

Date: 20070302

File: 166-02-35306

Citation: 2007 PSLRB 26



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

FREDERICK JAMES TOBIN

Grievor

and

**TREASURY BOARD
(Correctional Service of Canada)**

Employer

Indexed as

Tobin v. Treasury Board (Correctional Service of Canada)

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

REASONS FOR DECISION

Before: Barry D. Done, adjudicator

For the Grievor: David Yazbeck, counsel

For the Employer: John Jaworski, counsel

Heard at Kingston, Ontario, on October 2 to 5,
and at Ottawa, Ontario, on November 17, 2006.

REASONS FOR DECISION

I. Grievance referred to adjudication

[1] Prior to the termination of his employment, Frederick James Tobin was a consultant psychologist (PS-03 group and level) with the Correctional Service of Canada (CSC) in the Ontario Regional Treatment Centre (RTC) at Kingston Penitentiary.

[2] Mr. Tobin's employment was terminated by a letter dated May 7, 2004, (Exhibit E-23) that reads as follows:

...

I have completed a full review of the Plea and Sentencing document along with the Administrative Review conducted in 2002. I have also taken your comments from our meeting of April 28, 2004 and those of your union representative, provided to me in writing May 4, 2004, into consideration.

As indicated by your union representative on May 4, 2004, you have pled guilty to engaging in threatening conduct directed at [HM], thereby causing [HM] to reasonably, in all circumstances, fear for her safety, and you did thereby, commit an offence contrary to section 264 (2)(d) of the Criminal Code of Canada. You are on record as accepting responsibility for your actions in relation to this conviction and have been imposed a suspended sentence and eighteen months of probation by the Court.

You have contravened Standard 2 - Conduct and Appearance of the Code of Discipline and the Standards of Professional Conduct:

- Acts, while on or off duty, in a manner likely to discredit the Service;*
- Commits an indictable offence or an offence punishable on summary conviction under any statute of Canada or any province or territory, which may bring discredit to the Service or affect his or her continued performance with the Service.*

In making my decision, I have concluded that the behaviour you have demonstrated is incompatible with the duties you were required to perform as a Psychologist and with the behaviour expected of employees of the Correctional Service of Canada.

You have brought the Correctional Service of Canada into disrepute in the eyes of the public, the staff and offenders, and the trust and confidence that you were once afforded have been irrevocably damaged.

I have taken into consideration your years of service and your disciplinary record; however, this does not mitigate the seriousness of your actions. Therefore, based on the foregoing and in accordance with the Financial Administration Act, Section 11 (2), you are hereby advised that your employment with the Correctional Service of Canada is terminated effective April 23, 2004.

...

[The parties requested that my decision refer to the person who was the object of Mr. Tobin's behaviour only by the initials "HM".]

[3] Mr. Tobin filed a grievance against the termination of his employment on May 18, 2004, requesting to be reinstated with no loss of pay or benefits.

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

[5] The hearing of this matter was originally scheduled for June 1, 2005, but was postponed at the request of either party on three occasions. A pre-hearing conference was also ordered and conducted in this matter by the Chairperson of the Public Service Labour Relations Board.

II. Summary of the evidence

[6] Before reviewing the evidence tendered at the hearing, I would like to provide the general background that led to this case. In January 2001, HM began volunteering at the RTC. This is how Mr. Tobin first met her. They began an affair in March 2001. HM later became a casual employee at the CSC, working until January 2002. In July 2002, Mr. Tobin was criminally charged with six offences relating to incidents involving HM. He pled guilty to one of those charges, and all the others were dismissed. HM has filed a lawsuit against the CSC and some CSC staff.

[7] A total of 70 exhibits were filed and five witnesses testified, including Mr. Tobin.

[8] Alan Stevenson is the Warden of Pittsburgh Institution. He summarized his 36-year employment history with the CSC, emphasizing both his duties as the Warden of Collins Bay Institution (CBI) and its management structure. A very critical role in that management structure is that of Deputy Warden, Correctional Operations (Exhibit E-3). This is so because the incumbent of that position replaces the Warden when he is absent, which Mr. Stevenson estimated to be 40 percent of the time. The Deputy Warden's job is extremely demanding, requiring good judgment and the ability to work well with both staff and inmates at all times.

[9] When the position of Deputy Warden became vacant at the CBI, Mr. Stevenson was asked if he would accept Mr. Tobin in an acting assignment for approximately six to eight weeks. Despite some initial reservations, after meeting with Mr. Tobin, Mr. Stevenson agreed. In fact, Mr. Stevenson agreed to extend Mr. Tobin's acting assignment on one or two occasions, and it continued from February 25 to July 9, 2002, when, as a result of the employer receiving information that Mr. Tobin had been arrested, criminally charged and detained (Exhibits E-1 and E-2), Mr. Tobin was suspended without pay by Mr. Stevenson pending an investigation (Exhibit E-8).

[10] Mr. Stevenson initiated an investigation, but other than a very brief meeting to deliver documents to Mr. Tobin's home, he had no further involvement in Mr. Tobin's termination. During that meeting, Mr. Tobin assured Mr. Stevenson that he was not guilty of the charges (Exhibit E-7).

[11] In cross-examination, Mr. Stevenson acknowledged that Mr. Tobin had performed well as the Deputy Warden of the CBI, had demonstrated a good knowledge of legal and policy requirements in a crisis situation, and had demonstrated good judgment.

[12] Although not the author of the "Narrative Candidate Assessment Report" for Mr. Tobin's acting assignment as Deputy Warden at the RTC (Exhibit G-2), Mr. Stevenson nevertheless agreed with the assessment in paragraphs 2 and 4 on page 2 of that report:

...

Knowledge:

...

As Acting Deputy Warden and in his previous work assignments, Mr. Tobin continuously demonstrates a thorough knowledge and understanding of CSC's Mission, its policies and Corporate Objectives. He assists his staff to understand the issues and the importance of ensuring that the legal and policy requirements are met.

...

I have had the opportunity to manage a number of crisis with the assistance of Mr. Tobin and he has demonstrated a good knowledge of the legal and policy requirements as well as good judgment during very difficult situation. He provides staff with the necessary direction to ensure the safe resolution of the crisis. I consider his management style and knowledge an asset during the management of crisis situations.

[Sic throughout]

[13] Mr. Stevenson did not discuss with Mr. Tobin or with anyone at CSC National Headquarters the issues related to the charges prior to deciding to suspend Mr. Tobin on July 9, 2002. Mr. Stevenson conceded that he could have chosen some alternative to suspension without pay - for example, a reassignment or suspension with pay.

[14] When the investigation was complete, Mr. Stevenson read the "Administrative Review" report prepared by the investigators (Exhibit E-15). Mr. Stevenson agrees that the investigators found that Mr. Tobin had no disciplinary record up to then.

[15] Mr. Stevenson did not speak to anyone concerning whether the arrest and the charges would affect Mr. Tobin's ability to perform his duties but, although Mr. Tobin had assured him that he was not guilty, he was concerned that Mr. Tobin had entered a plea of guilty to the charge of engaging in threatening conduct directed at HM.

[16] Nancy L. Stableforth had been employed with the CSC for 10 years, the last four as Deputy Commissioner, Ontario Region. She reviewed her career and explained her duties as Deputy Commissioner (Exhibit E-9).

[17] Ms. Stableforth believes that the generic position description for a consultant psychologist position at the RTC (Exhibit E-10) was still current in the years 2002 to 2004. As well, she stated that the *Standards of Professional Conduct in the Correctional*

Service of Canada (“the *Standards of Professional Conduct*”) (Exhibit E-11) and the *Code of Discipline in the Correctional Service of Canada* (“the *Code of Discipline*”) (Exhibit E-12) applied throughout the period covered by the grievance.

[18] While on vacation leave, Ms. Stableforth read two newspaper articles concerning Mr. Tobin’s arrest and charges (Exhibits E-13 and E-14). Upon her return to work, several months before her appointment as Regional Deputy Commissioner, Ms. Stableforth familiarized herself with Mr. Tobin’s case by reviewing the “Administrative Review” report on November 20, 2002. Based on that review, Ms. Stableforth signed a letter returning Mr. Tobin to work, with retroactive pay; however, neither to his acting deputy warden position nor to his substantive consultant psychologist position. Although Ms. Stableforth acknowledged that she did not meet with Mr. Tobin until later in the year to discuss the findings in the “Administrative Review” report, she believed that, as HM was a former casual employee and serious criminal charges were proceeding, it would have been inappropriate to return Mr. Tobin to a position where he had contact with inmates, particularly as Ms. Stableforth had concerns over Mr. Tobin’s judgment and self-control.

[19] On April 19, 2004, Mr. Tobin pled guilty to threatening conduct directed at HM. All other charges against him were dismissed (Exhibit E-2). Details of his court appearance and plea appeared in two newspaper articles (Exhibits E-17 and E-18). On April 23, 2004, Ms. Stableforth again suspended Mr. Tobin without pay pending a further investigation, and arranged to meet with Mr. Tobin and his lawyer on April 28, 2004 (Exhibit E-20), to discuss his plea of guilty.

[20] In an email from Ms. Stableforth to Human Resources at CSC National Headquarters, she summarizes the April 28, 2004, meeting with Mr. Tobin and his lawyer (Exhibit E-21). Although very little information was shared at that meeting, an agreement was reached that a representative from Mr. Tobin’s bargaining agent would contact Ms. Stableforth and provide representation. That contact was by letter dated May 4, 2004 (Exhibit E-22), from Marija Dolenc, Employment Relations Officer, Professional Institute of the Public Service of Canada. Ms. Stableforth did not respond to this letter.

[21] On May 7, 2004, Ms. Stableforth terminated Mr. Tobin's employment effective April 23, 2004, the date of his second indefinite suspension (Exhibit E-23). Ms. Stableforth had no further contact with Mr. Tobin, his bargaining agent or his lawyer following Ms. Dolenc's letter of May 4, 2004.

[22] Ms. Stableforth explained why she had decided upon termination of employment:

- Standard Two (Conduct and Appearance) of the *Standards of Professional Conduct* (Exhibit E-11) had been violated;
- Mr. Tobin's behaviour had discredited the CSC;
- Mr. Tobin had pled guilty to an indictable offence;
- Mr. Tobin's judgment would be affected;
- it is particularly important for CSC employees to abide by the law, as they serve as role models for inmates;
- Mr. Tobin would no longer be credible in providing counselling and advice; and
- the behaviour that led to the filing of the criminal charges involved more than one incident.

[23] Ms. Stableforth did not meet with Mr. Tobin to deliver the termination letter, but opted for delivery by a courier service instead.

[24] In cross-examination, Ms. Stableforth conceded that she had no background in psychology, no experience in polling the media and no education in statistics. As a lawyer with experience in criminal law, she was aware of the possibility of a finding of guilt even though the accused may maintain his innocence. After she became aware of the criminal charges filed against Mr. Tobin, Ms. Stableforth had no discussions with him concerning the performance of his duties.

[25] Ms. Stableforth conceded that committing a criminal act does not automatically result in disciplinary discharge, as all factors must be considered. Of those factors, imprisonment is an important one to consider.

[26] Mr. Tobin had a clean disciplinary record before this and had never been found to have harassed anyone in the workplace. As seen in her curriculum vitae (Exhibit E-9), Ms. Stableforth had no line-management responsibility for Mr. Tobin prior to commencing her current position on October 21, 2002. Ms. Stableforth did not consider, in arriving at her decision to terminate Mr. Tobin's employment, whether other senior CSC managers who were also mentioned in newspaper articles had been disciplined for misconduct alleged by HM, nor did she consult with Mr. Stevenson.

[27] Ms. Stableforth agreed with the following information contained in the "Administrative Review" report:

...

After Mr. TOBIN's assignment to RHQ in September 2001, there is no indication that his relationship with [HM] negatively impacted on his work or on the operation of CSC.

...

[28] Although Ms. Stableforth conceded that she was unaware of any difficulties with Mr. Tobin's work performance following his return to work in November 2002, she felt that her trust in Mr. Tobin had been affected by his earlier statement that he was likely to be exonerated and his later plea of guilty to harassment. Despite this trust issue, on August 14, 2003, Ms. Stableforth requested that Mr. Tobin be assigned for a six-month period "... in the areas of psychology, reintegration, programs, and/or research. . ." in the Kingston area (Exhibit G-5).

[29] HM declined to be interviewed or to participate further in the investigation, due to her lawsuit against the CSC and CSC staff and the then outstanding criminal charges against Mr. Tobin. Nevertheless, based on statements that HM made to the investigators, Ms. Stableforth concluded that Mr. Tobin's conduct toward HM had continued over a period of time.

[30] Ms. Stableforth chose not to speak to Mr. Tobin's colleagues, to the Chief Psychologist and to Mr. Stevenson (Mr. Tobin's immediate supervisor) before deciding to terminate Mr. Tobin's employment. She did, however, recall speaking to the Commissioner, to Warden James W. Blackler, and to Assistant Deputy Commissioner of Operations, Lou Kelly, about the matter.

[31] When Ms. Stableforth lifted Mr. Tobin's first suspension, she knew that Mr. Tobin could be convicted on any of the charges pending against him.

[32] Concerning the newspaper articles and discredit to the CSC, Ms. Stableforth stated that she had only generally compared the accuracy of those articles to the transcript of the plea and sentencing hearing (Exhibit E-2), but, in any case, she did not rely on the newspaper articles. She conceded that she had no evidence of the public's attitude toward the CSC as a result of those articles and did not conduct a poll. She stated: "I did not terminate Mr. Tobin because of media coverage."

[33] HM was no longer employed at the CSC after January 2002; therefore, the incidents of July 2002 were off-duty behaviour. However, Ms. Stableforth relied on HM's allegations mentioned by the investigators in their "Administrative Review" report that Mr. Tobin's behaviour was on-duty as well.

[34] With respect to her summary of the April 28, 2004, meeting with Mr. Tobin and his lawyer, Ms. Stableforth agreed that she did not include Mr. Tobin's lawyer's explanation as to why the plea of guilty had been tendered, taking the position that "I'm not going to try this thing all over."

[35] Ms. Stableforth did not mention specifically to Mr. Tobin or to his lawyer at their meeting of April 28, 2004, her concern about a violation of Standard Two (Conduct and Appearance) of the *Standards of Professional Conduct*. Nor did she mention her conclusions, as expressed in the termination letter (Exhibit E-23), that Mr. Tobin's behaviour was incompatible with his duties as a consultant psychologist, the issues of bringing the CSC into disrepute or her lack of trust and confidence in Mr. Tobin.

[36] In deciding that termination of Mr. Tobin's employment was appropriate, Ms. Stableforth did not consider his appraisals or commendations. She did not consider other positions to which he could be appointed, nor did she consider whether he could be rehabilitated since, in her opinion, his conduct was so serious that it could not be corrected, and the misconduct was, in and of itself, sufficient to warrant a termination of employment.

[37] However, Ms. Stableforth agreed that there are CSC staff that have been convicted of serious criminal offences, including a manager convicted of spousal assault, whose employment was not terminated.

[38] Mr. Tobin was denied legal assistance at public expense, as “. . . many of the acts of misconduct alleged against [him] did not take place at work . . .” (Exhibit G-8). In an internal document prepared by the CSC’s Media Relations Directorate (Exhibit G-9), it was suggested that, if asked whether legal assistance would be provided for Mr. Tobin’s defence, the reply should be that “[t]he criminal charges are the result of a personal matter outside of his work with CSC; therefore he is not represented by government lawyers.”

[39] Mr. Tobin explained his educational background and his employment history. The latter included a brief look at 18 exhibits reflecting both formal and informal performance assessments, commendations and acknowledgements of participation in work-related activities from August 1988 to October 2003, as exemplified by:

- Exhibit G-2: “Narrative Candidate Assessment Report” for an acting deputy warden assignment at the RTC;
- Exhibit G-3: Mr. Stevenson’s request to have Mr. Tobin appointed as the Deputy Warden for the CBI (May 15, 2002);
- Exhibit G-5: Ms. Stableforth’s request to have Mr. Tobin considered for a national assignment in the areas of psychology, reintegration, programs and/or research (August 14, 2003);
- Exhibit G-10: “Performance Review and Appraisal Report” as Programme Director, Female Behavioural Unit, RTC (October 16, 1989);
- Exhibit G-11: “Performance Review and Appraisal Report” as Programme Director, Female Behavioural Unit, RTC (February 12, 1992);
- Exhibit G-12: “Performance Review and Appraisal Report” as Programme Director, Female Behavioural Unit, RTC (February 27, 1992);
- Exhibit G-13: commendation letter (December 29, 1993);
- Exhibit G-16: “Performance Review and Appraisal Report” as Consultant Psychologist, RTC (April 16, 1996);
- Exhibit G-17: “Performance Evaluation Report” as Consultant Psychologist, RTC (June 17, 1998);

- Exhibit G-19: “Performance Evaluation Report” as Psychologist, Chief Psychology and Programs, Senior Project Officer, Acting Deputy Warden, RTC (July 27, 2000);
- Exhibit G-20: “Selection Process Assessment Report” (October 19, 2000);
- Exhibit G-21: “CSC Ontario Region Succession Planning Program” for Mr. Tobin (undated);
- Exhibit G-25: “Senior Management Performance Feedback” for Mr. Tobin (May 16, 2001);
- Exhibit G-28: commendation memorandum (April 18, 2002);
- Exhibit G-31: “Performance Evaluation Report” as Project Officer, Regional Headquarters (October 14, 2003); and
- Exhibit G-38: “Certificate of Appreciation” (undated).

[40] Mr. Tobin could not recall assuring Mr. Stevenson prior to being offered the acting assignment to the Deputy Warden position at the CBI that his relationship with HM was over. Although this relationship was known to some CSC staff, Mr. Tobin had never been disciplined for his relationship with HM. Mr. Tobin acknowledged having told Mr. Stevenson and Ms. Stableforth that he was innocent of the charges against him. It was, and is, his belief that his behaviour was not criminal.

[41] Mr. Tobin explained the impact that the criminal charges, the detention and the media coverage had had on himself, his wife and his children. With the exception of a reminder of the availability of the Employee Assistance Program, no training or counselling was provided to help him deal with the charges while continuing to perform his duties.

[42] When asked to explain why he had entered a plea of guilty to one of the six criminal charges, Mr. Tobin stated that it was the result of a process that had evolved through many discussions with his wife and with his lawyer. As well, one important consideration was the expected length of the criminal trial and the estimated cost of his defence.

[43] Mr. Tobin stated that the reasons on which Ms. Stableforth relied in her termination letter (Exhibit E-23) were not brought up by her at their April 28, 2004, meeting one week before the termination of his employment. Hence, he had no opportunity to rebut her conclusions that: (a) his behaviour was incompatible with the duties that he was required to perform as a consultant psychologist; (b) he brought the CSC into disrepute in the eyes of the public, its staff and its offenders; and (c) the trust and confidence that he was once afforded had been irrevocably damaged.

[44] Mr. Tobin was not offered any training, counselling or courses to deal with workplace performance issues, nor was there any suggestion made to him of accepting an alternate job as opposed to being discharged.

[45] After approximately seven months off work since the April 23, 2004, second indefinite suspension and subsequent termination, Mr. Tobin accepted a position as a psychometrist with the County of Leeds-Grenville Developmental Services Department, where he currently works. This job requires one-on-one contact with clients on a regular basis. Primarily, the duties of this position include such things as administering and interpreting psychological tests, training staff and dealing with children, adolescents, adults and teachers. The organization's clients have developmental disabilities and learning/developmental disorders.

[46] Mr. Tobin's new employer knows of the criminal charges that have been filed against him and his plea of guilty, as Mr. Tobin disclosed the details at his interview before receiving a job offer.

[47] In cross-examination, Mr. Tobin was asked to provide greater detail on his employment history. As the Program Director of the Female Behaviour Unit at the RTC he had a caseload, shared with one other psychologist, of six to 10 inmates. He acknowledged that, as stated in Exhibit G-2 (the "Narrative Candidate Assessment Report" for an acting assignment as Deputy Warden at the RTC), he needed to exercise good judgment in serious situations. Mr. Tobin did not know HM prior to January 2001, when she began as a volunteer at the RTC, but he began an affair with her shortly after, in March 2001. Between March and September 2001, they had broken up once or twice, but between September 2001 and February 2002 the relationship was ongoing. HM had been employed as a casual clerk at the CBI prior to Mr. Tobin's arrival as Acting Deputy Warden. Although Mr. Tobin did not tell Mr. Stevenson of his ongoing relationship with HM, a number of senior staff at the CSC, including Mr. Blackler, knew

of their relationship. Mr. Tobin described his relationship with HM as being off and on. As an example, he said that HM had given him a key to her house but had later asked him to return it to her, only to give it back to him again, as she did following the June 25 to 27, 2002, Cornwall training conference (Exhibit G-34) to which she had accompanied him. Mr. Tobin believes that his wife knew of his relationship with HM sometime between September 2001 and February 2002, but he continued the affair even though he knew that it was stressful to his wife and children. Mr. Tobin acknowledged having attended a one-day course in November 2000 called “Anti-Harassment for Managers” (Exhibit G-34). He conceded that his behaviour towards HM in July 2002 was inappropriate and harassing, as HM had said that she felt threatened, and he characterized his July 2, 2002, voicemail messages to her as “vulgar, profane, despicable and inappropriate”.

[48] Mr. Tobin agreed that the description for a consultant psychologist position at the RTC (Exhibit E-10) is accurate, and that he received a copy of the *Standards of Professional Conduct* and the *Code of Discipline*. As Deputy Warden for the RTC and for the CBI, he had to ensure that his staff complied with the *Code of Discipline* and he had to impose discipline. Mr. Tobin was “somewhat familiar” with “A Guide to Staff Discipline and Non Disciplinary Demotion or Termination of Employment for Cause” (Exhibit G-6).

[49] Janet de Laat is the Warden of Frontenac Institution, and has held this position since April 2002. Her employment history with the CSC includes 13 years in labour relations, ending with her being the Director of Labour Relations, as well as two deputy warden positions, in 1996 at Kingston Penitentiary and in 1998 at the CBI. Ms. de Laat has known Mr. Tobin since 1996 and is a friend of both Mr. Tobin and his wife. On the weekend of July 2, 2002, Ms. de Laat had arranged to see the Tobins socially, but Mrs. Tobin called to advise her that Mr. Tobin had been arrested and criminally charged. At Mr. Tobin’s request, Ms. de Laat paged Mr. Stevenson to notify him of the charges. Other than that, Ms. de Laat’s only involvement with this process was to attend two interviews that formed part of the investigation that led to the termination of Mr. Tobin’s employment.

[50] Mr. Tobin worked on an assignment at Frontenac Institution in the fall of 2003 and reported directly to Ms. de Laat. He worked very hard, and Ms. de Laat and her management team were pleased with his results. There was no negative reaction to

Mr. Tobin's arrival following his criminal charges and the newspaper coverage of the charges. Even with the knowledge that Mr. Tobin had entered a plea of guilty to one of the criminal charges, Ms. de Laat did not believe that Mr. Tobin's ability to perform his duties would be affected, and she would have no hesitation assigning him work involving inmate contact.

[51] In cross-examination, Ms. de Laat said that she knew that Mr. Tobin was guilty of inappropriate behaviour, as he had acknowledged his affair with HM to her very early on in the relationship.

[52] David J. Farnsworth is the Director of Psychological Rehabilitation at the RTC. Mr. Farnsworth explained his employment history, both prior to his arrival at the CSC in 1990 and since, concluding with his appointment as Director in 1997.

[53] As Mr. Tobin's immediate supervisor in 1996, Mr. Farnsworth completed and signed Exhibit G-16, a performance review of Mr. Tobin at the RTC. Mr. Tobin worked with six to eight female inmates, supervised four subordinates and worked with all of the CSC staff. The overall rating given to Mr. Tobin was that of "superior", and it is Mr. Farnsworth's opinion that Mr. Tobin is "totally competent".

[54] Mr. Farnsworth is aware of the criminal charges against Mr. Tobin and, having attended Mr. Tobin's trial, is also aware of Mr. Tobin's plea of guilty. He would not be concerned at all if Mr. Tobin returned to work at the RTC, including Mr. Tobin interacting with inmates, as all that he observed was "excellent interaction with inmates for five years". Mr. Farnsworth acknowledged that he is, and has been since 1990, a friend of Mr. Tobin.

[55] In cross-examination, Mr. Farnsworth said that he continues to be a friend of Mr. Tobin and was aware of Mr. Tobin's affair with HM.

[56] At the outset of the continuation of the hearing on November 17, 2006, as per an agreement at the previous hearing, the parties submitted, on consent, Exhibit E-25 addressing discipline to other CSC employees who had committed indictable offences.

III. Summary of the arguments

A. For the employer

[57] On the positive side, counsel for the employer conceded that Mr. Tobin was a 16-year employee who had been given several acting opportunities, including those of Deputy Warden, both at the RTC and at the CBI. Mr. Tobin had been a good employee whose career was moving forward, as seen in his many appraisals and citations, and in particular his “Performance Review and Appraisal Reports” for 1988 to 1990 (Exhibits G-10 and G-11) that contained many positive comments. As well as assigning Mr. Tobin to his initial acting assignment as the Deputy Warden at the CBI, Mr. Stevenson had been sufficiently pleased with Mr. Tobin’s performance in that position to extend him from the initial six-week appointment to a four-month appointment.

[58] However, Mr. Tobin began to demonstrate a lack of good judgment, resulting in his making bad decisions. Mr. Tobin’s decision to have HM accompany him to a training conference for managers in Cornwall in June 2002 was evidence of a poor decision resulting from a lack of good judgment. Poor decisions continued and included the events of July 2002 that led to Mr. Tobin’s arrest and detention.

[59] In addition, Mr. Tobin was less than forthright with Mr. Stevenson about his continuing relationship with HM and what had transpired between them that led to his being charged. In fact, on two occasions Mr. Tobin told Mr. Stevenson that he was not guilty of the criminal charges and that he expected to be exonerated. He repeated this same opinion to the newly appointed Deputy Commissioner, Ms. Stableforth. Despite these assurances, Mr. Tobin entered a plea of guilty to the charge of criminal harassment on April 19, 2004, 16 months after his return to work following the administrative review.

[60] Mr. Tobin was subject to the *Standards of Professional Conduct* and the *Code of Discipline*.

[61] Mr. Tobin’s acting position as Deputy Warden was a very senior and important one within the CSC. As Deputy Warden he could be, and was, called upon to replace the Warden in his absence. Mr. Tobin’s job was essentially behaviour modification (to get inmates to change and become better people), and in order to achieve this Mr. Tobin had to exercise good judgment. But, time after time, he did the opposite.

[62] Moreover, Mr. Tobin did not think that he had done anything wrong, and he has not offered an apology.

[63] Counsel for the employer briefly reviewed the case law. A total of nine decisions were submitted dealing with the test to be applied in imposing discipline for off-duty behaviour: *Flewwelling v. Treasury Board (Fisheries and Oceans)*, PSSRB File No. 166-02-14236 (19840328), *Wells v. Treasury Board (Solicitor General - Correctional Service Canada)*, PSSRB File No. 166-02-27802 (19971125), *McIsaac v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File No. 166-02-20610 (19901231), *Gibbons v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-19622 (19901115), *Moore v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-23658 (19930527), *Fauteux v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-26211 (19950620), *Beirnes v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-21914 (19920710), *Cudmore v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-26517 (19960725), and *Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43.

B. For Mr. Tobin

[64] Counsel for the employer has failed to meet his burden. His burden was to prove the disciplinary grounds, as set out in the termination letter (Exhibit E-23), that Mr. Tobin contravened Standard Two (Conduct and Appearance) of the *Standards of Professional Conduct* and the *Code of Discipline*. Standard Two of the *Standards of Professional Conduct* reads as follows:

...

Infractions

An employee has committed an infraction, if he or she:

...

- *acts, while on or off duty, in a manner likely to discredit the Service;*
- *commits an indictable offence or an offence punishable on summary conviction... which may bring discredit to the Service or affect his or her continued performance with the Service.*

...

[65] Concerning any alleged discredit which Mr. Tobin's actions may have caused the CSC, it is insufficient merely to state it; counsel for the employer must have some evidence to prove it. There is no evidence here, only an assumption. No evidence was led of complaints to the CSC or of any negative results discovered in a survey or poll of the public. Nor is there any evidence of any negative impact on the operations of the CSC or of any effect on Mr. Tobin's continued performance with the CSC. The only related information provided is coverage in various newspapers (Exhibits E-13, E-14, E-17 and E-18).

[66] The employer did not bother to look at reliable objective evidence that could speak to whether Mr. Tobin could perform his duties satisfactorily following his plea of guilty: for example, appraisals and comments by Mr. Tobin's colleagues, by his supervisor, by Mr. Stevenson, Mr. Farnsworth, Ms. de Laat, by the offenders or even by Mr. Tobin himself.

[67] Counsel for Mr. Tobin referred me to Brown and Beatty's *Canadian Labour Arbitration*, 4th Edition, para 7:3010, that deals with the employer's burden in imposing discipline for off-duty behaviour. Para 7:3010 reads as follows:

7:3010 Off-duty Behaviour

...

In all cases, however, arbitrators have insisted that employers show there is a real causal connection between the events that occurred when the employee was not on duty and the efficient operation of their businesses. They are required to undertake a meaningful investigation of how seriously the employee's personal activities will affect their interests, and not rely on unsubstantiated supposition and speculation. Ultimately, an arbitrator must balance the competing interests of the employer and the employee, and it has been held that any interference with the employee's private affairs must be proportional to the interest of the employer that is at stake.

[Footnotes omitted]

[68] Counsel for Mr. Tobin reminded me that Mr. Tobin was not disciplined for having a relationship with HM, as many CSC staff knew of their relationship and nothing was done about it.

[69] In order to establish a link between off-duty behaviour and the performance of duties, more than speculation is required; yet, no real attempts were made to prove that link. Further, the degree of proof requires “clear, convincing and cogent” proof where serious misconduct or criminal behaviour is involved. For example, in *Nova Scotia Community College v. Nova Scotia Teachers’ Union* (2003), 121 L.A.C. (4th) 159, an arbitrator found as follows:

...

[72] . . . While the burden of proof in discipline cases is on a balance of probabilities, it is also accepted that proof where dealing with serious misconduct or criminal behaviour must be “clear, convincing and cogent”

...

[70] Counsel agreed on the application of the test in *Millhaven Fibres Limited, Millhaven Works v. Oil, Chemical and Atomic Workers International Union, Local 9-670* (1967), (1A) Union Management Arbitration Cases 328, as reported in *Port Moody (City) v. Canadian Union of Public Employees, Local 825* (1997), 63 L.A.C. (4th) 203.

[71] Counsel for the employer seems to rely heavily on the fact that on the one hand Mr. Tobin said that he was not guilty and expected to be exonerated, while on the other hand he entered a plea of guilty to one of the criminal charges filed against him. There is no mention in the termination letter of this as a concern, let alone as a ground relied upon by the employer to terminate Mr. Tobin’s employment. In any case, the explanation is readily understood: Mr. Tobin was not lying but, rather, expressing his own personal view. He took the offer that made the most sense, on the advice of his lawyer. What was the alternative? Litigation? More publicity? Potentially more harm, both to his family and to the CSC? A plea bargain in itself displays an exercise of good judgment.

[72] Concerning counsel for the employer’s submission on Mr. Tobin’s lack of good judgment, counsel for Mr. Tobin urged me to distinguish between the exercise of poor judgment in Mr. Tobin’s personal life and in his working life. There is no evidence to support a finding of poor judgment in the performance of his duties. Another thing that had no impact on Mr. Tobin performing his duties was his relationship with HM after September 2001, as clearly stated in the “Administrative Review” report.

1. Credibility of witnesses

[73] Mr. Stevenson's recollection of events was not crystal clear. Mr. Tobin's evidence was open, frank and responsive, even in cross-examination. Indeed, even concerning negative events, Mr. Tobin readily admitted them and made no attempt to waffle or to put a gloss on the details.

[74] Also, Mr. Tobin was noted by the investigators as having cooperated fully in the administrative review. For these reasons, counsel for Mr. Tobin suggested that I ought to prefer Mr. Tobin's evidence where there is a conflict between differing versions of events; this would include Ms. Stableforth's testimony, as she was a reluctant witness at times. In this regard, counsel for Mr. Tobin referred to Ms. Stableforth's reluctance to acknowledge that imprisonment was an important factor to consider when weighing the seriousness of criminal acts, as clearly stated in Standard Two (Conduct and Appearance) of the *Standards of Professional Conduct*.

[75] Counsel for Mr. Tobin asked me to consider as mitigating factors Mr. Tobin's appraisals, Mr. Farnsworth's testimony, Ms. de Laat's testimony, the absence of a disciplinary record and the commendations found in Mr. Tobin's letters of reference from the Department of Justice, St. Lawrence College and the Warden of the Prison for Women (Exhibits G-35 to G-39).

2. Admission of wrongdoing

[76] Mr. Tobin did not say that what he did was not wrong. What he did say was that it was not criminally wrong. After all, he entered a plea of guilty and accepted the agreed facts as recorded in the "Plea and Sentencing Report" (Exhibit E-2).

3. Mr. Tobin's ability to perform his duties

[77] There is evidence that despite what happened between HM and Mr. Tobin, and despite the criminal charges, detention and media coverage that followed, Mr. Tobin could, and did, continue to perform his duties satisfactorily. He was returned to work in November 2002 and the evidence is that there were no issues with his performance from his return to work until his suspension in the spring of 2004, 17 months later. This is the best evidence that there was no impact on his duties. On August 14, 2003, Ms. Stableforth requested that Mr. Tobin be considered for a national assignment in psychology (Exhibit G-5).

[78] Mr. Tobin's misconduct was not sufficiently serious to warrant, by itself, a termination of employment, and the employer was wrong not to look at his potential for rehabilitation. This becomes clear when one considers how the CSC has dealt with other, more serious conduct resulting in criminal convictions of CSC staff, such as spousal assault and impaired driving (Exhibit E-25).

[79] There is no evidence that even one of the five *Millhaven Fibres* criteria commonly used to determine whether an employer can impose discipline for off-duty behaviour has been met in this case.

[80] The employer should have considered all mitigating factors in assessing what should be the appropriate response. In this regard, counsel for Mr. Tobin referred me to *Canadian Labour Arbitration* that, at para 7:4400, lists 10 separate factors:

7:4400 Mitigating Factors

...

1. *The previous good record of the grievor*
2. *The long service of the grievor*
3. *Whether or not the offence was an isolated incident in the employment history of the grievor*
4. *Provocation*
5. *Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated*
6. *Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances*
7. *Evidence that the company [sic] rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination*
8. *Circumstances negating intent, e.g., likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it*
9. *The seriousness of the offence in terms of company policy and company obligations*

10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance (c) failure of the company to permit the grievor to explain or deny the alleged offence

C. Employer's rebuttal

[81] In reply, counsel for the employer made the following comments. Mr. Farnsworth and Ms. de Laat are close friends of Mr. Tobin. After his return to work, Mr. Tobin entered a plea of guilty, which is what changed things from the employer's perspective. While counsel for the employer agrees that the events of July 2002 occurred in a highly emotionally charged time and were initially spur of the moment, the events did not continue to be spur of the moment when Mr. Tobin left several voicemail messages.

[82] Counsel for the employer suggested that in considering consistency of discipline I should look at the criminal conduct of other CSC staff (Exhibit E-25) in context, considering the employees' duties and the facts in each case. The employer did not direct Mr. Tobin to end his relationship with HM, as "it's not their responsibility to guide Mr. Tobin's personal life".

IV. Reasons

[83] To meet its burden in discipline cases, an employer must normally prove that the misconduct complained of occurred and that the discipline imposed was reasonable in the circumstances. However, the fact that the conduct complained of in this case was off-duty conduct raises a third consideration, as not all off-duty behaviour is subject to the employer's power to correct through the application of progressive discipline.

[84] The first part of the burden is met by the plea of guilty. However, before I look at the reasonableness of the discipline imposed, I must determine whether Mr. Tobin's off-duty behaviour was within the employer's control.

[85] An employer is not generally considered to be the custodian of an employee's moral character. Counsel for the employer recognized this principle when he submitted that the employer's reason for not directing Mr. Tobin to end his relationship with HM was that "it's not their responsibility to guide Mr. Tobin's personal life". Ironically, it is precisely this issue that I must decide in order to determine whether the employer had the right to discipline Mr. Tobin for off-duty behaviour – an event that occurred in Mr. Tobin's personal life. If that event was beyond the employer's control, any discipline imposed for that off-duty behaviour cannot stand.

[86] Counsel agreed that, in order to answer this question, the *Millhaven Fibres* test should be applied. I agree with this submission, as this five-fold test has been applied numerous times over the last 40 years.

A. Did Mr. Tobin's conduct harm the CSC's reputation and has his criminal conviction rendered his conduct injurious to the general reputation of the CSC and employees working at the CSC?

[87] The first criterion of the *Millhaven Fibres* test is closely related to Standard Two (Conduct and Appearance) of the *Code of Discipline* and relates to harming the CSC's reputation. It is also similar to the second part of its fourth criterion, which relates to "... rendering his conduct injurious to the general reputation ..." and employees working at the CSC. I will deal with the first *Millhaven Fibres* criterion and the second part of its fourth criterion.

[88] I accept counsel for Mr. Tobin's submission that proof is required, perhaps even clear and cogent proof, given the criminality of the conduct complained of, but some proof is required at the very least. It seems logical to me, as well, that not only the severity of the conduct but the severity of the discipline imposed can elevate, within the civil standard, the quality of evidence required.

[89] There is no evidence of harm suffered by the CSC as a result of Mr. Tobin's off-duty behaviour. To arrive at such a conclusion, I would need evidence of the following:

- a) the CSC's reputation before the events of July 2002;
- b) the CSC's reputation following the events of July 2002; and

- c) if there was any deterioration of the CSC's reputation in the pre- and post-July 2002 period, whether that deterioration was directly attributable to Mr. Tobin's off-duty conduct.

[90] I have been provided with no evidence to support a finding on any of these points. The only evidence before me that relates to potential harm to the CSC's reputation falls short of any acceptable standard of proof and especially that of clear, convincing and cogent evidence.

[91] Four newspaper articles were submitted by the employer - two following the filing of criminal charges (Exhibits E-13 and E-14) and two following the plea of guilty (Exhibits E-17 and E-18). What weight can I give such hearsay evidence? The authors of the articles were not called to testify, not sworn and not subject to cross-examination. I can only accept the articles for the fact that they were published and not for their factual content that, I note, contains many inaccuracies.

[92] While I accept that the contents of the newspaper articles could not be reasonably viewed as flattering or enhancing in any way to the reputation of the CSC, they shed no light whatsoever on harm suffered by the CSC in general or on the three points of evidence that I would need to conclude that harm was caused by Mr. Tobin in particular.

[93] In this regard, I note Ms. Stableforth's statement: "I did not terminate Mr. Tobin because of media coverage." Indeed, Ms. Stableforth conceded that she had no evidence of the public's attitude toward the CSC as a result of the articles and did not rely on the newspaper coverage.

[94] What, then, of any harm to the reputation of the employees working at the CSC? Again, there is no evidence other than the four newspaper articles that fall far short of the proof required. Moreover, there is evidence to the contrary: the testimonies of Ms. de Laat, the Warden at Frontenac Institution, and Mr. Farnsworth, a senior manager at the RTC, were not seriously challenged. Nor does the fact that they continue to be friends of Mr. Tobin's undermine their credibility. They spoke highly of Mr. Tobin's abilities and job performance, and both said that they would have no problem working with him again should he be reinstated. The question of whether they felt that Mr. Tobin's behaviour or his plea of guilty injured their reputations was not directly put to them, but their very attendance as witnesses for Mr. Tobin and their testimony,

which did not support the decision to terminate Mr. Tobin' employment, seem inconsistent with a perception on their part that Mr. Tobin's off-duty conduct harmed their reputation or that of the CSC. I note that no employees were called to testify to suggest that their reputation as CSC staff was in any way tarnished or injured by Mr. Tobin's conduct.

B. Did Mr. Tobin's behaviour render him unable to perform his duties satisfactorily?

[95] Mr. Tobin's duties are contained in the position description for a PS-03 consultant psychologist (Exhibit E-10). While some of counsel for the employer's submissions was on the importance of Mr. Tobin's acting position as Deputy Warden, the duties of which are described in Exhibit E-3, I am concerned with Mr. Tobin's substantive duties as a consultant psychologist. There was no evidence before me that would enable me to determine which, if any, of the six duties of a consultant psychologist Mr. Tobin could no longer satisfactorily perform. There is, however, a preponderance of evidence to the contrary.

[96] According to the second *Millhaven Fibres* criterion, it must be the behaviour that renders an employee unable to perform his duties satisfactorily. The behaviour involved the events that occurred during the long weekend of July 2002. The only thing that happened between July 2002 and the termination of Mr. Tobin's employment was his plea of guilty on April 19, 2004. But that was not the behaviour complained of. In the interim, Mr. Tobin was returned to work in November 2002, where he remained until his second suspension on April 23, 2004, 17 months later. There has been no suggestion that during this period Mr. Tobin was unable to perform his duties satisfactorily.

[97] What we do know from many appraisals, citations, commendations, etc., is that Mr. Tobin had always been a valued employee as a consultant psychologist, as a program director, as the Deputy Warden at the RTC, as the Deputy Warden at the CBI, and as the Acting Warden at the RTC and at the CBI. To bolster those credentials, I have the opinions of both the Warden of Frontenac Institution and the Director of Psychological Rehabilitation at the RTC, who believe that Mr. Tobin's abilities to perform his substantive duties were not diminished in any way as a result of his off-duty behaviour.

[98] The evidence does not support a finding that Mr. Tobin was not able to perform his duties satisfactorily as a result of his off-duty behaviour. In fact, although Mr. Tobin's duties as a psychometrist within the County of Leeds-Grenville Developmental Services Department differ somewhat from those of a consultant psychologist at the CSC, his evidence was unchallenged that he continues to perform his duties without difficulty.

C. Has Mr. Tobin's behaviour led to refusal, reluctance or inability of other CSC employees to work with him?

[99] Neither Mr. Stevenson nor Ms. Stableforth was asked this question directly. However, as Ms. Stableforth made the decision to terminate Mr. Tobin's employment, it is reasonable to conclude that she may be reluctant to work with him.

[100] On the other hand, the question was put directly to Mr. Farnsworth and to Ms. de Laat, and they were unequivocal in their replies that they would have no problem working with Mr. Tobin. Mr. Farnsworth's evidence was particularly relevant, as he is a director at the RTC, where Mr. Tobin's substantive position is located. No colleagues of Mr. Tobin's were called, no subordinates, no correctional officers, and not one of the management team at Kingston Penitentiary, where the RTC is located, were called to express their reluctance or inability to work with Mr. Tobin.

[101] In short, there would have to be strong, objective evidence to support this criterion and enable me to conclude that Mr. Tobin would be treated as a pariah were he to be reinstated. None was presented to me. Exhibit E-25, which was admitted on consent on the final day of the hearing, sheds some light on this consideration. This exhibit addresses other CSC staff with criminal convictions for offences ranging from criminal harassment (the same offence to which Mr. Tobin entered a plea of guilty), to impaired driving and spousal assault. Those employees, identified in Exhibit E-25, retained their positions. No evidence was led to the effect that others in the workplace were either reluctant to work with them or that their continued employment created an untenable work situation either for the employees or for management.

D. Has Mr. Tobin been guilty of a serious breach of the *Criminal Code*?

[102] According to the second part of the fourth criterion of the *Millhaven Fibres* test, was Mr. Tobin's conduct a serious breach of the *Criminal Code*?

[103] Serious, of course, is a subjective or comparative term. Obviously, what is serious to one may not be serious to another. The term lends itself to interpretation. For that reason, I put the question to counsel for their submissions as to what in their opinions constitutes a serious breach of the *Criminal Code*. It was suggested that examples of a serious breach were assault, causing a death, offences involving a child or an elderly or infirm person, rape and crimes of that ilk. I agree that those types of offences are serious. Perhaps, then, the answer as to what is and what is not serious is a comparison to other *Criminal Code* offences to determine where an offence sits in the grand scheme of things. One way to judge the relative degree of the seriousness of an offence is to examine the various penalties that flow from offences.

[104] In Mr. Tobin's case, there was a joint submission suggested to the court as an appropriate penalty. That was a suspended sentence and 18 months' probation with conditions (Exhibit E-2). The court was satisfied that Mr. Tobin's best interests and those of society were met, and that the general concern of deterrence was also met by this sentence. All of the above considerations lead me to conclude that Mr. Tobin's behaviour was not, for the purposes of my deliberations, a serious breach of the *Criminal Code*.

[105] This finding should in no way be construed to suggest that I have taken lightly the plea of guilty, as well as the off-duty behaviour that gave rise to it. I most certainly do not.

E. Did Mr. Tobin's conduct place difficulty in the way of the CSC properly carrying out its function of efficiently managing its work and efficiently directing its workforce?

[106] We have evidence that, in the 17-month period between Mr. Tobin's return to the workforce following his first suspension and his second indefinite suspension on April 23, 2004 (Exhibit E-20), there were no work-performance issues. Throughout this period the criminal charges against him were well known, both to the CSC and, according to the employer's counsel's submission, to the general public through various newspaper articles (Exhibits E-13, E-14, E-17 and E-18). There was, however, no evidence concerning reaction to those articles from any individual or group, no petition demanding Mr. Tobin's immediate discharge from an angry citizens' group or protests of that nature.

[107] What we do have are Exhibits G-29, G-30 and G-31, which cover the November 2002 to April 2004 period, and these exhibits do not demonstrate any difficulty in managing the workplace:

- Exhibit G-29 concerns Mr. Tobin's assignment of duties for a six-month period (November 25, 2002, to May 25, 2003). Of particular interest are the following conditions:
 - a) the completion of the assignment is subject to satisfactory work performance;
 - b) the assignment may be terminated on 30 days written notice; and
 - c) the assignment may be extended subject to operational requirements and the agreement of all parties.
- Exhibit G-30 is an extension of the assignment mentioned in Exhibit G-29, for a period of more than three months, subject to the same conditions. Presumably, the employer was satisfied with both the work arrangement and Mr. Tobin's performance, as the assignment was not terminated but, rather, extended.
- Exhibit G-31, wherein Mr. Tobin's then immediate supervisor, Bonnie Smith, formally assessed Mr. Tobin's performance. On October 14, 2003, she had this to say: ". . . Any work that was assigned to Fred was done very efficiently and thoroughly and he was most co-operative in seeking to help others with any projects where his assistance could be utilized."

[108] No evidence was led to establish that this temporary working arrangement interfered to any degree with the efficient operation of the CSC. There was not even a suggestion that this arrangement was not beneficial or productive, or that it was a great inconvenience or a waste of resources, such as a make-work project might be.

F. Summary

[109] As I stated earlier, there must be some proof that the criteria in *Millhaven Fibres* apply, as, generally speaking, employers have no authority over what employees do outside of their working hours. Employers must prove some link between events that occur during off-duty hours and the workplace. I do not believe, in the facts before me, that the employer has proven that a link exists. As stated earlier, absent that essential link, Mr. Tobin's off-duty behaviour is beyond the CSC's control and any discipline imposed for that off-duty behaviour cannot stand.

[110] As tragic as the events were for two families, these events, as stated by the employer in its "Suggested Media Lines" (Exhibit G-9), "... are the result of a personal matter outside of his work with the CSC. . . ."

[111] A hearing into this matter was delayed due to the unavailability of the parties. No representation was made concerning any liability for the delay.

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

(The Order appears on the next page)

V. Order

[113] I order the employer to reinstate Mr. Tobin to his substantive position without loss of either pay or benefits, and to remove from his file any reference to the termination of his employment.

[114] I will remain seized for two months following the issuance of this decision to deal with any issue concerning Mr. Tobin's reinstatement.

March 2, 2007.

**Barry D. Done,
adjudicator**