File: 366-YG-17

Yukon *Education*
Labour Relations Act

Before an adjudicator

BETWEEN

DAVID TREVOR RATCLIFF

Grievor

and

GOVERNMENT OF YUKON

Employer

Indexed as
Ratcliff v. Government of Yukon

In the matter of an individual grievance referred to adjudication

Before: Paul Love, adjudicator

For the Grievor: Peter Sandiford, counsel

For the Employer: Ian H. Fraser, counsel

Heard at Whitehorse, Yukon,
September 26 to 29, 2017.

I. Grievance referred to adjudication

[1] The grievor, David Trevor Ratcliff, represented by the Yukon Teachers' Association (YTA), is a vice-principal at Porter Creek Secondary School ("Porter Creek") in Whitehorse, Yukon. He alleges that he was treated unfairly in a selection process held for the recruitment of a temporary principal for the 2014-2015 school year for Porter Creek. He states that as a result of his treatment during the selection process, he suffered an acute stress reaction, and he was off work from August 20, 2014, until February 10, 2015. He seeks damages, including aggravated damages.

[2] The grievance was referred to adjudication under s. 65(7) of the *Education Labour Relations Act*, RSY 2002, c.62 (*ELRA*), as "... a grievance ... that does not arise either in whole or in part out of the administration or interpretation of a provision of a collective agreement or arbitral award ...". In accordance with s. 65(7)(a), it was determined on an expedited basis, which resulted in a final and binding decision that is not subject to judicial review, including under s. 95(1) of the *ELRA*.

[3] During its opening statements, the employer raised a jurisdictional objection. After hearing it, based on the submissions of counsel, the documents filed (Exhibit E-1, which is a joint book of documents, and Exhibit E-2, the relevant collective agreement), and the authorities presented, I reserved my decision and required the parties to call evidence on the balance of the case. I advised them that when writing the decision, I would first determine the issue of jurisdiction, and that, if necessary, I would then deal with the balance of the grievance. I note that further submissions were made about the impact of *Crabb v. Government of the Yukon*, File No. 367-YG-19 (April 24, 2013), *Gabb v. Government of the Yukon*, File No. 367-YG-9 (November 10, 1977), and *Gabb v. Government of the Yukon*, Decision of Grievance Resolution Person (January 9, 2002), which were cases referred to in the grievor's argument, after copies of the *Gabb* decisions were provided. I have included these submissions in the jurisdiction portion of this decision.

[4] The grievor and Dr. Xiu-Mei Zhang, his family doctor, testified on his behalf. Three out of the four persons involved in the selection process testified on behalf of the employer — Bruce Underhill, assistant chair of the Porter Creek School Council ("the council"), Kerri Ann Scholz, the chair of that council, and Superintendent Penny Prysnuk.

II. Jurisdictional objection

A. For the employer

[5] The employer argues that I have no jurisdiction to hear the claim as the power to select a principal is a statutory right of a school council under s. 113(1)(c) of the *Education Act* (SY 2002, c.61) with the minister having the power under s. 170(1) to appoint the selected person. Those provisions read as follows:

> ***School Councils***
>
> *113(1) A Council shall*
>
> ...
>
> *(c) participate in the selection procedures for persons to be interviewed for the position of principal and select for appointment a principal ....*
>
> ...
>
> ***Employment of Staff***
>
> *170(1) The Minister*
>
> *(a) shall appoint a principal for each school and may appoint a principal for more than one school ....*
>
> [Emphasis in the original]

[6] The employer argues that a council is an independent body corporate with elected representatives. In selecting a principal, it is not an agent of the Yukon government.

[7] The Yukon government is the grievor's employer. The grievance is against the employer, which is obliged to appoint the person selected by council.

[8] Under s. 65(7) of the *ELRA*, the adjudicator's jurisdiction extends only to reviewing acts of the employer, as follows:

> *65(7) When a grievance is referred to adjudication that does not arise either in whole or in part out of the administration or interpretation of a provision of a collective agreement or arbitral award, the adjudicator shall*
>
> *(a) determine the grievance on an expedited basis;*
>
> *(b) review the grievance in order to determine whether the*

> *employer has acted in accordance with an Act, regulation, bylaw, direction or other instrument of policy made or issued by the employer;*
>
> *(c) not require the amendment of any collective agreement or arbitral award or Act, regulation, bylaw, direction other [sic] instrument or policy made or issued by the employer;*
>
> *(d) render a decision thereon which shall not be referred to in any future decision, shall be final and binding and not subject to any judicial review including the review referred to in section 95 of this Act ...*
>
> [Underline emphasis added]

[9] The employer relies on the principle *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other). It argues that because the *Education Act* expresses that school boards are not agents of the Yukon government, except when exercising its function to select employees for appointment, councils are also not its agents for selecting principals. Section 170 of that Act reads in part as follows:

> *170(1) The Minister*
>
> *(a) shall appoint a principal for each school and may appoint a principal for more than one school;*
>
> *(b) may appoint teachers to administrative or supervisory positions, including vice-principals; and*
>
> *(c) shall employ teachers, teaching assistants and other technical support staff necessary for the proper functioning of the school.*
>
> *(2) Each School Board shall be empowered to select for appointment employees referred to in subsection (1) that are required by the School Board for any school operated by it and, in relation to those employees, to exercise powers referred to in this Part and when doing so acts as an agent of the Government of the Yukon.*
>
> ...
>
> [Underline emphasis added]

[10] The employer relies on *Fox v. Government of Newfoundland*, [1898] AC 667 (PC), (1898) UKPC 32; *Westeel-Rosco Ltd. v. Board of Governors of South Saskatchewan Hospital Centre*, [1977] 2 SCR 238; and *Canada (Dir. of Investigation) v. NFLD.*

Telephone, [1987] 2 SCR 466. In particular, in *Westeel-Rosco Ltd.*, at 249, the Supreme Court said that whether a particular body is a Crown agent depends on the nature and degree of control the Crown exercises over it.

[11] The minister or a delegate is required to appoint a person as principal who was selected by a council, and that action is covered by a comprehensive statutory immunity set out as follows in s. 194 of the *Education Act*:

> ***Immunity for elected persons***
>
> *194(1) A School Board or Council is not liable for anything done or omitted, without negligence, in the exercise of a power conferred in this Act.*
>
> *(2) No trustee of a School Board or member of a Council is liable and no other person acting on the lawful instructions of the School Board or Council is liable for anything that the trustee, member, or other person does or omits to do, lawfully and without negligence, in the exercise of a power conferred by this Act....*
>
> [Emphasis in the original]

[12] The employer further submits that neither the two *Gabb* cases nor *Crabb* deals with the jurisdictional issue about a council selecting a principal.

B. <u>For the grievor</u>

[13] The grievor states that this case is about the reasonable apprehension of bias or unfair treatment of him in the selection process. He argues that the principle of the fair treatment of teachers under s. 167 of the *Education Act* is incorporated into the terms of employment by virtue of s. 108 of the *ELRA*. Those two provisions read as follows:

> ***Rights of Teachers***
>
> *167 Every teacher has the right to be treated in a fair and reasonable manner free from physical and other abuse....*
>
> ...
>
> ***Terms and conditions of employment***
>
> *108(1) Despite any agreement to the contrary, the terms and conditions of a contract of employment of an employee shall be*

> *(a) the provisions of this Act and regulations, and the* Education Act *and regulations ....*
>
> [Emphasis in the original]

[14] Adjudicators have determined that they had jurisdiction to hear grievances under the *ELRA* involving the selection of employees; see *Crabb* and both *Gabb* cases. The YTA further submits that those cases stand for the proposition that an adjudicator has jurisdiction to consider the selection and hiring of a principal.

[15] Part of the relief sought is that the grievor be made whole. The time for selecting him for the appointment at issue is long past. The issue of whether there are limits to the remedies an adjudicator can grant does not mean that an adjudicator cannot hear and decide the grievance.

[16] The grievor argues that the clear intent of the *Education Act* is that a council is an agent of the Yukon government for all purposes. Had the legislature intended for councils not to be its agents, it would have specified so expressly. The use of the *expressio unius exclusio alterius* argument is grounded in presumptions about the policies or values that a legislature is likely to express in statutes; see *Sullivan and Driedger on the Construction of Statutes*, 4th Edition, at pages 186 to 189.

[17] The grievor argues that there is a difference between the powers granted to a council and those granted to a school board. A school board's powers are more extensive. A school board is a more independent organization, which is why the legislature specified clearly that it is an agent for labour relations purposes under s. 9 of the *Education Act*.

[18] The YTA states that the employer has made a nonsensical argument. There is no reason that a council, a body with less power, should be held not to be an agent, when a school board, an entity with more power, is an agent in selecting employees. The better interpretation is that a council, which is an entity less independent of government than a school board, is an agent of the government for all purposes.

[19] The Yukon government's *Principal Recruitment Process* policy (Exhibit E-1, Tab 9) clearly shows that it is responsible for the fairness of the hiring process as it is the employer of teachers and principals. The policy states in part at page 2 as follows:

> *... It is the responsibility of Yukon Education officials*

> *(Superintendent) to ensure that:*
>
> ...
>
> • *the selection process followed in reaching the final decision is fair and consistent with the hiring policies of the Government of the Yukon*
>
> *a) Role of the Superintendent:*
> *The Superintendent coordinates the hiring process ensuring that all appropriate procedures are followed since any principal hired becomes an employee of the Government of Yukon ....*
>
> [Emphasis in the original]

[20] In the alternative, if a council was not an agent of the Yukon government in a selection process, then nevertheless, the government must satisfy itself that the process was conducted fairly before it appoints someone, and it has the duty to refuse to appoint if it becomes aware of unfairness in the process.

C. The employer's reply

[21] The grievor's entire claim is based on the fact that he was not appointed, but the minister must appoint the person selected by council. While the Yukon government has an interest in the process, since an applicant may become an employee, it has no control over a council's actions, which has power independent of the government; see *Fox*.

[22] The *Crabb* decision was not a s. 65(7) case. The employer had conceded jurisdiction as the grievance had arisen partly under the collective agreement.

[23] There is no provision in the collective agreement dealing with appointments.

III. Determination of jurisdiction

[24] This grievance concerns the duty of fairness in the selection process at issue. Although the collective agreement, Education Act, and ELRA are silent with respect to the processes that the employer follows when selecting employees, s. 167 of the Education Act sets out a teacher's right to fair treatment as follows:

> ***Rights of Teachers***
>
> *167 Every teacher has the right to be treated in a fair and*

> *reasonable manner free from physical and other abuse....*
>
> [Emphasis in the original]

[25] In my view, the duty of fairness is a term and condition of employment (*Education Act*, s. 108). As pointed as follows out in *Crabb*:

> *... the jurisdiction to hear and determine grievances arising out of selection processes and decisions for advertised teaching positions falls comfortably within the plain meaning of the broad words "as a result of any occurrence or matter affecting terms and conditions of employment" under paragraph 63(1)(b) of the ELRA.*

[26] In *Crabb*, the adjudicator found that the standard of review included fairness and reasonableness but not correctness. In my view, fairness and reasonableness also includes an entitlement to a process free of a reasonable apprehension of bias.

[27] Under the *Education Act*, principals are also teachers, as a principal is a teacher who is appointed or designated as a principal.

[28] I note further that the duty of fairness in s. 167 appears in Part 9 of the *Education Act*, which deals with staffing schools.

[29] In my view, a council's staffing actions are the employer's actions. While there may be policy reasons to allow school boards autonomy in most of their operations, the *Education Act* reserves to the minister the appointment power and expressly excludes appointments from the autonomy given to school boards. There is no reason for the *Education Act* to express this similar restriction about the power of a council as the legislature granted a more limited set of powers to a council under that Act.

[30] Whether someone is an agent turns on the degree of control retained by the principal actor — in this case, the employer, which has significant control over the process. It decides whether a temporary position will be filled by direct appointment or after a competition. It provides policies about selecting staff. It supplied the wording for the posting at issue, it screened the applicants and selected those to be interviewed, it supplied draft interview questions, and it supplied its superintendent to supervise the process. And it provides policies about selecting principals.

[31] For all the above reasons, I find that I have jurisdiction to hear and decide the grievor's grievance.

[32] The collective agreement, *Education Act*, and *ELRA* are silent with respect to the processes that the employer follows when selecting employees. The employer also argues that there are remedial limits to an adjudicator's jurisdiction, and I will deal with them in the latter part of this decision when considering remedies.

IV. Summary of the evidence

[33] Mr. Ratcliff is the vice-principal at Porter Creek. He has been in the teaching profession for 35 years. He has been a teacher in the Yukon since 1998 and has been a head teacher, an acting principal, and a vice-principal. He has won awards for his teaching. He is well respected within the Yukon system and has no disciplinary record. He became the permanent vice-principal at Porter Creek effective August 31, 2010.

[34] The principal at Porter Creek had been in difficulty for some time and did not return following the 2014 spring break. Mr. Ratcliff summarized the problems as the former principal having a divisive style; he made unilateral decisions. He was unable to bring the school together as a team. Staff morale was low. Students were apparently also unhappy, and some transferred to other schools.

[35] The evidence before me indicates that the council was concerned about the principal's performance and that it had requested a review of the school operations. Ms. Prysnuk had commenced her review of the school but had not completed it before the principal went on leave. Her review ended at that point.

[36] On or about April 14, 2014, Ms. Prysnuk appointed Mr. Ratcliff as the acting principal for the balance of the school year, until June 23, 2014. Ms. Prysnuk notified the council of Mr. Ratfcliff's temporary appointment. Ms. Prysnuk and Assistant Deputy Minister Albert Trask met with the council on April 15 to advise it of the principal taking leave and of Mr. Ratcliff's acting appointment.

[37] At the meeting, the council objected to Mr. Ratcliff's acting appointment. Ms. Scholz followed up with objections by email dated April 17, 2014 (Exhibit E-1, Tab 2), and by letter dated April 19, 2014 (Exhibit E-1, Tab 3). The oral testimony of Ms. Scholz and Mr. Underhill confirmed that these documents contained the views of everyone on the council, who had an opportunity to review them and suggest comments.

[38] The email (Exhibit E-1, Tab 2) reads as follows:

...

> *... Upon further reflection and discussion, the Porter Creek School Council does not approve Trevor Ratcliff being appointed the Acting Principal in* [the principal's] *absence. We think the Council should have been consulted, as per the Education Act- Section 113(1)(C)- "A Council shall participate in the selection procedures for persons to be interviewed for the position of principal and select or appointment [sic] a principal". We strongly feel that another person, possibly a retired principal, could take over at this time and Trevor could provide input into the staffing issues and planning for the next year. We feel that this position could even be put out for competition as an acting position, as this happens quite often in the government.*
>
> *Because in March the School Council had asked for a review of the entire Administrative Team as per the Education Act- 113(2)(g)- "A Council may direct the superintendent to evaluate a teacher, principal or other staff member and provide a report to the council of the evaluation, which report shall be returned to the superintendent immediately after the council has reviewed and considered it", we strongly feel that putting someone that we are uncomfortable with in their Vice Principal position into the Principal's seat is not respectful of our position, or our role as defined in the Education Act.*
>
> *As a Council we are disappointed in the department's handling of this situation and the exclusion of the Council in this very important decision regarding a situation that we are already so concerned about.*
>
> *We ask that you re-evaluate your decision and take our concerns seriously. We need to do everything we can to ensure that Porter Creek Secondary School returns to being a positive school, so the students can prosper and feel proud of their school. Our priority is the students and what's best for them, not what the most convenient way is to handle the situation.*
>
> *A more detailed formal letter from the PCSS School Council will be coming next week.*
>
> ...
>
> [Emphasis added]

[39] The letter (Exhibit E-1, Tab 3) reads in part as follows:

...

Thank you for meeting with us on April 15 to update us on the progress of the principal's review that was initiated at our request in December, 2013.

...

In the 5 days since being informed of [the principal's absence], *our council has discussed what we felt were the best options for filling the administrator position for the remainder of the school year, and the timing and options for posting and going through the hiring process for a new, permanent administrator to be in place in August. We were anticipating that at our meeting you would be letting us know the options to be considered, including timing, and for you to consult with us on how to best get through this challenging scenario, including your preferred option. Instead you informed us that you have decided to promote Trevor Ratcliff from Vice Principal to Acting Principal for the remainder of this school year. You had apparently already made the decision, which we feel is ours to make according to the Education Act.*

The role of School Council is quite clear in the Education Act when it speaks to the hiring, review, or dismissal of a principal. [The letter refers to section 113(2)(c).] *This clearly makes the selection of a principal the duty of Council.*

We have recently discussed with you our concerns with the performance of both of the vice-principals at the school. Although it is difficult to determine whether or not these concerns are a result of the poor leadership demonstrated by the principal, we feel that having the department consider either of these individuals for the interim principal position is inconsiderate of this council's concerns, and to appoint one of them unilaterally, without even consulting council is contrary to existing legislation....

...

... We feel that the first option, which is the one proposed (or already taken) by the department is the least suitable in this case. It still leaves the school short staffed, and does nothing to resolve the lack of leadership issue.

...

... As a result, we are firm in our recommendations, as follows:

> 1. *We do not support having Trevor Ratcliff act as principal for the remainder of the school year. He has not shown that he is engaged with Council, or with the school generally. He has important VP duties, especially at this time of the year, which should be taking all of his time. The principal duties cannot be properly executed from the side of a desk, they need to be the primary focus of the person filling that role. Especially in a time of turmoil in a school in a leadership and image crisis, we need a principal that is respected and focused. Although he may be the logical choice because he knows the staff and issues at the school; he cannot be expected to fill both principal and vice principal duties at the same time and perform either of them effectively.*
>
> ...
>
> 3. *We would like to begin work with the department to have a permanent job posted for principal, in time to have a suitable replacement in place in August.*
>
> ...
>
> 5. *We would like you to take seriously our recommendation in March under Section 113 (2) (g) of the Education Act,* that the administrative team (Principal and vice principals) be reviewed as a whole and individually. *This recommendation alone should have suggested to you that we would not support having either of the VP's in an acting principal position. We recognize that the issues that we have with the VP's could be a result of their own issues with the principal. However, we also do not want to test that theory at this time, when morale and engagement by students and staff are in decline.*
>
> 6. *We always proceed based on our evaluation of "what is best for the students?" Sometimes we feel that the department is forced to consider the path of least resistance, the solution with the least legal risk, and a host of other variables that we are not subject to or aware of. We appreciate those challenges, but we hope that all of the partners in education, including the department, the YTA, the staff, and the students, can join us in keeping the needs of the students foremost in their minds.*
>
> ...
>
> [Emphasis added]

[40] The grievor met with Ms. Prysnuk and Peggy Dorosz, a labour relations advisor, on the last day of school in June 2014. They asked him if he would start the 2014-2015 school year as the principal. He advised them that that was not in the school's best

interests and that it needed stability and cohesiveness but that he was prepared to do it for a full year. Ms. Dorosz advised that the position did not have to be posted, and Ms. Prysnuk replied, "You don't know the school council." The grievor said that he felt uncomfortable with the conversation. Ms. Prysnuk did not recall its details, but I prefer his testimony, which was clear and cogent on this point.

[41] At that point, the grievor was not aware of the email and letter complaining about his appointment to the acting principal position. He left the meeting thinking that he could be appointed to a one-year acting position, without a competition, as had occurred in the past when he became an acting principal at Vanier Catholic Secondary School and at Porter Creek.

[42] Before his appointment as acting principal at Porter Creek, the grievor did not attend monthly council meetings. He advised that it was not a requirement of his vice-principal job. He attended two meetings following his appointment before the end of the school year. He stated that he had no reason to believe that his relationship with the council was problematic.

[43] There is a conflict between Ms. Prysnuk's evidence that many vice-principals attend council meetings, as they are public, and the grievor's testimony that it was not considered part of his job duties. The employer did not challenge his testimony about his reasons for not attending council meetings. It was never put to him in cross-examination that most other vice-principals attended council meetings. Therefore, I put no weight on Ms. Prysnuk's testimony on this point.

[44] On July 17, 2014, Ms. Prysnuk emailed the grievor (Exhibit E-1, Tab 6), notifying him that that the council wanted to hold a competition to select a temporary principal for the 2014-2015 school year. By that email, she encouraged him to apply for the temporary position (Exhibit E-1, Tab 4).

[45] On July 18, 2014, the grievor requested that Ms. Prysnuk evaluate his performance as Porter Creek's acting principal from April to June 2014 (Exhibit E-1, Tab 5). His email sets out as follows: "... I feel that it is important that I receive feedback (verbal and written) on my evaluation. The content, recommendations and critique could have a great deal of weight and influence regarding my future applications." He said that he did this because his "spidy [*sic*] senses" were up following the notification on July 17 that the term principal position at Porter Creek

would be posted. Ms. Prysnuk did not complete the evaluation, which involved interviewing staff and the council. She interviewed staff but did not interview the council. After hearing from Ms. Prysnuk, I am satisfied that she was unable to get to it because of personal issues during the summer; clearly, there was no ulterior motive.

[46] The employer held a competition for a temporary one-year principal position. It provided a draft posting and draft interview questions, which the council revised. The Yukon government posted the position on July 25, 2014. Mr. Ratcliff applied for it by letter dated July 28, 2014 (Exhibit E-1, Tab 8).

[47] The government screened the applications and selected three candidates, including the grievor, to interview. The interviews of the two external candidates were conducted via Skype on August 14, 2014, and the grievor was interviewed in person on August 15, 2014.

[48] On the whole of the evidence, it is clear that neither Ms. Prysnuk nor the selection committee prepared an answer key for the interview questions; yet, the committee purported to mark or grade each of the applicants on their interview performance. The grievor received a mark of 43.5, and the successful candidate received 45 out of 60 (Exhibit E-1, Tab 13). Mr. Underhill and Ms. Scholz described that difference as insignificant.

[49] All interviewers on the panel signed a conflict of interest statement (Exhibit E-1, Tab 30). For the council interviewers, the salient part of the "Conflict of Interest and Oath of Secrecy" statement reads as follows:

...

> *I PROMISE that I will faithfully and honestly fulfill [sic] the duties which devolve upon me in connection with this board and that I will not reveal to any person or persons, except those authorized, the deliberations of the board or the nature of this report. I also declare that I am not associated with any of the candidates through a business or personal relationship in a manner that WOULD INFLUENCE or APPEAR TO INFLUENCE the fairness of this selection process.*

...

[50] Mr. Ratcliff felt that his interview went well, despite his concerns about some of the interviewers. He said that Ms. Deacon, a council member, stared at him the whole

time, and he felt that she was trying to intimidate him. He felt that Ms. Scholz was hiding something, and she made no eye contact with him during the interview. He felt that Ms. Prysnuk and Mr. Underhill acted professionally.

[51] The interview panel selected a principal from a British Columbia school ("the successful candidate") for the acting position (Exhibit E-1, Tab 14). He has subsequently been appointed as the full-time principal, after succeeding in another selection process.

[52] Ms. Prysnuk notified Mr. Ratcliff that he was unsuccessful on August 19, 2014. He said that he told her it was not the correct decision and that he would be visiting his doctor. He felt angry, distraught, and dumbfounded. He particularly felt betrayed as Ms. Prysnuk had not evaluated him and had not responded to his request to be his reference. He did not feel that he was able to make good decisions, and he went home feeling shaky, with his mind racing. He stutters when he is upset, and he was stuttering at that point. He questioned his professionalism and abilities and was feeling pretty low.

[53] He was on leave from August 20, 2014. He saw his doctor on August 26 and periodically after that. His absences were supported by medical notes. He gave notice to the employer that he was ready to return to work on January 25, but he did not return until February 10, 2015. He returned to work, initially on a gradual basis, at Takeni Elementary School. In the fall of 2015, he returned to his vice-principal position at Porter Creek. In all, he missed 103 days of work, which depleted his sick leave bank.

[54] He filed his grievance on August 28, 2014 (Exhibit E-1, Tab 17).

[55] He felt worse as time went on as the employer did not respond in a timely way to his request for documents about the selection process. When he learned of the email (Exhibit E-1, Tab 2) and letter (Exhibit E-1, Tab 3) written by Ms. Scholz after his acting appointment, he felt angry and betrayed that Ms. Prysnuk had not disclosed those communications to him.

[56] Ms. Prysnuk took Ms. Scholz's email and letter as expressions of the council's unhappiness with her at appointing the grievor; it had wanted to make that decision, so it attacked everybody. At the hearing, Ms. Prysnuk stated that she did not disclose

the email and letter to the grievor as she wanted him to have a positive start and an opportunity to prove himself.

[57] The grievor sought medical attention because he was not feeling any better. He continued to see a counsellor every couple of weeks and then once per month. He took medication only occasionally as he was reluctant to take it. He acted in accordance with his doctor's advice.

[58] The doctor's clinical notes were filed (Exhibit E-1, Tab 33). The initial note of August 26, 2014, diagnosed Mr. Ratcliff as having an acute reaction to stress and stated that he required one month off work. In a follow-up medical appointment on September 25, 2014, Dr. Zhang recommended that the grievor be off work until October 31 (Exhibit E-1, Tab 34). In a clinical note on October 31, 2014 (Exhibit E-1, Tab 35), Dr. Zhang noted the problem as "308 - Acute reaction to stress." She recommended that he be off work until January 26, 2015, the end of the school term. In a clinical note on January 22, 2015 (Exhibit E-1, Tab 36), she recommended that he be off work until March 30, 2015, for an acute reaction to stress. On January 22, 2015 (Exhibit E-1, Tab 38), she wrote to Joan Stanton, the disability manager, as follows:

...

> *He suffers the symptoms most likely PTSD. He has palpitation, strong emotions and flush of the memories of what's had happened at work, insomnia and fatigue when thinking about his job situation at PC. Unable to tolerate stressful situation due to his anxiety and his elevated blood pressure when dealing with the ame organization. He feel resentful and under-valued by his work at the same working environment which depressed him. So he is best to avoid the triggers and work at a new Environment.*
>
> *I do think that Mr Ratcliff can go back to his vice-principal job due to he had showed better coping skills of conflicts through counselling and he will need more of counselling before back to work. Also recommended a gradual back to work schedule.*
>
> *My concerns of that if he goes back to PC, he will re-exposure to the situations which reminded him the conflicts and de-valuation which will trigger his strong emotions, anxiety and affect his self-esteem and logical communications.*

...

[*Sic* throughout]

[59] In a letter on January 29, 2015 (Exhibit E-1, Tab 39), Dr. Zhang recommended that the grievor start with a gradual return to work of four hours per day for the first week and increasing that if he was adjusting well.

[60] Dr. Zhang's direct testimony was presented by affidavit (Exhibit G-1), and she was cross-examined and re-examined at the hearing. In her affidavit, her opinion is that the grievor suffered an acute reaction to stress following the recruitment of the new principal (Exhibit G-1, at paragraph 25). As a result of further testing on October 31, 2014, she found that his symptoms had worsened and that they were consistent with a diagnosis of depression. It is clear that these matters are within her regular scope of practice as a family doctor. She treated him through a referral to counselling, with cognitive behavioural therapy (CBT) and avoiding stimuli — such as work — which could worsen his symptoms. Dr. Zhang's opinion was that the grievor was ready for a gradual return to work on or about January 25, 2015 (Exhibit G-1, at paragraph 30).

[61] In diagnosing and treating the grievor, Dr. Zhang used the clinical guidelines referred to in the *International Statistical Classification of Diseases and Related Health Problems*, 9th Revision, published by the World Health Organization ("ICD-9"). In cross-examination, she explained that while there is an ICD-10, it is not yet in use in the Yukon.

[62] Dr. Zhang refers patients to a psychiatrist only if they do not respond to treatment or there is "... a severe condition, such as un-controlled [*sic*] suicidal/homicidal ideations/actions, psychosis, co-morbidities, such as alcohol or drug abuse, where other health conditions could be a contraindication to common anti-depressant medications" (Exhibit G-1, at paragraph 11).

[63] While Dr. Zhang is an experienced physician, English is not her first language. At times, it appeared to me that she had some difficulty understanding nuances in the questions asked by cross-examining counsel. In my view, she did her best to communicate clearly, and her testimony was straightforward.

[64] She indicated that the grievor's baseline was as a calm, cheerful person who took good care himself. When he came to her in August, he was crying, and something

triggered an acute reaction. In response to questions indicating that he could not have the diagnosed condition because he had not been exposed to serious trauma of the kind required, Dr. Zhang stated that it would be a normal human reaction for someone to experience trauma if that person were taking his or her job seriously and someone in authority said something that that person did not think was right or valid.

[65] Before me as exhibits were the following clinical guidelines and definitions:

- Katzman et. al., *Canadian clinical practice guidelines for the management of anxiety, posttraumatic stress and obsessive-compulsive disorders, BMC Psychiatry* 2014, 14 (Supp 1):S1, printed from http://www.boiomedcentral.com/1471-244X/14/S1/S1 (Exhibit E-5);
- *ICD-10 Version:2016* (Exhibit E-6);
- "Acute reaction to stress 308", ICD-9 (Exhibit E-7); and
- "Trauma- and Stressor-Related Disorders", *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (Exhibit E-8) ("DSM-V").

[66] The diagnostic criteria for an acute reaction to stress (308, the ICD-9) are as follows (Exhibit E-7):

- *A class of traumatic stress disorders that is characterized by the significant dissociative states seen immediately after overwhelming trauma. By definition it cannot last longer than 1 month, if it persists, a diagnosis of post-traumatic stress disorder (stress disorders, post-traumatic) is more appropriate.*
- *An anxiety disorder precipitated by an experience of intense fear or horror while exposed to a traumatic (especially life-threatening) event. The disorder is characterized by dissociative symptoms; vivid recollections of the traumatic event; avoidance of stimuli associated with the traumatic event; and a constant state of hyperarousal for no more than one month.*
- *Disorder characterized by the development of anxiety and dissociative symptoms as a result of exposure to a traumatic event. Symptoms last at least two days and no longer than four weeks.*

[Emphasis added]

[67] Under the DSM-V, for both post-traumatic stress disorder (309.81; "PTSD") and acute stress disorder (308.3), the first diagnostic criteria is the following:

...

> *A. Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:*
>
> *1. Directly experiencing the traumatic event(s).*
>
> *2. Witnessing, in person, the event(s) as it occurred to others.*
>
> *3. Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental.*
>
> *4. Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse).*

...

[68] Dr. Zhang agreed that according to the ICD-9 guidelines, an acute reaction to stress should resolve within a month, and if the symptoms persist beyond that, a physician should consider a different diagnosis. She said that in reality and in her experience, symptoms can last longer than stated in the guidelines. She ordered and reviewed blood tests to see if anything else had triggered his condition. She said that in the grievor's case, the stressor happened at work, and it continued to exist. She stated that it is common to see patients with anxiety, depression, and PTSD features, and the clinical management and treatment of them is very similar.

[69] In cross-examination, Dr. Zhang was questioned about her diagnosis and the clinical guidelines that she used. She does not use the DSM-V as a family physician would not use it. She uses the ICD-9 in her clinical encounters. She stated that the guidelines are just guidelines and that they are not "hard science". She stated that her treatment of the grievor was informed by her clinical impressions of him. She confirmed that her diagnosis was of an acute reaction to stress. She noted that he had PTSD features, but not PTSD; however, the treatment would be the same.

[70] During cross-examination, she admitted that she was mistaken in her assessment that the grievor had PTSD as noted in her letter to Ms. Stanton dated January 22, 2015 (Exhibit E-1, Tab 38).

[71] Dr. Zhang was also cross-examined on the point of whether her diagnosis of an acute reaction to stress was founded, as the condition lasted longer than one month. She was also questioned about the exposure or the stressor, a reaction to a rejection in a selection process, in that it was not similar to the diagnostic criteria required for a traumatic incident.

[72] Nevertheless, she maintained her evidence that Mr. Ratcliff was disabled from work because of an acute reaction to stress and that he was in good health before the August 26, 2014, visit. She also maintained that her treatment of him was appropriate and in particular that "exposure therapy" was not a prudent treatment option for him. She was concerned that rather than gradual exposure, it would have been better for him to work on his strengths in counselling. She felt that putting him back to work too early would be problematic and that it would create more harm.

A. ATIP requests

[73] The grievor had great difficulty obtaining documents from the employer. When he filed his grievance, he made a detailed document request. Further, he made two access to information and privacy (ATIP) requests, on November 24, 2014 (Exhibit E-1, Tab 18), and on January 11, 2015 (Exhibit E-1, Tab 21). One included a request for a marking key, which was not produced until the second ATIP request was fulfilled. It is clear that the marking key included in an email of November 18, 2014 (Exhibit E-1, Tab 26), was not used in the selection process and that it was fabricated at a date well after the second ATIP request was fulfilled.

[74] The notes of the selection interviews for the grievor (Exhibit E-4) and the successful candidate (Exhibit E-5) taken by Mr. Underhill, a member of the selection panel, were not produced by the employer until the day of the hearing, although requests for them were made on three separate occasions. They were introduced at the hearing for the limited purpose of explaining the marking of the interviews of two candidates (Exhibit E-1, Tab 13).

[75] The grievor explained the pay entitlements of the collective agreement (Exhibit E-2). His pay is determined according to the "Teacher Pay Grid" (see Appendix "A", Schedule 1, pages 47 and 48; "the grid"). He is a "Category V" teacher, with 10 years of experience. For example, his annual salary according to the grid has been the following:

- $105 469 effective July 1, 2015;
- $107 051 effective July 1, 2016; and
- $109 192 effective July 1, 2017

[76] As a vice-principal, he is also entitled to both a basic allowance and a supervisory allowance (see page 49 of the collective agreement). The allowance is half that of the principal. Porter Creek is a Category 2 school as it has junior and senior high school programs. The basic allowance for principals is an annual payment that varies by year as follows:

- $6732 effective July 1, 2015;
- $6468 effective July 1, 2016; and
- $6597 effective July 1, 2017.

[77] The supervisory allowance is based on the number of employees and the school, and it varies by year. The allowance is paid based on up to a maximum of 42 regular staff members and is set out as follows:

	The first 2 to 6 professionals and paraprofessionals	The next 7 to 18 professionals and paraprofessionals	The next 19 to 42 professionals and paraprofessionals
Effective July 1, 2015	$580/year/employee	$536/year/employee	$439/year/employee
Effective July 1, 2016	$589/year/employee	$544/year/employee	$446/year/employee
Effective July 1, 2017	$601/year/employee	$555/year/employee	$455/year/employee

[78] He testified that the allowances come to about $25 000 per year for the principal and $12 500 for the vice-principal.

[79] The grievor stated that he took 103 days of sick leave as a result of the employer's actions. Clause 20.04 of the collective agreement provides for a buyout of sick leave by the employer at retirement of one-third of the amount of sick days, to a maximum of 300 hours (180 days). This may represent a financial loss to him in the future, which would be calculated when he retires.

[80] The grievor has received positive evaluations in the past, including one when he was the acting principal at Vanier Catholic Secondary School. He was hoping to be able to apply for the principal position at Porter Creek if it became available. He felt that he had a lot to offer as he had 27 years of experience in the Yukon and was a role model to other principals and administrators. He was certain he could do a good job as Porter Creek's principal.

[81] He did not apply for the permanent position at Porter Creek when it was posted in May or June of 2015. He said that by then, he knew that the council was biased against him. He did not feel that there was any possibility that he would secure the position given the fact that Ms. Prysnuk had not evaluated his performance as principal and was not supporting him. His outstanding grievance had not yet been settled. He believed that all the major players in the council were still on the council. He believes that he would have been a strong candidate had he had an unbiased council, a fair evaluation, and a reference from his superintendent.

[82] The grievor stated that attending council meetings was not in his vice-principal job description but that he would have attended had the principal asked him to. He testified that no one asked him to attend. He attended when he was a principal. He does not attend now as he thinks that the council has animosity towards him and as it is not a requirement of his position.

[83] In cross-examination, the grievor conceded that the fairness of the selection process cannot necessarily be judged by his success or lack of it in the process. He confirmed that he had objected to the posting of the position as other term positions had been filled without postings in the past, but he conceded that the position could be posted. He did not feel that the description of the position in the posting was unfair. He agreed that it would be fair to consider the attributes of the job description when selecting the candidate. He did not feel it was unfair for him to have to compete for the job, and the council had the right to take an active role in

determining who the principal would be.

[84] His position is that it was unfair because of the bias of the participants involved, as they were biased from the outset of the process and acted in a way to ensure that he did not get the job.

[85] He did not raise any concerns about the fairness or adequacy of the selection process immediately following his interview. However, he felt that he was the best candidate for the position because of his experience, skill set, knowledge of the school, and abilities, which is why he expressed to Ms. Prysnuk that a mistake had been made when he learned he had not been successful in the competition.

B. Mr. Underhill

[86] Mr. Underhill testified that he agreed with Ms. Scholz's email (Exhibit E-1, Tab 2) and letter (Exhibit E-1, Tab 3). He stated that the council was frustrated and disappointed with Mr. Ratcliff's appointment, and it wanted more involvement in selecting a new principal. It is clear from Mr. Underhill's testimony that the council was looking for a new principal, and his view was that taking someone from a position in the school did not help.

[87] At the hearing, Mr. Underhill produced his interview notes of the two candidates, which had not been previously disclosed in the ATIP responses. He characterized the scoring of the candidates and a 1.5-point difference as a wash. He indicated that both candidates answered the questions fully and that either of them could have been chosen. He stated that he noticed a "difference in energy" between them. He said that the decision boiled down to a "gut feeling" as to who was the best choice. He said that he was leaning slightly toward Mr. Ratcliff as he was a known person, but the successful candidate gave a very strong interview. Mr. Underhill considered the selection process open and straightforward.

[88] In cross-examination, Mr. Underhill was questioned about the email and the letter. He said that Mr. Ratcliff was perceived to be "part of the problem" with the administration of Porter Creek. The council's view was that something different was needed, and there was a need to reach out and find a person from outside the existing administration.

C. Ms. Scholz

[89] Ms. Scholz testified that she and the council were frustrated with the Yukon government appointing the grievor. They felt that he was part of the "broken" administrative team. At the time of his appointment, she stated that they had not received a copy of the review of the principal. The council considered that the grievor was disrespectful because he did not attend its meetings, although it is clear that it never directly communicated with him or invited him to the meetings and that it did not know whether invitations given through the principal were passed on to the grievor. Ms. Scholz said that the council was given the option of either having Mr. Ratcliff appointed for a year or having the temporary position posted for a competition. The council wanted the position posted as it wanted to see who else was out there.

[90] In her comments on the selection process, Ms. Scholz stated that the grievor had done a good job in the acting position and that his failure to attend council meetings as the vice-principal was not considered when selecting the principal. She confirmed that the council really wanted someone new.

[91] In her direct examination, Ms. Scholz was questioned about her impressions of the successful candidate after his interview. She stated that she felt that he did really well, better than the other person who had been interviewed. She said that it was "encouraging to us that we might have a good candidate."

[92] In cross-examination, Ms. Scholz confirmed that her email and letter reflected the council's views and that they could be read at face value. She confirmed that the council did not want the grievor placed in the acting position. She felt that putting him there might not fix what the council felt was broken about the administrative team. She confirmed that initially, the council had requested that the superintendent review the principal, but it had broadened the request to cover the whole administrative team.

D. Ms. Prysnuk

[93] Ms. Prysnuk has worked in the teaching profession in the Yukon since 1987. She became a superintendent after nine years, and she was in her fourth year as superintendent in the 2013-2014 school year.

[94] Ms. Prysnuk testified that there was only one school review process. It was not completed because the former principal went on leave. She appointed the grievor to the acting principal position as it was clear that the principal would not return before the end of the school year. She had the authority to make a short-term appointment without consulting the council.

[95] She confirmed that the council had wanted a change of principal for three years. Ms. Prysnuk recalls that she and Ms. Dorosz discussed whether the grievor would be willing to start the school year as the principal, but she does not recall making him an offer. In cross-examination, she confirmed that in March 2014, the council broadened its request to a review of the entire administrative team from its initial request to review only the principal. She confirmed that it meant that the council wanted the team evaluated and possibly replaced.

[96] She testified that she did not complete the grievor's assessment or respond to his request for a reference as she was coping with a family tragedy, and she needed a break from work. As part of the review, she interviewed staff. In cross-examination, she agreed that the survey showed positive comments and that from a staff view, the grievor was doing a very good job as principal. From her observations, it appeared his efforts to bring the staff together had created a happier work environment, and the school's morale had improved.

[97] She confirmed that the council was looking for a leadership change. While the grievor did a good job on his interview, the successful candidate was outstanding, landing in the top 10% of people she had interviewed for about a dozen principal selection processes in the past. She said that the council discussed whether to select the grievor and stay with the status quo. It opted for the leadership change it thought the successful candidate represented.

V. Summary of the arguments

A. For the grievor

[98] The YTA argues that although seldom is there direct evidence of bad faith, it can be inferred from circumstantial evidence and can involve acts of serious recklessness or carelessness; see *Beyak v. Deputy Minister of National Resources Canada*, 2009 PSST 7 at para. 129.

[99] The YTA reviewed portions of Ms. Scholz's email and letter and submitted that they can be read at face value. The council had clearly formed the view that the grievor was part of the problem with the Porter Creek administration and that the way to solve it was to bring in a new principal.

[100] At no time did Ms. Prysnuk do anything to reconcile the grievor's successful performance as principal with the council's unfounded and prejudiced concerns. She did not disclose to him those concerns, as expressed in the email and letter.

[101] The employer breached s. 167 of the *Education Act*, and the grievor was not treated in a fair and reasonable manner during the selection process. The council expressed strong views about him, which continued to the end of the selection process. The fact that the council conceded that he did a good job in his interview is not sufficient to outweigh the stronger views expressed earlier.

[102] The whole process was flawed as the council had decided it wished to clean house by removing the entire administrative team. The council demanded the competition process, and it was designed to find an alternative to the grievor. Carrying out a process for an improper purpose is bad faith; see *Roncarelli v. Duplessis*, [1959] SCR 121; *Matthews v. Canada (Attorney General)*, [1999] F.C.J. No. 830 (C.A.)(QL), affirming [1996] F.C.J. No. 1077 (T.D.)(QL); and *Beyak*.

[103] A statement indicating an adverse disposition towards a grievor is sufficient evidence to find bias. A direct statement such as the following: "The only way I would give you this job is if I am ordered to", is bias; see *Ryan v. Deputy Minister of National Defence*, 2014 PSST 9. Evidence of bias is rare. An adverse disposition towards the grievor can be inferred from the circumstances.

[104] The council took no steps to inform itself of the grievor's suitability as a candidate. The Yukon government's representative, Ms. Prysnuk, took no steps to address the concerns and failed to disclose them to the grievor. It is implausible to suggest that the 2.5 months in which he worked as the principal had any real impact on mitigating the bias expressed by the council in the email and letter before the selection process started.

[105] The selection process included council members who had filed a grievance about the grievor's appointment to the acting position. An informed person would

think it more likely than not that those members, consciously or unconsciously, would not have treated the grievor fairly in the selection process; see *Denny v. Deputy Minister of National Defence*, 2009 PSST 29 at para. 133.

[106] The YTA relies on the reasonably informed bystander test set out in *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10.

[107] The grievor sought medical leave as a result of the process. While the exact diagnosis may be in dispute, there is no doubt that he suffered from symptoms of anxiety, insomnia, depression, and palpitations. Dr. Zhang's diagnosis of him was reasonable.

[108] The grievor returned to work on February 10, 2015, at Takeni Elementary School. He has since returned to Porter Creek.

[109] The YTA states that the way the grievor was treated was reckless, underhanded, and egregious. He suffered damages as a result of the unfair process. But for the unfair treatment, he likely would have had a reasonable chance of being chosen for the job. The YTA seeks compensation for the loss of sick days and for the loss of the chance to be the principal at Porter Creek and aggravated damages.

[110] The YTA argues that it has proven that the employer's actions were an effective cause of the grievor's loss. It further submits that it is necessary to prove only that there is a reasonable chance of loss or damage occurring, not that it will occur; see *Schrump v. Koot*, [1977] O.J. No. 2502 (C.A.)(QL); and *National Bank of Canada v. R.C.I.U.*, 3 Can. L.R.B.R. 1 at para. 90. The YTA states that based on the grievor's career, in which he has acted as a principal, it is likely that he could have become a principal.

[111] The YTA suggests that damages should be assessed at 50% of the value of the principal's allowance to when the grievor reaches age 65, or for 8 years. One of the issues is that the values of the allowances are unknown after the current collective agreement expires. Rates after 2018 should be locked in at the 2018 rate, on the assumption that it will likely increase by an amount that is impossible to predict. The YTA states that I should reserve jurisdiction over the calculation of damages, which would give the employer's Human Resources department an opportunity to precisely calculate the amount.

[112] The YTA further submits that the grievor is entitled to aggravated damages. It relies on *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 55. The grievor suffered unfair, bad faith, untruthful, misleading, and unduly insensitive conduct; see *Matthews*. The purpose of s. 167 of the *Education Act* is to ensure fair treatment. It is reasonably foreseeable that a lack of fair and reasonable treatment will result in harm and mental distress; see *Keays*, at para. 60.

[113] The grievor submits that $15 000 would be an appropriate award for aggravated damages based on a review of the following cases, with the following awards, considering that they are old:

- *Pilon v. Peugeot Canada Ltd.* (1980), 114 D.L.R. (3d) 378 - $7500 for an acute anxiety state, chest pain, sweating, and inability to sleep following a wrongful dismissal; and

- *Brown v. Waterloo (City) Regional Commissioners of Police* (1982), 136 D.L.R. (3d) 49 - $10 000 for frustration, humiliation, anxiety, stress, and betrayal following a wrongful dismissal.

[114] The YTA submits that the adjudicator has broad authority to award a range of remedies, including damages; see O.C.A.W v. *Polymer Corp. Ltd.*, 1959 CarswellOnt 271 at paras. 3 and 9; and *Imbleau v. Laskin*, [1962] SCR 338. The YTA relies on *Tipple v. Canada (Attorney General)*, 2012 FCA 158, which refers to *Canada (Attorney General) v. Mowat*, 2011 SCC 53. The language in s. 65 of the *ELRA* is not unlike the language in *Polymer* and *Imbleau*. In those cases, the arbitration board and the Court rejected arguments that the power given to labour arbitrators was limited to declaratory relief, and the powers included awarding damages.

[115] Article 10 of the collective agreement outlines the grievance process, but the details are dealt with in s. 63 to 76 of the *ELRA*. That Act provides a skeletal approach, which it is up to an adjudicator to flesh out in keeping with a fair, large, and liberal interpretation of the legislation, as required by s. 10 of the *Interpretation Act*, RSY 2002, c. 125.

[116] The YTA states that in a case such as this, it would be an absurd waste of money if relief under s. 65(7) were limited to a declaration. A declaration is useful only as a guide to the future, and s. 65(7)(d) provides that the decision shall not be referred

to in any future decision. The YTA states that the adjudicator should avoid a decision which is a "real deprivation of the ultimate remedy"; see *Weber v. Ontario Hydro*, [1995] 2 SCR 929 at para. 62.

B. <u>For the employer</u>

[117] The employer submits that there is no jurisdiction to award damages under the *ELRA*. The adjudicator must carefully consider the statutory scheme, as recourse can be limited in the public sector. Many grievances simply do not reach adjudication.

[118] The *Weber* case dealt with s. 45 of the Ontario *Labour Relations Act*, 1995 (R.S.O. 1990, c. L.2), which provided for a broad referral to arbitration of all differences that arose. Likewise, in *Polymer*, the arbitrators found that use of the language "final settlement without stoppage or work, by arbitration or otherwise, of all differences between the parties" would have included a claim for damages in the commercial arbitration context and that there was no reason to exclude claims of damages for a labour arbitration conducted under the Ontario *Labour Relations Act*. The statutory context of teacher labour relations in the Yukon is very different. The *ELRA* does not provide for arbitration or adjudication as a global procedure to decide "all differences arising".

[119] The YTA's argument confuses the determination of legal rights and access to a remedy to vindicate those rights. The adjudicator declares rights under s. 65(7) of the *ELRA*, and then a decision is enforced in the Yukon Supreme Court under s. 15.12. The *ELRA* provides for a scheme similar to a trial split between liability and damages; an adjudicator can determine liability, and it is for the Court to award damages.

[120] The remedies available are those limited by statute; see *Canadian Union of Public Employees v. Labour Relations Board (N.S.)*, [1983] 2 SCR 311 (*CUPE*). An adjudicator cannot exceed the limits of the powers granted; see *Wolfe Lake First Nation v. Young*, [1997] F.C.J. No. 514 (T.D.)(QL); *Gignac*; and *Murdoch v. Canada (Royal Canadian Mounted Police)*, 2005 FC 420. *Murdoch* noted that the privacy commissioner's power was set out in s. 35 of the *Privacy Act* (R.S.C. 1985, c. P-21), was limited to reporting on findings and recommendations, and did not extend a right to award damages for a breach of privacy.

[121] Unless there is an explicit power in the statute to award damages, which there is not in this case, an adjudicator cannot award damages. His or her power is to determine the grievance, consider whether the employer has complied with the collective agreement, law, and policies, and render a final and binding decision, which is not a precedent. An adjudicator's statutory authority under s. 65(7) is limited to declarations.

[122] The employer contrasted this with the adjudicator's broad remedial powers in s. 72 disciplinary cases, which could conceivably include a claim for damages for mental distress. This is to be contrasted with a different statutory regime for staffing issues. This is not a case for inferring powers.

[123] The employer reviewed the facts. The council was clearly angry with the government appointing the grievor to the acting principal position. However, the email and letter are remarkably even-handed and fair to all concerned when read as a whole. The council focused on the employer's need to respect and consult it before appointing a principal. It did not know much about the grievor as he did not attend its meetings, and it was unable to determine whether he was part of the problem with the school administration. It expressed opinions as it was entitled to as a council of elected members.

[124] There is a large difference between stating that the council did not want him acting and that it did not want him as the principal. In fact, at the end of the selection process, having had contact with him as the acting principal, it was perfectly happy with him as the principal. Nothing in the correspondence indicates that the council wished to clean house and replace the grievor; it is simply a case of it not knowing enough about him.

[125] The only real difference is, the grievor wished to be appointed to the job without a competition, and the council wanted a process to determine if it could find someone better than the grievor.

[126] While the grievor is convinced that "dark forces are gathered against" him, the test focuses on what a reasonable and fair-minded person who is fully informed would consider in all the circumstances. The grievor concedes that the posting was fair. He had no problems with the questions. There is no external evidence that the process was biased or unfair. The creation of an answer key after the fact was dumb, but it was

not used. The council knew what it was looking for; the criteria that were applied and used were from the posting.

[127] There was not much difference between the two candidates on the substance of what they said, but there was a huge difference in energy and personality. While the council was looking for a change agent, it is not fair to say that it had determined that only an external candidate could supply change. It was open to the Yukon government to directly appoint someone else to the position. The council chose a process, which gave the grievor a chance; but he was unsuccessful.

[128] The question of a reasonable apprehension of bias requires a critical analysis when dealing with administrative decision makers who perform multiple duties. If there is an overlapping of functions, a reasonable apprehension of bias cannot arise from performing a duty authorized by statute; see *Control & Metering Ltd. v. Karpowicz* (1994), 17 O.R. (3d) 431; *Law Society of Upper Canada v. French*, [1975] 2 SCR 767; and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41.

[129] One has to consider the context and the nature of the proceedings. The council has a number of mandatory duties under s. 113(1) of the *Education Act*, including proposing courses of study; approving instructional materials; establishing policies; directing a superintendent to evaluate a principal, teacher, or staff; recommending a dismissal or transfer and discipline and promotion; and approving field trips and extra-curricular activities. Further, under s. 39, the council exercises a rule-making function, and under s. 41, it acts as an appeal court for student discipline.

[130] The council was performing an authorized statutory function when it wrote the email and letters, which therefore could not have created a reasonable apprehension of bias when it engaged in the principal selection process. One has to limit the analysis to considering the actions in which it engaged during the selection process. Nothing in this case attracts a finding of a reasonable apprehension of bias.

[131] The employer particularly relies upon *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, as follows:

...

Further, a member of a board which performs a policy

> *formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the Board.*
>
> ...

[132] The employer states that there is an "open mind test" as set out in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 SCR 1170, as cited in *Newfoundland Telephones* at page 638 as follows: "The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile."

[133] While the council made up its mind about the former principal, it had not made up its mind about the grievor. As a matter of law, what council said and did in another role cannot be considered as bias in the selection process as it was discharging a role under the *Education Act*. One has to consider the impugned behavior in the "silo" and not behavior outside it.

[134] The employer addressed the issue of damages as an alternative argument. It said that there is no issue about the salary and allowances but that the adjudicator should carefully consider the chances the grievor had of landing the job and assign a probability to that.

[135] The more substantial issue is the causal link between the employer's actions and the grievor's absence from work. There is no doubt that he was off work and that he was not selected, but they are not proof of causality. Dr. Zhang's testimony did not establish a causal link. At the heart is the question of diagnosis. Dr. Zhang diagnosed that he had an acute stress reaction; if that diagnosis was wrong, then there is no proof of why he was off work.

[136] While Dr. Zhang was a caring and dedicated physician, by definition in the ICD-9, the diagnosed condition cannot last longer than a month. No other diagnosis was offered, and there is no evidence of a causal link. This category is about threats of murder and rape or of surviving an earthquake and the fear and horror arising from such an incident. The fact that the grievor was not selected for the job could not be a stressor for the diagnosed condition or for PTSD. He was not screened for depression until October of 2014, and there is no evidence about how or when this condition started. He was working in a very toxic work environment, and it is possible that he was stressed for a long time. The usual treatment of psychiatric first aid, emotional stabilization, and a treatment plan with exposure therapy and adequate support was not done.

[137] The employer submits that if damages are awarded, they should be limited to one month, which is the accepted length of the usual treatment period for an acute reaction to stress.

C. <u>The grievor's reply</u>

[138] The finding of a reasonable apprehension of bias does not turn on proof of malice. The predisposition against the grievor, no matter whether it was honestly held, may be a source of bias. Bias can be conscious or unconscious, and it is no answer that the selection procedure the employer followed afforded some chance of success to the grievor. The comments that were made were in the course of the contemplated recruitment and selection of the principal, and this was precisely what came to a head during the selection process. These comments were not made in the exercise of another statutory function.

[139] The YTA states that considering the statutory scheme as a whole, it is proper to infer a power to award damages.

[140] In reply to the employer's argument, counsel for the grievor argued that Dr. Zhang clearly stated that treatment guidelines are not binding. Her approach to treatment was reasonable. Clearly, the grievor had symptoms of a medical disorder, and the type of disorder is of no relevance. Dr. Zhang confirmed that the treatment and approach would have been the same regardless of whether this was PTSD or a condition with the features of PTSD.

[141] The thin-skulled principle of taking the victim as he or she is found applies, and on a balance of probabilities, there was a link between the employer's actions and the grievor's condition. His baseline and the timing of the onset of symptoms support a finding of causation.

VI. Reasons

[142] The adjudicative task is not to determine whether the employer made the correct appointment to the principal position. My task is to assess whether the grievor was fairly treated, and if not, to make a final and binding decision.

[143] As set out in *Crabb*, at para. 37, and pursuant to s. 108(1) of the *ELRA*, the full scope of the terms and conditions of a teacher's contract of employment with the employer are composed of a combination of the contractual provisions of the collective agreement (Exhibit E-2) and the provisions of the *ELRA* and the *Education Act* and their regulations. The duty to act fairly, set out in s. 167 of the *Education Act*, is a condition of the contract of employment by application of s. 108(1).

> *108(1) Despite any agreement to the contrary, the terms and conditions of a contract of employment of an employee shall be*
>
> *(a) the provisions of this Act and regulations, and the* Education Act *and regulations;*
>
> *(b) the terms and conditions, not inconsistent with any Act and regulations, of the collective agreement negotiated under this Act; and*
>
> *(c) the terms and conditions not inconsistent with paragraphs (a) and (b) agreed to between the employees employed in an attendance area and the superintendent.*
>
> *(2) Any agreement excluding or purporting to exclude the provisions of this section is void.*

[144] Apart from any right to be treated fairly, it is trite law that a person exercising a statutory power of decision must do so in an unbiased manner. The duty of fairness requires that decision makers be impartial and that they be perceived as such; see *Gignac*, at para. 64. In my view, that applies to persons selecting a principal for appointment and to the minister, who is empowered to appoint a principal.

[145] Principal positions are rare within the Yukon education system. They represent a unique career opportunity, with substantial collective agreement pay entitlements. This is reflected as follows at page 3 of the *Principal Recruitment Process* policy:

> *d) Provide opportunities for change and promotion within the system:*
>
> *Teaching as a profession is a very "horizontal organization" relative to most other jobs whether in public or private sector. Most jobs are teaching positions. For teachers and administrators in the Yukon who are looking for leadership positions, the opportunities are limited. There are about 40 administrative positions (principals and vice-principals) out of a teaching force of 500 (and 160 paraprofessionals)... .*
>
> [Emphasis in the original]

[146] The issue before the selection committee was important, and it had serious implications for the grievor's career.

[147] The question is whether a reasonably informed bystander assessing all the evidence could reasonably perceive bias on the part of the council or the employer's representative.

[148] In my view, I should not limit the analysis to what occurred during the selection process. That is not a consideration of all the circumstances. It is clear that the comments made in the email and the letter relate to selecting a principal for the school. They are not in the nature of unrelated policy comments in the exercise of another statutory function.

[149] The council members signed a "Conflict of Interest and Oath of Secrecy" form at the outset of the interviews. I do not consider this determinative of whether a reasonable apprehension of bias existed. The test does not turn on whether the selection committee members perceived a problem but rather on what a reasonably informed bystander would perceive. Further, I note that the declaration in the form does not reflect all matters that could give rise to a reasonable apprehension of bias.

[150] I find that the council did not want the grievor as the temporary principal, as expressed in the email and letter. I find that it was also seeking a principal from outside Porter Creek from the outset of the selection process. Further, I find that the council was also seeking a candidate other than the person that the employer selected

and placed into the position, to reinforce to the employer its statutory right to select the candidate. In my view, these are inescapable conclusions based on the evidence before me, including the oral testimony.

[151] Any or all of these views could afford a reasonably informed bystander a reasonable apprehension that the council had formed a view that the grievor was not a candidate to select for the principal position and that it had a predisposition to consciously or unconsciously select an external candidate, whether from another Yukon school or from outside the Yukon.

[152] In my view, the fact that Mr. Ratcliff was screened into the process, was interviewed, came in second, and could have been appointed if the successful candidate did not accept the position is not persuasive evidence that the council acted with fairness or in an unbiased manner. Clearly, by any objective assessment, Mr. Ratcliff was a suitably qualified candidate as required by the recruitment guidelines in the *Principal Recruitment Process* policy. He was entitled to an interview if he applied, to determine if he was the best candidate. It would have been extremely odd if he was not screened into an interview given his obvious qualifications exhibited in his testimony and résumé, including four prior years of service at the school as vice-principal and his work as the acting principal.

[153] My view is that the council's stated preference was to have an external candidate over the grievor in the temporary principal position. By the application of the selection process in this case, the council obtained its intended result. Before interviewing Mr. Ratcliff and after interviewing the ultimately successful candidate, Ms. Scholz commented, "I think we have a good candidate."

[154] Further, it is clear that Ms. Prysnuk, who was the employer's representative on the committee, was aware of the council's views about the grievor's lack of suitability as the principal well before the start of the selection process as she was the recipient of the email and letter from council complaining about the grievor's temporary appointment. She had no voting rights to select the candidates, but she was the Yukon government's representative on the committee to ensure, among other things, the fairness of the selection process. Ms. Prysnuk took no steps with respect to this bias that the council expressed against the grievor.

[155] I find several of the authorities provided by the YTA helpful in assessing this case. They are from the Public Service Staffing Tribunal (PSST), which operated in a different statutory regime than the Yukon. In *Gignac*, the impugned comment made by the Chair of the selection committee to the grievor, well before the selection process, was, "If I were in your shoes, I'd concentrate on my job as production chief and the training you want, be it in mediation or something else." The PSST applied the test in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at 394, and determined that the comment conveyed a negative attitude and that the Chair had already decided that the complainant would not be appointed. This is very similar to the comments Ms. Scholz expressed in her email and letter and the testimony of Mr. Underhill and Ms. Scholz at the hearing.

[156] In *Denny*, there was a pre-existing dispute between one of the committee members and the grievor, which was sufficient to amount to a predisposition. While the grievor in this case was not aware of it, it is clear that the council perceived him as part of the problem with the administration, which was a predisposition.

[157] The council did not want the grievor to leave his vice-principal job as its view was that it might have affected school operations. This was an irrelevant factor to consider when selecting a principal and was inconsistent with providing opportunities for promotion within the system. In my view, it is unfair to deny an applicant an opportunity for advancement because the applicant is doing a good job in his or her current position, and the employer's operations would be disrupted by the applicant taking on a new position.

[158] The employer is charged with maintaining the fairness stated in its *Principal Recruitment Process* Policy (Exhibit E-1, Tab 9). In particular, that policy states as follows:

> ...
>
> *RECRUITMENT GUIDELINES*
>
> *In consideration of the relevant sections of the Education Act and the Education Labour Relations Act, the following procedures and guidelines have been developed to facilitate the recruitment process. It is the responsibility of Yukon Education officials (Superintendent) to ensure that:*
>
> ...

> • *the selection process followed in reaching the final decision is fair and consistent with the hiring policies of the Government of the Yukon*
>
> ...
>
> [Emphasis in the original]

[159] I find it surprising that the candidates were rated when no answer key had been prepared before the interviews. For some reason, an answer key was created in November of 2014. It was clearly not used in the selection process. The lack of an answer key and then purporting to mark the candidates at the interviews lends an aura of unfairness to the council's decision-making process. I note that Ms. Prysnuk agreed with counsel in cross-examination that it was deceptive to include in an ATIP response an answer key that was not created for or used in the interview process.

[160] The reasonable apprehension of bias test does not require a finding of malice. In this decision, I do not wish to be taken as suggesting that Mr. Underhill, Ms. Scholz, Ms. Deacon, or Ms. Prysnuk behaved maliciously towards the grievor. It appears that all of them acted in what they perceived were the best interests of Porter Creek. Nevertheless, in my view, there was a clear violation of Principal Recruitment Process policy as well as s. 167 of the *Education Act* in this selection process.

[161] I find that the employer and the council, as its agent, breached a duty of fairness to the grievor in the selection process set out in the policy and that they violated s. 167 of the *Education Act.*

[162] The selection process invites the selection of the best candidate. On the whole of the evidence, I am not satisfied that the council approached its task of selecting the best candidate with an open mind.

VII. Remedies - the availability of damages

[163] A typical remedy for when an employer breaches a duty of fairness in a selection process would be an order revoking the appointment of the successful party and ordering the employer to engage in a new selection process. Neither party supports a revocation of the successful candidate's appointment.

[164] The grievor seeks damages as a remedy. I was not presented with any authorities in which an arbitrator or adjudicator awarded damages to an unsuccessful

applicant in a selection process. Typically, employers have great latitude in selecting employees. In my view, damages are a novel request.

[165] The YTA states that I can infer that an adjudicator deciding a grievance has a power to award damages, and it relies on *Polymer*. The employer argues that there is no jurisdiction to award damages. It points out that there is a difference in the statutory context. The *Polymer* case was decided pursuant to federal labour law — the *Industrial Relations and Disputes Investigation Act* (R.S.C., 1952, c. 152). The collective agreement in that case provided as follows: "Any dispute arising between the Company and the Union regarding the administration, interpretation, alleged violation or application of this Agreement may be submitted in writing by either party..." [emphasis added]. The employer further argues that *Weber* was decided in the context of the Ontario *Labour Relations Act*, which contained as follows in s. 45(1) a reference to "all differences between the parties":

> *45. (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable... .*
>
> [Underline emphasis added]

[166] The rights to grievance adjudication for teachers are more limited and are defined in the *ELRA*. The adjudicator's jurisdiction in adjudicating grievances under s. 65(7) is limited to making a declaration that the statute or policy has been breached. The employer further argues that if damages are sought, they should be pursued in court.

[167] In my view, there is a difference between an entity charged with making a final decision about a grievance, such as an adjudicator appointed by the Yukon Teachers Labour Relations Board (YTLRB) pursuant to s. 65 of the *ELRA*, and the federal privacy commissioner, whose powers are limited to making findings and recommendations. Other than a general principle that jurisdictional relief must be based on a collective agreement or applicable statutes, I find that *Murdoch* is of no assistance in determining the extent of an adjudicator's remedial powers under the *ELRA*.

[168] I also find that *CUPE* is of no assistance in interpreting the powers of a grievance adjudicator under the *ELRA*. *CUPE* arose from a stated case in an unfair labour practices complaint about good-faith bargaining. It concerned the powers of the Nova Scotia Labour Relations Board to make certain orders. It is clear that certain of the orders went well beyond the board's mandate to supervise collective bargaining and interfered with the content of the dispute, the proposals made and who made them, etc.

[169] Access to adjudication is spelled out in the *ELRA*, and some disputes simply do not reach adjudication, such as terminations of probationary employees (s. 64(3)) and disputes that can be dealt with in an administrative procedure under another enactment (s. 63). However, it does not follow that because some disputes cannot be adjudicated, this limits an adjudicator's power to engage in the task of effective dispute adjudication for those disputes that can be referred to adjudication.

[170] In my view, effective dispute adjudication involves more than simply making rights declarations. It involves crafting an award that finally disposes of the issues and providing a meaningful remedy for the parties.

[171] It is helpful to consider the historical context for grievance arbitration set out as follows in *Polymer*. During the currency of a collective agreement, strikes were barred, and grievance arbitration was substituted as the recourse for collective agreement violations:

...

> *... As a matter of history, collective agreements in Canada had no legal force in their own right until the advent of compulsory collective bargaining legislation. Our Courts refused to assume original jurisdiction for their enforcement and placed them outside of the legal framework within which contractual obligations of individuals were administered. The legislation, which is [sic] the context of encouragement to collective bargaining sought stability in employer-employee relations, envisaged arbitration through a mutually acceptable tribunal as a built-in device for ensuring the realization of the rights and enforcement of the obligations which were the products of successful negotiation. Original jurisdiction without right of appeal was vested in boards of arbitration under legislative and consensual prescriptions for finality and for binding determinations. In short, boards of arbitration were entrusted with a duty of effective*

> *adjudication differing in no way, save perhaps in the greater responsibility conferred upon them, from the adjudicative authority exercised by the ordinary Courts in civil cases of breach of contract. That the adjudication was intended to be remedial as well as declaratory could hardly be doubted ... To have proposed to union negotiators that collective agreements, so long ignored in law and left to "lawless" enforcement by strikes and picketing, should continue to be merely empty vehicles for propounding declarations of right when the right to strike during their currency was taken away, would be to mock the policy of compulsory collective bargaining legislation which envisaged the collective agreement as the touchstone of the successful operation of that policy.*
>
> [Emphasis added]

...

[172] In *Polymer*, at para. 12, the arbitrators went on to deal with the issue of the separation of a rights violation declaration and a damages remedy. The arbitrators found that it was possible for them to be separated but that that is not ordinarily done, either in the Courts or in commercial arbitration, and that separation was inconsistent with the desirability of completeness and finality in arbitration. In my view, *Polymer* does not turn on the wording of the particular statute but rather on a functional and historical analysis of the context of grievance arbitration. As grievance adjudication under the *ELRA* shares some attributes of labour arbitration under a collective agreement, I find the comments helpful in interpreting the scheme in the *ELRA*.

[173] The *ELRA* includes a comprehensive labour relations scheme for teachers and the employer and specifies different mechanisms for resolving disputes. Issues about the acquisition or termination of bargaining rights are dealt with by the YTLRB under Part 3. Collective bargaining impasses can be dealt with by arbitration and conciliation under Part 5, "Disputes". Arbitration under Part 5 is in the nature of interest arbitration. It was important for the legislature to spell out the parameters, as interest arbitration takes the dispute out of bargaining, a strike, or a lockout. Complaints about the employer or a union — essentially, unfair labour practice complaints — are dealt with by the YTLRB under Part 8, "Strikes, Lockouts and Enforcement". Exclusive bargaining rights are recognized, and the *ELRA* provides a broad range of powers to adjudicate complaints against the employer and the YTA and between the YTA and its members. An unfair labour practice is a pure statutory concept, and therefore, it is

necessary for the legislature to spell out the nature of the right to file a complaint and remedies.

[174] Grievances are decided by adjudicators under Part 7, "Adjudication of Grievances". Grievance adjudication is similar but not identical to arbitration, pursuant to an arbitration clause in the collective agreement. An adjudicator must find his or her authority in the collective agreement or relevant statutes. Sections 71 and 72 provide powers with respect to disciplinary matters (s. 120) to determine remedial action and determine penalties. Matters other than discipline are considered under s. 65.

[175] I note that the powers with respect to discipline matters are broadly expressed. In my view, this is largely because there is a difference between the common law and collective bargaining approaches to discipline and to dismissing employees.

[176] There is a statutory intent in the *ELRA* to ensure that adjudicators deal with discipline cases using the tools typically available to labour arbitrators, including progressive discipline with the right to reinstate or suspend an employee. At common law, judges will not reinstate an employee and never become involved in supervising discipline short of termination. In the absence of an agreed power to suspend in the employment contract, a suspension could be considered a constructive dismissal.

[177] In my view, it makes little sense to compare the powers of the YTLRB to adjudicate unfair labour practice complaints or arbitral powers under Part 5 with powers of adjudicators to adjudicate grievances and then to argue that since adjudicators' powers are more limited, damages cannot be awarded. These parts of the *ELRA* address discrete labour relations problems. The fact that available remedies are expressed in s. 90 for the YTLRB in dealing with complaints (s. 87) does not *per se* limit an adjudicator's jurisdiction in granting remedies under s. 65(7) of the *ELRA*.

[178] In this adjudication, I am dealing with what amounts to a breach of the duty of fairness. It is a statutory obligation, which has been incorporated into the employment contract. It is clear that the *ELRA* intends adjudication, rather than an action in court, to be the place to seek remedies for most grievances. The dispute before me is within an adjudicator's jurisdiction.

[179] Subsection 65(7) does not expressly confine an adjudicator's jurisdiction to declaratory remedies; it provides that the adjudicator is to review the grievance and render a binding decision, which is not subject to judicial review. Further, it seems odd that one must seek a declaration of rights from a YTLRB adjudicator and then seek a remedy for a breach of those rights before a court, when the legislature created an adjudication scheme administered by the YTLRB. The precise issue is purely labour relations in nature — reviewing the employer's selection process to ensure that an applicant was treated fairly. Historically, this is not a type of problem that the courts deal with or have any expertise to assess.

[180] An adjudicator's orders can be enforced by filing an order with a court. A provision for enforcing orders by court filing does not help define the remedial powers available to a YTLRB adjudicator — it is simply a recognition of the distinction between a court and the YTLRB and the court's obligation to help enforce YTLRB orders. I note that typically, enforcement orders are based on a court's coercive power to incarcerate or fine someone for contempt of its orders. This is a power not granted to any labour board.

[181] In my view, making a declaration would only be a sterile remedy. Further, I am not satisfied that a declaration would give Mr. Ratcliff or the YTA to right to sue for damages in court, as the employer suggested; see *Weber*.

[182] No limits are expressed in s. 65(7)(d) about the nature of the remedy to be granted, as follows: "... render a decision thereon which shall not be referred to in any future decision, shall be final and binding and not subject to any judicial review including the review referred to in section 95 of this Act ...".

[183] Paragraph 65(7)(d) limits the precedential value of any award made to the facts of the case before the adjudicator.

[184] Limits expressed in s. 65(7)(e) state that an adjudicator cannot make an order that results in an amendment to a collective agreement, Act, or policy. This is consistent with the policy that the terms and conditions of the employment relationship are set out in legislation, are otherwise negotiated by the parties, or fall to the exercise of management rights. In my view, this does not prevent an adjudicator from making declarations, awarding damages, or making a grievor whole.

[185] In my view, the fact that this is the type of dispute that can be dealt with by an adjudicator, that the decision is to be of no precedential value, that the decision is to be final and without further judicial recourse, and that no remedial limits are placed on an adjudicator other than not to rewrite a collective agreement suggests that this is the type of decision referred to in *Polymer*. It requires effective adjudication and is one in which it makes no labour relations sense to simply pronounce the rights of the parties, leaving them to apply (if possible) to a court for damages. I am satisfied that I have the power to award damages for the breach of the duty of fairness in the selection process.

VIII. Damage assessment

[186] The grievor claims three aspects of damages: (a) the restoration of his sick leave bank; (b) damages for the loss of the opportunity to become the principal; and (c) aggravated damages. I note that the basis of damages in a contract is to put the innocent party in the position it expected to be had the breach not occurred.

[187] In its arguments, the employer did not directly address the causation test that I should apply when determining whether the grievor's medical condition was caused by the employer's conduct in the selection process. The YTA provided a case, *Schrump*, which sets out a test for tort causation.

[188] The question of the medical consequences of conduct is often a matter considered in tort rather than in contract law. The modern formulation of the tort test is set out in *Athey v. Leonati*, [1996] 3 SCR 458, in which the headnote reads as follows:

...

> *Causation is established where the plaintiff proves to the civil standard that the defendant caused or contributed to the injury. The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant. Where the "but for" test is unworkable, the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury. In some circumstances an inference of causation may be drawn from the evidence without positive scientific proof. The plaintiff need not establish that the defendant's negligence was the sole cause of the injury. The law does not excuse a defendant from liability merely because other causal factors for which he or she is not*

> *responsible also helped produce the harm. It is sufficient if the defendant's negligence was a cause of the harm.*
>
> ...
>
> [Emphasis added]

[189] At common law, only those kinds of damages that are reasonably foreseeable consequences of a wrongful act are recoverable as damages. Heads of damages that are not reasonably foreseeable are not recoverable: *Chopra v. Canada (Attorney General)*, 2007 FCA 268, paras. 30 to 34.

[190] The duty to act fairly when selecting employees — rests on contract law principles, which limit damages to those fairly and reasonably arising naturally from the breach or such as may reasonably be supposed to have been in the contemplation of the parties; see *Keays* at para. 54.

[191] Accordingly, whichever approach is adopted, the question is essentially whether it was reasonably foreseeable that the grievor would have medical issues arising from the employer's conduct which resulted in time off of work?

[192] I have considered the evidence of the grievor and of Dr. Zhang. The grievor was not cross-examined about other stressors in his life before he went on leave. In particular, it was not suggested to him that before the selection process, the workplace had caused him any health problems. While it would be anecdotal, there is no factual basis in the evidence for me to find that factors contributed to his health problems other than the selection process and its result.

[193] It may be that Dr. Zhang's diagnosis was not entirely accurate. She was not retained to prepare an expert assessment of the grievor's psychological condition, but she treated him in a way consistent with the prevailing standards of care of a general medical practitioner. The grievor had a mental health condition following the selection process, which was not present before it. Dr. Zhang testified that before he filed his grievance, the grievor was in good health. I am satisfied that his condition probably did result from the treatment he experienced.

[194] He experienced a shock at the outcome of the selection process because he had been asked to take on the principal's role for the following September, his superintendent suggested that he apply, and he had no knowledge of how the council

viewed his work. This is not of the magnitude of the type of events that usually cause acute stress disorder in the ICD-9, but it is important to consider the impact of the actions on the grievor, not on some hypothetical person. Regardless of the label attached to his health problem, it is clear that his health was impacted by the employer's selection process.

[195] There is no other alternative theory before me of other potential causes of the grievor's absence from work such as an underlying depressive condition or exposure to other trauma. It is clear that he worked in a stressful environment before he participated in the selection process, but stress at work was not developed as a theory during his cross-examination.

[196] In the absence of evidence of any other cause, on a balance of probabilities, the only logical conclusion is that the selection process resulted in the grievor losing time from work. On a balance of probabilities, I conclude that "but for" the council's treatment of him in the selection process, he would not have suffered the symptoms he experienced.

A. **Restoration of the sick leave bank**

[197] As a result, the grievor had to use his sick leave bank. Under the collective agreement, it has a monetary value, which is assessed at retirement. At present, he has no intention to retire. It is inappropriate to fix a value to the loss. The future is uncertain, and the grievor may need to draw on his sick leave bank, which the loss of days attributable to the employer's conduct could impact. In my view, the appropriate remedy is to restore the sick leave bank to its state before he went on leave, which would put him in the position he was in before the flawed selection process took place.

B. **Damages for the lost chance to work as a principal**

[198] I am being asked to assess damages based on the loss of a chance to work as a principal at Porter Creek. The grievor would be at the same point on the grid whether he were a vice-principal or principal. I am being asked to award damages for the loss of allowances to which he would have been entitled had he succeeded in the selection process. He stated that he had at least a 50% chance of being selected; therefore, I should award 50% of the value of the allowance, to age 65.

[199] In my view, he had at least a 50% chance of succeeding in the selection process in the absence of a reasonable apprehension of bias by the council. The grievor had a demonstrated track record within the Yukon educational system. He was interested in becoming a principal and had had acting appointments in the past. He was familiar with Porter Creek's operations as he was the vice-principal. The only clear choice in the selection process was between the successful candidate and the grievor. I place weight on Mr. Underhill's comments that based on the answers given at the interview by both candidates, it was a wash between them.

[200] The grievor already has an entitlement as a vice-principal to 50% of the basic and supervisory allowances. Based on a 50-50 chance of becoming the principal, Mr. Ratcliff lost 25% of the principal's basic and supervisory allowances.

[201] This loss will continue as long as the grievor is a vice-principal.

[202] When dealing with future losses, an adjudicator must make reasonable assumptions. While there is no mandatory retirement age, and there is no evidence of the grievor's prospective retirement date, he does not seek compensation beyond eight years. I note that he was born on October 2, 1957. He would turn 65 shortly after the start of the 2022-2023 school year. I find it probable that he will retire before the start of the 2022-2023 school year. His years of loss extend for eight school years (2014-2015 to 2021-2022).

[203] I have considered limiting the loss to one month as suggested by the employer, based on the application of the ICD-9 clinical guideline. While most people seem to recover within a month, I accept Dr. Zhang's view that she monitored the grievor and that he was not ready to go back to work until he actually did.

C. <u>Mitigation of damages</u>

[204] The grievor had a responsibility to mitigate his damages, and arguably, he could have applied for the permanent principal job when it was posted for the 2015-2016 school year. I find it reasonable that he did not apply to the competition for the permanent position given that his grievance was not resolved, the council members were the same, and he would have been up against a person who had a one-year track record as the principal at Porter Creek. There is no evidence of any other way he could have mitigated his losses, for example by applying for other principal positions, as

there is no evidence before me that there were any other vacant principal positions.

D. Contingencies

[205] When assessing a future loss, both positive and negative contingencies should be considered. Positive contingencies tend to enhance the loss. Negative contingencies reduce it. I am not satisfied that there are any positive contingencies. For example, there is no evidence before me that the grievor was interested in positions paying higher than a principal position. He applied for a superintendent's position in the past, but there is no evidence before me that this is a higher-paying position.

[206] However, I find that there are some negative contingencies. The grievor expressed interest in a principal position; there is no indication that he would not apply for one in the future within the Yukon educational system. If he applies and is successful, then the damages would be a windfall to the extent that he would collect the full principal's allowance in the future after I award him damages now for the loss of those allowances. In my view, it is also possible that he might retire sooner. I make a 5% deduction for them.

[207] Therefore, the amount of the loss should be assessed at 20% of the principal's allowance from the 2014-2015 to the 2021-2022 school years.

[208] I am going to retain jurisdiction for 90 days over the calculation of the damages to be paid to the grievor, to permit the parties to reach an agreement.

E. Aggravated damages

[209] The grievor seeks $15 000 for aggravated damages or damages for the mental distress arising from his failure to be selected. I decline to award aggravated damages.

[210] Aggravated damages in an employment or labour context are often awarded in the context of a dismissal case. In my view, there is a significant difference between the loss of a chance for promotion and the termination of an employment relationship. The employer operates numerous selection processes to fill vacancies. One could reasonably conclude that every single selection process results in disappointment to unsuccessful applicants. I have found that there was a lack of fairness in this process. That merits some redress to the grievor. While *Keays* may apply beyond the dismissal context, in my view, the employer's conduct in this case was not sufficiently outrageous as to merit an aggravated award of damages.

[211] An award of ordinary contractual damages in this case (the loss of chance of promotion assessed at 20% of the value of the principal's allowances for 8 years), together with the restoration of his sick leave bank should be sufficient to compensate the grievor for the breach of an expectation of fair treatment in a selection process.

[212] Because damages are an unusual remedy in selection cases, in my view, any such award will also bring home to the employer the need to treat employees fairly under s. 167 of the *Education Act* and to eliminate a reasonable apprehension of bias in its selection processes.

[213] For all of the above reasons, I make the following order:

(The Order appears on the next page)

IX. Order

[214] I declare that the employer breached s. 167 of the *Education Act.*

[215] The employer shall restore the grievor's sick leave bank to its state before he took medical leave in August of 2014 for the period until he returned to work in February of 2015.

[216] The grievor is entitled to damages on the basis of 20% of a principal's basic and supervisory allowances from September 2014 to June 2022.

[217] The grievor's claim for aggravated damages is dismissed.

[218] I retain jurisdiction over the implementation of this decision, including the calculation of the damages, for a period of 90 days.

January 31, 2018.

Paul Love,
adjudicator