Date: 20060119

File: 166-02-30200

Citation: 2006 PSLRB 4

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

HENRI BÉDIRIAN

Grievor

and

TREASURY BOARD
(Department of Justice)

Employer

Indexed as
Bédirian v. Treasury Board (Department of Justice)

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

REASONS FOR DECISION

Before: Sylvie Matteau, adjudicator

For the Grievor: Maryse Lepage, counsel

For the Employer: Michel LeFrançois, counsel

Heard at Montréal, Quebec,
February 7 to 11, May 30 to June 2, and June 6 to 10, 2005.
(P.S.L.R.B. Translation)

I. Grievance referred to adjudication

[1] This decision has to do with the claim for damages made by the grievor, Henri Bédirian, as part of his grievance dated August 24, 2000. In that grievance, he contests the disciplinary measure imposed by the employer on July 28, 2000. That grievance was heard and determined in part by Adjudicator Anne E. Bertrand ("Adjudicator Bertrand"). In decision 2002 PSSRB 89, Adjudicator Bertrand allowed the grievance and set aside the disciplinary measure. However, she did not retain jurisdiction over the issue of the damages claimed at that time by the grievor.

[2] The parties each applied for judicial review of Adjudicator Bertrand's 2002 decision: the grievor requested that Adjudicator Bertrand exercise her jurisdiction fully with regard to his claim for damages, while the employer contested the reasons for the decision. The employer subsequently withdrew its application for judicial review. The Federal Court found in favour of the grievor (2004 FC 566). The matter was therefore referred to a grievance adjudicator, who was to exercise that person's jurisdiction fully. The Federal Court found as follows:

> *[1] This is an application for judicial review of a decision by Anne E. Bertrand, adjudicator and member of the Public Service Staff Relations Board of Canada (the adjudicator), in which she refused to retain jurisdiction with regard to the claims and the damages in the applicant's grievance.*
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> . . .
>
> *[22] In my opinion, the respondent's claim that the jurisdiction of the adjudicator under the PSSRA extends only to ordering monetary compensation for the loss of salary and benefits caused by the suspension cannot succeed.*
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> . . .
>
> *[24] Certainly, as with any claim for damages, the applicant will have the burden to show, on a balance of probabilities, that the respondent was at fault or acted negligently or in bad faith.*
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> *[25] In this case, the applicant is looking for a forum in which he can adduce evidence of his employer's fault and the moral prejudice resulting therefrom. The civil law, the common law, and Canadian caselaw provide limitations on the award of damages which will have to be observed by the adjudicator who will determine the merits of this claim.*
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> . . .

> *[28] Consequently, . . . the matter is referred . . . so that the adjudicator fully exercises his or her jurisdiction, that the hearing on the claims and the award of damages is held and that this point is adjudicated. Without costs.*
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> . . .

[3] At a pre-hearing conference held on October 6, 2004, I informed the parties that I was acting as adjudicator. The parties then agreed on the procedure and dates of the hearing.

[4] On October 15, 2004, in accordance with the terms agreed upon at the pre-hearing conference, the grievor amended his grievance. This amendment is not contested by the employer. It has to do only with the valuation of the alleged damages and the detailed breakdown of the amount claimed. The employer responded to it on October 22, 2004; the grievor filed his reply on November 9, 2004. The order now sought by the grievor reads as follows:

> [Translation]
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> . . .
>
> 6. ***Order*** *full reimbursement of the legal and other costs that I was obliged to incur in this matter;*
>
> 7. ***Order*** *that the Department of Justice send me a letter of apology;*
>
> 8. ***Order*** *that I be paid in damages, now estimated at* ***$1,750,000.00****, all with interest, broken down as follows:*
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> | | |
> |---|---|
> | *- Harm to reputation* | ***: $250,000.00*** |
> | *- Stress, anxiety, trouble and inconvenience, loss of enjoyment of life* | ***: $350,000.00*** |
> | *- Psychological harm* | ***: $75,000.00*** |
> | *- Permanent harm* | ***: $50,000.00*** *(to be completed)* |
> | *- Interruption of career* | ***: $100,000.00*** |
> | *- Loss of income, wages and other pensionable benefits (shortfall)* | ***: $600,000.00*** *(to be completed)* |

- *Other miscellaneous costs (financing costs, valuation costs, professional fees, etc.)* : ***$75,000.00***

- *Exemplary damages* : ***$250,000.00***

9. ***Make*** *any other order in order to protect my rights.*

. . .

[The underlined passages are underlined in the original and indicate the amendments.]

[5] The employer maintained that it acted at all times in a responsible and reasonable manner in the circumstances and that the claim is not justified in any way. In a subsidiary argument, the employer alleged that the claim is greatly exaggerated, to say the least. It also argued that the grievor was amply compensated by the actions taken by the employer following Adjudicator Bertrand's decision.

[6] Contrary to usual practice, the hearing before Adjudicator Bertrand was recorded. It was therefore agreed that the full transcript of the testimony would be adduced if the parties referred to any excerpt from it in completing their evidence on an issue before me. This procedure avoided reiterating that case in its entirety. Numerous volumes of transcripts, representing 19 days of hearings before Adjudicator Bertrand, were therefore adduced. The following transcripts of testimony were adduced before me:

1. examination and cross-examination of Morris Rosenberg (March 26, 2001);

2. Exhibit "J" referred to in the affidavit of Lorraine Blondin (witness: C. Letellier de St-Just) (March 27, 2001);

3. Exhibit "K" referred to in the affidavit of Lorraine Blondin (witnesses: C. Letellier de St-Just, P. O'Bomsawin) (March 28, 2001);

4. testimony by Mario Dion, Anne-Marie Lévesque, Aziz Saheb-Ettaba (March 29, 2001);

5. examination of Mathilde Gravelle-Bazinet (March 30, 2001);

6. examination of Mathilde Gravelle-Bazinet (June 26, 2001);

7. cross-examination of Mathilde Gravelle-Bazinet (June 27, 2001);

8. cross-examination and re-examination of Mathilde Gravelle-Bazinet (June 28, 2001);

9. examination, cross-examination and re-examination of Jean-Maurice Cantin (June 28, 2001);

10. examination, cross-examination and re-examination of France Dufresne (August 15, 2001);

11. examination and cross-examination of Henri Bédirian (August 22, 2001);

12. cross-examination of Henri Bédirian (August 22, 2001);

13. Exhibit "P" referred to in the affidavit of Daniel Massé (witnesses: A. Côté, C. Letellier de St-Just) (August 28, 2001).

[7] It is understood that my role is not to review Adjudicator Bertrand's evaluation of the evidence or the conclusions she reached as a result. This unusual situation caused some difficulties at the hearing, the parties routinely objecting to any evidence previously adduced at the first hearing. As well, I took under advisement an objection concerning part of the testimony by Mario Dion, then Associate Deputy Minister responsible for civil law and corporate management ("Associate Deputy Minister Dion").

[8] The grievor called as witnesses a psychiatrist and an actuary acknowledged to be experts, his attending physician, and the Deputy Minister of Justice who authorized the disciplinary measure. He also testified himself for more than a day. The employer called as witnesses two human resources experts, Associate Deputy Minister Dion, and a psychiatrist also acknowledged to be an expert. The medical assessments and ongoing notes of the grievor's attending physician were filed and sealed in order to protect their confidentiality.

[9] 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*, I retain jurisdiction over the referral of this grievance to adjudication, on which I must rule in accordance with the *Public Service Staff Relations Act* ("the former *Act*").

II. Background

[10] The grievor is a lawyer with the Department of Justice (group and level LA-3A) and a manager at the Quebec Regional Office (QRO). He has been the Director of Tax Litigation since 1996. At the time the events occurred, he was a career public servant aspiring to the position of Director of the QRO, which had become vacant in January 2000.

[11] The Department of Justice adopted a workplace harassment prevention policy in 1993 and created the Federal Office for Conflict Resolution ("the Office") in 1996. The Office's Executive Director, Senior Advisor Mathilde Gravelle-Bazinet ("the Senior Advisor") reported directly to the Deputy Minister of Justice until 2002. She then reported to Associate Deputy Minister Collette. At the time of the present hearing, the Senior Advisor had retired. The parties did not call her as a witness.

[12] The QRO was the subject of a 1998 workplace assessment (Exhibit E-1). That assessment noted various significant problems and dissatisfactions among the employees, including perceived discrimination against the female lawyers by the senior male lawyers. Follow-up was carried out and mechanisms were set up. A workplace harassment committee was struck; the grievor sat on this committee.

[13] On February 2, 2000, the Senior Advisor informed the grievor by telephone that a young female lawyer whom he was supervising wished to file a complaint of sexual harassment against him. Although two female lawyers had been involved in the events concerned, only one filed a complaint. She blamed the grievor for [translation] "improper and inappropriate comments and propositions" (Exhibit E-39). However, both female lawyers participated in the investigation into the complaint and in the subsequent adjudication of the grievor's grievance.

[14] An investigation was therefore initiated immediately under the auspices of the Office and the Senior Advisor. She appointed two investigators, Jean-Maurice Cantin and Carole Piette. At the conclusion of this investigation, on June 28, 2000, Deputy Minister Morris Rosenberg ("the Deputy Minister") suspended the grievor for a period of three days and relieved him of his position as Director of Tax Litigation at the QRO and of all staff management responsibilities. However, the grievor retained his LA-3A classification level.

[15] The grievor then lodged his grievance against this disciplinary measure. The hearing before Adjudicator Bertrand lasted for 19 days and extended from March 26 to October 26, 2001. At that hearing, the parties called 25 witnesses, including the Senior Advisor, who testified for nearly four days. The grievor stated that, at that hearing, he uncovered and noted numerous faults committed by the employer and its representatives in this matter.

[16] At the conclusion of the hearing before her, Adjudicator Bertrand found as follows:

> . . .
>
> *[412] . . . that the sexual harassment allegations brought against Henri Bédirian are unfounded, aside from the minor and isolated incident in which the complainant made inappropriate comments during the social get-together. For such comments, a disciplinary measure in the form of a reprimand would have been appropriate at the time when the incident took place. However, in light of all the circumstances of this case, the complainant should not be subject to any penalties since, in my view, the discipline to which he has been subjected has been more severe than he deserved.*
>
> *[413] Having so decided, I allow the complainant's grievance, I set aside the employer's decision dated July 28, 2000 and I order as follows: . . .*
>
> . . .

[17] Adjudicator Bertrand ordered that the grievor's three days of suspension be reimbursed to him. She also ordered that he be reinstated in his management position, and that all references to the disciplinary measure set aside be removed from his file. However, she did not retain jurisdiction over the issue of damages, concluding as follows:

> *[414] I do not believe it is appropriate for me to retain jurisdiction in respect of the additional claims in the complainant's grievance.*

[18] It is that issue which the Federal Court has referred to me. As that Court emphasized, the grievor must adduce before me evidence of the damages contained in his grievance and resulting from fault by the employer. The burden of proof is on the grievor.

[19] In his case argument plan, the grievor alleges the following faults by the employer:

a) having the clear and avowed intention of solving the alleged problem at the QRO and placing responsibility for it on the grievor;

b) failing to inform the investigators of the apologies offered by the grievor;

c) falsely informing the Deputy Minister, in the course of his decision-making, that at no time had the grievor offered apologies;

d) knowingly failing to forward to the investigators the various initial statements and the documents in the file before the investigation process began;

e) following the evidence of misconduct by its employees, specifically the Senior Advisor, failing to reconsider and/or to rectify the Deputy Minister's decision;

f) after the grievance was lodged, assessing the workplace atmosphere against the background of the complaint of sexual harassment filed against the grievor, without taking any precautions regarding the potential repercussions on the grievor's life and career.

III. Summary of the evidence

A. Evidence previously adduced

[20] As the parties agreed, I read all the testimony listed in paragraph 6 of the present decision. This testimony was already summarized by Adjudicator Bertrand in her decision. I also read all the exhibits that had been adduced before Adjudicator Bertrand.

B. Evidence adduced before me

[21] The parties completed before me their evidence on the allegations of fault. They adduced evidence and made arguments concerning the existence and valuation of damages and a causal link. This evidence can be summarized as follows.

[22] The grievor began his career at Revenue Canada in 1977 as a Recovery Officer. In 1979, he was called to the Barreau du Québec. He joined the Department of Justice in 1984 and was promoted to the position of Director of Tax Litigation (group and level LA-3A) in 1996. Today, his Directorate employs nearly 60 lawyers and 40 support staff. The grievor headed this Directorate until the Deputy Minister relieved him of this position in June 2000. He was reinstated in this position following Adjudicator Bertrand's decision in October 2002, some two years and three months later.

[23] At the end of 1999, the grievor was informed that Jacques Letellier, Director of the QRO, was preparing to leave his position. At the invitation of Associate Deputy Minister Dion, the grievor applied for this position on January 25, 2000.

[24] In January 2000, the career options open to the grievor were as follows: either to continue his career in management, or to seek a position as General Counsel. Ultimately, he aimed for group and level LA-3C and the accompanying recognition as a tax expert.

[25] The grievor regularly took part in professional law co-ordination activities at the regional and national levels. He argued that at that time he enjoyed an excellent reputation, both as a manager and as a legal specialist. All his performance evaluations indicate ratings of superior or outstanding, and are indicative of his excellent relations with his employees and his legal skills.

[26] On February 2, 2000, the Senior Advisor informed the grievor by telephone that a female lawyer he was supervising intended to file a complaint of sexual harassment against him. At that point the grievor's world was turned upside down.

[27] The grievor stated that, because an investigation process was initiated shortly after that point, news of the matter began to spread within the Tax Litigation Directorate to a very limited number of persons. Although some persons were seeking witnesses, very little news of the matter spread while the investigation was being conducted. It was in August 2000, when the employer announced to all the employees that the grievor was being relieved of his position as Director, that news of the matter

spread to all parts of the country. It was known to all the national Directors and to lawyers in private practice and at the Tax Court of Canada. Some practitioners in this field apparently even commented to the grievor about the matter.

[28] While Adjudicator Bertrand was hearing the grievor's grievance, the report entitled [translation] *Toward a Respectful Workplace* was distributed to all employees of the QRO (Exhibit P-7). At page 1 of this report, the consultants explain the background of the action taken and the methodology used:

> [Translation]
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> . . .
>
> ***2. BACKGROUND OF ACTION TAKEN AND METHODOLOGY***
>
> *"Respect in the workplace" is a corporate priority of the Government of Canada. That said, when the consultants were approached about taking action in this matter, the Quebec Regional Office (QRO) of Justice Canada was faced with a very specific situation: a complaint of sexual harassment had been filed against one of its managers and, in the office, was causing some degree of uneasiness, the extent of which remained to be determined.*
>
> *Obviously there was no question of designing an approach that would focus on that event alone, particularly since respect in the workplace—a concept that can be defined in a number of ways—undoubtedly covers many other aspects of organizational life in addition to sexual harassment. As well, the approach could not and was not to resemble an investigation seeking answers to predetermined questions, which would have been difficult to formulate. For these reasons, it was agreed not to proceed using specific questions, and the possibility of using a questionnaire was thus eliminated. Instead, the approach taken was to seek to explore various points that the employees themselves related to the subject of respect in the workplace. In addition, individuals were to be allowed to express themselves on this subject and to explore it as freely as possible, while being given an opportunity to exchange and even to confront their views. On this basis, the consultants carried out a study of information gathered at discussion groups and individual meetings.*
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> . . .
>
> [Original emphasis.]

[29] Farther on in this report, the consultants explain that their action was taken over a period of 16 weeks, from February 11 to June 1, 2001. In the report we read that 158 persons were met (22 individually and 148 in small discussion groups of approximately 10 persons). This consultation apparently reached 42.8% of the employees of the QRO.

[30] Section 3.2 of this report paints a picture of the QRO as a respectful workplace, in the respondents' view. Page 11 of the report sets out the comments by the respondents from the Tax Litigation Directorate. Under the heading [translation] "Instances of non-respect most often noted", point number one reads as follows:

> [Translation]
>
> √ *Management of the complaint of harassment perceived as ineffective and reactive: failure by management to distribute appropriate information; failure to manage rumours and the emerging phenomenon of taking sides (for or against); uneasiness about the decision to keep the Director who was the subject of the complaint in the workplace.*
>
> [The footnote has not been reproduced.]

Here we can also read the comments by the respondents from the Criminal Affairs Directorate, including the following point:

> [Translation]
>
> √ *Perceived uneasiness in relations between women and men because of the lack of information on the status of the complaint of sexual harassment filed at the Tax Litigation Directorate.*

[31] The possible solutions identified by the working group include the following suggestion, at page 14 of this report under the heading of communications: [translation] "Clarify the status of the complaint of sexual harassment at the Tax Litigation Directorate." The report was distributed on the consultants' recommendation.

[32] This report clearly refers to the complaint against the grievor. According to him, this fact allegedly confirms that the complaint was being increasingly discussed within the QRO. He considers that, given the rumours circulating at that time, the employer

directly harmed his reputation by authorizing a workplace assessment while he was pursuing his grievance. He also noted that this report was distributed electronically to nearly 400 employees and thus could readily have been distributed to a great many persons, both inside and outside the Department. According to him, the entire taxation field in Quebec, a small community, was informed of the report. In fact, he even heard that lawyers in private practice and at Revenu Québec had received that information.

[33] Following Adjudicator Bertrand's decision, the grievor was reinstated in his position. He worked three days per week until December 2002. He then worked full-time starting in January 2003. In November 2002, he asked the employer for assistance in reaffirming his leadership. He had been experiencing difficulties because the employer had applied for judicial review of Adjudicator Bertrand's decision. A number of persons appeared to ignore his authority, thinking that he would not remain in his position for very long. Even the team leaders were holding parallel meetings. A consultant intervened in order to assist him. She worked with him and his team throughout 2003.

[34] The grievor explained that this entire situation affected his day-to-day life: the way he made decisions, "networked", and related to others. He became withdrawn. His ambition and motivation were no longer what they had been. He stopped socializing with people from the office. Starting in 2004, he no longer attended conferences in his field. His professional isolation led to the breaking off of relations with many resource persons in both the Department and the private sector.

[35] The grievor described the various repercussions on his health as the matter progressed. It was like a Chinese water torture. First he experienced stress and enormous anxiety pending the Deputy Minister's decision. Then there was the lengthy hearing before Adjudicator Bertrand. Lastly, he was obliged to wait until the day of the hearing before the Federal Court in February 2004 to learn that the employer had withdrawn its application for judicial review of Adjudicator Bertrand's decision.

[36] The grievor stated that the workplace atmosphere was very difficult because people appeared to behave very coldly toward him. All sorts of rumours were circulating about him. People hesitated to speak to him or associate with him. Lawyers in the private sector called him to say that news of the matter had spread like wildfire.

[37] The grievor stated that over 28 years he had build, [translation] "stone by stone", a solid reputation in the federal public service. He considered his reputation invaluable. He stated that he always acted in a professional manner and was careful to avoid any ambiguity in his relations with his colleagues and support staff. Throughout that time, he was never subjected to any disciplinary measures; his record was unsullied.

[38] Because the employer found that two of the allegations made against him were founded, the grievor spent five years in hell. Each of those allegations had to do with a conversation lasting some 30 seconds. His reputation, his honour and his integrity suddenly melted away. According to him, no judgment, decision or any other action could fully restore his reputation. He stated: [translation] "I've been branded; there will always be doubts in the minds of people who do not know me." Until February 2000, every possibility was open to him. He had considerable potential. Overnight, he lost everything. He argued that the reaction among people in the field was terrible.

[39] The grievor explained that, following the Deputy Minister's decision, he was asked to consent in writing to his reassignment. He was in shock and believed he was being asked to sign nothing more than an administrative form, which he did some three weeks later. He was subsequently informed that he should never have signed that consent and that he was making his grievance meaningless. He stated that he felt that he had been betrayed by the employer. As a result, he became more mistrustful and distressed. Although he had not yet breathed a word of the matter to his spouse or his attending physician, this incident was the last straw. After he finally spoke to his physician about the matter, the physician immediately withdrew him from work.

[40] The grievor was absent until January 2, 2001. That period was very difficult because he lived in a loft where his spouse worked. He said that he lived like a wanderer three or four days a week, leaving the apartment in the morning and returning only in the evening. He stated that during that period he felt completely abandoned by the employer. He experienced depression and other health problems. He was very ashamed of what had happened and could not talk about it to anyone. He felt increasingly isolated. He was very apprehensive about his return to work, people's reaction, and his ability to concentrate. These concerns were borne out as soon as he returned to work.

[41] The grievor explained that, as the hearing before Adjudicator Bertrand progressed, he realized that there was a desire to place responsibility for the situation at the QRO on him. He considered that the Senior Advisor did not perform her role well. She never attempted to bring the parties together, help them communicate, or allow them to explain themselves. According to the grievor, she did not attempt to resolve the situation as she should have done. Instead, she attempted to demonstrate that the existence of the Office was justified. At a time when she should have been a neutral intervenor, she concealed information from the investigators and made statements to the Deputy Minister that unduly influenced his decision.

[42] The grievor blamed the Senior Advisor for wanting to start with a clean slate. According to him, that approach was unfair. He added that, even before giving the investigators a mandate, she apparently contacted France Dufresne, the person responsible for the 1998 workplace assessment, on the pretext of checking the truth of the grievor's statement that Ms. Dufresne had told him he was a "gentleman". That approach by the Senior Advisor indicated to the grievor that what was happening was [translation] " a witch hunt" and that the Senior Advisor was [translation] "out to get me". According to the grievor, he became a scapegoat. The employer was using that approach to show that it was following up on the 1998 workplace assessment.

[43] The grievor could not imagine why the employer did not notice the errors in the investigation and in the entire approach taken by the Senior Advisor, as they were uncovered at the hearing before Adjudicator Bertrand. Nor did he understand how the employer could have continued to take that approach, going so far as to apply for judicial review of Adjudicator Bertrand's decision. The grievor believes that the employer abused its power and that the matter should never have gone that far. The employer had available all the information it needed to change its position and did not do so.

[44] The period pending Adjudicator Bertrand's decision was particularly difficult. Eventually the grievor's spouse left him. He had numerous health problems and had to withdraw from work again. In July 2002, he returned to work, but his ability to concentrate was weak. The work required a great deal of effort. He had his work checked. He stated that he still has difficulty concentrating today. When Adjudicator Bertrand's decision was conveyed to him, he finally saw an end to his suffering. However, the employer applied for judicial review, which crushed him. That

application confirmed to him that the employer's attitude and objectives had never changed. It also confirmed to him that from that point on he was [translation] "marked" and "branded". He suffered from headaches, insomnia and nausea. These symptoms are still acerbated by the various stages of the matter, including the hearing before me.

[45] The grievor stated that he lived under the sword of Damocles from November 2002 to March 2004, while the employer contested Adjudicator Bertrand's decision and alleged that sexual harassment had in fact occurred. The grievor argued that the employer's representatives harmed his reputation in referring to him as [translation] "the presumed harasser" at the hearing before the Federal Court. According to him, the use of that expression cannot be justified since, with regard to the grievance, he is considered the grievor. The terms used before the Federal Court allegedly constituted a direct public attack on his honour, his reputation and his integrity.

[46] In contrast, the employer pointed out that, in withdrawing its application for judicial review in March 2004, it willingly and unilaterally made a commitment to review the grievor's performance evaluations for 2000 and 2001 (Exhibit P-27) and to reimburse to him reasonable representation costs up to February 17, 2004. As well, the employer offered the grievor a position at group and level LA-3B in Ottawa.

[47] This offer notwithstanding, at the suggestion of Joanne D'Auray, then Director of the QRO, the grievor's performance evaluations for 1998 and 1999 were apparently revised upward because doing so was more advantageous to him. He confirmed that doing so made it possible for him to receive a performance bonus. He considered that the employer was not reaching out to him because it was his due. As well, his performance evaluation for 2000 was never completed, and he was also waiting for the revision of the 2001evaluation. He also acknowledged being reimbursed for a little more than 118 days of sick leave (Exhibit E-47).

[48] The grievor also confirmed the payment (Exhibit E-45), in June 2004, of $102,250 for his representation costs in connection with the complaint, his grievance, and the applications for judicial review. He explained that he had been obliged to cover those costs himself. To that end, he had had to sell real estate belonging to him. He had even used his credit cards to cover those costs. He stated that he had incurred interest costs amounting to approximately $12,000. However, he adduced no evidence to that effect. He also incurred costs amounting to $4,621.12 in October 2003,

following a debt consolidation (Exhibit P-28). He stated that he borrowed $75,000, giving a mortgage as security. He did not adduce any documentary evidence to that effect either.

[49] The grievor maintained that the employer's attitude never changed. He was cross-examined at length. He stated that he continued to mistrust the action taken by the employer following Adjudicator Bertrand's decision. He suggested that the employer attempted to make his grievance meaningless by paying him $102,250. He pointed out that this payment was made only following threats by him. He added that, in any other case of this type, the grievor is reimbursed immediately under an agreement with the Association of Professional Executives of the Public Service of Canada (APEX). According to the grievor, the employer was doing no more than reacting to Adjudicator Bertrand's decision. However, he was unable to explain how the employer would have had such an obligation in the case of a grievance. In his opinion, what was involved was a complaint of sexual harassment against a manager, in which the employer was obliged to pay his representation costs.

[50] From July 23, 2004 to May 27, 2005, the grievor incurred legal costs amounting to $45,434.46 (Exhibit P-29), including part of his costs for the hearing before me.

[51] In its letter dated February 17, 2004, the employer offered the grievor a new management position at group and level LA-3B, in Ottawa, as well as training that might be helpful to him in his new duties. In this letter, the employer writes: [translation] "This decision reflects the employer's sincere desire to help [the grievor] turn the page on a situation that was disturbing to him, in order to allow him to contribute once again to the activities of the Department of Justice, to the full extent of his abilities."

[52] The grievor maintained that the employer never offered him the position referred to in the letter dated February 17, 2004. To his knowledge, that position was never created; he never saw the work description for it. However, he acknowledged that he did not follow up with the employer on this offer, since it was merely a suggestion by the employer.

[53] Lastly, at a management meeting on November 30, 2004, attended by all the directors, team leaders, lawyers and paralegal staff, that is, approximately 60 persons, clear reference was made to the grievor's case. The topic was a presentation on the

provisions of the new *Public Service Modernization Act*. Michel LeFrançois admitted that, in speaking to that group, he apparently made the following comment : [translation] "We are all aware of cases in which the harassee was transferred and the harasser was obliged to stay put." The grievor argued that Mr. LeFrançois apparently said, instead: [translation] "We are all aware of the case . . .". The grievor stated that he felt very uncomfortable when Mr. LeFrançois uttered those words. Mr. LeFrançois knew that the grievor was present in the room. Since there had been only one such case at the Department of Justice, the grievor was clearly being singled out.

[54] Morris Rosenberg, Deputy Minister of Justice from July 1, 1998 to December 20, 2004, testified. He confirmed that he was the author of the disciplinary measure imposed on the grievor and confirmed that the Senior Advisor reported directly to him at that time.

[55] The Deputy Minister stated that, in determining the disciplinary measure to be imposed on the grievor, he took into consideration a number of factors. He specified that, first of all, the decision was made under the departmental workplace harassment prevention policy, for which the employer is responsible. He took into consideration the fact that the investigation had been conducted by not one but two investigators, one of them an experienced investigator and a former member of the Public Service Staff Relations Board. Also considered was the fact that the grievor had management responsibilities, including additional responsibilities under the departmental workplace harassment prevention policy, and had received training in these matters.

[56] The Deputy Minister also took into consideration the fact that the QRO had had morale problems for a few years because of the workplace atmosphere, and the fact that the Senior Advisor had held discussions on this point with this group in the past. He also took into consideration his own workplace harassment prevention responsibilities. Lastly, he considered the fact that, at a meeting with the employees of the QRO on October 22 and 23, 1999, some female lawyers openly complained to him about the workplace atmosphere at the QRO. He acknowledged that he made his decision after reviewing all the material on the matter provided to him by the Senior Advisor.

[57] The Deputy Minister also confirmed that to some extent he followed the progress of the case during the hearing before Adjudicator Bertrand. He stated that, although he was not informed of the progress of the hearing on a daily basis, he was

kept informed in a general way by the legal counsel involved. He stated that he considered the case an important one that the Department took seriously. He realized that the case would have repercussions and some degree of notoriety. It was the first such case at the Department.

[58] The Deputy Minister did not recall being told that the grievor apparently offered apologies to the complainant. When the Deputy Minister was informed of Adjudicator Bertrand's decision, which found that apologies had been offered, he did not follow up or confront the Senior Advisor on this point. The transfer of responsibilities to Associate Deputy Minister Collette had already taken place. In fact, he did not follow up on Adjudicator Bertrand's decision in any way. He also stated that he had not discussed the case with anyone other than the persons involved, but conceded that people in the field must have been aware of the grievor's reassignment following the Deputy Minister's decision to relieve him of his management responsibilities.

[59] Associate Deputy Minister Dion explained his reaction to the apologies offered by the grievor. He stated that he had just spent several hours with the two female lawyers involved. He noted how upset they were. The grievor could not get off that easily. Simple apologies were not enough given the state of the two female lawyers. As well, those apologies were offered at the very end of the discussion with the grievor, when it had become clear that there would be repercussions including an investigation. Associate Deputy Minister Dion specified that, in his opinion, the point was not to determine whether the apologies were sincere or not. Rather, in his opinion the apologies appeared inadequate in the circumstances. Under cross-examination, he stated that, at later meetings including the meeting at which the Deputy Minister made his decision, he did not recall discussions about these apologies being offered.

[60] The Deputy Minister also testified about the staffing process for the position of Director of the QRO, initiated on January 28, 2000 (Exhibit P-8). He explained that the process progressed normally and that the successful candidate (at group and level LA-3B), Donald Lemaire, assumed his new responsibilities on April 1, 2000 (Exhibit P-9). Mr. Lemaire occupied this position for approximately three and one-half years, until his successor, Ms. D'Auray, was appointed in February 2003 (Exhibit P-11). One important factor in favour of Mr. Lemaire's appointment was the fact that he was not already a grievor at the QRO.

[61] The Deputy Minister explained that, in December 2002, four regional directors obtained a reclassification to group and level LA-3C, following a "Hay System" evaluation. That decision was made at the national level in order to better reflect the increases in the number of staff and the number and complexity of cases at those four offices, as well as the expansion of directors' responsibilities and the Department's mandate. The Deputy Minister specified that the reclassification had to do with the individuals and not their positions. The four directors were required to take part in a selection process for that purpose, and they were all successful.

[62] The grievor stated that he was invited by Associate Deputy Minister Dion to enter the January 2000 competition. At that time, Associate Deputy Minister Dion apparently told him that he had the skills needed for the position. The announcement in February 2000 that a complaint would be filed led the grievor to withdraw his application, at the suggestion of Associate Deputy Minister Dion. The grievor argued that the comments by Associate Deputy Minister Dion before the events clearly indicated his esteem for the grievor's work and the grievor expressed confidence that he would have obtained that promotion.

[63] The Deputy Minister also confirmed that Ms. D'Auray was appointed without competition to replace Mr. Lemaire. That appointment was a transfer since Ms. D'Auray was already classified at group and level LA-3B. Experience had shown that appointing a person from the outside was advantageous.

[64] In the grievor's opinion, that appointment was clearly a tactic to ensure that he did not apply for the position of Director of the QRO. It confirmed that there was no longer any possibility of promotion for him. He indicated that he heard of a competition for the position when Mr. Lemaire's departure was announced. Associate Deputy Minister Dion apparently invited him to apply once again. Thus he was very surprised to learn that Ms. D'Auray had been appointed without competition, and drew his own conclusions from that fact. Under cross examination, however, he did not explain why he was apparently invited to enter such a competition eventually, if the employer was continuing to hound him.

[65] Actuary Louis Morissette adduced an actuarial estimate (estimate 5) showing the grievor's projected income if he had obtained the position of Director of the QRO on March 27, 2000 and remained in that position at group and level LA-3B until retirement. According to that estimate, the grievor's total loss would have been

$232,883 (including loss of employment income, retirement income, and additional grievor contributions to the pension plan: see Exhibit P-9 for the details of this calculation). Mr. Morissette's report contains four other estimates of possible promotions the grievor might have obtained starting in January 2000, based on the promotion dates of managers in the desired positions.

[66] The employer called two witnesses, human resources experts who worked on the files involved in staffing the position of Director of the QRO in January 2000. Their testimony confirmed the procedure that was followed and the fact that the grievor's withdrawal (Exhibit E-56) was received on February 14, 2000. As a result, his name was taken off the list of candidates for the February 22, 2000 interview (Exhibits E-58 and E-59).

[67] The employer presented another argument, further to Adjudicator Bertrand's interpretation (2002 PSSRB 89, ¶ 58, 140) of what Associate Deputy Minister Dion said about the grievor's qualifications for the position of Director of the QRO in January 2000. The employer alleged that Adjudicator Bertrand's interpretation was erroneous and that the employer could correct it by means of testimony by the person involved, Associate Deputy Minister Dion himself. The grievor objected to this portion of the testimony, alleging that the employer had had the option of contesting that error in its application for judicial review of Adjudicator Bertrand's decision. Having withdrawn that application, the employer could not now intervene on this point. This objection was taken under advisement; my comments on this objection are given in the Reasons set out below.

[68] Given the confidential nature of the information contained in the medical assessments adduced before me, I have limited my comments for the purposes of this decision.

[69] Dr. Sylvain-Louis Lafontaine, a psychiatrist, testified for the grievor; his assessment report dated October 7, 2004 (Exhibit P-13) was adduced and was sealed at the grievor's request and with the employer's consent. In this report, Dr. Lafontaine concludes that the grievor's mental functions are permanently affected to the extent of 45%. Dr. Lafontaine is of the opinion that the grievor's professional ability and his interpersonal relational ability were affected.

[70] Dr. Lafontaine specified that he noted no prior stress-producing medical causes or events other than those now under consideration. One important factor, in his opinion, is the fact that the grievor has not experienced closure in this matter. The lengthy delays are unfavourable to him, and he cannot turn the page until he knows the final outcome of his case. The psychiatrist believes that the employer was malicious in the way it handled this case, which contributed to the grievor's distress. The grievor will always have doubts about his abilities and his good reputation. According to Dr. Lafontaine, unfounded allegations of sexual harassment generate enormous stress that has significant physical and mental consequences.

[71] Dr. Lafontaine was cross-examined at length by the employer, which questioned his objectivity and independence given his opinions on the employer's attitude and actions. Dr. Lafontaine's assessment of the extent to which the grievor's mental functions have been permanently affected was also questioned.

[72] The employer called as a witness Dr. Louis Bérard, who commented on Dr. Lafontaine's report and provided his own observations of the grievor's mental state following a meeting with him. Dr. Bérard's assessment report, dated January 27, 2005, was adduced under the same conditions as Dr. Lafontaine's report. Dr. Bérard is of the opinion that the grievor's mental functions are permanently affected to the extent of 5% instead. This opinion is based on the grievor's condition on the date of the assessment. The grievor was doing his work and performing his duties fully, according to Dr. Bérard. In these circumstances, the scale used, that of Quebec's Commission de la santé et de la sécurité du travail (CSST) and the same one used by Dr. Lafontaine, sets a maximum of 15%. Dr. Bérard also took into consideration the fact that the grievor had been in a stable love relationship once again for over one year, as well as the fact that no treatment measures had been taken for two years. In addition, he noted that, in January 2005, the grievor never used the services of a therapist.

[73] Although the quality of the grievor's work or relationships may be less than it was before the events, the CSST scale establishes the extent to which a person is affected on the basis of symptoms and their recurrence. Dr. Bérard concluded by stating that it was still too early to determine definitely the extent to which the grievor was affected because the trauma would allegedly be prolonged by the ongoing legal proceedings. This assessment should be carried out only two years after the conclusion of the events.

[74] Dr. Jean-Yves Bennett has been the grievor's attending physician since 1996. Dr. Bennett's ongoing notes (Exhibit P-16) and medication record (Exhibit P-17) were adduced and sealed. Dr. Bennett stated that the grievor first consulted him on June 9, 2000. At that time the grievor complained of significant stress at work, anxiety, and difficulty sleeping and concentrating. Dr. Bennett noted and treated higher blood pressure, a prior condition that had previously been stabilized. His follow-up led him to withdraw the grievor from his workplace, a source of stress, on July 9, 2000. It was only on October 6, 2000 that the grievor told Dr. Bennett that a complaint of sexual harassment had been filed against him. Dr. Bennett then withdrew him from the workplace and adjusted his medication.

[75] Dr. Bennett saw the grievor again several times, particularly at times corresponding to the various stages of the case, such as the hearing before Adjudicator Bertrand and then the period pending her decision. That period appeared to cause the grievor a great deal of anxiety. In March 2002, the grievor complained of various forms of discomfort that were then diagnosed and treated by Dr. Bennett. Dr. Bennett repeatedly discussed the grievor's experiences with him. On a number of occasions, Dr. Bennett suggested that the grievor consult a psychologist, but the grievor apparently preferred to handle the situation himself, with the help of medication.

[76] In recent years, the grievor endeavoured unsuccessfully to resume his network of contacts and to take part in certain events. On those occasions he felt so uncomfortable that he quickly abandoned his efforts. He acknowledged that he did not seek the assistance of a psychologist. He tried to manage by himself. However, in March 2005, when the present hearing was resumed, psychological follow-up was recommended, to which he finally agreed. However, his insomnia and anxiety remain. Nor has the grievor regained his self-confidence or his assurance at work. For a lawyer, this is a vital part of the game; they have to exude strong self-confidence if they are to represent their clients well. The grievor has also lost his leadership abilities. When he returned to his management position, he needed the help of a consultant to re-assert his authority.

[77] According to the grievor, there should never have been an investigation. Instead, he should have been offered an opportunity to sit down with the female lawyers involved, in order to clarify the situation and offer his apologies. Then there would

have been no complaint and no grievance. No one knew when to put a stop to the situation before it degenerated.

[78] The grievor considered that the Senior Advisor and the employer acted in bad faith, and claimed exemplary damages. In particular, he alleged that the action taken by the Senior Advisor constituted bad faith in exercising her discretion. She knowingly misled the Deputy Minister by stating in her documents that the grievor never apologized. Under cross-examination, the grievor was confronted with the numerous opportunities he had to note and correct the information gathered by the investigators. He acknowledged receiving copies of the investigation reports in accordance with the usual procedure. At that time he had an opportunity to ensure that the investigators had all existing information. At that time he did not correct the information on this point set out in the investigation reports. In response, the grievor said that he took for granted that all the information was in the file and that the investigators had received all the information from the outset.

[79] The grievor also argued that the employer hounded him and was negligent in the way it managed the information about his case. He stressed that continuing to refer to him repeatedly as [translation] "the presumed harasser" was malicious, because he considered that Adjudicator Bertrand had exonerated him. He also considered the new assessment of the workplace atmosphere carried out in 2001 to be hounding, given the complaint filed against him and the fact that Adjudicator Bertrand was hearing his grievance. As well, the report entitled [translation] *Toward a Respectful Workplace* (Exhibit P-7) clearly alluded to the complaint against him.

IV. Summary of the arguments

A. For the grievor

[80] Recalling the context in which the events occurred, the grievor points out that, in January 2000, he was preparing to apply for the position of Director of the QRO when he was told that a complaint of sexual harassment would be filed against him. An investigation ensued. The Deputy Minister's July 28, 2000 decision, considered a demotion since it relieved the grievor of all management responsibilities, was known nationwide and sealed his doom. In order to salvage his reputation and his integrity, and because he was convinced that he had not harassed the complainant or anyone, the grievor lodged a grievance. Another lengthy process ensued. At the hearing before

Adjudicator Bertrand, the grievor was able to uncover and note the faults committed by the employer.

[81] The grievor argues that his case was coloured from the outset by the employer's intention to find a solution to the problem at the QRO. In fact, the employer often referred to the 1998 workplace assessment. It tried to place responsibility for that assessment on the grievor, as Adjudicator Bertrand clearly concluded in stating that that assessment should never have been used as evidence against him. The grievor was not the subject of the complaints expressed during that assessment. Nor was the Tax Litigation Directorate, as the employer acknowledged.

[82] However, according to the grievor, that was the mandate taken on by the Senior Advisor, as Adjudicator Bertrand noted (2002 PSSRB 89, ¶ 192):

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> *On cross-examination,* [the Senior Advisor] *admitted that the assessment conducted at the QRO in 1998 was relevant in* [the grievor's] *case because a new Deputy Minister had just arrived* . . . [The Senior Advisor] *admitted that the problem therefore had to be resolved.*
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> . . .

[83] Although the grievor was not the subject of that workplace assessment, the Deputy Minister admitted that he had taken it into consideration, without regard for the repercussions on the grievor. The employer thus apparently based its decision on facts that had never been established. Those facts were alleged by employees who could not even be named. However, in the documents she presented to the Deputy Minister, the Senior Advisor did not include the fact that, in that same assessment, the grievor had been identified as "a gentleman".

[84] As well, allegations in which the investigators did not find merit should never have appeared in the executive summary that the Senior Advisor presented to the Deputy Minister.

[85] The employer knew that the grievor was never the subject of that workplace assessment. In testifying before Adjudicator Bertrand on August 15, 2001, Ms. Dufresne confirmed that the grievor was never the subject of the complaints at that time (Exhibit P-4: [translation] *Preliminary Observations of Conflicts in the*

Workplace, dated April 14, 1998). In that assessment, five persons were clearly identified as sources of conflict at the QRO; the grievor was not among them. As well, Adjudicator Bertrand found that any reference to "senior management" did not include the grievor, as the consultant explained. In 2002 PSSRB 89, ¶ 143, Adjudicator Bertrand writes as follows: "Ms. Dufresne testified that, during the [discussion sessions], it became increasingly obvious that [the Director of the QRO] was the sixth person identified as a source of conflict. [The Senior Advisor] . . . [was] involved with her in those sessions."

[86] Thus it was dishonest and tendentious to refer to the June 1998 workplace assessment report (Exhibit E-1) in any way whatsoever, as Adjudicator Bertrand found in 2002 PSSRB 89, ¶ 341:

> . . .
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> . . . *the references to behaviour problems related to sexual harassment at the QRO and in particular the passages noted on pages 37 to 42 of the assessment (E-1), which are repeated in the executive summary, do not apply to* [the grievor] *and therefore should not have been used as evidence against him.*
>
> . . .

Reference to the 1998 workplace assessment is thus one fault by the employer noted by Adjudicator Bertrand.

[87] Once a case is considered unfounded, it must be concluded that the resulting actions constitute a fault. The employer, in the person of the Senior Advisor, knowing that the case was unfounded, nevertheless went ahead in an attempt to ensure the credibility of the Office and the effectiveness of the departmental workplace harassment prevention policy. The Senior Advisor also admitted these points, which show up as crucial factors in her recommendations to the Deputy Minister. However, those factors do not include an assessment of the repercussions on the grievor and his career.

[88] Another fault by the employer is clear from the evidence: the failure to inform the investigators and the Deputy Minister of the apologies offered by the grievor at the very first meeting with the Senior Advisor and Associate Deputy Minister Dion. Apologies are nevertheless an essential factor in a case of this type. The employer, in

the persons of the Senior Advisor and Associate Deputy Minister Dion, considered these apologies tardy and lacking in sincerity, in accordance with the comments of the complainant, to whom they were conveyed. However, Investigator Cantin notes the importance of these apologies at page 194 of the transcript of his cross-examination: [translation] "I think that could have been taken into consideration . . . for the purposes, if you wish, of the disciplinary measure." Nor were these apologies conveyed to Mr. Deeprose, the human resources expert responsible for the matter. Mr. Deeprose therefore made his recommendations without being aware of this important factor.

[89] In contrast, the executive summary informs the Deputy Minister that the Senior Advisor based her recommendations (paragraph 7) on, among other things, the fact that the grievor denied any wrongdoing, showed no concern for the complainant or the other female lawyer involved, and expressed no desire to apologize right from the time he was informed of the complaint (Exhibit E-35). In the grievor's opinion, that representation constitutes a fault since it was made with full knowledge of the facts. The Senior Advisor admitted that the grievor had offered apologies at the very first meeting. That representation allegedly constitutes abuse of power and gross negligence. It was not the Senior Advisor's job to determine the sincerity of the grievor's apologies or to decide arbitrarily not to include this important factor in the information conveyed to the investigators and then to the Deputy Minister.

[90] This fault flawed the entire process: the investigation, the recommendations by the Senior Advisor, the recommendations by the other advisors to the Deputy Minister and, ultimately, the Deputy Minister's decision. The Senior Advisor did not have the authority or the right to act in that manner. The employer is directly responsible for this fault, particularly given the Senior Advisor's crucial role. On this point, Adjudicator Bertrand writes as follows (2002 PSSRB 89, ¶ 407):

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> . . . *The Policy confers a great deal of responsibility and power on the Office and on the Senior Advisor* . . .. [The Senior Advisor's] *position was the constant element in all complaints brought to the Office's attention. It thus appears that . . . the Senior Advisor acts at all times in an independent, impartial and objective manner in order to maintain the integrity of her position in the process and in the eyes of the parties to whom she intends to provide assistance.*

. . .

[91] Another fault noted was the fact that the initial statements were not conveyed to the investigators. This failure was crucial to the determination of the case. Investigator Cantin acknowledged the importance of these statements at page 119 of the transcript of his cross-examination. These statements could be used to determine whether the complainant had always been consistent in what she said. They could also be used to evaluate the entire case. Instead, the action taken by the Senior Advisor favoured starting with a clean slate. That action was a fault.

[92] Those faults constitute a denial of justice because they had the effect of biasing and blemishing a decision that had dramatic repercussions on the grievor's career and life. There is an obligation to ensure that this situation never recurs. These actions must be denounced and punished.

[93] Furthermore, the employer was at fault in not reconsidering the case and changing the Deputy Minister's decision after noting, at the hearing before Adjudicator Bertrand, that faults and errors had been committed. Doing so would certainly have attenuated the harm sustained by the grievor. The employer even added to the fault by making an application for a judicial review of Adjudicator Bertrand's clear and unequivocal decision. That action directly affected the grievor's level of stress and anxiety, as well as his reputation and his leadership ability at work. He had to be assisted by a consultant in this regard. Why did the employer wait until the last minute to withdraw that application? It had all the resources it needed to consider and reconsider the case.

[94] Lastly, the employer was also at fault in carrying out an assessment of the workplace atmosphere in 2001. Doing so had the effect of making the matter public. The employer should have exercised care and diligence and not acted hastily without regard for the repercussions on the grievor. The report entitled [translation] *Toward a Respectful Workplace* (Exhibit P-7) was distributed to the whole QRO, not just the Tax Litigation Directorate. The context of the investigation is explained at page 1 of this report, which reads in part as follows:

[Translation]

. . .

> *. . . when the consultants were approached . . . the* [QRO] *was faced with a very specific situation: a complaint of sexual harassment had been filed against one of its managers and, in the office, was causing some degree of uneasiness, the extent of which remained to be determined.*
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> . . .

[95] In summary, the employer did not ensure that the grievor had the benefit of a fair and equitable investigation process. As well, it failed in its duty to protect the grievor's reputation during that investigation and afterward. These faults had repercussions on the grievor's career and private life.

[96] The harm resulting from these faults has been established. With regard to the harm to the grievor's reputation, he alleges that reputation is essential and of the greatest importance for a career lawyer. It is the cornerstone of both his professional and his personal life. In his opinion, a person cannot [translation] "survive as a lawyer without a pristine reputation". He alleges that, over the previous 27 years, he had built a solid reputation, with both his colleagues in the Department and lawyers in private practice. His performance evaluations (Exhibit P-22) acknowledge that he is a hard worker, a team player with integrity, and a dogged prosecutor.

[97] This reputation was irreparably damaged. Regardless of Adjudicator Bertrand's or any other decision, people will always harbour doubts about the grievor. He has been stigmatized. The case has been discussed nationwide, in both the public and the private sectors, as is shown by the minutes of management committee meetings and the comments made at regional and national conferences. The grievor's case is still the only one of its type at the Department, and thus any reference to this subject inevitably points to him.

[98] The grievor testified at length about the stress he experienced, his anxiety, and the repercussions of the case on his professional and private life. In his opinion, his ability to interact with others and his ability to carry a normal workload autonomously were greatly affected. He also testified about the problems he experienced at work, including lack of concentration, self-confidence and leadership. As well, he described his personal situation and the fact that he was no longer with his former spouse. In terms of physical symptoms, he described his insomnia, stress, various problems and blood pressure, which increases at times. Before the events, the grievor's blood pressure was his only problem and was stabilized very well. The medical assessments

adduced in evidence show that the grievor's mental functions are now permanently affected to the extent of 45%.

[99] It is understood that the employer cannot be held responsible for the fact that a female lawyer complained. That said, the employer must be held responsible for the way the complaint was processed and the way it subsequently handled the entire situation. According to the grievor, that handling of the case, and not the actual allegations of sexual harassment, was the direct cause of the harm sustained.

[100] The interruption of the grievor's career and the loss of his income must be valued as moral damages. The actuarial analysis adduced in evidence provides various estimates. These estimates take into consideration the probability that the grievor would have obtained the position of Director of the QRO in February 2000 or been promoted at another time. According to the grievor, his chances in this regard are now zero.

[101] In support of this argument, the grievor points out that, in October 2002, after he had been cleared of the allegations, a position of interest to him opened up. Although it had been suggested to him that he might obtain that position, it was staffed without competition. He argues that from these events I should deduce a negative intention by the employer.

[102] As well, the grievor alleges that his career is also blocked outside the public service. His lessened performance since the events, his difficulty concentrating, and the harm to his reputation are all factors that make the possibility of interesting employment in the private sector less likely.

[103] With regard to the miscellaneous costs, the grievor argued that his case is exceptional and that he deserves to be reimbursed for the costs of his defence that he would not have had to assume were it not for the fault by the employer.

[104] The grievor argues that the Federal Court gave me jurisdiction to award him exemplary damages (2004 FC 566, ¶ 21). According to him, the employer persisted in placing on him responsibility for the poor workplace atmosphere disclosed by the June 1998 workplace assessment report.

[105] As well, the employer knowingly failed to inform the Deputy Minister of the grievor's apologies. In the grievor's opinion, a number of statements in the executive

summary prepared for the Deputy Minister were not only tendentious but clearly erroneous. The Senior Advisor not only failed to mention the fact that the grievor had offered apologies to the female lawyers involved, but actually stated that the grievor never apologized and never acknowledged wrongdoing.

[106] Lastly, the employer waited until the very last minute to withdraw its application for judicial review, when it should have noted, throughout the hearing before Adjudicator Bertrand, the faults and errors committed.

[107] In conclusion, the grievor argues that the harm sustained was the logical, direct, immediate and unquestionable consequence of the faults committed by the employer. The grievor had no previous record of harassment and no history of medical disorders except for a blood pressure problem that was under control. No other external factor can account for the harm sustained. Furthermore, the employer did not establish that it acted for purely legitimate purposes.

[108] A number of decisions were cited by the grievor in support of his arguments, specifically concerning the amount of the damages. However, those decisions had to do with cases involving dismissal, malicious accusations, and libel.

[109] The grievor alleges that he established harm resulting from the faults by the employer. The harm sustained is valued at $1,750,000, plus interest, and the grievor requests that this amount be awarded to him.

B. For the Employer

[110] The employer bases its defence on four main points. First and foremost, it is obliged to provide a harassment-free workplace. Second, in the present case, it acted responsibly and diligently. Third, the onus on the grievor to establish any liability by the employer has not been discharged. Last, if the employer is held liable, the employer argues that the grievor did not establish damages in excess of the amount already reimbursed.

[111] The decisions in *Robichaud v. Canada (Treasury Board),* [1987] 2 S.C.R. 84, and *Janzen v. Platy Enterprises Ltd.,* [1989] 1 S.C.R. 1252, establish a positive obligation for the employer. The employer must be proactive in providing a harassment-free workplace. Thus, once a complaint has been filed, the employer is obliged to get to the bottom of the matter. That is the reason for the investigation. But it is not enough

merely to process the complaint: the problem in the workplace must also be solved. That point was the justification for the action taken in 2001.

[112] The employer admitted that the findings of the 1998 workplace assessment were a factor in the decision made in this case. The employer maintains that the Senior Advisor cannot be blamed for including this factor as context for the case involving the grievor. The grievor was a manager at that time, had responsibilities under the departmental workplace harassment prevention policy, and was himself aware of the situation at the QRO with regard to the workplace atmosphere.

[113] It was the Senior Advisor's responsibility to ensure that the Deputy Minister made an informed decision while taking into consideration the context of the workplace, his obligations in the workplace, and the grievor's responsibilities.

[114] The employer was obliged to take this factor into consideration because the grievor not only was a manager, but also had sat on a QRO workplace harassment prevention committee. According to case law and the departmental workplace harassment prevention policy, management at all levels is responsible for providing a harassment-free workplace. Like the Deputy Minister, the grievor, too, in his capacity as a manager, had responsibilities under this policy and with regard to the findings of the 1998 workplace assessment.

[115] The employer concluded that, in the circumstances, the grievor's capacity as a manager was an aggravating factor. It is through its managers that the employer ensures that the departmental workplace harassment prevention policy is respected.

[116] The grievor argues that there should never have been an investigation, because he was not the subject of the 1998 workplace assessment report, had no record, had received the gold award, and had a reputation as "a gentleman". On the contrary, it would have been irresponsible of the employer not to conduct an investigation, given the background against which the complaint was filed.

[117] The Deputy Minister himself had stated, at a forum attended by all QRO employees, that managers were to put an end to the clouded workplace atmosphere at the QRO. How could whitewashing a complaint against the grievor, a manager, have been justified solely on the basis of the fact that he had no record and the fact that the June 1998 workplace assessment report did not name him?

[118] According to the employer, the Deputy Minister never alleged that the June 1998 workplace assessment report suggested that the grievor was part of the problem. That said, the grievor was certainly supposed to be part of the solution. Without managers' participation, the departmental workplace harassment prevention policy would be ineffective.

[119] Various evidence adduced before Adjudicator Bertrand established that the female lawyers involved felt that their situation was precarious, that they were not supported, and that their relationship with their manager, the grievor, was extremely tense. This evidence showed that the grievor was not assuming his responsibilities under the departmental workplace harassment prevention policy.

[120] When the grievor suggested meeting with the female lawyers, offering apologies and thus settling the matter quickly, Associate Deputy Minister Dion disagreed. He had already met with the female lawyers. Given the context at the time, they had clearly expressed uneasiness with the entire situation. The grievor's offer was conveyed to them; they turned it down.

[121] Given this fact and the fact that seven allegations had been made against the grievor, Associate Deputy Minister Dion concluded, instead, that the matter could not be settled that quickly. Against the background of the 1998 workplace assessment, he considered it too expeditious and, most importantly, disproportionate to close the case on the basis of that simple offer to apologize. Given the complaint, the investigation was legitimate and inevitable.

[122] The employer addressed the issue of failing to convey information to the investigators and to the decision-maker. In the employer's opinion, it was never contested that the grievor was prepared to offer apologies only if his comments had been misinterpreted. That offer was therefore conditional on misinterpretation by the complainant. It was not acknowledgement of wrongdoing by the grievor. He simply was not apologizing for making inappropriate comments. It should be noted that Adjudicator Bertrand, although she found that no sexual harassment by the grievor occurred, nevertheless found that he had made inappropriate comments. As well, the offer to apologize was apparently made only after there was a possibility that an investigation would be conducted.

[123] According to the employer, failing to inform the Deputy Minister of that offer had a minimal effect on his decision. Here again, that factor could have been used, not in determining whether sexual harassment occurred, but only in determining the disciplinary measure. The employer argues that it was not the only factor to be taken into consideration by the Deputy Minister and certainly not the greatest material factor in the circumstances.

[124] The Deputy Minister took into consideration the fact that the grievor was responsible for managing approximately 100 employees, and the fact that there were significant difficulties at the QRO with regard to the workplace atmosphere. He took into consideration the fact that the grievor had received training and had sat on a special committee.

[125] It cannot be concluded that the case would have turned out differently if the Deputy Minister had taken into consideration the offer to apologize. There is nothing to establish that the outcome would have been different. A minimal disciplinary measure of three days' suspension was imposed on the grievor and he was not demoted, although he was relieved of his management responsibilities.

[126] With regard to the actions by the Senior Advisor, the employer suggests that the grievor wants to place a heavy burden on her. The person responsible for the case acted diligently and in accordance with her roles and responsibilities throughout the case. She acted in accordance with the instructions of the Deputy Minister. As well, she was surrounded by legal and human resources advisors.

[127] The investigators' report is not the report of the Senior Advisor, which does in fact refer to seven allegations made against the grievor. The investigators found merit in two of those allegations. A summary for the Deputy Minister could not arbitrarily ignore the whole file and still be called a full report on the events. The Senior Advisor was obliged to provide the Deputy Minister with all the factors representative of the whole case so that he could make an informed decision.

[128] With regard to the handling of the investigation, the grievor alleges that information should have been provided to the investigators. However, he did not establish that such a procedure would have been more appropriate. Both the Senior Advisor and Investigator Cantin confirmed that starting with a clean slate was routine. They were not contradicted. Adjudicator Bertrand did not question this procedure. She

had all the factors before her. At that time the grievor had an opportunity to examine and cross-examine all the witnesses.

[129] One cannot demand perfection in the investigations that the employer must conduct. That is why grievance adjudicators have always relied on the decision in *Tipple v. Canada (Treasury Board),* [1985] F.C.J. No. 818 (QL), which recognizes that any unfairness during an administrative investigation is cured by a hearing *de novo* before an administrative tribunal. The faults alleged by the grievor were therefore cured by the hearing before Adjudicator Bertrand. They cannot form the basis of an action for damages. In any case, they are not material to the point at issue and cannot justify a claim for damages.

[130] With regard to the harm to the grievor's reputation, the employer argues that any publicity of this matter was due to the investigation process, which was legitimate, and to the grievance procedure, which the grievor initiated.

[131] No evidence of excessive or intentional publicity by the employer was adduced. The decision to relieve the grievor of his management responsibilities was conveyed in a non-judgmental manner. The new assessment of the workplace atmosphere in 2001 was legitimate, and the grievor was not named in the report entitled [translation] *Toward a Respectful Workplace*. The employer acted in good faith and entirely legitimately.

[132] If the grievor feels targeted by certain comments, remarks or documents by the employer or his colleagues, that feeling may be due to his own perception or to the fact that his case is still the only one of its type at the Department of Justice. Both possibilities are beyond the employer's control. Furthermore, if, as grievor argues, everyone knew that he was the subject of allegations of sexual harassment, how can he deny that everyone knew that he was cleared of those allegations? If people knew about one situation, why would they not know about the subsequent situation? Everyone could see that he was reinstated in his position.

[133] The employer points out that it reimbursed the grievor's representation costs to him. The amount of $102,250 was sent to counsel for the grievor on February 17, 2004. The grievor blamed the employer for delaying this reimbursement since, according to him, this type of reimbursement is usually made right at the beginning of a case. The employer argues that the grievor is confusing the situation in which

individual managers receive financial assistance in defending themselves against complaints of sexual harassment filed against them, and the situation in which individual managers defend themselves against a disciplinary measure, which is the case here. Clearly, the employer does not provide this type of assistance in the latter situation.

[134] Under cross-examination, the grievor suggests that this reimbursement was made with the intention of making his grievance meaningless by removing his action for damages. No evidence of such an intention was adduced. The employer argues, instead, that care and caution must be exercised since public funds were at stake.

[135] With regard to the interruption of career and loss of income, the employer argues that it cannot be stated that the grievor would have won the competition for the position of Director of the QRO. Pursuant to the *Public Service Employment Act*, the most highly qualified candidate must be appointed to any position staffed by competition. There is no way of showing or establishing that the grievor would have been that candidate, whatever he says or thinks.

[136] The employer argues that, according to case law, for damages to be awarded, fault must be established that is actionable independently from the disciplinary measure. The fault must be of the nature of a tort. In this regard, the decisions in *Vorvis v. Insurance Corp. of British Columbia,* [1989] 1 S.C.R. 1085, and *Wallace v. United Grain Growers Ltd.,* [1997] 3 S.C.R. 701, are clear. In the latter decision, the Supreme Court of Canada clearly indicates that bad faith conduct must be established. In *Canada (Attorney General) v. Hester,* [1997] 2 F.C. 706 (T.D.), Mr. Hester applied for punitive damages. They were denied him, in the absence of evidence of vindictive or malicious intent. The employer also cites a good many decisions on the amount of damages awarded in certain circumstances where the employer's civil liability was engaged. The amounts of damages awarded in these decisions are much lower than those referred to in the case law cited by the grievor.

[137] The employer concludes that the present case is not one in which the employer acted in a manner that would open the door to an award for damages. No error was committed in law. The employer very much regrets the situation for everyone involved. It found itself between the devil and the deep blue sea; it did its best. It must be borne in mind that Adjudicator Bertrand found that the complainant was credible. The delays were undoubtedly stressful for the grievor. However, they were due, not to bad faith by

the employer, but to the normal progress of procedures of grievance and judicial review.

[138] The employer then commented on the alleged harm and the evidence adduced by the grievor. It also questioned Dr. Lafontaine's independence. The employer alleges that Dr. Lafontaine's testimony should be set aside in its entirety and that he had no credibility.

[139] In conclusion, the employer was of the opinion that fault engaging the civil liability of the employer was not established. At law, the actions and omissions criticized cannot constitute faults giving rise to damages.

[140] In a subsidiary argument, the grievor was amply compensated for the harm he sustained by the payment of the amount of $102,250 and by the other actions taken voluntarily and unilaterally by the employer in February 2004.

C. Reply by the grievor

[141] In reply, the grievor acknowledged the duty of the employer under the departmental workplace harassment prevention policy and the decisions by the Supreme Court of Canada. He notes, however, that this duty carries with it a heavy responsibility, both to complainants and to persons against whom complaints of harassment are filed, in order to ensure a fair and equitable process. In the present case, the employer failed to fulfil this duty and must be held responsible for the actions and omissions by its representatives.

V. Reasons

[142] In their arguments, the parties often referred to passages of the testimony, indexed in paragraph 6 of the present decision, that they considered relevant to the issue now under consideration. I paid special attention to these passages, which are mainly testimony concerning the investigation process and the decision-making process. I also read all the exhibits that had been adduced before Adjudicator Bertrand.

[143] As I have indicated, my role is simply to exercise fully the Adjudicator's jurisdiction with regard to the claim for damages contained in the grievor's grievance. Adjudicator Bertrand found that the allegations of sexual harassment made against the

grievor were unfounded, and set aside the Deputy Minister's decision to impose a disciplinary measure on the grievor (2002 PSSRB 89, ¶ 412). My role is not to review Adjudicator Bertrand's evaluation of the evidence or the conclusions she reached as a result. The parameters of my jurisdiction were set by the Federal Court decision on the grievor's application for judicial review. My role is to exercise jurisdiction fully with regard to the claim for damages contained in the grievor's grievance, in accordance with the principles set out in civil law and common law, and developed in Canadian case law (2004 FC 566, ¶ 1, 24-25, 28).

[144] In *Vorvis* (*supra*) and *Wallace* (*supra*), the Supreme Court of Canada developed a four-point analysis for determining whether the civil liability of the employer is engaged. The questions before me are therefore the following:

1) As worded by the Federal Court (2004 FC 566, ¶ 24), has the grievor shown, on a balance of probabilities, that the employer was at fault or acted negligently or in bad faith?

2) If so, is the fault independently actionable on the basis of the tort or contractual liability of the employer (*Vorvis* (*supra*) and *Wallace* (*supra*))? In other words, is the civil liability of the employer engaged?

3) If so, has the grievor established harm?

4) If so, has the grievor established a probable causal link between the harm sustained and the actions criticized and established?

[145] There is, therefore, a series of points that must be established by the evidence before I can address the issue of the amount of damages to which the grievor would be entitled within the limitations set out in civil law, common law, and Canadian case law (2004 FC 566, ¶ 25). If necessary, I must also ensure that, according to the evidence before me, the grievor was not already compensated in whole or in part.

[146] Since the burden of proof is on the grievor, I shall limit myself to the alleged faults set out in his case argument plan and in paragraph 19 of the present decision. What I propose, with regard to each of these alleged faults, is to consider the first two questions. If necessary, I shall then consider the questions of damages and a causal link.

[147] The alleged faults have to do, firstly, with actions related to the investigation process into the complaint of sexual harassment and the subsequent process leading to the Deputy Minister's decision. They have to do, secondly, with actions and omissions that took place after the grievance was lodged, including actions related to the management of information about the case within the Department and harm to the grievor's reputation.

[148] My analysis of the evidence and my conclusions do not require me to rule on the objection to Associate Deputy Minister Dion's testimony concerning the representations made to the grievor about his qualifications for obtaining the position of Director of the QRO. I have not had to take that testimony into consideration.

A. Clear and avowed intention of solving the "problem" at the QRO and placing responsibility for it on the grievor

[149] The grievor blames the employer for taking into consideration the findings of the 1998 workplace assessment, when nothing in that assessment had anything to do with him, directly or indirectly. He alleges that the employer processed the complaint of sexual harassment only because it was afraid of being criticized for not taking action about the workplace atmosphere and in order to show that it was doing something to remedy the situation at the QRO. The grievor alleges that this entire context coloured the case, and wrongly so. Thus he was allegedly a scapegoat. In his opinion, there should never have been an investigation. Since the basis for the employer's actions was flawed, the Deputy Minister's conclusions were allegedly flawed.

[150] I cannot agree with that assertion. The evidence before me and before Adjudicator Bertrand is to the effect that the complaint of sexual harassment filed against the grievor was sufficiently serious to justify an in-depth investigation. According to Adjudicator Bertrand, the extent of the female lawyers' distress during the investigation and even at the hearing before her could be explained only by their sincerity. She also found the female lawyers credible. The choice of whether to file a complaint was made by the complainant (2002 PSSRB 89, ¶ 81-82). Neither of the two female lawyers agreed to meet with the grievor for an explanation and a settlement by mutual agreement. The employer could not require them to do so. That being the case, according to the evidence, the investigation process was automatically initiated.

[151] In the circumstances, the employer had an obligation to act, not only under the departmental workplace harassment prevention policy, but also and most importantly under the case law, as confirmed by the Supreme Court of Canada in *Robichaud* (*supra*) and *Janzen* (*supra*). The findings of the June 1998 workplace assessment report (Exhibit E-1) added to this obligation.

[152] The Deputy Minister, who determined the disciplinary measure, had notified all the employees, and specifically the managers, that the employer would not tolerate the situation disclosed by the June 1998 workplace assessment report (Exhibit E-1). The Deputy Minister himself addressed the employees of the QRO at a forum held in Montréal on October 22 and 23, 1998. The grievor was present at that forum. On that occasion, some female lawyers publicly informed the Deputy Minister of their concerns with regard to the workplace.

[153] Against that background, the Senior Advisor had received specific instructions concerning that workplace (2002 PSSRB 89, ¶ 20). As she had been asked to do by the Deputy Minister, she immediately notified him that a complaint of sexual harassment would be filed. He immediately called upon Associate Deputy Minister Dion, in order to indicate the seriousness of the situation. In fact, the employer had no choice, in my opinion, but to take the situation at the QRO seriously. The findings of the June 1998 workplace assessment report and the comments made at the forum held in Montréal were clear. The employer was also obliged to take seriously a complaint of sexual harassment against a manager.

[154] Following the 1998 workplace assessment, the employer had struck a QRO workplace harassment prevention committee, and action was taken with employees in order to improve the workplace atmosphere. The grievor sat on this committee. As a manager, he was also obliged to act and to react if he learned of inappropriate actions or comments. He acknowledged receiving training, as a member of this committee, on the departmental workplace harassment prevention policy and on the role of managers.

[155] Against the same background, the Senior Advisor presented her executive summary to the Deputy Minister. She cannot be blamed for taking this background into consideration in that document, since the Deputy Minister had given her specific instructions. The grievor did not establish that, by presenting the recommendations of the investigators and the advisors in this way, the Senior Advisor or the employer had

the intention of placing responsibility for all the employer's actions in the workplace on the grievor.

[156] In my opinion, therefore, there is no fault solely due to the fact that the employer took into consideration the background of the 1998 workplace assessment in acting. On the contrary, the opposite would have been sheer negligence by the employer. The investigation into the complaint of sexual harassment was a legitimate process. The clear and avowed intention of solving the problem at the QRO was established, but, since that intention was legitimate, I cannot find that the purpose of the process initiated following the complaint against the grievor was to place responsibility for that problem on the grievor alone. The grievor did not establish that he was a scapegoat for the situation at the QRO, or that the process was flawed from the outset.

[157] The grievor also argues that the inappropriate use of the findings of the June 1998 workplace assessment report supports his allegation that the employer was seeking to show that it was reacting to the overall situation at the QRO, at the grievor's expense. Adjudicator Bertrand commented on the use of the information related to this report in analysing the complaint against the grievor. The report was used in an attempt to substantiate or corroborate the complaint of sexual harassment against the grievor, but did not name the grievor in any way (2002 PSSRB 89, ¶ 344-345). The grievor argues that this use was inappropriate and constituted a fault by the employer.

[158] The context of the 1998 workplace assessment was noted again at the beginning of the meetings with the grievor and with the female lawyers. It was at that time that the grievor indicated to the Senior Advisor and Associate Deputy Minister Dion that the assessors had made no criticisms of the Tax Litigation Directorate and that one of the female consultants had even told him that he was "a gentleman". Even if the Senior Advisor had only tried to check exonerating factors with the assessors, that is, the fact that the grievor had received the gold award, I consider that it would in fact have been a mistake.

[159] The Senior Advisor had given responsibility for the investigation to two consultants. She was not obliged to seek additional information. Her role, as she amply explained, required that she be, and appear to be, detached and neutral. There is no evidence that the Senior Advisor acted maliciously, with impunity, or in bad faith.

[160] In summary, the reference to the June 1998 workplace assessment report in the executive summary was legitimate. It served to provide background for the situation. According to the uncontradicted testimony by the Deputy Minister, the report was considered only a background factor in the decision.

[161] That said, the use the Senior Advisor made of the findings and the details of the June 1998 workplace assessment report in the investigation into the complaint of sexual harassment against the grievor was, in part, inappropriate. She was not obliged to do research herself. The objective nature of her role should have prevented her from doing so.

[162] However, that fault does not engage the civil liability of the employer. Nor is there evidence that the Senior Advisor acted in bad faith (*Wallace* (*supra*)), or evidence of an independently actionable fault. That fault in the investigation procedure was cured by Adjudicator Bertrand's decision. The civil liability of the employer is not engaged here. As well, the grievor did not establish that the employer's actions were shockingly harsh, vindictive, reprehensible or malicious (*Vorvis* (*supra*)).

B. Failing to inform the investigators of the apologies offered by the grievor and failing to forward to the investigators the various initial statements and the documents in the file before the investigation process began

[163] Specifically, the Senior Advisor was blamed for not providing the investigators with important information in the course of their work. That information is, of course, the apologies offered by the grievor, the initial statements by the parties, and the other documents in the file.

[164] Although the wording of apologies is an important factor, it is a factor in determining the disciplinary measure, not in determining the facts. Therefore it cannot be concluded that the Senior Advisor committed an error by not providing this information to the investigators.

[165] With regard to providing the initial statements and the documents in the file, the Senior Advisor testified that, under the policy of the Office, these documents were not to be provided to the investigators in order to ensure that they were not influenced in their investigation. She testified before Adjudicator Bertrand: [translation] "We start with a clean slate."

[166] Adjudicator Bertrand found that the investigators had not received all the information disclosed by the two female lawyers and the grievor at the first meetings in December 1999 and January 2000, that is, the notes taken by the various persons involved (2002 PSSRB 89, ¶ 372-373). She found that the Deputy Minister had based his decision on inadequate findings because the evidence, including the important initial statements and the responses to them, had not been rigorously examined. Adjudicator Bertrand, appropriately, completely re-opened the administrative investigation following her observations of the apparent flaws in that procedure. She then set aside the employer's decision.

[167] Here again, however, there is no independently actionable fault engaging the civil liability of the employer. That error in the investigation procedure was clearly cured by Adjudicator Bertrand's decision. The rule in *Tipple* (*supra*) is applicable here. Nor is there evidence that the employer or its representatives acted in bad faith. Furthermore, as with the previously alleged fault, the grievor did not establish that the employer's actions were shockingly harsh, vindictive, reprehensible or malicious.

C. Falsely informing the Deputy Minister, in the course of his decision-making, that at no time had the grievor offered apologies

[168] It was alleged that the Senior Advisor presented a document that falsified the facts. In her executive summary, she did not inform the Deputy Minister of the offer to apologize that she herself had heard the grievor utter. In that document she wrote that, at the February 2, 2000 meeting, the grievor had not acknowledged wrongdoing and had not offered apologies (Exhibit E-34, page 3). As well, in the memorandum accompanying the executive summary (Exhibit E-35, page 2) and containing her recommendations, she indicates that the grievor:

> [Translation]
>
> . . .
>
> *7. Denied any wrongdoing, showed no concern for the complainant or even for* [the other female lawyer]*, and expressed no desire to apologize, from the time he was first informed of the allegations by Mario Dion and the Senior Advisor until his final submissions were presented;*
>
> . . .

[169] Although the grievor may be convinced that he offered sincere apologies, the wording he used throughout this matter leaves room for interpretation. That was what the Senior Advisor and Associate Deputy Minister Dion concluded. Before Adjudicator Bertrand, the grievor was quite clear: [translation] ". . . I am prepared to apologize, Madam Chair, I am prepared to apologize if I made a misstep, if I ever failed to express myself properly and if they misinterpreted my comments. I never wanted to harass anyone." (page 111 of Henri Bédirian's examination and cross-examination, August 22, 2001).

[170] This wording of the apologies offered by the grievor, even before Adjudicator Bertrand, is conditional: if the complainants have misinterpreted his words, he will apologize. He does not acknowledge having "made a misstep". However, he does not appear to acknowledge that his apologies are conditional.

[171] At the hearing before Adjudicator Bertrand, the grievor acknowledged issuing a blanket denial of all the allegations of which the Senior Advisor and Associate Deputy Minister Dion informed him in February 2000 (page 51 of his August 22, 2001 examination and cross-examination): [translation] ". . . I realize that I issued a blanket denial of all those allegations, the way they threw them at me; I did not admit to any incident for which I was blamed." Thus it cannot be concluded that the assessment of the grievor's statements by Associate Deputy Minister Dion and the Senior Advisor was erroneous.

[172] As well, the Deputy Minister testified that he alone made the decision to suspend the grievor and to relieve him of his staff management responsibilities. The Deputy Minister confirmed that he did not recall being told that apologies had been offered by the grievor. However, when the Deputy Minister explained the factors taken into consideration in determining the appropriate disciplinary measure, he did not note a lack of contrition or an absence of apologies by the grievor.

[173] The Deputy Minister stated, instead, that he took into consideration a number of other factors. The responsibility of the employer and the managers under the departmental workplace harassment prevention policy was the first factor. He also took into consideration the fact that not just one but two respected investigators had come to the conclusion that two allegations were founded. As well, he took into consideration the fact that the grievor had received workplace harassment prevention training and that the Office had already intervened with the grievors and managers at

the QRO. Lastly, given the matter in its entirety and the fact that the grievor was a manager, the Deputy Minister considered it inappropriate to allow the grievor to continue in his responsibilities. That said, a demotion was not called for, and the Deputy Minister protected the grievor's classification level.

[174] It was not established that the representations by the Senior Advisor concerning the apologies had a determining effect on the disciplinary measure imposed. The Deputy Minister based his decision on the information then available to him, which was mainly made up of the investigation report prepared by two experienced investigators who found merit in two allegations out of a total of seven.

[175] It was only when the entire matter was considered in detail by Adjudicator Bertrand that she found that certain conclusions of the investigation were erroneous, that the grievor could be blamed only for inappropriate comments, and that the disciplinary measure imposed by the Deputy Minister was inappropriate and should have been limited to a reprimand.

[176] In *Wallace* (*supra*), the Supreme Court of Canada notes that a claim for damages contained in a grievance must be supported by evidence of malicious intent, gross negligence or carelessness by the employer, as defined in the relevant labour case law. Even if the Senior Advisor had, in good faith, considered the apologies offered to be inappropriate, she could have reported to the Deputy Minister the apologies as they had been communicated to her, thus allowing him to decide on the nature of the apologies and the grievor's acknowledgement of wrongdoing. However, there is no evidence that this action by the Senior Advisor was malicious or characterized by gross negligence or carelessness.

[177] Nor is the action for which the Senior Advisor was blamed, which I cannot describe as a fault engaging the civil liability of the employer, actionable independently from the disciplinary measure, in accordance with the doctrine set out in *Wallace* (*supra*).

D. Following the evidence of misconduct by its employees, specifically the Senior Advisor, failing to reconsider and/or to rectify the Deputy Minister's decision

[178] I shall now consider the other actions for which the employer was blamed that were taken after the grievor's grievance was lodged, in order to determine whether

they are such that they engage the civil liability of the employer. These actions were taken during the period when the grievance procedure was taking its course, and following that period.

[179] The first of these actions have to do with the employer's reaction to the uncovering of errors committed during the investigation into the complaint. The grievor stated that he noted all these errors at the hearing before Adjudicator Bertrand. In his opinion, the employer should have reacted even before Adjudicator Bertrand rendered her decision.

[180] The grievor alleges that, once the errors committed during the investigation were uncovered, the employer should have reassessed the entire situation, which would have prevented his being subjected to the [translation] "odious" grievance procedure, his numerous hearing days, and the lengthy delay pending Adjudicator Bertrand's decision. The situation had significant repercussions on his physical and mental health and on his financial situation. The grievor believes that the entire situation could have been avoided by simple acknowledgement of the errors and reassessment of the case by the employer.

[181] Given my previous conclusions on the nature of the errors committed during the investigation, I cannot find that the employer should have reassessed its case and allowed the grievance, as the grievor suggested. A grievance procedure is initiated by the grievor. It places the onus on the employer to justify the disciplinary measure imposed, to the grievor and before a third party, the adjudicator. There is no evidence before me that the employer abused this process, which belongs to the grievor as well, or that it acted in bad faith. Thus there is no evidence of a fault engaging the liability of the employer.

[182] The grievor also blamed the employer for prolonging doubt about his innocence by applying for judicial review of Adjudicator Bertrand's decision, when it had no chance of success and withdrew that application the day before the hearing before the Federal Court. Here again, the employer did not concede to the grievor's application for judicial review, and the grievor was again subjected to delays pending the Federal Court decision. Those delays, as well as the doubt about his reputation that those procedures prolonged, apparently caused him manifold additional harm.

[183] The option of applying for judicial review is available to all parties. In itself, it cannot constitute an abuse of process, unless there is evidence to the contrary. The grievor had to establish that the employer acted in bad faith by applying for judicial review and by waiting until the last minute to withdraw its application. It is of judicial knowledge that these situations are not exceptional. Here again, the grievor did not establish that the employer's application for judicial review was trivial or abusive. In this regard, I note that the Federal Court did not order the employer to pay the grievor's legal costs.

[184] Here again, I cannot find that there is a fault engaging the liability of the employer.

E. After the grievance was lodged, assessing the workplace atmosphere against the background of the complaint of sexual harassment filed against the grievor, without taking any precautions regarding the potential repercussions on the grievor's life and career

[185] The grievor argues that the employer hounded him, as shown by the fact that a workplace assessment was carried out in 2001, after he had lodged his grievance. The report entitled [translation] *Toward a Respectful Workplace* clearly refers to the complaint of sexual harassment filed against a manager at the Tax Litigation Directorate. The grievor argued that the employer should have acted with care, given the grievance procedure in which the grievor was contesting the disciplinary measure. The report entitled [translation] *Toward a Respectful Workplace* was distributed to over 400 persons and was accessible by e-mail. Although it does not name the grievor, there is no doubt that it refers to the complaint of sexual harassment filed against him. The distribution of that report allegedly did the grievor a great deal of harm.

[186] The report entitled [translation] *Toward a Respectful Workplace* clearly indicates that certain rumours were circulating in the workplace. It confirms that the employees were concerned about the situation at the Tax Litigation Directorate. It also confirms that the employer was very discreet about the situation. The employees even requested additional information. The employer stated that it acted legitimately by carrying out the workplace assessment, as a responsible employer. The findings of the report confirm that the employees were concerned and that the employer was obliged to take action. Does the distribution of the report constitute a fault covered by the grievor's grievance?

[187] The case now before me is the same as the one before Adjudicator Bertrand. The amendment to the grievance has to do only with the amount of damages claimed. The actions for which the employer is blamed in the present wording took place after the grievance was lodged and are unrelated to either the disciplinary measure or the investigation process into the complaint that led to the disciplinary measure.

[188] The 2001 workplace assessment and the distribution of the report entitled [translation] *Toward a Respectful Workplace* are actions that are independent of the disciplinary measure and were not alleged in the grievor's grievance or added to it. Thus they cannot constitute a fault covered by the claim for damages contained in the grievor's grievance.

[189] Nor can the employer be blamed for taking action in response to uneasiness in the workplace. The report entitled [translation] *Toward a Respectful Workplace* confirms that uneasiness. It is understandable that the employer would follow up in the workplace after a complaint of sexual harassment was filed against one of its managers. Doing so is part of the employer's responsibilities toward all employees under its workplace harassment prevention obligations. The employer is also responsible for handling the matter properly in the workplace since, in addition to being responsible toward all employees, it is also responsible toward the grievor against whom the complaint was filed.

[190] The report entitled [translation] *Toward a Respectful Workplace*, an excerpt of which is quoted at paragraph 28 of the present decision, indicates that the employer took certain steps in order to attenuate the repercussions of the workplace assessment on the grievor. The report was distributed on the consultants' recommendation and this distribution appears reasonable in the circumstances. Thus, even if it were an independently actionable fault (*Wallace* (*supra*)), it would not engage the civil liability of the employer since there is no evidence of bad faith or gross negligence.

F. Damages: harm to reputation, interruption of career, loss of income, torts and punitive damages and their link to the alleged faults

[191] I do not doubt that the grievor experienced very difficult moments. His physical and mental health were affected. His reputation was also affected. His career may have been slowed and his overall financial situation may have been affected.

[192] Nor do I doubt that the grievor saw himself as a scapegoat in this entire matter, or that he is convinced that he would never have had such a hellish experience if he had had an opportunity to explain himself to the female lawyers.

[193] As well, I do not doubt that the employer acted in good faith. It immediately reinstated the grievor in his management position, with no conditions or comments, as soon as it learned of Adjudicator Bertrand's decision. When the grievor experienced difficulties affirming his leadership and asked the employer for assistance, the employer immediately provided him with the services of a consultant. She worked with the grievor and his subordinates for nearly one year. The grievor himself indicated that the contract for her services must have involved several thousand dollars.

[194] The grievor had to establish fault engaging the civil liability of the employer, as defined by the Supreme Court of Canada. He had to establish the harm to him, and establish that the actions taken by the employer were the direct cause of that harm. Lastly, he had to establish that he had not already been compensated by the employer for the harm.

[195] The nature of the errors and omissions alleged here do not permit me to allow the grievor's claims. As well, a causal link is very difficult to establish. The complaint of sexual harassment is the main source of all the difficulties experienced by the grievor. It is difficult to identify the repercussions of the alleged errors and omissions on the grievor's present situation.

[196] The evidence has established that the female lawyers to whom the grievor's offer to apologize was conveyed were not prepared to accept them or to meet with him. The Deputy Minister's decision was based on the information then available to him and on the factors about which he testified. Even if he had taken into consideration the offer to apologize as worded by the grievor, there is no evidence that his decision would likely have been different, given the other factors taken into consideration and the nature of the disciplinary measure.

[197] The decision to contest the disciplinary measure was the grievor's, not the employer's. The grievance required the employer to justify the disciplinary measure. The employer chose to leave to Adjudicator Bertrand the task of determining whether the disciplinary measure was appropriate, as it was entitled to do.

[198] Adjudicator Bertrand's decision had the effect of reinstating the grievor in his management position. His reinstatement was necessarily in the sight and with the knowledge of everyone, as was the previous loss of those same responsibilities, which in the grievor's opinion had made the matter public. The perception in the workplace should have changed from that time forward.

[199] The grievor also argued that the harm to his reputation was prolonged after Adjudicator Bertrand's decision. He noted the words used by counsel for the employer before the Federal Court and by a Department of Justice lawyer at a presentation on the *Public Service Modernization Act* in November 2004. In each of those instances, the grievor established that he was referred to as [translation] "the presumed harasser". From the time Adjudicator Bertrand rendered her decision finding that sexual harassment had not occurred but that, instead, the grievor had made inappropriate comments, he could no longer be referred to as [translation] "the presumed harasser".

[200] Those events nevertheless occurred long after Adjudicator Bertrand's decision. The damages claimed and contained in the grievance must be linked to separate faults committed by the employer as part of the disciplinary measure. The grievor is now alleging new faults, not covered by the initial grievance. These faults cannot therefore be considered in the analysis of the damages claimed in the grievance, although those comments may confirm that the grievor's reputation was harmed. A causal link is still missing.

[201] I must limit myself to the circumstances set out in the grievance initially lodged and debated before Adjudicator Bertrand, and to those places and circumstances. The Federal Court clearly invited the parties to complete their evidence on fault. That evidence cannot have to do with new faults, which would also be contrary to any rule of natural justice, since the employer was entitled to know the faults for which it was blamed in order to prepare its defence properly. Thus I need not rule on those faults that cannot be linked to the grievance.

[202] The grievor did not establish a fault related to the fact that he did not obtain the promotion to the position of Director of the QRO in February 2000. As well, given the staffing process adhered to in the federal public service, it cannot be established that the grievor would have been the best qualified candidate in the February 2000 competition. As well, the employer was authorized to replace the outgoing Director of the QRO without competition. The grievor did not establish that that appointment was

made solely in order to prevent him from entering the competition and obtaining the position.

[203] Firstly, although the grievor may have been invited to apply because his abilities and skills were recognized, no candidate can be assured of being appointed to a position in the public service for which that person has applied. The merit principle ensures that the best qualified candidate in comparison with the other candidates is appointed to the position. Contrary to what the grievor suggested, the employer does not control the outcome.

[204] Secondly, the choice not to hold a competition is that of the Deputy Minister. The evidence has not satisfied me that this decision was made solely in order to ensure that the grievor did not obtain that position. A valid and reasonable explanation for that decision was presented to me. As well, the grievor admitted that he had been invited to apply for that position before the decision was made to appoint a person without competition.

[205] The delays that the grievor had to undergo pending the decisions of Adjudicator Bertrand and then the Federal Court and even the present decision were certainly stressful. That said, they were not caused by the employer. There is no causal link that would have allowed me to conclude that the liability of the employer was engaged in this regard. The experts confirmed that those delays were largely responsible for the harm sustained by the grievor.

[206] The grievor kept his employment, by the choice of the Deputy Minister. Nor was he demoted. He obtained the assistance he needed to reaffirm his leadership with his team, at the employer's expense. His performance evaluations were advantageously readjusted, at the suggestion of the new Director of the QRO, and a performance bonus was granted to him. The employer unilaterally and voluntarily reimbursed the grievor's representation costs up to February 17, 2004. It also offered him a new position.

[207] The grievor did not follow up on this offer. I find that omission by the grievor odd. He argues that the employer was trying to make his grievance meaningless. Would it not have been more appropriate to take the opportunity offered by this promotion? The grievor cannot justify failing to follow up on this offer on the pretext that the employer was actually trying to make his grievance meaningless. Like any other civil

liability claimant, he was obliged to limit the harm he sustained. He had a written offer of a promotion in the Ottawa region.

[208] Given my conclusions, I need not rule on the awarding of damages, or value them. The grievor also claimed exemplary damages. Since the grievor did not establish that the employer's actions were shockingly harsh, vindictive, reprehensible or malicious (*Vorvis* (*supra*)), I cannot allow those damages.

[209] The grievor also claims financing, valuation and representation costs. Given that the employer unilaterally and voluntarily paid the amount of $102,250 to counsel for the grievor in reimbursement of his representation costs up to February 17, 2004, and that no fault engaging the liability of the employer was established, that claim is not allowed either.

[210] For these reasons, I make the following order:

(The Order appears on the following page)

VI. Order

[211] The claim for damages related to the grievance is dismissed.

January 19, 2006.

P.S.L.R.B. Translation

Sylvie Matteau,
adjudicator