was not upset at those comments since the grievor made them all the time. They did not surprise him.

[122] In cross-examination, Ms. Dionne agreed that those comments were fairly scathing on her division. She agreed that during one of their discussions on the issue, she had told the grievor something along the lines that an upward adjustment would damage the division's integrity. She reiterated that it was because his requests were unsubstantiated and based only on his opinion or feeling. She disagreed that it would have required extra work for him to substantiate his requests.

[123] On December 12, 2017, the grievor sent the general email address "ComDirect" an email entitled, "What's right or what is wrong". It went to the CRA's commissioner and provided the following:

> …
>
> *I'm the guy who told you about one of the most prevalent tax scams in the country.…*
>
> *New issue:*

> *I fear possible upcoming job action because Management and I have different priorities.*
>
> *I'm in disagreement with all levels of Management in the Appeals Division on one issue. I want to up the tax adjustment but management is preventing me from doing it.*
>
> *See attached two page document for full details*
>
> …

[124] In the attachment, he provided as follows:

> …
>
> *I'm not meeting performance expectations because, in my view,*
>
> - *It is true that I blow my files time budget by considerable amount of time, with reason to up the adjustment.*
> - *The performance expectations don't give consideration to the perhaps $100 million dollars per year I can recover for CRA.*
> - *Performance expectations does not consider that the quality of my work has never been challenged at the next level in 17 years with CRA.*
> - *Performance expectation does not consider my skills learned while working for a public accounting firm.*
>
> *I fear job action. Once that is done, there is no turning back thus I take pre-emptive action with the hope that all that happens is that I get transferred to CRA Ottawa Headquarters in the function of Tax Avoidance or Aggressive International Tax Planning.*
>
> …
>
> ***It is my understanding from what my manager, Suzanne Dionne,*** *International and Ottawa Tax Service Office, is making me believe that all of Appeal Management do not want to up the adjustment because it would send a message to the taxpayers where they may fear filing an objection even though they were harmed by a bad audit.*
>
> …
>
> *Doesn't the Appeals Management expect me to administer compliance with the Law? A confirm and move on is not compliance with the Act once I have an awareness of non-compliance. The problem is having a sufficient level of competency to reach awareness or maybe it's the excessive time on file that afforded me that awareness or a combination of both.* ***If awareness of non-compliance is not desired at the Appeals Division, the solution is to hire 12 graders as appeal officers****. I was hired based on a 90% test score on a very tax technical test that only a few people out of about 20 passed.*

…

[Emphasis added]

[*Sic* throughout]

[125] The grievor forwarded the email to Ms. Dionne that same day. His email stated this: "I [have provided] the attached two page document to the Commissioner of [the] CRA. It is so high up, I have no expectations that it will amount to anything but you should be aware just in case." He testified that he just wanted someone to tell Ms. Dionne that it was okay for her to approve an upward adjustment.

[126] In cross-examination, Ms. Dionne denied being upset by the email. She stated that she was just a little shocked and disappointed that the grievor had written to the commissioner directly since it was not the way CRA employees were supposed to work. For her, it was another proof that he could not follow the rules. If he had concerns with her, he should have gone to her manager.

[127] According to the response that the CRA's commissioner provided, the matter was referred to the assistant commissioner of the HR branch, Dan Couture. Ms. Dionne stated that he then contacted her. He clarified a few things, such as her level and how long the grievor had been working for her. She denied that it made her angry. She said that once again, she was just a little disappointed.

[128] Mr. Goel stated that he was first informed of performance concerns with the grievor in 2017, when Ms. Dionne informed him of a complaint about upward adjustments. He stated that he and his director, Mr. Pagnotta (Mr. Vijh's predecessor), called the grievor, to discuss his complaint.

[129] Mr. Pagnotta then met with the grievor in person. The grievor provided him with a package to substantiate why he believed that the upward adjustments were deserved. Mr. Goel stated that Mr. Pagnotta gave him the package to look into. He stated that "they" looked at it and determined that there was no basis for it and that it was only conjecture. He did not specify who looked into the grievor's complaint.

[130] In cross-examination, Mr. Goel stated that he did not recall being made aware of the grievor's December 12, 2017, letter to the commissioner. However, he agreed that it likely was brought to his attention, given its content. He denied that it bothered him since the commissioner had an open-door policy, and it was acceptable for employees

to raise concerns with the commissioner. He stated that employees were encouraged to. He stated that he did not take these things personally and that the grievor expressed his opinion, but they simply did not agree with it. He added that the grievor was within his right to express his concerns. He did not view it as misconduct that the grievor complained about Ms. Dionne or the Appeals Division.

[131] Both Mr. Guillemette and Mr. Vijh denied that they were made aware of the letter to the commissioner.

[132] Mr. Guillemette stated that during the May 31, 2018, meeting, when the grievor was provided with Mr. Goel's warning letter, the grievor took the opportunity to once again present his case about the upward adjustments. Mr. Guillemette stated that that issue was tied to the grievor's performance issues since it was an example of him not following directions. On cross-examination, he agreed that the grievor's comments during the meeting with Mr. Goel were another example of him going above Ms. Dionne to complain about her with respect to her refusal to accept any upward adjustments.

[133] The grievor also entered into evidence other emails that he sent to other senior CRA officials about the tax schemes that he saw, but all four witnesses denied knowledge of them. They were sent on April 6, 2017, July 19, 2017, and June 22, 2018.

H. Post-demotion considerations

[134] The grievor testified that after he received the demotion on April 10, 2019, it was such a disappointment that he could not go back to work, so he went on medical leave. He stated that it was humiliating for him to go to work in front of his colleagues. However, after four months, he went back, and he had to endure the embarrassment.

[135] He stated that his career was gone and that it would have been better for him had he been terminated. He stated that he applied for many positions but that he could not secure one since each employer would look at the fact that he was an SP-03. He stated that all job applications require the applicant to state their current position. He stated that after the demotion, he applied for AU-04 and AU-05 positions. He stated that applying for a position below AU-03 was insulting since he had applied for those before in the progression of his career.

[136] The grievor stated that the demotion caused extreme strain on his family. They could not afford to do the things that they could before it. It caused many arguments since he became very cranky with his family.

[137] Mr. Goel was asked whether the grievor applied to another position after his demotion. He replied that he was not aware but that the grievor would have been promoted had he done so. He stated that the CRA had a number of positions at several levels become available after the grievor's demotion. Based on its processes and the number of hires made, he was confident that the grievor would have been successful had he applied.

[138] In cross-examination, Mr. Goel stated that they had discussed the career impact of going from an AU-03 accountant to an SP-03 clerk position; however, he stated that the grievor did not apply for positions that would have resulted in advancements to his career.

III. Summary of the submissions

A. For the grievor

[139] The grievor relied on *Canada (Attorney General) v. Frazee*, 2007 FC 1176, and asserted that the concept of disguised discipline allows the Federal Public Sector Labour Relations and Employment Board ("the Board") to look behind the employer's stated motivation, to determine what was actually intended. When the impact of the employer's decision is significantly disproportionate to the administrative rationale, the decision may be viewed as disciplinary.

[140] The grievor also referred to *Bergey v. Canada (Attorney General)*, 2017 FCA 30; *C.D. v. Canadian Security Intelligence Service*, 2024 FPSLREB 22; and *Kashala Tshishimbi v. Social Sciences and Humanities Research Council*, 2020 FPSLREB 83.

[141] The grievor submitted that the employer's stated motivation disguised an intent to punish him for his quixotic determination to recommend the upward adjustments of file audits.

[142] The grievor argued that it was important to note that the performance issues identified in the performance appraisals were not caused by any inability on his part to perform tax accountancy. To the contrary, his team leads wrote that he was quite capable in tax law, and he was assigned the more complex tax appeal files for his team,

which in some cases were above-level AU-04 and AU-06 files. He scored 90% on a tax knowledge exam and mentored some of his colleagues. There was no evidence that he was a difficult person to work with, was dishonest, or did not work hard.

[143] The grievor argued that he felt strongly that he could not turn a blind eye to, and thus ignore, mistaken audit assessments. He was dedicated to the cause of correct tax assessments and protecting employer assets (i.e., tax revenue). Although the Appeals Division's policy did not forbid upward assessments, apparently, they were discouraged in his office.

[144] The grievor submitted that in the employer's eyes, his wilful refusal to turn a blind eye to audit mistakes, to conform to the Appeals Division office's policy of not adjusting audit assessments, was misconduct and culpable behaviour, and the employer used the performance evaluation scores to punish him for that wilful behaviour. He submitted that the low evaluation scores were used with the intent to change his behaviour. The impact on the grievor was that it put him in a so-called "Catch 22" situation, in which he had to either ignore his tax assessment training or face low performance evaluations.

[145] The grievor submitted that since he assessed the tax adjustments according to law, it could not be considered insubordination. However, his determination to pursue those upward adjustments likely irritated the employer.

[146] The grievor pointed to a number of deficiencies with the employer's performance appraisals that support a finding that its true intent was to punish him.

[147] Firstly, the performance evaluations failed to include that the grievor experienced delays receiving a response to his upward adjustments and project files after they were submitted either to his manager or to HQ, which affected his file turnover rate. Since no credit was given for a file that was not completed, the performance evaluations were misleading because they did not credit him for his work in progress on files that were not counted as complete.

[148] Secondly, the performance evaluations treated all the grievor's files equally, regardless of complexity or dollar amount.

[149] Thirdly, the performance evaluations asserted that the grievor's evaluation scores suffered because the first draft reports that he wrote should not have included

personal comments and opinions. He submitted that that criticism was disingenuous since the employer knew that they were first-draft reports, and the opinions and comments were necessary to help the team leader understand the issue. There was no evidence that he received coaching specific to how to write the reports.

[150] Fourthly, there is no evidence that the grievor failed to respond to information requests in a timely manner or that he received any service complaints or ATIP applications.

[151] The employer's failure to include in the performance evaluations the circumstances that affected the grievor's file-completion statistics and low score rating revealed an intent to not tell the entire performance story. Its policy on file turnover stated that the standard hours to complete files were not designed to be used as a standalone indicator of any employee's performance, in isolation from other observations and indicators.

[152] The employer's reliance on the misleading performance evaluations to justify the seven-level demotion disguised an intent to discipline the grievor.

[153] The grievor further submitted that the employer's motivation to impose such a significant demotion was a response to his complaints to the commissioner. They irritated Mr. Goel and Ms. Dionne and motivated them to begin a course of action that led to Mr. Goel's warning letter and eventually the demotion to discipline the grievor. Humiliating him in front of his colleagues, who witnessed his reduced quality of work and salary, was also a form of discipline and a way to ensure that no other AO would consider upward adjustments.

[154] Despite that the grievor showed improvement after receiving the warning letter on May 31, 2018, and that the employer did not wait for the ongoing PIP to complete, he was demoted. That was evidence that his improved performance did not matter. There was both a lack of procedural fairness and an intent to punish him for his past behaviour.

[155] The grievor submitted that when the demotion's impact on him is considered, the consideration must include the significant and disproportionate imbalance between the demotion's impact and its stated rationale.

[156] It was further submitted that the employer would most certainly have foreseen and appreciated that the extreme demotion would hurt the grievor since it removed accountant work from him and significantly reduced his career prospects and salary. Under the circumstances, the Board could infer that the employer did not care about the demotion's foreseeable impact. That further reveals its disguised intent to punish him.

[157] The evidence showed that the grievor is a hard-working and honest tax accountant, with years of tax accounting experience. But he made complaints against his division. A demotion that put him out of accountancy was not a reasonable response by the employer to those complaints and revealed an intention to correct his behaviour.

[158] Further, a demotion of that magnitude could be viewed as having had the intent to force the grievor to resign from his employment, from which the Board could infer an intent to punish.

[159] With respect to the grievor's participation in the PIPs, it was submitted that he participated because he openly, willingly, and regularly discussed his tax-file issues with his team leaders, and they knew his files' progress. He submitted that in any event, the employer could not use the PIP participation as the rationale for demoting him seven levels.

[160] The documentary evidence and the testimonies of the employer's witnesses do not indicate that the alleged performance issues were of a nature or magnitude that would suggest that the grievor could not have held a position classified at the AU-03 group and level elsewhere in the CRA. The impact on the grievor from that level of demotion was not considered in a bona fide manner. Also not considered was how to minimize the demotion's impact, which, he submitted, would have been the reasonable and proportionate response to the asserted administrative reason for the demotion.

[161] The grievor submitted that for those reasons, the impact of the seven-level demotion was significantly disproportionate to the employer's stated administrative rationale and revealed an ulterior disciplinary motive.

B. For the employer

[162] The employer submitted that since the grievance was referred to adjudication under s. 209(1)(b) of the *Act*, the Board lacks jurisdiction to hear it unless the grievor can demonstrate that his demotion was disguised discipline.

[163] The employer had the burden to establish that on a balance of probabilities, the demotion was an employment-related action. It argued that it met that onus. It relied on the evidence documenting the grievor's ongoing performance issues in the six years before the demotion. In *C.D.*, the Board held that unsatisfactory performance is an employment-related reason.

[164] Since the employer met its burden, the onus shifted to the grievor to establish that on a balance of probabilities, the reasons that the employer cited were a sham or subterfuge and that his demotion was in fact disguised discipline (see *Stevenson v. Canada Revenue Agency*, 2009 PSLRB 89 at para. 18; and *Lindsay v. Canada (Attorney General)*, 2010 FC 389 at para. 46).

[165] The employer argued that the evidence as presented did not support such a conclusion.

[166] The employer relied on *Peters v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 7, and argued that to discharge his onus, the grievor had to show that it identified a culpable deficiency or an act of malfeasance and that it took disguised disciplinary action to correct that deficiency or to punish him (see paragraph 309).

[167] It also relied on *Garcia Marin v. Treasury Board (Public Works and Government Services Canada)*, 2006 PSLRB 16, and argued that the grievor had to establish that he was guilty of some form of culpable act or misconduct of some kind (see paragraph 86).

[168] It relied on *Bergey* to argue that in the absence of culpable conduct and the intent to punish or correct, the situation should be viewed as non-disciplinary (see paragraph 37). In that case, the Federal Court stated that distinguishing between a disciplinary and a non-disciplinary employer action requires considering both the employer's actual (as opposed to stated) intentions in taking the action and the action's impact on the employee's career.

[169] The employer relied on *Frazee*, in which the Federal Court stated that "… not every action taken by an employer that adversely affects an employee amounts to discipline." To determine whether an action is administrative or disciplinary, it is necessary to examine the employer's intention. While not determinative, it is a primary factor to consider.

[170] The employer asserted that there was no evidence of any disciplinary intent. None of the hallmarks of one were present. There was no disciplinary interview and no written reprimand or letter of discipline. There was no record of discipline, as none of the documents that were put to the decision maker (Mr. Vijh) referred to misconduct or malfeasance that the employer sought to punish or correct.

[171] The employer argued that it remained unclear what behaviour the grievor claimed that the employer sought to punish or correct through progressive discipline. However, the email to the commissioner about upward adjustments appeared to be at the heart of his theory. The employer submitted that that theory was not based on facts, relied on speculation and conjectures, and did not accord with logic. Indeed, he spent several hundred hours on a file, had a good relationship with his team leader, and was assigned files, just like any other AU-03 in the Appeals Division. The evidence set out that writing to the commissioner to voice concerns was not a problem whatsoever.

[172] The grievor had the onus to prove the underlying reason for any disguised discipline. He did not provide any evidence other than the issue of upward adjustments. He did not allege any misconduct on his part. And importantly, no questions were put to the employer's witnesses about any incident of insubordination or alleged misconduct, other than the email to the commissioner. As such, the employer's witnesses were not given an opportunity to comment on any alleged act of insubordination and the impact on its decision to demote him.

[173] The employer submitted that there was no evidence of any intention to punish the grievor but rather to see him succeed. It worked closely with him over several years, providing support to help him improve his performance and meet the requirements of his AU-03 position.

[174] It was noteworthy that the language in the performance reviews, the PIPs, and the warning letter was not disparaging or belittling. It identified the gaps and provided

specific directions on how to improve. The reviews also highlighted improvements and other tasks on which the grievor had performed well. The employer set reasonable work objectives and performance indicators, which were clearly communicated to him. The performance indicators were not arbitrary. He clearly understood what was expected of him, at every turn.

[175] The grievor was given ample opportunities to make significant and sustained improvement. The gaps were easily quantified and ascertained. The performance issues were not about any arbitrary assessment of conduct or personality suitability. They related to specific performance indicators. The employer gave him reasonable time to meet the work objectives. His team leaders and Ms. Dionne made sincere efforts to help him succeed at his job; however, those efforts were to no avail.

[176] The grievor knew the potential consequences of not meeting expectations. However, based on his testimony, it was apparent that he had yet to fully understand and acknowledge the gaps in his performance. Because he was so focused on the "turnover rate", he completely overlooked the real issues behind his failure to meet the CRA's production standard. It seemed to be beyond his control, in the sense that he did not necessarily ignore his team leader's feedback; rather, he could not grasp the issues and hence chose not to participate in the PIP. His belief that the PIP did not apply to a professional of his level is a good illustration of his inability to understand the performance indicators and what was required of him as an AU-03.

[177] That the grievor continued to demonstrate an inability to meet his position's requirements, despite the employer's efforts, makes it difficult to find that it intended to discipline him for some alleged insubordination.

[178] The employer argued that even if the Board found that a portion of the grievor's conduct could be seen as insubordination, it did not make his demotion disciplinary action. Disguised discipline could not go so far as to limit the employer's options to disciplining an employee if only one part of their conduct was culpable, given a situation in which the employee was underperforming and should have been demoted for legitimate employment-related reasons.

[179] The issue to be determined is whether the employer intended to take disciplinary action against the grievor but that it took it in a disguised way. If the grievor consistently underperformed, made mistakes, etc., but also on occasion

refused to follow HQ's instructions because he disagreed with its analysis, it did not taint the entire demotion, given that on a balance of probabilities, the intended purpose was administrative or employment related.

[180] The Board must look at what the employer actually intended. It referred to *Frazee*, which stated that the threshold to establish discipline would not be reached were the employer's action seen as a reasonable, but not necessarily the best, response to honestly held operational considerations (see paragraph 24). The employer submitted that the demotion was based on a *bona fide* dissatisfaction with the grievor's ability to perform the duties of his AU-03 position. Under the circumstances, its intention could not be characterized as disciplinary.

[181] The fact that an employer's action has an adverse effect on an employee does not necessarily make it disciplinary. The employer did not dispute that the grievor's demotion had an adverse effect on his career. However, the demotion resulted from ongoing performance issues and his failure to fully engage in the PIPs that were put in place to put him in a position to succeed.

[182] Beginning in 2013, gaps were identified, and the grievor was offered multiple opportunities to improve his performance. He made minimal efforts to meet the stated objectives in the PIPs, and he knew that he if continued to not meet expectations, he could be demoted or terminated, for incompetence. In that context, the fact that the demotion had repercussion on him could not have the effect of transforming it into disciplinary action.

[183] The employer asserted that its decision to demote the grievor to the SP-03 position was not disproportionate to its cited administrative ground. Its response did not need to be the best response, it needed only to be reasonable. It submitted that in the context of his documented ongoing performance issues, the demotion was a reasonable response.

[184] In terms of the repercussions on his career prospects, the employer submitted that a demotion inherently has a certain impact on an employee's career. However, it was due inherently to the grievor's inability to meet the requirements of a position that he was unfortunately, and quite obviously, not suited for. Further, he was free to seek other employment opportunities within the CRA or elsewhere in the federal government. He could have immediately applied for another position. Evidence was led

that he would have been almost guaranteed to obtain a promotion had he applied for one, but he failed to.

[185] Finally, there was no likelihood that the demotion would be invoked in future disciplinary actions. The grievor had a clean disciplinary record. Should he have been subjected to disciplinary action in the future, nothing suggested that the employer would raise his demotion or that it would be considered in the context of progressive disciplinary action.

IV. Analysis and reasons

[186] This grievance was filed under s. 209(1)(b) of the *Act*, which provides that an employee may refer to adjudication an individual grievance if it is related to a "… **disciplinary action** resulting in termination, **demotion**, suspension or financial penalty …" [emphasis added].

[187] The stated reason for the demotion was that it was an administrative action taken as a result of the grievor's long-standing unsatisfactory performance. To have jurisdiction, I must find that despite that stated reason, the demotion was in reality disguised disciplinary action. If I find that the employer's action was administrative, then I do not have jurisdiction.

[188] The grievor had the burden of proving that his demotion was disguised disciplinary action, based on a balance of probabilities. In other words, I must find that it was more likely than not that that was so. For clarity, I need not decide whether his performance was satisfactory, only whether the employer's actions were disciplinary (see *C.D.*).

[189] To support their positions, the parties referred to several Board and Federal Court decisions. I have reviewed them all but will refer only to those that I believe are the most relevant to my analysis and findings.

[190] The leading case of relevance is *Frazee*, in which the Federal Court reviewed the case law on what constitutes disciplinary action. The Court held that that determination is an issue of mixed fact and law and that it requires examining both the purpose and the effect of the employer's action. The Court referred to Brown and Beatty, *Canadian Labour Arbitration* (4th ed.), at paragraph 7:4210, when it

summarized the authorities on the issue. The following passages are of relevance to this case:

> …
>
> *In deciding whether an employee has been disciplined or not, arbitrators look at both the purpose and effect of the employer's action. The essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part by punishing the employee in some way. An employer's assurance that it did not intend its action to be disciplinary often, but not always, settles the question.*
>
> *Where an employee's behaviour is not culpable and/or the employer's purpose is not to punish, whatever action is taken will generally be characterized as non-disciplinary. On the basis of this definition, arbitrators have ruled that … demotions for non-culpable reasons … have … been characterized as non-disciplinary.…*
>
> *A disciplinary sanction must at least have the potential to prejudicially affect an employee's situation ….*
>
> …

[191] The Federal Court went on to acknowledge that not every employer action that adversely affects an employee amounts to discipline and that an employee's feelings about being unfairly treated do not convert administrative action into discipline. However, it added the following important points at paragraphs 23 to 26:

> *[23] It is accepted, nonetheless, that how the employer chooses to characterize its decision cannot be by itself a determinative factor. The concept of disguised discipline is a well known and a necessary controlling consideration which allows an adjudicator to look behind the employer's stated motivation to determine what was actually intended.…*
>
> *[24] The problem of disguised discipline can also be addressed by examining the effects of the employer's action on the employee. Where the impact of the employer's decision is significantly disproportionate to the administrative rationale being served, the decision may be viewed as disciplinary: see* Re Toronto East General & Orthopaedic Hospital Inc. and Association of Allied Health Professionals Ontario *(1989) 8 L.A.C. (4th) 391 (*Re Toronto East General*). However, that threshold will not be reached where the employer's action is seen to be a reasonable response (but not necessarily the best response) to honestly held operational considerations.*
>
> *[25] Other considerations for defining discipline in the employment context include the impact of the decision upon the employee's career prospects, whether the subject incident or the employer's*

> *view of it could be seen to involve culpable or corrigible behaviour by the employee, whether the decision taken was intended to be corrective and whether the employer's action had an immediate adverse effect on the employee: see* Re St. Clair*, above, and* Re Civil Service Commission*, above.*
>
> *[26] It is against the above-noted considerations that the Adjudicator's decision must be assessed in this proceeding.*

[192] Having reviewed the evidence in this case, I find that the demotion constituted disguised disciplinary action, in both purpose and effect. The employer's decision was made in response to the grievor's culpable or corrigible conduct and was intended to have a corrective and punitive aspect. In terms of its effect, the demotion was significantly disproportionate to the provided administrative rationale and had an immediate and significant adverse effect on the grievor and his career prospects.

[193] I have come to that determination for the reasons that follow.

A. The presence of culpable behaviour

[194] As stated in Brown and Beatty, the essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part by punishing the employee in some way. However, if their behaviour is not culpable, or the employer's purpose is not to punish, the action taken will generally be characterized as non-disciplinary.

[195] In this case, the stated reason for the demotion was that the grievor failed to meet the performance expectations of the AU-03 position over an extended period. Mr. Vijh, the decision maker, stated that the grievor was demoted to the SP-03 position since management was confident that the grievor would be able to succeed in that role. Ms. Dionne, Mr. Goel, and Mr. Vijh all testified that his demotion was done strictly for performance concerns and for no other reason.

[196] However, as stated in *Frazee*, how the employer chooses to characterize its decision cannot by itself be a determinative factor. The concept of disguised discipline requires me to look behind the employer's stated motivation, to determine what was actually intended.

[197] The grievor's theory is that the employer's desire to punish him stemmed from his disagreement with his manager, Ms. Dionne, over the issue of upward adjustments and the fact that he complained about her and the Appeals Division to the CRA's

commissioner. He referred to authoring the November 2017 email, in which he accused CRA employees of being blind to a tax scheme and stated that all levels of management had to work smarter. Then, in December 2017, he emailed the CRA's commissioner, specifically complaining about Ms. Dionne. That resulted in the AC contacting Ms. Dionne, to question her.

[198] Ms. Dionne agreed that the comments in the grievor's November 2017 email were fairly scathing on her division, but she denied being upset by any of those actions. She stated that she was just a little shocked and disappointed that he wrote to the commissioner directly since it was not the way they were supposed to work. She stated that it was more proof that he "could not follow the rules" and that if he had concerns with her, he should have gone to her manager. Mr. Goel also denied being upset by it and stated that the commissioner had an open-door policy and welcomed employee letters.

[199] I do not believe that it is necessary for me to determine the extent to which Ms. Dionne and Mr. Goel were bothered by those events. Suffice it to say that it did not endear the grievor any further to his employer. I say **any further**, since when those events happened, he already had behaviours that the employer reproached.

[200] Mr. Houle supervised the grievor from 2014 to 2016 and described the concerns as mainly encompassing three points. Firstly, the grievor had a tendency to review entire files, not just the taxpayers' objections. He believed that doing so was within his right. It resulted in him exceeding the amount of time that he should have taken to complete his files. Secondly, he added many personal observations or assumptions to his reports and letters despite having repeatedly been told not to. Thirdly, he refused to follow other divisions' instructions if he did not agree with them.

[201] Ms. Dionne stated that those concerns continued when Mr. Guillemette replaced Mr. Houle after his departure in January 2017. She stated that the concerns were discussed with the grievor during his performance appraisals and that the PIPs were implemented to address them. She stated that no improvements were noted, that he provided only limited cooperation, and that he did not acknowledge his shortcomings.

[202] Mr. Guillemette was asked if the grievor ever acknowledged his shortcomings. He replied that the grievor acknowledged that he spent significant time on his files,

but the grievor justified it based on the time that **he** believed was required to conduct the review that **he** believed should be done.

[203] The PIPs provided direct instructions to the grievor on what had to be done. In a mid-year review on May 31, 2018, he was told that he had to understand that an AO's role is to review only the taxpayer's issues and that any additional concerns were to be referred to the Audit Division for review. Further, it provided that once a recommendation was received from the Audit Division he was to follow the provided instructions. It also stated that he understood that his personal comments could not be included in reports and letters but that he continued to make them with the understanding that his superiors would review them. He was specifically instructed as follows: "These comments should be removed altogether." Finally, it stated that he was to discuss with management the potential of an upward adjustment before extensively analyzing it.

[204] The employer's concerns were again itemized in the May 31, 2018, warning letter, and the grievor was given a new PIP on June 1, 2018. The performance concerns were essentially the following:

- Need to improve his production rate.
- Need to limit his reviews to only the issues that the taxpayer raised, and need approval to refer to the Audit Division if additional risks are identified.
- Need to follow the instructions of the Audit Division, HQ, the Competent Authority, and the Department of Justice instead of completing additional work on their submissions.
- Need to follow the instructions in the *Appeals Manual* when considering and proposing upward adjustments.
- Need to obtain the proper approval to refer matters to HQ.
- Need to remove assumptions and personal opinions from the working papers.
- Need to consider taxpayers' verbal representations when attempting to resolve objections.
- Need to respond to ATIP requests in a timely manner.

[205] Mr. Goel spoke to the grievor's performance issues. He stated that the grievor did work that was not required and that he had been told many times that he had to obtain approval before doing all that work. He was also told not to include personal opinions and that he had to work impartially. He also refused the follow the instructions that the Audit Division made. Mr. Goel stated that those were all qualitative deficiencies that resulted in the grievor not meeting expectations. He stated

that the warning letter identified that the grievor was not following instructions on several issues, which was very serious.

[206] Similarly, Mr. Houle, Mr. Guillemette, and Ms. Dionne all spoke to repeatedly telling the grievor that he was not to audit his files, that he was to look into only the taxpayer's objection, that he was to obtain permission before looking into other issues, that he was to follow the instructions received from other divisions and not redo the work, and that he was not to include personal comments or opinions in his work documents.

[207] The June 2018 appraisal referred to an incident involving files that the Department of Justice and Revenue Quebec had settled. It stated that the grievor disagreed with the settlement and that the manager had requested that instead, his team leader prepare the notice of confirmation. Mr. Goel stated that the Department of Justice was a higher level than the Appeals Division and that the division had to follow instructions when they were received.

[208] The November 2018 appraisal referred to an incident involving an ATIP request. Mr. Guillemette testified that it was about one of the grievor's files and that it was the grievor's responsibility to comply with it. He stated that the grievor did not agree with the decision on that file and that he declined to provide the requested information. He stated that by refusing to do it, the grievor did not comply with an AO's duties.

[209] The May 2018 warning letter stated that the grievor had made submissions to the HQ Appeals Branch without obtaining proper approval, which had resulted in a negative impact on the Appeals Division's reputation and had required Mr. Goel's intervention.

[210] In cross-examination, Mr. Goel stated that that comment referred to an event in which the grievor had referred a file without obtaining the required approval in advance. He stated that the grievor did not follow the procedure that applied to everyone and that it made the Appeals Division look bad since it had an AO who was not following the procedure. He stated that the letter pointed it out to him that it was not correct to not follow those procedures and that doing so was wrong.

[211] In his November 2017 PIP, the grievor was directed to refrain from making negative comments about taxpayers, their representatives, or other CRA employees. That same direction appeared again in his November 2018 PIP.

[212] All that demonstrates a consistent pattern of the grievor refusing to follow direction or to "follow the rules", as Ms. Dionne described it.

[213] However, I do not see evidence of incompetence. The grievor's ongoing refusals to follow the directions given to him appeared to be very deliberate actions because he did not agree with the directions that had been provided to him. There is no evidence that he did not follow the instructions because he did not understand what was being asked of him. His performance appraisals are replete with comments that he understood what was asked of him but chose to do otherwise. He purely and simply disagreed.

[214] This is not a situation of an employee not being able to accomplish their work because they do not possess the requisite knowledge. Indeed, there was ample evidence that the grievor was competent in performing the technical aspects of his position. Several notations to that effect can be found in his performance appraisals, which Mr. Guillemette also confirmed. And he obtained 90% on a technical test when he obtained the AO position.

[215] The fact that the grievor was not provided training to address any of the employer's concerns also underscores that those concerns were attitudinal and not competency based.

[216] The employer argued that the grievor did not necessarily wilfully ignore his team leader's feedback, but rather, his behaviour seemed beyond his control. It argued that he could not grasp the issues or understand the performance indicators and what was required of him as an AU-03.

[217] The evidence suggests otherwise. Indeed, there is evidence that the grievor made a concerted effort to address the employer's concerns after he received the warning letter in May 2018.

[218] The grievor's June 2018 performance assessment noted that during that month, his submissions did not contain any negative comments to the taxpayers and their representatives, that he understood that an AO's role was to review only the matter

under objection, and that he accepted direction from the team leader to prepare to restrict his analysis and to prepare leads to have the Audit Division review other areas of concern.

[219] His November 2018 performance appraisal covered the period before the warning letter. However, nonetheless, it noted that his production had improved over the previous year, that he kept his team leader up to date on the statuses of his files and discussed issues, that he understood that he could not propose additional adjustments without providing adequate documentation and support, and that when detecting issues that could require further audit review, he had instead prepared leads to the Audit Division.

[220] Finally, the performance summary provided to Mr. Vijh on February 14, 2019, stated that in the months of July and August 2018, the grievor received three new files and issued proposal letters for two of them and that he was in the process of proposing and preparing a lead to the Audit Division for the third.

[221] It stated that for the month of September 2018, he demonstrated a small improvement in understanding that he could not propose additional adjustments, unless there was adequate justification, and that he had instead to prepare audit referrals. It stated again for that month that he demonstrated another small improvement in meeting the monthly production standards by closing four files that month and that an improvement was also seen in preparing reports relying only on the facts at hand. He testified that he continued to make improvements to address the employer's concerns after that date.

[222] Those improvements occurred after the grievor received his warning letter — which is also usually the first step in a progressive discipline process. Those improvements clearly demonstrate that the grievor understood the direction that he had been given and that he decided to change his behaviour once he became aware that the employer would no longer tolerate his refusal to cooperate.

[223] As a result, I conclude that the grievor's refusal to follow instructions was not based on incompetence. It was wilful and therefore constituted culpable or corrigible behaviour.

B. The presence of an intent to punish or correct the grievor's behaviour

[224] An intention is not an easy thing to determine, even more so when the suggested intent is denied. In this case, the grievor claimed that the employer's actions were clearly intended as punitive. Ms. Dionne, Mr. Goel, and Mr. Vijh all claimed that they had no such intent and that they just wished to see the grievor succeed.

[225] To determine the employer's intent, I must look at its actions and determine whether they are more in keeping with its or the grievor's position. That determination is made based on a balance of probabilities.

[226] I took the time to carefully review the evidence, and I found a number of examples in which the employer failed to deal with the grievor in good faith. Those examples, taken as a whole, support a finding that more likely than not, its actions were tainted by disciplinary intent and were not a reasonable response to honestly held operational considerations.

[227] Indeed, as in *Kashala Tshishimbi* and *C.D.*, and contrary to *A v. Canadian Security Intelligence Service*, 2013 PSLRB 3, I found that the evidence presented at the hearing did not set out that the employer truly sought to help the grievor improve his performance.

[228] The following are some of the examples that led to my finding.

1. Higher expectations of the grievor, compared to other AOs

[229] In his initial PIP in November 2016, the grievor was instructed to "[r]esolve SP-05 to AU-03 **regular** SME Objections within **120 workable days** from the date of assignment to the decision date (on average) …" [emphasis added]. However, all the subsequent PIPs set higher expectations for him than for other AOs.

[230] In his November 2017 and June 2018 PIPs, the grievor was instructed to complete his objections within 120 days from the date they were assigned. That represented a stark change from the expectation placed on other AOs to complete **regular** objections within 120 **workable** days. Similarly, in his warning letter, he was advised that he was not meeting the expectation of completing his files within **120 days of assignment**, on average.

[231] No explanation was provided as to why the grievor was expected to complete his files within 120 days rather than 120 **workable** days, as was required in 2016 and for all other AOs.

[232] Although all the employer's witnesses stated that a file's non-workable days were not counted, the evidence pointed to the contrary. In the 2017-2018 performance appraisal, the employer stated that the grievor's files had been completed within 355 to 800 days. It added, "**While most files had to be placed on hold** pending the outcome of referrals made to other sections, **this is still well beyond the target of completing files within 120 days of assignment**" [emphasis added].

[233] That comment specifically supports that the employer measured the grievor based on the total amount of days taken to complete a file, rather than calculating the amount of workable days, as was applicable to other AOs. In fact, his evaluation did not refer to the amount of workable days that he took to close his files.

[234] The expectations were made even worse in his June 2018 PIP, when he was instructed to complete his files within 120 days from the assignment date and within the standard number of hours and, on average, "… within 365 days of the objection being received by the intake centre". No evidence was led as to why the grievor was expected to complete his files within 365 days of the intake centre receiving the objection. That was not in the expectations for other AOs, and the evidence was clear that he did not control the time it took for a file to be assigned to him after the intake centre received it.

[235] Finally, in his November 2018 PIP, the grievor's performance indicator to complete his files was increased from 120 days to "… **within 150 days from the date of assignment** …" [emphasis added]. However, once again, this expectation was greater than the one set for all other AOs for the 2018-2019 performance cycle, which was to "[r]esolve **medium** complexity objections within **170 net days**, from the date of assignment to the decision date (on average)" [emphasis added]. Again, no evidence was provided as to why that PIP set greater expectations on him than for the other AOs.

[236] The fact that the employer placed higher expectations on the grievor than on other AOs supports that it did not hold a genuine desire to help him succeed,

particularly when those expectations were in a PIP. Those actions were more in keeping with a punitive intent.

2. Unbalanced assessments of the grievor's performance

[237] A lack of good faith toward the grievor can also be discerned from how he was assessed.

[238] His last performance appraisal before his demotion (for the period from September 1, 2017, to August 31, 2018) stated that although the grievor's production had improved over the previous year, it remained below the expectations for someone with his experience. It noted that for the objections that were in progress, the main issue was the amount of time spent on files and that "[t]he total hours charged were not justified based on the complexity of the files …".

[239] However, his March 21, 2018, mid-year assessment (covering the first six months of that same period) stated that the grievor's hours exceeded the maximum target partly because several of his files dealt with complex issues (transfer pricing and international transactions). The fact that the employer's last evaluation of him failed to acknowledge the complexity of his files and the contribution to his production rate illustrates that by November 2018, the employer was intent to portray him in the most negative light possible.

[240] That can also be seen in the performance summary that was provided to Mr. Vijh in February 2019. Mr. Vijh, the decision maker, testified that he based his decision solely on that document, the job analysis, and Mr. Goel's recommendation when he decided to demote the grievor. Yet, as previously noted, the summary was unbalanced, written in an overly negative manner, contained errors, and did not refer to all the reasons that the grievor was failing to meet his production targets.

[241] In fact, the summary made it sound as if the delays were solely due to the grievor not limiting himself to the taxpayers' objections and doing unauthorized research. It made no mention whatsoever of the complexity of his files. It did not refer to the fact during the period of his last performance assessment, his hours exceeded the maximum target, partly because several of his files dealt with complex issues (transfer pricing and international transactions), as was noted in his March 2018 mid-year appraisal. It did not refer to the fact that he was assigned files above his level (AU-

04 and AO-06), that a group of his files had been referred for a criminal investigation, or that many of his files could not be closed since they were awaiting decisions from other divisions.

[242] The grievor testified that 70% of his files involved complex international matters that could not be closed within the normal standard hours. Mr. Guillemette agreed that the grievor had more complex issues. Mr. Goel also testified that the AU-03s were the most senior positions on the teams and that they were responsible for appeals that often involved more complex issues. Although Mr. Goel denied that the grievor's files were more complex than those of the other AO-03s, it did not constitute a denial that the AU-03 files were more complex. Further, no evidence was led as to how long it took other AU-03s to complete their files or how the grievor compared to them.

[243] I also noted that the standard hours applied to all employees at the SP-05 to AU-03 groups and levels. Given that the AO-03 files were often more complex, it appears rather logical that the grievor would not always have been able to complete his work within the stated standard hours, as he testified to. Further, the employer's document on the use of standard hours specified that they were not intended to represent individual limits or targets. The employer's witnesses also agreed that the standard hours were only guidelines. Despite that, they were used as targets for the grievor to meet.

[244] Those are illustrations of the employer's intent to portray the grievor in the most negative light possible. Again, it is consistent with a punitive intent.

3. The failure to consider the full extent of the grievor's improvements

[245] The evidence set out that by the time the decision was made to demote the grievor, it did not matter what efforts he was making to address his employer's concerns. The decision had been made, and that was the end of it. That alone provides fairly powerful evidence that the employer's intent had become purely punitive.

[246] After the grievor's May 31, 2018, warning letter, only two performance appraisals were made. The first was one month later, and the second was in November 2018, when he received his year-end appraisal for his performance from September 1, 2017, to August 31, 2018. That assessment included the nine months proceeding his warning letter and the three months after it. It did not discern what actions occurred

when, and as such, it does not represent an assessment of the improvements he made after the warning letter.

[247] The grievor was informed that a follow-up assessment would occur on February 28, 2019. However, none was made. Mr. Goel testified that it chose not to do so since it had already decided to demote him. As a result, no formal assessment was made of his improvements from July 1, 2018, until his demotion on April 10, 2019 — over nine months later.

[248] On top of that, the employer's witnesses also had very little to say about his improvements. Surprisingly, Mr. Guillemette was not questioned during his examination-in-chief on the grievor's improvements after the warning letter, aside from stating that he prepared the June 2018 assessment and the 2017-2018 year-end appraisal. Ms. Dionne stated that she was aware of some improvements but that she did not know the specifics. She stated that when she retired in December 2018, it was all left in the LR team's hands. Mr. Goel and Mr. Vijh were also unaware of the extent of the grievor's improvements after the warning letter.

[249] Mr. Goel testified that he was aware that the grievor had closed a few files after the warning letter, but he did not know how many. When asked whether he was aware that the grievor's performance had improved, he replied as follows: "You would have to go to the team leader for that, I am not aware. I do not observe his performance directly; I am not his team leader. I was told that the issues persisted. What is in the document is what I was informed of. So it is what is in his performance review." Mr. Guillemette confirmed that he never discussed the grievor's performance with Mr. Goel.

[250] The only evidence provided of after August 31, 2018, was in the summary provided to Mr. Vijh on February 14, 2019. However, no witness spoke to it. Those comments referred to the grievor's specific improvements in July, August, and September 2018. However, in generalized terms, they stated that deficiencies remained, without naming any specifics.

[251] The employer also entered into evidence the grievor's 2018-2019 performance appraisal. However, it was prepared after the fact, and the employer did not rely on it when it made its decision.

[252] The grievor, on the other hand, testified that after he received the warning letter, he worked very hard to improve his production. He testified that Mr. Guillemette agreed to allow him to refer a group of his outstanding files for a criminal investigation. He stated that between September 2018 and March 2019, he closed 8 files and that he completed 16 files in 2019. He stated that he could not close all his files since many of them had been referred to other divisions for their input, and he had no control over how much time a referred file took to be returned. The employer did not challenge his evidence on his production after September 1, 2018, and did not lead any evidence that it considered those improvements when it decided to demote him.

[253] The fact that the employer showed so little interest in the grievor's actual improvements to address its concerns after the warning letter was issued is once again indicative of an intent to punish him rather than to help him meet the objectives of his position.

[254] Considering that evidence together supports a finding that the employer did not truly care about helping the grievor improve his performance. It set expectations that were greater than those set for other employees, it established fixed performance targets and failed to fairly consider why they were not met, and finally, it ignored his efforts to address its concerns. Altogether, it paints a picture of an employer that lost its ability to manage the grievor in good faith and that opted instead to take punitive or corrective actions to address his refusal to follow its directions.

[255] The employer argued that even were I to find that a portion of the grievor's conduct could be seen as insubordination, it would not make his demotion disciplinary action. It argued that disguised discipline could not go so far as to limit its options to disciplining an employee only if one part of the employee's conduct was culpable, given a situation in which the employee was underperforming and should have been demoted for legitimate employment-related reasons.

[256] I agree that that argument might have merit in a scenario of a minor act of insubordination. However, in this case, the actions that the employer reproached were predominantly insubordinate in nature. Had it followed progressive discipline, the acts of insubordination might very well have ceased. Indeed, there is evidence that the

grievor made a concerted effort to address the concerns that the employer raised after he received the warning letter in May 2018.

[257] By all accounts, the grievor was difficult to manage. However, the employer could not simply choose to manage his insubordination as part of an administrative process because doing so was easier or more convenient.

[258] The standard of review for a demotion due to discipline is that it can be done only for cause (see s. 12(3) of the *Financial Administration Act* (R.S.C., 1985, c. F-11)). However, if an employee is demoted due to unsatisfactory performance, the standard of review is lesser and is based only on whether the employer's decision was reasonable. Section 230 of the *Act* reads as follows:

> ***230*** *In the case of an employee in the core public administration or an employee of a separate agency designated under subsection 209(3),* ***in making a decision in respect of an employee's individual grievance relating to*** *a termination of employment or* ***demotion for unsatisfactory performance, an adjudicator or the Board, as the case may be, must determine the*** *termination or* ***demotion to have been for cause if the opinion of the deputy head*** *that the employee's performance was unsatisfactory* ***is determined by the adjudicator or the Board to have been reasonable.***
>
> ***230*** *Saisi d'un grief individuel portant sur le licenciement ou la rétrogradation pour rendement insuffisant d'un fonctionnaire de l'administration publique centrale ou d'un organisme distinct désigné au titre du paragraphe 209(3),* ***l'arbitre de grief ou la Commission, selon le cas, doit décider que*** *le licenciement ou* ***la rétrogradation étaient motivés s'il conclut qu'il était raisonnable*** *que* ***l'administrateur général estime le rendement du fonctionnaire insuffisant****.*
>
> [Emphasis added]

[259] Therefore, I disagree with the employer's argument that it did not have to discipline the grievor simply because a part of his conduct was culpable. Since the legislation has two different standards of review, it is essential that an employee's conduct be defined properly and treated accordingly.

[260] I am certainly not suggesting that an employer should rush to discipline all culpable conduct. However, once corrective measures are taken, such as a demotion, they must reflect the nature of the problem. In this case, the grievor's conduct was clearly culpable in nature and not based on incompetence.

C. The impact or effect of the employer's action

[261] As stated in *Frazee*, if the impact of the employer's decision is significantly disproportionate to the administrative rationale being served, the decision may be viewed as disciplinary. Other considerations include the impact of the decision upon the employee's career prospects and whether the employer's action had an immediate adverse effect on the employee. All those are present in this case.

[262] The employer's demotion decision can only be described as extreme. The grievor was demoted to an SP-03 appeals processing clerk position within the same Appeals Division office. That represented a 6-level demotion, was 2 levels lower than the position that he held upon being hired 19 years earlier, and represented approximately 50% less income per year.

[263] The grievor testified to the embarrassment of having to work as a clerk within the same office in which he had previously worked as an AU-03 — the most senior AO position on his team. He spoke to the stress that it placed on his family life and to the toll that it took on his mental well-being. He spoke to the devasting impact that the demotion had on his career. He stated that he did not have any realistic career advancement opportunities since he had to divulge in his résumé that he was working as a clerk in a position that did not even require any professional designations.

[264] Mr. Goel and Mr. Vijh testified that the grievor could have easily applied for another SP or AU position and that he almost certainly would have obtained one had he tried since the testing was minimal, and several positions had been vacant. Those statements are difficult to reconcile with their decision to demote him to SP-03 on the basis that he was not competent for any of those positions.

[265] In fact, those statements support once again that the true intention in demoting the grievor by six levels was to punish or correct his culpable conduct. Had it truly been due to the fact that he was not competent to perform in any of the positions at the SP-04 to AU-03 groups and levels, then the employer would not have suggested that he could so easily have reobtained a promotion.

[266] The employer argued that its response did not have to be the best, only reasonable. In my opinion, the fact that it made its decision based on inaccurate and incomplete information made its decision unreasonable.

V. Conclusion

[267] Based on the preponderance of the evidence, I find that the decision to demote the grievor from an AU-03 to an SP-03 position concealed disciplinary intentions. The employer used the performance evaluation process and the PIPs to qualify as incompetence the difficulties it encountered with the grievor's attitude and behaviour.

[268] In an employment relationship, an employee is not free to do their work based on their own views and beliefs if they are contrary to their employer's direction. Employees are required to follow those directions, and failing to is culpable behaviour to the extent that the directions are understood.

[269] In this case, it was clear that the grievor understood the instructions that were given to him. However, he refused to follow them because he did not agree with them. That situation was allowed to go on for years until the employer decided to take the extreme measure of demoting him, by six levels, to a clerical position. That was so significantly disproportionate to the stated goal of placing him in a role in which he could succeed that it can be viewed in no other way than an attempt to punish him and correct his behaviour.

[270] As a result, I find that the demotion was not a reasonable response to honestly held operational considerations (see *Bergey*).

[271] The parties requested that I reserve my decision on the remedy, in the event that I held that the demotion was disciplinary, and that I allow them the opportunity to agree to terms on their own. I agreed.

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

(The Order appears on the next page)

VI. Order

[273] The Board will remain seized of this grievance until it is resolved either by an agreement of the parties or by a further Board order. The parties will inform the Board of their desired course of action within 90 days of the date of this decision.

December 12, 2025.

Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board