Date: 20140921

File: 166-02-35944 and 35945

Citation: 2006 PSLRB 105

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

IVO ARENA

Grievor

and

TREASURY BOARD
(Department of Finance)

Employer

Indexed as
Arena v. Treasury Board (Department of Finance)

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Léo-Paul Guindon, adjudicator

For the Grievor: André Lortie, Professional Institute of the Public Service of Canada

For the Employer: Karl G. Chemsi, counsel
Louis-Phillippe Dubrule, counsel

Heard at Ottawa, Ontario,
October 31 to November 3, 2005,
December 14 and 15, 2005, and March 23, 2006.
(P.S.L.R.B. Translation)

Grievances referred to adjudication

[1] Mr. Arena has been employed in the Information Technology Services Section of the Department of Finance (Corporate Services) since August 30, 1999. Initially hired as a junior analyst (CS-01 group and level), he was promoted to an analyst position (CS-02 group and level) on November 1, 2000 following the reclassification of his position. He then moved to an Information Technology Solutions Specialist position (CS-03 group and level) on July 2, 2002, after participating in a promotion competition (Exhibit E-7).

[2] He was suspended without pay from work on December 8, 2004, for an indefinite period pending investigation of allegations of theft (Exhibit G-3). On December 20, 2004, he was dismissed by his employer for the reasons set out in the letter of dismissal given to him the same day (Exhibit E-1).

[3] On December 22, 2004, Mr. Arena prepared a grievance contesting his suspension and dismissal. This grievance was referred to adjudication and bears PSLRB File No. 166-02-35944.

[4] Early in January 2005, the grievor filed a second grievance regarding the application of clause 36.03 of the collective agreement between Treasury Board and the Professional Institute of the Public Service of Canada for the Computer Systems group (code 303, expiry date of December 21, 2004). The grievor alleges therein that his employer failed to respect his right to union representation and did not comply with the advance notice of two working days set out in the collective agreement for the meeting held on December 7, 2004. The grievance was referred to adjudication and bears PSLRB File No. 166-02-35945.

[5] At the start of the hearing on both grievances on October 31, 2005, I would have preferred to proceed first with the grievance contesting the suspension and dismissal. The evidence on this grievance may include, at least in part, the evidence related to the grievance on the application and interpretation of clause 36.03 of the collective agreement in terms of the employer's actions in deciding the disciplinary measure. At the request of the bargaining agent, and in the absence of an objection from the employer, I agreed to begin the hearing on the grievance relating to the interpretation and application of the collective agreement (PSLRB File No. 166-02-35945). The

evidence on this matter will be included in the file on the disciplinary measures in the event that a hearing is necessary on the merits of File No. 166-02-35944.

[6] The grievance submitted by the grievor relating to the application and interpretation of clause 36.03 of the collective agreement is written as follows:

> *STATEMENT OF GRIEVANCE:*
>
> *I grieve my employer's violation of Section 36.03 of my collective agreement (CS), in that, on December 7, 2004, my employer required me to attend a meeting on disciplinary matters, but failed to give me the opportunity to have a union representative attend the meeting with me. The employer also failed, without justification, to give me written notice of this meeting at least two working days in advance.*
>
> *CORRECTIVE ACTION REQUESTED:*
>
> *That my employer rescind my suspension and dismissal, that I be reinstated in my CS-3 position, and that I be paid the salary and benefits lost because of my suspension and dismissal.*
>
> *That my employer acknowledge that it failed to abide by the CS Collective Agreement, and that it undertake to fully respect the CS Collective Agreement in the future.*

[7] On April 1, 2005, the new *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the former *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former Act").

Summary of the evidence

The incidents leading to the employer's investigation

[8] Helen O'Kane, Director, Information Technology Division, Corporate Services Branch, Department of Finance and Treasury Board of Canada Secretariat was informed on November 3, 2004, by Gertie Seniuck, Chief, Information Management and Technology Directorate that in spring 2004 three laptop computers were stolen, along with the money from a hockey pool. These incidents were reported to security (Exhibit G-10). She was also informed that in late October 2004, during the review of budget operations, it was noted that there had been a considerable number of purchases made

between April and September 2004 to replace memory cards, hard drives and computer monitors that had disappeared.

[9] The procurement procedure was changed and access to the third-floor storage room was restricted to five senior technicians by Ms. Senuick and another Branch chief, Carole Mainville. Employees were informed at a meeting on October 20, 2004, that these changes were the result of equipment losses. Following the meeting, three employees confided to Ms. Senuick that the grievor might be involved in the disappearance of the equipment. They were told that there was no evidence linking the grievor to the incidents and that they should stop any rumours about him (Exhibit G-10). Ms. Senuick sent a memorandum to Ms. O'Kane on November 4, 2004 (Exhibit E-11), reiterating the points in the email of November 3, 2004 (Exhibit G-10).

[10] Ms. O'Kane obtained an incident report from the chiefs of the Directorate in order to inform Marilyn Dingwall, Director, Human Resources Services, Corporate Services, Department of Finance. The detailed report, estimating the equipment loss at $24 371 for the period from April to September 2004, was sent to the Directorate's Executive Director, Robert Brodeur, on November 1, 2004 (Exhibit G-13). Ms. Dingwall received a copy of the report, and it was agreed that Security would only become involved at her request (Exhibit G-13). No request was made to that effect.

Meeting of December 7, 2004

[11] Ms. Dingwall and Ms. O'Kane reviewed the incidents on December 1, 2004, and decided to investigate the employees in the Information Technology Services Section to find out the facts. Ms. Dingwall and Ms. O'Kane met with four employees on December 7, 2004, and four others thereafter.

[12] The grievor was interviewed on December 7, 2004. Two other employees were interviewed before him. According to the testimony, Ms. O'Kane called the grievor on the telephone around 10:30 a.m. on December 7, 2004. She asked him to come to room 22-C immediately, without giving him any reason. Following her request, he was told that he did not need any tools. The grievor testified that he thought that his services were needed to repair or install a piece of equipment being used in a meeting, as he had often been asked to do.

[13] According to her handwritten notes taken during the meeting, Ms. O'Kane prepared "[Translation] notes from interviews" (Exhibit G-1). The document was

finalized on December 15, 2004, and was approved by Ms. Dingwall the same day. These notes read as follows:

. . .

IT INVESTIGATION (See original statement from Managers)

Notes from Interviews:

Ivo Arena December 7th

Advised Ivo that we were doing an investigation of the thefts in IT. Explained that this was a fact finding meeting and that no accusations were going to be made, however there are some fingers pointing at him on some of the issues, we had four categories for questions.

Asked Ivo what he knew about missing computer equipment:

- *He said that he heard there had been 15 flat screens but thought that it was more like 25, that this was huge and it would take someone organized to pull this off and it had to be more than one person*
- *Asked if he had ever taken any equipment or if he heard anything about who had, he said no, he did not know anything about this.*

Keys

Asked Ivo how he accesses the storage room and if he had access.

- *Explained the sign out process with Ruth*
- *Asked if he had made his own keys – he said no*

Hockey Pool Money

Asked Ivo if he knew what happened to the $100 missing from the hockey pool. He said he didn't know anything about it, that he was in 2nd place in the pool and the money was partly his.

Taxi Chits

Asked Ivo if there was anything he wanted to tell us about taxi chits that he knew about?

- *He said he knew nothing about taxi chits*
- *I asked him if he ever used them, he said no*
- *I said you have never used them? He said only when he was required to work overtime sometimes. I said anything else? He said no. I asked if he ever used them for personal use? He said no.*

WINE

Asked him if he knew what happened to the wine?

- *He said he nothing about it, heard that it went missing*
- *Then said that he heard, no proof that* [Mr. X] *used it to pay for his parking, he never pays money but pays off the parking lot attendant with wine.*

We re-iterated that this was fact-finding and that if he went away and thought of anything he could bring forward just let us know.

He said defensively I don't need to, I have no information, he then started saying I did not do this, I swear I did not do this.

I said that was good. If he knew who he should encourage them to come forward because if we are able to help the individual we wanted to, I told him that we were first tying to resolve internally and if we were unable to we would turn over to the police and then if we found out that someone did do it who said that they did not, it would be more severe in terms of consequences and discipline.

He then said could I say something: We said yes. He said I did have my own keys made, we said why: He said I did not want to sign out keys all the time. He said I did not want to lie, I didn't mean to lie and I wanted to tell you because if you found out after that I did you would wonder why I lied. Helen asked where the keys were now. He said that when the wine went missing from the storage room he didn't want people accusing him so he destroyed them. He said he thought it would make him look guilty if he had keys so he got rid of them.

He asked if we were meeting everyone, we said we would if we had to. Our intent was to resolve this.

December 8th

Ivo approached Helen O'Kane in her office at 8am. He said he wanted to explain why he had lied about the keys. He said that he thought it would make him look guilty so he didn't want to admit that he had keys. After he thought about it a few minutes he realized that he should tell us the truth. He again swore that he had nothing to do with the thefts of the flat panel monitors, the wine or the hockey pool money. Helen again told him that we were just investigating and that if he knew anything he should come forward. That we were trying to handle this internally and didn't want to have to bring in the police.

Helen O'Kane *Marilyn Dingwall*
December 15, 2004 *December 15, 2004*

[The person's identity has been protected]

[*Sic* throughout]

[14] During their testimony, Ms. Dingwall and Ms. O'Kane substantially reiterated the points from their notes of the meeting of December 7, 2004. Ms. Dingwall also stated that the employees interviewed before the grievor said that the grievor bragged about taking the equipment. The grievor was not specifically informed of these allegations, but was told that certain statements implicated him. Ms. Dingwall did not attend the meeting on December 8, 2004, between the grievor and Ms. O'Kane. She therefore cannot confirm the accuracy of the points reported by Ms. O'Kane (Exhibit G-1).

[15] During her testimony, Ms. O'Kane confirmed the content of the meeting she had with the grievor on December 8, 2004, and the note at the end of Exhibit G-1. According to Ms. O'Kane, the grievor was suspended because he apparently did not comply with the instruction he was given not to discuss the ongoing investigation with anyone. She checked the taxi chits and the overtime in the grievor's file in about mid-December 2004. The review of the taxi chits and overtime showed that, on some occasions, taxi expenses were claimed with no indication of overtime (Exhibits E-2, E-3 and E-4).

[16] The procedure for using taxi chits operated on the basis of good faith, with no one authorizing these expenditures. Ms. O'Kane added that she never suspected that anyone could abuse the taxi chits, and she never looked at the details of the claims although she was responsible for doing so. She explained that the employee in question might not have distinguished between "overtime" and "on-call". She apparently had not told the grievor at what times the taxi chits could be used.

[17] She checked the grievor's emails and traced the emails of October 15, 2004, between Joseph Boushey and the grievor regarding the company Mica Technologies (Exhibit E-12). Invoices for services from Mica Technologies (Exhibit E-6) and documents related to the incorporation of that company (Exhibit E-9) were obtained by Ms. Dingwall. For his part, the grievor prepared a note, as follows, after he left the December 7, 2004, meeting, specifying the elements discussed (Exhibit G-14):

. . .

Dec 7th: Interviewed by Marylyn Dingwall and Helen O'Kane.

- *Asked about the keys to P2 and P3.*
- *Asked if I ever took equipment from TriNet.*
- *Asked about taxi chits*
- *Asked about what I knew – Told them about* [Mr. X].

. . .

[18] From December 7 to 9, 2004, the grievor prepared a more detailed summary, based on his note (Exhibit G-14) of the December 7, 2004, meeting. The summary reads as follows (Exhibit G-15):

. . .

Dec 9th 2004

On the morning of Dec 7th, I received a phone call from Helen O'Kane asking me to meet her right away in boardroom 22C. When I arrived she introduced me to Marilyn Dingwall, of Human Resources/Labour Relations. They told me that the meeting was concerning the thefts that happened in our division. The whole thing lasted about 10-15 minutes. They asked me the following four questions.

1. *They asked/commented that certain of my colleagues had said that I bragged about stealing equipment and selling it.*

I answered that unequivocally I never stole anything and if I did I wouldn't brag about it. I mentioned that from the sounds of the accusations it sounded like someone had a vendetta against me. They denied this.

2. *The second question was whether I ever took taxi chits.*

I replied yes, but only when I work overtime.

3. *They then asked me if I had my own keys to our supplementary storage area in the parking garage.*

I answered no.

4. *After that they asked me once again if I ever took equipment from the dept.*

I replied only the equipment that was assigned to me, my home PC.

5. *They then told me that it was my duty to come forth with any information that I had and if I knew anything now was the time.*

I hesitated as I didn't want to say something that I did not know was true. I told them that rumours were the reason I was being interviewed by them and I did not want to put one of my colleagues in the same position. They reminded me that as a Public Servant it was my duty. I told them that the only thing I heard was that Roland felt that Mr. X was responsible for the thefts and that he had made our chief, Gertie Senuik, aware of this. I told then that Roland had told a number of us that he knew for a fact that Mr. X did not pay for parking in the underground parking garage. Instead he gave the attendant in the booth bottles of wine and various other types of liquor. He said this explained the missing wine. He also said that as Mr. X did all our purchasing and pretty much single-handedly controlled our inventory, he had opportunity. He also mentioned that Mr. X was constantly borrowing 50-100$ at a time from him to get to the next paycheck and that he would have had motive to steal the pool money. They said that they had not heard that and Marylin Dingwall wrote it down.

They then asked me if I had anything else to say. I told them that I did have my own keys to our supplementary storage rooms downstairs. I had made them 5 years earlier when I was in charge of TriNet Repairs (looking after liaising with our service providers). I mentioned that in retrospect it was wrong to have my own keys made but I was tired of constantly signing them out as part of the job (when I was doing TriNet Repairs) entailed often having to go down to our supplementary storage area. I didn't think it was a big deal as we only kept our outdated surplus equipment in there that was heading to the school programs.

They asked me if I had ever lent the keys to anyone and I told them that on several occasions I had lent them to Claude Robillard and Derek Nemer.

The next day, on Dec 8th at 3:45pm I received a call from Sylvie Cloutier, from Labour Relations, She asked me to be at a meeting in Robert Brodeur's office at 4:00 o'clock. When I arrived, there was Robert Brodeur, the Director General of Informatics services, Helen O'Kane and Marilyn Dingwall. They informed that they had taken the liberty to ask a PIPSC representative to be present. They said he was waiting in the boardroom and that if I wanted he could come in. I told them that I had nothing to hide but seeing that he was there we should have him sit in.

The PIPSC representative, Jean-Francois Mélançon was not fully aware of why he was there. They briefed him in about a

> *minute and a half about the thefts in the division and informed him I was suspected of being involved. They then turned to me and informed me that I was hereby suspended without pay indefinitely pending a full investigation in the alleged thefts in the division. They presented me with a memorandum signed by the Dennis Kam, the acting ADM of Corporate Services, to that effect. I pleaded my innocence repeatedly and asked them to call in the police to handle the rest of the investigation as I didn't think they were handling it in the right way. I told them I was willing to subject myself to criminal charges in order to prove my innocence.*
>
> . . .
>
> [The identify of the person has been protected.]
>
> [*Sic* throughout]

[19] During his testimony, the grievor stated that the first paragraph of Exhibit G-1 is indeed the introduction stated at the beginning of the meeting on December 7, 2004. He added that the words used were more specific, stating that he was implicated in the thefts and that Ms. Dingwall and Ms. O'Kane wanted to know what he had to say. His version of this point is set out in item 1 of Exhibit G-15.

[20] The grievor explained that he answered "No" to the question about the keys because he was upset by the fact that certain people were pointing the finger at him. At the end of the meeting, he went back to say that he had made his own keys for the underground storage room and that he had loaned them to two employees at the CS-02 level. He admitted that the elements reported (Exhibit G-1) for December 8, 2004, are correct.

[21] With respect to the taxi chits, Ms. Dingwall and Ms. O'Kane asked the grievor if he had only used them when he was working overtime. Mr. Arena believes that this type of question implies allegations against him.

[22] As for the case of wine, Ms. Dingwall and Ms. O'Kane asked him if he had taken it because employees had made these allegations to them. He apparently told them what is reported in Exhibit G-1, that is, that he had heard that an employee gave the wine to a parking attendant as payment.

[23] During his testimony, the grievor stated that he did not ask to have a union representative present at the meeting on December 7, 2004. He explained that he was

somewhat upset by the direct questions from Ms. Dingwall and Ms. O'Kane and that he did not know that he had a right to be represented.

[24] According to Ms. Dingwall, "[Translation] the Treasury Board guidelines on discipline" (Exhibit G-2) do not apply to the December 7, 2004, meeting. In her view, the meeting had nothing to do with discipline because its purpose was to obtain the grievor's version of the facts about the incidents. She explained that the employer did not criticize the grievor at this meeting and had no evidence that the grievor was involved in these incidents. She confirmed that the grievor did not ask to be accompanied by a union representative. Ms. O'Kane was not familiar with the disciplinary procedure, being involved for the first time during these incidents.

[25] Ms. Dingwall did not send the file on the equipment losses to the local police department or to the Department's Legal Services, and did not apply the Policy on the Loss of Money and Offences and Other Illegal Acts against the Crown (Exhibit G-6) to this matter.

[26] The collective agreement between Treasury Board and the Professional Institute of the Public Service of Canada for the Computer Systems group (expiry: December 21, 2004) applies to this case. More specifically, the collective agreement states as follows:

> ***ARTICLE 36***
> ***STANDARDS OF DISCIPLINE***
>
> . . .
>
> ***36.03*** *Where an employee is required to attend a meeting on disciplinary matters, the employee is entitled to have a representative of the Institute attend the meeting when the representative is readily available. Where practicable, the employee shall receive in writing a minimum of two (2) working days notice of such meeting.*
>
> . . .

Events after December 7, 2004

[27] The grievor was suspended without pay as of December 9, 2004, for an indefinite period during the investigation. A letter informing him of his suspension was given to him at a meeting on December 8, 2004, with Robert Brodeur, Executive Director, and Ms. Dingwall and Ms. O'Kane. The employer had informed the bargaining agent of this meeting and a representative was available on site. The employer

informed the grievor of his right to have a representative present. The grievor requested the presence of the union representative. The memorandum reads as follows (Exhibit G-3):

. . .

> *Suspension pending investigation*
>
> *This is to advise you that you are suspended from work without pay indefinitely from your position as of December 9, 2004. This action is taken pending completion of an investigation into alleged acts of theft.*
>
> *You are not to enter the premises unless requested to do so by management. During the suspension, should you wish to attend the premises, you may telephone Robert Brodeur at 992-4306.*
>
> *A final decision concerning this matter will only be taken after a full investigation. You will be informed of the results as soon as available.*

. . .

[28] According to Ms. O'Kane, the employer suspended the grievor during the investigation because he allegedly did not respect the instruction not to speak to anyone about the December 7, 2004, meeting.

[29] According to the grievor, he felt tricked at the December 8, 2004, meeting. The letter of suspension states that the investigation was related to the thefts, while the meeting the day before was only to obtain his version of the facts. When he was given the notice of suspension, he was not informed of any allegation of misconduct. The grievor reacted emotionally. He was informed that he would be escorted outside by security. He described the situation as "bullshit", stating that he was not guilty and that the Human Resources managers were not qualified to make these investigations. He asked that the police be called to conduct the investigation properly. The employer's notes (Exhibit G-7) corroborate this information.

[30] An email message dated December 13, 2004, sent to Ms. O'Kane by Ms. Dingwall states that the latter wanted the final meeting to be held on Thursday, December 16, 2004, and that she had to inform the Deputy Minister first and have the letters prepared (Exhibit G-4). Ms. O'Kane suggested that Ms. Dingwall not deliver the

letters until Monday, December 20, 2004, in order to avoid any unwanted visitors at the group's lunch on Friday, December 17, 2004 (Exhibit G-4).

[31] According to the grievor, these emails show that the decision to dismiss him was made on December 13, 2004. Ms. O'Kane testified that she still had not completed the investigation of the taxi chits on that date, and that no final disciplinary decision had been made.

[32] The dismissal decision was given to the grievor on December 20, 2004, at a meeting with Mr. Brodeur, Ms. Dingwall and a union representative. The letter of dismissal reads as follows (Exhibit E-1):

. . .

> *Mr. Ivo Arena:*
>
> *On December 9, 2004, you were suspended without pay until such time as management had an opportunity to thoroughly review all available information gathered during an investigation into allegations concerning your conduct. The review is now complete and I have found the following:*
>
> *Regarding the taxi chits, after a thorough review, I have concluded that you used taxi chits on numerous occasions when they were not associated with work related matters, specifically overtime. When you were asked about taxi chit usage during the investigation, you claimed that you did not use them except for some overtime.*
>
> *I have also learned that you are directly associated with a company, namely MICA, which has secured departmental business over the years, thereby violating the Values and Ethics Code of the Public Service. On at least three occasions this company has provided computer equipment for major events, like the Budget and Departmental seminars. This was common knowledge amongst your colleagues but yet you failed to disclose this on your conflict of interest declaration. As an employee of the Department, you were required to declare your association with this company on a confidential report to the delegated manager. Had you done so, you would have been told that it is inappropriate for this company to engage in any work related to the department.*
>
> *There is also evidence that you have commented and acknowledged to your colleagues that you removed government equipment from the workplace for the purpose of selling this equipment outside the workplace. It was*

> *further found that you had also done repairs at the workplace for personal equipment.*
>
> *I have concluded that you knew that making a personal set of keys for the storage areas on P2 and P3 was not appropriate and contrary to divisional procedures. The procedures in place included a sign out process. Despite this, you decided to have your own set made. When questioned, you denied this allegation at first, and then retracted the denial on two occasions. This convinces me that you knew it was wrong.*
>
> *Your conduct has betrayed irreparably your integrity and the trust that the Employer can place in you. These incidents demonstrate very serious errors in judgment on your part. I have taken into consideration that you did not demonstrate complete forthrightness during the investigative process as well as the fact that you clearly have not recognized the significance of your behaviour.*
>
> *Your behaviour has resulted in a situation which I, as well as other management representatives, no longer trust you with government equipment or your ability to maintain professional and respectful relationships with colleagues. [*sic*]*
>
> *Therefore, I have concluded that the employee/employer relationship has been irrevocably damaged and as a consequence of your actions, you cannot continue to be employed in the Public Service.*
>
> *Under the circumstances, I hereby terminate your employment for cause pursuant to Section 11 (2) (f) of the Financial Administration Act. This action is effective at the close of business on December 8, 2004 when you were suspended without pay pending investigation.*
>
> *You have the right to grieve this decision within 25 days from the date of this letter.*
>
> . . .
>
> [*Sic* throughout]

Order to produce documents

[33] During cross-examination and at the hearing on November 3, 2005, the grievor was questioned regarding the notes of the December 7, 2004, meeting adduced as exhibits G-14 and G-15. The grievor wrote the list of points discussed immediately after the meeting, using the computer that the employer made available to him at work, and he subsequently transferred it to the computer that the employer provided

for use at his home. The paper copy of this document was adduced as Exhibit G-14. The grievor used this document to prepare a more complete report of the December 7, 2004, meeting, using the employer's computer at his home. He clarified that he started writing the report on the evening of December 7, 2004, and finished it on December 8 and 9, 2004. The paper copy of this document was adduced as Exhibit G-15.

[34] The report (Exhibit G-15) was prepared using Microsoft Word 2000 software. The document was transferred to the computer loaned by the employer to the grievor's personal computer in December 2004 and at the beginning of January 2005 to Microsoft Word 2003 software. It was from his personal computer that Exhibit G-15 was printed, the week before the October 31, 2005, hearing.

[35] During cross-examination, the grievor stated that he still had the original documents (Exhibit G-14 and G-15) in electronic format on his personal computer. He indicated that he could send copies of the electronic documents used to prepare Exhibits G-14 and G-15 to the tribunal through his representative.

[36] The grievor's representative objected to this request to adduce documents, because they were not requested by subpoena prior to the hearing. He also questioned the tribunal's capacity to order these documents to be adduced. Counsel for the employer responded that he is entitled to ask that a document that the witness mentioned in his testimony and that is relevant to the dispute, be adduced. The witness stated that he had the document in his possession and would be able to send it to the tribunal. In reply, the grievor's representative argued that the request by the employer's counsel was unfounded.

[37] I dismissed the objection, explaining to the parties that the tribunal can order a witness to produce a document to which he has referred during testimony and that is relevant to the dispute. I verbally ordered the witness to send exhibits G-14 and G-15 by email to his counsel in the original electronic format during the evening of November 3, 2005. He stated that he could send these documents as an attachment to an email message to his representative on the evening of November 3, 2005. His representative undertook to forward these documents to the tribunal and to the employer's representative at the beginning of the week of November 6, 2005.

[38] On November 10, 2005, the grievor's representative sent to the tribunal, in the form of an attachment to his email message, the exhibit identified as Exhibit G-13, which was sent to him by the grievor on November 3, 2005. The document is a copy of Exhibit G-14 in electronic format. On November 10, 2005, the grievor's representative sent to the tribunal a second email message containing a copy of documents that he identified as Exhibits G-14 and G-15, which he had received from the grievor on November 10, 2005.

[39] In an email message dated November 15, 2005, the employer's counsel pointed out to the tribunal:

> [Translation]
>
> . . .
>
> *This email message is further to your letter of November 8, 2005, regarding Mr. Guindon's instruction and the correspondence received from André Lortie.The employer wishes to inform you that it is prepared to proceed directly with oral arguments on December 14, 2005, and <u>not continue</u> cross-examination of Mr. Arena.*
> *However, the employer wishes to point out the following:*
>
> *The employer's request regarding the electronic versions of G14 and G15 was further to Mr. Arena's testimony that he had originally created these documents using Word software. It was specifically the <u>original</u> electronic documents in Word format that were requested and there was no ambiguity about this aspect at the hearing. However, the electronic documents received are in pdf format (acrobat reader). They are clearly not the original documents requested at the hearing and which Adjudicator Guindon ordered disclosed.*
>
> *Accordingly, the employer reserves the right to reiterate its request at the hearing on the merit of this case, if it considers it necessary.*
>
> *Nevertheless, to avoid further delays in this case we will be prepared to proceed directly with arguments on December 14, 2005,*
>
> . . .
>
> [Emphasis in the original]

[40] When the hearing resumed on December 14, 2005, counsel for the employer argued that he had not received the documents in the original Microsoft Word 2003 electronic format ("doc" format), but in Adobe electronic format ("pdf" format). He is

unable to find on a "pdf" document the information that was in the original "doc" format. He reiterated that he had not received the electronic document that he had specifically requested and that the adjudicator had ordered the witness to produce. He argued that the document produced did not allow him to verify whether it had been changed by the grievor after December 9, 2004.

[41] The grievor's representative argued that a "doc" format document would enable the employer to track information contained in the metadata, which does not appear on the "paper" copies adduced as exhibits G-14 and G-15. Such information could be protected by the privilege governing communication between the grievor and his counsel. Further, the request to provide the document in "doc" format is different from the order sent in writing by the tribunal on November 8, 2005. That order reads as follows (Exhibit E-14):

> [Translation]
>
> . . .
>
> *We also remind you of the instructions of Mr. Guindon at the hearing:*
>
> - *Mr. Ivo Arena must send, by electronic mail and as an attachment to said email message, copies, in electronic format, of Exhibit G-14 (Mr. Arena's notes from the meeting of December 7, 2004) and G-15 (Mr. Arena's notes dated December 9, 2004) to Mr. André Lortie (PIPSC) on November 3, 2005;*
>
> - *Mr. André Lortie (PIPSC) must forward this correspondence (including the documents requested from Mr. Arena), during the week of November 7, 2005 (this week), by electronic mail, to the Board and to Mr. Karl Chemsi;*
>
> - *This correspondence and these documents will be adduced into evidence as Exhibit E-13 in File No. 166-02-35945.*
>
> . . .

[42] In response, counsel for the employer argued that one of the parties has the right to obtain details on the steps in the production of a document adduced into evidence. The adjudicator's order as stated at the hearing was not confusing and it was clear that the employer wanted the document in "doc" format. The employer was not seeking information that could be of a privileged nature in terms of communications

between counsel and his client, but wanted to be able to verify whether changes were made to the documents (exhibits G-14 and G-15) after the period of preparation specified by the grievor during his testimony.

[43] The grievor's counsel asked me to adjourn the hearing to allow him to check with his legal counsel on whether the order to produce the documents, issued n November 3, 2005, respects the witness' rights as set out in the *Charter of Rights and Freedoms*.

[44] With respect to the arguments by the grievor's representative, I decided to clarify the order to produce issued on November 3, 2005. I therefore ordered the grievor, for the resumption of the hearing on December 15, 2005, at 9:30 a.m., to provide to the tribunal, on computer diskette, the document in "doc" format that was used to prepare exhibits G-14 and G-15, and to provide a copy of the diskette to the employer's representative. If certain information contained in this "doc" format document could be considered privileged communication between counsel and his client, the grievor's representative will have to submit it to me and convince me that I must allow him to remove such information so that the employer does not have access to it. The representatives of both parties, and the grievor, acknowledged that this order was clear and unambiguous.

[45] The hearing was adjourned to allow the grievor's representative to verify the information he felt was necessary with his counsel during the afternoon of December 14, 2005.

[46] When the hearing resumed on December 15, 2005, at 9:30 a.m., the parties' representatives asked for the hearing to be suspended to allow them to discuss, among themselves, the consequences of the evidence. The hearing resumed around 11:00 a.m., with the continuation of cross-examination of the grievor. The grievor then explained that, on the evening of November 3, 2005, he realized that Exhibit G-15 contained numerous personal annotations about certain paragraphs and that, by providing this document in "doc" format, he would also be sending the annotations. He stated that he did not want to send these annotations and the way to erase them was to convert the document to "pdf" format. He deleted the "doc" format document because he did not want the employer's counsel to have access to his personal notes. He testified that he did not believe he was acting in contravention of the order by taking such action, having considered it only from a computer technology perspective.

He added that the document was created on the computer provided by the department, which had been returned to the employer. He further commented that the document was created using the computer provided by the department, which had been erased, but there may be a way to recover it if the employer wanted to do so.

[47] Given that the execution of the order to produce the documents was raised during cross-examination of the grievor, counsel was allowed to question the grievor on this matter again in re-examination. The grievor then explained that his notes did not appear on the screen when he printed Exhibit E-15 and did not appear on the paper copy. This means that the notes are in the metadata of the document in "doc" format. When the data was converted to "pdf" format, the metadata were not transferred to the new format. Between November 3 and the date that he provided the second document, the grievor spoke with his representative, who told him not to delete any document. Under cross-examination, the grievor stated that he did not understand that he was to provide the original document and that he decided, without consultation, to delete it. The annotations were added to the document up until October 31, 2005, based on the personal reflections of the grievor and certain conversations with his representative. They were personal notes and lines of defence. The text printed and adduced as Exhibit G-15 had not been changed since the initial preparation; only annotations were added below the paragraphs. These were subsequently deleted.

[48] In rebuttal evidence, the grievor spent considerable time manipulating the computer to transfer a file from a diskette to a computer hard drive and from the hard drive to a diskette or compact disk. These various manipulations of an original document change the document's creation date, which appears in the document's properties.

[49] The diskette containing the information from the computer used by the grievor at work was adduced as Exhibit G-17. The document contains confidential information that must be protected.

[50] At the conclusion of the grievor's testimony, I informed him that his failure to comply with an order of a tribunal could constitute contempt and that I could order him to appear before the Court to explain why he should not be found guilty of contempt. I explained to the grievor that, in this instance, such an order would not be in the interests of justice. The representatives were advised to explain to me, in their

arguments, the impact on the credibility of the grievor's testimony of his failure to comply with the order to produce the documents.

Summary of the arguments

For the grievor

Order to produce documents

[51] According to the grievor's representative, the grievor complied with the order by providing an electronic copy of exhibits G-14 and G-15. He added that the written order sent by the Board does not state the type of file or file format that must be used to send the document. If there is ambiguity about what was ordered, the grievor should not suffer the consequences.

[52] The grievor did not understand that he was being ordered to provide both documents and he sent the copy of the second document after clarification from his representative. Thus, he produced the required documents with diligence.

[53] The grievor wanted to protect his personal notes and his privileged communications with his representative by converting the "doc" format document to a "pdf" format document. This transfer preserved exact copies of the paper documents (exhibits G-14 and G-15), which were thus provided in electronic format. The "doc" format document is no longer available, as the grievor deleted it after the change in format.

[54] Based on the demonstration given at the hearing, the information that the employer wanted from the document (dates on which changes were made to the text) is no longer accessible. Converting a document from one electronic format to another automatically changes the document's creation date.

On the merit of the grievance

[55] The grievance concerns the December 7, 2004, meeting. The only meeting at which he was invited to present his version of the facts was when he was questioned on December 7, 2004. The subsequent meetings on December 8 and 20, 2004, are relevant because they show that the employer did not make allegations of inappropriate conduct at the outset of the disciplinary investigation of the grievor.

[56] At this meeting, three of the reasons for dismissal were discussed, namely:

- theft of equipment;
- taxi chits;
- copying of storage room keys.

The fourth reason, relating to a conflict of interest, was not discussed at this meeting, and the employer never offered the grievor an opportunity to present his side of this matter.

[57] The laptops computers, hockey pool money and cases of wine disappeared in spring 2004. The employer did nothing about these incidents before November 1, 2004, when an audit of the budget estimated the equipment loss at over $24 000. Certain employees expressed doubts about the grievor to division chiefs.

[58] Despite the high value of the losses, neither the police, nor the Department's Legal Services were called in. This is contrary to the Policy on the Loss of Money and Offences and Other Illegal Acts against the Crown (Exhibit G-6) when, as in this instance, there are serious incidents.

[59] The employer began the interviews with certain employees on December 7, 2004, more than three weeks after the denunciations in early November 2004. The employer had enough time to respect the notice period, set out in the collective agreement, of two working days, which must be given to the employee for a disciplinary meeting.

[60] The reason for the meeting given in Ms. Dingwall and Ms. O'Kane's notes was an investigation of the thefts (Exhibit G-1). The allegations made against the grievor and another employee by other employees were the reasons for the meetings held on December 7 and 8, 2004. During the meeting with the grievor, the employer did not explain to him the specific allegations regarding the loss of equipment, the theft of the hockey pool money or the use of the taxi chits. This approach is contrary to the guidelines for investigation of and interviews relating to thefts, which state that the employee is entitled to know the misconduct of which he is being accused and must be able to respond.

[61] The employer did not inform the grievor at the December 7, 2004, meeting of his right to be represented, although the employer tried indirectly to make him answer to the allegations made against him by other employees. They told him that other employees were pointing the finger at him.

[62] It is not logical, in such circumstances, that the employer did not inform the grievor of his right to be represented when, for the December 8, 2004, meeting, the employer took the initiative to inform the bargaining agent so that a representative was available to represent him.

[63] After the meetings of December 7 and 8, 2004, the employer decided to dismiss the grievor after only two working days, that is, on December 13, 2004 (Exhibit G-4). The dismissal meeting was postponed until December 20, 2004, to avoid unwanted visitors at the group's lunch on Friday, December 17, 2004. At that time, the employer knew the allegations regarding the keys, the theft of equipment and the taxi chits arising from the employees' denunciations. Only the matter relating to the conflict of interest was subsequently discovered by the employer.

[64] The grievor's representative argued that the right to representation is not merely a question of procedural fairness but a fundamental right. Accordingly, violation of the right to representation cannot be corrected by a *de novo* investigation before an adjudicator, and, consequently, the disciplinary action must be rescinded. The following decisions set out this interpretation:

- *Shneidman v. Canada Customs and Revenue Agency*, 2004 PSSRB 133;
- *Evans v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-2-25641 (1994);
- *Corporation of City of Toronto v. Canadian Union of Public Employees*, Local 79 (1995), 47 L.A.C. (4th) 197; and
- *Brink's Canada Ltd. v. Independent Canadian Transit Union, Local 1* (1997), 69 L.A.C. (4th) 199.

[65] As a signatory to the collective agreement, the employer has an implicit obligation to respect the right of representation (*Brink's Canada Ltd.*). In addition, the employer must inform the employee of his right to be represented (*Corporation of City of Toronto*).

[66] It is very difficult to determine at what moment an investigation becomes disciplinary. This distinction between administrative and disciplinary investigations is purely semantic, and adjudicators prefer to rely on facts. When a disciplinary measure

is imposed on an employee, each of the steps leading to that decision forms part of a disciplinary continuum. The employee's rights may be affected at each of the steps on the disciplinary continuum, and his or her right to representation must be respected. The decisions in *Riverdale Hospital v. Canadian Union of Public Employees, Local 79* (2000), 93 L.A.C. (4th) 195; *Medis Health and Pharmaceutical Services v. Teamsters, Chemical and Allied Workers, Local 424* (2001), 100 L.A.C. (4th) 178; and *United Food v. Commercial Workers International Union, Local 175* (2000), 87 L.A.C. (4th) 100 reflect this position and should be applied in this case.

[67] Clause 36.03 of the collective agreement applying to this grievance provides more general wording than the clause of the collective agreement interpreted in *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124. Clause 36.03 states that the right to representation applies to "a meeting on disciplinary matters" while in *Naidu*, this right is restricted to a meeting at which a disciplinary decision is rendered. In *Shneidman* the adjudicator stipulated that the right to representation applies to all meetings concerning disciplinary measures, based on wording broader than in *Naidu* and similar to that in clause 36.03 of the collective agreement in the grievor's case.

[68] In the view of the grievor's representative, the meeting of December 7, 2004, was clearly disciplinary in nature. The employer asked the grievor to provide explanations about the theft of the equipment and the wine, and on the use of taxi chits. In any event, this meeting was part of a disciplinary continuum, the elements discussed at the meeting being given as reasons for the dismissal. The adjudicator should, therefore, allow the grievance and rescind the dismissal. The grievor should be reinstated in his position with all rights and benefits.

For the employer

On the merit of the grievance

[69] The grievor must show that his right to representation, set out in clause 36.03 of the collective agreement, was not respected during the December 7, 2004, meeting. To do so, he must convince the adjudicator of the disciplinary nature of that meeting, that he did not have an opportunity to be represented there, and that this violation cannot be corrected by a *de novo* hearing before the adjudicator.

[70] The wording of clause 36.03 provides the right to representation at "a meeting on disciplinary matters". This right, set out in the collective agreement, is different

from rights set out in charters, and its scope is determined by the stipulations agreed upon by the parties.

[71] The decisions cited by the grievor interpret clauses different from the one considered in this grievance. Thus, in *United Food and Commercial Workers International Union, Local 175*, the collective agreement sets out a right to representation that also extends to meetings of a professional nature. Further, the adjudicator stated in *Shneidman* that the right to representation also extends to administrative meetings. In this case, the right to representation was only agreed to for meetings on disciplinary matters, as in *Naidu*.

[72] Based on the specific facts adduced, the adjudicator must determine if the meeting has the characteristics of a disciplinary meeting. Adjudicators have found that meetings are of a disciplinary nature when the employer asks an employee to answer for or explain his conduct regarding specific allegations. In the grievor's case, during the December 7, 2004, meeting, the employer had no evidence that the allegations made against the grievor by other employees were founded. The employer made no disciplinary decision against the grievor at that meeting. The employer described the allegations against the grievor as rumours in the November 4, 2004, report (Exhibit E-11) and ordered the employees to stop spreading them.

[73] The employer met with employees beginning on December 7, 2004 to gather facts around events as a result of the November 1, 2004, report (Exhibit G-13). During the meeting with the grievor, the employer did not ask him if he had stolen, but if he knew anything about the missing equipment and taxi chits. During the meeting, the grievor was not confronted with the allegations made by the other employees and there was no discussion of a disciplinary measure (exhibits E-1 and G-15). According to the testimony of Ms. O'Kane and Ms. Dingwall, no disciplinary action was planned against the grievor at this stage. According to their testimony, the evidence showing that the grievor made inappropriate use of taxi chits, that he had not declared the possibility of a conflict of interest, and that he held duplicate keys to the storage room, were discovered after the December 7, 2004, meeting. The grievor's dismissal is the result of a loss of the employer's trust arising from the above three incidents, and not for theft of equipment.

[74] During the two subsequent meetings, the grievor exercised his right to representation and the employer took the initiative to inform the bargaining agent in

advance. The suspension without pay pending the investigation was imposed on December 8, 2004, because the grievor spoke about the investigation to another employee in contravention of the instruction given. He was represented at the December 20, 2004, meeting with the employer during which the employer gave him the letter of dismissal.

[75] This grievance deals only with the December 7, 2004, meeting. If the grievor did not have an opportunity to present his version of the facts during the subsequent meetings with the employer, he is able to do so during the hearing before the adjudicator, pursuant to *Tipple v. Canada (Treasury Board)*, [1985] FCJ No. 818 (A.C.).

[76] In *Arctander v. Treasury Board (Canada Post)*, PSSRB File No. 166-2-10565 (1982) the adjudicator found that an interview is not necessarily disciplinary in nature merely because an act discussed later becomes the object of a disciplinary measure. At the time of the interview, despite having suspicions about the employee, the employer did not have tangible evidence and did not make any accusations. In the grievor's case, the same circumstances existed at the time of the December 7, 2004, meeting.

[77] J*ohnson v. Treasury Board (Royal Canadian Mounted Police)*, PSSRB File No. 166-2-26107 (1995) concerns the right to representation during a disciplinary meeting, as the present case does. According to that decision, the grievor must show that a disciplinary measure was imposed on him during the meeting, directly or in a constructive manner. The adjudicator stated that, if the parties intended to grant the right of representation during investigatory meetings at which an employee is asked for explanations of his conduct, they should have included that right in the collective agreement. The adjudicator should find similarly in this case, since the evidence presents the same elements.

[78] The way to correct the contravention of the right to representation must be determined based on the injury caused to the grievor. In *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124 the adjudicator agreed with the Saskatchewan Court of Appeal, which stated that the right to representation is fundamental, being more than a simple procedural matter (*Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*, 2000 SKCA 119). However, the Court clarified that violation of such a clause does not necessarily result in the employee's reinstatement as the presumed corrective action. In such circumstances, the adjudicator must select

a remedy that is adapted to correcting, effectively but not excessively, the prejudice caused to the employee.

[79] The day after the hearing, the Federal Court overturned the adjudicator's decision in *Canada (Attorney General) v. Shneidman*, 2006 FC 381.

Regarding the grievor's credibility

[80] During his testimony, the grievor admitted deliberately destroying the electronic document in "doc" format so that it would not be disclosed. During his cross-examination, the employer asked that the document in "doc" format be produced, and the grievor decided instead to provide it in "pdf" (Adobe) format. He destroyed the document in "doc" format after the order from the tribunal.

[81] The grievor testified about the matters discussed at the December 7, 2004, meeting based on this document (Exhibit G-15). The fact that he destroyed the original document to prevent its verification removes any credibility from his version. The adjudicator must apply the principle that these circumstances create a presumption that the evidence would have been prejudicial to the party in question. The proof of bad faith by the grievor, who destroyed the evidence to prevent its disclosure, creates a presumption that this evidence would have been adverse to the grievor, in keeping with the principle set out in *Spencer v. Quadco Equipment Inc.*, 2005 NBBR 2.

[82] The grievor has not discharged his burden of proof, and has not shown that the December 7, 2004, meeting was disciplinary in nature. The grievance should be denied on this basis. Even if it was possible to conclude that the grievor was entitled to be represented, the grievance cannot be allowed because the employee did not suffer any prejudice. Moreover, the adjudicator should reserve his decision and hear the evidence on the merit of the dismissal grievance, adjudicators having always acted accordingly in decisions submitted to the tribunal.

Reply of the grievor

[83] The employer met with the grievor because other employees had pointed the finger at him, not because the employer believed that he had information on the thefts. In accordance with the principle set out in *Medis Health*, the investigation conducted by the employer forms part of the disciplinary process when the matter involves theft, as is the case in this instance.

[84] With respect to the argument that adjudicators have always heard the full evidence on the merit of the disciplinary measure before deciding on contravention of the right to representation, the second question arose because of a grievance contesting the disciplinary measure. A distinction must be made between the grievor's case and the decision in *Shneidman*, because, in this case, a specific grievance is contesting the employer's failure to apply the right to representation. The Federal Court did not question the right to union representation during the disciplinary interview in *Shneidman*. The Court considered that the adjudicator was not seized of a grievance about the right to representation that must be dealt with in a grievance separate from that contesting the dismissal.

[85] The grievor's representative reiterated in reply that the grievor complied with the tribunal's order and produced an electronic copy of exhibits G-14 and G-15. The grievor was entitled to believe that a "pdf" format met the requirements expressed in the order.

[86] The decision in *Riverdale* clearly states that contravention of the right to representation is a violation of the fundamental rights of an employee, and that such a violation results in the disciplinary sanction being rescinded. These principles must be applied in the grievor's case.

Reasons

[87] The interpretation grievance filed by the grievor alleges that the employer did not respect his right to union representation at the December 7, 2004, meeting. The grievor also grieves the fact that the employer did not give him advance notice of two working days for the meeting. He asks, as corrective action, that his suspension and dismissal be rescinded, and that he be reinstated in his position with full rights and privileges.

[88] The representatives of the parties in this case spoke extensively about the principles and the application of the concepts of procedural fairness relating to discipline. I will not proceed with a systematic analysis of each of the arguments made on this issue, but it is crucial to identify the elements relevant to this grievance, since each collective agreement has wording that is specific to it and must be applied in a particular factual context.

[89] The elements of the principle of procedural fairness relating to contracts are set out in the terms used in collective agreements. In *Evans*, an extract from the article published by Mervin Chertkow explained that the wording of the collective agreement provided the elements constituting procedural fairness. Thus, the terms and conditions of the right to representation, and its scope, must be interpreted according to the wording of the collective agreement. In *Naidu*, at paragraph 79, the adjudicator explained his thinking on this matter as follows:

. . .

> *Investigatory meetings, and meetings requesting explanations for the conduct of employees are common occurrences in the work place. Had the parties intended the language of the collective agreement to include the right to representation at these meetings or at all meetings between the employer and its employees, collectively or individually, it would have been a simple matter to include that right in the agreement.*

. . .

[90] Like any other right granted by the collective agreement, the right to representation must be determined on the basis of the language of the collective agreement and must not be confused with the fundamental rights of charters. In the present case, the right to representation agreed between the parties is worded as follows:

. . .

> ***36.03*** *Where an employee is required to attend a meeting on disciplinary matters, the employee is entitled to have a representative of the Institute attend the meeting when the representative is readily available. Where practicable, the employee shall receive in writing a minimum of two (2) working days notice of such meeting.*

. . .

[91] The words used in this clause must be understood in their ordinary meaning. The collective agreement does not contain a definition of the meaning of the words “on disciplinary matters”. The word “on” means “in relation to” or “in respect of” in its ordinary meaning. It must, therefore, be understood that the meeting during which the right to representation is granted is “in relation to disciplinary matters” or “in respect of disciplinary matters”.

[92] This wording is broader than the wording of some of the collective agreements brought to my attention and that deal with a meeting at which a disciplinary decision will be rendered. Clause 36.03 stipulates, however, that a disciplinary measure must be discussed at the meeting. Discussing a disciplinary measure necessarily implies that the employee has been accused of misconduct, which could result in a sanction against him.

[93] Based on this reasoning, a meeting at which the employer is seeking facts about events, normally considered an "administrative investigation", is not a meeting in relation to a disciplinary measure. At such an investigatory meeting, the employer's purpose is to gather all of the facts and to verify their accuracy. A disciplinary process may follow this administrative action, if the facts show, in the employer's assessment, that an employee acted improperly, and if that action warrants a sanction.

[94] I can conceive that, in certain circumstances, it may be difficult to determine at what point the administrative action ends and the disciplinary process begins. This issue must be assessed in light of the specific facts in each case. It cannot be concluded *a priori* that the imposition of a penalty on the employee retroactively confers a disciplinary nature on each of the steps taken by the employer to allow it to reach its decision.

[95] The theory of a disciplinary continuum that would necessarily stem from the imposition *a posteriori* of a disciplinary measure would be contrary to the principle that an adjudicator cannot alter or add to the wording of a collective agreement. According to the grievor's arguments, I should find that there was a disciplinary continuum in this case, and, thus, attribute a disciplinary nature to the December 7, 2004, meeting, thereby giving entitlement to the right to representation. I do not believe that the adjudicators in *Riverdale Hospital, Brink's Canada* and *Evans v. Treasury Board* wanted to extend the right of representation to administrative meetings in contradiction of the wording of the collective agreements.

[96] In the case before us, it is clear that the right to representation is limited to meetings on disciplinary matters, and the wording of clause 36.03 of the collective agreement does not include fact-finding meetings of an administrative nature. To conclude otherwise would be to go against the well-established principle that an adjudicator does not have the authority to alter or add to the wording of the collective agreement (Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., at para 2:1202).

[97] The parties have different understandings of what took place during the December 7, 2004, meeting. The employer's version, recorded by Ms. Dingwall and Ms. O'Kane (Exhibit G-1), and the accuracy of which was confirmed by their testimony, would indicate the administrative nature of the meeting. The grievor, for his part, wanted to show the disciplinary nature of the meeting, both by his notes (exhibits G-14 and G-15) and by his testimony.

[98] The assessment of the evidence adduced by Ms. Dingwall and Ms. O'Kane shows that the meeting of December 7, 2004, was motivated by the thefts within Information Technology Services. The grievor was clearly informed that certain colleagues had pointed the finger at him. He was asked if he had information about the missing equipment, the procedure for accessing the storage rooms, the disappearance of the hockey pool money and bottles of wine, and the use of taxi chits. He was asked specific questions to learn whether he had taken equipment or had used taxi chits for personal use. Following the grievor's statement that he had had a copy of the keys made, he was questioned about why he had changed his earlier answer on this matter and whether he still had the keys in his possession.

[99] According to the grievor's testimony, supported by his notes (Exhibit G-15), the two representatives of the employer apparently went further, telling him that colleagues had said that he bragged about taking the equipment and selling it. The grievor apparently even suggested that this was a vendetta against him. Exhibit G-15 indicates that the employer's representative asked him a second time if he had taken the equipment, after a general question about the use of taxi chits and after raising the issue of the keys. The grievor insisted throughout his testimony that these questions implied that he was involved in the theft of the equipment and the wine and that he had used the taxi chits inappropriately. However, when he gave his version of the December 8, 2004, meeting where he was given a notice of suspension without pay pending the investigation, he stated that he was surprised that the employer told him he was involved in the thefts, when the meeting the day before (December 7, 2004) had only been a fact-finding investigation.

[100] The strength of the grievor's version of the December 7, 2004, meeting is considerably reduced by the fact that he voluntarily acted in such a way that the adjudicator and the employer did not have access to the original electronic document in "doc" format from which he had prepared the notes on this meeting. The order that

I issued at the hearing on November 3, 2005, was definite on this point. Under his cross-examination, the grievor clearly told the employer's counsel that he had the Word 2003 document on his personal computer, from which he had printed Exhibit G-15. He stated that he would send his representative a copy of the original electronic document by email that same day as an attachment and that this would not be a problem for him.

[101] By arguing at the start of the hearing on December 14, 2005 that the electronic document adduced (attachments to an email message) met the requirements of the written confirmation of the order sent by the Board on November 8, 2005, the grievor's representative removes the relevance and importance of the evidence that the tribunal wanted to obtain. According to the argument adduced, the tribunal simply wanted an electronic version of a document already adduced in paper format. This argument is only valid if the order is taken out of the context in which it was issued during the hearing on November 3, 2005, where it was clearly stated that it was the original electronic document that was required.

[102] When, at the hearing of December 14, 2005, I again required the grievor to adduce the original electronic document, the grievor and his representative answered that the order was clear and unambiguous. It is somewhat questionable that they did not inform me then that this document had been deleted and was no longer available. According to the explanations given to the tribunal by the grievor when the hearing resumed on December 15, 2005, the original document had already been deleted. It was no longer necessary to suspend the hearing to allow the grievor's representative to verify whether the order to produce the document respected the principles of natural justice and/or the rights set out in the charters. The inquiries had become purely academic; the order could no longer be carried out, since the document had been deleted.

[103] By altering his original document by converting it from "doc" format (Microsoft Word 2003) to "pdf" format (Adobe), the grievor wanted to prevent the tribunal and the employer's counsel from accessing the metadata of the original electronic document. This action clearly contravened the November 3, 2005 order. Refusing to comply with an order of the tribunal, altering or destroying a document that the tribunal has ordered be produced constitutes contempt of court. In this case, I

informed the grievor that I did not feel it was in the interest of justice to have him called before a court to explain why he should not be found guilty of contempt.

[104] After considering all of the information relating to this incident, and the arguments adduced by the parties, I believe that an inference must be made against the grievor, who knowingly destroyed evidence to prevent the tribunal and the other party from accessing it. Under such circumstances, I can infer that, if this evidence had been adduced before the tribunal in accordance with the order, it would have been adverse to the grievor. Authors Gorsky, Usprich and Brandt explain this principle as follows in their *Evidence and Procedure in Canadian Labour Arbitration* (Carswell, 2005), at para 13-8:

> *Along the same lines, the lack of an adequate explanation in suspicious circumstances may lead to an inference that the suspicion is justified.*

[105] Authors Brown and Beatty discuss this principle at paragraph 3:5120 of their *Canadian Labour Arbitration* (3rd ed.) as follows:

> *Thus, where a party can, by his own testimony, throw light on a matter and fails to do so, an arbitrator is entitled to infer that such evidence would not have supported his position.*

[106] According, I give more weight to the evidence adduced by the employer regarding the purpose and proceedings of the December 7, 2004, meeting. All of the evidence adduced shows that the employer conducted an investigation at this meeting to discover the facts surrounding the incidents (theft of equipment and bottles of wine, disappearance of the hockey pool money, use of taxi chits and duplication of keys to the storage room). There was no accusation or charge levelled against the grievor at this meeting. Although the employer had been informed of certain suspicions by some employees regarding the grievor, it did not have any evidence showing his involvement. In these circumstances, the December 7, 2004, meeting was "administrative" in nature and does not have the elements that might show that its purpose was related to a disciplinary measure.

[107] Even if I gave full credibility to the version presented by Mr. Arena of how the meeting of December 7, 2004 proceeded, I would still come to the conclusion that this meeting was not related to a disciplinary measure. While, according to Mr. Arena's version, the employer's questions were apparently insistent and insinuated that he was

involved in the incidents, at no time does he mention that there was any discussion of a disciplinary measure.

[108] The employer showed considerable openness during the meeting with the grievor by telling him outright that certain colleagues were pointing the finger at him in respect of the incidents under investigation. It also asked the grievor explicitly if he had taken the equipment or had used the taxi chits for personal use. These elements are also found in the grievor's testimony. I did not find the grievor's version convincing, since he exaggerated the facts during his testimony, interpreting them as reproaches.

[109] I must point out that extending the right to representation to all "administrative" investigations that the employer must conduct would have a significant negative impact on the climate of labour relations by creating paranoia that would hinder open and sincere communication between the parties.

[110] Given that this meeting did not relate to a disciplinary measure, the advance notice provided in clause 36.03 cannot be applied. Further, given these circumstances, it is not appropriate to discuss in the case before us the impact that failure to respect the right to representation might have had on the validity of the disciplinary sanction subsequently imposed on the grievor.

[111] The Board must contact the parties, in accordance with its usual procedures, to set a time for the continuation of the hearing on the merit of the grievance contesting the suspension without pay and dismissal bearing File No. 166-02-35944. The evidence adduced in this grievance, bearing File No. 166-02-35945, with respect to the right to representation, is relevant to the file on the suspension and dismissal and will be considered subject to arguments that the parties may present to me at the continuation of the hearing.

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

(The Order appears on the next page)

Order

[113] Grievance 166-02-35945 is denied.

[114] The Board must set a date for the continuation of the hearing with respect to File No. 166-02-35944 contesting the suspension without pay and the dismissal as soon as possible, in accordance with its usual procedure.

September 21, 2006.

Léo-Paul Guindon,
adjudicator