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Parliamentary Employment and Staff Relations Act

Before an adjudicator

BETWEEN

DAVID SABOURIN

Grievor

and

HOUSE OF COMMONS

Employer

Indexed as
Sabourin v. House of Commons

In the matter of a grievance referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Paul Champ, counsel and Samantha Lamb, counsel

For the Employer: Charles Hofley, counsel

Heard at Ottawa, Ontario,
March 13 to 17 and April 28, 2006.

Grievance referred to adjudication

[1] David Sabourin's employment with the House of Commons was terminated on October 14, 2003. His employer alleged that he had dishonestly misrepresented his medical condition after a workplace injury in order to obtain benefits. The employer relied on this alleged misconduct as a culminating incident justifying discharge. Mr. Sabourin is represented by the PSAC and was governed by the collective agreement between the Public Service Alliance of Canada (PSAC) and the House of Commons for the Postal Services Sub-Group bargaining unit (expiry date: June 30, 2003; Exhibit G-1).

[2] I issued a decision on the admissibility of videotape surveillance evidence and a report based on the videotapes on February 14, 2006 (*Sabourin v. House of Commons,* 2006 PSLRB 15). In that decision, I ruled that the evidence was not admissible. The hearing continued on the merits the week of March 13, 2006.

[3] The evidence in the preliminary decision is summarized in that decision and is included by reference in this decision. I have considered the relevant evidence from that decision in deciding the merits of the grievance.

[4] On February 24, 2006, the employer requested an adjournment of the hearing scheduled for March 13, 2006, for a period of two months. The employer requested this on the basis that it required more time to prepare its case, given that the videotape evidence had been ruled inadmissible. Mr. Sabourin objected to the request. After hearing the submission of the parties by teleconference on February 28, 2006, I denied the request for adjournment on the basis that the employer had had sufficient time to prepare its case.

Rulings on evidence

[5] The employer sought to introduce as an exhibit a letter written by Mr. Sabourin's counsel, Paul Champ, to counsel for the employer, Charles Hofley. The letter allegedly contained an admission against interest. Mr. Sabourin objected to the introduction of the letter on the ground that it was written on a "without prejudice" basis. Cynthia Lamb argued the motion for Mr. Sabourin.

[6] Ms. Lamb submitted that the absence of the phrase "without prejudice" in the letter was not determinative of the issue. The determining factor was whether the letter was written for the purpose of settlement: *Blood Band v. Canada (Ministry of*

Indian Affairs and Northern Development), 2003 FC 1397 (C.A.). The purpose of settlement privilege is to encourage the settlement of disputes.

[7] Ms. Lamb stated that three conditions must be met in order for the privilege to be recognized (*Tommy Hillfiger Licensing Inc. v. Price Costco*, [2000] F.C.J. No. 84 (T.D.):

1) a litigious dispute must exist;

2) the communication must be made with the explicit or implied intention that it would not be disclosed; and

3) the purpose of the communication must be to attempt to effect a settlement.

[8] Ms. Lamb submitted that not only is the possibility of settlement noted in the letter, but the letter was sent (following my preliminary ruling) in order to facilitate discussion of settlement. She also referred me to *Newfoundland and Labrador Housing Corp. v. Canadian Union of Public Employees*, *Local* 1860, [1998] Nfld. L.A.A. No. 30 (QL).

[9] Mr. Hofley agreed that the test for privilege was substance and not form. He stated that this letter was simply a response to Mr. Hofley's letter requesting an adjournment, and was not an invitation to settle. Its purpose was not to negotiate but to give views on the impact of the preliminary ruling. This was reinforced by the last sentence: ". . . Notwithstanding all the above, we remain open to discuss a settlement. . . ."

[10] Ms. Lamb submitted that the letter was setting the context for the re-opening of discussions with the employer. The letter also states ". . . If this matter proceeds to hearing. . . ." When reviewed in its entirety, the letter is setting out the reason why it was best to consider settlement. The reference in the first paragraph of the letter to a requested adjournment was a separate issue.

[11] I ruled that the letter was admissible. It is the substance not the form of the letter that is important in assessing whether privilege attaches to a lawyer's letter. In this case, the absence of the notation "Without Prejudice" is not determinative. I looked at the overall intent or purpose of the letter, and this examination led me to the conclusion that it was not subject to privilege. The entire content of the letter, up until

the last paragraph, does not relate to settlement of the grievance. It refers to the bargaining agent's position that it hoped the ruling on the videotape evidence had been "instructive" for the employer, and provides notice that Mr. Sabourin will be calling witnesses with regard to alleged threats made against him. The reference to settlement in the final paragraph is an afterthought. This is reinforced by the fact that the paragraph in question commences with ". . . Notwithstanding all of the above we remain open to discussing a settlement. . . ."

[12] At the end of the case for the grievor, Mr. Hofley stated that he wished to call a number of witnesses in reply. Mr. Champ agreed to the recall of Paul Deault with regards to whether he assisted Mr. Sabourin in getting onto and up from a sofa at work. I ruled that André Cyr, the occupational health and safety coordinator, could be called in reply to testify as to drug claims made through the Workers Safety and Insurance Board (WSIB), but not on other matters as requested by Mr. Hofley. I ruled that the other requested witnesses could not be called in reply. The submissions of the parties and my reasons for the ruling are below beginning at paragraph 82.

Summary of the evidence

[13] Mr. Sabourin is 43 years old and worked at the House of Commons for 10 years. He was suspended without pay on July 24, 2003, and was terminated on October 14, 2003. At the time of his termination, he was employed in postal services at the Belfast Road warehouse of the House of Commons. He is married and has three teenaged children.

Previous discipline

[14] The employer is, in part, relying on previous discipline of Mr. Sabourin to justify its termination of the grievor. Mr. Sabourin received a verbal reprimand, two letters of reprimand, a three-day suspension and a twenty-day suspension with a demotion prior to his employment being terminated on the basis of an alleged culminating incident. Mr. Sabourin did not grieve any of the previous discipline.

[15] On December 6, 1999, he received a letter of reprimand for the unauthorized use of a taxi voucher. The letter of reprimand (Exhibit E-18) reads, in part, as follows:

. . .

> *On October 5, 1998, following an injury on duty, you were provided with a taxi voucher . . . in order to seek immediate medical attention. You never used this voucher nor gave it back to Management. However, this taxi voucher was used on October 16, 1999 to get from Vanier to Gloucester, resulting in a $30.00 cab fare. . . . I was aware that you attended the André-Laurendeau reunion, which was held in Vanier on October 16, and knew that you lived in Gloucester (Orleans).*
>
> *During our meeting, you immediately came forward with an admission that you used this taxi voucher that you regretted doing so and that this was a lack of judgment on your part. You further mentioned that you were embarrassed and humiliated by your action and you offered immediate and complete restitution.*
>
> *Your candor and forthrightness are well appreciated and have been taken into account in my decision. The unauthorized use of this taxi voucher can be characterized as theft and these cases are dealt with rather seriously at the House of Commons. Indeed, should you have denied your responsibility, either Security Services and/or Ottawa Police would have further investigated the matter. In the event that such an investigation would have proven your guilt, your employment at the House of Commons, as was the case for similar cases of theft, would have likely ended.*
>
> *Although this is only a letter of reprimand, you were advised that any misconduct on your part within the next two years will be dealt with very seriously and, depending on the nature of the recurrence, could lead to your automatic termination from the House of Commons.*
>
> . . .

[16] Mr. Sabourin testified that he had been inebriated the evening that he used the taxi chit and was not thinking clearly. He testified that he admitted his guilt when confronted and made restitution.

[17] Richard Mallette, Chief of Postal, Distribution and Messenger Services, testified that Mr. Sabourin received a verbal reprimand in July 2000 for being absent from his work location without the permission of his supervisor. Mr. Sabourin left work to go to his bank and was absent for 55 minutes. Mr. Mallette testified that employees had been advised at staff meetings of the requirement to obtain permission of the supervisor. Mr. Sabourin testified that he had been unable to find his supervisor to obtain permission and that past practice was that as long as the counter was covered by an employee, there was no problem with being absent for short periods.

[18] On July 5, 2001, Mr. Sabourin received a letter of reprimand for an unauthorized absence from work. The letter of reprimand (Exhibit E-19) reads, in part, as follows:

. . .

> *On Friday, June 29, 2001, you left work at approximately 11:40 a.m., without advising a supervisor of your early departure, to attend the 50/50 draw in the Wellington Building, which was being held at noon. The draw was terminated before 12:10 p.m. Though you had permission to attend the 50/50 draw, you were not authorized for an early departure from the worksite afterwards. Your lunch period is scheduled from 12:30 p.m. to 1:30 p.m., at which time you did return to work.*
>
> *I would like to remind you that this meeting was an opportunity for you to provide an explanation for your unauthorized absence. You have already been verbally reprimanded in the past for similar incidents. However, I was pleased by the fact that you acknowledged responsibility for your actions. Consequently, I am prepared to mitigate the penalty and to give you this letter of reprimand for being absent from work on unauthorized leave.*
>
> . . .
>
> *I remind you that should you fail to report to work again, you will be subject to disciplinary measures of a more serious nature.*

. . .

[19] Mr. Sabourin testified that he was one of the organizers of the draw for the United Way. There were a number of other employees who did not return to work immediately after the draw. Mr. Mallette did not remember these points being raised by Mr. Sabourin or his representative at the disciplinary interview.

[20] On October 4, 2001, Mr. Sabourin received a three-day suspension for opening a Member of Parliament's mail and attempting to get a colleague to change his interpretation of the incident. The discipline letter (Exhibit E-20) reads, in part, as follows:

. . .

> *. . . On August 29, 2001, the Justice postal unit received a request from Mrs. Bakopanos' office to send the contents (envelopes) of 6 lettertainers to the riding office via Expresspost. According to the testimonies given during our*

investigation, you were busy doing personal work. When instructed to box and send these envelopes, you expressed discontent with your body language. You then proceeded to open an envelope, read the content and decided to call the member's office to discuss the method of delivery. The call was unanswered. You then proceeded to send the boxed envelopes by regular mail. These boxes were only sent by Expresspost the next morning when your colleague noticed that they were still in the room.

The next incident occurred after our first meeting of September 12, which dealt with the above-described incident. When approached by a colleague who was a witness, you tried to convince him to change his interpretation of the incident. You then told him "Peux-tu faire un message pour moi, tu diras au petit cocksucker, what goes around comes around".

With regards to the first incident, you claim that you did not know that the contents of the lettertainers were to be sent by Expresspost. You mentioned through your union representative that routinely, contents of opened envelopes are read to look for a date. Finally, you explained that you were on break at that time, which would explain your personal activities and your expression of frustration when instructed to work on the mailing.

As for the second incident, you acknowledged that the incident happened as reported, offered apologies, expressed remorse, humiliation and embarrassment of the whole incident.

. . . I went back to the witnesses to establish your knowledge of whether or not the contents of these lettertainers had to be sent by Expresspost. Both witnesses confirmed that in their presence, you were told that the envelopes in the lettertainers had to be boxed and sent by Expresspost.

Therefore, I must reject your version of the incident. Indeed, both witnesses were unequivocal about your knowledge of the method of delivery. Furthermore, I fail to understand why you would even call the Member's office if you believed from the outset that these were to be sent by regular mail. If that was your belief, why even call the office? Another fact leads me to doubt your versions of the fact. You mentioned that at that time, you were on break. However, I found that to be quite unbelievable for a number of reasons. Firstly, you were back from your lunch hour for about 30 minutes or so. Secondly, it is an established practice that no breaks are taken in the afternoon, rather employees leave earlier at the end of the day. I confirmed this information with your colleagues and one of them also confirmed that

> *you left at the usual time that night, contradicting your assertion that you were on break.*
>
> *Considering all the above, you understand that I have no choice but to impose a suspension. Your candor and honesty displayed during our second interview has convinced me to reduce the combined penalty for both incidents. I also had to consider that you already have on file a letter of reprimand dated December 6, 1999 for misuse of a taxi voucher. Also, in July 2000 and July 2001, you were reprimanded orally and in writing for unauthorized absence from the workplace.*
>
> . . .
>
> *. . . As you mentioned yourself during our last interview, this may very well constitute your last chance for continued employment at the House of Commons. We value our employees and it would be a shame that behavioral issues negate all the investment made by the employer in you as well as your own efforts. I invite you to reflect seriously on your attitude towards work in general. Should you need any assistance in dealing with personal issues that may affect your behavior at work, I strongly encourage you to contact the Employee Assistance Program at. . . .*

[21] Mr. Sabourin testified that he did say the words to his colleague recounted in the letter of discipline, but denied that what he said constituted a threat. He also testified that he did not necessarily agree with the discipline, but just wanted it "to go away". Mr. Mallette testified that the reference to a "last chance for continued employment" in the letter were the words of Mr. Sabourin, and not his.

[22] On June 3, 2002, Mr. Sabourin received a 20-day suspension and a demotion for theft of employer property. The disciplinary letter (Exhibit E-17) reads, in part, as follows:

> . . .
>
> *. . . During the month of May 2002, your supervisor, Pierre Giguère, noticed that on a stationery requisition dated April 10, 2002, two (2) boxes of batteries were ordered for the unit. However, since there is no use for batteries in the Wellington Building Post Office, this raised suspicions.*
>
> *Also during the month of May, you took a "bescherelle"* [*sic*] *book from the Wellington Building Unit. You then asked a colleague, Monique Payant, to take the book from the stock so that it would not show on the inventory. The following day, Ms. Payant refused to comply.*

> *You then called Daniel Lavoie, at the Confederation Building Unit, and asked him to send you a "bescherelle"* [*sic*] *book to cover up the shortage of stock, which he did.*
>
> *Following these incidents, Management was prepared to go ahead with an investigation and issued notices to employees. However, at the request of your union representative and yourself, interviews were cancelled and a meeting was called for the next day. Your representative indicated to management that you were prepare* [*sic*] *to admit guilt.*
>
> *During our meeting, you indeed admitted having taken the batteries and the "bescherelle"* [*sic*] *book for personal use. You indicated, however, that you did not pressure Ms. Payant following her refusal to cover up for the book. You also indicated that you told Mr. Lavoie the reason you needed the book was to take it home for your daughter.*
>
> *As you are aware, this is not the first incident for which Management has* [sic] to *take disciplinary action against you*. . . . [Previous discipline is listed.]
>
> *I would like to reiterate that theft is the gravest act of misconduct in an employment relationship and usually leads to dismissal. However, Management has taken into consideration the fact that you have children and the impact a dismissal would have on your family.*
>
> *On the other hand, due to the seriousness of your misconduct, disciplinary action has to be taken and I have decided to impose you* [*sic*] *a 20-day suspension. However, to alleviate the financial burden this would cause on your family, I am willing to waive this suspension.* ***Please take note that a waived suspension, although no financial penalty is suffered, has the same weight to support more severe disciplinary action should the behaviour reoccur.***
>
> *You will also be required to reimburse the House of Commons for the items you took*. . . .
>
> . . . *As indicated during our meeting this is your last chance for continued employment at the House of Commons.*
>
> [Emphasis in the original]

. . .

[23] Mr. Sabourin testified that, at the time, he did not think his actions were wrong, as he had seen other people do similar things. However, he testified that he admitted his guilt when he was caught, and felt humiliated.

[24] Mr. Sabourin signed a "Memorandum of Agreement" with regard to this discipline (Exhibit E-21). He waived the confidentiality provision in the memorandum at this hearing. The memorandum contained the following terms:

. . .

1. *The employee receives a 20-day suspension (non served) (letter attached) for having taken 24 batteries and a "bescherelle" book from the Wellington Building Stationery.*

2. *The employee will reimburse the House of Commons by cheque to the Receiver General of Canada in the amount of $16.71.*

3. *The employee will withdraw, by letter addressed to Personnel Services, from competition 2002-13 (Indeterminate position as Supervisor) and competition 2002-24 (Acting assignment as Supervisor).*

4. *The employee will request, by letter addressed to Richard Mallette, to be demoted to the OPS-3 group and level, Mail Processing Clerk position at the Belfast Warehouse.*

5. *The employee will not grieve the issues contained in this agreement.*

6. *All parties shall hold this memorandum of agreement confidential. It is agreed that disclosure will be made to House of Commons personnel responsible for the implementation of the terms of the agreement.*

. . .

[25] Mr. Mallette participated in the meetings with Mr. Sabourin to discuss the memorandum of agreement. He testified that the demotion ensured that Mr. Sabourin would have no front line contact with clients. Mr. Sabourin expressed remorse, and it appeared to Mr. Mallette that Mr. Sabourin clearly understood the ramifications of his actions. Mr. Mallette testified that Mr. Sabourin understood that this was "definitely a last, last chance". Mr. Sabourin testified that he was not told that this was a last-chance agreement. He also testified that he signed the memorandum because he was threatened that he would lose his job if he did not sign it. Mr. St. Louis testified that it was stated quite clearly in the letter of discipline and verbally that this was the last chance for continued employment for Mr. Sabourin.

Alleged culminating incident

[26] As noted above, evidence about the alleged culminating incident is also contained in the earlier decision on admissibility of the videotape evidence.

[27] Mr. Sabourin was injured at work on June 9, 2003. He was driven to the hospital by his supervisor, Mr. Deault. Mr. Sabourin testified that Mr. Deault told him in the car that he should make sure to tell the doctor that no modified duties were available. Mr. Deault denied saying this. Mr. Sabourin did not stay at the hospital, because he was advised of a lengthy waiting period. He returned to work to obtain his vehicle and attended a local clinic where he was seen by Dr. Wijay. Dr. Wijay told him to rest for one week and prescribed painkillers and anti-inflammatory medication. At the end of the week, Mr. Sabourin was still in pain and advised Mr. Deault that he would be seeing his family physician (Dr. James Dickson) the following Monday. Mr. Sabourin testified that his doctor diagnosed him through asking "how things felt", and concluded that it was either a slipped disc or a pinched nerve. Mr. Sabourin did not receive any other diagnostic tests, such as an X-ray, until September 2003.

[28] Mr. Sabourin was prescribed medication by Dr. Dickson, including pain medication (Exhibit E/G-3). Mr. Sabourin could not remember the exact medication he was prescribed. Mr. Cyr testified that the employer received no notification of claims for medication by Mr. Sabourin. Mr. Cyr testified that claims would be paid through the WSIB, and that the employer would see the claims. He stated that claiming under the WSIB claim would result in better coverage than if the employee claimed under the employee health care plan (Sun Life), because there is no deductible amount for WSIB claims. Mr. Sabourin testified that he did not claim all his medication because he believed not all of it was covered. After he was suspended without pay, he also thought that he was no longer covered by the benefit plan. In cross-examination, Mr. Cyr stated that he did not discuss prescription drugs with Mr. Sabourin and did not advise him that he could claim the drugs through his WSIB claim.

[29] As set out in more detail in the interim decision, Mr. Sabourin was asked to go to the Belfast Road warehouse on June 17, 2003, to obtain WSIB forms for his doctor to fill out. Mr. Deault asked him to come upstairs to his office. Mr. Sabourin testified that he used the hand railing to pull himself up the stairs. Mr. Deault testified that Mr. Sabourin did have difficulty walking up the stairs and he was walking slowly. Once in the office, Mr. Deault asked him if he wanted to sit down. Mr. Sabourin testified that

Mr. Deault helped him to sit down on a low couch and also helped him to get up. Mr. Deault denied that he assisted Mr. Sabourin. Mr. Deault agreed in cross-examination that Mr. Sabourin was experiencing difficulty in walking and sitting.

[30] Robert Frenette (Mr. Deault's supervisor) asked him to call Mr. Sabourin about a scanner training course to be held the following day (June 18, 2003). Details of this discussion and training course are set out in my preliminary decision at paragraph 16.

[31] Mr. Sabourin testified that he had days where he was in extreme pain at the beginning of the day, but, that, by the middle of the day, with the aid of medication, he felt better and able to do errands such as getting milk or driving to the video store. He was doing stretching exercises and some squats, as tolerated. Every day was different in terms of pain, he testified. In cross-examination he testified that some days he would lie in bed and sometimes he would sit. He testified that as of July 1, 2003, he was not fit to go to work and did not want to risk re-injuring his back.

[32] As noted above, I ruled that a letter sent to Mr. Hofley by Mr. Champ was admissible (Exhibit E-25). The part of the letter that Mr. Hofley relied on as an admission against interest is as follows:

. . .

> *. . . Performing certain activities for a brief period in time does not and can not lead to the conclusion that a person can perform similar activities for a full day or, more seriously, a person is acting fraudulently. . . .*

. . .

[33] Mr. Sabourin was asked in cross-examination whether he had assisted in setting up a basketball hoop at his home while he was on injury-on-duty leave. He testified that the basketball hoop had been brought to his house in the back of a van. He opened the box but his son removed it from the box. He was asked if this was contrary to his doctor's orders, and he replied that it was not, because his doctor said that he could do activities "as tolerated". His wife, son and neighbour put the basketball hoop together, and he read the instructions. He was asked if he put up the centre pole of the basketball hoop and he testified that he did not remember. He also did not remember if he broke down the box by jumping on it. He was also asked if he washed his car manually. He testified that he did not know. He was also asked if he had been able to bend and twist to wash his car. He testified that he was not sure, however his doctor

said that he could do these activities as tolerated-some days he felt good, and others he did not. On some days, he had to get his wife to tie his shoelaces.

[34] In cross-examination, Mr. Sabourin testified that on July 3, 2003, a neighbour had noticed someone videotaping from a car parked on the street and told Mr. Sabourin. Mr. Sabourin approached the videographer and had words with him.

[35] Mr. Cyr called Dr. Dickson on July 3, 2003, to seek clarification on the Functional Abilities Form (Exhibit G-5). Mr. Cyr testified that Dr. Dickson told him that Mr. Sabourin was not able to do modified duties.

[36] Mr. Sabourin went to a physiotherapist (Mélanie Farmer) 11 times between July 11 and August 7, 2003. Ms. Farmer prepared an assessment report for the WSIB (dated July 11, 2003 (Exhibit E/G-3)). She indicated in her report that complete recovery was expected within six weeks. At the time (July 11, 2003), she listed the following physical restrictions: no bending/twisting of back; no lifting; and sitting with a lumbar roll. In the letter from the WSIB claims adjudicator dated September 11, 2003 (Exhibit E-23), the adjudicator noted that he had contacted the physiotherapist on or about July 17, 2003, "who indicated that you would be able to return to modified duties". Mr. Sabourin testified that he never discussed modified duties with his physiotherapist.

[37] Mr. Cyr testified that in a telephone conversation with Mr. Sabourin on July 14, 2003, he asked Mr. Sabourin if he was willing to do modified work and Mr. Sabourin said he was not fit to return to work. Mr. Sabourin denied that he discussed modified work with Mr. Cyr. Dr. Dickson completed a progress report for the WSIB on July 16, 2003 (Exhibit E/G-3), with a diagnosis of "mechanical back strain". He noted that Mr. Sabourin was "unfit for work at present". Dr. Dickson indicated that a CT scan of his back was being ordered.

[38] A disciplinary interview was conducted on July 22, 2003, with Mr. Sabourin. Mr. Sabourin was accompanied by a union representative. Art St. Louis, Director, Building Management, chaired the meeting, and Mr. Frenette and Mr. Cyr were in attendance. Cheryl Paquette was the note-taker for the meeting (Exhibit G-12). Mr. St. Louis told Mr. Sabourin that there was suspicion of fraud with regards to his WSIB claim, and that the employer believed he was malingering. Mr. Sabourin testified that Mr. St. Louis told him that, if he did not resign, the Ontario Provincial Police (OPP),

the Ottawa Police or the RCMP could be called, and he could be charged with fraud. Mr. St. Louis testified that he simply told Mr. Sabourin that the WSIB could investigate and get the police involved. He did not recall referring to the Ottawa Police or the RCMP. The notes of the meeting refer to the possibility of charges by the OPP and that the matter was "outside" the House of Commons.

[39] A further meeting was held with the same people in attendance on July 24, 2003 (Exhibit G-13). At this meeting, Mr. Sabourin was advised of the video surveillance evidence. The notes indicate that Mr. St. Louis said that the "impact is severe" and that the OPP could be called. Mr. St. Louis testified that he wanted Mr. Sabourin to be "well informed", and that he was referring to the fact that the WSIB could call in the OPP. He is also recorded in the notes as saying that once the evidence was with the WSIB the matter was "out of our hands". Mr. St. Louis testified that if Mr. Sabourin had resigned the employer would have "shut the file" and taken no further action. Mr. Sabourin was advised that he would be suspended pending an investigation. On the same day he received a letter suspending him without pay (Exhibit G-2).

[40] The letter of suspension without pay stated that the employer was in possession of information that ". . . suggests that your actual physical and health status was incompatible with the medical information provided. . . .". The information that the employer referred to in the letter was primarily the videotape of Mr. Sabourin (which I have ruled inadmissible). Mr. St. Louis testified that the other information relied upon included the observations of Mr. Deault and Mr. Sabourin's refusal to take the scanner training course. Mr. Sabourin was told in the letter that he was being suspended without pay "on suspicion of fraudulent use of injury on duty leave". The letter of suspension also stated that the employer would be conducting further investigations and reviewing his claim with the WSIB claims adjudicator. Mr. Mallette testified that management questioned whether the injury was as serious as Mr. Sabourin had suggested.

[41] Mr. Sabourin testified that he started to feel better near the end of July. On July 29 or 30, 2003, Dr. Dickson asked him if he thought he was capable of doing modified duties, and Mr. Sabourin said yes.

[42] Mr. Sabourin received a letter dated August 5, 2003, from Rob Panchuk, the claims adjudicator for his WSIB file. The letter denied his claim from June 25, 2003. It reads as follows (Exhibit E-22):

This letter is to confirm our conversation of July 29th, 2003 in which we discussed the status of your claim.

Your claim is allowed for a back injury you sustained at work on June 9th, 2003 while working for the House of Commons. Dr. Wijay diagnosed mechanical back pain and ordered one week off work. Further medical from [*sic*] *Dr. Dickson was received indicating that your absence from work should be prolonged due to your ongoing back condition. Dr. Dickson also completed a functional abilities report in which he states your tolerances as follows:*

- *Walking, short distances only*
- *Sitting, less than 30 minutes*
- *Standing, less than 15 minutes*
- *Lifting, as tolerated*
- *Physical exertion, as tolerated*

Your employer claims that they offered you modified work entailing the viewing of training materials. André Cyr claims that he called your doctor to discuss this and your doctor informed him that you were unable to perform any work due to your injury.

Your employer has also submitted surveillance tapes taken between June 25th and July 11th, 2003 that they believe demonstrate your ability to work contrary to the medical information in your claim.

Upon reviewing the tapes, I have concluded that I cannot support lost time in your claim from June 25, 2003. I am unable to conclude from that time, that you have a back impairment. In order to arrive at this conclusion, I watched the tapes with standard back precautions in mind which include:

- *No prolonged static positions as in sitting or standing*
- *No prolonged weight bearing or walking*
- *No repeated or extremes of bending and twisting*
- *No repeated or heavy lifting*

The tapes demonstrate you [*sic*] *ability to:*

- *Sit and stand for prolonged periods*
- *Walk for a prolonged period*
- *Twist and bend repeatedly*
- *Repetitively lift*

Furthermore, there are no apparent physical manifestations of any back condition such as slowed walking or grimacing from pain.

> *You have informed me that your employer never offered modified work to you or mentioned it to your doctor. To date this is not consistent with the information I have your claim file* [*sic*]*. However, should you be able to document this, I will revisit my decision.*
>
> *If you do not understand the reasons for the decision, or if you do not agree with the conclusions reached, please call me. I would be pleased to discuss your concerns.*
>
> *I also wish to inform you that the Workplace Safety and Insurance Act imposes time limits on appeals. If you plan to appeal the decision, the Act requires that you notify me in writing by February 6, 2003.*

[43] Mr. Cyr testified that he shared this letter with Mr. St. Louis. Mr. Sabourin testified that no one at the House of Commons discussed the letter with him. In cross-examination Mr. Sabourin initially said that he did not agree with the conclusion in the WSIB letter. He testified that, since he was going to grieve his termination, he did not appeal the decision of the WSIB. He testified that he felt he would win his grievance and would then go back to the WSIB to get their decision corrected. He later testified in cross-examination that he "agreed" with the letter: "I abided by it".

[44] Mr. Cyr contacted the WSIB claims adjudicator to find out if the WSIB was going to take further action against Mr. Sabourin, such as a prosecution. Mr. Cyr testified that the claims adjudicator told him that, since the amount of the claim at issue was less than $5000, the matter would not be turned over to an investigation team and no further action would be taken.

[45] Mr. Cyr testified that the claims adjudicator did mention the issue of modified work and wanted to make sure that the employer had modified work to offer. Mr. Cyr testified that Mr. Mallette would have been the person to decide on modified duties. It was not discussed with Mr. Mallette because he was away.

[46] Dr. Dickson concluded that Mr. Sabourin was ready to return to work on full duties as of August 26, 2003 (Exhibit E/G-3). In his progress report to the WSIB (dated August 26, 2003), Dr. Dickson wrote that the lower back pain was "largely gone". On the same date, Dr. Dickson wrote that Mr. Sabourin had been fit to return to work on "modified light duties" as of August 4, 2003, but had not been offered light duties (Exhibit E/G-3).

[47] A different WSIB claims adjudicator, W.A. Howard, reviewed Mr. Sabourin's claim and issued a decision letter on September 11, 2003. The letter reads as follow (Exhibit E-23):

> *This letter is to confirm our conversation of today regarding a further review of your claim. As per our letter of August 5, 2003 loss of earnings benefits were stopped since it was felt that you were not disabled from work beyond June 25, 2003.*
>
> *Further information has been provided by your union representative and your employer and I have reviewed your file further noting this additional information. You have indicated that you felt that you were never offered modified duties by your employer. Your employer has provided information indicating that you were contacted on one occasion and it was requested that you attend a half day training session reviewing video tapes at which time you advised them that you were totally disabled and unable to attend. You were also contacted on July 2, 2003 when you provided a functional abilities form, which indicated that you were totally disabled but indicated that, you could return to modified duties. At that time you indicated that you could not work and your doctor was contacted. Modified duties were discussed with your doctor who advised that you were totally disabled and unable to work at that time.*
>
> *I contacted you on July 17, 2003 and discussed modified duties with you. At that time you again indicated that you were totally disabled and unable to return to modified duties. I contacted your physiotherapist at that time who indicated that you would be able to return to modified duties. You continued to indicate that you were not able to return to even modified duties.*
>
> *Following the above the videotape was received from your employer and reviewed. At that time it was determined that this demonstrated that you were not disabled from working at all and your benefits were stopped as of June 25, 2003.*
>
> *I have reviewed the decision of August 5, 2003 and I am unable to change it. Although there is some confusion regarding when and if modified duties were offered to you, the videotape information shows that you were not disabled at all as early as June 25, 2003 and therefore would not be entitled to loss of earnings benefits from that date onwards.*
>
> *I want to make the best decision possible based on the evidence. To do this, it is important that I have all the pertinent information. If you do not agree with my decision, maybe I do not have all the information available. If you*

> *have new facts, please send them to me and I will reconsider my decision. If you still disagree after I have reconsidered the decision based on anything new you send me, please contact me. We can talk about the situation and, if necessary, I will forward your objection to the Appeals Branch.*
>
> *If you do not understand the reason for the decision, or if you do not agree with the conclusions reached, please call me. I would be pleased to discuss your concerns.*
>
> *I also wish to inform you that the* Workplace Safety and Insurance Act *imposes time limits on appeals. If you plan to appeal the decision, the* Act *requires that you notify me in writing by March 11, 2004.*

[48] Mr. Cyr testified that he had not known that the claims adjudicator had contacted the physiotherapist. Mr. St. Louis said he was aware of the conclusions of the physiotherapist only from reading the WSIB decision letter. Mr. Sabourin did not appeal this decision letter.

[49] Mr. Sabourin received a CT scan on September 16, 2003, and the doctor's report concluded that there was ". . . minimal degenerative disc disease in the lower thoracic segments with mild disc space narrowing. . . ." (Exhibit E/G-3).

[50] In the termination letter dated October 14, 2003, the employer stated that it was terminating Mr. Sabourin because he had ". . . attempted to defraud the employer of injury-on-duty leave benefits" (Exhibit G-3). The letter stated that the employer had concluded that he had "dishonestly misrepresented" his medical condition in order to claim benefits. On the basis of this incident and the previous five instances of discipline, the employer concluded that the culminating incident had proven that ". . . the trust that must exist in an employer/employee relationship can no longer be re-established. . . .". The letter was signed by the Sergeant-at-Arms of the House of Commons, M.G. Cloutier.

[51] Mr. St. Louis testified that there were a number of factors that he took into account in recommending the imposition of discipline, apart from the videotape evidence. He testified that he ordered the videotape surveillance out of caution in order to obtain more information. The videotape was not the core of the reason for his recommendation. Mr. St. Louis testified that he considered the following factors in coming to his decision. Mr. Sabourin attended the workplace to pick up and drop off the WSIB forms and showed no sign of visible discomfort, which was incompatible with

his reported condition. The WSIB reports and the employer's communications with WSIB made it "quite clear" that he should have been proactive and cooperative and he was "anything but cooperative". Mr. Sabourin was not cooperative when he refused the scanner training course. The WSIB concluded that Mr. Sabourin was able to perform modified duties as of June 25, 2003, yet Mr. Sabourin remained unavailable to work, and uncooperative. Mr. St. Louis also regarded the WSIB decision letter ending Mr. Sabourin's benefits as compelling. The WSIB letter of August 5, 2003, did "solidify in his mind" that the employer was going in the right direction. In determining the discipline to impose, Mr. St. Louis testified that he examined Mr. Sabourin's past record and noted that Mr. Sabourin had breached a "last chance" agreement less than a year after entering into it. He testified that the same pattern of dishonesty was there. In the past, Mr. Sabourin had been cooperative and remorseful, but, in this case, he was stonewalling any attempt to resolve the issue. Mr. St. Louis testified that the relationship between employee and employer had been broken and was not repairable.

[52] Mr. Mallette testified that there were no concerns about Mr. Sabourin's job performance, and that his work was viewed by the employer as competent.

[53] In the third-level reply to Mr. Sabourin's grievance (Exhibit G-8) the employer referred to the video surveillance and its analysis by a kinesiologist ". . . who confirmed that you were misrepresenting your medical condition. . . .". The employer also referred to the fact that the video was submitted to the WSIB and that the claims adjudicator "concurred with this conclusion". The employer then stated:

. . .

> *Relying on these outside expert opinions, Management concluded that the trust that must exist in an employee/employer relationship could not be re-established here and your employment was terminated. . . . Management acted reasonably in the circumstances.*

. . .

Post-termination

[54] Mr. Sabourin testified on post-termination damages and mitigation of those damages. Income tax records and financial records were introduced as exhibits. Mr. Sabourin obtained employment in 2004 at Statistics Canada as a contract employee. He has been unemployed since July 1, 2005. He was also in receipt of

employment insurance benefits for periods both before and after his employment at Statistics Canada. He testified that he applied for a number of jobs but was unsuccessful. His wife was required to close her daycare operation and obtain a salaried job with benefits.

[55] Mr. Sabourin testified that he was forced to borrow money from friends and family in order to pay his bills. A list of people he owed money to was provided. He testified that there was no interest being charged for these amounts. He also testified that his credit card balances had been paid off prior to his termination, and that he now owed a significant amount of interest for cash advances and charges relating to the payment of bills and the necessities of life. On one credit card he had interest owing of $2000, on another he had interest owing of $2500 and on a third card he had $100 of interest owing. He also testified that his credit rating had been harmed because of his financial situation after termination.

[56] Mr. Sabourin had advanced sick leave credits prior to his termination and he has been unable to pay back the value of those credits to his employer because of his financial situation.

Submissions

Summary of the arguments on reply evidence

[57] The employer sought to call reply evidence. As noted, I only allowed two witnesses to testify in reply. Mr. Sabourin did not object to Mr. Deault testifying in reply. I ruled that Mr. Cyr could testify in reply on one issue.

[58] The employer wanted to call the following witnesses in reply:

1. Mr. Cyr, to provide evidence on the phone conversation of July 14, 2003. Mr. Cyr testified that Mr. Sabourin told him he was not fit for any duties. Mr. Sabourin testified that he never told Mr. Cyr this. Mr. Hofley's position is that this was not put to Mr. Cyr, contrary to the rule in *Browne and Dunn* (1894), 6 R. 67 (H.L.).

2. Mr. Cyr, to provide evidence on claims for drugs and the process for making such claims for employees injured at work.

3. Chantal Paquette, the note-taker at the disciplinary meetings. Mr. Hofley maintained that there were discrepancies in the testimony on the comment about calling the OPP, and that this had not been put to Mr. St. Louis, contrary to the rule in *Browne and Dunn.*

4. Mr. Sabourin's physiotherapist, to testify on discussions she may have had with him on his ability to do modified duties.

5. Mr. St. Louis, and perhaps one or two others, to testify on the appropriate remedy, in particular the appropriateness of reinstatement.

[59] The employer also argued that, since the video surveillance was put into issue by the grievor, the video should be admitted as evidence or the oral testimony of the videographer/investigator should be allowed.

[60] Mr. Champ argued it was improper to call Ms. Paquette to impeach or contest Mr. Sabourin's testimony. The employer had already called two witnesses to this meeting (Messrs. Cyr and St. Louis), and the OPP reference was canvassed by both witnesses in cross-examination. It was clear to the employer that Mr. Sabourin was putting this at issue. The employer could have called Ms. Paquette before it finished its case. Ms. Paquette's testimony would simply bolster what others already said. Her notes are already an exhibit (Exhibit G-12 and G-13).

[61] Mr. Champ submitted that calling the physiotherapist in reply would constitute improper case splitting, as the employer was aware of her statements prior to concluding its case.

[62] With regards to Mr. Cyr and the telephone conversation of July 14, 2003, Mr. Champ submitted that Mr. Cyr testified in cross-examination that Mr. Sabourin told him that he was not fit for modified duties. Since this did not come out in direct examination, it is technically not a *Browne and Dunn* situation. Mr. Sabourin's evidence could be discarded on this point, as it was a peripheral issue. It would be better to dismiss Mr. Sabourin's evidence on this point rather than to adjourn in order to recall Mr. Cyr on this point.

[63] Mr. Champ submitted that it would be improper to recall Mr. Cyr to testify on drug benefits. The purpose of this reply would be to impeach Mr. Sabourin on whether he was taking medication during June and July 2003. The documents in evidence do not support that contention. The evidence already includes Dr. Dickson's notes (Exhibit E/G-3) where it is noted that medication was being prescribed. The evidence of Mr. Cyr would not assist the adjudicator.

[64] With regards to the investigator or videographer, Mr. Champ referred me to *Enwin Utilities Ltd. v. I.B.E.W.* (2003), 114 L.A.C. (4th) 421 and *R. v. Bisko* (1998), 123 C.C.C. (3d) 432 (Ont. C.A.). The evidence that has been admitted about the surveillance

relates to the fairness of the employer's investigation. The video surveillance went on for some time, and Mr. Sabourin was not contacted by the employer. There was some evidence about what the videographer was doing, but Mr. Sabourin is not relying on that evidence in any way. Mr. Champ argued that the principles in *R. v. Bisko* apply: it is not appropriate to use excluded evidence to destroy credibility unless there are very special circumstances. This is not a case where the evidence is clearly demonstrably false, which is the only thing that would justify calling evidence already found to be in violation of *Charter* rights.

[65] With regards to evidence on the appropriate remedy, the onus of proving that the grievor did not make sufficient efforts to mitigate rests with the employer. Mr. Champ submitted that the employer would be entitled to call on a witness on interest payments. However, the other remedies requested were clearly known, and, the employer could have called evidence. It was not clear what assistance Mr. St. Louis could bring with regard to remedy. It was also not appropriate, since recalling witnesses on this matter would delay the hearing. Mr. Champ also referred me to *Canadian Pacific Forest Products Ltd. v. I.W.A. Loc. 2693* (1993), 32 L.A.C. (4th) 18 and *Consumers Gas Co. v. E.C.W.U. Loc. 513* (1987), 32 L.A.C. (3d) 121.

[66] Mr. Hofley submitted that there is no debate on the principles for calling reply evidence as set out in the *Canadian Pacific v. Consumers Gas* cases. The right to reply ought not to be narrowly construed (*Canada Post v. L.C.U.C.* (1988), 1 L.A.C. (4th) 447 (1988)). Also, the grievor has a right to be recalled to rebut any evidence tendered in reply. The employer is not trying to raise new matters or matters that it was aware of at the commencement of its case. Its purpose is to clarify contradicted evidence, and to rehabilitate evidence that was subject to *Browne and Dunn*. Since there is no discovery process, one cannot anticipate everything that will be raised in defence of a grievance. He also referred me to *Community Lifecare Inc. v. Community Health Care Workers Union* (2001), 98 L.A.C. (4th) 365.

[67] Mr. Hofley submitted that with regards to Ms. Paquette, the purpose in calling her was because Mr. St. Louis was in attendance at the hearing, and, in the interests of fairness, it would be better to call her. If I find it improper to call her, then Mr. St. Louis could testify.

[68] Mr. Hofley submitted that the evidence on the drug claims was far from clear and cogent. Mr. Cyr could explain the process for drug claims when an employee is receiving benefits from the WSIB.

[69] Mr. Hofley submitted that the employer had both the physiotherapist's report and the WSIB letters, which state clearly that the physiotherapist confirmed Mr. Sabourin's capacity for modified duties. Yet Mr. Sabourin continued to deny that he was capable of modified duties. In light of what the report states, and in light of Mr. Sabourin's evidence, there is a discrepancy, not new facts.

[70] Mr. Hofley submitted that at the beginning of the hearing we did not resolve how we would proceed on the remedies portion of the grievance. With regards to mitigation evidence, it is the employer's position that, in the event that the grievance is allowed, the employer will be making a detailed submission that the proper remedy is not to reinstate Mr. Sabourin. Mr. Hofley stated that it was his understanding that this would be how the hearing would proceed, as it is often done. There is no prejudice to anyone in doing it this way. Mr. Hofley submitted that the employer only saw the mitigation evidence at the hearing and would require an adjournment to properly respond to this evidence.

[71] Mr. Hofley submitted that the request to call the videographer relates to the scope of the preliminary ruling and the fact that the bargaining agent has put the video surveillance squarely into issue. Mr. Hofley submitted that there was nothing in the preliminary decision on admissibility that limits the admissibility of evidence outside of the videotapes and the kinesiology report. It was not argued by the bargaining agent that all surveillance information should be excluded. In *Centre for Addiction and Mental Health v. Ontario Public Service Employees Union*, [2004] O.L.A.A. No. 457 (QL) the arbitrator agreed to exclude videotapes as well as oral evidence but did not refuse to hear the testimony of employer witnesses and the investigation report was also admitted. To exclude this testimony is to entirely prevent the employer from putting its best case forward. The *Enwin* decision drew a distinction between eyewitness evidence and video surveillance, and this was applicable here as well.

[72] Mr. Hofley submitted that Mr. Sabourin brought the video surveillance squarely into issue. It is not fair that the bargaining agent can have evidence excluded and "cherry-pick" what it wants to say about that period. This only presents part of the truth and is clearly unfair. Mr. Sabourin has submitted that he suffered damages as

result of being followed. At the very least, oral evidence would contradict what he was asserting. Mr. Sabourin gave contradictory evidence on being under surveillance. He testified that he called Mr. Cyr on July 14, 2003, to ask whether he was being videotaped, yet he testified that on July 3, 2003, he knew that he was under surveillance. It is only fair that the employer can call the investigator to testify whether or not Mr. Sabourin was under surveillance on July 14, 2003. Mr. Sabourin has brought this into issue and waived his rights in respect of it. Evidence of the surveillance is relevant, pertinent and appropriate.

[73] Mr. Hofley submitted that Mr. Sabourin agreed with the contents of the September 11 and August 5, 2003, decision letters of the WSIB that refer to video surveillance. Neither of those decision letters were appealed. In agreeing with the contents of those letters, Mr. Sabourin is agreeing with the video but he then contradicts the video in his testimony. Evidence on the basketball hoop was admitted, and this is an opportunity to clarify this evidence with further direct evidence.

[74] In reply, Mr. Champ submitted that this was not a discovery process, and the employer cannot use adjudication to come up with new grounds for termination. It is a basic principle of labour relations that the employer is obliged to rely on the stated grounds at the time of termination. The evidence on the physiotherapist report is new in that the employer did not have it at the time that it made the decision to terminate. The employer is now seeking to bring it in through the back door.

[75] Mr. Champ submitted that the rule in *Browne v. Dunn* obliges counsel to put alternative versions of facts to a witness and give that witness an opportunity to explain. There is no obligation to advise that you are going to call a witness that will provide that evidence.

[76] Mr. Champ argued that the employer could have raised its evidence on the drug claims as part of its case. Mr. Cyr will not be directly contradicting the evidence on medication.

[77] Mr. Champ submitted that the employer did not rely on the physiotherapist report, but relied on the WSIB letter. The employer could have called the WSIB adjudicator. There is no clear discrepancy in the evidence on the physiotherapist's report, and this amounts to case splitting.

[78] Mr. Champ submitted that, with regards to evidence on the appropriate remedy, compensation in lieu of reinstatement was not within my jurisdiction: *Gannon v. Canada (Treasury Board),* 2004 FCA 417 (QL). In any event, Mr. St. Louis did testify about the relationship of trust being broken.

[79] Mr. Champ submitted that the issue of other evidence related to the surveillance was not addressed explicitly in my preliminary ruling but was addressed implicitly. The employer must have agreed, since it did not seek to introduce any such evidence in its case in chief. To admit this evidence amounts to "back door" litigation. The grievor is not seeking general damages for the actions of the investigators. The dates of surveillance were put into issue by the employer, which does not address the issues in the case. Mr. Champ said that the grievor was prepared to introduce the surveillance report to show that there was surveillance on July 14, 2003. Mr. Champ stated that the grievor was also prepared to not rely on evidence before me that related to the surveillance.

[80] Mr. Hofley submitted that pursuant to the *Workers Safety Insurance Act*, no employee of the WSIB is compellable before any tribunal.

[81] Mr. Hofley submitted that it was not appropriate to lead evidence and then say "Just disregard it". This evidence is very significant: the question is whether Mr. Sabourin knew already on July 3, 2003, that he was under surveillance.

Ruling on reply evidence

[82] At the hearing, I noted that the summary of the arbitral jurisprudence in Brown and Beatty, *Canadian Labour Arbitration,* 3rd ed. (1997), at 3:2655 succinctly summarized the principles of reply evidence:

. . .

> *. . . the scope of reply is limited to rebuttal only and evidence going beyond that may not be received by the arbitrator. This limitation to reply evidence is based largely on the unfairness that would result from allowing a party to split its case in chief. Thus, reply evidence is usually restricted to attacking the credibility of the opposing party's witnesses or to explaining any inconsistency that may have emerged. It cannot be used to raise a new subject not raised in chief or to bolster the case in chief. . . .*

. . .

[83] In view of the agreement of Mr. Sabourin to the calling of Mr. Deault, I ruled that reply evidence from him could proceed. I allowed Mr. Cyr to be recalled to testify on the benefits statement from the WSIB. I reserved on the relevance and weight of his testimony.

[84] I held that it was not appropriate to call Ms. Paquette. I had already heard the evidence of two employer witnesses on this meeting. The evidence of Ms. Paquette would simply bolster existing evidence, which is not appropriate reply evidence. I also rejected the alternative argument of calling Mr. St. Louis on the meeting. Mr. St. Louis knew that there was an allegation of a threat, and he testified as to his statements at the meeting and his intentions. Reply evidence on this point would add nothing to his existing evidence but would simply bolster the employer's case.

[85] I held that it was not appropriate to call Mr. Cyr with regards to his telephone conversation of July 14, 2003. The rule in *Browne v. Dunn* requires that alternate versions of facts be set out; it does not require that all differences in testimony be put to the witness. Mr. Cyr says Mr. Sabourin said something and Mr. Sabourin denies it. Mr. Cyr will then simply repeat what he has already testified to. I see no point in such repetitive testimony. It is clear that there are two different versions of the conversation, and I will have to decide which version is correct. I can do so on the evidence already before me.

[86] I ruled that it would not be appropriate to call Mr. St. Louis and others on the issue of possible remedies. Mr. St. Louis would only testify as to the merits, or lack of merits, of reinstating Mr. Sabourin. I did not address the issue raised by Mr. Champ of my jurisdiction to award compensation in lieu of reinstatement (which I stated was better left to final argument). Although damages are not always presented and argued before a determination on the merits, the issue of reinstatement is always addressed by the employer, as part of its case, if it has any concerns about reinstatement. This is because, if the employer does not establish that the quantum of discipline is appropriate, the immediate award is for reinstatement. Often the issue of damages that arise from reinstatement, such as lost salary, benefits, etc., are left to after the initial determination on the merits of the grievance. In this case, the length of time since his termination allowed Mr. Sabourin to testify on damages. The employer was able to cross-examine Mr. Sabourin on his claim for damages. The employer did not identify what evidence it could introduce on interest costs or mitigation, and I find

that its cross-examination of Mr. Sabourin on these issues was sufficient to protect its interests. Mr. St. Louis has already testified as to the issue of loss of trust, and I have noted that.

[87] I ruled that it was not appropriate to call the physiotherapist. Her report that Mr. Sabourin was fit for modified duties was referenced in the WSIB decision letter. The employer was aware of this evidence when it received the decision letter, prior to presenting its case. The employer had the opportunity to call the physiotherapist as part of its case. The proposed evidence was available to the employer and within its knowledge when it placed its evidence in chief.

[88] I ruled that it was not appropriate to call the videographer or investigator. With regard to the scope of the preliminary decision, if this was the employer's position it should have raised it at the beginning of the hearing on the merits of the grievance or during the presentation of its case. In any event, I agree with the reasoning in *Enwin* that oral evidence on the surveillance is also not admissible when there has been a finding that the surveillance itself is not admissible.

[89] I ruled that the videotape surveillance remained inadmissible. I rejected the claim that the grievor "waived" his rights with regards to the video by putting it squarely in issue. First of all, I do not agree that the dates on which surveillance occurred, or when Mr. Sabourin knew about the surveillance, are relevant. I have already ruled the surveillance inadmissible, and evidence about when Mr. Sabourin knew about it is, consequently, not relevant. I do not regard Mr. Sabourin's testimony on what he was doing during the time of the surveillance as putting the video in issue. Mr. Sabourin was testifying as to his activities after his injury. He could have easily testified as to these activities in the absence of any video surveillance by the employer. I gave some latitude in questioning to allow counsel to obviously refer to events that he became aware of only through the videotape. However, this does not constitute a waiver of Mr. Sabourin's objection to the videotape.

Summary of arguments on the merits of the grievance

For the employer

[90] Mr. Hofley submitted that Mr. Sabourin had betrayed the essential trust of the employer several times. In each of these disciplinary incidents, in particular the second-last one, the employer could have terminated Mr. Sabourin's employment, but

chose to counsel Mr. Sabourin and progressively discipline him. In the letters of progressive discipline, Mr. Sabourin had been clearly warned that termination of employment could result if his behaviour continued.

[91] Mr. Hofley noted that none of the previous disciplinary actions had been grieved, and any evidence of Mr. Sabourin that attempted to explain his actions for those disciplinary offences was not admissible (*Greyhound Lines of Canada Ltd. v. Amalgamated Transit Union, Local 1374* (1991), 22 L.A.C. (4th) 291).

[92] Mr. Hofley argued that in cases of culminating incidents, even quite minor transgressions may justify discharge (*Air Canada v. International Association of Machinists, Lodge 148* (1973), 5 L.A.C. (2d) 7; Brown and Beatty, at 7:4312). He also referred me to *Anten v. Treasury Board (National Defence)*, PSSRB File Nos. 166-2-27491 and 27499 (1997). However, the actions of Mr. Sabourin did not represent a minor infraction. The exclusion of the videotape evidence made the presentation of the employer's case a challenge. However, he submitted that if I was able to find any infraction by Mr. Sabourin, I must uphold the termination of employment.

[93] Mr. Hofley reviewed the evidence that showed, in the employer's view, that Mr. Sabourin was dishonest. Mr. Sabourin did not accurately represent his condition to the WSIB or to the employer. He did not appeal the decision of the WSIB, and he testified that he agreed with the contents of the WSIB letter ending his claim (Exhibit E-23). The only way to rationalize the evidence with the claims of Mr. Sabourin that he was "totally disabled" is to conclude that he was misrepresenting his condition and abusing sick leave.

[94] Mr. Hofley argued, in the alternative, that if I was unable to find some dishonesty, the doctrine of issue estoppel applied to the decision of the WSIB (Exhibit E-23). The test for the application of the doctrine of estoppel is set out in *Korenberg v. Global Wood Concepts Ltd.,* [2005] O.J. No. 5333 (Ontario S.C.J.) (QL):

. . .

> *The first tier requires that the following three questions be affirmatively answered:*
>
> *Were the issues the same?*
>
> *Were the parties the same?*

> *Was the decision a final judicial decision?*
>
> *If all these questions are affirmatively answered, the court must . . . ask whether there is "something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work in injustice. . . ."*
>
> . . .

[95] Mr. Hofley submitted that all parts of the test were satisfied in this case. The issues were the same. Mr. Sabourin's employment was terminated for fraudulent misuse of sick leave, and the WSIB terminated his claim because of misrepresentation of his medical condition. The same parties were involved and, in fact, the employer fully participated. The decision was final and Mr. Sabourin did not appeal the decision.

[96] Mr. Hofley reviewed the factors set out by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 for determining whether the operation of the doctrine of issue estoppel would "work an injustice". The factors are: (i) wording of the statute and purpose of the legislative scheme; (ii) availability of an appeal; (iii) safeguards; (iv) expertise of the decision-maker; (v) circumstances giving rise to the earlier determination; and (vi) potential injustice.

[97] Mr. Hofley submitted that an appeal of the WSIB decision was available. With regard to safeguards, Mr. Hofley submitted that the lack of an ability to cross-examine was not considered by the courts to be a determining factor. With regard to the expertise of the decision-maker, the claims adjudicator was likely best placed and particularly skilled in making assessments about misrepresentation of medical conditions. Mr. Sabourin participated in the process and was given every opportunity to participate. There was clearly no injustice, as he was fully informed of his rights, was given ample opportunity to appeal, and his bargaining agent was representing him and was aware of all the circumstances. The bargaining agent asked for the grievance to be held in abeyance pending the WSIB review (Exhibit E-24). It is clear that the parties were doing this with the purpose of relying on the WSIB's findings.

[98] Mr. Hofley argued that, in the alternative, it would be an abuse of process to find that Mr. Sabourin did not misrepresent his condition when the WSIB found that he did. He referred me to *Toronto (City) v. C.U.P.E., Local 79,* [2003] 3 S.C.R. 77; 2003 SCC 63 (November 6, 2003).

[99] Mr. Hofley submitted that based on the evidence I must find that Mr. Sabourin was dishonest and misrepresented his medical condition. The next question to determine is whether engaging in this dishonesty and misrepresentation justified discharge in all of the circumstances. He submitted that in light of the case law on abuse of sick leave and culminating incidents, I was left with no other choice but to find discharge appropriate. Mr. Hofley submitted that abuse of sick leave has been consistently regarded by arbitrators as akin to theft and punishable by termination (*Johnson Matthey Ltd. v. United Steelworkers of America, Local 9046* (2004), 131 L.A.C. (4th) 249). Mr. Hofley noted that this decision discusses the limitations of self-reporting to doctors on back-related symptoms and submitted that the same limitations apply here. He also referred me to *Biron v. Treasury Board (Revenue Canada-Customs and Excise)*, PSSRB File No. 166-2-14447 (1984).

[100] Mr. Hofley argued that Mr. Sabourin's dishonesty was deliberate and calculated (*Goodyear Canada Inc. Collingwood Plant v. United Rubber, Cork, Linoleum and Plastic Workers of America, Local 834* (1993) unreported).

[101] Mr. Hofley submitted that when misconduct relating to abuse of sick leave is established it is up to the grievor to satisfy the adjudicator that the employment relationship is salvageable and viable (*Quality Meat Packers Ltd. v. United Food and Commercial Workers International Union, Local 743* (1998), 69 L.A.C. (4th) 410). Mr. Hofley argued that the failure of Mr. Sabourin to acknowledge his wrongdoing, and his poor demeanour in the witness box (which showed no respect for the proceedings or the employer) demonstrate that the employment relationship is not viable.

[102] Mr. Hofley argued that in the event that I determine that the employer has not established cause, the evidence clearly demonstrates that any remedy should not include reinstatement. It is clear that the trust is broken between employer and employee. Mr. Sabourin’s return to the workplace could easily involve a repeat of his behaviour.

[103] With regard to the claim for damages (specifically debt costs), Mr. Hofley submitted that Mr. Sabourin gave no thought to the implications of his actions on his family, and that the responsibility for those losses rests on his shoulders.

[104] In conclusion, Mr. Hofley stated that I should give a "tip of the hat" to this employer because it went beyond what any employer might do and well beyond its legal obligation, giving Mr. Sabourin a number of chances to improve his behaviour.

For the grievor

[105] Mr. Champ noted that this case involves an injured worker and a resulting disability. This was not disputed by the employer. What is at issue is the length of time that Mr. Sabourin was disabled. The employer's position that Mr. Sabourin was fraudulently malingering requires a higher burden or standard of proof than the usual balance of probabilities. The employer must establish sufficient, cogent and reliable evidence.

[106] Mr. Champ submitted that disagreements over when an employee is ready to return to work are common disputes. There can be an honest disagreement over such issues without saying that the employee is fraudulent. Mr. Champ hypothesized that the employer chose to deal with this disagreement through discipline because of regrets that it did not terminate Mr. Sabourin's employment for earlier incidents of misconduct. Mr. Champ submitted that there was no evidence of fraudulent behaviour.

[107] Mr. Champ said that the key issue was Mr. Sabourin's state of mind. In order for there to be deliberate and calculated dishonesty (*Goodyear Canada Inc.)*, there has to be an intent to mislead. There was no evidence that Mr. Sabourin had seen the physiotherapist's report stating that he was capable of modified duties. He did not discuss modified duties with the physiotherapist, but did discuss this with Dr. Dickson. Mr. Champ argued that the employer was now challenging Dr. Dickson's honesty and that, if the bargaining agent had known this, it would have called Dr. Dickson as a witness.

[108] Mr. Champ reviewed the evidence and concluded there was no evidence to suggest that Mr. Sabourin was deliberately misleading in any way. He submitted that it was a big jump from the conclusions set out in the WSIB decision letters to a conclusion that the grievor had engaged in fraud. Mr. Champ submitted that, in fact, the employer was relying on the excluded videotape in coming to its decision to terminate. He submitted that the employer was trying to tailor its evidence, and that Mr. St. Louis was being dishonest in his testimony when he said that he relied on the WSIB letters and not the videotape.

[109] Mr. Champ submitted that no modified duties were ever offered to Mr. Sabourin. There was confusion among employer witnesses as to who had the authority to offer modified duties. Mr. Champ suggested that if it was going to rely on fraud, the employer should have come up with modified duties and put them to Dr. Dickson to determine if Mr. Sabourin could perform those duties. Mr. Champ also submitted that the employer's threats to call the police demonstrated the employer's attitude and approach.

[110] Mr. Champ referred me to *Salvation Army (Sunset Lodge) v. Hospital Employees' Union* (2004), 76 C.L.A.S. 182. He submitted that the similarities to this case were striking. The arbitrator noted that the evidence of the grievor's activities was not inconsistent with her restrictions, as was shown in this hearing. To find against Mr. Sabourin would require me to totally ignore this decision, Mr. Champ submitted.

[111] Mr. Champ distinguished *Biron* and *Quality Meat Packers Ltd.* on the basis that in both cases there was evidence that the grievors were working at other jobs. This is not the case here. Similarly, in *Goodyear Canada Inc.*, there was cogent evidence of an intention to mislead, which is not the case here.

[112] Mr. Champ agreed with the test for issue estoppel set out in *Korenberg*. He submitted that the WSIB decision fails on all three factors: same issue; same parties; and final decision. The WSIB did not determine whether Mr. Sabourin had acted fraudulently; therefore, it was not the same issue. The parties were not the same, because the bargaining agent was not party to the WSIB process. It was not a final decision, because the claims adjudicator was not a judicial body. Mr. Sabourin never had an opportunity to see the videotape relied on by the WSIB or the documents on file with it. The fact that Mr. Cyr had discussions with the WSIB without Mr. Sabourin's knowledge reinforces the view that the process was not judicial. Mr. Champ referred me to the analysis in *Hotel-Dieu Grace Hospital v. Canadian Auto Workers, Local 2458* (2004), 129 L.A.C. (4th) 225.

[113] Mr. Champ submitted, in the alternative, that to rely on issue estoppel would result in an injustice to Mr. Sabourin. The WSIB decision was based on evidence obtained as a result of a breach of Mr. Sabourin's *Charter* rights.

[114] With regard to reinstatement, Mr. Champ submitted that Mr. Sabourin's demeanour during cross-examination could not be relied upon to argue against

reinstatement, as suggested by Mr. Hofley. Mr. Champ described the cross-examination as "hostile". The inflammatory questions of Mr. Hofley (including such examples as "Do you cry easily?") served no purpose other than to upset Mr. Sabourin. Mr. Champ stated that Mr. Sabourin was capable of working professionally, as he always has, if returned to the workplace.

[115] Mr. Champ argued that I had no jurisdiction to order compensation in lieu of reinstatement (*Gannon v. Canada (Treasury Board)*. Subsection 11(4) of the *Financial Administration Act* precluded choosing any remedy other than reinstatement.

[116] Mr. Champ submitted that I have jurisdiction to award damages for loan costs. He referred me to *Canada (Attorney Genera) v. Lussier*, [1993] F.C.J. No. 64 and *Chénier v. Treasury Board (Solicitor General Canada-Correctional Service)*, 2003 PSSRB 27.

[117] Mr. Champ asked that I allow the grievance and the following corrective action for the grievor:

1. Reinstatement to his former position or the classification he would have been in had he continued to be employed.

2. Backpay from August 9, 2003 (when Dr. Dickson said he was able to return to work), to the present, less his income earned in mitigation and employment insurance payments. Also, that the employer be directed to make the Employment Insurance overpayments directly to Human Resources and Skills Development Canada (HRSDC).

3. The value of benefit contributions since the termination of his employment, including all pension contributions, full accumulation of vacation leave credits and accumulated sick leave credits and any outstanding overpayment of sick leave to be deducted from accumulated sick leave credits.

4. Loan costs in the amount of $5750, to be paid within 10 days of the award. Although this was something that could not be routinely ordered, the employer was aware that Mr. Sabourin was particularly financially vulnerable. The amount includes $3750 in itemized loan costs (Exhibit E/G-1) and $2000 for damages to his credit rating. Mr. Champ argued that, although not precise, it was permissible to use a "rough and ready" approach for such damages.

[118] Mr. Champ submitted that Mr. Sabourin should be placed on the payroll within 10 days of this decision. He submitted that such detailed requests are appropriate given the nature of the case. He also asked that I remain seized of this matter.

Reply submissions of the employer

[119] Mr. Hofley submitted that the standard of proof was a balance of probabilities. In any case, there has to be cogent, persuasive evidence, and the employer has provided such evidence.

[120] Mr. Hofley argued that the focus of the discipline was not on fraud but on Mr. Sabourin's misrepresentation of his conduct and his lack of honesty with respect to his capabilities.

[121] Mr. Hofley asked why we would accept Mr. Sabourin's credibility and favour his evidence? Mr. Sabourin's recollections were inconsistent and he has a marked record of dishonesty. Mr. Deault had nothing to gain by lying. Mr. St. Louis takes umbrage at the statement by Mr. Champ that he was dishonest. Mr. St. Louis is a director at the House of Commons with a long and distinguished career, and was professional throughout his evidence.

[122] Mr. Hofley submitted that any submission that the employer was "out to get" Mr. Sabourin was pure speculation not supported by the evidence. The House of Commons bent over backwards for Mr. Sabourin.

[123] Mr. Hofley argued that I should draw an adverse inference from the failure to call Dr. Dickson as a witness. Mr. Hofley stated that Dr. Dickson could not assist the employer in getting down to the issues because all he knew was based on what the patient told him. It was the employer's position that Mr. Sabourin was dishonest in what he was telling his physician.

[124] Mr. Hofley noted that with regard to the alleged threats to call the police, the evidence of Mr. St. Louis was forthright. He testified that the House of Commons was not in the habit of calling the police on its employees and they were just describing the WSIB process, as they understood it, and educating Mr. Sabourin about his rights.

[125] Mr. Hofley submitted that *Salvation Army (Sunset Lodge)* was not relevant because it did not deal with a culminating incident. In that case, the adjudicator had

the ability to view a videotape and concluded that the actions of the grievor were not inconsistent with the limitations. The employer did not conduct its own investigation, and relied solely on the videotape. This is not the case here. Also, in that case, the doctor testified and was able to put matters in proper perspective.

[126] Mr. Hofley argued that, with regard to issue estoppel, the bargaining agent was fully aware of the WSIB proceedings. Mr. Hofley also noted that, by statute, the WSIB favours the employee and is required to give the benefit of the doubt to the employee.

[127] Mr. Hofley noted that the decision in *Gannon* was based on the *Financial Administration Act*, which does not apply to employees of the House of Commons. He submitted, therefore, that the process for determining whether reinstatement was appropriate was similar to that of other jurisdictions. He referred me to *NAV Canada v. International Brotherhood of Electrical Workers, Local 2228* (2004), 131 L.A.C. (4th) 429. He submitted that nearly all the circumstances where reinstatement is not appropriate, as enumerated in the decision, are present here. The witness demonstrated animosity to management throughout the hearing.

[128] Mr. Hofley argued that compensation in lieu of reinstatement in the nature of wrongful dismissal damages would be appropriate. Six months of compensation, less mitigation amounts, would be appropriate.

[129] Mr. Hofley submitted that there was a lack of foundation for the debt costs, as only summary totals of what was owed were provided. There was no evidence of the purposes for the cash advances; the damages were far too remote.

Further reply for the grievor

[130] Mr. Champ submitted that he should have the right to reply to submissions of Mr. Hofley that were not proper reply submissions. In particular, he asked to be permitted to make submissions in reply on *Gannon* and *NAV Canada*. Mr. Hofley objected. I ruled that I would only allow reply argument on *NAV Canada*.

[131] Mr. Champ submitted that I still had to find some cause for discipline before I could consider compensation in lieu of reinstatement. He also submitted that the decision does not apply wrongful dismissal principles, as Mr. Hofley suggested. Instead, the decision sets out the "modern approach", which is to provide damages that compensate the employee for the economic value of being in a bargaining unit

governed by a collective agreement. *NAV Canada* also states that mitigation should not be considered when determining compensation in lieu of reinstatement.

[132] Mr. Champ stated that, in the event that I should order compensation in lieu of reinstatement, I should make no order as to employment insurance payments, since there is case law that states that there is no obligation to repay employment insurance when awarded damages of this nature.

[133] Mr. Champ submitted that if I decide to order compensation in lieu of reinstatement I should take into account the value of being a federal public service employee and order two months per year of service, with a 20-percent gross up for the value of benefits. In addition, I should award the severance Mr. Sabourin would be entitled to under the collective agreement: one week per year of service.

Further reply for the employer

[134] Mr. Hofley stated that the employer would agree that I should not address employment insurance benefits repayment, but not for the reasons given by Mr. Champ.

[135] Mr. Hofley submitted that two months per year of service was unreasonable, and one month was more appropriate. This was quite close to what the employer had submitted. Mr. Sabourin demonstrated through his conduct over the years that he did not value his employment.

[136] Mr. Hofley submitted that nothing under the collective agreement would allow me to provide severance. The *Parliamentary Employment and Staff Relations Act* prohibits an amendment to the collective agreement. The calculation of compensation in lieu should reflect the years of service, and should be in the range of six to eight months.

Reasons

[137] The hearing of this grievance has been long and contentious. The counsel for the employer suggested that I should give a “tip of the hat” to this employer for its forbearance in dealing with the grievor. In my view, it is not the proper role for an adjudicator to give a “tip of the hat” or a “wag of the finger” to either party to a grievance. An adjudicator’s role is to assess the evidence and rule on the merits of the grievance.

[138] There are three threshold questions that I need to answer:

- Does the decision of the WSIB claims adjudicator to end benefits constitute issue estoppel?
- Did the employer have just cause to discipline Mr. Sabourin?
- If it did have just cause, was this a culminating incident justifying termination?

Issue Estoppel

[139] The employer alleges that the decision letters of the WSIB claims adjudicators (Exhibits E-22 and E-23) establish the fact of misrepresentation by the grievor and, therefore, prevent me from coming to a different conclusion. In order for the doctrine of issue estoppel to apply, the parties must be the same; the issue(s) must be the same; and the decision must be final and judicial (see *Sherman v. Canada Customs and Revenue Agency,* 2004 PSSRB 125, affirmed by 2006 FC 192).

[140] I agree that the parties are the same. Mr. Sabourin has an independent right to grieve his discipline, and he was receiving advice from his bargaining agent with regards to his WSIB claim. However, I cannot conclude that the issues are the same. The WSIB claims adjudicator told Mr. Cyr that the amount of the benefits received did not justify an investigation by the WSIB. I take from this statement that the WSIB had not, in fact, concluded that Mr. Sabourin had been fraudulent or dishonest. The letter of August 5, 2003, states "I have concluded that I cannot support lost time in your claim from June 25, 2003. I am unable to conclude from that time, that you have a back impairment. . . .". The letter of September 11, 2003, is described as a "review" of the claim. The adjudicator stated he was unable to change the original decision, as the videotape showed ". . . that you were not disabled at all as early as June 25, 2003 and therefore would not be entitled to loss of earnings benefits from that date onwards". The determination by the WSIB is relevant to the analysis that is required to determine whether the employer demonstrated just cause; however it does not squarely address the main issue before me in this grievance: did the grievor act fraudulently or dishonestly?

[141] I also conclude that the process followed by the claims adjudicator was not sufficiently "judicial". The decision was an administrative decision by the WSIB. The main factor that leads to this conclusion is the absence of full disclosure of the case to

be met. Justice Abella in *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683 stated that the hearing process must provide the parties with an opportunity to know and meet the case against them. Although Mr. Sabourin was given an opportunity to provide further information, he was not given an opportunity to review the videotape relied on by the decision-maker. Although I agree that the absence of cross-examination is not necessarily a critical factor, the total absence of a full hearing is such a critical factor.

[142] In conclusion, the decision letters of the WSIB claims adjudicators do not constitute issue estoppel and are, consequently, not binding. They are, however, relevant and I have considered them in coming to a conclusion on whether just cause has been demonstrated by the employer.

Discipline for alleged abuse of injury-on-duty leave

[143] The employer has referred to the alleged culminating incident as "dishonestly misrepresenting" a medical condition in order to obtain benefits. At the hearing, the employer characterized this as theft, and in the original suspension letter referred to suspicions of "fraudulent use" of injury on duty leave. The termination letter states that Mr. Sabourin attempted to defraud the employer. However it is characterized, allegations such as these must be proven on the basis of clear, compelling and cogent evidence.

[144] There was contradicted testimony on the meaning of references to the police at the disciplinary meetings of July 22 and 24, 2003. There is no dispute that the OPP was mentioned at the meeting, as this is reflected in the notes of that meeting (Exhibits G-12 and G-13). The testimony of Mr. St. Louis is also relevant here. He suggested that the matter would "go away" if Mr. Sabourin resigned. From the context, I conclude that this included the possibility that the police would not get involved if he chose to resign. I also note that in earlier discipline involving the improper use of a taxi chit, the employer suggested that Senate Security or the police might have been called to investigate if Mr. Sabourin had not cooperated. I find that the employer did make the reference to the police in an effort to encourage Mr. Sabourin to resign. However, given that he did not resign, I do not find that this action of the employer is relevant to a finding on discipline.

[145] It is clear that the employer initially and primarily relied on videotape surveillance and a report based on that surveillance to justify its decision to terminate. As noted above, I previously ruled that this evidence was not admissible. Mr. Champ suggested that the employer was now putting forward different grounds for termination, and tailoring its evidence accordingly. This might have been true if the employer was relying on evidence that it did not have in its possession at the time of the discipline. From the employer's perspective, it appears that the videotape surveillance may have been its "best evidence", but it was not the only evidence it relied on in coming to its decision. I can therefore not conclude that the employer is putting forward different grounds for termination. The grounds remain the same, but the evidentiary foundation for those grounds has shifted to allow for the exclusion of some of the evidence.

[146] Mr. Sabourin did maintain that he was totally disabled and unable to report to work. This conclusion was supported by his doctor. The evidence showed that Mr. Sabourin was capable of some activity during this period – including driving, walking, going to the video store and buying milk. He also testified that he had "good days and bad days". The evidence of Mr. Sabourin on the setting up of a basketball hoop was not conclusive. The activities that Mr. Sabourin testified to were not, on their face, contradictory to his limitations as specified by his doctor. The evidence about Mr. Sabourin's visit to the office to pick up and drop off WSIB forms showed that Mr. Sabourin did have difficulty walking and was in obvious discomfort. The evidence on whether Mr. Deault assisted Mr. Sabourin to sit down and get up from the couch was contradictory. On balance, I find that Mr. Sabourin's testimony is to be preferred on this point. Although Mr. Deault was certain that he did not assist Mr. Sabourin, he had poor recollection of other events. He quite rightly stated that the events happened a long time ago and he could not recall everything. I therefore conclude that it is likely that his memory is faulty on this as well. However, this aspect of the evidence is not critical to my findings. Even if Mr. Sabourin did not require assistance in sitting down or getting up, this would not demonstrate that Mr. Sabourin was able to return to modified or regular duties, and was, therefore, misrepresenting his medical condition.

[147] The employer did not adduce evidence that contradicts the medical evaluation by Dr. Dickson, nor the restrictions cited by the physiotherapist. At the hearing on the merits, the employer attacked the credibility of Dr. Dickson (by saying that his diagnosis was based on self-reporting by the grievor) without establishing a foundation

for the attack on his credibility and without Dr. Dickson being called to testify. In the hearing on the preliminary motion, Mr. Cyr and Mr. St. Louis testified that they had no reason to question Dr. Dickson's diagnosis. In the *Johnson Matthey Ltd.* decision, the doctor was one that the patient had never seen before, and the evidence showed that the grievor was able to walk, lift, and bend without difficulty. The arbitrator concluded that this was an indication that the grievor may not have been completely frank with the doctor. In Mr. Sabourin's case, Dr. Dickson has been his physician for a lengthy period and the employer did not demonstrate that Mr. Sabourin was able to do activities consistently without difficulty. I therefore have no reason to doubt the diagnosis of Dr. Dickson.

[148] The physiotherapist listed certain restrictions for Mr. Sabourin on July 11, 2003, that supported Dr. Dickson's diagnosis. On July 17, 2003, the WSIB claims adjudicator contacted the physiotherapist and reported that she told him that Mr. Sabourin was capable of performing modified duties. There was no evidence on the substance of their conversation. It is clear that the employer never discussed modified duties with the physiotherapist. Her comments are therefore without context and constitute hearsay. I also accept Mr. Sabourin's testimony that he never discussed modified duties with the physiotherapist.

[149] There was a great deal of back and forth in the testimony about who was authorized to offer modified work to Mr. Sabourin. The fact remains, however, that apart from a half-day training program, no modified duties were offered to Mr. Sabourin. The employer's position is that Mr. Sabourin said he was totally disabled, so it was not appropriate to offer modified duties. Yet, it is also the employer's position that Mr. Sabourin was capable of modified duties. If the employer was convinced that Mr. Sabourin was capable of modified duties, it should have followed up with Dr. Dickson or requested a third-party medical examination to ascertain if this was the case and then offered him modified duties. The half-day training course offered to Mr. Sabourin is not sufficient to demonstrate that he was malingering. As I concluded in the preliminary decision, the employer did not show that the refusal was incompatible with Mr. Sabourin's medical restrictions. The request to attend the course was made at the last minute, and came only nine days after the initial injury. There was no opportunity for Mr. Sabourin or the employer to check with Dr. Dickson on the impact of his limitations on his ability to attend the training session.

[150] In *Gentek Building Products Ltd. v. U.S.W.A., Local 1105 (Batko)* (2003), 119 L.A.C. (4th) 193 the employer concluded that the grievor was malingering based on a WSIB letter denying a claim for benefits. The employer received evidence that contradicted the assessment of the WSIB claims adjudicator. The arbitrator held that the employer was not entitled to rely on the WSIB determination to the exclusion of everything else. This was because the WSIB's jurisdiction is restricted to the *Workplace Safety and Insurance Act*, whereas the employer has obligations under the collective agreement. He also held that the determination by the WSIB was relevant, but not determinative of the issue of the grievor's rights under the collective agreement. In that case, the employer had not considered medical information provided by the grievor. The arbitrator concluded that:

. . .

> *. . . The Company was obliged to give serious consideration to this new information, and to re-examine the situation in the light of the new information, including conducting an appropriate investigation and assessment of the situation. For example, the Company could have asked the grievor for additional medical information. It could have asked the grievor to undergo an independent medical examination. . . . The grievor could have refused to do so, but his refusal would then have been a relevant consideration. The Company could have asked the grievor what accommodation he required, or the Union whether it had any accommodation or other suggestions. The Company failed to do any of this, or to properly consider all of the information available or its duty to accommodate under the Code.*

. . .

[151] In Mr. Sabourin's case, there was medical information from his doctor that contradicted the findings of the WSIB. The employer did not follow up with Dr. Dickson to receive clarification or further information. In light of the WSIB determination it was also open to the employer to request a third-party medical examination. As I noted in the preliminary decision, the employer did have some cause for concern about Mr. Sabourin's medical condition, based on the observations and the reported activities of Mr. Sabourin. However, this cause for concern should have led to further inquiries of Mr. Sabourin's doctor (Mr. Sabourin had given authorization for the employer to discuss his medical condition directly with his doctor), or to a request for a third-party medical examination. In short, the information that the employer had

with regards to Mr. Sabourin was not sufficient to justify its conclusion that he was acting dishonestly.

[152] Accordingly, I conclude that the evidence relied on by the employer to justify its decision to terminate Mr. Sabourin's employment does not meet the requisite standard of clear, cogent and compelling evidence. As a result, the employer has not demonstrated just cause for discipline.

Culminating incident

[153] In light of my conclusion that the employer did not establish that it had just cause to discipline, there is no culminating incident.

Remedies

[154] Mr. Sabourin is to be reinstated to his position at the House of Commons, effective October 14, 2003. Mr. Champ submitted that Mr. Sabourin should be reinstated as of August 9, 2003, when his doctor concluded that he was fit to return to regular duties. Mr. Sabourin, however, did not refer to adjudication a grievance against his suspension without pay. I therefore conclude that I am without jurisdiction to order payment of his salary for the period from August 9, 2003, to October 14, 2003.

[155] The employer argued that should the grievance be allowed, reinstatement was not appropriate in the circumstances. The employer also argued that the ruling of the Federal Court of Appeal in *Gannon* did not apply to it, while the grievor argued that it did. I find that I do not need to reach a conclusion on the applicability of the *Gannon* decision to this employer. In the absence of a finding of misconduct, reinstatement is the natural and proper outcome. Compensation in lieu of reinstatement should only be considered where there has been a finding of misconduct and the adjudicator concludes that termination was excessive, in the circumstances.

[156] Mr. Sabourin is also requesting damages for interest payments and the harm done to his credit rating, as a result of his termination. I accept that an adjudicator has jurisdiction to award damages in the appropriate circumstances: *Bedirian v. Canada (Attorney General)* 2004 FC 566. In this case, Mr. Sabourin has testified that he used his credit cards to obtain cash advances to pay for the necessities of life, as well as using his credit card to pay bills. In order to consider damages for such expenses, there needs to be evidence to show the connection between the credit card balances and the

payment for necessities (for example, in the form of bills or receipts). Although there was evidence of his credit card balances and interest payments, there was no documentary evidence provided that showed the connection between cash advances and payment for necessities. Only if that evidence is presented could an adjudicator properly assess whether damages are justified. Accordingly, it is not appropriate to award payment for these costs.

[157] Mr. Sabourin's counsel made extensive submissions on the ruling I should make on the consequences of an order reinstating Mr. Sabourin. It is not necessary to rule on most of these matters, as the consequences of reinstatement to October 14, 2003, will be governed by the applicable collective agreement (in terms of leave credits) and by contract or legislation (in terms of health and other benefits). I will also leave it to the parties to resolve the mechanics of the reimbursement of advanced sick leave credits. There was no dispute that Mr. Sabourin had received an advance of sick leave credits. The damages for loss of salary from October 14, 2003, to the date of this decision are to be mitigated by income received during the period, as set out in the income tax returns submitted by Mr. Sabourin. The repayment of employment insurance benefits is a matter between the parties and HRSDC.

[158] Mr. Sabourin submitted a number of exhibits that contained personal financial information (credit card statements and income tax returns, for example) and medical information (Exhibits G-16 and E/G-3). I order that these exhibits be sealed. These sealed exhibits will be returned to Mr. Sabourin's counsel in due course.

[159] I will also retain jurisdiction, in case the parties have any difficulties in implementing the decision, for a period of 90 days from the date of this decision.

[160] I recognize that Mr. Sabourin's reintegration into the workplace will be a challenge for both parties. The grievance process, especially the hearing, has been unnecessarily acrimonious on both sides. I trust the parties can put their differences aside and work together to ensure a relatively smooth return to work.

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

(The Order appears on the next page)

Order

[162] The grievance is allowed.

[163] Mr. Sabourin is reinstated to his position at the House of Commons, effective October 14, 2003. He is to receive salary and benefits for the period between October 14, 2003, and his reinstatement, less any amounts in mitigation.

[164] I retain jurisdiction to assist in the implementation of this order, if necessary, for a period of 90 days from the date of this decision.

July 4, 2006.

Ian R. Mackenzie,
adjudicator