Date: 20090525

Files: 166-02-37325, 37326 and 37379

Citation: 2009 PSLRB 62

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

RACQUEL ANGELLA LINDSAY

Grievor

and

CANADA BORDER SERVICES AGENCY

Employer

Indexed as
Lindsay v. Canada Border Services Agency

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

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Herself and Mary Mackinnon, counsel

For the Employer: Debra Prupas and Susan Keenan, counsel

Heard at Toronto, Ontario,
January 13, 14, 19 and 20 and April 7, 8 and 9, 2009.

I. Grievances referred to adjudication

[1] When she filed her grievances, Racquel Angella Lindsay ("the grievor") was a customs inspector in Commercial Operations at the Toronto Pearson International Airport for Customs Services of the Canada Customs and Revenue Agency (CCRA). Customs Services is now part of the Canada Border Services Agency (CBSA) ("the employer"). The grievor was covered by the collective agreement signed on December 29, 1998, between the Treasury Board and the Public Service Alliance of Canada for the Program and Administration Services bargaining unit ("the collective agreement").

[2] In her first two grievances (PSLRB File Nos. 166-02-37325 and 37326), the grievor disputes the employer's decision to impose on her a one-day suspension, served on June 15, 1999, as well as flaws in the disciplinary procedure used by the employer. The employer's response at the final level of the grievance procedure is dated May 18, 2006. These two grievances were referred to adjudication on July 6, 2006. The Public Service Alliance of Canada ("the bargaining agent") is representing the grievor for these two grievances.

[3] In her third grievance (PSLRB File No. 166-02-37379), the grievor disputes the employer's decision to terminate her employment, on December 12, 2001. The employer's response at the final level of the grievance procedure is dated July 7, 2006. The grievance was referred to adjudication on September 15, 2006. The grievor is self-represented for this grievance.

[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*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 ("the former *Act*").

[5] The hearing was first scheduled for December 3 to 5, 2007, but was postponed following a request from the bargaining agent. The hearing was rescheduled for July 8 to 11, 2008, but was postponed again after the grievor advised the Board, a few days before the hearing, that she was no longer available. It was then decided that the hearing would take place in January 2009.

II. Summary of the evidence on the suspension grievances

[6] The parties entered 45 documents into evidence. The grievor called Janet Gover and the employer called Bruce Herd, Lorie Alpous, Judy Bennett, Chris Millar, Assia Hussain and Glenda Lavergne as witnesses. The grievor also testified. At the time of the incidents referred to in the grievances, Mr. Herd was a staff relations advisor for the employer for the Greater Toronto Area; Ms. Alpous was acting supervisor in the section in which the grievor worked; Ms. Bennett was a supervisor in that section and was also acting chief in April 1999; Mr. Millar was a supervisor in that section and was acting chief starting in May 1999; Ms. Hussain was a supervisor in that section; and Ms. Lavergne was a director for Commercial Operations of the employer in the Greater Toronto Area. Ms. Gover was a customs inspector in the same section as the grievor in April and May 1999. She was also an employee representative and became a union shop steward on May 13, 1999.

[7] The grievor worked as a temporary customs inspector from May 4 to December 21, 1998. At the time, Mr. Millar was her supervisor. After December 1998, the grievor went to work for the revenue division of the CCRA. The grievor was then offered an indeterminate position as a customs inspector, effective April 1, 1999, in Commercial Operations at the Toronto Pearson International Airport. Customs inspectors, both temporary and indeterminate, wore uniforms at work. At the time, female inspectors could wear a skirt or pants as part of their uniform.

[8] On May 11, 1999, the grievor was called to a meeting with Mr. Millar and Ms. Hussain. The grievor was accompanied by local union president John King and Ms. Gover. In the first part of the meeting, management outlined the grievor's responsibilities in following instructions and directions from management. Mr. Millar also gave the grievor a letter summarizing his vision of what constituted insubordination. In the second part of the meeting, at approximately 16:00, Mr. Millar advised the grievor that her uniform skirt was too short and that she was not to wear that skirt at work anymore. Mr. Millar advised the grievor that skirts were supposed to be knee-length.

[9] On May 12, 1999, the grievor came to work wearing the same skirt as the previous day. At approximately 08:30, Ms. Alpous told the grievor that her skirt length was not appropriate and that she had to change into another outfit. The grievor said that she had no other clothes at the office. The grievor and Ms. Alpous also had a

discussion on the appropriate length for a skirt. The grievor asked Ms. Alpous to put in writing the requirements regarding skirt length. At 09:00, Mr. Millar ordered the grievor to change into another uniform or, if she did not have another uniform at the office, to go home and change. According to the grievor, Mr. Millar was aggressive and intimidating. Mr. Millar said that he was calm, even if his tone of voice was firm. Mr. Millar added that he was frustrated because he felt that the grievor was not listening to him. The grievor informed Mr. Millar that she refused to pursue the discussion without the presence of a union representative. The grievor then spoke to Ms. Gover and Donna Brown, a union shop steward.

[10] On May 12, 1999, at approximately 11:00, a meeting was arranged to discuss the situation. Ms. Gover, Ms. Brown, the grievor, Mr. Millar and Ms. Hussain attended the meeting. Mr. Millar reiterated that the grievor had to go home and change her skirt. Ms. Brown, on behalf of the grievor, suggested as an alternative that the grievor be allowed to wear Ms. Brown's coverall for the day, that the grievor be allowed to stay at work with her skirt for the day, or that she be assigned to a work area with no public access. The grievor refused the first option, and Mr. Millar refused the last two options. However, Mr. Millar agreed to put his order regarding the skirt in writing. He gave a letter to the grievor at approximately 13:15. He specified that skirts had to be knee-length. Mr. Millar ordered the grievor to go home, change and return to work. During the meeting, the grievor argued that she had been advised only late the previous day that her skirt length was no longer acceptable, and that there was not enough time to comply. She also argued that she had not yet received the request in writing. Furthermore, she had worn that same skirt for eight months in 1998, when she worked under Mr. Millar's supervision, and no comments were made to her at that time regarding the length of her skirt.

[11] For the grievor, there was no clear direction on what was an acceptable skirt length for the employer. Other female inspectors were wearing skirts shorter than knee-length. Ms. Gover testified that her own skirt was two inches above the knee. Some of the employer's witnesses gave their opinions on acceptable skirt length. While driving the grievor to the uniform supplier on April 21, 1999, Ms. Bennett told the grievor that skirts should be knee-length. In his testimony, Mr. Millar said that skirts should be knee-length, but that it might be acceptable to wear a slightly shorter skirt. In her testimony, Ms. Hussain said that skirts should be knee-length, and Ms. Lavergne said that they should not be overly short.

[12] The grievor testified that her skirt was just above her knees but, when asked to physically illustrate it, she showed three to four inches above her knee. Ms. Grover testified that the grievor's skirt was shorter than her own skirt, which was two inches above the knee. Ms. Hussain and Mr. Millar testified that the grievor's skirt was mid-thigh.

[13] Prior to July 1999, there was no specific written policy on skirt length. The employer's document entitled "Standards of Conduct" specified that employees should dress in a way that reflects a professional image and that is consistent with the duties performed. The employer's document entitled "Code of Conduct and Appearance Required of Employees of Customs and Excise" specified that the dress and appearance of employees should enhance the professional image of the department. That document also specified that uniformed employees have a particular responsibility for maintaining a good appearance, since their uniforms foster the immediate recognition of an official representative of the federal government. In July 1999, the employer issued a policy regarding skirt length.

[14] The skirt that the grievor was wearing in April and May 1999 was the skirt that she was provided when she worked for the employer as a student customs inspector in 1998. The grievor was also provided with two new skirts on April 21, 1999. At the time, inspectors had to take care of alterations, and the employer reimbursed them for the costs incurred. On May 11 and 12, 1999, the grievor's two new skirts had not been altered yet, so the grievor could not wear either one on May 12, 1999. The grievor also had uniform pants that she could wear to work. On May 11, 1999, those pants were in the laundry. On the evening of May 11, 1999, the grievor was busy and did not have time to wash the uniform pants so that she could wear them on May 12, 1999.

[15] The grievor could not comply with the order given to her by the employer on May 11, 1999, because she had no clothes to wear other than her short skirt. However, on May 11 and May 12, neither the grievor nor her union representatives advised the employer that the grievor could not comply with the order because she had nothing else to wear. In his testimony, Mr. Millar said that if he had known that the grievor could not comply with the order to wear a knee-length skirt, he would have given her more time to comply.

[16] At approximately 13:30 on May 12, 1999, the grievor went home as ordered by Mr. Millar, but did not return to work as required. She had nothing else to wear. Moreover, she was afraid to go back to work and be exposed to Mr. Millar.

[17] At approximately 15:00 on June 1, 1999, Ms. Hussain advised the grievor that she was required to attend a meeting at 15:30 on June 2, 1999, in which a notice of disciplinary action would be delivered to her. The meeting took place, and the grievor was given a document advising her that she was suspended for one day, and the suspension would be served on June 15, 1999. Ms. Hussain explained that the grievor was in training in early June 1999, and the employer did not want the suspension to be served during the training period. Ms. Hussain admitted that there was no fact-finding during the June 2, 1999 meeting and that the purpose of the meeting was simply to give the grievor the notice of disciplinary action. The grievor was accompanied at the meeting by Ms. Gover, who was then a union shop steward. Ms. Gover testified that, contrary to what the employer had told her, no fact-finding meeting took place before the employer decided to impose disciplinary action.

[18] Evidence was presented by the parties regarding a harassment complaint filed by the grievor in 1998, a second harassment complaint filed by the grievor in May 1999, the discipline imposed on the grievor in spring 1999 for being late, an exchange of correspondence regarding the grievor's driver's licence, a conflict between the grievor and the employer on the appropriate code to write on leave forms when late for work. That evidence is not relevant to the grievances at bar, and I will not report on it.

III. Summary of the evidence on the termination grievance

[19] The parties relied on certain documents presented as evidence for the suspension grievances. They also presented 40 additional documents related solely to the termination grievance. The grievor testified. The employer called Norm Sheridan and Barbara Hébert as witnesses. When the grievor was terminated, Mr. Sheridan was the Director of Customs, Passenger Operations, at the Toronto Pearson International Airport, and Ms. Hébert was the Regional Director of Customs for the Greater Toronto Area Division.

[20] Some of the evidence submitted by the parties dealt with incidents related to a harassment complaint filed by the grievor in May 1999. That complaint was filed

against several members of the management teams of Commercial Operations at the Toronto Pearson International Airport. I will not report on that evidence because it is irrelevant to the grievance in which the grievor blames the employer for having terminated her without proper and sufficient cause, in a way that was arbitrary, unreasonable and wrongful. The grievance at bar is not a harassment grievance but a termination grievance. There was also evidence presented on the exchange between the grievor and Mr. Sheridan, and on the appropriateness for the employer to grant her education leave and reimburse her tuition fees. I will not report on that evidence because it is not relevant to this case.

[21] Following the grievor's harassment complaint against management members of Commercial Operations, the employer agreed to transfer the grievor, effective June 15, 1999, from Commercial Operations to Passenger Operations at the Toronto Pearson International Airport. The grievor worked in Passenger Operations until May 2000. On May 17, 2000, the grievor wrote to the employer, requesting a leave of absence or a significant reduction in her scheduled hours of work. The grievor specified in her letter that her request was to "accommodate pending post-secondary educational arrangements" and "in consideration for the atmosphere that has been created by the harassment complaint".

[22] After the letter of May 17, 2000, there were discussions between the grievor, Ms. Gover as a union representative, and Mr. Sheridan, to clarify the grievor's request. From those discussions, it became clear that the grievor was not looking for a reduction in her scheduled hours of work, but rather for a paid leave.

[23] On June 20, 2000, Mr. Sheridan replied to the grievor that he could not grant her request for a paid leave. He offered her the following options: a personal needs leave without pay for up to one year, an assignment in the International Mail Division or another assignment in a CCRA office in the Greater Toronto Area.

[24] On June 21, 2000, the grievor wrote to Mr. Sheridan, reiterating that she wanted a leave with pay. She also informed Mr. Sheridan that her "self-preservation required that [she] withdraw [herself] from the unhealthy atmosphere of intense discomfort from the workplace". Consequently, she was unwilling to return to work at the CCRA until the work atmosphere had changed. The grievor also attached to her letter three leave forms covering her working hours from June 22, 2000, to July 2, 2000.

[25] On June 29, 2000, in her reply to Mr. Sheridan's letter of June 20, 2000, the grievor did not comment on the three options that Mr. Sheridan had offered her. In a subsequent letter dated July 8, 2000, the grievor indicated to Mr. Sheridan that she was not interested in taking a leave without pay. The grievor also attached eight leave forms to that letter, covering the period from July 10 to September 9, 2000. Those leave forms did not indicate the type of leave requested.

[26] On July 18, 2000, Mr. Sheridan wrote to the grievor and advised her that she was placed under pay list 7A, which meant that she would be paid only when she completed and submitted a time report, and not automatically. Mr. Sheridan explained in his letter that that would prevent the employer from overpaying her and then having to recover the overpayments. Mr. Sheridan also returned the leave applications that the grievor had sent him. He reiterated to the grievor that her options were to take a leave without pay for personal leave or certified sick leave. An assignment to a position at another CCRA office also remained an option. Mr. Sheridan asked the grievor to advise her superintendent by August 4, 2000, regarding her preferred option.

[27] The grievor wrote to Mr. Sheridan on August 14, 2000. She did not address Mr. Sheridan's request regarding her preferred option. The grievor instead asked for details and clarification on all available options regarding leave and employment within the CCRA. She also asked if the employer would be willing to accommodate her by granting a leave with pay and, if so, what the duration of such a leave would be.

[28] Mr. Sheridan responded to that letter on August 25, 2000. He reminded the grievor that he was prepared to authorize a personal needs leave for a period of three months or one year, or a certified sick leave to the extent of the grievor's sick leave credits. Mr. Sheridan added that he was prepared to advance her 25 days of sick leave credits if necessary. He also indicated that he was not prepared to authorize a leave with pay for other reasons, as per the collective agreement. Mr. Sheridan reminded the grievor that the employer was prepared to pursue assignment opportunities for her at another suitable CCRA office in the Greater Toronto Area. He told the grievor that if she wished to consider that option, she should indicate her interest and preferred assignment locations.

[29] The grievor wrote to Mr. Sheridan on September 6, 2000. She mentioned that Mr. Sheridan's letter of August 25, 2000, did not address the majority of her concerns,

that considerable confusion still existed, and that she was uncertain of the alternatives available to her. The grievor also informed Mr. Sheridan that she was going to be a student at the University of Ottawa in the PhD program in economics, and that she was proposing an educational leave with pay as the most appropriate action.

[30] On October 5, 2000, Mr. Sheridan wrote to the grievor to inform her that he was disturbed that the grievor had enrolled in a four-year educational program without obtaining any approval for leave. Mr. Sheridan also informed her that the only leave option that he was prepared to approve was a leave without pay for personal reasons for a period of three months or one year, or a certified sick leave. He also reminded her that he was prepared to pursue assignment opportunities for her. As an interim measure, Mr. Sheridan informed the grievor that he had authorized her continuing absence from work from June to September by granting her "other leave without pay". However, he advised the grievor that this situation could not continue for an indefinite time. He asked her to advise him in writing by October 27, 2000, of her choice of leave from the options that had been offered to her. Finally, Mr. Sheridan warned the grievor that failure on her part to do so would result in her being considered absent without leave, which could result in disciplinary action.

[31] The grievor replied to Mr. Sheridan on October 27, 2000. She found it very disturbing to have received a threat of disciplinary action. She asked a series of questions and expressed her dissatisfaction regarding his lack of response to her previous questions. The grievor did not address Mr. Sheridan's request regarding her preferred leave option.

[32] Mr. Sheridan wrote to the grievor on November 30, 2000. He remarked that the grievor, in her October 27, 2000 letter, had not addressed the leave options and assignment opportunities offered to her. However, he informed her that he was prepared to authorize an educational leave without pay solely for the current academic year (fall 2000 to spring 2001). He advised the grievor that she should not anticipate favourable consideration of subsequent leave requests related to her educational pursuit. By that time, the grievor was living in Ottawa but had maintained her Mississauga address. Mr. Sheridan asked her if she would prefer that he direct future correspondence to a more current address. On that point, the grievor indicated in a letter dated February 28, 2001, that she preferred that future correspondence continue to be sent to her Mississauga address.

[33] On June 19, 2001, Mr. Sheridan wrote to the grievor and told her that she was expected to return to work. He gave her flexibility on her date of return, and he invited her to contact him by phone to discuss a mutually acceptable start date. He also mentioned that he saw no reason for the start date to be later than the week of July 23, 2001. Finally, Mr. Sheridan advised the grievor that, if she did not reply by the week of July 16, or if she did not express a willingness to return to work within a timeframe acceptable to management, he would consider her as being absent without approved leave. Mr. Sheridan advised the grievor that this could result in management initiating steps to terminate her employment, as per his authority under the *Canada Customs and Revenue Act*.

[34] On July 20, 2001, the grievor replied to Mr. Sheridan's letter of June 19, 2001. The grievor reminded Mr. Sheridan that her departure from work was initiated by her need to remove herself from the effects of "overwhelming harassment within the work environment". She reminded Mr. Sheridan that the investigation on her harassment complaint was still ongoing. She also wrote that she was fearful and reluctant to go back to work. Finally, she indicated that she would prefer to remain on leave and that she would appreciate consultation on any proposed plan for a return to the work environment.

[35] On August 31, 2001, Mr. Sheridan wrote to the grievor and reiterated that he would not approve any additional requests for an educational leave related to her current educational pursuit. He reminded her that she did not show any interest in the offer that he had made to discuss assignment opportunities in other CCRA offices. Mr. Sheridan advised the grievor that she was no longer on an approved leave of any kind, and that he was expecting her to report for work. He also wrote that, if the grievor chose to ignore her obligations, he would initiate action to terminate her employment for non-disciplinary reasons. Finally, Mr. Sheridan asked the grievor to contact him no later than September 24, 2001, in order to clarify her intentions. For that purpose, he gave her a direct phone number where he could be reached.

[36] On September 24, 2001, the grievor replied to Mr. Sheridan's letter of August 31, 2001. She reiterated the fears expressed in her letter of July 20, 2001, regarding her return to the workplace. She asked Mr. Sheridan to give her information regarding the opportunity for work assignments at other CCRA offices, as well as other type of leaves that he would consider.

[37] On November 7, 2001, Mr. Sheridan wrote to the grievor and advised her that her letter of September 24, 2001, did not convey a willingness on her part to return to work. In reply to the grievor, he wrote that the offer made in 2000 for leave without pay for personal needs was no longer an acceptable option for the employer. Mr. Sheridan ended his letter with the following paragraph:

. . .

> *Therefore, I am requesting, once again that you contact me, no later than November 23, 2001, in order to relay your intentions. I hope that I have clearly conveyed to you my position that you must immediately return to work. Should you not be willing to make that commitment, then you will have left me with no alternative but to terminate your employment for non disciplinary reasons under the authority of Section 51.(1)(g) of the Canada Customs and Revenue Agency Act. As per your request, the entire Act is enclosed for your reference.*

. . .

[38] The grievor never replied to Mr. Sheridan's letter of November 7, 2001. On December 12, 2001, Ms. Hébert wrote to the grievor, informing her that she was terminating her employment, as per her authority under section 51(1)(*g*) of the *Customs and Revenue Agency Act*, for non-disciplinary reasons, effective at the end of business on that day. Ms. Hébert based her decision on the fact the grievor had been absent from work without authorization for a period of several months, and had provided no indication of her intent to return to work. The grievor also had failed to commit herself to return to work by November 23, 2001, as requested by Mr. Sheridan in his letter of November 7, 2001.

[39] The grievor presented evidence showing that her father signed a Priority Post form to acknowledge that Mr. Sheridan's letter of November 7, 2001, had been received at the grievor's home address in Mississauga on November 14, 2001. The grievor testified that she was in Ottawa at the time, and that her father did not open the letter or communicated with her to let her know that a letter had been received. The grievor testified that she only opened the letter on December 12, 2001, between 19:30 and 20:00. She also testified that she received her termination letter on December 14, 2001. The grievor admitted in cross-examination that she did not call or try to get in touch with Mr. Sheridan on December 13 or 14 before receiving the termination letter. She

also did not try to contact Mr. Sheridan or Ms. Hébert after having received the termination letter.

[40] Evidence was also presented regarding the harassment complaint investigation process. The process was relatively slow. Most of the interviews were conducted in the fall of 2000. On June 5, 2001, a draft report of the investigation findings was sent to the grievor for her comments. She was asked for input by July 13, 2001. That deadline was extended to September 21, 2001. On October 1, 2001, the grievor was advised that the investigator had been directed to issue his final report. The report was finally issued in early 2002, and it concluded that the complaint was unfounded.

[41] Ms. Hébert and Mr. Sheridan testified that it was necessary to have all staff present at work after the tragic incidents of September 11, 2001. Security was increased at airports, and the employer needed all its employees to be at work. Ms. Hébert also testified that the authority to terminate employees was delegated to her and not Mr. Sheridan. That is why it was she who made the decision to terminate the grievor.

[42] Ms. Hébert explained that when she made the decision to terminate the grievor, she made sure that the following rules had been observed: the grievor was aware of management concerns, the grievor had an opportunity to respond to those concerns, the grievor understood the consequences of not addressing those concerns, the employer's actions and decisions were made in good faith and communicated clearly.

[43] Ms. Hébert testified that, if the grievor had called her or Mr. Sheridan on December 13 or even later to let them know that the grievor had not received Mr. Sheridan's letter of November 7, 2001, until December 12, 2001, and if the grievor had expressed a clear intention to return to work, Ms. Hébert might have reconsidered her decision.

[44] In her testimony, the grievor expressed that Mr. Sheridan never explained the employment opportunities that could be offered to her. She did not know where she had to report to work. The grievor said that she was interested in going back to work.

IV. Summary of the arguments on the suspension grievances

A. For the employer

[45] There was no disciplinary action imposed on the grievor on May 12, 1999, and the meeting held that day was not a disciplinary meeting. Rather, the grievor was ordered to go home, change her skirt and come back to work. The employer did not pay the grievor for the time she was gone and had the right to do so. It is a case of "no work, no pay". On May 12, 1999, the grievor decided not to come back to work. She was not ordered to go home for the day but rather to go home and change. Because there was no discipline imposed on the grievor on May 12, 1999, the employer cannot be accused of having applied the disciplinary procedure that day.

[46] The grievor alleged that the employer is at fault because it did not proceed with a fact-finding investigation. There is no obligation in the collective agreement in that respect, and no promise was made to the grievor that such an investigation would take place.

[47] The grievor had been told by Ms. Bennett on April 21, 1999, that skirts should be knee-length. On May 11, 1999, the grievor was told that her skirt was too short and she should not report to work again wearing that skirt. On May 12, 1999, she came to work in the same short skirt even though the evidence shows that she knew that skirts should be knee-length. She did not comply with the order, and she was clearly insubordinate. The order was clear, legal and in compliance with health and safety requirements. Furthermore, the grievor did not indicate on May 11 or 12, 1999, that she could not comply with the order.

[48] The grievor received two new skirts on April 21, 1999, and she had plenty of time to get them altered, so that she could wear them. She also had a pair of uniform pants that she could have washed to wear on May 12, 1999. The grievor did not make any effort to comply with the order given by the employer.

[49] The grievor was given 24 hour's notice of the June 2, 1999 disciplinary meeting. She was accompanied at the meeting by a union representative. The allegation that there was a breach of the disciplinary procedure outlined in the collective agreement should be rejected.

[50] The employer referred me to the following case law: *Desrochers v. Treasury Board (Department of National Defence)*, 2005 PSLRB 159; *Castonguay v. Treasury Board (Revenue Canada – Customs and Excise)*, PSSRB File No. 166-02-17531 (19881028); and *Pinto v. Treasury Board (Revenue Canada – Customs and Excise)*, PSSRB File No. 166-02-16801 (19880411).

B. <u>For the grievor</u>

[51] The employer imposed disciplinary action on the grievor when it ordered her to go home on May 12, 1999. The employer wanted to correct the grievor's behaviour because the employer felt that the grievor did not meet its expectations. The grievor's behaviour was voluntary and culpable in the employer's opinion, and the employer responded with discipline. As a consequence, the grievor suffered a financial penalty.

[52] The suspension on May 12, 1999, should be null and void, considering that the employer did not comply with article 17 of the collective agreement. The employer did not notify the grievor in writing of the reason for suspending her, did not serve 24 hour's notice of the disciplinary meeting, and did not notify the bargaining agent that a suspension had occurred.

[53] The employer suspended the grievor again on June 15, 1999, for her behaviour on May 12, 1999. An employer cannot discipline an employee twice for the same incident.

[54] The employer advised the grievor at the end of the day on May 11, 1999, that she should not wear the same skirt, starting the next day. The employer wanted to create a situation in which the grievor would be insubordinate. On May 12, 1999, a number of alternatives to being sent home were proposed by the grievor but they were all refused by the employer. There was no ground for discipline.

[55] If the adjudicator accepts that there was ground for discipline, the loss of pay of one and a half days imposed on the grievor was unreasonable. There is no question that the employer has the right to set workplace rules, but rules should be imposed in a reasonable manner. They should be consistent with the collective agreement and be applied consistently among employees.

[56] Disciplinary action should not have been imposed on the grievor. The grievor wore that skirt for eight months in 1998 when she was under Mr. Millar's supervision.

She wore that skirt again in April and May 1999, and she was never advised to stop wearing it. Also, Ms. Gover was wearing her skirt 2 inches above the knee but was never advised that it was inappropriate dress. In addition, the employer's standards were unclear. For Ms. Lavergne, a skirt should not be overly short; for Ms. Hussain, it should be knee-length; and for Mr. Millar, it could be just above the knee. On May 11 and 12, 1999, the grievor wanted the employer to put its standards in writing, so that she knew exactly what was expected of her.

[57] Because the employer did not communicate its dress code clearly, the grievor should not have been disciplined. On May 12, 1999, when clear written instructions were given regarding skirt length, the employer should have provided the grievor with sufficient notice to comply.

[58] There was no evidence submitted that the grievor wanted to defy management and be insubordinate. It was not unreasonable for her to ask for a union representative when she was asked to leave the workplace at 09:00 on May 12, 1999. If the grievor has committed an offence, it was to not adhere immediately to the dress code. The penalty imposed on her by the employer was too severe and the principle of progressive discipline was not adhered to.

[59] The grievor referred me to the following case law: *Ford Motor Co. of Canada Ltd. v. United Automobile Workers, Local 707* (1974), 5 L.A.C. (2d) 5; *Riverdale Hospital v. Canadian Union of Public Employees Local 79* (2000), 93 L.A.C. (4th) 195; *Calgary Co-operative Ltd. v. Union of Calgary Co-op Employees* (2006), 145 L.A.C. (4th) 296; *Mains Ouvertes – Open Hands Inc. v. Ontario Public Service Employees Union* [2004], O.L.A.A. No. 879 (QL*); United Steelworkers, Local 6480 v. Torngait Services Inc.* (2008), 172 L.A.C. (4th) 43; *KVP Co. Ltd. v. Lumber & Sawmill Worker's Union, Local 2537* (1965), 16 L.A.C. 73; *Westfair Food Ltd. v. United Food and Commercial Workers, Local 401* (2005), 82 C.L.A.S. 49 (QL); and *Peters v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 7.

V. Summary of the arguments on the termination grievance

A. For the employer

[60] The employer argued that I do not have jurisdiction to hear this grievance. The grievor was terminated for non-disciplinary reasons while employed at the CCRA, which is not a Part I Schedule I employer under the former *Act*. The wording of section

92(1)(*c*) of the former *Act* does not support the reference of this grievance to adjudication. The grievance does not deal with disciplinary action resulting in termination of employment, suspension or financial penalty. Consequently, the grievance should be dismissed for lack of jurisdiction by the adjudicator.

[61] There was no discipline imposed on the grievor. The employer wanted her to return to work and advised her many times to return to work, but she did not commit herself to do so. The grievor was absent from work for several months without approved leave, and the employer decided to terminate her employment.

[62] In 1999, the grievor had filed a complaint against members of the management team of Commercial Operations. The employer accommodated the grievor by giving her an assignment in Passenger Operations, where she would not be in contact with the managers against whom she had filed the complaint.

[63] The employer showed good faith toward the grievor, despite the fact that she was on an unauthorized leave in 2000. The employer then agreed to regularize her status by approving a leave retroactively. When that leave ended, the grievor did not report back to work, even though the employer had not approved any further leave. The grievor did not submit any evidence that she was not capable of going back to work.

[64] The grievor chose to provide the employer with her Mississauga address, even though she was temporarily residing in Ottawa. She was responsible for obtaining her mail. The grievor testified that she did not receive Mr. Sheridan's letter of November 7, 2001, until December 12, 2001. The deadline given by Mr. Sheridan for the grievor to return to work had passed, but the grievor did not call or write Mr. Sheridan to regularize her status. The grievor did not provide any evidence that she was unable to contact Mr. Sheridan before she received her termination letter from Ms. Hébert.

[65] The evidence submitted by the grievor does not show that the employer acted in bad faith, or that it used disguised discipline to terminate the grievor. The grievor was terminated for abandoning her position and an adjudicator has no jurisdiction to deal with her grievance.

[66] In support of its arguments, the employer referred me to *Peters*, already cited, and the following case law: *Pachowski v. Canada (Treasury Board)*, [2000] F.C.J. No. 1679 (QL); *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (FCA); *Weiten v. Treasury Board (Revenue Canada – Customs & Excise)*, PSSRB File No. 166-2-24748 (19950714); *Slattery v. Communications Security Establishment (National Defence)*, PSSRB File No. 166-13-17850 (19900312); and *Canada (Attorney General) v. Horn*, [1994] 1 F.C. 453.

B. <u>For the grievor</u>

[67] This termination of employment is disguised discipline. In that respect, the grievor referred me to *Peters*, and specifically to the factors considered by arbitrators to assess whether an action taken by the employer is disciplinary rather than administrative in nature. The grievor argued that a review of those factors should lead me to conclude that her employment was terminated for disciplinary reasons. Furthermore, the employer did not act in good faith by taking what it called administrative action. Also, it did not fully inform the grievor of what was required of her and the consequences of not fulfilling those requirements.

[68] The employer was working towards a goal to terminate the grievor's employment. It created a hostile work environment by harassing the grievor and imposing disciplinary action on her. Discipline was served on the first day of her assignment to Passenger Operations. That created a negative work environment for the grievor in her new assignment.

[69] In his letter of November 7, 2001, Mr. Sheridan gave the grievor two weeks to relay her intention to return to work. That deadline was shorter than previous deadlines given to the grievor. In his previous letters, Mr. Sheridan referred to work assignment options, but never explained what those options were. Furthermore, on November 7, 2001, the employer withdrew its offer for the grievor to apply for personal leave. Ms. Hébert testified that the employer could no longer afford it, after the incidents of September 11, 2001, but Mr. Sheridan contradicted her by saying that the grievor could have been assigned to the taxation division.

[70] Except for the letter of November, 7, 2001, the grievor always responded to the employer's letters and indicated that she was interested to return to work. When the employer realized that the grievor did not answer the letter of November 7, 2001, the

employer should not have used the opportunity to terminate the grievor. That showed that the employer never had intended to help the grievor. The employer could have called the grievor to find out why she had not replied. The grievor could have been sick, or it could have been otherwise impossible for her to reply.

[71] According to the evidence, Mr. Sheridan did not have the authority to terminate the grievor's employment; that authority belonged to Ms. Hébert. However, Mr. Sheridan stated that he could make such a decision in several of his letters.

[72] The grievor argued that she never abandoned her position, and that the employer's operational requirements were not jeopardized by her absence from the workplace. The grievor argued that it was difficult to obtain an indeterminate position in the federal government, and she never would have abandoned it voluntarily.

VI. Reasons on the suspension grievances

[73] On May 11, 1999, the employer advised the grievor that she should not wear the same skirt anymore because it was too short. On May 12, 1999, the grievor wore the skirt and the employer sent her home to change. The grievor chose not to return to work and consequently lost 4.5 hours of wages. On June 2, 1999, the employer advised the grievor that she would be suspended for one day because of her insubordination on May 12, 1999.

[74] The grievor admits that it was within the employer's authority to impose a dress code. There is some confusion from the employer as to what constitutes proper skirt length. It varies from "knee-length" to "not too short". The employer's witnesses testified that the grievor was wearing a skirt about six inches above the knee or at mid-thigh. The grievor testified that the skirt was two inches above the knee. Ms. Gover testified that her own skirt was two inches above the knee and the grievor's skirt was shorter than hers. It is reasonable to conclude from that testimony that the grievor was wearing a skirt somewhere between three inches to six inches above the knee. That was much shorter than what the employer deemed acceptable.

[75] When the employer sent the grievor home on May 12, 1999, in order for her to change her skirt, it was simply following up on the order that it had given the grievor at the end of the previous day. At the time, the grievor offered no explanation as to why she was still wearing the same skirt and why she was not complying with the order.

[76] I agree with the employer that the 4.5 hours of lost pay on May 12, 1999, does not constitute disciplinary action but is rather a "no work, no pay" situation. This case is comparable to *Castonguay* in which the employee was sent home to get his necktie, which was mandatory according to the employer's dress code. In *Castonguay*, the adjudicator concluded that the principle of "no work, no pay" was applicable. The adjudicator also wrote that his conclusion would have been different if the employer had simply sent the grievor home for the day without the possibility of returning to work, as in *Desrochers*. That would have been disciplinary action.

[77] I agree with the distinction made in *Castonguay*. If an employee is sent home to change into clothes that are acceptable under the dress code, the employee is not paid for the time spent to go to change. That is a "no work, no pay" situation. If an employer sends an employee home for the day because the employee is not properly dressed, the employer's intent is to punish the employee, so at that point it becomes disciplinary action.

[78] Having established that there was no disciplinary action imposed on the grievor on May 12, 1999, I reject the grievor's argument that the employer, on that day, did not follow the disciplinary procedure outlined in the collective agreement. I also reject the grievor's argument that the grievor was disciplined twice for the same incident. As outlined in *Pinto*, the employer has the right to deduct pay for hours not worked and, later, to take disciplinary action resulting from the incident in question. In *Pinto*, the adjudicator found that the employer could deduct pay for the hour the employee was late, and later impose a one-day suspension, because the employee was late by one hour. That is not a case of double jeopardy, as in *Mains Ouvertes – Open Hands Inc.*

[79] The employer believes that the one-day suspension imposed on the grievor is fully justified because the grievor was insubordinate. The evidence is clear: the grievor did not comply with the employer's order to no longer wear her short skirt at work. The employer has the right to impose a dress code on employees, and an order to comply with the dress code was clearly communicated to the grievor on May 11, 1999. The grievor did not inform the employer on May 11 or 12, 1999, that she could not comply with the order. It was her responsibility to do so. In my opinion, there was cause for discipline.

[80] However, there are mitigating factors that I should consider to decide if the employer was correct in imposing a one-day suspension.

[81] From May to December 1998, the grievor worked as a student customs inspector under Mr. Millar's direct supervision. During that period of time, the grievor wore the same short skirt on a regular basis, and Mr. Millar never commented on her skirt length. Also, the grievor wore the same short skirt on a regular basis from April 1 to May 11, 1999, and neither Mr. Millar nor another employer representative made any comment regarding the grievor's skirt. The only time before May 11, 1999, that the grievor was told that skirts should be knee-length was when Ms. Bennett drove her to the uniform provider on April 21, 1999.

[82] Even if Mr. Millar had made it clear to the grievor on May 11, 1999, that skirts should be knee-length, it is clear from the evidence that there was some flexibility. One inch or even two inches less than knee length seemed to be acceptable for the employer. Ms. Gover's skirt length has always been accepted by the employer even though it was two inches above the knee. Mr. Millar testified that skirts could be accepted slightly shorter than knee length, and Ms. Lavergne said that skirts should not be overly short.

[83] Considering that the employer accepted the grievor's short skirt for several months and that there was confusion on the proper length for a skirt, I find the one-day suspension imposed on the grievor too severe. The objective of the employer in imposing disciplinary action was for the grievor to comply with the employer's order regarding skirt length. There were mitigating circumstances, and I find that a letter of reprimand would have been more appropriate, and might have been sufficient to ensure that the grievor complied with the order.

[84] I reject the allegation by the grievor that the employer did not follow the disciplinary procedure set out in the collective agreement and that the employer did not conduct a fact-finding investigation before suspending the grievor. The contractual obligations of the employer in terms of disciplinary procedures are set out in article 17 of the collective agreement:

> ***ARTICLE 17***
> ***DISCIPLINE***
>
> ***17.01*** *When an employee is suspended from duty or terminated in accordance with paragraph 11(2)(f) of the* Financial Administration Act*, the Employer undertakes to notify the employee in writing of the reason for such suspension or termination. The Employer shall endeavour to*

> *give such notification at the time of suspension or termination.*
>
> ***17.02*** *When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her or to render a disciplinary decision concerning him or her, the employee is entitled to have, at his or her request, a representative of the Alliance attend the meeting. Where practicable, the employee shall receive a minimum of one day's notice of such a meeting.*
>
> ***17.03*** *The Employer shall notify the local representative of the Alliance as soon as possible that such suspension or termination has occurred.*
>
> ***17.04*** *The Employer agrees not to introduce as evidence in a hearing relating to disciplinary action any document from the file of an employee the content of which the employee was not aware of at the time of filing or within a reasonable period thereafter.*
>
> ***17.05*** *Any document or written statement related to disciplinary action, which may have been placed on the personnel file of an employee, shall be destroyed after two (2) years have elapsed since the disciplinary action was taken, provided that no further disciplinary action has been recorded during this period.*

[85] The grievor was notified in writing on June 2, 1999, of the reason for the one-day suspension that she was to serve on June 15, 1999. The grievor was notified on June 1, 1999, that a disciplinary meeting would take place on June 2, 1999. The grievor was accompanied at the meeting by a union representative, and the union was notified in advance that the meeting would take place. The grievor admits that there was no violation of clause 17.04, and clause 17.05 did not apply to the situation. Finally, there is nothing in article 17 or elsewhere in the collective agreement that obliges the employer to conduct a fact-finding investigation. Consequently, I conclude that there were no flaws in the disciplinary procedure used by the employer.

VII. Reasons on the termination grievance

[86] The employer argued that it did not terminate the grievor's employment for disciplinary reasons. Given that the employer is not included in Part I of Schedule I of the former *Act*, an adjudicator does not have jurisdiction to decide this grievance if no discipline is involved. Section 92(1) of the former *Act* reads as follows:

. . .

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> > (a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
> >
> > (b) *in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4)*
> >
> > > *(i) disciplinary action resulting in suspension or a financial penalty, or*
> > >
> > > *(ii) termination of employment or demotion pursuant to paragraph 11(2)*(f) *or* (g) *of the* Financial Administration Act, *or*
> >
> > (c) *in the case of an employee not described in paragraph* (b)*, disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

. . .

[87] The Canada Revenue Agency is not an employer described in paragraph 92(1)(*b*) of the former *Act*. Consequently, I do not have jurisdiction if the grievance is not related to disciplinary action. The employer argued that the grievor's termination was an administrative action resulting from her not returning to work after she was asked to do so several times. The grievor argued that her termination was not administrative but rather disciplinary and that the employer had acted in bad faith.

[88] The grievor obtained an indeterminate position as a customs officer in Commercial Operations on April 1, 1999. The next month, she filed a harassment complaint against members of the management team. In order to remove her from that workplace, the employer assigned the grievor to Passenger Operations on June 15, 1999. From that time to the date of her termination, on December 14, 2001, the grievor was at work for less than one year and absent on authorized or unauthorized leaves for 20 months.

[89] The grievor was absent from work on an unauthorized leave from June to September 2000. The employer regularized her status by granting her a leave without pay after the leave had already been taken. It then advised the grievor that she needed to regularize her status. In that respect, the employer offered the grievor a sick leave, leave without pay for personal reasons, or work on another assignment. In all her subsequent correspondence with the employer, the grievor never directly addressed those offers.

[90] The employer regularized the grievor's status again in November 2000, when it granted her an educational leave without pay, after the leave had already begun. In June 2001, the employer asked the grievor to return to work by the week of July 23, 2001. The grievor was then advised that, if she did not comply, her employment could be terminated. The grievor did not return to work. On August 31, 2001, the employer asked the grievor again to return to work, and it reiterated that the grievor could be terminated if she did not comply. The grievor did not return to work. On November 7, 2001, the employer wrote to the grievor again and requested that she contact the employer no later than November 23, 2001, to communicate her intention to return to work, or else her employment would be terminated. The grievor did not contact the employer by November 23, 2001, and the employer terminated the grievor's employment on December 14, 2001.

[91] I agree with the employer's argument that it did not discipline the grievor, but rather terminated her for administrative reasons. She was told several times to apply for a leave or to go back to work. She did not comply with the employer's legitimate instructions. In fall 2001, the leave options were not available anymore, and the grievor was told to return to work. The grievor was advised of the consequences of not returning to work. She did not comply and was terminated. Even though the grievor testified that she did not want to abandon her position, she did in fact abandon it.

[92] The grievor did not present any evidence to show that she could not return to work. Her only explanation was that she did not receive Mr. Sheridan's letter of November 7, 2001, until December 12, 2001. I am not convinced that this is true, but even if it is, the employer still had the right to terminate the grievor's employment, as it did. The grievor had already been advised in late August and in September 2001 that her employment could be terminated. It is reasonable to think that the grievor should have checked her mail in November and December 2001, knowing that she was on an

unauthorized leave. Furthermore, she did not try to contact the employer on December 12 or 13, 2001, after she allegedly received the employer's letter of November 7, 2001.

[93] An employer is fully entitled to expect an employee to show up for work. That is an intrinsic part of the employment relationship and contract. The employee needs advance authorization to be absent from work. Such authorization is given according to the rules set out in the collective agreement. The only exceptions to that basic logic would be situations in which an employee cannot, for compelling reasons, contact the employer to obtain leave authorization. That is not the case here. Consequently, the employer had the right to terminate the grievor's employment for an administrative reason, namely that the employee was not available for work.

[94] Nothing in the evidence presented by the grievor has convinced me that her termination was disciplinary. The grievor felt harassed at Commercial Operations. She filed a complaint, and the employer assigned the grievor to another position. After 11 months in her new position, the grievor felt that she was working in an unhealthy work atmosphere. No evidence was submitted to support that allegation. Subsequently, the grievor decided, without prior approval from the employer, to remove herself from the workplace. The employer agreed to accommodate her until fall 2001. At that time, it became clear that the employer would not further tolerate the grievor taking an unauthorized leave. There is nothing abusive, of bad faith or disciplinary in the employer's position.

[95] As mentioned in *Pachowski*, the principle of progressive discipline is not applicable in cases of non-disciplinary termination. However, there is an obligation for the employer to act fairly in terminating an employee for non-disciplinary reasons. The employer must act in good faith, fully inform the employee of what is expected from him or her, inform the employee of the consequences of not meeting the expectations, give the employee the opportunity to adjust to meet the requirements, help the employee to adjust, and explore solutions before terminating the employee. In this case, the employer acted fairly, and the evidence shows that it met all of those obligations before terminating the grievor's employment.

[96] As in *Weiten*, the employer asked the grievor to express her intentions regarding her return to work. The employer also warned that failure to return to work could result in termination. As in *Weiten*, the employer served a final warning to the grievor,

and it did not act immediately when the grievor failed to reply by the deadline. It waited three weeks before terminating her employment.

[97] It is not necessary for the employer to prove that the grievor wanted to abandon her position to conclude that she had abandoned her position. An employer can conclude that an employee has abandoned his or her position when he or she has been absent from work without authorization under circumstances within the employee's control. In this case, the grievor was absent without authorization for several weeks, and that was sufficient for the employer to conclude that the grievor had abandoned her position.

[98] On a balance of probabilities, the employer has proven that it acted fairly and in good faith when it terminated the grievor's employment for an administrative reason, namely, that she did not return to work when asked. The grievor did not prove, using the same standard, that she was subjected to disciplinary action. Therefore, I have no jurisdiction to decide this grievance.

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

(The Order appears on the next page)

VIII. Order

[100] The one-day suspension grievance is allowed in part.

[101] The grievance alleging flaws in the discipline procedure used by the employer is denied.

[102] The employer must reimburse the grievor for her wages for the day of the suspension served on June 15, 1999.

[103] The termination grievance is dismissed.

May 25, 2009.

Renaud Paquet,
adjudicator