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File: 566-02-272

Citation: 2007 PSLRB 121



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

LYNN NESSRALLAH

Grievor

and

**DEPUTY HEAD
(Public Service Commission)**

Respondent

Indexed as
Nessrallah v. Deputy Head (Public Service Commission)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: D.R. Quigley, adjudicator

For the Grievor: Sean McGee, counsel

For the Respondent: Jennifer Lewis, counsel

Heard at Ottawa, Ontario,
September 4, 6 and 7, 2007.

I. Individual grievance referred to adjudication

[1] This decision concerns a grievance filed by Lynn Nessrallah (“the grievor”) on August 2, 2005, regarding a three-day suspension without pay. The grievor is a political activities advisor (PE-05) in the Policy Branch at the Public Service Commission (PSC). The suspension was imposed because the grievor took a photograph of her manager asleep at his desk, attached it to an email and sent the email to four colleagues. The respondent contends that the grievor wanted to bring the manager into disrepute with its employees.

[2] The letter of suspension dated July 7, 2005, and signed by Dal Hines, Director General, Delegation, Policy Branch, PSC (Exhibit E-6), states, in part:

...

This letter refers to our meeting on June 28, 2005, during which you were asked to explain your actions concerning the distribution of an email and photograph to fellow co-workers.

At our meeting, you confirmed that you had taken the picture in question and sent it with an email to four colleagues. You also confirmed that you had shown this picture to others in your work unit, and that there was in fact a second picture taken of your manager without his consent which you had not shown to anyone, but which resides on your home computer along with the original picture. You also explained the context for your actions and later provided me with a detailed written response to my questions.

I find that your distribution of this material was a wilful act on your part to bring your manager into disrepute with his employees. This type of behaviour is totally unacceptable particularly because it erodes the necessary employer employee relationship and cannot be tolerated.

Consequently, by virtue of the authority delegated to me, you are being suspended without pay for a period of three (3) working days from July 11, 2005 to July 13, 2005 inclusive. This disciplinary measure was mitigated by your years of service and no previous incidents of this nature. Furthermore, I am requesting that you destroy the images concerned so as not to make any further use of them. Please let me know when you have done so. Should you fail to comply with this, you may be subject to further disciplinary action.

...

[3] As corrective action, the grievor seeks:

...

Full redress including removal of any discipline from my file, compensation for any losses with interest, together with an assurance that there will be no future reprisal for my whistleblowing. Also include reinstatement of all sick leave taken as a result of the impact of the investigation and disciplinary measure on my health and ability to work.

...

[4] At the final level of the grievance procedure in March 2006, Anne-Marie Robinson, Vice-President, Corporate Management Branch, PSC, reduced the suspension to one day.

[5] Both counsel made opening statements. Counsel for the respondent called two witnesses and filed 12 exhibits. The grievor testified, and her counsel filed four exhibits. Although I admitted the exhibits, some of them are irrelevant, and I will therefore only consider the ones related to the suspension.

[6] At the outset of the hearing, counsel for the respondent requested that the grievor's manager not be identified in my decision. I instructed counsel to proceed with the evidence and on September 21, 2007, I held a conference call with both parties to hear their submissions on the issue.

[7] Counsel for the respondent argued that the grievor's manager should not be identified since he was not a party to the proceedings and that if the grievor requested that he be identified, it would be a spiteful action on her part.

[8] Counsel for the grievor stated that if the grievor's manager was not identified then the grievor's colleagues, who viewed themselves as whistle-blowers, should not be identified either. As well, counsel noted that the grievor's manager had threatened to sue the grievor for defamation if her suspension was reduced.

[9] I concluded the conference call by advising counsel that I would carefully consider their submissions. After having done so, I have decided that it would not be appropriate to identify the grievor's manager, and I will explain the reasons for doing so later in this decision. Therefore, the individual will be referred to as "the grievor's manager" or "her manager" throughout this decision.

[10] I have also decided not to identify the grievor's colleagues, and again my reasons for doing so are explained later in this decision.

II. Summary of the evidence

[11] In April 2003 the grievor's manager, a lawyer at the Department of Justice classified at the LA-2A group and level, accepted an interchange assignment with the PSC, at the EX-01 group and level.

[12] The respondent's first witness was Dal Hines. Mr. Hines was a public service employee for 34 years before retiring on August 22, 2007. From April 2003 to April 2006, he was Director General of the Delegation Directorate in the Policy Branch at the PSC and he supervised the grievor's manager.

[13] Mr. Hines testified that the grievor came to see him on January 26, 2005, to discuss concerns about her manager's conduct at work. Her manager was responsible for three business lines that included political activities, official languages (exemptions) and the priority administration system. Initially, the grievor's manager had five direct reports; however, by 2005, the number had grown to 10. Mr. Hines testified that the grievor advised him that she was the spokesperson for a number of her PE-05 colleagues. She expressed concerns about her manager's work habits, as he had been observed on a number of occasions sleeping during meetings, playing solitaire on his computer, and arriving late and leaving early. The grievor questioned his leadership style, lack of vision, strategic planning and delays in completing work assignments.

[14] Mr. Hines testified that he took the grievor's allegations seriously. He advised her that he was going to act on the matter, as he perceived it to be a performance management issue. Mr. Hines then met with five of the grievor's manager's direct reports and with Human Resources (HR) representatives to explore organizational development options for the manager and his direct reports.

[15] Mr. Hines recalled that he had seen the grievor's manager sleeping during working hours. Although he could not remember exactly when, it was before 2003 when they had worked together on different projects; at that time, the grievor's manager was not under his supervision. Mr. Hines also recalled entering the grievor's manager's office in fall 2004 and although it appeared that he was asleep at his desk, Mr. Hines could not be sure since the grievor's manager's back was turned to him.

[16] Mr. Hines was asked for his recollection of his meeting in mid-March 2005 with the grievor's manager to discuss the grievor's allegations. He stated that the meeting was not candy coated. The grievor's manager was taken aback and denied the allegations. Mr. Hines advised him that he found it difficult to believe that five employees would make up the same story and that the matter had to be dealt with. Mr. Hines also advised him that he was hiring a consultant, using a sole-source contract to expedite the process, and that the consultant would meet with the grievor's manager, the grievor and her colleagues to engage in a "Group & Leadership Effectiveness Review."

[17] Mr. Hines identified Exhibit E-2 as the contract for the "Group & Leadership Effectiveness Review" signed on March 17, 2005.

[18] On March 18, 2005, the consultant met with the grievor's manager, and on March 30, 2005, she met individually with the grievor and five of her colleagues. On April 1, 2005, the consultant met again with the grievor's manager to provide him with feedback following her meetings with the grievor and her colleagues.

[19] The next step in the process was for the consultant to customize 10 to 12 coaching-initiative sessions of 1.5 to 2 hours each. However, before the consultant could do so, her contract was suspended, because on June 6, 2005, the grievor's manager brought to Mr. Hines' attention an email (Exhibit E-1) that the grievor had sent on January 4, 2005, to Mr. Hines' assistant and to three of her colleagues. The subject line of the email stated: "Warning: This is what happens if you work too hard!" In the body of the email, the grievor wrote, "Well, at least he made up for the time he slept by playing cards at 4:30! Pas de farce!" [Translation: No joke!]

[20] Mr. Hines testified that after he reviewed the email he felt that the circumstances had changed and that an investigation might be warranted. He contacted HR representatives to seek their advice.

[21] Mr. Hines stated that when the grievor came to see him on January 26, 2005, he viewed it as the proper approach on her part. However, after being made aware of Exhibit E-1 he felt that the grievor had not been completely honest with him and had not acted in good faith. He then questioned the outcome he had initially expected from the consultant, since it now appeared that the matter might be more convoluted than what he was first led to believe.

[22] Mr. Hines stated that it was one of the grievor's colleagues who provided the grievor's manager with Exhibit E-1.

[23] On June 13, 2005, Mr. Hines contacted the PSC's Director of Information Technology (IT) to request that the grievor's email account be searched to retrieve any emails that she might have sent that contained an attachment.

[24] On June 21, 2005, Mr. Hines sent a letter to the grievor (Exhibit E-3), enclosing copies of emails with attachments (including Exhibit E-1) that she had sent to some of her colleagues. In his letter he stated that he was investigating the matter and that the grievor was requested to attend a meeting in his office on June 22, 2005. At the grievor's request, the meeting was deferred to June 28, 2005.

[25] At this point in the proceedings counsel for the grievor raised an objection as to the relevance of the emails with an attachment referred to in Mr. Hines' June 21, 2005 letter, since the letter of discipline (Exhibit E-6) only refers to the distribution of an email and a photograph.

[26] Counsel for the respondent agreed that the letter of discipline only refers to an email and a photograph but stated that the other emails had to be taken in context to reflect the grievor's intention to embarrass and humiliate her manager.

[27] I have decided not to consider the other emails since the letter of discipline only refers to an email and a photograph that both parties agreed is Exhibit E-1. As well, and as will be noted later, Mr. Hines testified that he was advised by HR representatives to only focus on Exhibit E-1.

[28] Mr. Hines identified Exhibit E-5 as the disciplinary report that he prepared following his meeting on June 28, 2005, with the grievor.

[29] According to Mr. Hines, when the grievor was asked why she had sent Exhibit E-1 to four colleagues she replied that someone (she could not remember the person's name) had suggested that she take a photograph of her manager asleep at his desk so that if the issue were brought to management's attention, the grievor and her colleagues would have evidence. When the grievor was asked if she had forwarded Exhibit E-1 to anyone else, she replied that she had not but admitted that she had shown the photograph to some other colleagues. She also admitted that she had mentioned the photograph to an employee who worked outside her unit.

[30] Mr. Hines identified Exhibit E-4 as the grievor's written response following their meeting on June 28, 2005. He stated that he did not believe that the grievor had taken responsibility for her actions or that her apology was sincere. He noted that if the grievor had taken the photograph and kept it to herself, "we would not be at adjudication." However, the grievor used it for another purpose - to mock her manager - and Mr. Hines viewed this as highly inappropriate behaviour. He stated that he had taken the grievor's allegations seriously and was in the process of dealing with them.

[31] Mr. Hines testified that he decided that disciplinary action was warranted even though he considered that the grievor had worked for the PSC for 27 years with no prior disciplinary record. However, the grievor's lack of remorse and accountability for her actions were the reasons that upheld his decision.

[32] Mr. Hines was referred to the letter of discipline that he signed on July 7, 2005 (Exhibit E-6). He stated that when he decided to impose discipline he did not ignore the other emails with an attachment given to him by IT (Exhibit E-3) but mentioned only Exhibit E-1 in his letter following advice he received from HR representatives.

[33] In cross-examination, Mr. Hines stated that although he was aware of the progressive discipline principle, it was not considered during his discussions with HR representatives.

[34] Mr. Hines reiterated that the contract with the consultant was suspended and not cancelled since her services could still have been required. The contract was eventually renewed to 2006.

[35] In reply to a question from counsel for the grievor as to whether the PSC had a policy on picture taking, Mr. Hines replied that taking pictures of willing participants at birthday celebrations, retirements or other occasions was allowed. He added, "We never needed a policy in the past and that is why a picture-taking policy does not exist."

[36] Mr. Hines stated that if in fact someone had suggested to the grievor that she take a photograph of her manager asleep at his desk for evidence, then he did not understand why she had sent it to four of her colleagues. He noted that it was not only the photograph that was at issue but also the disparaging remark contained in the grievor's email, which was viewed as a deliberate intent to embarrass her manager.

[37] Mr. Hines indicated that the reason he did not issue a letter of reprimand or a stern warning instead of the three-day suspension without pay was that he felt that the grievor was not forthright during their meeting on June 28, 2005. He found her evasive or vague when asked to whom she had shown the photograph. As the delegated authority, he considered a three-day suspension without pay an appropriate disciplinary penalty.

[38] With respect to the June 28, 2005 meeting, Mr. Hines testified that the grievor was emotional; at times she was crying and at other times she was angry. She emphatically denied the allegation that she meant to mock her manager. Mr. Hines recalled that at one point he cut the grievor off, and she asked him if she could finish her statement. Mr. Hines noted that Susan Patterson, Director of Labour Relations, Public Works and Government Services Canada, represented the grievor, and that Francine Chabot-Plante, Acting Vice-President, Policy Branch, was also present. At no time did they raise concerns regarding the tone of the meeting.

[39] Mr. Hines noted that although he stated in the analysis portion of the disciplinary report (Exhibit E-5) that the grievor's actions could be viewed as defamation and a potential violation of the *Criminal Code*, it was not a factor in his decision to impose discipline.

[40] In reply, when referred to the disciplinary report (Exhibit E-5), Mr. Hines noted that when the grievor was asked to whom she had shown the photograph, she mentioned the names of three colleagues but she could not recall if she had shown it to anyone else. She also indicated that she had mentioned the photograph to a

colleague from another directorate. However, in her written response following their meeting on June 28, 2005 (Exhibit E-4), the grievor wrote: "It [the photograph] was not sent to individuals other than the 4 listed on the e-mail; I recall showing it to some of the others in our division (I cannot recall with certainty who saw it)." He stated that this was why he felt the grievor had lied during their meeting.

[41] Mr. Hines concluded by stating that the PSC is a values-based organization. By her actions, the grievor demonstrated a lack of respect and honesty.

[42] The respondent's next witness was Jacques Pelletier. Mr. Pelletier was a vice-president at the PSC from March 2003 to December 2005.

[43] Mr. Pelletier testified that the grievor's manager did not report to him but that he had met him on several occasions. He stated that no one had ever complained to him about the grievor's manager sleeping during working hours. He noted that if someone would have done so, his advice to that person would have been to speak to the manager's supervisor (to respect the chain of command) or to the PSC's ombudsman. He also noted that he would have informed the manager's supervisor of the allegations.

[44] When asked about the comments that the grievor attributed to him in her written submission following the final-level grievance hearing (Exhibit E-11) that Mr. Pelletier tiptoed by her manager's office so as not to awaken him and that he suggested that a sign be put up to tell people to be quiet so as not to disturb her manager, Mr. Pelletier replied that those comments were made in jest. He stated that he has made similar comments about other employees.

[45] In cross-examination, Mr. Pelletier stated that he could only recall one occasion when he made a comment about the grievor's manager.

[46] The grievor was the final witness. She stated that in the fall of 2004 she began reporting to her manager. She testified that she and her colleagues had observed him sleeping during meetings but that she had never mentioned this to Mr. Hines. She acknowledged that when she met with Mr. Hines on January 26, 2005, she did not mention to him that she had taken a photograph of her manager asleep at his desk and that she had emailed it to four colleagues.

[47] The grievor described the circumstances that led to her taking the photograph. She and her manager had been very busy revising guidelines related to granting permission and leave without pay to employees seeking to be candidates in federal, provincial, territorial or municipal elections. The guidelines were to be included in regulations that the President of the PSC was requesting. The delivery time frame was extremely tight, and both she and her manager worked late on Christmas Eve 2004 to finalize the guidelines, since her manager was taking vacation leave from December 27, 2004, to January 3, 2005.

[48] The grievor testified that at approximately 2:15 p.m. on January 4, 2005, someone came to her office, mentioned that her manager was asleep at his desk and suggested that a photograph be taken. Since the grievor had a Sony CLIE, an electronic personal organizer (similar to a Palm Pilot) with a camera, she decided to take a photograph of her manager.

[49] The grievor stated that later that afternoon, at 4:29 p.m., she emailed her manager (Exhibit G-3) requesting his comments by the next day on amendments that she had made to the guidelines they had revised. The email was sent as a high priority. Shortly after sending it, the grievor walked by his office and observed him playing a card game on his computer. At approximately 5:00 p.m. she returned to his office, but he had left for the day. She said that since he arrived at 9:30 a.m. she expected him to leave at 5:30 p.m.

[50] That evening the grievor checked her email from home to see if her manager had replied. He had not. At 10:33 p.m. she decided to send Exhibit E-1 to four colleagues.

[51] The grievor stated that her manager finally read her email at 1:56 p.m. the next day. She indicated that she and her colleagues are "HR people and the rule is to document, document and document."

[52] The grievor testified that before taking the photograph she and her colleagues had met on several occasions with the PSC's ombudsman, to discuss their concerns. They felt that if they approached senior management directly, her manager would deny the allegations and might retaliate against them.

[53] The grievor stated that on March 30, 2005, she met with the consultant and informed her that in January she had taken a photograph of her manager asleep at his desk. The consultant told her that she would keep the information confidential. The grievor testified that she would not have objected if the consultant had advised her that she (the consultant) needed to bring the issue to Mr. Hines' attention.

[54] The grievor stated that she believed she did nothing wrong in taking the photograph of her manager asleep at his desk. She wanted it as proof and stated, "You'd better damn well have proof when making allegations." Her only regret is that she sent it to her colleagues by email.

[55] The grievor clarified that the apology in her written statement to Mr. Hines following their meeting on June 28, 2005 (Exhibit E-4), was not in respect of her comment, "Well, at least he made up for the time he slept by playing cards at 4:30! Pas de farce!" [Translation: No joke!] (Exhibit E-1). She did not intend to be sarcastic but was merely making a tongue-in-cheek remark. She stated that her remark was true, since her manager was playing a card game on his computer, and her colleagues had observed him doing so before.

[56] The grievor then stated that she regretted using "that kind of language" in her email (Exhibit E-1). Although she sent the email late in the evening and had taken medication, she recognizes that she "should have been more careful." She noted that if the PSC had a rule that employees could not send emails that criticized managers or a policy on picture taking in the workplace, she would not have done so.

[57] The grievor noted that she had a 27-year work history free of disciplinary action.

[58] The grievor then summarized the June 28, 2005, meeting with Mr. Hines. She stated that Mr. Hines was hostile and at times aggressive. She was emotional and cried during the meeting.

[59] After the meeting, the grievor viewed the workplace as a negative environment, since her manager avoided her and kept his door closed at all times.

[60] The grievor stated that management is aware that she suffers from multiple sclerosis (MS). The disciplinary meeting with Mr. Hines, her manager's subsequent attitude toward her and the disciplinary action imposed on her caused her significant stress that aggravated her MS. She could not concentrate on her work, and she suffered burning and unrelenting pain in her lower limbs. She went on sick leave as of July 15, 2005. After she exhausted her sick leave credits, she applied for long-term disability. Her claim was approved on October 3, 2005, and she has not yet returned to work.

[61] In cross-examination, the grievor agreed that she and her colleagues had met with the PSC's ombudsman on several occasions and that it was following the Ombudsman's advice that she approached Mr. Hines to express their concerns about her manager's conduct at work.

[62] The grievor also agreed that more than likely, her manager would be upset when he found out about the email and photograph (Exhibit E-1). She stated, "I guess, I wonder if it could have been dealt with differently? The end result was not good. Perhaps I should have just turned a blind eye, left it alone or shut up."

[63] When asked by counsel for the respondent if taking a photograph of an employee without his or her knowledge or consent was acceptable, the grievor replied, "Yes, I think that is ok."

[64] Counsel for the respondent then referred the grievor to Exhibit E-1. When she was asked if she had shown the photograph to anyone else, the grievor replied that two other employees may have seen it but that she could not recall if she had shown it to them or if someone else had. The grievor stated that she did not take the photograph to ridicule or embarrass her manager.

[65] The grievor agreed that the comment in her email (Exhibit E-1) "was not neutral". She stated, "It was not positive. It was not a wow look at this guy, but rather a tongue-in-cheek remark." She conceded that her remark could be viewed negatively and that in the end, it had been.

[66] When the grievor was asked if she could have written a comment that would not have been viewed as sarcastic, she agreed that she could have. She also agreed that she had not sent Exhibit E-1 to her manager and had never discussed it with him. She

stated that although she had never personally apologized to her manager, she had provided an apology in her written response to Mr. Hines following their meeting on June 28, 2005 (Exhibit E-4).

[67] The grievor conceded that although she was advised by her colleagues that her manager had threatened to sue her for defamation if her three-day suspension without pay was reduced, he never said that to her personally and did not take any legal action against her.

[68] When asked by counsel for the respondent if her colleagues had asked for a copy of the photograph (Exhibit E-1), the grievor initially replied that she could not remember but then admitted that they had not.

[69] The grievor was questioned on her background in HR and labour relations. She stated that from 1978 to 1983 she worked as an HR generalist at the Royal Canadian Mounted Police, and from 1983 to 1985 she was a labour relations officer in Montreal at Citizenship and Immigration Canada. Some of the matters she handled concerned employee misconduct, discipline and termination of employment.

[70] When asked by counsel for the respondent if she felt that it was appropriate to send an email with a tongue-in-cheek remark to employees who worked outside her unit, the grievor responded: "If there were employees who had never seen [her manager] asleep then it would have been totally wrong. [Her manager], however, bears responsibility for his actions and I bear responsibility for what I wrote, although it was not written to humiliate him."

III. Summary of the arguments

A. For the respondent

[71] Counsel for the respondent argued that the discipline was imposed not only for the photograph that the grievor took of her manager asleep at his desk, but also for the disparaging comment that she made in her email (Exhibit E-1). As well, the grievor did not mention to Mr. Hines, when she met with him on January 26, 2005, that she had taken a photograph of her manager asleep at his desk and had attached it to an email that she sent to four colleagues.

[72] Although the grievor testified that she did not intend to humiliate or embarrass her manager that was the end result. The photograph was not taken as proof, as the grievor claims, but as a deliberate attempt to humiliate or embarrass her manager.

[73] With respect to the grievor's request for reinstatement of her sick leave credits, counsel for the respondent stated that the respondent is aware that the grievor suffers from MS and did not hesitate to approve her request to take sick leave. However, other than the grievor's testimony, no information or medical evidence was presented to show that the respondent's decision to discipline the grievor aggravated her MS.

[74] Counsel for the respondent referred me to the following cases: *Re Highland Valley Copper v. United Steelworkers of America, Local 7619* (1999), 82 L.A.C. (4th) 310; *Sauvageau v. Treasury Board (Employment and Immigration)*, PSSRB File No. 166-02-13504 (19830810); *Bousquet v. Treasury Board (Public Works Canada)*, PSSRB File No. 166-02-16316 (19870421); *Canada (Attorney General) v. Hester*, [1997] 2 F.C. 706; *Bédirian v. Treasury Board (Department of Justice)*, 2006 PSLRB 4; and *Faryna v. Chorny*, [1952] 2 D.L.R. 354.

B. For the grievor

[75] Counsel for the grievor argued that the grievor and some of her colleagues felt that something had to be done about her manager's conduct at work. Counsel argued that this is a case of whistle-blowing.

[76] The grievor and her colleagues were concerned that if they exposed her manager they would be subject to retaliatory action. Following several meetings with the PSC's ombudsman, the grievor decided to approach Mr. Hines as the spokesperson for her PE-05 colleagues. By doing so she put her neck on the line. The grievor felt that there might be a backlash, and that is exactly what happened. After her manager became aware of the email and photograph (Exhibit E-1) he kept his door closed and avoided her. She began feeling the reprisals.

[77] The grievor testified that when she met with the consultant, she advised her that she had taken a photograph of her manager asleep at his desk. The consultant, however, did not tell her to destroy the photograph or that she had acted inappropriately.

[78] The grievor testified that her manager had mentioned to her colleagues that if her suspension was reduced, he was going to sue her for defamation. Counsel stated “it is unconceivable that the grievor would be threatened by [her manager] with a lawsuit since neither the email nor the photograph were defamatory or criminal in nature since the grievor’s remark was true.”

[79] Although the three-day suspension without pay was later reduced to one day, it is still excessive discipline for an employee with 27 years of service and no prior disciplinary record. If anything, a letter of reprimand should have been sufficient.

[80] In her written response to Mr. Hines following their meeting on June 28, 2005 (Exhibit E-4), the grievor wrote, “. . . I sincerely apologize for any behavior on my part that is or was inappropriate. . . ” The grievor underlined and bolded the word “any”, but Mr. Hines did not believe that she was sincere.

[81] The grievor worked in HR and had dealt with labour relations matters in the past. As a result, she recognizes the importance of gathering facts before making allegations, and that is why she took the photograph of her manager asleep at his desk.

[82] Mr. Pelletier agreed that he had joked about the grievor’s manager sleeping at work. Is it surprising then that the grievor wrote her email the way she did?

[83] The grievor did not personally apologize to her manager since she went on sick leave after being disciplined and is now on long-term disability. As well, her colleagues had mentioned to her that he intended to sue her for defamation.

[84] As the respondent is aware, the grievor suffers from MS. The meeting on June 28, 2005, with Mr. Hines, her manager’s attitude towards her afterwards and the discipline imposed caused the grievor enormous stress that aggravated her MS.

[85] Counsel noted that the respondent did not submit any case law that a doctor’s testimony is required to prove a consequential result. The respondent is aware that stress affects the grievor’s health and had in the past accommodated her. Through her testimony the grievor proved that Mr. Hines’ conduct during the meeting on June 28, 2005, her manager’s retaliation and the discipline imposed were the casual link that aggravated her MS.

[86] Since counsel for the respondent did not cross-examine the grievor on her allegation that it was the respondent's actions that aggravated her MS, the grievor did not have to describe the link or provide any medical evidence to substantiate her claim.

[87] Counsel for the grievor referred me to the following: *Grover v. National Research Council of Canada*, 2006 PSLRB 117; *Haydon v. Treasury Board (Health Canada)*, 2002 PSSRB 10; *Ferreira v. Richmond (City)* (2007), 161 L.A.C. (4th) 20; and excerpts from Brown and Beatty, *Canadian Labour Arbitration*, 4th ed.

C. Respondent's rebuttal

[88] Counsel for the respondent agreed that the grievor approaching Mr. Hines on January 26, 2005, could be characterized as whistle-blowing. However, forwarding an email to her colleagues with a disparaging remark and attaching a photograph of her manager asleep at his desk is a far cry from whistle-blowing.

[89] The concern that the grievor's manager was going to sue her if her three-day suspension without pay was reduced is a red herring since he never took any legal action against her.

IV. Reasons

[90] As stated earlier, I will explain my reasons for not identifying the grievor's manager in this decision.

[91] The authority to ban publication or order confidentiality is a discretionary power. The exercise of the discretion to ban publication or order confidentiality essentially involves balancing the values flowing from the right to information against the interest to be protected.

[92] In *Re Vancouver Sun*, 2004 SCC 43, the Supreme Court of Canada made the principles, which have come to be known as the *Dagenais/Mentuck* test, that apply to all discretionary actions that limit the right to information during judicial proceedings.

[93] The party seeking a publication ban or confidentiality order bears the burden of justifying the limitation to the right to information. There must be sufficient evidentiary basis from which the tribunal may assess the application and on which it may exercise its discretion judicially.

[94] Counsel for the respondent argued that the grievor's manager should not be identified since he was not a party to the proceedings and if the grievor requested that he be identified, it would be a spiteful action on her part.

[95] Counsel for the grievor argued that if I decided not to identify the grievor's manager then the grievor's colleagues should not be identified either since they viewed themselves as whistle-blowers.

[96] I believe that it is sufficient to say that the harm that would be caused to the grievor's manager greatly outweighs any benefit attached to the publication of his name. He was not a party to the proceedings and although the allegations made against him – which were neither denied nor refuted by counsel for the respondent – have not been proven, they are damaging. By not identifying the grievor's manager the “open court” principle has not been violated, since it was a public hearing and not an in-camera one.

[97] I believe the grievor meant to embarrass or humiliate her manager by sending Exhibit E-1 to her colleagues and publishing his name would only compound the humiliation.

[98] I have also decided not to identify the grievor's colleagues because they, as well, were not a party to the proceedings and I do not see the benefit to the analysis of this case.

[99] I will now address the disciplinary action imposed on the grievor. The respondent's burden was to establish, on a balance of probabilities, that the discipline imposed was warranted and appropriate in the circumstances. In his July 7, 2005 letter (Exhibit E-6), Mr. Hines stated the following reasons for imposing discipline:

...

I find that your distribution of this material was a willful act on your part to bring your manager into disrepute with his employees. This type of behaviour is totally unacceptable

particularly because it erodes the necessary employer employee relationship and cannot be tolerated.

. . .

[100] The facts in this case are quite straightforward. The grievor's manager was observed asleep at his desk on January 4, 2005, and at approximately 2:15 p.m. the grievor took a photograph of him, which she then attached to an email and sent to four colleagues. In her email, the grievor wrote, "Warning: This is what happens if your work too hard! Well, at least he made up for the time he slept by playing cards at 4:30! Pas de farce! " [Translation: No joke!] (Exhibit E-1). At 4:29 p.m. she sent him an email requesting his comments by the following day on amendments that she had made to the guidelines that they had worked on. Shortly thereafter she went by his office and noticed that he was playing a card game on his computer. At 5:00 p.m. he had left for the day. That evening she checked from home to see if he had replied to the email she had sent him earlier that afternoon. She discovered that he had not, and at 10:33 p.m. she sent Exhibit E-1 to four colleagues.

[101] In cross-examination, the grievor agreed that her colleagues had not asked for a copy of the photograph and stated that it was only to be used as proof if senior management or her manager denied that he was asleep at his desk.

[102] The grievor testified that she and her colleagues had met on several occasions with the PSC's ombudsman to discuss their concerns about the manager's conduct at work and that the Ombudsman had advised them to speak to Mr. Hines.

[103] On January 26, 2005, the grievor went to see Mr. Hines to discuss her manager's behaviour at work - that he had been observed sleeping during meetings, playing solitaire at his computer and arriving late and leaving early. She also questioned his leadership style, lack of vision, strategic planning and delays in completing his work assignments. The grievor, however, did not mention to Mr. Hines that she had taken a photograph of her manager asleep at his desk on January 4, 2005, attached it to an email and sent it to four of her colleagues. Mr. Hines only found out much later - on June 6, 2005 - when the grievor's manager brought the email to his attention.

[104] I believe that Mr. Hines was a credible witness. He testified that he took the grievor's allegations seriously and was going to act on the matter, as he perceived it to be a performance management issue. He met with the grievor's manager and HR

representatives and hired a consultant whose mandate was to meet with the grievor's manager, the grievor and other employees to customize coaching-initiative sessions.

[105] On the other hand, after reviewing the evidence, the grievor's testimony and her written response to Mr. Hines following their meeting on June 28, 2005, I question the grievor's credibility. The grievor stated that she took the photograph to "document, document, and document." If that is true, then why did she forward the photograph to her colleagues? Why didn't she advise Mr. Hines that she had taken a photograph of her manager asleep at his desk? Why did she show the photograph or discuss it with employees outside her work unit? And why did she write a comment in her email that she contends was only a tongue-in-cheek remark?

[106] Having worked in HR and in labour relations the grievor knows that evidence or documentation is an integral part of building a case. The grievor also knows that an employee has to respect the chain of command, which she initially did when she approached Mr. Hines on January 26, 2005. However, she was not forthright with him since she withheld information. In my view, she did not act in good faith.

[107] I believe that the grievor never imagined that one of her colleagues would provide her manager with a copy of Exhibit E-1. Only that person can explain the reasons for doing so.

[108] Counsel for the grievor argued that this is a whistle-blowing case. I do not agree. When the grievor approached Mr. Hines about her manager's conduct at work, he took her allegations seriously and decided to act on the matter. The grievor never filed a formal complaint. This cannot be viewed as a whistle-blowing case since the grievor did not act in good faith by providing full disclosure to Mr. Hines or giving him an opportunity to rectify the situation.

[109] The grievor testified that her MS was aggravated by Mr. Hines' conduct during their meeting on June 28, 2005, her manager avoiding her and the disciplinary action taken against her. The grievor testified that Mr. Hines was hostile and aggressive during the meeting. Mr. Hines testified that although Ms. Patterson and Ms. Chabot-Plante were present, no one raised a concern about the tone of the meeting. Also, no evidence was adduced that the investigation was conducted inappropriately or that the grievor filed a complaint after the meeting. I find that Mr. Hines was clearer and more forthright than the grievor, and his testimony must be preferred. With no evidence

aside from the grievor's testimony that her manager avoided her, I do not see a nexus between Mr. Hines' and her manager's actions that was not as a result of the grievor's own misguided actions.

[110] No evidence was adduced that Mr. Hines' decision to impose discipline was influenced by the grievor's manager. The latter's alleged comment that he would sue the grievor for defamation if her three-day suspension without pay was reduced did not materialize. The suspension was reduced from three days to one day and the grievor was not subject to any legal action by her manager.

[111] The grievor's testimony, that if the PSC had a rule that employees could not send emails criticizing managers or take pictures in the workplace she would not have done so, is so preposterous that I prefer not to comment.

[112] For all the above reasons, I find that the three-day suspension without pay, which was later reduced to one day, is appropriate in the circumstances. I believe that the grievor meant to embarrass or humiliate her manager by taking a photograph of him asleep at his desk and forwarding it to her colleagues. This grievance is therefore dismissed.

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

(The Order appears on the next page)

V. Order

[114] The grievance is dismissed.

December 19, 2007.

**D.R. Quigley,
adjudicator**