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File: 566-37-3458

Citation: 2010 PSLRB 135

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

VIVIAN ROSE BOUTZIOUVIS

Grievor

and

FINANCIAL TRANSACTIONS AND REPORTS ANALYSIS CENTRE OF CANADA

Employer

Indexed as
Boutziouvis v. Financial Transactions and Reports Analysis Centre of Canada

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Christopher C. Rootham, counsel

For the Employer: George G. Viucic, counsel

Heard at Ottawa, Ontario,
October 25 and 26, 2010.

I. Individual grievance referred to adjudication

[1] The employer, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), claims that its Director ("the Director") terminated the employment of Vivian Rose Boutziouvis ("the grievor") on January 8, 2010, "otherwise than for cause." It argues that that decision fell within the Director's exclusive authority under subsection 49(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("the *FINTRAC Act*"), S.C. 2000, c. 17, and that subsection 49(2) of that statute prohibits an adjudicator from considering the matter. Section 49 of the *FINTRAC Act* reads as follows:

> ***49.*** *(1) The Director has exclusive authority to*
>
> *(*a*) appoint, lay off or terminate the employment of the employees of the Centre; and*
>
> *(*b*) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of the employment of employees otherwise than for cause.*
>
> *(2) Nothing in the* Public Service Labour Relations Act *shall be construed so as to affect the right or authority of the Director to deal with the matters referred to in paragraph (1)(*b*).*
>
> *(3) Subsections 11.1(1) and 12(2) of the* Financial Administration Act *do not apply to the Centre, and the Director may*
>
> *(*a*) determine the organization of and classify the positions in the Centre;*
>
> *(*b*) set the terms and conditions of employment for employees, including termination of employment for cause, and assign to them their duties;*
>
> *(*c*) notwithstanding section 112 of the* Public Service Labour Relations Act*, in accordance with the mandate approved by the Treasury Board, fix the remuneration of the employees of the Centre; and*
>
> *(*d*) provide for any other matters that the Director considers necessary for effective human resources management in the Centre.*

[2] The grievor contends that the subject matter of her grievance contesting the Director's decision is "related to" discipline and that she is entitled to challenge that

measure as a disguised disciplinary action within the meaning of paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22. She argues further that the termination was without cause and should be reversed with full redress. Paragraph 209(1)(*b*) of the *PSLRA* reads as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> . . .
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*

II. Preliminary matters

[3] The adjudicator initially assigned to this case decided that an oral hearing was required to determine the jurisdictional question. The parties were informed to that effect and notified that they should be prepared to proceed on the merits should the adjudicator reserve his decision on the objection to jurisdiction.

[4] I was subsequently assigned by the Chairperson of the Public Service Labour Relations Board ("the Board") to conduct the hearing. Under section 226 of the *PSLRA*, an adjudicator has the discretion to decide how to conduct a hearing. After consulting with both counsel immediately before the hearing, I determined that it was appropriate to consolidate the evidence and arguments on the jurisdictional objection and on the merits of the grievance rather than bifurcate the hearing process because the evidence pertinent to the issue of jurisdiction and to the merits overlap significantly.

[5] As confirmed once the hearing opened, the employer indicated that, consistent with its objection to jurisdiction, it did not intend to submit evidence or arguments — in the alternative — about the merits of the Director's decision. It intended to rest its case on the question of jurisdiction.

III. Summary of the evidence

[6] The employer did not call any witnesses.

[7] On consent, I admitted the following four documents, proposed as exhibits by the employer: the letter of termination dated January 8, 2010 (Exhibit R-1); the grievance against the Director's decision, filed by the grievor on February 12, 2010 (Exhibit R-2); the employer's reply to the grievance, also dated February 12, 2010, signed by the FINTRAC's general counsel (Exhibit R-3); and the FINTRAC's general counsel's reply, dated February 25, 2010, to the grievor's reference to adjudication (Exhibit R-4).

[8] Exhibits R-2 to R-4 do not provide contemporaneous evidence of what occurred up to, or at the time of, the Director's decision to terminate the grievor's employment. Instead, they document for the record positions taken by the grievor and the employer after the termination decision.

[9] The key passages of the letter of termination of January 8, 2010, read as follows:

. . .

> *. . . While you were on language training, you were advised by me and by your supervisor that you were to concentrate on your studies, and that you were not to involve yourself in day-to-day issues. I have recently discovered that contrary to these instructions, you did involve yourself in the daily operations of your unit.*
>
> *In addition, I have also learned that you played a role in relation to a staffing process to fill an FT-4 position. A review was conducted to determine your level of involvement relating to this staffing action and this review revealed that you attempted to create an atmosphere of fear and intimidation with some of your colleagues, and that you abused your position of authority, in an attempt to improperly influence the outcome of the competitive staffing process.*
>
> *This behaviour is unacceptable from any employee, and more so from a member of the management cadre. As such, you have lost the confidence of senior management and I consequently must advise you that your employment with FINTRAC is terminated effective at the close of business on January 6th, 2010.*

. . .

Attached to the letter of termination was a synopsis of termination benefits including a lump sum payment representing salary and benefits for the period of January 11 to July 29, 2010.

[10] The grievor was the sole witness on her behalf.

[11] The grievor began her career in the federal public service in October 1987 with the organization today known as the Canada Revenue Agency. In March 2001, she accepted a position with the newly created FINTRAC. From January 2005 to the date of her termination of employment, she worked in a senior management position at the FT-6 level, the salary equivalent of EX-1/EX-2 in the core public administration. Most recently, the title of the position was Manager, Tactical Financial Analysis, Money Laundering (Exhibit G-1). In that role, the grievor managed one of five units that reported initially to a deputy director and then, after a reorganization, to an assistant director. The primary mandate of her unit was to develop proactive intelligence about suspicious transactions related to money laundering for disclosure to the appropriate law enforcement authorities.

[12] During her employment with the FINTRAC, the grievor earned favourable performance assessments and performance pay awards and received several merit awards for contributions to the organization (Exhibits G-2 to G-8 and G-10 to G-14).

[13] The grievor's position as a manager was designated "bilingual non-imperative." In October 2008, she began French language training to meet the "CBC" level set for her job. By July 2009, she completed the written and reading elements but fell short on the oral component. On further evaluation, the trainer determined that the grievor needed approximately 12 more weeks of instruction to acquire level C. The trainer subsequently submitted weekly reports on the grievor's progress to the human resources section at the FINTRAC (Exhibit G-15). On December 31, 2009, the grievor learned that she had passed the final oral component at the C level.

[14] The grievor first encountered Denis Meunier, her new assistant director, at a meeting shortly after his appointment in November 2008. Following a brief review of her career, Mr. Meunier told her that she had been at the FINTRAC "a bit too long" and that it would be a good career move for her to look into other opportunities outside the FINTRAC to gain new experience and to continue to advance.

[15] The grievor returned to work from language training on January 6, 2010, and met twice with Mr. Meunier on that day. On January 8, 2010, she was called to a meeting with Mr. Meunier and Stephen Black, Assistant Director, Human Resources. Mr. Meunier informed her that her employment was terminated and gave her a letter of termination (Exhibit R-1). Mr. Black answered several questions about the termination benefits that the employer proposed to provide. After the meeting, security staff walked the grievor to her office, allowed her to get her purse and keys, required her to hand over her building and parking passes, and then escorted her off the premises.

[16] Through a subsequent access-to-information (ATIP) request, the grievor secured the speaking notes used by Mr. Meunier at the meeting (Exhibit G-16). They read, in part, as follows:

. . .

- *While you were on language training, both the Director and I clearly communicated to you that you were to focus on your studies, and not involve yourself in day-to-day operations*
- *Unfortunately you did not follow those instructions*
- *You remained involved in day-to-day operations*
- *Most recently you were involved with the competition for the FT-4 position*

. . .

- *I reviewed a large number of e-mails that you sent, both to members of the selection committee and to members of your team . . .*
- *You were extremely critical and disrespectful towards a number of people, including HR, your colleagues and me*
- *You attempted to create an atmosphere of fear and intimidation, you harassed your colleagues and you attempted to improperly influence the selection process . . .*
- *This behaviour is unacceptable from any employee, and even more so from someone who is a member of the Management Cadre. Members of the Management Cadre are expected to conduct themselves in a professional and exemplary manner.*
- *As a result of your actions, I have lost confidence in your ability to effectively carry out your duties*
- *The decision taken by senior management is to terminate your employment*
- *I appreciate the contributions you have made and our intention is to ensure that you receive fair and reasonable treatment*

> - *Attached is a letter of termination, along with details relating to your benefits package*
>
> . . .

The grievor confirmed that what Mr. Meunier actually said at the meeting conformed with the text of the speaking notes. The grievor stated that no other reason was given for the termination beyond the contents of the speaking notes.

[17] Among other documents that the grievor obtained through the ATIP request was a redacted report entitled "Issue" compiled by Mr. Meunier (Exhibit G-17). He described the "issue" in the report's introduction as follows:

> *As* [the grievor's] *immediate supervisor I have serious concerns about* [the grievor's] *compliance with FINTRAC's Code of Conduct, her compliance with FINTRAC and public service values, her integrity as a manager and employee and her negative impact on morale of the FADD staff and management team.*
>
> *I have reason to suspect that* [the grievor] *is no longer operating as a loyal employee of FINTRAC behaving transparently in the best interest of the organization but rather operating in conflict with FINTRAC's and the Public Service's values. As her superior I have reason to suspect these deficiencies in her conduct and wish to verify some facts surrounding certain information and circumstances in order to determine if these suspicions are fact and whether I can maintain trust in her.*
>
> ***I have reasons to suspect that* [the grievor]:**
>
> - ***is attempting to corrupt a staffing process;***
> - ***and in doing so is harassing colleagues and potentially other staff;***
> - ***is insubordinate***
> - ***failed to request approval for leave***
> - ***attempted to disguise leave***
> - ***diminished subordinate staff's opportunity to apply on a staffing process; and***
> - ***is creating an atmosphere of fear and intimidation.***
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

The main body of the report outlines the alleged facts that Mr. Meunier judged to be pertinent to his suspicions. Towards the end of the report, he appears to confirm those suspicions, expanding on the initially-stated reasons for his report, as follows:

. . .

> *I suspect* [the grievor]:
>
> - *is attempting to corrupt a staffing process by applying inappropriate pressure on board members;*
> - *and in doing so is harassing colleagues, subordinates and potentially other staff;*
> - *is insubordinate as per two previous emails and at least 2 discussions about not interfering in day-to-day operations of the Unit while on French language study;*
> - *failed to request approval for leave through appropriate means;*
> - *attempted to disguise leave approval potentially by coercing or influencing someone with access to the HRWare system and obtaining leave approval without my consent;*
> - *potentially diminished subordinate staff's opportunity to apply on a staffing process by applying pressure; and*
> - *is creating an atmosphere of fear and intimidation among FADD staff disrupting the productive and safe environment we currently enjoy.*

. . .

The grievor interpreted the document as the equivalent of an investigation report into her actions and those of two other employees. She testified that she was never interviewed about the concerns outlined by Mr. Meunier in the report and that she was never told that an investigation was conducted. At no time was she afforded an opportunity to respond to any allegations. The grievor confirmed that the Director terminated the employment of the two other employees mentioned in the report at the same time as her termination.

[18] The ATIP request also produced a "proposed timeline and key messages" document about the terminations prepared for Mr. Meunier and the Director (Exhibit G-18), two versions of the memo from Mr. Meunier to the Director recommending the terminations "without cause" (Exhibits G-20 and G-21) and the Director's message about the terminations sent to employees in the grievor's directorate (Exhibit G-22). With respect to the two versions of Mr. Meunier's memo, the

grievor stated that she did not know which was a draft and which was the final document; both were materially the same.

[19] Mr. Meunier's memo to the Director (Exhibit G-20) summarized his findings against the grievor as follows:

. . .

> *As you are aware,* [the grievor] *has been undergoing language training since October 6, 2008. Upon her departure for language training,* [the grievor] *was clearly advised by both you and me that while undergoing language training, that her full time job was to learn French and that she was not to engage in day to day activities of her unit. I also confirmed this in writing to* [the grievor]. *Despite these very clear directions, following my review of the e-mails noted above, it has become evident that* [the grievor] *has constantly been involved in the daily activities of the unit. In fact, in a 3-month period,* [the grievor] *sent approximately 700 e-mails . . . most of which were business related.*
>
> [The grievor] *has recently completed her language training. She was originally scheduled to attend language training for a period of approximately 9 months. Instead, her language training lasted approximately 15 months, and she passed her language exam on her 4th attempt. It is clear to me that had she concentrated on her language training instead of the daily activities of her unit, as she was advised,* [the grievor] *would quite likely have completed her training at a much earlier date, and at far less cost to the taxpayer.*
>
> *The review of e-mails clearly showed that her objective was to ensure that . . . was successful in the competition. The e-mails showed that* [the grievor] *coached her staff . . . to ensure this outcome. When this did not materialize, she attempted to bully two of her colleagues who were selection board members, and have them provide . . . with a higher rating, based on his performance in the job, as opposed to his performance in the job interview.*
>
> *Many of the e-mails sent by* [the grievor] *were disturbing for other reasons. In particular, there were many critical and disrespectful comments made towards Human Resources (whose role was to ensure a fair and transparent process, the other board members (who did not rate . . . as highly as she would have liked) and finally me (as the person overseeing all of this). In my view the content of the e-mails clearly shows that she was undermining my authority and calling into question my integrity. As a result, I have lost confidence*

> *in the ability of* [the grievor] *to effectively carry out her duties.*
>
> . . .

[20] The grievor testified that six employees contacted her following her termination to say that they were upset by her departure. One of those employees told her that Mr. Meunier reminded employees at a meeting when the terminations were discussed that they worked closely with law enforcement and that employees should watch what they put into emails. The employee told the grievor that Mr. Meunier's statements left him with the impression that the three dismissed employees unlawfully disclosed information in emails and that that was the reason for the terminations.

[21] The grievor recounted that she felt devastated, humiliated and confused by what happened to her. For two months after the January 8, 2010 meeting, she stayed at home almost all the time. During the week following her dismissal, her physician examined her, told her that she was not to look for work at that time under any circumstances and issued several sick leave notes (Exhibit G-23).

[22] The grievor testified that she felt that she had been found guilty of an unlawful disclosure of information and experienced problems leaving her home for many months as a result. Nonetheless, after seeing her physician on April 6, 2010, she began looking for work elsewhere in the government. She concentrated on job opportunities at the EX-1 or senior management AS-7 level, keeping a journal of her job search efforts and compiling a file of unsuccessful contacts (Exhibits G-24 and G-25). At the time of the hearing, the grievor's job search remained unsuccessful.

[23] In cross-examination, the employer suggested that Mr. Meunier acted out of a concern to help the grievor in her career when he stated that she had been at the FINTRAC too long at their initial meeting in November 2008. The grievor replied that she took Mr. Meunier's comments as a suggestion that it was time for her to move on. She found it strange that he would make such a comment at their very first encounter.

[24] The grievor acknowledged that the comment from one employee after her termination about an unlawful disclosure of information had been only his impression and that he did not tell the grievor that Mr. Meunier or anyone else at the FINTRAC stated that the terminated employees unlawfully disclosed information. The grievor

also agreed that there was no suggestion in Mr. Meunier's speaking notes (Exhibit G-16) of unlawful disclosure.

[25] After the grievor closed her evidence, the employer declined the opportunity to lead reply evidence. For greater certainty, I asked the employer whether, in the event that I accepted jurisdiction over the matter under paragraph 209(1)(*b*) of the *PSLRA*, it was satisfied that its proof was complete. The employer reiterated that it relied on its position that I am without jurisdiction to rule on the grievance and that it did not wish to offer evidence on the merits.

IV. Summary of the arguments

[26] For a case about a termination of employment, the evidence, as summarized in the preceding section, is compact. While that evidence is obviously very important for several aspects of the decision that I must make, the core of this case concerns an important issue of law — one that, to my knowledge, has not been previously considered by an adjudicator under the *PSLRA*.

[27] The central proposition underlying the employer's argument is that the "almost unique" language of section 49 of the *FINTRAC Act* has the effect of importing to the employer's relationship with its employees certain precepts of common law, specifically the common law right of an employer to terminate employment otherwise than for cause provided that it gives reasonable notice or pay in lieu of reasonable notice. Within that legal model, the employer maintains that there is no place for a legal challenge to the exercise of its discretion based on the notion of disguised discipline. It contends that exclusionary language in the *FINTRAC Act* prohibits intervention by an adjudicator under paragraph 209(1)(*b*) of the *PSLRA* on any grounds once the Director has decided to terminate otherwise than for cause, even should cause for termination demonstrably exist.

[28] Given the novel nature of the employer's position, it is not surprising that the arguments offered by the parties were quite detailed and extensive. I wish to make special note of the skill with which both parties presented their respective cases. In the summary that follows, I condense their submissions considerably. However, in reaching my decision, I have considered all their arguments in full detail.

[29] In their arguments, the parties sometimes referred to "termination without cause" instead of "termination otherwise than for cause." In what follows, I understand

"termination without cause" to be a short-hand expression for "termination otherwise than for cause."

A. <u>For the employer</u>

[30] The Director of the FINTRAC exercised her authority to choose to terminate the employment of the grievor otherwise than for cause rather than follow a disciplinary approach. Subsection 49(1) of the *FINTRAC Act* gives her that exclusive right.

[31] In essence, subsection 49(1) of the *FINTRAC Act* embodies the common law approach to termination of employment for cause and termination without cause. Under the common law of contracts, if an employer chooses to terminate employment for cause, it must prove that there are elements of misconduct or that a breach of contract occurred sufficient to justify dismissal. In either event, no notice or pay in lieu of notice is required. If an employer selects the "without cause" approach, its legal obligation is to provide reasonable notice or pay in lieu of that notice: see the overview of common law principles in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986.

[32] Under common law, an indefinite contract of employment is presumed to exist. Either party to the contract may decide to terminate it, provided the requirement for reasonable notice has been met. Dismissal by an employer is wrongful if it fails to give reasonable notice or its equivalent in pay.

[33] In her January 8, 2010, letter of termination (Exhibit R-1), the Director stated that senior management lost trust in the grievor. However, the Director did not invoke that reason as cause for the termination. There is no suggestion anywhere else in the evidence that the Director or any other representative of the employer ever invoked cause as the reason for the termination. The Director only referred to the issue of loss of confidence to provide an explanation to the grievor. The Director may decide to provide such an explanation in a "without cause" situation to defend against an argument that she acted unreasonably, capriciously or in bad faith.

[34] The mere fact that there were events in this case that could have formed the basis for termination for cause is not sufficient to support a conclusion that the employer's action was disciplinary. Regardless of the existence of reasons to render discipline, the law does not allow the grievor to impute that the employer took a disciplinary approach — because the employer explicitly chose to proceed on a

"without cause" basis under paragraph 49(1)(*b*) of the *FINTRAC Act* rather than invoke cause under paragraph 49(1)(*a*).

[35] In response to a question that I later posed, the employer confirmed its view that there were serious grounds of misconduct in this case. Asked why it chose not to take disciplinary action based on those grounds, the employer stated that it wished to minimize the effect of the Director's decision on the grievor. By proceeding "otherwise than for cause," it was able to offer her an amount of pay in lieu of notice (Exhibit R-1) that was fair and reasonable in the circumstances. Such compensation would not have formed part of a disciplinary termination.

[36] The Director's exclusive right to choose between a cause-based and a "without cause" approach is analogous to the right of an employer, amply recognized in the case law, to decide to terminate a probationary employee either for cause or as a matter of rejection on probation: see *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.); and *Morin v. Treasury Board (Department of Fisheries and Oceans)*, 2006 PSLRB 35, especially at para 94.

[37] An employer that chooses to proceed on a "without cause" basis is not free from the obligation to act in good faith. Bad faith can attract damages, provided that the appropriate tests are met: see, for example, *Desforge v. E-D Roofing Limited*, 2008 CanLII 48130 (Ont. Sup. Ct. J.); and *Merrill Lynch Canada Inc. v. Soost*, 2010 ABCA 251, at para 23 and 25. Recourse where an employee alleges bad faith lies with the courts, not under the *PSLRA*.

[38] In her testimony, the grievor did not refute the documentary evidence about the reasons why the senior management of the FINTRAC lost trust in her. There is no other evidence that disproves those reasons. There is no basis for an argument that the employer acted in bad faith.

[39] The leading cases dealing with the concept of disguised discipline in the public service remain *Jacmain v. Attorney General (Can.) et al.*, [1978] 2 S.C.R. 15, and *Penner*. The concept was developed in view of a specific statutory dichotomy that existed then and now — the difference between a disciplinary discharge under the authority of the *Financial Administration Act* (*FAA*), R.S.C., 1985, c. F-11, and a termination of employment under the *Public Service Employment Act* (*PSEA*), enacted by sections 12 and 13 of the *Public Service Modernization Act*. When employers choose to proceed

under the *PSEA*, particularly by rejection on probation or by layoff, the statutory framework opens to grievors the possibility of arguing that their *PSEA*-based terminations were a sham or disguise for something else — discipline. If successful in substantiating the alleged sham or disguise before an adjudicator under the *Public Service Staff Relations Act* (*PSSRA*), R.S.C., 1985, c. P-35, or, recently, under the *PSLRA*, grievors are entitled to challenge whether cause exists for that discipline, as required by the *FAA*, and to pursue corrective action. In all the case law involving disguised discipline, employers have not had the statutory authority to terminate otherwise than for cause that is provided to the Director by the *FINTRAC Act*.

[40] Both parties referred me in their arguments to provisions of the *FAA*. The *FINTRAC Act* provides that subsections 11.1(1) and 12(2) of the *FAA* do not apply. Those subsections read as follows:

> ***11.1*** *(1) In the exercise of its human resources management responsibilities under paragraph 7(1)*(e)*, the Treasury Board may*
>
> > *(*a*) determine the human resources requirements of the public service and provide for the allocation and effective utilization of human resources in the public service;*
> >
> > *(*b*) provide for the classification of positions and persons employed in the public service;*
> >
> > *(*c*) determine and regulate the pay to which persons employed in the public service are entitled for services rendered, the hours of work and leave of those persons and any related matters;*
> >
> > *(*d*) determine and regulate the payments that may be made to persons employed in the public service by way of reimbursement for travel or other expenses and by way of allowances in respect of expenses and conditions arising out of their employment;*
> >
> > *(*e*) subject to the* Employment Equity Act*, establish policies and programs with respect to the implementation of employment equity in the public service;*
> >
> > *(*f*) establish policies or issue directives respecting the exercise of the powers granted by this Act to deputy heads in the core public administration and the reporting by those deputy heads in respect of the exercise of those powers;*

(g) *establish policies or issue directives respecting*

(i) *the manner in which deputy heads in the core public administration may deal with grievances under the* Public Service Labour Relations Act *to which they are a party, and the manner in which they may deal with them if the grievances are referred to adjudication under subsection 209(1) of that Act, and*

(ii) *the reporting by those deputy heads in respect of those grievances;*

(h) *establish policies or issue directives respecting the disclosure by persons employed in the public service of information concerning wrongdoing in the public service and the protection from reprisal of persons who disclose such information in accordance with those policies or directives;*

(i) *establish policies or issue directives respecting the prevention of harassment in the workplace and the resolution of disputes relating to such harassment; and*

(j) *provide for any other matters, including terms and conditions of employment not otherwise specifically provided for in this section, that it considers necessary for effective human resources management in the public service.*

(2) The powers of the Treasury Board in relation to any of the matters specified in subsection (1)

(a) *do not extend to any matter that is expressly determined, fixed, provided for, regulated or established by any Act otherwise than by the conferring of powers in relation to those matters on any authority or person specified in that Act; and*

(b) *do not include or extend to*

(i) *any power specifically conferred on the Public Service Commission under the* Public Service Employment Act, *or*

(ii) *any process of human resources selection required to be used under the* Public Service Employment Act *or authorized to be used by the Public Service Commission under that Act.*

. . .

> ***12.*** *(2) Subject to any terms and conditions that the Governor in Council may direct, every deputy head of a separate agency, and every deputy head designated under paragraph 11(2)*(b)*, may, with respect to the portion of the federal public administration for which he or she is deputy head,*
>
> > *(*a*) determine the learning, training and development requirements of persons employed in the public service and fixing the terms on which the learning, training and development may be carried out;*
> >
> > *(*b*) provide for the awards that may be made to persons employed in the public service for outstanding performance of their duties, for other meritorious achievement in relation to their duties or for inventions or practical suggestions for improvements;*
> >
> > *(*c*) establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties; and*
> >
> > *(d) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct.*

[41] By virtue of subsection 49(1) of the *FINTRAC Act*, the dichotomy is different. Neither the *PSEA* nor the cited provisions of the *FAA* apply. The Director has the exclusive authority, following the common law model, to terminate "without cause" under paragraph 49(1)(*b*) of the *FINTRAC Act* or to proceed for cause under paragraph 49(1)(*a*). As a result, the concern that someone might attempt to camouflage or disguise a disciplinary decision is not relevant. The operative dichotomy — between a "for cause" approach and proceeding "otherwise than for cause" — excludes it as a consideration. In short, there is no legal foundation to import the concept of disguised discipline to the relationship between the FINTRAC and its employees or, on that basis, to challenge the Director's decision to terminate an employee otherwise than for cause under paragraph 209(1)(*b*) of the *PSLRA*.

[42] Section 13 of the *Parks Canada Agency Act* (*PCAA*), S.C. 1998, c. 31 is virtually identical to section 49 of the *FINTRAC Act*. It reads as follows:

> ***13.*** *(1) The Chief Executive Officer has exclusive authority to*

> *(*a*) appoint, lay-off or terminate the employment of the employees of the Agency; and*
>
> *(*b*) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of employment otherwise than for cause, of employees.*
>
> *(2) Nothing in the* Public Service Labour Relations Act *shall be construed to affect the right or authority of the Chief Executive Officer to deal with the matters referred to in paragraph (1)(*b*).*
>
> *(3) Subsections 11.1(1) and 12(2) of the* Financial Administration Act *do not apply with respect to the Agency and the Chief Executive Officer may*
>
> *(*a*) determine the organization of and classify the positions in the Agency;*
>
> *(*b*) set the terms and conditions of employment, including termination of employment for cause, for employees and assign duties to them; and*
>
> *(*c*) provide for any other matters that the Chief Executive Officer considers necessary for effective human resources management in the Agency.*

[43] In *Peck v. Parks Canada*, 2009 FC 686, at para 33, the Federal Court confirmed that the language of the *PCAA* confers on it the exclusive authority to establish terms and conditions of employment and to ". . . do anything within its wide grant of statutory authority as employer that is not specifically or by inference restricted by statute." The Federal Court's conclusion about the breadth of the employer's authority must also apply to the FINTRAC which operates under virtually the same statutory provisions.

[44] In *Monette v. Parks Canada Agency*, 2010 PSLRB 89, at para 40, an adjudicator recently considered subsection 13(1) of the *PCAA* and found as follows:

> *[40] For the purposes of this case, subsection 13(1) of the* PCCA *gives the employer exclusive authority over the appointment process, including the probationary period of new employees, and over termination other than for cause. Subsection 13(2) prevents me from dealing with grievances referring to those issues. . . .*

The adjudicator then considered but rejected an argument about disguised discipline, but he did so without the benefit of the arguments about the proper interpretation of the statutory language proposed by the employer in this case.

[45] Substantial support for the position that the common law of contracts applies in the public sector, unless and to the extent modified by statute, is found in *Dunsmuir v. New Brunswick*, 2008 SCC 9. In that decision, the Supreme Court of Canada examined the probationary termination (with no specific allegation of cause) of a non-unionized employee who held a position with the Government of the Province of New Brunswick "at pleasure." The employee received pay in lieu of notice but sought to grieve his dismissal as having been without cause under the New Brunswick *Public Service Labour Relations Act* (*NBPSLRA*), R.S.N.B. 1973, c. P-25. The Supreme Court of Canada upheld the judgment of the New Brunswick Court of Appeal that a non-unionized employee of the provincial government could be dismissed with notice and that an adjudicator under the *NBPSLRA* could not inquire into the true reasons for the employee's dismissal, only the reasonableness of the length of the notice period. The Supreme Court of Canada ruled that the applicable law governing the employee's dismissal was the law of contracts as specified in the New Brunswick *Civil Service Act* (*NBCSA*), S.N.B. 1984, c. C-5.1: see *Dunsmuir*, paragraphs 74, 75, 81, 102 to 105 and 113.

[46] Although the Supreme Court of Canada's ruling in *Dunsmuir* concerned a non-unionized employee, the FINTRAC's position in this case does not depend on the fact that the grievor was non-unionized. Other case law, including *Peck*, has confirmed that an employer's authority is unrestricted in the area of "without cause" terminations of employment under a statutory provision such as section 49 of the *FINTRAC Act.* Subsection 31(2) of the *Interpretation Act*, R.S.C., 1985, c. I-21, which reads as follows, further confirms the extent of such a grant of authority:

> ***31.*** *(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.*

[47] Any fettering of the interpretation of subsection 49(1) of the *FINTRAC Act* would render it meaningless, contrary to the rules of statutory interpretation: see, for example, *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R 493, at 504; and

Aliant Telecom Inc. v. Prince Edward Island (Regulatory and Appeals Commission), 2004 PESCAD 1, at para 21.

[48] For the reasons argued, the grievance should be dismissed on the grounds that an adjudicator has no jurisdiction to consider a termination otherwise than for cause exercised within the exclusive authority of the Director.

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

[49] An adjudicator under the *PSLRA* enjoys no inherent authority. His or her authority derives exclusively from that statute. In this case, paragraph 209(1)(*b*) determines the adjudicator's jurisdiction. It reads as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> . . .
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*

The question to be determined to resolve the jurisdictional objection in this case is whether the grievance is "related to" a disciplinary action.

[50] Faced with allegations of disguised discipline, adjudicators and the Federal Courts have enumerated factors or criteria to determine whether a grievance is related to discipline within the meaning of paragraph 209(1)(*b*) of the *PSLRA*. The case law has relied on considerations such as the following: the intention of the employer, the effect on the employee (immediate versus prospective), the impact on the employee's career prospects, whether the employer's actions were intended to be corrective, and whether the employer's decision concerns culpable or corrigible behaviour: see *Canada (Attorney General) v. Frazee*, 2007 FC 1176, at para 22 to 25; *Lindsay v. Canada (Attorney General)*, 2010 FC 389, at para 45; *Canada (Attorney General) v. Basra*, 2010 FCA 24, at para 18 and 19; and *Canada (Attorney General) v. Fortin*, 2003 FCA 376, at para 6.

[51] In a disguised discipline case, the burden of proof falls to the grievor. He or she must demonstrate that it is more likely than not that the challenged action constituted

disguised discipline: *Peters v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 7, at para 304. At paragraph 309, the adjudicator in *Peters* described the onus as follows:

> *[309] . . . a grievor who alleges disguised discipline has an onus to show that the employer identified a culpable deficiency or an act of malfeasance on the part of the grievor and then undertook disguised disciplinary action to address this deficiency or act. Stated in a somewhat different way, a case for disguised discipline depends on the grievor demonstrating that the employer had the intent to discipline the grievor for a specific reason or reasons, but disguised its disciplinary action in a different form which nevertheless had the equivalent effect of correcting or punishing the grievor.*

[52] The concept of disguised discipline has survived in the post-*Dunsmuir* era. In *Lindsay*, at paragraphs 48 and 49, the Federal Court recognized that an adjudicator could inquire into the possibility that an action identified by an employer as administrative rather than disciplinary nonetheless constituted discipline. In *Basra*, at paragraphs 18 and 19, the Federal Court of Appeal upheld that the adjudicator had properly looked behind the reasons given for an employer's decision to determine whether that decision was based on disciplinary considerations. Case law, such as *Lindsay* and *Basra*, and earlier decisions such as *Frazee*, confirm that a decision made on the basis of, or because of or related to, behaviour that is culpable or corrigible triggers an adjudicator's jurisdiction under paragraph 209(1)(*b*) of the *PSLRA*.

[53] In this case, the evidence shows that the Director's reasons involved behaviour on the part of the grievor that she found culpable or corrigible. The termination letter (Exhibit R-1) refers to the grievor acting "contrary to these instructions" — clearly an allegation of insubordination, which is a disciplinary offence: see *Guertin v. Treasury Board*, PSSRB File No. 166-02-36 (19680417), cited in *Peters* at paragraph 308. The letter states that the grievor ". . . attempted to create an atmosphere of fear and intimidation . . . and abused [her] position of authority, in an attempt to improperly influence the outcome of the competitive staffing process." According to the letter, the grievor's ". . . behaviour [was] unacceptable from any employee." On its face, the letter of termination is disciplinary. Missing from it is any reference to the termination as a dismissal "without cause." Simply attaching to it a schedule of severance benefits does not transform the decision into a "without cause" dismissal.

[54] The January 6, 2010, memo sent by Mr. Meunier to the Director (Exhibit G-20) refers to harassment and intimidation on the part of the grievor. It alleges that the grievor was insubordinate by continuing, against instructions, to involve herself in the affairs of her work unit while away on language training. According to Mr. Meunier, that insubordinate involvement unnecessarily lengthened the time that the grievor required to complete language training successfully, when she could have finished earlier ". . . at far less cost to the taxpayer." Mr. Meunier states that the grievor attempted to bully a selection board and influence its rating of an employee. He also accuses the grievor of making critical and disrespectful comments towards the human resources staff as well as towards himself, of undermining his authority and of questioning his integrity. All the allegations made by Mr. Meunier in the document concern disciplinary matters.

[55] While Mr. Meunier's memo refers to termination "without cause," the employer never gave that document to the grievor. There is no evidence that the employer ever told the grievor that the Director was acting "otherwise than for cause" under paragraph 49(1)(*b*) of the *FINTRAC Act*. At his termination meeting with the grievor on January 8, 2010, Mr. Meunier did not refer to the Director's decision as having been made "without cause." Instead, he repeated most of the same disciplinary allegations canvassed in his memo to the Director, as borne out by his "talking points" for the termination meeting (Exhibit G-16).

[56] Mr. Meunier's "Issue" document (Exhibit G-17) is equally clear in that it reveals that his allegations against the grievor concerned serious acts of misconduct.

[57] On the basis of the documentary record, the grievor has clearly met her burden of proving that the Director's decision to terminate her employment was disciplinary. Therefore, the grievor properly referred her grievance to adjudication under paragraph 209(1)(*b*) of the *PSLRA*.

[58] The removal of the grievor's right to contest the Director's decision under paragraph 209(1)(*b*) of the *PSLRA* would require explicit statutory language of irresistible clearness: *Goodyear Tire & Rubber Co. of Canada Ltd. et al. v. T. Eaton Co. Ltd. et al.*, [1956] S.C.R. 610, at 4; *Melnichouk v. Canadian Food Inspection Agency*, 2004 PSSRB 181, at para 47 and 49; and *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, at para 29. Section 49 of the *FINTRAC Act* does not meet that requirement.

[59] The extent of the Director's exclusive authority under paragraph 49(1)(*b*) of the *FINTRAC Act* is to ". . . establish standards, procedures and processes governing staffing. . . ." The words that follow the word "staffing" all modify or describe it. The inclusion of the reference to ". . . termination of the employment of employees otherwise than for cause . . ." in the modifying list of descriptors means that the Director has the exclusive authority to establish standards, procedures and processes governing termination otherwise than for cause as part of her staffing authority. The effect is not to oust an adjudicator's authority over disciplinary terminations under paragraph 209(1)(*b*) of the *PSLRA* but rather to prohibit decisions made under that provision's authority from interfering with the Director's exclusive right to establish staffing standards, procedures and processes. In that sense, Parliament's intent in legislating paragraph 49(1)(*b*) of the *FINTRAC Act* was to preserve the Director's right over staffing in the same way that it has protected that right in the core public administration.

[60] Subsection 49(3) of *the FINTRAC Act* specifically states that subsection 12(2) of the *FAA* does not apply. Subsection 12(2) of the *FAA* is the provision that clothes the deputy heads of many separate agencies with the authority to dismiss employees for disciplinary reasons. Necessary to the granting of that authority is the inclusion in paragraph 12(2)(*c*) of the words "set penalties." In contrast, the *FINTRAC Act* does not authorize the Director to set penalties. That is why paragraph 49(1)(*b*) of that *Act* is not the source of the Director's statutory authority to dismiss an employee "without cause." That authority instead resides in paragraph 49(1)(*a*) and only there. Paragraph 49(1)(*a*) applies exhaustively to all forms of termination, whether or not for cause. Subsection 49(2), which refers to the exercise of authorities under the *PSLRA*, including those of an adjudicator, does not refer to paragraph 49(1)(*a*) of the *FINTRAC Act*. Nothing in the latter provision precludes an adjudicator from considering a grievance under paragraph 209(1)(*b*) of the *PSLRA*, provided its subject matter, more likely than not, relates to disciplinary action.

[61] The employer contends that *Dunsmuir* supports its position that an adjudicator cannot look into the basis of the Director's decision in this case because the grievor's termination purportedly was made "without cause." According to the employer, the Supreme Court of Canada's syllogism in *Dunsmuir* takes the following form; (1) the common law of employment applies to public servants; (2) under common law, an employer may dismiss an employee "without cause"; and (3) therefore, public sector

employers have the discretion to act on a "without cause" basis. That is not precisely what the Supreme Court of Canada said in *Dunsmuir.* Its conclusions depended on the quite different statutory context that prevailed in New Brunswick and, specifically, reflected the operation of section 20 of the *NBCSA* and the interplay of several provisions of the *NBPSLRA*: see *Dunsmuir*, at para 74 and 75. Section 20 of the *NBCSA* reads as follows:

> ***20.*** *Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.*

Section 20 has no equivalent in the federal statutory framework. Because of subsection 12(3) of the *FAA* and section 23 of the *Interpretation Act*, the opposite is, in fact, true in the federal public service. Section 12(3) of the *FAA* reads as follows:

> ***12.*** *(3) Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(c), (d) or (e) or (2)(c) or (d) may only be for cause.*

Section 23 of the *Interpretation Act* reads as follows:

> ***23.*** *(1) Every public officer appointed by or under the authority of an enactment or otherwise is deemed to have been appointed to hold office during pleasure only, unless it is otherwise expressed in the enactment, commission or instrument of appointment.*
>
> *(2) Where an appointment is made by instrument under the Great Seal, the instrument may purport to have been issued on or after the day its issue was authorized, and the day on which it so purports to have been issued is deemed to be the day on which the appointment takes effect.*
>
> *(3) Where there is authority in an enactment to appoint a person to a position or to engage the services of a person, otherwise than by instrument under the Great Seal, the instrument of appointment or engagement may be expressed to be effective on or after the day on which that person commenced the performance of the duties of the position or commenced the performance of the services, and the day on which it is so expressed to be effective, unless that day is more than sixty days before the day on which the instrument is issued, is deemed to be the day on which the appointment or engagement takes effect.*

> *(4) Where a person is appointed to an office, the appointing authority may fix, vary or terminate that person's remuneration.*
>
> *(5) Where a person is appointed to an office effective on a specified day, or where the appointment of a person is terminated effective on a specified day, the appointment or termination is deemed to have been effected immediately on the expiration of the previous day.*

[62] With respect to the *NBPSLRA*, the ruling in *Dunsmuir* depends on the distinction that that statute makes between the grievance rights of unionized versus non-unionized employees. Given that distinction, as well as the interplay with section 20 of the *NBCSA*, it was appropriate for the Supreme Court of Canada to refer in *Dunsmuir* to the application of the common law regime to non-unionized employees. In the federal public service, Part 2 of the *PSLRA* does not distinguish between unionized and non-unionized public servants. Employees in both populations have access to the same grievance process and, specifically, are commonly entitled to refer to adjudication grievances with subject matter listed under paragraph 209(1)(*b*).

[63] *Peck*, argued by the employer, has little bearing on this case. Its finding concerning the scope of an employer's authority to set terms and conditions of employment is limited to classification.

[64] As corrective action, the grievor seeks reinstatement, conforming to the "normal" model, with full restoration of pay and benefits. The grievor requests that the adjudicator retain jurisdiction for the "usual" period to address any reinstatement issue that may arise.

[65] The grievor also seeks "full redress." Full redress includes the grievor's legal expenses. On that subject, the grievor referred me to *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2010 PSLRB 83.

[66] Full redress further requires an award for bad faith: see *Tipple*; as well as *Rousseau v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 91; and *Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70.

[67] The obligation of the Director to act in good faith includes the requirement that she investigate before exercising the authority set out at paragraph 49(1)(*a*) of the *FINTRAC Act*. The Director was also required to observe basic rules of procedural

fairness toward the grievor. In particular, good faith conduct requires that an employee be given an opportunity to respond to his or her employer's concerns and allegations: *McMorrow v. Treasury Board (Veterans Affairs Canada)*, PSSRB File No. 166-02-23967 (19941021); and *Dhaliwal v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2004 PSSRB 109.

[68] In this case, the employer's investigation consisted of several conversations with managers and a review of emails, as reported in the "Issue" document (Exhibit G-17). The employer failed to allow the grievor any opportunity to address its concerns, thereby proving its bad faith. According to the grievor's evidence, Mr. Meunier, on his very first encounter with the grievor, wanted to get rid of her. When he saw his opportunity, he leapt at it. His actions were the very crux of what comprises bad faith in dismissal.

[69] The Director's termination of the grievor's employment has had harsh repercussions on the grievor's health. The medical evidence provided by the grievor also justifies an award of general damages.

C. Employer's rebuttal

[70] The disguised discipline cases argued by the grievor all reflected a different statutory context that did not include a provision comparable to section 49 of the *FINTRAC Act*.

[71] The process used by the Director to terminate an employee otherwise than for cause is to provide severance pay in lieu of notice. Each of the following documents made the employer's approach clear: the termination letter (Exhibit R-1), which attached a schedule of severance benefits; Mr. Meunier's memo (Exhibit G-20), which referred to termination "without cause"; Mr. Meunier's speaking notes (Exhibit G-16), which discussed "fair and reasonable treatment" and a benefits package; and the "Issue" document (Exhibit G-17), which emphasized Mr. Meunier's loss of trust in the grievor — not a "for cause" argument.

[72] Contrary to what the grievor argued, the *FAA* does not set out the employer's authority. In the case of the FINTRAC, all of section 12 of the *FAA* is replaced by section 49 of the *FINTRAC Act*. The wording of section 49 is very different from the

FAA and constitutes a very broad grant of authority quite distinct from the provisions that apply to those separate agencies that remain under the *FAA*.

[73] The authority of the Director under paragraph 49(1)(*b*) of the *FINTRAC Act* is not limited to establishing standards. It includes the authority to set processes thereby founding his or her right to proceed in termination cases otherwise than for cause. Contending that the actual implementation of standards and processes may be subject to review is an overly narrow reading of the paragraph that is inconsistent with a holistic review of section 49.

[74] At paragraph 33 of *Peck*, the Federal Court used the words "including classification" when it stated that Park Canada's authority to set terms and conditions of employment is unrestricted. Clearly, the Federal Court's ruling did not apply only to classification, as argued by the grievor.

[75] The grievor failed to point out paragraphs 29, 30, 31 and 39 in *Monette*, which show the adjudicator's use of *PSEA* criteria in his ruling, even if the *PSEA* did not apply, and that suggest that the employer invited the "disguised discipline" test despite the different statutory framework of the *PCAA*.

[76] With respect to *Dunsmuir* and its reliance on section 20 of the *NBCSA*, it remains the case that, despite the absence of a provision comparable to section 20 in the federal jurisdiction, section 49 of the *FINTRAC Act* incorporates common law criteria and imports the common law of contracts. Non-unionized employees of the FINTRAC are presumed to have a contract of employment, whether written or not, and the common law rules of employment apply in administering that contract.

[77] Adjudicators under the *PSLRA* have not traditionally awarded legal costs because they lack that authority. The only reason for the award of legal costs in *Tipple* was the exceptional and egregious delays not attributable to the grievor that caused him to incur very substantial extra legal expenses. The adjudicator's award was limited to those costs.

[78] There is no supporting evidence for an award of bad faith damages. Such damages are available only in exceptional circumstances, such as when an employer has committed an act calculated to cause harm to an employee or has knowingly deceived an employee. As for the grievor's medical condition, the only evidence of that

condition is the doctor's note. In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Supreme Court of Canada narrowly limited the scope of permissible damages related to a medical condition and required specific evidence of actual medical costs attributable to an employer's actions. Nothing in this case meets those requirements.

V. Reasons

A. Is an adjudicator entitled to inquire into the reasons for the grievor's termination?

[79] The essence of the employer's objection to my jurisdiction is that I may not look into the basis of the Director's alleged termination of the grievor's employment otherwise than for cause for evidence that the termination was, in fact, related to disciplinary action making it a matter that may be properly adjudicated under paragraph 209(1)(*b*) of the *PSLRA*.

[80] The employer's position relies principally upon a reading of the Director's authorities under subsection 49(1) of the *FINTRAC Act* that, according to the employer, imports common law contract principles to the FINTRAC's employment relationship with its employees. As I have noted earlier, the employer's argument is novel. It seeks a ruling that would confirm that its mandating statute allows the Director to terminate employment otherwise than for cause, beyond the jurisdiction of an adjudicator under the *PSLRA*, and subject only to the common law requirements of good faith and fair dealings in the manner of termination and to provide reasonable notice or pay in lieu of reasonable notice.

[81] For support for the proposition that I should determine this case within the parameters of the common law of contracts, the employer cited the Supreme Court of Canada's decision in *Dunsmuir*.

[82] The general principle enunciated by the Supreme Court of Canada in *Dunsmuir*, at para 113, following its earlier decisions in *Attorney General of Quebec v. Labrecque and al.*, [1980] 2 S.C.R. 1057, and in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, was that ". . . most public employment relationships are contractual." As such, ". . . disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations. . . ."

[83] A central element in *Dunsmuir* was the issue of whether the employer owed Mr. Dunsmuir a public law duty of fairness when it dismissed him with four months' pay in lieu of notice. The Supreme Court of Canada's analysis of the application of the common law of contracts to public sector employment was predicated on its need to rule on that key issue. If the common law of contracts applied, Mr. Dunsmuir was not entitled, in the Supreme Court of Canada's view at para 113, to a public law duty of fairness (a hearing) before the employer made its decision. The available remedies to any breach of the employment contract would be limited to ". . . ordinary contractual remedies."

[84] The existence of a public law duty of fairness is not directly an issue in this case. I believe that the analysis in *Dunsmuir* applies primarily for two general propositions: (1) that the grievor, as a public servant, is deemed to have been working under a contract of employment of indefinite duration; and (2) that, following the line of Supreme Court of Canada decisions of which *Dunsmuir* forms the most recent part, the terms and conditions of the employment contract include those provisions in force by virtue of applicable statutes and regulations.

[85] In *Wells*, the Supreme Court of Canada declared that the contract of employment applicable to public servants may include a number of different elements and that it is not limited to the written and verbal manifestations of the agreement. It referred first at paragraph 30 to *Labrecque* to the following effect:

> ***30** . . . the common law views mutually agreed employment relationships through the lens of contract. This undeniably is the way virtually everyone dealing with the Crown sees it. While the terms and conditions of the contract may be dictated, in whole or in part, by statute, the employment relationship remains a contract in substance and the general law of contract will apply unless specifically superceded by explicit terms in the statute or the agreement.*

The Supreme Court of Canada then stated as follows at paragraph 33:

> ***33** . . . the Court's inquiry should focus on the terms of the civil servant's contract. These are to be found in the written and verbal manifestations of the agreement, applicable statutes and regulations, and the common law. . . .*

[86] In the situation faced by Mr. Dunsmuir, the Supreme Court of Canada closely examined the applicable statutes as part of its analysis to determine whether the

Government of the Province of New Brunswick breached his employment contract. There can be no question in reading its decision that section 20 of the *NBCSA* — stipulating that the termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract — and its interplay with provisions of the *NBPSLRA*, were important considerations in the Supreme Court of Canada's analysis. In effect, it considered section 20 of the *NBCSA* and provisions from the *NBPSLRA* as forming part of Mr. Dunsmuir's contract of employment.

[87] The federal statutory framework is clearly different. For example, there is no statutory provision similar to section 20 of the *NBCSA* in the *FINTRAC Act* or elsewhere that explicitly states that the ordinary rules of contract — and only those rules — govern the termination of employment of employees. Moreover, the employer has not referred me to any clear guidance from a supervising court that suggests that the finding in *Dunsmuir* about the common law right to terminate employment on notice, based on the statutory framework in New Brunswick, could or should now apply to the federal public service with its own distinctive statutory framework.

[88] For the reasons stated in this decision, I have come to the conclusion that I cannot accept the employer's interpretation of section 49 of the *FINTRAC Act*. On my reading, I do not believe that it disturbs the authority of an adjudicator under paragraph 209(1)(*b*) of the *PSLRA* to consider the possibility that a termination decision by the Director is a contrived reliance on a provision of the *FINTRAC Act*, a sham or a camouflage. In particular, I do not accept that paragraphs 49(1)(*a*) and (*b*) of the *FINTRAC Act* separately establish two different termination authorities — the authority to terminate employment for cause under paragraph 49(1)(*a*) versus otherwise than for cause under paragraph 49(1)(*b*), with the latter excluded from the purview of the *PSLRA* by virtue of the operation of subsection 49(2) of the *FINTRAC Act*.

[89] The operative provisions of the *FINTRAC Act* are, once more, as follows:

> ***49.*** *(1) The Director has exclusive authority to*
>
> *(*a*) appoint, lay off or terminate the employment of the employees of the Centre; and*
>
> *(*b*) establish standards, procedures and processes governing staffing, including the appointment, lay-off*

> *or termination of the employment of employees otherwise than for cause.*
>
> *(2) Nothing in the* Public Service Labour Relations Act *shall be construed so as to affect the right or authority of the Director to deal with the matters referred to in paragraph (1)(*b*).*
>
> *(3) Subsections 11.1(1) and 12(2) of the* Financial Administration Act *do not apply to the Centre, and the Director may*
>
> > *(*a*) determine the organization of and classify the positions in the Centre;*
> >
> > *(*b*) set the terms and conditions of employment for employees, including termination of employment for cause, and assign to them their duties;*
> >
> > *(*c*) notwithstanding section 112 of the* Public Service Labour Relations Act*, in accordance with the mandate approved by the Treasury Board, fix the remuneration of the employees of the Centre; and*
> >
> > *(*d*) provide for any other matters that the Director considers necessary for effective human resources management in the Centre.*

[90] Within the boundaries of section 49 of the *FINTRAC Act*, three different provisions establish the Director's authorities with respect to the termination of employment, as follows:

- Paragraph 49(1)(*a*) grants the Director exclusive authority to ". . . terminate the employment of the employees of the Centre. . . ."
- Paragraph 49(1)(*b*) grants her exclusive authority to ". . . establish standards, procedures and processes governing staffing, including . . . termination of the employment of employees otherwise than for cause."
- Paragraph 49(3)(*b*) states that the Director may "set the terms and conditions of employment for employees, including termination of employment for cause. . . ."

[91] The employer's interpretation of paragraph 49(1)(*a*) of the *FINTRAC Act* holds that the legislator intended the reference to "terminate the employment" to mean a termination of employment for cause. I disagree. The plain wording of the paragraph

does not limit termination of employment to "for cause" situations. In my view, it was available to Parliament to use an expression such as "terminate the employment for cause" in paragraph 49(1)(*a*) to capture the intent argued by the employer but Parliament chose not to. My opinion on that point is supported by the fact the legislator did choose to refer explicitly to "termination of employment for cause" in paragraph 49(3)(*b*). To limit the scope of paragraph 49(1)(*a*) only to "for cause" situations ignores that the legislator actively chose when, and when not, to employ the expression "terminate the employment for cause." Therefore, I judge that I must take the legislator's use of the expression "terminate the employment" in paragraph 49(1)(*a*) to be purposive and that I must give it a meaning broader than "termination of employment for cause."

[92] Giving the phrase "terminate the employment" in paragraph 49(1)(*a*) of the *FINTRAC Act* its required broader meaning, it follows that the Director acts under the authority of paragraph 49(1)(*a*) whenever he or she terminates the employment of an employee, whether for cause or otherwise than for cause.

[93] Paragraph 49(1)(*a*) of the *FINTRAC Act* also founds the exclusive authority of the Director to appoint employees. That authority supplants the appointment powers of the Public Service Commission under the *PSEA*. Appointing, laying off and terminating employees are all recognizable elements of a staffing regime. In the absence of the application of any other statutory staffing authority, notably the *PSEA*, Parliament enacted subsection 49(1) of the *FINTRAC Act* for the specific purpose of establishing the nature and scope of the Director's powers over staffing.

[94] Paragraph 49(1)(*b*) of the *FINTRAC Act* must be read in light of, and harmoniously with, paragraph 49(1)(*a*). As such, what does its reference to "termination of the employment of employees otherwise than for cause" achieve? Why should I not accept the employer's argument that it represents a separate and distinct grant of authority to the Director to terminate employment in "otherwise than for cause" situations? On those questions, I agree substantially with the grievor's reading of paragraph 49(1)(*b*) of the *FINTRAC Act*.

[95] In my view, paragraph 49(1)(*b*) of the *FINTRAC Act* elaborates aspects of the Director's exclusive grant of authority over staffing under paragraph 49(1)(*a*). The principal clause (in a grammatical sense) of paragraph 49(1)(*b*) states that the Director is exclusively authorized to ". . . establish standards, procedures and processes

governing staffing. . . .” The words that follow — “. . . including the appointment, lay-off or termination of the employment of employees otherwise than for cause . . .” — cannot be read as separate and independent subjects. Those words form a subordinate clause that modifies the word “staffing.” Thus, the “standards, procedures and processes” to which paragraph 49(1)(*b*) refers all relate to “staffing.” The legislator has chosen to state explicitly that “. . . the appointment, lay-off or termination of the employment of employees otherwise than for cause” are subjects associated with “staffing” for the purpose of paragraph 49(1)(*b*). The resulting effect of paragraph 49(1)(*b*) is to grant the Director the exclusive authority to, among other things, “. . . establish standards, procedures and processes governing . . . termination of the employment of employees otherwise than for cause.” Rather than being the fundamental source of the Director’s exclusive authority to terminate employment otherwise than for cause, as argued by the employer, paragraph 49(1)(*b*) achieves the more limited purpose of granting the Director the power to establish the “standards, procedures and processes” that apply when she exercises her staffing authority, including situations when she terminates employment “otherwise than for cause.”

[96] There is no question that Parliament has limited the application of the *PSLRA* to the FINTRAC through subsection 49(2) of the *FINTRAC Act*. However, that limitation must be viewed as operating only with respect to the powers granted to the Director by paragraph 49(1)(*b*). In my view, the effect of subsection 49(2) is to preclude any decision maker from exercising an authority under the *PSLRA*, including an adjudicator under section 209, that would affect the Director’s exclusive power to establish standards, procedures and processes governing staffing. What subsection 49(2) clearly does not state is that an adjudicator is prohibited from considering the Director’s termination decision itself, provided that decision falls within an adjudicator’s mandate under subsection 209(1) of the *PSLRA*. Had Parliament intended to oust the jurisdiction of an adjudicator to inquire into a termination decision when that decision is argued as comprising subject matter listed under paragraph 209(1)(*b*), I believe that subsection 49(2) of the *FINTRAC Act* would also have referred to, and thereby explicitly sheltered from scrutiny, the termination authority established under paragraph 49(1)(*a*). It does not.

[97] The French text of subsection 49(2) of the *FINTRAC Act* provides additional support for my interpretation. It reads as follows:

> ***49.*** *(2) La* Loi sur les relations de travail dans la fonction publique *n'a pas pour effet de porter atteinte au droit ou au pouvoir du directeur de régir les questions visées à l'alinéa (1)*b*).*

According to *Le Petit Robert*, the meaning of "*régir*" is "*diriger*," "*gouverner*" or "*déterminer les règles*." The protected power of the Director set out in subsection 49(2) to ". . . *régir les questions visées à l'alinéa (1)*b*)* . . ." refers to her authority to adopt rules — "*déterminer les règles*" — dealing with standards, procedures and process. I do not believe that the French text suggests that her protected authority extends any further.

[98] I note that the Board in *Public Service Alliance of Canada v. Parks Canada Agency*, 2009 PSLRB 176, at paragraph 138, reached a similar conclusion when it examined the virtually identical language of the *PCAA*, as follows:

> *[138] . . . The exclusive authority to appoint rests with the CEO of the PCA. The CEO also has the exclusive authority to establish "standards, procedures and processes" for appointments. The* PCAA *also clearly provides that the* PSLRA *shall not be interpreted in a way that affects the authority of the CEO to "deal with" those standards, procedures and processes. . . .*

The Federal Court of Appeal upheld the Board's decision in *Public Service Alliance of Canada v. Canada (Attorney General)*, 2010 FCA 305.

[99] Paragraph 49(3)(*b*) of the *FINTRAC Act* introduces the question of the interplay of authorities under the *FINTRAC Act* with those established by the *FAA*. The FINTRAC is listed as a separate agency in Schedule V to the *FAA*. By virtue of section 12.1 of the *FAA*, the powers given to deputy heads in the core public administration apply to separate agencies ". . . subject to the provisions of any Act of Parliament. . . ." Under subsection 45(1) of the *FINTRAC Act*, the Director has the status of a deputy head. However, by virtue of subsection 49(3), subsections 11.1(1) and 12(2) of the *FAA*, defining the authorities of a deputy head, do not apply to the FINTRAC.

[100] In the absence of the application of subsections 11.1(1) and 12(2) of the *FAA*, Parliament has given the Director the specific authorities listed under paragraphs 49(3)(*a*) through (*d*) of the *FINTRAC Act* in addition to those listed in subsections 49(1) and (2). One of those authorities is the discretionary power to set terms and conditions of employment governing termination for cause under

paragraph 49(3)(*b*). As in the case of termination otherwise than for cause, I do not interpret paragraph 49(3)(*b*) as the source of the Director's underlying authority to terminate the employment of the employees of the FINTRAC. In my view, the paragraph once more serves a derivative purpose — giving the Director the power, among others, to establish conditions that apply when he or she decides to proceed by way of a "for cause" termination under paragraph 49(1)(*a*).

[101] The interpretation of paragraph 49(3)(*b*) of the *FINTRAC Act* is not a live issue in this case. I have commented on it in this analysis only because I believe that it has a status and effect similar to paragraph 49(1)(*b*) within the architecture of section 49 — and, of course, because it establishes that the legislator used the expression "termination of employment for cause" when it intended to.

[102] Parenthetically, I note that the employer in this case did not lead evidence to the effect that the Director has used her authority under paragraph 49(1)(*b*) of the *FINTRAC Act* to establish any written standard, procedure or process about termination of employment otherwise than for cause or, under paragraph 49(3)(*b*), to establish any formal terms and conditions of employment governing termination of employment for cause.

[103] In sum, I have not found in the architecture of section 49 clear language that would have the effect of ousting the jurisdiction of an adjudicator under section 209 of the *PSLRA* to consider whether a decision made by the Director to terminate the employment of an employee relates to disciplinary action within the meaning of paragraph 209(1)(*b*). On the basis of case law from the Supreme Court of Canada, the grievor argued that I would need explicit statutory language of irresistible clearness to conclude that the *FINTRAC Act* removes the right of an employee to adjudication under paragraph 209(1)(*b*) of the *PSLRA*. I concur. My reading of section 49 of the *FINTRAC Act* construes the limitation expressed in subsection 49(2) more narrowly than the employer would have me accept and differs crucially in identifying paragraph 49(1)(*a*) as the source of the Director's power to terminate otherwise than for cause rather than paragraph 49(1)(*b*).

[104] At the beginning of this section, I posed the question, "Is an adjudicator entitled to inquire into the reasons for the grievor's termination?" In my view, the inquiry required in this case to determine my jurisdiction is no different in kind than the

analysis that occurs when an employer claims to terminate employment under the authority of the *PSEA* — most often in the form of a rejection on probation.

[105] Under paragraph 211(*a*) of the *PSLRA*, which reads as follows, a grievance contesting a termination of employment under the *PSEA* may not be referred to adjudication:

> ***211.*** *Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*
>
> (a) *any termination of employment under the* Public Service Employment Act*; or*

The same prohibition existed as subsection 92(3) under the *PSSRA*, as follows:

> ***92.*** *(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the Public Service Employment Act.*

[106] As argued by the employer, citing the Federal Court of Appeal's decision in *Penner*, the Director's right to choose between a cause-based termination and a termination otherwise than for cause — in *Penner*, between a disciplinary termination under the *PSSRA* and a rejection on probation under the *PSEA* — is protected. However, that right is not unqualified and an employer does not definitively remove a matter from the grievance adjudication regime by the exercise of that choice alone. *Jacmain*, *Penner* and the decisions about various types of *PSEA* terminations that have followed in their wake all underscore the need for caution before depriving an employee of access to the grievance adjudication system that Parliament created, first through the *PSSRA* and now under the *PSLRA*. The Supreme Court of Canada in *Vaughan v. Canada*, 2005 SCC 11, found that the statutory regime created by the *PSSRA* (and, by extension, by the *PSLRA*) is a comprehensive regime for the resolution of labour disputes. It does not follow from that finding that an employer may set aside that regime solely by exercising a choice to terminate employment for a reason that allegedly lies outside the ambit of grievance adjudication. The right to challenge how it proceeded and the bona fides of its choice is a necessary safeguard against the possibility of arbitrarily frustrating the intent of Parliament to accord an employee access to grievance adjudication.

[107] The tests used to assess the bona fides of a termination decision under the *PSEA* have been extensively canvassed and applied in the case law for three decades. *Penner*, drawing on the Supreme Court of Canada's decision in *Jacmain*, set out a test that has influenced the approach taken in much of the subsequent case law, at least regarding rejection on probation. The following passage summarizes:

> . . .
>
> *. . . As I have been able to follow the jurisprudence of the Public Service Staff Relations Board, two schools of thought exist today, both looking for support to the* Jacmain *decision. Some adjudicators have taken the view that as soon as the reason that led to the rejection on probation could be regarded as disciplinary, that is to say could be linked to sanctionable misbehavior or misconduct, they could inquire into the termination and, where appropriate, provide a remedy to the employee. . . .*
>
> . . .
>
> *Other adjudicators have adopted quite a different attitude and accepted that they had no jurisdiction to inquire into the adequacy and the merit of the decision to reject, as soon as they could satisfy themselves that indeed the decision was founded on a real cause for rejection, that is to say a* bona fide *dissatisfaction as to suitability. In* Smith *(Board file 166-2-3017), adjudicator Norman is straightforward:*
>
> > *In effect, once credible evidence is tendered by the Employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes shuddering to a halt. The adjudicator, at that moment, loses any authority to order the grievor reinstated on the footing that just cause for discharge has not been established by the Employer.*
>
> *In my opinion, the latter view is the only one that the* Jacmain *judgment authorizes and the only one that the legislation really supports.*
>
> . . .

[108] According to the Federal Court of Appeal in *Penner*, the employer's decision to proceed by way of a rejection on probation must be founded on a ". . . *bona fide* dissatisfaction as to suitability . . ." to argue successfully that an adjudicator has no jurisdiction. Stated more generally, an adjudicator is entitled to look into the basis of a

termination decision to satisfy himself or herself that it is not a contrived reliance on a statutory authority — in *Penner*, on the authority to reject an employee on probation under the *PSEA* —, a sham or a camouflage. Once an employer has produced evidence to support that its decision falls under the claimed statutory authority, then an adjudicator may consider whether the grievor can prove that the real nature of the decision was a matter that may be referred to grievance adjudication: see *Canada (Conseil du Trésor) v. Rinaldi* (1997), 172 F.T.R. 60 (T.D.), especially for the concept of "contrived reliance." Other important decisions in the *Jacmain* and *Penner* line of decisions include *Canada (Attorney General) v. Horn* (1993), [1994] 1 F.C. 453 (T.D.), and *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529.

[109] Under the *PSLRA*, adjudicators continue to accept jurisdiction to review decisions purportedly made under the authority of the *PSEA* for evidence that those decisions were a contrived reliance on a provision of the *PSEA*, a sham or a camouflage — and thus potentially comprise subject matter that an adjudicator may consider as disciplinary under subsection 209(1)(*b*) of the *PSLRA*: see, for example, recent decisions such as *Kagimbi v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 67; and *Salib v. Canadian Food Inspection Agency*, 2010 PSLRB 104.

[110] In *Basra*, at para 18-19, the Federal Court of Appeal also endorsed the authority of an adjudicator to inquire into a decision characterized as "administrative" by an employer — not related to the *PSEA* — to determine whether the decision became disciplinary in the specific circumstances of the case and a proper subject for grievance adjudication.

[111] The recent ruling in *Monette*, argued by the grievor, has particular resonance. In that decision, an adjudicator examined the basis of an employer's decision to reject an employee on probation under the *PCAA*, founded on an authority to terminate otherwise than for cause similar to that given to the Director of the FINTRAC under section 49 of the *FINTRAC Act*. The adjudicator wrote as follows:

. . .

> *[40] For the purposes of this case, subsection 13(1) of the* PCCA *gives the employer exclusive authority over the appointment process, including the probationary period of new employees, and over termination other than for cause. Subsection 13(2) prevents me from dealing with grievances referring to those issues. That legal framework is*

> *comparable to that of the core public administration, which involves section 211 of the* Act *and subsection 62(1) of the* PSEA*. . . .*
>
> *[41] Based on the above, I agree with the employer's argument that I must dismiss the grievance for want of jurisdiction if I find that this rejection on probation was based on employment-related reasons. However, should I find that the grievor was in fact rejected on probation; the matter does not end there. The grievance would still be adjudicable if I find that it concerns disciplinary action. The wording of the grievance indicates that the grievor was of the opinion that he was filing a grievance against a disciplinary matter. The grievance wording contests what the grievor refers as his "dismissal" and uses the term "punitive in nature". Also, he referred his grievance to adjudication under paragraph 209(1)(*b*) of the* Act*, which covers grievances against disciplinary action.*
>
> *. . .*
>
> *[46] When dealing with a rejection on probation, the role of an adjudicator is not to determine for himself or herself whether the employer should have rejected an employee for his or her actions, behaviour or performance. Rather, the adjudicator should determine if there was an employment-related reason behind the employer's decision to reject on probation. In this case, there was an employment-related reason to reject the grievor on probation. Consequently, I do not have jurisdiction to decide the grievance.*
>
> *. . .*

I recognize the employer's point that the adjudicator in *Monette* did not have the benefit of the arguments about statutory interpretation placed before me. I also acknowledge that my consideration of those arguments has led me to an interpretation of paragraph 49(1)(*b*) of the *FINTRAC Act* that differs from the adjudicator's reading of paragraph 13(1)(*b*) of the *PCAA* in *Monette*. Nonetheless, *Monette* offers support for the authority of an adjudicator to inquire into the basis of an "otherwise than for cause" termination, whether under the *PCAA* or the *FINTRAC Act*, and to decide whether it comprises a contrived reliance on a statutory authority, a sham or a camouflage. *Monette* has not been challenged and must be considered relevant case law.

[112] The employer argued *Peck* to the effect that the Director's statutory authority is very broad and should not be fettered. Beyond the fact that the subject matter in *Peck* (classification) has nothing to do with termination of employment, its finding concerning the breadth of an employer's exclusive authority related specifically to its

power to establish terms and conditions of employment. That power is not at issue in this case. Conducting an analysis that looks into the bona fides of the Director's termination decision does not interfere with her power to establish terms and conditions of employment; to be sure, an exceptional feature of this case is that it is far from clear that the Director has actually exercised that power or, if she has, the details of the terms and conditions that she has established.

[113] In sum, I believe that my analysis conforms to the underlying approach in *Dunsmuir* in that it interprets the contract of employment between the grievor and the employer in light of the terms and conditions of employment set by the *FINTRAC Act* and the *PSLRA*. As outlined, my reading of section 49 of the *FINTRAC Act* has led me to conclude that the Director acted under paragraph 49(1)(*a*) of the *FINTRAC Act* when she terminated the grievor's employment, that the exclusionary provision found in subsection 49(2) does not apply and that I am entitled to explore the Director's decision for the possibility that it was a contrived reliance on her authority to terminate employment otherwise than for cause under the *FINTRAC Act*, a sham or a camouflage. For the grievor, the right to grievance adjudication under paragraph 209(1)(*b*) of the *PSLRA* is a term or condition of her employment. My task is to determine whether she has access to that term or condition of employment in the circumstances of this case.

[114] Therefore, I find that section 49 of the *FINTRAC Act* does not bar my accepting jurisdiction on statutory grounds alone. The employer's jurisdictional objection must be determined based on the evidence. The important issues are: (1) has the employer substantiated its contention that the Director proceeded on an "otherwise than for cause" basis; and (2) has the grievor established that the Director's decision was a contrived reliance on her authority to terminate employment otherwise than for cause under the *FINTRAC Act*, a sham or a camouflage allowing an adjudicator to take jurisdiction under paragraph 209(1)(*b*) of the *PSLRA*?

B. Has the employer substantiated its contention that the Director proceeded on an "otherwise than for cause" basis? Has the grievor established that the Director's decision was a contrived reliance on her authority to terminate employment otherwise than for cause under the *FINTRAC Act*, a sham or a camouflage allowing an adjudicator to take jurisdiction under paragraph 209(1)(*b*) of the *PSLRA*?

[115] Other than filing four documents as exhibits, the employer declined the opportunity to lead evidence. Based upon its responses to my inquiries at the hearing, I

am satisfied that the employer chose not to offer further evidence in full knowledge of the risks that it might encounter should I not accept its jurisdictional objection on grounds of statutory interpretation and proceed to make rulings based on the evidence.

[116] Given the employer's approach to the evidence, is there, in the first instance, any basis for accepting that the Director proceeded on an "otherwise than for cause" basis, as maintained by the employer?

[117] I am troubled for several reasons. (1) Neither the termination letter (Exhibit R-1) nor Mr. Meunier's speaking notes for his meeting with the grievor on January 8, 2010 (Exhibit G-16) identify the Director's decision as a termination of employment otherwise than for cause. (2) The grievor's uncontradicted testimony is that she was never told that her dismissal was otherwise than for cause. (3) Until the employer's response to the grievance some weeks after the termination (Exhibit R-3), I find no specific reference anywhere in the evidence to paragraph 49(1)(*b*) of the *FINTRAC Act* as the authority under which the Director allegedly acted. (4) I did not hear either from Mr. Meunier or from the Director herself, or from any representative of the employer, as to whether the Director specifically intended to terminate the grievor's employment for cause or otherwise than for cause. (5) I have no evidence of any formal standard, procedure or process established by the Director for "otherwise than for cause" terminations that might offer procedural indicators confirming an "otherwise than for cause" approach.

[118] While it is clear that a representative of the employer (its general counsel) stated that the Director terminated the grievor's employment otherwise than for cause and cited the provisions of the *FINTRAC Act* once the grievor had filed her grievance (Exhibits R-3 and R-4), the weight of such statements made after the fact must be questioned, particularly when there has been no opportunity to hear from and question the author or any other employer representative. What then remains in evidence are two other references in documents: (1) the reference to a recommended termination "without cause" in Exhibits G-20 and G-21 (the two versions of Mr. Meunier's memo to the Director); and (2) the presence of a schedule of severance benefits attached to the termination letter (Exhibit R-1).

[119] I cannot depend on the first reference. Mr. Meunier did not appear as a witness to explain what he meant by the phrase "without cause;" nor did I hear from the

Director as to what she understood the phrase to mean. Without confirming testimony, I also cannot know with confidence whether the Director in fact acted on Mr. Meunier's recommendation or for other reasons, based on other input.

[120] I also am not prepared to accept that the second source, the schedule of severance benefits attached to the termination letter, conclusively determines the matter in favour of the employer's position. I acknowledge that the Director's offer of severance benefits to the grievor appears to be consistent in form with an "otherwise than for cause" termination decision rather than one based on misconduct. However, I have no firm evidence before me as to why the Director offered severance benefits to the grievor, only an argument by counsel for the employer to the effect that it is the employer's practice to do so when terminating employment otherwise than for cause. Argument is not proof.

[121] I rule that the employer did not substantiate that, on a balance of probabilities, the Director intended to terminate the employment of the grievor otherwise than for cause.

[122] What is the evidence that supports the argument that the Director's decision was a contrived reliance on her authority to terminate employment otherwise than for cause under the *FINTRAC Act*, a sham or a camouflage allowing an adjudicator to take jurisdiction under paragraph 209(1)(*b*) of the *PSLRA*? In my view, that evidence can be found in at least the following sources: (1) the termination letter itself (Exhibit R-1); (2) Mr. Meunier's "Issue" document (Exhibit G-17); (3) his memo to the Director (Exhibit G-20 or G-21); and (4) his speaking notes for the January 8, 2010 meeting with the grievor (Exhibit G-16). Taken together, and in the absence of any credible contrary evidence from an employer witness, I find that those sources offer a revealing insight into the nature of the Director's decision.

[123] The following excerpts from Exhibits R-1, G-17, G-20 and G-16 indicate that perceived misconduct on the grievor's part was the precipitating reason for the Director's decision:

> [Exhibit R-1 - the termination letter]
>
> . . .

. . . I have recently discovered that contrary to these instructions, you did involve yourself in the daily operations of your unit.

. . . you attempted to create an atmosphere of fear and intimidation with some of your colleagues . . . you abused your position of authority, in an attempt to improperly influence the outcome of the competitive staffing process.

This behaviour is unacceptable from any employee, and more so from a member of the management cadre. As such, you have lost the confidence of senior management and I consequently must advise you that your employment with FINTRAC is terminated effective at the close of business on January 6th, 2010.

. . .

[Exhibit G-17 - Mr. Meunier's "Issue" document]

. . .

I have reasons to suspect that [the grievor]:

- *is attempting to corrupt a staffing process;*
- *and in doing so is harassing colleagues and potentially other staff;*
- *is insubordinate*
- *failed to request approval for leave*
- *attempted to disguise leave*
- *diminished subordinate staff's opportunity to apply on a staffing process; and*
- *is creating an atmosphere of fear and intimidation.*

. . .

. . . I am concerned that [the grievor was] *absent from work/French language training on Monday December 14 . . . I have no record of personally being advised of her request for a vacation day . . . I find it unacceptable that an employee does not advise their superior of their absence from work. In this case,* [the grievor] *was absent from work without my permission. . . .*

. . .

. . . [the grievor] *. . . trying to influence/corrupt a staffing process . . . I understood that there was apparent intimidation by* [the grievor]*. . . .*

. . .

. . . I requested [the grievor] *to completely separate herself from the office operations in order to concentrate on her French language training. . . .* [The grievor] *is insubordinate by continuing to interfere with day to day operations without my consent. . . .*

. . .

[Exhibit G-20 - Mr. Meunier's memorandum to the Director]

. . .

. . . Upon her departure for language training, [the grievor] *was clearly advised by both you and me that while undergoing language training . . . she was not to engage in day to day activities of her unit. . . . Despite these very clear directions . . . it has become evident that* [the grievor] *has constantly been involved in the daily activities of the unit. . . .*

. . . It is clear to me that had [the grievor] *concentrated on her language training instead of the daily activities of her unit, as she was advised,* [the grievor] *would quite likely have completed her training at a much earlier date, and at far less cost to the taxpayer.*

The review of e-mails clearly showed that her objective was to ensure that [name redacted] *was successful in the competition. The e-mails showed that* [the grievor] *coached her staff . . . to ensure this outcome. When this did not materialize, she attempted to bully two of her colleagues who were selection board members. . . .*

Many of the e-mails . . . were disturbing for other reasons. In particular, there were many critical and disrespectful comments made towards Human resources . . . the other board members . . . and finally me . . . . In my view the content of the e-mails clearly shows that she was undermining my authority and calling into question my integrity. As a result, I have lost confidence in the ability of [the grievor] *to effectively carry out her job.*

. . .

[Exhibit G-16 - Mr. Meunier's speaking notes]

. . .

- *Unfortunately you did not follow . . . instructions*
- *You remained involved in day-to-day operations*

. . .

- *You were extremely critical and disrespectful towards a number of people, including HR, your colleagues and me*
- *You attempted to create an atmosphere of fear and intimidation, you harassed your colleagues and you attempted to improperly influence the selection process. . . .*
- *This behaviour is unacceptable. . . .*
- *As a result of your actions, I have lost confidence in your ability to effectively carry out your duties*

. . .

Understood in its most basic sense, misconduct is improper or wrong behaviour. In my view, no reasonable reader of the preceding excerpts could mistake the allegations as involving anything other than misconduct. Moreover, most of those allegations cite culpable behaviour that is very serious rather than minor. The arbitral jurisprudence, particularly on the subjects of insubordination, harassment and intimidation, is replete with cases where such behaviours have attracted discipline, including termination of employment. In Exhibits R-1, G-17, G-20 and G-16, no other reasons of a different nature for terminating the grievor's employment are listed, such as a concern for the grievor's abilities or documented performance problems. Notably, every reference in those exhibits concluding that the grievor "lost the confidence of senior management" is linked directly to the substantive allegations of misconduct. In my opinion, it is simply not credible on the face of the evidence to argue that the employer's loss of confidence in the grievor was not based on concerns arising out of her alleged misbehaviour and was not the reason driving the Director's decision. Similarly, it is not credible that the examples of misconduct repeatedly cited by the employer were only explanations voluntarily provided to the grievor that cannot be relied upon to establish why the Director terminated the grievor's employment.

[124] All things considered, the Director's decision to terminate the grievor's employment conforms to important elements in many of the tests for discipline outlined in the case law. For her part, the grievor referred me to *Guertin* as well as to the analyses of disguised discipline found in *Lindsay*, *Basra* and *Frazee*. Other sources are also helpful. For example, in *Smith v. Treasury Board (External Affairs Canada)*, PSSRB File No. 166-02-19902 (19910116), an adjudicator stated simply that discipline can arise only out of "voluntary, wilful acts of malfeasance." In *Canadian Labour Arbitration* (online version), at 7:4210, Brown and Beatty comment as follows:

. . .

> *In deciding whether an employee has been disciplined or not, arbitrators look at both the purpose and effect of the employer's action. The essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part by punishing the employee in some way. An employer's assurance that it did not intend its action to be disciplinary often, but not always, settles the question.*
>
> . . .
>
> [Footnotes omitted]

[125] It is obvious that an employer's intent is a significant factor, although not necessarily determinative, in determining whether a decision is disciplinary. In the circumstances of this case, direct testimonial evidence of the Director's intent is missing. I have no assurance from the employer proven in evidence that the Director did not intend her action to be disciplinary. What I do have, as found above, is strong evidence portraying the Director's decision as a direct response to perceived misconduct on the part of the grievor. In that sense, the Director's decision demonstrably related to culpable or corrigible behaviour. In my view, it was punitive in nature. The effect on the grievor was essentially the same as a decision to terminate her employment for disciplinary reasons, despite the provision of severance benefits.

[126] In sum, I find that the weight of the evidence is sufficient to rule that, on a balance of probabilities, the employer's reliance on the Director's authority to terminate employment otherwise than for cause in this case is a contrivance and that the Director's decision was really disciplinary in nature. As the termination of employment resulted from a disciplinary action, I have jurisdiction under paragraph 209(1)(*b*) of the *PSLRA* to review the Director's decision. The employer's objection to my jurisdiction is not founded.

C. The disciplinary action on its merits

[127] Under the terms of section 49 of the *FINTRAC Act*, a termination can either be for cause or otherwise than for cause. There is no third category. I have ruled that the Director's decision was not a termination otherwise than for cause and that it was disciplinary in nature. Therefore, the employer bears the burden of proving that it acted with justification and that termination of employment was appropriate and proportionate in view of the nature of the grievor's misconduct.

[128] While some of the documents placed into evidence by the grievor, especially Exhibits R-1, G-16, G-17 and G-20, allege facts that might form part of a strong case for misconduct, the employer has chosen not to prove any of those facts. In the absence of testimony by the authors of the documents or by any other persons who might have knowledge of the events in this case, I cannot rely on any facts alleged in the documents to ground a finding of misconduct. Even if there were good reasons to attribute some weight to those facts, the grievor has had no opportunity to test those facts through cross-examination. In all the circumstances, I have no option but to conclude that the employer did not discharge its burden of proof.

[129] Therefore, I rule that the employer has not discharged its burden of proving on a balance of probabilities that the grievor's termination of employment was justified.

D. <u>Corrective action</u>

[130] The employer offered no evidence or argument that could lead me to consider any option other than reinstating the grievor to her substantive position with retroactive effect to the date of her termination of employment.

[131] The grievor has petitioned for full redress. In my view, there is no impediment to, or reason militating against, an order of reinstatement with full restoration of salary and benefits retroactive to the date that her employment was terminated. For the purpose of addressing any problems that may arise in fully restoring the grievor's salary and benefits, I accept the grievor's request that I remain temporarily seized of the matter.

[132] On the matter of the grievor's request that I order the employer to pay her legal costs, I must decline. The grievor cited *Tipple* as support for her claim, but it is clear from that decision that the adjudicator did not contemplate the reimbursement of legal costs in the ordinary sense. He outlined his rationale and ruling as follows:

. . .

> *[353] The* PSLRA *contains no express statutory provision allowing an adjudicator to award costs to a successful grievor. While subsection 228(2) of the* PSLRA *gives an adjudicator broad remedial powers justifying making the order that he or she considers appropriate in the circumstances, the Federal Court of Appeal reminded us in* Mowat *that the wording of a similar provision in the*

> *New Brunswick* Human Rights Act, *R.S.N.B. 1973, c. H-11, did not provide the authority to award legal costs:* Moncton (City) v. Buggie *(1985), 21 D.L.R. (4th) 266 (N.B.C.A.). That said, I am of the view that an adjudicator has the power to compensate the loss incurred by a party in the pursuance of a grievance where that loss occurs as a result of the other party's actions.*
>
> *[354] In this case, five disclosure orders were issued pursuant to the power vested in an adjudicator by paragraph 226(1)*(e) *of the* PSLRA . . . .
>
> *[355] The respondent's continued failure to fully disclose relevant documentation, in a timely matter and in compliance with the disclosure orders, considerably and unduly lengthened the hearing, led to numerous letters from Mr. Tipple's counsel requiring the respondent's compliance with the disclosure orders, and led to numerous case management conferences. I have no doubt that Mr. Tipple incurred additional legal costs that were directly attributable to the respondent's non-compliance with the disclosure orders.*
>
> *[356] In light of the evidence before me, I find that, on a balance of probabilities, Mr. Tipple incurred additional legal costs caused by the respondent's continued failure to comply with the disclosure orders issued in this case and that the respondent is liable for those additional costs. . . .*
>
> . . .

In this case, the grievor has not offered evidence that would justify a similar award of damages. Certainly, I have no proof before me that the amounts spent by the grievor for legal representation, whatever those amounts may have been, were unusual, were unreasonably increased by any reprehensible action of the employer subsequent to the termination decision or were otherwise exceptional. Unless the case law under the *PSLRA* or legislation for other comparable administrative tribunals evolves to recognize a general obligation that an employer that has acted unlawfully must make a grievor or a complainant whole with respect to his or her legal costs, I do not believe that adjudicators will, or should, award legal costs in the ordinary course of affairs.

[133] The grievor has also sought an award of general damages, essentially on the following two grounds: (1) that the Director acted in bad faith on Mr. Meunier's predisposition to get rid of the grievor and that the employer conducted an investigation that lacked important elements of due process; and (2) that the Director's decision has had harsh repercussions on the grievor's health.

[134] The only evidence that I have that Mr. Meunier acted on an alleged determination to get rid of the grievor was her recollection of a single conversation with him shortly after his appointment as her supervisor in November 2008. While the grievor's version of that conversation was not contradicted by evidence from the employer, it nonetheless falls short of being sufficiently clear, convincing and cogent to establish on a balance of probabilities the existence of bad faith justifying an award of damages. The grievor may have had good reason for feeling disquieted by what Mr. Meunier said on their first encounter, but I am unable to conclude on that basis alone that Mr. Meunier had already formed an animus against her or that the Director's decision to terminate her employment was causally linked to that animus.

[135] With respect to the allegations that the employer did not follow due process requirements, I rely on *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (QL) (C.A.), for its finding that a *de novo* adjudication hearing resolves any procedural defects in the employer's investigation.

[136] Without disputing that the grievor's health was adversely affected by the Director's decision, at least in the short term, I accept the employer's argument, founded in *Honda Canada Inc.*, that specific evidence of actual medical costs attributable to the employer's actions would be required to support an award of damages for adverse health effects. The physician's notes supporting sick leave (Exhibit G-23) do not appear to satisfy that requirement.

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

(The Order appears on the next page)

VI. Order

[138] I declare that an adjudicator has jurisdiction over the grievor's termination of employment and dismiss the employer's objection to jurisdiction.

[139] I declare that the employer has not discharged its burden of proving on a balance of probabilities that termination was justified.

[140] I order the grievor reinstated to her position retroactive to the date of the termination of her employment. I further order the employer to restore to the grievor her salary, all salary-related benefits, all leave entitlements and all other benefits to which the grievor would have been entitled had her employment not been terminated, less any employment income earned by the grievor from other sources after January 8, 2010.

[141] I order the employer to remove from the grievor's employee file any reference to her termination and to the Director's letter of January 8, 2010.

[142] I shall remain seized of this matter for a period of 60 days for the limited purpose of resolving any issues that arise in giving effect to the corrective action that I have ordered.

December 22, 2010.

Dan Butler,
adjudicator