Date: 20260227

File: EMP-2017-10936

Citation: 2026 FPSLREB 19

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

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

BETWEEN

STÉPHANIE HARNOIS

Complainant

and

DEPUTY HEAD
(Deputy Minister of Transport, Infrastructure and Communities)

Respondent

and

OTHER PARTIES

Indexed as
Harnois v. Deputy Head (Deputy Minister of Transport, Infrastructure and Communities)

In the matter of a complaint of abuse of authority under section 77(1) of the *Public Service Employment Act*

Before: Guy Giguère, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Sylvain Archambault, Canada Employment and Immigration Union

For the Respondent: Simon Ferrand, Stephanie White, and John Maskine, counsel

For the Public Service Commission: Lissa Mussely, counsel

Decided on the basis of written submissions,
filed January 10 and 31 and February 7 and 17, 2025.

(FPSLREB Translation)

REASONS FOR DECISION (FPSLREB TRANSLATION)

Introduction

[1] This decision is about a claim for damages following a staffing complaint deemed founded on grounds of abuse of authority. For the first time, the Federal Public Sector Labour Relations and Employment Board ("the Board") is deciding whether damages should be awarded when the evidence has established not only that there was an abuse of authority but also that the complainant was qualified and that there was a high probability she would have been appointed but for that abuse.

[2] On August 2, 2024, the Board issued its decision on the complaint, finding that the respondent had flagrantly abused its authority. It established that the selection board had relied on insufficient information to assess the complainant, ignored her positive references, failed to follow the rating guide, and adopted a rigid position that prevented it from exercising the discretionary power delegated to it. The Board found that the selection board did not want the complainant to be appointed and had acted in bad faith by demonstrating bias against her (see *Harnois v. Deputy Head (Deputy Minister of Transport, Infrastructure and Communities)*, 2024 FPSLREB 106).

[3] During arguments in *Harnois*, the complainant requested as corrective action that the Deputy Minister of Transport, Infrastructure, and Communities ("the respondent") pay damages, which she had not stated at the pre-hearing conference. The Board explained in its decision that that the damage claim would be the subject of a second hearing given the particular circumstances of this case and that such a claim has rarely been made in the past.

[4] The parties chose not to present new evidence on the matter of damages and to proceed by written submissions. This allowed them to present more detailed arguments, notably on the nature of the damages being requested and the Board's jurisdiction to award them.

[5] The complainant submits that the Board has the jurisdiction to order damages, whether in staffing or labour relations. Essentially, she requests damages representing the additional remuneration she would have been entitled to had she been appointed, damages for pain and suffering, and punitive damages for the respondent's wrongdoing.

[6] The respondent argues that the case law has established that the Board does not have the general jurisdiction to order damages under ss. 81 and 82 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). It adds that the Board does not have jurisdiction to order damages for a lost opportunity, as this would presuppose that the complainant would have been appointed to the position.

[7] According to the respondent, there are no exceptional circumstances in this case that would justify departing from prior jurisprudence. The respondent argues that the Board's jurisdiction to order damages is limited to labour relations matters and that it has no such power for staffing complaints. Even if the Board had the jurisdiction, it would have to refuse to award damages, because the complainant has not proven her losses, and the measures already ordered are sufficient.

[8] The Public Service Commission (PSC) supports the respondent's arguments. It argues that the same meaning should be given to the term "corrective action" throughout the *PSEA*, regardless of the body taking them, and that they should be limited to administrative measures.

[9] I find that these issues require thorough analysis. The facts and arguments presented at the hearing distinguish this case from the prior jurisprudence. Moreover, the Board must determine whether it has jurisdiction to award damages for a lost opportunity, while in common law this does not constitute an appointment but rather a proportional remedy for the harm that was suffered.

[10] For the reasons that follow, the Board concludes that the term "corrective action" in s. 81 of the *PSEA* must be interpreted broadly and in its context and that its ordinary meaning includes awarding damages. It further finds that the *PSEA* is a complete and exclusive code.

[11] When the evidence demonstrates that because of an abuse of authority, a real and serious appointment opportunity was denied, an award of damages is a valid and proportionate corrective action that is consistent with the objectives of the *PSEA*.

[12] In this case, the evidence shows that the complainant was qualified and that had the selection board not abused its authority, there was a high probability that she would have been appointed. Therefore, compensatory damages for a lost opportunity are appropriate, as is an award of aggravated damages for pain and suffering since the

selection board's wrongdoing aggravated the prejudice suffered. In addition, the selection board's conduct was highly reprehensible and requires denunciation, including through the award of punitive damages.

Analysis

[13] **Question 1: Is the Board bound by previous case law on awarding damages?**

[14] The complainant submits that the Board has the same jurisdiction to award damages in staffing matters as it does in labour relations matters. The respondent argues on the contrary that the jurisprudence unanimously prohibits such an award following a staffing complaint. It also argues that the complainant has not put forward any exceptional circumstances that would make it possible to depart from the case law.

[15] The respondent cites in support of his position the decisions that have dealt with awarding damages, including the following: *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10; *Pugh v. Deputy Minister of National Defence*, 2007 PSST 25; *Rizqy v. Deputy Minister of Employment and Social Development*, 2021 FPSLREB 12; *Aldhahi v. Deputy Head (Department of Citizenship and Immigration)*, 2023 FPSLREB 117; *Fang v. Deputy Head (Department of Industry)*, 2023 FPSLREB 52; *Spruin v. Deputy Minister of Employment and Social Development*, 2019 FPSLREB 33; *Monfourny v. Deputy Head (Department of National Defence)*, 2023 FPSLREB 37; and *De Santis v. Commissioner of the Correctional Service of Canada*, 2016 PSLREB 34.

[16] However, those decisions do not support a conclusion that there is a clear and consistent exclusion of jurisdiction to award damages in staffing complaints. A reading of those decisions reveals that awarding damages to compensate for the salary difference with the position subject of the complaint (damages for lost opportunity) was not considered, given the context and the absence of any evidenced losses. As a result, those decisions have limited scope with respect to the facts raised by this complaint.

[17] In *Gignac*, the Public Service Staffing Tribunal ("the Tribunal") did not find a general lack of jurisdiction to award damages other than punitive damages. Rather, it left the question open, in the absence of sufficient evidence and arguments. At

paragraph 101, it notably found that the complainant had not explained or justified the legal basis for his claim and that he had produced no evidence, including through his testimony, establishing moral damages or any other harm linked to the alleged abuse of authority.

[18] At paragraph 102, the Tribunal stated that according to the case law at the time, it could order punitive damages only if the legislation permitted it. It was not then clearly established that punitive damages could be awarded in a context in which the parties were bound by a contract or collective agreement (see *Chénier v. Treasury Board*, 2003 PSLRB 27; *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 SCR 1085; and *Canada (Attorney General) v. Hester*, [1997] 2 FC 706).

[19] As the law has evolved, the jurisprudence now recognizes that punitive damages can be awarded when the respondent's behaviour was particularly reprehensible, malicious, or marked by flagrant bad faith. The respondent's conduct is the determining factor when deciding to award punitive damages (see *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 36 and 37; *Canada (Attorney General) v. Robitaille*, 2011 FC 1218 at paras. 51 to 53; and *Kline v. Deputy Head (Canada Border Services Agency)*, 2024 FPSLREB 115 at paras. 248 to 254).

[20] In *Pugh*, the Tribunal concluded that there had been no abuse of authority. At paragraph 43, it observed in passing (*obiter dictum*) that its powers were limited under ss. 81 and 82 of the *PSEA* and that it could not award monetary damages. In *Rizqy*, the complainant withdrew her damages request. At paragraph 59, the Board added in *obiter dictum* that it cannot grant an amount for loss of salary, without further explanation.

[21] An *obiter dictum* like in *Pugh* or *Rizqy* is not binding on the Board. Not only were those comments unnecessary to the reason for deciding (the *ratio decidendi*), since in the circumstances no damages order could be made, but they also fail to develop the legal reasoning that would support the conclusion advanced as to the absence of jurisdiction. As the Supreme Court recently reiterated, something said in passing must be weighed cautiously (see *Canada (Attorney General) v. Power*, 2024 SCC 26 at paras. 342 to 344).

[22] In the other decisions, damages for lost wages were not considered in the circumstances of those complaints. At paragraph 67 of *Aldhahi*, the Board explained

that regardless of jurisdiction, ordering damages was not appropriate, given the facts. In *Spruin* and *Fang*, the complaints were founded and damages were awarded for discrimination. The damage claims for lost wages were not considered, with only a brief note that this was not authorized under s. 82 of the *PSEA* (see *Spruin*, at para. 117; and *Fang*, at para. 151).

[23] In *Monfourny*, it was determined that the respondent had shown bias against the complainant but that it had not affected the assessment of her candidacy. There were no serious deficiencies in the assessment process, and the complainant was deemed qualified. In that context, damages for lost wages or lost opportunity were not considered. The complainant could not detail them because she had been appointed to another position from the pool. In addition, the claim for punitive and exemplary damages was dismissed because it clearly exceeded the complaint's scope, as those damages were requested to make the *PSEA* more binding in the future and to encourage deputy heads to comply with it.

[24] The *Monfourny* decision is the only decision in which the complainant's arguments to justify the award of damages are reported. Although an analysis is conducted therein, I do not find that it applies here.

[25] After looking at the case law cited by the respondent, I find that the argument that awarding damages in a staffing complaint is equivalent to an appointment warrants thorough analysis. Furthermore, the Board has never evaluated a damage claim for a lost opportunity. Although similar to a damage claim for lost wages, it refers to a well-established common law principle that damages can be awarded for a lost opportunity without that being equivalent to the complainant's appointment.

[26] The respondent also argues that damages cannot be awarded for a lost opportunity because doing so would be equivalent to appointing the complainant. It relies on *De Santis*, in which the complainant specifically requested damages for a lost opportunity. However, the Board did not rule on that damage claim from the complainant. The decision specifies at paragraph 53 that no assessment was made on the damage claim for the lost opportunity: "I have made no findings as to the application of the complainant." The Board simply indicated that that type of remedy was beyond its jurisdiction.

[27] Yet, common law damages are awarded in staffing matters when the respondent's wrongdoing has quashed the actual and not hypothetical opportunity of being appointed. Although it is impossible to establish with certainty that the appointment would have taken place, courts and tribunals have recognized that the loss of an opportunity constitutes compensable prejudice and have awarded damages for a lost opportunity for a promotion (see *Taticek v. Canada (Canada Border Services Agency)*, 2014 FC 281, upheld in *Taticek v. Canada (Canada Border Services Agency)*, 2015 FC 542 at paras. 21 and 22; and *Ontario (Ministry of Community, Family and Children's Services) v. O.P.S.E.U.*, 2004 CanLII 94698 (ON GSB), [2004] O.G.S.B.A. No. 192 (QL) at paras. 14 to 17).

[28] The case law recognizes that an administrative tribunal can depart from previous decisions when the context justifies it. This case differs from *Monfourny* in both facts and evidence. The parties' arguments also differ from those examined in previous decisions. In these circumstances, it is open to the Board not to follow that jurisprudence (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 129 to 131).

[29] It is also well established that administrative tribunals are not bound, as are courts of justice, to decide matters based on precedents under the rule of *stare decisis*, which means in conformity with previous binding decisions. Recognizing the importance of consistency in Board decisions, when a panel member departs from well-established case law, they must explain that departure in their reasons (see *Turner v. Canada (Attorney General)*, 2022 FCA 192).

[30] In *Harnois*, the Board found that bias and other abuses of authority had affected the assessment of the complainant's candidacy. Unlike in *Monfourny*, the complainant was not found qualified and appointed to another position, although she had been found qualified in the previous process, and Human Resources had confirmed to her that she had qualified in the process at issue.

[31] The law is bound to evolve to take into account the specific facts and circumstances of a case, which contributes to the development of jurisprudence. This means that the Board can resolve the complainant's dispute in the manner that it deems most appropriate, even when certain circumstances bear similarities to previous cases (see *Weber v. Ontario Hydro*, [1995] 2 SCR 929 at para. 14).

[32] A good example of this is *Amos v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 74, in which Adjudicator Butler departed from unanimous jurisprudence. In prior decisions of the Public Service Labour Relations Board (PSLRB) and the Federal Court, once a settlement agreement was reached, the adjudicator lost jurisdiction over the case. In *Amos*, Adjudicator Butler found that having regard in particular to the facts specific to that case, he had not lost jurisdiction to determine whether the parties had entered into a final and binding settlement agreement or whether they had complied with it.

[33] That decision was confirmed by the Federal Court of Appeal, which stated that the factual context of a complaint plays a determinative role in defining a decision maker's jurisdiction (see *Amos v. Canada (Attorney General)*, 2011 FCA 38 at para. 16).

[34] Establishing an abuse of authority is generally a demanding evidentiary exercise for complainants, who devote most of the evidence and hearing to that question. For that reason, damages claims are rarely brought, and when they are, they do not usually give rise to detailed debate. They are then made at the argument stage, without prior evidence having been submitted as to the nature and extent of the alleged harm and without detailed arguments being presented as to their legal basis.

[35] That reality has limited the need for the Board to analyze in depth the extent of its jurisdiction to award damages in the prior jurisprudence. In this case, the evidence submitted and the parties' detailed submissions on the sole issue of damages require the Board to address this question directly and determine its scope.

[36] Thus, in *Gignac*, the complainant's representative requested, at the end of his submissions, as a corrective action, the award of a lump sum in damages without having presented any evidence in support thereof or any argument on the probability that the complainant would have been appointed but for the respondent's bias.

[37] Unlike in *Gignac* and the other cited decisions, the complainant in this case presented evidence supporting the legal basis for her damages claim. She testified as to the pecuniary and moral harm flowing from the abuse of authority. The parties, including the PSC, presented arguments on the Board's jurisdiction to award damages so that a full analysis could be performed.

[38] To determine whether the Board has jurisdiction to order damages, I find that a detailed analysis is required, as in *Amos*. It is appropriate to first analyze the legislative context and the *PSEA*'s purpose and to determine the meaning and scope of the term "corrective action", then to answer the key questions raised by the parties.

[39] **The legislative context behind the Board's origin**

[40] In 2003, the *Public Service Modernization Act* (S.C. 2003, c. 22), which modernized the public service labour relations and employment regime, was enacted. Under this statutory framework, two new laws were enacted: a new *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*), which came into effect in April 2005, and a new *PSEA*, which came into effect in December 2005.

[41] For employment, Parliament made a profound change to the regime of the former Act. The PSC's authorities for internal appointments are now delegated to and exercised by deputy heads. They subdelegate appointment authorities to the managers under their responsibility. Moreover, the deputy head is now responsible for investigating internal appointments in their own organization and for taking any corrective actions that they consider appropriate.

[42] The PSC has exclusive jurisdiction over external appointments, but it may, at a deputy head's request, investigate an internal appointment and report to that deputy head. Its own jurisdiction over internal appointments is limited to fraud or political influence. Furthermore, it retains an oversight role and may audit the manner in which deputy heads make internal appointments, as well as revoke their delegation. Where the appointment power is not delegated, the PSC is the deputy head (see *Seck v. Canada (Attorney General)*, 2012 FCA 314 at paras. 25 and 28 to 30).

[43] The Tribunal became responsible for hearing public servants' complaints about internal appointments, revoked appointments, and layoffs.

[44] Then, on November 1, 2014, the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *FPSLREBA*) came into force and merged the PSLRB and the Tribunal. This was accomplished without modifying the manner in which staffing complaints are handled; the Tribunal's general powers under Part 6 of the *PSEA* were repealed and are now set out in the *FPSLREBA*.

[45] The *FPSLREBA* establishes the same functioning for the Board on staffing and labour relations matters. In both domains, the Board may hear allegations and render decisions relative to the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) and the *Accessible Canada Act* (S.C. 2019, c. 10; *ACA*).

[46] Matters before the Board are heard by a single panel member, with some exceptions. The member exercises all the powers conferred to the Board in staffing and labour relations hearings (see ss. 19 to 23 and 37 of the *FPSLREBA*).

[47] Members hold pre-hearing and case management conferences and may compel witnesses to appear. They preside over mediations and hearings and render decisions and orders. Under s. 23 of the *FPSLREBA*, members may help parties resolve any issues in dispute at any stage of a proceeding, without thereby losing jurisdiction to decide the issues that have not been settled.

[48] All Board decisions and orders are final and subject to the same privative clause. Section 34(1) of the *FPSLREBA* provides that the Board's decisions and orders are not to be questioned or reviewed in any court, with some exceptions. Similarly, during a proceeding, a decision, order, or procedural act may not be challenged, reviewed, restrained, or limited.

[49] With the *FPSLREBA*, Parliament merged these two quasi-judicial tribunals to create a single body to resolve federal public servants' disputes regarding internal appointments and labour relations matters. This merger did not lead to any major legislative amendment, as the two former tribunals operated in the same manner.

[50] **The *PSEA*'s purpose**

[51] According to the respondent, Parliament's intent was to exclude from the Board's jurisdiction the power to award damages. The respondent cites certain excerpts from parliamentary debates to support its argument. The jurisprudence and the doctrine on statutory interpretation hold that parliamentary debates may be taken into consideration with caution and as an accessory consideration, as long as they are relevant and reliable and not given excessive weight (see *Canada (Attorney General) v. Friends of the Canadian Wheat Board*, 2012 FCA 183 at para. 51; and Pierre-André Côté, *The Interpretation of Legislation in Canada*, Fourth Edition (Montréal: Thémis, 2009, at 414)).

[52] However, the excerpts cited by the respondent and the PSC cited are about the Board's revocation power. They say nothing about ordering corrective action. Furthermore, excerpts from parliamentarians reflecting their individual views cannot alter the scope of the text adopted by Parliament (see in particular House of Commons, 37th Parliament, 2nd Session, *Standing Committee on Government Operations and Estimates - Evidence*, February 27, 2003).

[53] It is well established that Parliament's intent is found by reading the text of the statute itself, read and interpreted in its entire context, including its preamble, its object, and general framework. The preamble is part of the Act and is a direct and legitimate source of Parliament's intent (see *Amos*, 2011 FCA 38, citing at para. 42 Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87, and citing at para. 43 *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 16; and *Côté*, at 395 to 396).

[54] The respondent submits that the Board does not have, in staffing matters, the same jurisdiction to award damages as it does for labour relations. According to it, the powers conferred by the *PSEA* must be interpreted strictly and narrowly, as that Act's preamble does not have the same scope as the *FPSLRA*.

[55] However, the analysis of those preambles and the case law shows that the Board's jurisdiction must be interpreted broadly. Both laws are complete codes, and the Board's jurisdiction comprises all the powers necessary to fulfil its legislative objectives.

[56] The preamble to the *PSEA* emphasizes fair and transparent employment practices as well as respect for employees. It defines the Board's functional role, which is to independently safeguard appointment values, including merit, to foster dispute resolution, and to resolve, through recourse, disputes regarding internal appointments (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 64; *Canada (Attorney General) v. Beyak*, 2011 FC 629 at paras. 38 to 40 and 51; and *Agnaou v. Canada (Attorney General)*, 2015 FC 523 at paras. 53 to 55).

[57] Similarly, the preamble to the *FPSLRA* recognizes that Act's objectives. It emphasizes effective labour-management relations through communication and sustained dialogue. It defines the Board's functional role, which is to foster dispute resolution so as to ensure mutual respect and the establishment of harmonious

relations and, through recourse, to resolve, in a fair, credible, and effective manner, problems related to conditions of employment (see *Amos*).

[58] The jurisprudence recognizes that the Board, as an administrative tribunal, must interpret its enabling statutes as including, in addition to the powers expressly conferred, all powers that are necessary to achieve its legislative objective. This objective is to resolve, through recourse, matters involving internal appointments (see *Agnaou* and *Beyak*).

[59] **Question 2: What is the meaning and scope of the term "corrective action"?**

[60] **a) Is corrective action limited to administrative measures?**

[61] Essentially, the complainant submits that a liberal interpretation of s. 81 of the *PSEA* allows the Board to award damages. The respondent argues on the contrary that that section must be interpreted narrowly and that the term "corrective action" is limited to administrative measures. It submits that this term commonly means to correct, which does not include awarding damages.

[62] Parliament provided in s. 81(1) of the *PSEA* that the Board, when it finds a complaint to be substantiated, may order the deputy head and the PSC to take any corrective action that it considers appropriate. The only restriction on this power is in s. 82, which specifies that the Board may not order an appointment or that a new appointment process be undertaken. Those sections read as follows:

81 (1) *If the Board finds a complaint under section 77 to be substantiated, the Board* ***may order*** *the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and* ***to take any corrective action that the Board considers appropriate.***	***81 (1)*** *Si elle juge la plainte fondée, la Commission des relations de travail et de l'emploi* ***peut ordonner*** *à la Commission ou à l'administrateur général de révoquer la nomination ou de ne pas faire la nomination, selon le cas, et* ***de prendre les mesures correctives qu'elle estime indiquées.***
…	[…]
(2) Corrective action *taken under subsection (1)* ***may include*** *an order for relief in accordance with paragraph 53(2)(e) or subsection*	***(2)*** *Les ordonnances prévues à l'alinéa 53(2)e) et au paragraphe 53(3) de la* Loi canadienne sur les

53(3) of the Canadian Human Rights Act.	droits de la personne ***peuvent faire partie des mesures correctives.***
…	[…]
***(3) Corrective action** taken under subsection (1) **may include** an order for relief in accordance with section 102 of the* Accessible Canada Act.	***(3)** Les ordonnances prévues à l'article 102 de la* Loi canadienne sur l'accessibilité ***peuvent faire partie des mesures correctives.***
…	[…]
82** The Board may not order the Commission to **make an appointment or to conduct a new appointment process.	***82** La Commission des relations de travail et de l'emploi ne peut ordonner à la Commission de **faire une nomination ou d'entreprendre un nouveau processus de nomination.***

[Emphasis added]

[63] The Federal Court has ruled on several occasions on the scope of those sections. Corrective action must seek to remedy the abuse of authority identified in the decision and relate only to the process that is the subject of the complaint. The Federal Court has recognized that Parliament has given the Tribunal (now the Board) considerable discretion. When there are concerns that go beyond the process at issue in the complaint, its decision may include recommendations to the respondent (see *Beyak*, at paras. 50 to 53; and *Canada (Attorney General) v. Cameron*, 2009 FC 618 at para. 18).

[64] In *Seck*, the Federal Court of Appeal examined at the PSC's jurisdiction to take corrective action under s. 69 of the *PSEA* following an investigation of fraud in an internal appointment process. Similar to the *Cameron* decision, the Federal Court of Appeal indicated that the PSC's jurisdiction to take corrective action after a fraud investigation must be exercised having regard to the respective authorities of the deputy heads, as well as the Tribunal (now the Board) (see *Seck*, at paras. 16, 25, and 29 to 31; and *MacAdam v. Canada (Attorney General)*, 2014 FC 443).

[65] The Federal Court of Appeal concluded that the PSC may take administrative measures but not disciplinary action, which is up to the deputy head. It may not impose criminal penalties. Those fall instead to judicial tribunals. It goes without saying that the Board may not order such discipline or criminal penalties, for those reasons (see *Seck*, at para. 52).

[66] The respondent argues that the meaning to be given to the term “corrective action” must be the same throughout the *PSEA* and that it is limited to administrative measures, as interpreted in *Seck*. The PSC subscribes to this view and invokes the presumption of consistent expression, according to which similar terms in a law must be interpreted the same way, unless there is a reason to distinguish between them or if the context is different. According to the PSC, no such distinction applies in this case.

[67] I do not share this analysis. It disregards the context that applies specifically to the deputy head, the PSC, and the Board under the *PSEA* and the distinct role that Parliament has given them. The meaning and scope of the term “corrective action” must necessarily take into account the body applying it. As the Federal Court of Appeal specified in *Seck*, the term “corrective action” must be interpreted having regard to the respective jurisdiction of the deputy head, the PSC, and the Board. It follows that although the words used are the same, the scope of “corrective action” cannot be the same when taken by a quasi-judicial tribunal such as the Board versus a deputy head or the PSC acting in the context of an administrative investigation.

[68] As the PSC indicated by citing Sullivan, *The Construction of Statutes*. 7th Ed. 8. §8.04, the presumption of consistent expression must nevertheless yield to the contextual principle of interpretation, which holds that the meaning of a term varies, depending on the context. Identical words may thus receive different meanings in the same statute when they are used in distinct contexts and for particular purposes. This flexibility is even more necessary for general or abstract terms like “corrective action”. Furthermore, this expression is used in different provisions depending on whether it refers to the deputy head or the Board for internal appointments and the PSC for external appointments.

[69] The Board has the mandate to provide independent recourse to hear public servants’ staffing complaints and, when abuse of authority is found, to order the corrective action that it considers appropriate. At the hearing of a complaint, the deputy head, as the respondent, must account for the exercise of their discretionary power under the *PSEA*. The Board’s decisions are published on its website and are accessible to everyone, which contributes to ensuring the transparency in the employment regime and accountability in the exercise of the delegated staffing authority.

[70] An administrative investigation differs fundamentally from a quasi-judicial hearing in terms of its nature, process, and analytical framework. After an investigation, the PSC or deputy head may revoke an appointment and take corrective action when they are satisfied "… that an error, an omission or improper conduct affected the selection of a person for appointment" (see ss. 15(3) and 67 of the *PSEA*).

[71] The Board, on the other hand, must assess the evidence in an adversarial context and determine whether the threshold required to find abuse of authority — such as bad faith, personal favouritism, or discriminatory or unreasonable actions, etc. — has been met before ordering corrective action. This distinction sheds light on the interpretation of the term "corrective action" and confirms that its scope may vary, depending on the body called upon to exercise it (see *Tibbs*, at paras. 39 and 70 to 74; *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 25; and ss. 77(1) and 81 of the *PSEA*).

[72] Moreover, in 2019, Parliament gave the Board concurrent jurisdiction with the Canadian Human Rights Tribunal to interpret and apply the *ACA* for complaints and grievances. It did so in 2005 for the *CHRA* for the PSLRB and the Tribunal, respectively. The Board may order the deputy head to pay damages under the *CHRA* and *ACA*. The PSC is not invested as a quasi-judicial tribunal with jurisdiction to order the deputy head to pay damages.

[73] The Board's jurisdiction to order such damages was established by the inclusion of similar provisions in the *FPSLRA* (see s. 226(2)) and the *PSEA* (see ss. 80 and 80.1). This does not exclude its general jurisdiction to award damages under s. 228(2) of the *FPSLRA*, just as it did not restrict the Board's general jurisdiction to award damages under s. 81 of the *PSEA*.

[74] Had Parliament wanted to exclude the awarding of damages from the corrective action that the Board may order, it would have expressly provided for this. The absence of such a restriction is significant under the recognized principles of legislative interpretation applicable here: Parliament does not speak in vain, and the express mention of one thing implies the exclusion of another (*expressio unius est eclusio alterius*). Yet, the only provision that restricts the Board's orders is s. 82 of the *PSEA*, which specifies that the Board may not order the respondent to make an appointment or conduct a new appointment process. However, s. 82 makes no mention

of the award of damages, which forecloses the restrictive interpretation proposed by the respondent and the PSC (see *Seck*, at para. 52; *Beyak*, at paras. 51 and 52; and *Tibbs*, at para. 65).

[75] Parliament did not provide a static definition of abuse of authority and proceeded in the same manner for corrective action, choosing not to define it or to enumerate the possible corrective action in s. 81 of the *PSEA*. It specified that it is up to the Board to determine those it considers appropriate, thereby granting the Board the flexibility to order the corrective action it deems appropriate in relation to the facts of the complaint, while having regard to the respective jurisdictions of the deputy head and the PSC (see *Tibbs*, at paras. 60 and 61).

[76] The analysis of ss. 81 and 82 of the *PSEA*, particularly the absence of any express limitation on awarding damages and Parliament's choice not to define or restrict the term "corrective action", demonstrates that those provisions do not limit the Board's jurisdiction to a narrow interpretation that would exclude awarding damages. By entrusting the Board with the authority to determine the corrective action that it considers appropriate, Parliament granted it genuine latitude, subject to the limits expressly provided in s. 82.

[77] **b) What is the ordinary and legal meaning of "corrective action"?**

[78] The respondent and the PSC argue that the ordinary meaning of "corrective action" does not include awarding damages. However, an analysis of both the common and legal meanings of the term "corrective action", together with the application of the rules of statutory interpretation, reveals that this term can include the award of damages..

[79] The ordinary meaning of the term "*mesures correctives*", as found in the French version of the *PSEA,* is a means implemented to correct or remedy an error, problem, or deficiency and to prevent it from recurring in the future (see the *Larousse* online for the definitions of the terms "*mesure*" and "*correctif*").

[80] This term has an even more distinct meaning when corrective action is ordered in a legal context. The term "*mesure*" is defined in the *Dictionnaire de droit québécois et canadien*, 4th edition, as follows: "[translation] A tribunal's decision that does not

deal with the merits of the dispute. It is generally ancillary, conservatory, or provisional." In this case, the awarding of damages is an incidental action.

[81] The *Dictionnaire des relations du travail*, 2nd edition, defines "*les mesures correctives*" ("corrective action") as follows: "[translation] An order imposed by a court or administrative body to remedy a situation or compensate for harm caused to an injured party resulting from a violation of the law." It gives as synonyms "*mesures de redressement*" ("[translation] remedial action") and "*remèdes*" ("[translation] remedies").

[82] The ordinary and legal meaning of the term "corrective action" can therefore include damages to remedy or compensate for harm caused to a complainant. Thus, the term "*mesures correctives*" is used is occasionally in legislative texts and court and tribunal decisions (see s. 30.15(2) of the *Canadian International Trade Tribunal Act* (R.S.C., 1984, c. 47 (4th Supp.)); *Canada (Attorney General) v. Valcom Consulting Group Inc.*, 2019 FCA 1; and *Ellis Don Corporation*, 2023 CanLII 87786 (CA CITT) at para. 90).

[83] The modern contextual method of interpretation applies to the interpretation of s. 81 of the *PSEA*. The term "corrective action" must be interpreted harmoniously with the scheme of the Act, its object, and the intention of Parliament. It is not sufficient to read the term in its ordinary meaning; consideration must also be given to the context in which it is used and the purpose of this section within the overall legislative scheme. Where the terms used may have more than one reasonable meaning, the ordinary meaning is secondary since Parliament's intent is determinative (see *Seck*, at paras. 21 and 22; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 SCR 601 at para. 10; and *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 599 at para. 27).

[84] As I explained above, the legislative context under which the Board reviews an internal appointment differs greatly from that of the PSC and the deputy head. Parliament provided a first-line recourse for concerned public servants when they are notified of an appointment or proposed appointment. Within 15 days of the notice of the appointment or proposed appointment, they can make a complaint of abuse of authority with the Board. Following a quasi-judicial hearing in which all parties may be heard, the Board determines whether there has been an abuse of authority, and that is when it may order any corrective action that it considers appropriate.

[85] On the other hand, it is a manager subdelegated by the deputy head who makes an appointment. If the deputy head later has concerns about the appointment, it may investigate and take corrective action if satisfied that the appointment was not based on merit or that an error, omission, or irregular conduct influenced the appointment.

[86] The nature of the corrective action available to the deputy head is very broad. The deputy head may aim to prevent a similar incident from recurring in its organization, for example by deciding to withdraw or suspend the delegation of appointment authority or to improve training for subdelegated managers. It may take disciplinary action (see *Seck* and s. 67 of the *PSEA*). It may also award damages or retroactive pay in particular after the grievance has been heard.

[87] It is noteworthy that the Federal Court, in Taticek 2015, indicated at paragraphs 21 and 22 that a decision maker at the final level of the grievance process may award damages for a lost opportunity if that is the remedy that it considers appropriate. Under a distinct staffing system specific to the Canada Revenue Agency, the Federal Court of Appeal confirmed that the employer had the discretion to issue retroactive pay as a remedy (see *Macklai v. Canada (Revenue Agency)*, 2011 FCA 49 at paras. 4 to 7).

[88] The same applies to the corrective action that the PSC may take after investigating an external process or when it has reason to believe that fraud or political influence might have occurred in an internal appointment process. In that context, the corrective action taken by the PSC may be considered administrative in nature. It may, for example, require in fraud cases that the grievor obtain its written authorization before accepting a position in the federal public service, failing which the appointment may be revoked. It may also temporarily remove a manager's sub-delegation of appointment authorities or require that they take mandatory training (see *Seck* and ss. 68 and 69 of the *PSEA*).

[89] As a specialized tribunal, the Board has knowledge and extensive experience in recourse proceedings that enables it to find a fair and practical solution to resolve the parties' disputes, in accordance with the *PSEA*'s objectives. The Board orders corrective action that it considers appropriate to correct or remedy the abuse of authority being complained of. Orders must respond to the demonstrated abuse of authority and must offer the complainant a valid remedy (see *Royal Oak Mines Inc. v. Canada (Labour*

Relations Board), [1996] 1 SCR 369 at para. 58; *Agnaou*, at paras. 54 and 55; and *Beyak*).

[90] For those reasons, I find that the ordinary and legal meaning of the term "corrective action" may include damages to remedy or compensate for harm caused to a complainant. I find that this term must be interpreted broadly in the context of the *PSEA*.

[91] **c) Is the staffing-complaint procedure in the *PSEA* a complete code excluding all other recourse?**

[92] It is also settled law that jurisdiction in recourse matters flows from two sources: an express grant in the enabling statute (express powers), in this case the *PSEA*, and the common law through the application of the doctrine of implied jurisdiction (implied powers) (see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4; *R. v. Cunningham*, 2010 SCC 10; and *R. v. 974649 Ontario Inc.*, 2001 SCC 81).

[93] The Federal Court of Appeal has confirmed the principle of exclusive recourse in the presence of a complete code, whether formulated explicitly or implicitly, notably in *Johnson-Paquette v. Canada*, [2000] 253 NR 305, [2000] A.C.F. No. 441 (QL) at para. 10; *Public Service Alliance of Canada v. Canada (Treasury Board)*, 2001 FCT 568; and *Public Service Alliance of Canada v. Canada (Treasury Board)*, 2002 FCA 239.

[94] Parliament introduced a complete dispute resolution regime in the *PSEA* by designating the Board, at s. 88, as the independent body responsible for hearing public servants' staffing complaints and rendering decisions. As the Federal Court noted at paragraph 51 of *Beyak*, by the non-limiting wording of s. 88, Parliament indicates that the Board has a wide margin of manoeuvre in handling these complaints. It is well established that in the presence of a complete code, the courts and other decision-making bodies must not intervene, as their intervention could undermine that regime (see *Weber*; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 SCR 360; and *Pelletier v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 117).

[95] Courts recognize that the exclusive-recourse regime in *Weber* applies to the Board for the recourses established in the *PSEA*. In particular, in *Doucette v. Canada*

(Attorney General), 2023 PESC 51, the Chief Justice of the Supreme Court of Prince Edward Island ruled that the *PSEA* is a comprehensive dispute-resolution regime. That is also the position that the defendant argued in *Doucette* (see by analogy *Welcome v. Canada*, 2024 FC 443 at paras. 21 and 23).

[96] Under that same exclusive-jurisdiction principle, a decision maker should dismiss an individual grievance filed by a complainant seeking damages at the levels of the grievance process, as the Supreme Court of Prince Edward Island did in *Doucette*. The essential character of the dispute, the staffing complaint, constitutes the necessary basis for determining that the damages request falls within the Board's jurisdiction (see *Regina Police Assn. Inc.*).

[97] In its arguments, the respondent ignored that the complete and exclusive code principle is well established and argued that the *PSEA* contains no provisions that are similar to s. 236 of the *FPSLRA*. Through s. 236, Parliament simply codified this principle by stating that an employee's right to seek redress by grieving their employment terms or conditions is in lieu of any right of action. The complete and exclusive code principle has been long recognized in the case law and applied to the Board's predecessors (see *Weber*, *Johnson-Paquette*, and *Public Service Alliance*).

[98] Similarly, although the complete and exclusive code principle is well established, Parliament still specified in s. 208(2) of the *FPSLRA* that an employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament.

[99] Accordingly, a grievance may not be filed with the Board under the *FPSLRA* for issues under the *PSEA*. Employees who wish to be heard by the Board must make a complaint under the *PSEA* (see *In re Cooper*, [1974] 2 FC 407; *Canada (Attorney General) v. Boutilier (C.A.)*, [2000] 3 FC 27; *Hureau v. Treasury Board (Department of the Environment)*, 2008 PSLRB 47; *Swan v. Canada Revenue Agency*, 2009 PSLRB 73; and *Pelletier v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 117).

[100] It must be concluded that the staffing complaint resolution regime constitutes a complete code. A damages claim arising from an internal staffing process may not be brought before a court of law. For the same reasons, a grievor who files a grievance and claims damages following an appointment process may not be heard by the

decision maker at the various levels of the grievance process or by the Board under the *FPSLRA*.

[101] **d) Does the Board have implied jurisdiction to order that damages be awarded under s. 81 of the *PSEA*?**

[102] The respondent and the PSC submit that the Board may not award damages in employment matters because s. 81 of the *PSEA* restricts it to ordering corrective action, whereas s. 228(2) of the *FPSLRA* has a broader scope. Sections 228 and 229 of the *FPSLRA* read as follows:

228 (1) *If a grievance is referred to adjudication, the adjudicator or the Board, as the case may be, must give both parties to the grievance an opportunity to be heard.*	***228 (1)*** *L'arbitre de grief ou la Commission, selon le cas, donne à chaque partie au grief l'occasion de se faire entendre.*
Decision on grievance	***Décision au sujet du grief***
(2) *After considering the grievance, the adjudicator or the Board, as the case may be, must render a decision, make the order that the adjudicator or the Board consider appropriate in the circumstances ….*	***(2)*** *Après étude du grief, l'arbitre de grief ou la Commission, selon le cas, tranche celui-ci par l'ordonnance qu'il juge indiquée* […]
…	[…]
229 *An adjudicator's or the Board's decision may not have the effect of requiring the amendment of a collective agreement or an arbitral award.*	***229*** *La décision de l'arbitre de grief ou de la Commission ne peut avoir pour effet d'exiger la modification d'une convention collective ou d'une décision arbitrale.*

[103] It is clear from reading it; s. 228(2) of the *FPSLRA* is neutral in scope and applies whether the grievance is allowed or denied. When a grievance is denied, the order will generally state that it is denied, but when it is allowed, what the Board may order is not specified.

[104] It is by virtue of its implied powers that the Board has jurisdiction to order an employer to pay damages following a grievance, if it considers that appropriate. This has been confirmed by the courts, which have recognized that awarding damages falls within the Board's implied jurisdiction, to the exclusion of the courts (see *Weber*;

Johnson-Paquette; *New Brunswick v. O'Leary*, [1995] 2 SCR 967; *Cleroux v. Canada (Attorney General)*, 2001 FCT 342; and *Royal Oak Mines Inc.*).

[105] Before the courts recognized an adjudicator's implied power to order damages following a grievance, the employer argued that no provision of the law at the time allowed it, including the equivalent of s. 228(2) of the *FPSLRA* (see *Bedirian v. Canada (Attorney General)*, 2004 FC 566 at paras. 22 to 25; and *Chénier v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 27).

[106] That is the argument that the respondent attempts to make by contending that s. 81 of the *PSEA* must be interpreted narrowly. However, in *Doucette*, the attorney general argued that the Court did not have jurisdiction to award damages to the complainant. He contended that the Board has broad remedial authority and that it may take any corrective action that it considers appropriate under s. 81(1) of the *PSEA*. He pointed out that it is difficult to imagine a more broadly worded remedial provision (see *Doucette*, at para. 50).

[107] Indeed, it is clear from reading s. 81 of the *PSEA* that the Board has broad powers to remedy the harm caused by the respondent's abuse of authority. That provision specifies that when a complaint is substantiated, the Board may order any corrective action that it considers appropriate. As the Court held in *Agnaou*, at paragraphs 54 and 55, the order for corrective action must be reasonable in terms of responding to the finding of a breach and providing a meaningful remedy (see also *Royal Oak Mines Inc.*, at para. 55; and *Plato v. Canada (Revenue Agency)*, 2013 FC 348).

[108] As the courts have confirmed, the essential-character test applies to determine whether awarding damages is within the Board's implied jurisdiction. The question is whether the essential character of the dispute falls expressly or implicitly within the scope of the *PSEA* (see *Weber* and *Regina Police Assn. Inc.*).

[109] The key question when determining whether the matter falls within the Board's implied jurisdiction is whether the essential character of the dispute, in its factual context, arises either expressly or inferentially from the *PSEA*. To answer this, the factual context must be taken into account while giving the *PSEA* a broad interpretation since conferring jurisdiction on the courts or another decision-making body could compromise the complete regime established by Parliament.

[110] In this case, the dispute is purely a staffing matter. The complainant was not treated fairly during an internal appointment process, and the Board found that the respondent had abused its authority. The complainant claims damages to remedy the harm that she suffered because the selection board abused its authority.

[111] This damages claim arises from the facts underlying the abuse-of-authority complaint under s. 77 of the *PSEA*. Because the claim stems from an abuse of authority that caused the complainant harm, there is no doubt that it is closely connected to the essential character of the dispute (see *Bedirian*, at paras. 17 to 20).

[112] For all those reasons, I consider that the term "corrective action" in its ordinary and legal sense, having regard to the interpretive principles set out above, includes awarding damages to a complainant. Furthermore, the Board has the implied power to award damages given the essential character of the dispute, which concerns the remediation of harm suffered in an internal appointment process.

[113] **Question 3: Does awarding damages for a lost opportunity equate to an appointment?**

[114] The respondent submits relying on prior decisions that awarding damages for a lost opportunity would be equivalent to making an appointment, which is prohibited under s. 82 of the *PSEA*. But that argument is not valid given that the common law recognizes that damages for a lost opportunity may be awarded without constituting an appointment.

[115] In a claim for lost opportunity, the claimant does not have need to demonstrate with certainty that they would have obtained the lost benefit, as such proof is impossible, by its nature. It suffices to establish the probability of that outcome. Rather than denying compensation altogether, courts and tribunals assess the value of the lost opportunity and award damages on a proportional basis, reflecting a real opportunity that was lost (see *Chaplin v. Hicks*, [1911] 2 KB 786 (Eng. CA), cited in *Webb & Knapp (Canada) Ltd. v. City of Edmonton*, [1970] SCR 588; *Northeast Marine Services Ltd. v. Atlantic Pilotage Authority* (FCA), [1995] 2 FC 132; *PricewaterhouseCoopers LLP*, 2023 CanLII 147003 (CA CITT); and *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.*, 1993 CanLII 3431 (ON CA), [1993] O.J. No. 676 (QL) at para. 42).

[116] The award of damages does not in any way imply that the claimant is to be treated as though they had been appointed to the position The claimant must first demonstrate the probability that they would have been appointed, and damages are then awarded in proportion to that probability (see *Grande Yellowhead Regional Division No. 35 v. Canadian Union of Public Employees, Local 1357 (Proulx)*, 2010 CarswellAlta 2891, [2010] A.G.A.A. No. 47 (QL), 103 C.L.A.S. 106, 197 L.A.C. (4th) 357; and *Syndicat des techniciens (nes) et professionnels (les) de la santé et de services sociaux de l'hôpital Maisonneuve-Rosemont (FSSS-CSC) v. Lamy*, 2017 QCCS 1099).

[117] In *Taticek* 2014, the abuse-of-authority complaint brought before the Tribunal had been settled in mediation, with the agreement stipulating that any vacant CS-03 position at the Canada Border Services Agency had to be staffed using an upcoming selection process. Later, three of those positions were staffed by deployment, and the complainant filed a grievance, claiming damages for the breach of the mediation agreement. The grievance was denied at the final level, the decision stating that the requested remedy could not be implemented. On judicial review, the Federal Court allowed the application, relying in particular on arbitration case law on lost opportunity and remitted the matter back to a different decision maker (see *Taticek* 2014, at paras. 66 and 67; *Taticek* 2015, at paras. 21 and 22; and *Backx v. Canadian Food Inspection Agency*, 2013 FC 139 at paras. 22 to 25).

[118] In *Ontario (Ministry of Community, Family and Children's Services)*, Vice-Chair Leighton noted that the difficulty of assessing damages with certainty does not relieve the defaulting employer of the obligation to pay damages. The complainant must first demonstrate a reasonable probability that they would have been appointed were it not for the employer's wrongdoing. She explained that the challenge for the decision maker is to establish a fair value for that lost opportunity, so as to restore the complainant, to the extent possible, to the situation that they would have been in had the wrongdoing not occurred.

[119] In *Grande Yellowhead Regional Division No. 35*, Alberta's arbitration board found that the complainant had been denied the opportunity to be considered for a position due to the employer's fault. It awarded her damages reflecting the probability that she would have been appointed. In making its decision, the arbitration board relied on the principles applicable to assessing damages for a lost opportunity, as

established by the Alberta Court of Appeal in *Calgary (City) v. Costello*, 1997 ABCA 281.

[120] In *Rogers v. Canada (Correctional Service) (T.D.)*, 2001 CanLII 22031 (FC), the Commissioner of Official Languages had found that the employer breached the complainant's rights. The complainant sought damages for the loss of opportunity for an appointment, based on *Chaplin*. The Federal Court awarded damages, holding that the existence of a serious possibility of obtaining the position constituted compensable harm, even in the absence of certainty as to the appointment, relying on *Canada (Attorney General) v. Morgan*, 1991 CanLII 13184 (FCA).

[121] The Board holds that in common law, awarding damages for a lost opportunity does not constitute an appointment or a recognition that a complainant would necessarily have been appointed. It is a corrective action that the Board may order under s. 81 of the *PSEA*, to remedy the loss of a real opportunity to be appointed in a process that complies with the *PSEA*.

[122] Since, by definition, it is impossible to establish with certainty what the outcome of the process would have been had there been no wrongdoing, damages are calculated proportionally to the probability of appointment.

[123] Furthermore, the Supreme Court of Canada has confirmed that employers have a duty of good faith and fair dealing toward their employees. If an employer acts in bad faith, and that conduct causes actual damage to the employee, damages for bad faith may be awarded. Punitive damages may also be awarded if the employer's conduct is particularly egregious (see *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362; *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701; *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26; and *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45).

[124] In *Ratcliff v. Yukon (Government of)*, 2018 CanLII 154347 (YT TLRB), Adjudicator Paul Love dealt with the employer's duty of good faith in staffing. He found that the employer had breached its duty to treat the grievor equally and fairly in the selection process and that it had acted in bad faith because it was biased against him. In his analysis, he referred to *Gignac* (see *Ratcliff*, at paras. 155 to 162).

[125] As in this case, the grievor requested damages, not revocation. Adjudicator Love awarded the grievor damages for the lost opportunity of a promotion resulting from

the employer's bad faith, since it failed to fulfil its duty to treat the grievor fairly, by exhibiting bias against him.

[126] Adjudicator Love emphasized that effective dispute adjudication involves more than simply making rights declarations. It involves rendering a decision that definitively resolves the issues at issue, along with providing a meaningful remedy for the parties (see *Ratcliff*, at para. 170).

[127] For those reasons, the Board finds that awarding damages for a lost opportunity does not constitute an appointment or a recognition that the complainant would necessarily have been appointed under ss. 81 and 82 of the *PSEA*. It is a corrective action to remedy the loss of a real opportunity for appointment in a process under the *PSEA*. Since by definition, it is impossible to establish with certainty that an appointment would have been made had there been no abuse of authority, damages are assessed proportionally to the probability of appointment had there been no wrongdoing. The complainant also remains subject to the obligation to mitigate damages, which are limited in time and restricted to losses reasonably attributable to the lost opportunity.

[128] Furthermore, when the respondent acts in bad faith in an appointment process, the Board considers that damages may be awarded for financial and moral harm. Similarly, in the most serious cases, punitive damages may be awarded when bad faith constitutes an independent wrong and the respondent's conduct is especially reprehensible.

[129] **Question 4: What damages are appropriate in the circumstances?**

[130] The complainant seeks $30 000 in damages, including $15 000 for pain and suffering that she explains as the difference in annual pay between the AS-04 position that she had when the events occurred and the PM-04 intelligence analyst, operational support, position ("the analyst position"). She also requests $15 000 in punitive damages for the harm to her physical and mental health, as well as her reputation. She cited *Lyons v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 95 at paras. 152 and 177, which refers to punitive damages awarded as a result of the respondent's reprehensible conduct.

[131] I find that the analysis of the $30 000 claim should be divided into the following three categories: a) compensatory damages for a lost opportunity, b) aggravated damages for pain and suffering, and c) punitive damages.

[132] **a) Compensatory damages for a lost opportunity**

[133] The respondent argues that there is no basis for ordering compensatory damages because the complainant did not provide evidence to support her claim for lost income. That is, she did not demonstrate that she would have been appointed had it not been for the deficiencies in the process.

[134] I do not accept that argument. The evidence shows not only that the complainant was qualified but also that there was a high probability that she would have been appointed had it not been for the selection board's abuse of authority, particularly when it assessed her references. For the reasons that follow, I conclude that at the hearing in *Harnois*, the complainant established the elements required to demonstrate the real and serious probability of her appointment, had it not been for the respondent's abuse of authority.

[135] In 2014, the complainant participated in an external process for an analyst position at Transport Canada. After completing all the steps, she was deemed qualified, and in August 2015, she received an offer, which she accepted, to start on September 15, 2015. That offer was withdrawn on August 27, 2015, solely because of a one-off budget constraint, not because her qualifications were questioned. The respondent confirmed that her name remained in the pool and that it would contact her as soon as the budget situation allowed.

[136] In my view, those circumstances initially establish a presumption that the complainant would have been appointed when the operational need to staff the position arose again.

[137] But instead of using the still-valid pool, the acting manager, Mr. Bertrand, launched a new internal process in 2016, which he restricted to the National Capital Region, and added two new qualifications, including "teamwork". The complainant reapplied, and Human Resources confirmed that she met the selection-area criterion because she was working in an acting position in Ottawa. In June 2016, she was even

informed that she would not have to take the exam, as she was already qualified from the 2015 process.

[138] However, in September 2016, she was notified that there had been an error and that two new qualifications had to be assessed through a written exam. In October 2016, the complainant wrote to the deputy minister to complain that Human Resources wanted to close the pool from the 2015 process and that two qualifications had been added, to block her from being appointed to the analyst position.

[139] Later, in October 2016, she passed the exam for the two additional qualifications, including teamwork. She was then asked to provide three references who were supervisors, but no one informed her that those references would be used to assess the "teamwork" qualification. Mr. Bertrand assessed the complainant's references, and on December 6, 2016, she was informed that she had not satisfied the "teamwork" qualification.

[140] In its decision, the Board found that Mr. Bertrand's explanation that the "teamwork" qualification had be added was not credible since the "effective interpersonal relationships" qualification already covered relationships with co-workers. That addition led to the complainant being reassessed unfavourably. He also assessed her references based on insufficient information and failed to recognize that the instructions to the candidates and referees had serious flaws. The Board found that the selection board did not want her and that it acted in bad faith by showing bias when it assessed her references.

[141] She demonstrated that she had been fully qualified for the analyst position since 2015 and that she remained qualified in 2016 while the pool was still in effect. However, the selection board abused its authority by adding an unnecessary criterion, manipulating assessments, deliberately interpreting her references unfavourably, and acting in bad faith by demonstrating bias against her, in order to prevent her appointment.

[142] As previously explained, in common law, it is not necessary to demonstrate with certainty that the appointment would have been made but rather that the complainant had a real and serious opportunity to be appointed, which did not materialize because of the abuse of authority (see *Ontario (Ministry of Community, Family and Children's Services)*; *Ratcliff*; and *Grande Yellowhead Regional Division No. 35*).

[143] On January 3, 2017, two appointments for the analyst position were posted. However, a few days later, on January 9, 2017, Mr. Bertrand had to announce on GCconnex that he was still looking for qualified individuals for a secondment or deployment to the analyst position. The 24/7 work schedule was stressful and made recruitment difficult. As Mr. Bertrand explained, when selected candidates learned about the shifts, many withdrew and did not sign the offer letter.

[144] Being deemed qualified at the end of an appointment process does not automatically mean that that person will be appointed. Qualified candidates are placed in a pool, and some may be appointed. That being said, the likelihood that the complainant would have been appointed was greater because Mr. Bertrand was still looking for candidates on GCconnex while, a few days earlier, two proposed appointments had been posted following the selection process in question.

[145] In those circumstances, I conclude that the complainant had not only a real and serious opportunity but also a very high probability — which I estimate at 75% — of being appointed to the analyst position had the selection board not abused its authority. That conclusion is based on the following facts: she had already been formally offered the job in 2015, and a start date was set; and the operational need to staff the position remained in 2016, and even after two appointees selected through the process were announced on January 3, 2017.

[146] For those reasons, I find that awarding compensatory damages for a lost opportunity is an appropriate corrective action. The question is the appropriate amount. The respondent argues that the amounts claimed have not been proven. However, it did not dispute that the work schedule was 24/7, the complainant would have had to work overtime had she been appointed, and she fulfilled her obligation to mitigate her losses promptly.

[147] When assessing a loss of anticipated income, the Board bases its analysis on reasonable assumptions, supported by evidence. The complainant also had an obligation to mitigate her damages. The Board's assessment takes into account "contingencies" and other weighting factors, whether favourable or unfavourable (see *Ratcliff*, at paras. 202 to 208).

[148] It is also well established that the difficulty determining the prejudice suffered does not exempt the respondent from paying damages for the losses that can be

proven. Even if the amount is difficult to estimate, the Board must simply do its best with the available evidence (see *Nova Scotia (Attorney General) v. B.M.G.*, 2007 NSCA 120 at para. 172, citing S.M. Waddams, *The Law of Damages*, 2nd ed. (Toronto: Canada Law Book Ltd., 1991) at para. 13.30; and *Public Service Alliance of Canada v. Canada (Department of National Defence)* (C.A.), 1996 CanLII 4067 (FCA), also citing S.M. Waddams, *The Law of Damages*, 2nd ed. (Toronto: Canada Law Book Inc., 1995) at 13-1 and 13-2).

[149] In her arguments, the complainant estimated that with the premiums and overtime stipulated in the collective agreement, she would have received an additional $10 000 per year in income as an analyst. She is claiming $15 000 for a period of approximately one-and-a-half years from June 16, 2016, to January 8, 2018, when she was appointed to the FB-04 group and level. The respondent argues that she has not adequately justified her financial claims.

[150] While I do not entirely agree with the respondent's position, I do believe that the claims need to be adjusted. First, the complaint does not concern the 2015 appointment process but rather the 2016 process, for which appointments were advertised on January 3, 2017. The complainant would then have moved to the second pay level. Therefore, the period may begin from that date.

[151] The complainant mitigated her damages by seeking other opportunities for promotion, and she was appointed to an FB-04 position on January 8, 2018, with higher pay. Therefore, compensatory damages may reasonably be considered for the approximately one-year period from January 2017 to January 2018.

[152] The complainant testified that there was no real difference in salary between her AS-04 position and the PM-04 position. However, the employment terms and conditions differ for the analyst position, in which the employee must work shifts and overtime in the event of an incident or crisis. Mr. Bertrand and the complainant confirmed that at the hearing.

[153] In her claim, the complainant explained that a $2-per-hour premium is paid under clauses 27.01 and 27.02 of the collective agreement for hours worked between 4 p.m. and 8 a.m. and for all hours worked on weekends.

[154] The complainant submitted a typical schedule provided during the 2015 process as well as the 2016 process notice containing the employment terms and conditions. Those documents show that analysts' activities are continuous, 24 hours a day, 7 days a week. Analysts must work shifts, and overtime during incidents or crisis. Under the collective agreement, an hourly premium is allocated for shifts, and overtime is paid (see the collective agreement between the Treasury Board and Public Service Alliance of Canada for the Program and Administrative Services (PA) group that expired on June 20, 2018).

[155] As for compensatory damages, I find it reasonable to consider the shift premium and overtime that the work environment requires as the difference in income for the analyst position.

[156] The complainant requests a total of $10 000 per year in compensatory damages, consisting of $3900 in shift premiums and the balance of $6100 in overtime. She calculates the premium at $2 for 37.50 hours per week and for 52 weeks per year (37.50 hours × 52 × $2 = $3900), for a total of $3900.

[157] But that must be corrected, as hours worked between 8 a.m. and 4 p.m. during the week are not eligible for a premium under clause 27.01 of the collective agreement. It states that the $2-per-hour premium is paid for all hours worked except for hours worked between 8 a.m. and 4 p.m. during the week. In addition, the premium is not paid on holidays since no hours are worked.

[158] Moreover, the analyst's job required overtime during a crisis, which was frequent in that work environment, as well as to fill in for a co-worker. A PM-04 appointment would have moved her up to the second pay level.

[159] In her damages breakdown, she estimated that she would have earned approximately $6500 in additional overtime income as an analyst.

[160] Her estimate that she would have worked overtime seems plausible in the context but is not supported by testimony or documentary evidence. That being said, the respondent did not dispute that a certain amount of overtime was required in the position. It did not produce any documents quantifying the hours normally worked.

[161] In those circumstances, I consider it reasonable to adopt an approach similar to the one that Board Member Jaworski took in *Scott v. Deputy Head (Correctional Service*

of Canada), 2022 FPSLREB 104 at para. 204, to compensate for the lost opportunity to work overtime.

[162] Therefore, overtime will be calculated for the complainant based on the average overtime per analyst for the period from January 2017 to January 2018. The calculation will be made by distinguishing between hours at time-and-a-half and double-time rates based on available data or, alternatively, on a reasonable estimate.

[163] The damages awarded for the lost opportunity to obtain the premium for working 24/7 and to be paid overtime are reduced to reflect the 75% probability that the complainant would have been appointed.

[164] The respondent will calculate the damages for the lost opportunity within 60 days and submit the calculation to the complainant. If, at the end of that period, the parties do not agree to the calculation, they may ask me for a new order on this issue.

[165] **b) Aggravated damages**

[166] There are many appointment processes in the public service, and it is normal for an unsuccessful candidate to feel disappointed. However, when it is shown that the respondent's reprehensible or unacceptable conduct not only caused financial harm but also added to the pain and suffering, aggravated damages are an appropriate remedy.

[167] Awarding aggravated damages must take into account the context and the actual impact of the damage. So, the pain and suffering resulting from wrongdoing does not necessarily have the same impact, depending on whether it involves a dismissal, suspension, or refusal of a promotion in a staffing process.

[168] The respondent argues that awarding aggravated damages is not justified because the complainant did not demonstrate that her failure to be appointed caused her harm beyond the usual stress and hurt feelings normally associated with such a decision. It notes that aggravated damages are awarded if the evidence establishes that it engaged in abusive conduct and demonstrates that that conduct added to the pain and suffering.

[169] However, the complainant argues that she was greatly affected by the respondent's wrongful conduct and that this went beyond the negative feelings

normally experienced by a candidate eliminated from a process. She felt strongly that the selection board did not want her and testified that her morale and health were affected as a result. Moreover, by not obtaining a position in the National Capital Region, where there are more opportunities, her advancement prospects diminished as a consequence.

[170] According to the respondent, she did not allege any loss of reputation beyond what would be expected from an unsuccessful staffing process.

[171] The complainant submits however that the respondent's conduct aggravated the harm she suffered, in particular by damaging her professional reputation. She testified that the negative assessment that the selection board gave in 2016 greatly tarnished her reputation during the 2018 staffing process for a regional inspector of transportation safety (TI-06) position in Dorval. After she was offered that indeterminate position, the offer was withdrawn.

[172] According to her testimony, the manager informed her that the job offer was withdrawn because she did not have "[translation] team spirit". That criticism precisely echoed the unfavourable assessment of the team work qualification in the flawed assessment of the 2016 process. She testified that the aviation world is small and that she had to give up her dream of working in that field. Only on August 28, 2023, did she begin working as a regional marine-transportation inspector at the same group and level (TI-06).

[173] The respondent did not comment on those allegations in its submissions and did not present any evidence about that episode. In the absence of contrary evidence, and given the complainant's testimony, I find that the manager informed her that the job offer had been withdrawn because she did not have "[translation] team spirit". That explanation echoes word for word the unfavourable assessment used to deem her unqualified in the process at issue. In those circumstances, it is appropriate to lend credibility to the uncontradicted testimony (see *Tibbs*, at para. 54, citing Gorsky, Uspich and Brandt, *Evidence and Procedure in Canadian Labour Arbitration* (Toronto: Thomson Carswell, 1994) at 9-15 and 9-16; and *Munden v. Commissioner of the Royal Canadian Mounted Police*, 2024 FPSLREB 141 at paras. 121 to 123).

[174] The complainant seeks $15 000 in aggravated damages for the impact to her health, morale, and reputation. She adds that her career progression was also affected.

Her goal was to work in the aviation field as a TI-07 at Transport Canada. She had to reorient her career to marine transportation, and only on August 28, 2023, was she was able to return to Transport Canada in a TI-06 position.

[175] When assessing the prejudice suffered, many factors must be taken into account, such as positive and negative contingencies. The inaccurate assessment of the teamwork qualification damaged her reputation and was a significant factor in the decision not to appoint her in 2018, as the evidence showed. However, the fact that she indicated that she preferred to start the position on secondment was perceived as a lack of enthusiasm for the position.

[176] The complainant demonstrated resilience and continued her search for a higher-level position. It is well recognized that intangible harm, such as the impact on a reputation resulting from the employer's unfair and inequitable treatment, negatively affected her search for another job. That injury is in itself sufficient to justify compensation (see *Wallace*, at para. 104; and *Kline*, at paras. 212 to 214).

[177] Since aggravated damages compensate for intangible harm, calculating them is not an exact science (see *Whiten*, at para. 116; and *Kline*, at paras. 244 to 247).

[178] Considering those factors, including the harm that the complainant suffered in terms of her morale, her health, the diminished opportunities for advancement, and the impact on her reputation, I find it reasonable to award $10 000 in aggravated damages.

[179] **c) Punitive damages**

[180] Punitive damages are an exceptional remedy, intended not to compensate a complainant but to deter, punish, and denounce conduct that has knowingly disregarded the rights of others. Their purpose is to mark public condemnation of extreme behaviour rather than remedy harm. The emphasis is on the seriousness of the respondent's conduct and its reprehensible character in the broad sense.

[181] Even in the absence of explicit malice, punitive damages are awarded if the conduct offends the standards of decency. The harm that a complainant suffers is relevant only as far as it helps assess the reprehensible nature of the respondent's conduct and enables the establishment of a reasonable amount of punitive damages

(see *Whiten*, at paras. 111 to 116 and 127; *Vorvis*; and *Norberg v. Wynrib*, [1992] 2 SCR 226).

[182] The respondent argues that punitive damages should not be awarded because the complainant did not establish an independent wrong, such as conduct that did not meet the expectation of good-faith operations. The behaviour must be reprehensible. It must offend the Board's sense of decency and represent a marked departure from the ordinary standards of decent behaviour.

[183] In *Harnois*, independent wrong was established, requiring punitive damages to be awarded because of its reprehensible character, which must be denounced. The selection board did not want the complainant, although she was qualified. It acted in bad faith by showing bias when it assessed her references. That was an abuse of authority of objective seriousness (see *Kline*, at para. 116).

[184] That unacceptable and malicious conduct goes against the very purpose of the *PSEA*. The deputy head and subdelegated managers have an obligation to act in good faith and to conduct appointment processes fairly and transparently. Bad faith is a prohibited practice specified by Parliament in s. 2(4) of the *PSEA* and constitutes an abuse of authority (see *Tibbs*, at paras. 56 and 57; *Kline*, at paras. 215 to 218; *Honda Canada Inc.*, at paras. 57 and 68; and *Whiten*, at para. 94).

[185] The PSC's appointment policy dated April 1, 2016, reiterates the deputy head's obligations, emphasizing that appointment processes must be conducted fairly, transparently, and in good faith. The deputy head also has an obligation to oversee appointment processes within its organization and to take appropriate corrective action.

[186] Under the *PSEA*, candidates have the right to be treated with respect by subdelegated managers and to have internal appointment processes conducted fairly, transparently, and in good faith.

[187] Reference assessment is at the core of a selection board's functions. As a sub-delegate of the staffing authority, the selection board must always exercise competence, prudence, diligence, honesty, and integrity when carrying out its duties. The trust placed in it as a sub-delegate of the appointment authority is necessary for the public service employment regime to function effectively.

[188] Public servants and the Canadian public must have confidence in the integrity of appointment processes and the individuals who conduct them. The selection board's conduct was particularly reprehensible. It ignored its obligations because it did not want the complainant, although she had demonstrated that she was qualified. It added a qualification that was unnecessary and acted in bad faith by ignoring the rating guide and assessing her references.

[189] Taking into account the other damages awarded, proportionality allows me to establish the appropriate total amount in this case. Therefore, I find that $6000 should be awarded in punitive damages.

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

(The Order appears on the next page)

Order

[191] The complainant's claim for damages, as a corrective action following her complaint, is allowed, as follows.

[192] The Board orders the respondent to pay the complainant the following:

- in compensatory damages, an amount representing 75% of the premium, based on the reasons in this decision;
- in compensatory damages, an amount representing 75% of her hourly overtime rate, based on the reasons in this decision;
- in aggravated damages, an amount of $10 000; and
- in punitive damages, an amount of $6000.

[193] The Board will remain seized of the matter for 120 days to resolve any issues that arise with respect to implementing this order.

February 27, 2026.

FPSLREB Translation

Guy Giguère,
a panel of the Federal Public Sector
Labour Relations and Employment Board