Date: 20140227

File: 166-02-31376

Citation: 2006 PSLRB 19

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

FRANÇOIS CHARLEBOIS

Grievor

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Employer

Indexed as
Charlebois v. Treasury Board (Department of Human Resources and Skills Development)

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

REASONS FOR DECISION

Before: Georges Nadeau, adjudicator

For the Grievor: James Cameron and Kim Patenaude-Lepage, counsel

For the Employer: Neil McGraw, counsel

Heard at Ottawa, Ontario,
October 18 to 21, 2005.

Grievance referred to adjudication

[1] François Charlebois, the grievor, was employed at what is now known as the Department of Human Resources and Skills Development (HRSDC) as an analyst at the CR-05 group and level in the National Information and Benefits Services (NIBS), Income Security Programs.

[2] On October 12, 2001, the grievor was advised by the Assistant Deputy Minister, Income Security Programs that his employment was terminated, effective at the close of business that same day. The reasons for the termination were set out in the following terms (Exhibit G-2):

. . .

> *. . . The investigation found that you obtained a back payment of $22,649.71 in CPP benefits to which you were not entitled and that you had established a $325.22 monthly payment from the Plan to which you were also not entitled. Evidence as well shows that that* [*sic*] *these payments were deposited to your account through direct deposit.*
>
> *I have carefully reviewed the evidence provided to me with respect to the activities conducted to make these payments. Your actions are inconsistent with the high level of trust, honesty and integrity required of your position as an analyst in Income Security Programs. I further find that you have irreparably damaged the bond of trust that is essential to the continuation of your employment as a member of the Public Service of Canada. I find no mitigating reasons why your employment should not be terminated for cause.*

. . .

[3] The grievor filed a grievance on November 1, 2001, against his termination and requested that he be reinstated in his position as of October 12, 2001, and reimbursed for all pay and benefits lost as a result of his termination. His grievance was referred to adjudication on July 15, 2002.

[4] The hearing of this matter has been scheduled on six different occasions. The parties have asked for five postponements. On one of those occasions, the grievor asked that this reference to adjudication be held in abeyance until the resolution of criminal charges laid against him, without prejudice to the employer's interests. The employer consented to that request.

[5] On April 1, 2005, the *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 *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

[6] Although his grievance and reference to adjudication have been filed in French, the grievor requested on May 20, 2005 that the hearing of this matter be held in English.

Summary of the evidence

[7] The first witness called by the employer was Brodie Harrington. He started his career in the Public Service in British Columbia in 1983, became the Director of NIBS, Central Operations in 1997 and still held that position at the time of his testimony.

[8] The NIBS group deals with exceptional circumstance cases within the Canada Pension Plan (CPP). These circumstances are those that the regular computer system (the “legacy system”), which pays out money under the CPP, cannot process. They essentially arise when, as a result of appeal decisions or for other administrative reasons, a pension is approved but does not conform to system requirements. The legacy system has no embedded rules and allows cheques to be written to anybody.

[9] According to Mr. Harrington, the main safeguards in place at the time were the fact that strong workplace ethics exist, there were very few people authorized to use the legacy system and those who were, were all located in Ottawa. There was also separation between the employees who worked on the requests and the employees who issued the cheques. Finally, all accounts would eventually be reopened and would be converted to the legacy system.

[10] After a few years as Director, Mr. Harrington became increasingly aware of the risks associated with the legacy system. In order to minimize these risks, he introduced subject-matter experts to train new employees and a small team equipped with business intelligence tools. These tools would be used to search for anomalies in the processing of files.

[11] Mr. Harrington indicated that, when he joined the NIBS, the group had 25 employees. These individuals had worked together for a number of years and were

considered experts in the administration of the CPP. They were highly appreciated because it was common knowledge that 5% of the clients could not be served by anyone but this group.

[12] The stress level was high in this group as there were not enough people to do the work. The group had struggled for years with a large backlog of work. All cheques prepared at National Headquarters are initiated by an agent or analyst; they are reviewed and given to a records officer, who verifies the calculations, addresses and Social Insurance Numbers (SIN). When the verification is completed, the cheque is sent to a separate group, under a separate director, who authorizes payment and issues the cheque.

[13] Mr. Harrington described the change that had taken place over the years with regard to requests from individuals in same-sex relationships. He indicated that, some time after the passage of the *Canadian Charter of Rights and Freedoms*, individuals in same-sex relationships had argued that the denial of CPP benefits was discriminatory. These views were being pursued through the appeal mechanism provided for by the legislation and through academic and political avenues and were discussed by policy experts within the federal government. By 1997, 30 to 40 such cases were being appealed.

[14] During this time, the public debate about same-sex marriage was also being discussed inside the NIBS as well as across the federal government. By 1998, the witness was made aware that HRSDC understood that the federal government was going to amend the legislation. A policy decision was made that anyone who had appealed this issue in a quasi-judicial forum would be offered a settlement. When the *Modernization of Benefits and Obligations Act* (*MOBA*) was passed, the legacy system was altered to make it possible to pay out CPP entitlements to individuals in same-sex relationships.

[15] In the lead-up to the implementation of the *MOBA*, HRSDC conducted information sessions for all its agents, and the NIBS was given special responsibility for making payments to the forty appellants. As of June 2000, it became legal to pay them the survivor's benefit.

[16] Mr. Harrington also indicated that a class action lawsuit had been initiated on behalf of 1,500 individuals whose spouses had died prior to June 2000. This led to a

number of applications for the survivor's benefit from individuals whose spouses had died prior to June 2000. There are currently over 300 of those applications being handled by the NIBS.

[17] In July 2000, a new directive was issued by the Income Security Programs (Exhibit E-1). Its purpose was to assist people to understand and apply the new legislation.

[18] At the time, HRSDC essentially had to deal with two groups. The first group was composed of the 40 persons who had appealed the denial of their survivor's benefit. The second group included all who had applied for the survivor's benefit after January 1998.

[19] Mr. Harrington testified that the NIBS was asked to ensure that the first group received the correct payments resulting from the settlements. He met with Sharen Dickson, Manager, NIBS and explained the importance of having these accounts triple-checked and assigned to someone very good at doing the work and sensitive to the issue. Ms. Dickson chose the grievor for this task. The rules of the *MOBA* were not finalized but the NIBS was asked to implement settlements.

[20] Mr. Harrington testified that he became aware of the payments to the grievor after having received a list of account files to verify the accuracy of the payments.

[21] The Program Investigation Group was responsible for developing projects to test the accuracy and quality of the benefits paid under the CPP. Every year, that group develops specific projects with different parameters, requiring that every office across the country pull out client account files and examine them according to standard operating procedures and report on their findings. The files would be cleaned up; errors and omissions would be fixed. Every office would receive an introduction to the project, the reporting forms and a list of accounts to be examined. The files would be chosen on a random basis in order to form a statistically valid sample.

[22] The project that made the witness aware of the payments to the grievor was designed to look at clients under the age of 45 receiving the survivor's benefit. This sample was chosen because people under the age of 45 receive, in accordance with the

legislation, a partial survivor's benefit. These account files are considered as having a higher risk of error.

[23] After noticing the grievor's name, the witness kept a copy of the list and forwarded the documents to the Program Integrity Group. That group would assign this work to a program integrity officer, who would obtain the files and review the procedures, make corrections and report on his work.

[24] Mr. Harrington then contacted Rod Kline, Director, Program Integrity and Quality Services, Income Security Programs, and asked for a confidential meeting. After reviewing the information available and cross-referencing it with records in his office, the witness consulted Mr. Kline and decided to ask for an outside investigation of the payments that were made to the grievor.

[25] Mr. Harrington contacted the Security Investigation and Emergency Response Group (SIER) and requested an investigation. He also asked someone from the system group to make a printout of all the actions done by the grievor to initiate these payments in the legacy system. He requested a discreet and full search of the file room in order to locate the account file in question. Everyone involved in these actions was asked to keep this information secret in order to protect the grievor's privacy. The file was nowhere to be found.

[26] The witness asked the SIER investigator to open the grievor's private locker. The file was not there. The witness then asked for a double check of the system to trace the movements of the file. A request was also made to stop payments as it appeared at that stage that the payments were not being made in accordance with the law.

[27] Mr. Harrington then met with Claude Jacques, Senior Investigator, Special Investigation Unit, SIER and briefed him on what had happened up to that point. Mr. Jacques, according to the witness, said that he needed to meet with the grievor to obtain his explanation of the situation. On the agreed-upon date, Mr. Harrington asked the grievor to accompany him to a meeting. In the meeting room, he advised the grievor that an investigation was underway and that Mr. Jacques wanted to talk to the grievor. The grievor was told that he was entitled to have a bargaining agent's representative present but he declined. The witness then left the grievor with Mr.

Jacques. Later on, Mr. Harrington was told that Mr. Jacques was going to accompany the grievor to the grievor's home.

[28] Mr. Harrington asked the grievor to stay home, with pay, and to refrain from talking to anyone about the matters under investigation. He also advised the grievor that he would not have anything to do with the investigation.

[29] The witness met with the director of Staff Relations to review the situation and prepare questions for his upcoming meeting with the grievor, following the investigation report.

[30] Mr. Jacques completed his report on October 3, 2001, and provided it to Mr. Harrington. The report concluded that the grievor had paid himself a benefit to which he was not entitled and had started working on the file to make it appear as if the proper procedures had been followed.

[31] Mr. Harrington sent a letter by courier to the grievor, requesting that he attend a meeting on October 9, 2001. The grievor came with his bargaining agent's representative, Manuel Corriea. The grievor advised Mr. Harrington that he had been told by Jules Bastien that he was entitled to the survivor's benefit and the grievor also told Mr. Harrington about the harassment that he had suffered prior to Mr. Harrington's arrival. Mr. Corriea contended that the grievor had issued payments to himself in good faith. He added that there were no clear training tools in place and that, if the grievor had made a mistake, it should be considered as such. The grievor also said that he believed that someone else had worked on, or made changes to, the account file in order to get at him.

[32] Following the meeting, Mr. Harrington reviewed the situation and concluded that the grievor's version of the event did not hold up. Considering that the grievor was one of the most knowledgeable people on the question of the survivor's benefit, Mr. Harrington could find no mitigating circumstances. He noted that, when the grievor's spouse died in 1994, the grievor had someone else work on the payment of the death benefit. However, in the case of the survivor's benefit, no one but the grievor worked on this account. The witness saw the contents of the grievor's file, which he kept at his home, and noted that this file was sharply different from other files that he had seen. It contained documentation that had nothing to do with the account and a number of letters used for the settlement of claims. The witness said that there were

two possible explanations for this. Either someone was preparing a training course or someone was trying to falsify the file.

[33] Mr. Harrington then gave his views about the harassment against the grievor. He said that he was aware of the allegations only by hearsay and added that other people in the office had talked about the harassment.

[34] Mr. Harrington indicated that, in light of the situation, he had a number of concerns. Based on Mr. Harrington's understanding, the grievor had been the subject of a fair amount of disciplinary action in the past with regard to his effort at work and his attitude. Mr. Harrington was also aware that personal circumstances outside the office may have been at play inside the office. The employees in the area had worked together for a long time and socialized outside the office. However, the witness had made a decision when he arrived that he would start with a clean slate and would base his judgments on his own experience. After reviewing the situation with the director of Staff Relations, the witness came to the conclusion that he would recommend terminating the grievor for breach of trust. He believed that the grievor had taken advantage of the situation and had stolen money and that he could not trust the grievor not to try the same thing again in the future.

[35] In cross-examination, Mr. Harrington acknowledged that there were a considerable number of CR-05 positions in HRSDC and in the National Capital Region. The witness was questioned about the disciplinary actions against the grievor to which he had referred in examination-in-chief. When asked whether the grievor had been suspended at any time prior to 2001, he replied that he did not know whether the grievor had ever been suspended. At that point, the employer acknowledged that the grievor had not been subject to any disciplinary action during his career. With regard to performance, the witness indicated that the grievor's supervisor had initially reported a minor performance problem but that, by 1998, an improvement had been noted.

[36] There were five different control processes put in place by the witness to minimize the risks involved in the NIBS: there were separate accounting systems that would not allow an analyst to write his own cheques; a different analyst would handle the conversion to the legacy system using Cognos software to check for anomalies, random audits would be conducted and a built-in tracking system was in place.

[37] Questioned about whether the grievor would have known that his case would turn up, Mr. Harrington replied that he had checked with a technical expert, who indicated that, if it did not turn up on random testing, it would turn up only at conversion time. With the backlog, the grievor would likely have retired by that time. It was unlikely that, by that time, a relationship could be established between the coding identifying the grievor and the beneficiary of the survivor's benefit. The witness acknowledged that the grievor did not attempt to conceal his identity and used his own code to process the benefit.

[38] Mr. Harrington confirmed that the grievor had immediately admitted that he had authorized the payment of the survivor's benefit to himself and that he believed that he was entitled to it. The witness confirmed that no fabricated documents were found in the file that had been in the grievor's possession. The witness indicated that he believed having given the grievor a copy of the investigation report prior to their meeting.

[39] Mr. Harrington did not try to find the grievor another position, as he considered the breach of trust too serious.

[40] In re-examination, Mr. Harrington said that he had taken the advice of the director of Staff Relations, who had 25 years of experience, when he decided not to look for alternative employment for the grievor. He concluded by saying that he was shocked by the turn of events.

[41] The second witness for the employer was Claude Jacques, who joined the department on April 2, 2001 as a senior investigator in the Special Investigation Unit in the SIER. Prior to his employment with HRSDC, he had been a member of the Royal Canadian Mounted Police (RCMP) for 25 years. He spent his last six years in the RCMP as a member of the Commercial Crime Section, located in Ottawa. His role in HRSDC was to investigate employee wrongdoing and questionable dealings by companies that dealt with the department.

[42] Mr. Jacques attended a meeting on September 13, 2001. Also present at that meeting were Mr. Harrington, Phil Publicover, Staff Relation Advisor, Paul Séguin, Associate Director, SIER, Jeannette Séguin, Manager, Investigation & Prevention, Program Integrity and Quality Services and Rod Kline, Director, Program Integrity and Quality Services, Income Security Programs. The purpose of the meeting was to

discuss the conduct of the investigation of the grievor. Preliminary indications were that the grievor had received a lump sum of $22,000 earlier that year and was receiving $325 monthly, to which he was not entitled.

[43] Mr. Jacques believed that it was important to review the account file and requested a second conversation with Mr. Harrington. Mr. Harrington conducted a search for the file. On September 17, 2001, Mr. Harrington reported that, despite two extensive searches, the file could not be found.

[44] On September 19, 2001, Mr. Jacques met with Ms. Séguin and Mr. Harrington. Ms. Séguin and Mr. Harrington provided Mr. Jacques with printouts of computer screens for the file tracking system. One of these screens caught his attention. The file had been charged out by Mr. Bastien. The witness interviewed Mr. Bastien, who could not recall why he would have charged out the file or where the file could be located.

[45] Mr. Jacques interviewed the grievor on September 26, 2001. The grievor declined the offer to have a bargaining agent's representative present. During the interview, the grievor did not deny that he was receiving the survivor's benefit and admitted to having received the lump sum payment. He indicated that he was entitled to this money. The grievor stated that he was the one who input the information into the legacy system. He had made all the adjustments and calculations. He did so because he did not want anyone from the office to know that his same-sex partner had passed away and he did not want his co-workers to know of his sexual orientation. The grievor, without hesitation, indicated that the file was at his residence.

[46] Mr. Jacques asked the grievor if he knew that he was not entitled to the survivor's benefit, because his same-sex partner had passed away in 1994. In response, the grievor indicated that, following the enactment of the *MOBA*, a survivor's benefit could be paid in cases of same-sex relationships and that his name was on a list of special cases that allowed him to be paid retroactively to 1994.

[47] When Mr. Jacques told the grievor that he was in possession of that list of special cases, the grievor became agitated and reiterated that he was entitled to the survivor's benefit. The grievor said that he had brought the matter up with some of his colleagues, namely, Mr. Bastien, and that they shared the view that the grievor was entitled to the survivor's benefit.

[48] After the interview, Mr. Jacques drove the grievor to the grievor's home to retrieve the file. The grievor first gave him a package and came back with a second set of documents. Both sets of documents were presented in evidence.

[49] Mr. Jacques interviewed Mr. Bastien, who acknowledged speaking with the grievor about the survivor's benefit on a number of occasions. However, Mr. Bastien said to the witness that he had told the grievor that he did not qualify for the survivor's benefit and was not entitled to the funds.

[50] Mr. Jacques interviewed Sharen Dickson, Manager, NIBS, who was the person responsible for the list of special cases for same-sex partners. The witness asked her if the grievor's name appeared on that list. He testified that she categorically denied it. He also indicated that she had reviewed the documents that the witness had retrieved from the grievor's home and considered that they were not of the type found in a special case file.

[51] Following this last meeting, Mr. Jacques prepared his report and sent it to senior management. He also prepared a package, which was sent to the RCMP for criminal investigation. The witness said that he believed that a criminal offence had occurred.

[52] In cross-examination, Mr. Jacques reiterated that, when he met with the grievor, he had asked him if he wanted a bargaining agent's representative to be present. The grievor asked Mr. Jacques if he had the mandate to recommend discharge. The witness replied that the guidelines suggesting that investigators not provide recommendations were not yet in place at the time when he wrote his report.

[53] The grievor testified that he started in the Public Service on October 6, 1975, as a control clerk in a CR-02 position at Health and Social Assistance Canada. He was promoted to a CR-04 position in 1981 as a pension benefit analyst. The department subsequently became HRSDC. In 1987, the position was reclassified as a CR-05 position and, following a competition, he was appointed at that level. From July 1998 to July 2000, he acted as a training officer, at the PM-02 group and level, to train new analysts who were joining the NIBS, Income Security Program section. In July 2000, he returned to his substantive position as a pension benefit analyst. In October of 2000, he received a plaque for his 25 years of service in the Government of Canada.

[54] The grievor had been in a same-sex relationship since 1977. In 1992, his spouse was diagnosed with Acquired Immunodeficiency Syndrome (AIDS) and became ill. In 1993, his spouse applied for disability benefit. In 1994, when the grievor's father died, the grievor's spouse was already in palliative care. The grievor looked after his spouse until he died at home in November 1994. It was only after his spouse's death that the grievor was tested to determine if he was also infected. The test result indicated that the grievor was in good health.

[55] Following the death of his spouse, the grievor applied for the death benefit and the survivor's benefit. The death benefit application was accepted; however, the request for the survivor's benefit was denied. The grounds for the denial, communicated to him on November 21, 1994 (Exhibits E-5, E-29 and E-30), were that the grievor and his spouse were of the same sex. The grievor claims to have sent a letter of appeal, which was unanswered. He did not follow up on this letter.

[56] During these years, the grievor's spouse's condition required considerable attention and, as a result, his work deteriorated. The grievor was often away from work, he suffered from depression and had to cope with colleagues at work asking him if he also had AIDS. He noticed that someone had looked in his spouse's disability benefit file. Because he had been frequently absent, he was forced to sign in every morning and his performance at work was closely monitored.

[57] In 1997, Mr. Harrington was appointed as the new director of NIBS, Central Operations. His arrival marked an improvement in the work atmosphere. The grievor was the subject of less scrutiny and his performance improved.

[58] The grievor indicated that, in 1999, the situation evolved with regard to the payment of the survivor's benefit to same-sex spouses. The NIBS started to receive cases that had gone to the Pension Appeal Board, with instructions to start payment. The *MOBA*, which amended the definition of spouse in a number of federal statutes, came into effect in July 2000. From that time on, new requests for the survivor's benefit were accepted. As for the requests that had been held pending, they were referred to as being subject to "rule 5". The grievor took it upon himself to locate his spouse's file and, after some research, found it. He asked Mr. Bastien and another colleague, if he was entitled to the survivor's benefit and he recalled being told by Mr. Bastien that he definitely was entitled to the retroactive payments in application of rule 5. The grievor's case was pending, as were the others. He recalls the case of a

colleague, whose spouse had died in 1992. This colleague, who had written a letter of appeal, was also waiting to receive the survivor's benefit and eventually did so in 2001.

[59] The grievor then added that he took the calculations that had been done in 1999 and made some additional calculations and then prepared the forms to process the request. The grievor acknowledged doing the data capture and receiving, from that time on, the survivor's benefit.

[60] The grievor indicated that he had acted in that way because he had suffered harassment in the workplace. He did not want to give his colleagues something else to use against him. The grievor indicated that he began being the victim of harassment in 1993 and that he had decided to start building a file by 1997. In 1998, he received threats and, at that point, he brought the matter to Mr. Harrington's attention. Following his complaint, he became aware that the term employment of the author of the threats had not been renewed. This did not really help, however, as he perceived that a "gang had formed against me".

[61] He recognizes today that his actions were a mistake and that he should have approached management with his request for the survivor's benefit rather than processing it himself. He indicated that he had worked very hard to accumulate his years of service.

[62] The grievor further testified that, on September 26, 2001, he was at his desk when Mr. Harrington asked him to follow him to a meeting. Mr. Harrington brought him to a boardroom where Mr. Jacques and an assistant were waiting. A tape recorder had been placed on the table. The grievor indicates that he was questioned but cannot specifically recall the questions that were put to him. He does recall being asked about his survivor's benefit, being showed a list and asked why his name was not on it. He said that he did not know how to reply. The grievor was adamant that at no time was he offered the opportunity to have a bargaining agent's representative present. When he was asked where the file was, the grievor replied that it was at his home. The grievor went to his home, accompanied by Mr. Jacques, and gave him back the file. He then realized that he still had a folder in his possession and promptly took that second folder to Mr. Jacques, who had not yet left the premises.

[63] When questioned on the content of the two folders that had been submitted in evidence (Exhibits E-5 and E-6), the grievor said that he sometimes worked from home

in the evenings and on weekends since Mr. Harrington's arrival. He said that he had brought his spouse's file home, as there was an error in the calculation of the survivor's benefit. When asked to explain what error had needed correction, the grievor indicated that he had brought the file home in September 2001 but, because of the strike of the Public Service Alliance of Canada, he did not have a chance to make the correction. The survivor's benefit should have been reduced because of the age factor. The grievor testified that the calculations in relation to the file were complicated and that he had to do considerable work to ensure that all contributions were properly considered. As for the contents of the second folder given to the investigator, the grievor said that, as a training officer, he had kept documents. He had been asked to keep a list containing the SIN of claimants in same-sex relationships. The grievor was also questioned with regard to a copy of a transaction report (Exhibit E-6, page 5). The grievor indicated that this was the transaction dated February 22, 2001, which started the survivor's benefit payments. The transaction had been done using his identification code.

[64] The grievor testified that he received a call at home on October 4, 2001, to let him know that a document would be sent to his home. The letter that he received was signed by Mr. Harrington, who required him to attend a disciplinary meeting on October 9, 2001. Two bargaining agent's representatives accompanied the grievor at this meeting. Mr. Harrington was accompanied by Mr. Publicover. The grievor recalls Mr. Harrington questioning him, but does not specifically remember the questions. He recalls explaining to Mr. Harrington what had happened. He was told to go home and wait for the outcome. The grievor indicated that he was on the phone with Mr. Harrington when the letter of discharge (Exhibit G-2) was delivered to his home.

[65] The grievor testified that he first saw the investigation report when the lawyer representing him in the criminal proceedings against him received a copy as part of the RCMP files in 2002. When asked about the criminal proceedings, the grievor indicated that charges were laid in December 2002 and he was to appear in court in January 2003. Eventually, all charges were stayed at the request of the Crown in 2004 (Exhibit G-3).

[66] The grievor went on to testify about the effect that the discharge had had on his life. The employer objected to the introduction of this evidence on the basis of

relevance. The parties agreed that I would hear the evidence and rule on its admissibility in my decision.

[67] The grievor testified that, after receiving the letter of discharge on October 12, 2001, his life became a nightmare. He lost his salary, he lost his Registered Retirement Savings Plan and he lost the money that he needed to survive. At that time, he did not know if criminal charges would be laid against him. He had a major nervous breakdown. He lost his friends at work, he lost the friendship of his family members and he lost his apartment. He eventually applied for Social Assistance. He developed drug and alcohol problems and attempted suicide on a number of times. He tried to explain to people what he had lost and all the years of hard work. In 2002, he had to look for a lawyer who would take his criminal case. He found a part-time job in a hotel at half the rate of pay that he had earned prior to his discharge. In January 2004, he lost his part-time job and collected Employment Insurance. He moved from his brother's place to live at Mr. Bastien's house. He is now living from Social Assistance.

[68] The grievor has been in receipt of the survivor's benefit since August 2005. He received a call from D. Osborne, who had been assigned to work on his file. She had calculated an entitlement of $10,000. The following day, Ms. Osborne called back, indicating that the grievor would have to complete a new request dated December 20, 2003. He was told that this needed to be done if he was going to receive the survivor's benefit from 2003 to 2005. The grievor refused to backdate his signature. Ms. Osborne then said that this would limit the retroactive period to one year. He is currently receiving the survivor's benefit of $71 per month.

[69] The grievor indicated that his actions were a mistake. He should have had confidence and submitted his case to the employer. He was trying to protect his privacy, as a result of the harassment that he had experienced in the '90s. Today, he regrets his actions and apologizes. He does not believe that the situation warrants a discharge and would have accepted a transfer. He worked considerable overtime hours and had agreed to train new employees.

[70] In cross-examination, the grievor testified that it was Ms. Dickson who had chosen him to act as a training officer and not Mr. Harrington; the grievor had a good relationship with her. Asked if he knew that there were statutory time limits to file an application for the survivor's benefit, the grievor replied that they had received

instructions to make payments to those who had made request prior to July 2000. Asked more specifically about the January 1, 1998 limit, he replied that payments were made to survivors that had applied prior to that date. While there were initially 40 applications, the number had climbed to 57 by the time that the grievor was discharged.

[71] Questioned about the file that he had brought home, the grievor acknowledged that he kept documents on same-sex relationship cases and said that it was in September 2001 that he brought his spouse's file home. Since 1994, he had always wanted the survivor's benefit and had always believed that the refusal was discriminatory.

Summary of the arguments

For the Employer

[72] The employer argued that this case was important in terms of public trust and that it involved the theft of more than $20,000. Even a good employee can commit an act that warrants termination.

[73] It is clear that the employer acted appropriately. It was considerate of the grievor's privacy and acted in good faith and with as much respect as it could. The employer recognizes that termination is the capital punishment of labour relations. The employer agrees that the grievor was a good employee, with a clear disciplinary record and 26 years of service. However, the employer is of the view that, in spite of his good and lengthy service record, the grievor's action could only result in termination. While the employer may be very sympathetic to the impact that the termination had on the grievor's life, this does not alter the fact that termination was warranted in light of the grievor's action.

[74] The fact is that the grievor accepted a position of trust in NIBS. This group was put in place to deal with exceptional cases. It relied on a high degree of ethics and trustworthiness on the part of the employees who had to work in the unit. However, the grievor committed fraud and theft. It has been often said that he who steals from the Crown cannot work for it. According to the employer, this was not a simple one-time incident; it occurred monthly. The grievor authorized payments to himself until he was caught.

[75] The employer indicated that the grievor, in his testimony, underlined a number of issues explaining his actions; the grievor alleged that he could not turn to anyone in his office, as he wanted to keep his life private. The employer argued that this was not credible. The grievor had a number of friends in the office, there was no evidence of negative relations of any kind and there was no reason why he could not go to Mr. Harrington. The employer added that, if the grievor had privacy concerns, then, surely, the answer was not to enter the legacy system himself and ensure himself a survivor's benefit.

[76] With regard to the issue of harassment, the employer is of the view that the evidence indicated abhorrent behaviour by another employee. However, this problem cannot be used as a defense because the grievor never brought these e-mails or activities to the attention of the employer. This was not a poisoned workplace where the grievor could not approach the employer or his colleagues with his allegations.

[77] The employer indicated that it must be kept in mind that there is a code of common sense and that not all rules need to be written down. He added that, for an employee working in an office like NIBS, where there is a cheque-writing machine that is not governed by any particular rules, it is common sense that an individual cannot on his own volition award himself benefits, and a benefit to which he is not entitled.

[78] The employer further argued that there was another important issue. The grievor was a subject-matter expert, a senior employee in the group. He knew or ought to have known that he was not entitled to benefits. Under the *MOBA*, it was clear as day that an individual whose same-sex partner had died prior to January 1, 1998 was not entitled to the survivor's benefit. It is important to distinguish between the Act in force at the time that the grievor acted and the later review of the law.

[79] The employer indicated that a class action lawsuit was underway challenging the retroactivity of the legislation. There is no question that there are many people who believed that the law was wrong and unconstitutional. However, the employer argued that this issue was not relevant to this case. Public Service employees cannot ignore laws with which they do not agree, particularly when it is for their own personal gain. The employer added that, even if the Supreme Court of Canada finds the law unconstitutional, this does not give the grievor the right to ignore the law.

[80] The employer took the position that the grievor knew or ought to have known that he was not entitled to the survivor's benefit. The grievor chose to ignore the law because he felt that the law was not right.

[81] The employer addressed the issue of whether it had considered options other than termination. Referring to a statement from Mr. Harrington, the employer indicated that the breach of trust was so serious that the grievor could not be trusted in any other position. The employer added that there is no legal obligation in disciplinary discharge cases to consider other employment and indicated that the reinstatement of an employee who had committed this type of fraud would shock the conscience of the public.

[82] The employer quoted from *Moore v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-23658 (1993) (QL), and argued that this was a similar case. In *Moore* (*supra*) a very experienced, well qualified and highly rated employee abused the Employment Insurance system thinking that she would not get caught. The adjudicator found in that case that the penalty was not too severe. The employer also quoted from *Zakoor v. Treasury Board (Revenue Canada – Customs & Excise),* PSSRB File No. 166-02-25882 (1994) (QL), and argued that this case was similar. The grievor was aware of the reason for his discharge and had an opportunity to make his case to the employer. The same arguments were considered by the employer. It also brought my attention to two cases that were, in its opinion, closely related; *Renouf v. Treasury Board (Revenue Canada, Taxation),* PSSRB File Nos. 166-02-27766 and 27865 (1998) (QL), and *King v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-25956 (1995) (QL). It also quoted from *Gannon v. Treasury Board (National Defence)*, 2002 PSSRB 32 and *Gannon v. Canada (Treasury Board),* 2004 FCA 417, where it was concluded that the employer was not responsible for instructing its employees on the fundamentals of good conduct or common sense. The employer argued that a reasonable person in similar circumstances with the experience of the grievor, as a training officer and a subject-matter expert, would not conduct himself as the grievor had. There was no justification for actions of this kind.

[83] On the question of the admissibility of post-termination evidence, the employer relied on *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 S.C.R. 1095. In that case, the Supreme Court of Canada ruled that post-termination evidence is admissible only if it helps to shed light on the reasonableness and appropriateness

of the dismissal under review at the time it was implemented. Once an adjudicator concludes that a decision to dismiss is justified, he cannot annul that decision on the sole ground that subsequent events render such an annulment fair and equitable. The employer argued that, in the present case, the profound impact that the termination had on the grievor is not relevant to determine whether just cause was establish at the time that the decision to terminate the grievor was made. The employer also drew my attention to *Casey v. Treasury Board (Public Works and Government Services Canada),* 2005 PSLRB 46, and *Funnell v. Treasury Board (Department of Justice*), PSSRB File No. 166-02-25762 (1995) (QL).

[84] Should I find the discharge not warranted, the employer argued that, in assessing damages, I should take into account the fact that the bargaining agent, on behalf of the grievor, had agreed that the delays in processing this case should not prejudice the employer.

For the grievor

[85] The grievor argued that there were a number of mitigating circumstances that support the position that termination was too severe a penalty in the circumstances. The grievor was a long-service employee of more than 26 years. He had started work just shy of his eighteenth birthday in 1975 and had worked for essentially the same department throughout these 26 years. The employer admitted that the grievor was a good employee with no disciplinary record. In the ’90s, the grievor went through a very difficult personal situation. For two years, he nursed and cared for his spouse, who succumbed to his illness in 1994. The grievor lived through 15 months of uncertainty until it was finally determined that he had not been physically affected by his spouse’s illness.

[86] The grievor added that in February 2001, after the passage of the *MOBA*, and following the settlement of a number of same-sex survivor’s benefit cases where the partner had died prior to January 1, 1998, the grievor believed that he was entitled to a surviving spouse’s pension. He calculated the amount and did the necessary paperwork to pay himself a surviving spouse’s pension, including retroactivity and ongoing payments.

[87] The grievor argued that he had admitted in his testimony that this was a mistake, an error in judgment. He admitted that he should have approached his

colleagues or his supervisor. The grievor explained why he did not do so, which was in order to protect his privacy. He pointed out that evidence was tendered with regard to the ongoing harassment to which he had been subjected at work. While the employer suggested that it was not a case of a poisonous work environment, the grievor said that it was a long way from being a good work environment. The grievor testified that he had been the victim of harassment before and after the arrival of Mr. Harrington. The grievor also testified that it was not the action of a single employee but of a group of employees, who had harassed him. While the explanations may not justify his actions, the grievor argued that it gave an idea of what he was going through at the time.

[88] The grievor pointed to the fact that, when confronted with his actions, he did not attempt to conceal them. He was upfront and honest. The evidence also showed that at no time did he try to conceal his identity in processing his payments. When asked where the file was, the grievor immediately informed the investigator that the file was at his home and he turned it over without delay.

[89] In light of all these mitigating factors, the grievor submitted that the termination was not justified.

[90] The grievor argued that the employer should have considered not only the impact of his action in determining the sanction but also the impact of the sanction itself on the grievor. In addition to the loss of wages, the grievor has lost future pension benefits and the possibility of a medical retirement. The grievor has worked hard for the Public Service and has worked a considerable amount of overtime. In light of these factors, the grievor expressed the view that the employer could and should have explored alternatives to termination.

[91] The grievor pointed out that Mr. Harrington had simply relied on the advice from Mr. Publicover that other options should not be pursued in light of the breach of trust. Mr. Harrington testified that there were hundreds of CR-05 positions in the National Capital Region. The grievor added that he could have been transferred to a less sensitive position or, alternatively, safeguards could have been put in place in order to prevent the recurrence of such a situation. In fact, Mr. Harrington testified that a new computer system was being installed that would require the signature of two individuals to authorize eligibility in exceptional cases. The grievor added that it was unfortunate that these options were not pursued.

[92] With regard to the disciplinary process in this case, the grievor asked me to consider two things. The grievor did not have the benefit of a bargaining agent's representative during the first meeting. While there was contradictory evidence on whether he was actually given the opportunity to have a bargaining agent's representative present, the fact remains that the grievor was not aware of the purpose of the meeting prior to attending the meeting. In spite of this, he answered frankly the questions put to him.

[93] The grievor added that, while he did have a bargaining agent's representative present at the second meeting, he did not have a copy of the investigation report and had only a limited ability to respond to the allegations. He also added that Mr. Jacques recommended termination in his report despite the fact that it was not in his mandate and that he was probably unfamiliar with employment law.

[94] The first case referred to the grievor was *Hislop v. Canada (Attorney General),* 246 D.L.R. (4th) 644 (Ont. C.A.), and *Hislop v. Canada (Attorney General),* [2005] S.C.C.A. No. 26 (QL). The grievor commented that there was no doubt that rights relating to same-sex benefits are evolving in the context of political action. The Supreme Court of Canada may well decide that he was entitled to his surviving spouse's pension retroactively and prospectively, but he could not do so himself.

[95] The grievor pointed out that there were a number of cases where an employee was reinstated despite a breach of trust. In *Douglas v. Treasury Board (Human Resources Development Canada),* 2004 PSSRB 60, a 20-year employee who falsified documents to obtain employment benefits for a third party and who suffered from a bipolar disorder exacerbated by her work was reinstated. As for *Moore* (*supr*a) and *Zakoor* (*supra*), the employees did not have lengthy service with their employer.

[96] The grievor argued that, although the payments were made every month, the offence was not repetitive in nature. This was an isolated incident with repeated effects.

[97] The grievor submitted that, in light of the mitigating factors and the options available to the employer, his termination was not justified.

[98] As for the perception of the public, the grievor argued that is was legally irrelevant as the adjudicator was making the decision, not the general public. He

pointed out that, while the employer argued that I should keep the proceedings before the Gomery Commission in mind when ruling in the present situation, the employer also argued that post-termination evidence can be used only to determine the appropriateness and reasonableness of the termination. The grievor submitted that post-termination evidence can be used to determine the appropriate sanction, should the adjudicator decide that termination was not appropriate. In support of his argument, the grievor submitted *Re Natrel Inc. v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 674*, 134 L.A.C. (4th) 142.

[99] The grievor summarized his arguments by indicating that he agrees that some sanction is appropriate and that it is up to the adjudicator to determine what that sanction should be. The grievor argued that he had been sufficiently punished, in that the consequences of termination had been devastating for him. The grievor has lost his savings, his assets, his friends and his family. His health has been affected, he has been living from social assistance and has attempted to take his own life. He has learned his lesson. This was a one-time indiscretion. The termination is unjustified. The grievor asked that he be reinstated in his own position and termination replaced with a lesser penalty.

Reply

[100] In reply, the employer indicated that *Natrel* (*supra*) was clearly contradicted by *Cie minière Québec Cartier* (*supra*) and urged me to follow the jurisprudence of adjudicators under the former *Act*, which had followed the approach taken by *Cie minière Québec Cartier* (*supra*). The employer also underlined the fact that the death of the grievor's spouse from AIDS and the uncertainty about the grievor's own health were events that took place in the first part of the '90s and were rather far removed from the events in 2001.

[101] The employer also added that, while there may have been settlements under the grievor's circumstances, this cannot lead one to conclude that the grievor was entitled to the survivor's benefit. How the grievor felt about the situation is irrelevant. It is not because some settlements were made that a person has the right to give himself that benefit.

[102] On the issue of the presence of a bargaining agent's representative at the initial investigation meeting, the employer argued that the evidence was contradictory and

that, in any event, no grievance had been submitted on this issue. As for the appropriateness of considering alternative employment for the grievor, the employer argued that this places an undue onus on the employer. The employer should not be expected to put locks on every door.

Reasons

[103] As in any termination case for disciplinary reasons, the first issue is whether, on a balance of probabilities, the grievor engaged in the actions that the employer claims he did. In this case, as noted in the termination letter, the employer claims that the grievor has obtained a retroactive payment of $22,649.71 and a monthly payment of $325.22 in CPP benefits to which he was not entitled. The employer argued before me that this was essentially a case of theft for which the only outcome should be termination.

[104] The grievor, while acknowledging that he did process these payments himself and should not have done so, maintains that he was entitled to the payment of a survivor's benefit. He does recognize that there was an error in calculating the benefit, but claims that he was in the process of correcting this error when the employer became aware of his actions and terminated his employment.

[105] The evidence before me, although conclusive as to the fact that the grievor did pay himself a benefit, is less convincing as to whether this payment was fraudulent. The employer's evidence, with regard to the fraud, can be summarized in the following fashion. Mr. Harrington testified that, after observing from a report that the grievor was receiving CPP payments, requested that an investigation be held. On the basis of the conclusions of the investigator contained in his report and after hearing the grievor's explanation, Mr. Harrington recommended to discharge the grievor.

[106] The investigator, who was called upon to testify, indicated that, after being told by the grievor that he, the grievor, was entitled to the survivor's benefit, he checked this with a Ms. Dickson, Manager at the NIBS, who was responsible for special cases. The investigator reported that she had told him that the grievor's name did not appear on the list of special cases and that the file presented to her bore no resemblance to the special case files that she had seen. The investigator had also been told by the grievor that a colleague, namely, Mr. Bastien, had told the grievor that the grievor was entitled to the survivor's benefit. The investigator testified that he interviewed this

colleague, who essentially denied sharing the grievor's view on the survivor's benefit. None of the individuals who were interviewed by the investigator was called by the employer to testify at this hearing. I am left with hearsay evidence on the crucial point, which is whether or not the grievor was entitled to those payments and whether a fraud had occurred.

[107] In his initial argument, the employer made the case that these payments were contrary to the legislation in force at the time. While I agree that there was no provision in the legislation to provide payments to individuals whose same-sex spouse had died prior to January 1998, there was, without doubt, clear evidence that a number of individuals, who had made a request for the survivor's benefit prior to January 1998 were receiving such benefits. Furthermore, the grievor had made a request in 1994 to obtain such benefits. That request was denied on the same basis as all the other requests, which eventually resulted in the survivor's benefit being obtained. In 1994, individuals in same-sex relationships were not entitled to the survivor's benefit. It is only after 1999, as the evidence revealed, that requests were approved in special cases for those who had filed claims prior to 1998.

[108] The grievor, in his testimony, maintained that he was entitled to the survivor's benefit. He also indicated that, while initially 40 special survivor's benefit cases had been approved, the number had grown to 57 by the time he was discharged. The grievor acknowledges that he miscalculated the benefits payable to him. This leaves me with a few unanswered questions: had the criteria been relaxed, how did his personal circumstance compare to the other cases and was the miscalculation deliberate? However, I can only speculate on the answers.

[109] The employer also argued that the contents of the file and the documents remitted by the grievor to the investigator indicated that the grievor was attempting to conceal his actions. After reviewing the documentary evidence presented to me and considering the explanation of the grievor as to the reason for the types of documents found in the file, I am not convinced, on a balance of probabilities, that the grievor was concealing his actions. The documents are quite varied and the explanation provided by the grievor, that they had been collected for training purposes, is acceptable.

[110] The grievor acknowledges that he should not have initiated the payment himself and was quite forthright in responding to the employer when questioned. However, the grievor's explanation for not having gone through proper channels is not wholly

convincing. The grievor maintains that he processed the payments himself in reaction to the harassment to which he had been subjected in recent years. He wanted to keep his life private for fear of continued harassment. However, by his own admission, he did not hesitate to discuss his situation with two of his colleagues.

[111] The termination of an employee is the most serious penalty that can be imposed for misconduct. I expect an employer to establish, on a balance of probabilities, that the grievor engaged in the actions that were the basis for the discharge. In this case, the employer asked me to conclude that the grievor had defrauded the employer. Unfortunately for the employer, one piece of the puzzle is missing. Aside from the hearsay evidence provided by the investigator, there is no evidence contradicting the grievor's testimony that he was entitled to the survivor's benefit that he paid to himself. I am asked to accept that it is sufficient for an employer to submit hearsay evidence in support of a discharge. I am simply unable to agree to this proposition. This is even more true when no reasons are given or explanations offered as to why a person who could have testified did not, that is, Ms. Dickson.

[112] Therefore, I am left with an employee who processed a claim for his own benefit. No evidence was tendered to show that a directive had been issued specifying in no uncertain terms that an employee should not process his own benefits claim. Although I can accept the employer's contention that there should be no need to give such a common sense directive, it does affect my perception of the situation and the gravity of the grievor's conduct. Having regard to the above-mentioned considerations, I am of the view that the penalty of discharge is too severe in the circumstances established before me and I am ordering the grievor reinstated. However, there is no doubt in my mind that the grievor's conduct is unacceptable and warrants severe discipline. For that reason, and considering the history of these proceedings, I am ordering that the grievor's reinstatement be as of the date of this decision, with no back pay.

[113] I was asked by the grievor to consider the effects that the severity of the penalty initially imposed on him had on his life. The employer objected to the introduction of this evidence on the grounds of relevance. Although it may be appropriate in some cases to admit such evidence, after reviewing the situation here, I agree with the employer's objection and am not prepared to consider, in the present case, the effect of the termination on the grievor. Had the employer established its case of fraud on a

balance of probabilities, I would have had no hesitation in concluding that termination was the appropriate discipline, regardless of the impact on the grievor's life. Furthermore, even if I had found this evidence to be relevant, I would still have reached the same conclusion regarding the appropriate discipline in the present case.

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

(The Order appears on the next page)

Order

[115] I order that the grievor be reinstated as of the date of this decision, with no back pay.

February 27, 2006.

Georges Nadeau,
adjudicator