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File: 566-02-2338

Citation: 2010 PSLRB 45



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

JULIE HOPWOOD-JONES

Grievor

and

**DEPUTY HEAD
(Department of Transport)**

Respondent

Indexed as
Hopwood-Jones v. Deputy Head (Department of Transport)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: [Marie-Josée Bédard, adjudicator](#)

For the Grievor: [Patricia H. Harewood, Public Service Alliance of Canada](#)

For the Respondent: [Debra L. Prupas, counsel](#)

Decided on the basis of written submissions
filed February 12 and March 5, 12, 22 and 24, 2010.

REASONS FOR DECISION

Individual grievance referred to adjudication

[1] The grievor, Julie Hopwood-Jones, was an intelligence analyst at Transport Canada (“the respondent”) when her employment was terminated on April 24, 2008. The letter of termination sets out as follows the reasons for her dismissal:

...

... During the midnight shift from 00:00 to 08:00 on January 31, 2008, you left the workplace without authorization for more than 2.5 hours and as such failed to perform assigned duties for the period in question. This absence was compounded by the fact that you created a security breach by removing classified material from the workplace without following Government Security Policy requirements for the handling, storage, communication and transportation of classified material.

Based on the information provided [sic] me, I have determined that your actions placed the department in a significant risk situation in three specific areas: 1) inability for the TCSC to respond or act in the event of an incident or event; 2) inability for Security Operations to respond or act in the event of an incident or event: and, 3) placed classified material in a position where it could have been lost, stolen or compromised, which could have caused serious injury to national interests.

...

[Emphasis added]

[2] On May 13, 2008, the grievor filed a grievance against the termination of her employment, and she referred it to adjudication on September 23, 2008.

Preliminary matters

[3] The Chairperson of the Public Service Labour Relations Board (“the Board”) originally appointed a different adjudicator to hear the grievance, and the hearing was scheduled for August 10 to 14, 2009. At the start of the hearing, the grievor made a request seeking an order compelling the respondent to disclose the Passenger Protect Program (PPP) binder (“the PPP binder”). The respondent objected to the request and asked that it be heard *in camera* (meaning “in private”). The grievor did not object to that request. After both parties presented their submissions on that request for disclosure, the originally assigned adjudicator found that he did not possess the

appropriate security clearance to continue the hearing. The hearing was therefore adjourned.

[4] On July 17, 2009, the grievor sent a written request to the respondent for the disclosure of material, including the PPP binder. The respondent refused to disclose a copy of the PPP binder on the grounds that it contains “sensitive information” and “potentially injurious information” as defined in section 38 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 (“the *CEA*”). The respondent, however, provided the grievor with the PPP binder’s table of contents.

[5] The respondent objected to disclosing the PPP binder on three grounds. First, it alleged that the contents of the PPP binder are not relevant to the merits of the grievance. Second, it contended that the PPP binder contains “sensitive information” and “potentially injurious information” as defined in section 38 of the *CEA* and that, pursuant to sections 38.01 to 38.15 of the *CEA*, an adjudicator does not have jurisdiction to compel disclosure of such material. Third, it contended that the PPP binder is also covered by the *Aeronautics Act*, R.S.C., 1985, c. A-2, and the *Identity Screening Regulations*, SOR/2007-82, and that an adjudicator does not have jurisdiction to compel disclosure of such material. The grievor, for her part, contended that the contents of the PPP binder are relevant to her grievance, that they should be disclosed and that an adjudicator has jurisdiction to compel its production.

[6] On November 25, 2009, the Chairperson of the Board appointed me to hear the grievor’s grievance and to deal with any matter related to it.

[7] On November 30, 2009, the parties were asked if the request for disclosure of the PPP binder and the respondent’s objection to its disclosure could be dealt with by way of written submissions. The parties agreed.

[8] The hearing on the merits of the grievance has been scheduled for May 10 to 14, 2010.

Request for disclosure

[9] The respondent explained as follows the nature of the PPP binder:

...

7. While aviation security has always been a priority for the government, the terrorist events of September 11, 2001 were the catalyst for developing new programs to promote aviation security. The Passenger Protect Program ("PPP") is part of the Canadian Government's expanded aviation security initiatives and is designed to keep people, who may pose an immediate threat from boarding a flight.

...

[10] In her submissions of February 12, 2010, the grievor transcribed the table of contents of the PPP binder. For ease of reference, I am reproducing here the description of the items of the table of contents that the respondent later provided:

- (a) "PPP SPL Data Sheets": the acronym SPL refers to the *Specified Persons List*. The Sheets contain classified (Secret) information relating to individuals specified by the Minister of Transport and are used by the Intelligence Analyst (the grievor's position) to confirm the identity of a specified person when informed by an airline of a match and in their decision whether or not to issue an Emergency Direction;
- (b) "Record of Destruction for PPP call notepad": on receipt of a call by the PPP Operations 24/7 line, the Intelligence Analyst is required to make notes capturing the information provided by the carrier. Section 4.81(6) of the Aeronautics Act requires that this information be destroyed within 7 days. The notepad indicates that the destruction has been completed for the notes taken;
- (c) "SPL list": as indicated above;
- (d) "PPP SOP V.8" ... the acronym refers to the *Passenger Protect Program Standard Operating Procedures*;
- (e) "PPP Alphabetical list of persons on the SPL": refers to the listing of specified persons in alphabetical order;
- (f) "PPP Numerical list (sic) of persons on the SPL": each person on the SPL is given a unique numerical identifier and the list is ordered by the numerical identifiers;
- (g) "Guideline under which individuals have been added to the SPL": there are three and they guide the Specified

Persons List Advisory Group in reviewing a nomination for an addition to the SPL;

- (h) "Emergency Direction (generic) for Carriers: an ED is issued in the event of a positive match of an individual seeking to board an airplane and the formation of an opinion by the Intelligence Analyst of an immediate threat to aviation security;*
- (i) "ED for Individuals": the acronym ED stands for Emergency Direction as used in (h),*
- (j) "Three (3) samples of ED for the three (3) criteria": the criteria are the 'guidelines' referred to in (g) above;*
- (k) "USB key containing electronic version (sic) of SPL, Data Sheets and PPP SOPs" . . .; and*
- (l) "Keys for entry into High Security Zone": a high security zone is a designation for a building area that meets specific security requirements.*

[Sic throughout]

The grievor described as follows the relevance of the PPP binder:

...

- 2. The PPP binder is a document that is classified as Secret. It contains information related to the protection of aviation security in Canada, including the specified persons list, also known as the "no-fly list". This is a list of persons that are not authorized to board flights in Canada, or presumably elsewhere.*

...

- 52. The contents of the binder are relevant to the issue at bar because the employer dismissed the employee when she allegedly left her workplace on January 31, 2008 with this very document in hand and without authorization. The employer claims that the grievor's action constituted a security breach because inter alia, "...she placed classified material in a position where it could have been lost, stolen, or compromised and could have caused serious injury to "national interest".*

- 53. In particular, the binder is relevant because allowing the bargaining agent to review it [sic] contents could help determine:*

- (a.) whether there were any policies or procedures contained in the binder which outlined the nature of the restrictions*

on the use, distribution or communication of the information in the binder;

(b.) whether the binder physically appeared to be a Secret document on account of markings on it or inside of it;

(c.) whether there was any training or other material in the binder regarding how the information in the binder ought to be, stored or secured;

(d.) whether the binder's authenticity can be confirmed;

(e.) whether the contents of the binder, including the Table of Contents, were changed or in any way modified, following the grievor's dismissal;

(f.) other questions which may arise or be related to all of the above.

...

[11] The respondent, for its part, contended in its submissions of March 5, 2010, that the contents of the PPP binder are not relevant to the merits of the grievance. It articulated its positions as follows:

...

17. *The bargaining agent states that "the contents of the Binder are relevant to the issue at bar because the Employer dismissed the Employee when she left her workplace on January 31, 2008 with this very document in hand and without authorization" (paragraph 52). As noted in paragraph 15, the termination of the Grievor's employment was because she left the workplace without authorization. Authorization to leave with the PPP Binder is not the issue in question even if such authorization were possible.*

...

The respondent also replied as follows to each of the specific elements on which the grievor based her allegations about the relevance of the contents of the PPP binder:

...

19. *In response to paragraphs 53(a) and (c) of the bargaining agent's submissions, the Employer states for the record that in [sic] the PPP Binder did not contain the referenced material.*

20. *In response to paragraph 53(b), the Employer states for the record that on the front of the PPP Binder, at the top,*

there was a sticker that said "Secret". The Employer reiterates that the PPP Binder contains sensitive information and potentially injurious information as defined in section 38 of the CEA.

...

23. In response to paragraphs 53(d) and (e) and further to paragraph 22 above, the PPP Binder is an "evergreen document" that is regularly updated. Between January 31, 2008 and June 16, 2008, updates were made to the PPP binder. The Employer can account for the chain of custody of the PPP Binder from June 16, 2008 to the present.

24. The PPP Binder was taken out of service on June 16, 2008 and a replacement binder was put in place. A section on the security of information was added to Standard Operating Procedure (SOP) 3 on July 18, 2008 by Chris Free, Manager of the PPP. Mr. Free will be a witness for the Employer at the hearing on the merits. Another part was added to the same SOP addressing business continuity. In addition, other non-essential information was removed from the Binder.

25. The Employer submits that the bargaining agent has not established the relevance of the actual contents of the PPP Binder and on that basis alone, an order compelling the production of the Binder should not [sic] issue.

...

[12] In her submissions of March 12, 2010, the grievor replied to the respondent's submissions. First, for the respondent's statement with respect to the grievor's specific allegations about the material's relevance, the grievor contended as follows:

...

9. . . . the bargaining agent submits that it is inappropriate for the respondent's Counsel to suggest that in place of producing the binder for review, it would be sufficient to stipulate for the record that the binder does not contain any directions prohibiting its removal from the workplace or that it had a sticker on it that said "Secret".

10. The Adjudicator should not allow the Employer's counsel to be both the Employer's advocate and give evidence at the same time. Furthermore, neither the Adjudicator nor the Board are a court of record.

...

With respect to the relevance of the contents of the PPP binder, the grievor added the following:

...

13. *Furthermore, the bargaining agent submits that it intends to lead evidence from the grievor that establishes is [sic] because of the very nature of the information that she allegedly removed without authorization that the employer disciplined her so severely.*
14. *The respondent has submitted at paragraph 24 of its submissions that the PPP binder was taken out of service on June 16, 2008 and a replacement binder was put in place which included information on the security of information. This is information that apparently was not previously in the binder. The bargaining agent submits that this action was taken by the Employer less than two months after the grievor was fired.*
15. *The bargaining agent submits that the Adjudicator will be unable to appreciate the gravity or lack thereof of the grievor's alleged actions and the Employer's response if it is unable to fully appreciate the binder's content or have any access to it at all.*

...

The grievor also requested the respondent to state, in its estimate, which of the following documents contain potentially sensitive or injurious information and which documents it could disclose:

...

- a.) *A brief description of what each item in the Table of contents is referring to, since the Table of Contents, as provided on August 5th, 20009 [sic] is not clear; Copies of the following:*
- b.) *PPP SOP V. 8.0*
- c.) *Guideline under which individuals have been added to the SPL*
- d.) *Emergency Direction (generic) for Carriers*
- e.) *ED for individuals*
- f.) *Three (3) samples of the ED for the three (3) criteria*
- g.) *PPP SOP's (if this differs from the PPP SOP V. 8.0)*
- h.) *The actual binder that contained the abovementioned documents*

...

[13] Despite its objection to the relevance of the PPP binder, the respondent agreed, in its submissions of March 22, 2010, to disclose certain documents in the PPP binder. First, the respondent stated that it provided a copy of the PPP SOP V.8.0 (Standard Operating Procedures) to the grievor on August 10, 2009. The respondent also stated that it had disclosed the following items:

- the guidelines under which individuals have been added to the Specified Persons List (SPL);
- the Emergency Direction (ED) (generic) for carriers; and
- the ED for individuals.

With respect to the standard operating procedures, the respondent stated that they are set out in PPP SOP V.8.0 (Standard Operating Procedures). The respondent also stated that it was prepared to disclose the empty binder for inspection purposes and, if needed, to allow the grievor to view the empty binder at the respondent's office before May 10, 2010.

[14] In her submissions of March 24, 2010, the grievor acknowledged that, on August 10, 2009, she received a redacted copy of the PPP SOP V.8.0 (Standard Operating Procedures). With respect to the respondent's offer that the grievor review the empty binder at its office prior to May 10, 2010, the grievor requested that both the grievor and her representative have an opportunity to review the empty binder prior to that date.

Reasons

[15] I will deal first with the relevance of the PPP binder. If I find that the PPP binder is relevant to the issues raised by the grievance, I will then deal with the respondent's objection to my jurisdiction to compel its production.

[16] Sopinka, Lederman and Bryant, in *The Law of Evidence in Canada*, 3rd ed., expressed what follows at §2.36:

§2.36 . . . the first step in determining what is relevant is to identify the facts that are in issue in the case. It is the substantive law relating to the particular charge or cause of action that forms the basis for this identification exercise. . . .

[17] In *Canadian Labour Arbitration*, 4th ed., Brown and Beatty laid out as follows the parameters to apply in determining whether a pre-hearing disclosure order should be issued:

...

3:1400 Pre-hearing Disclosure

...

... the requirements of natural justice require that one party not unfairly surprise the other, and accordingly, some arbitrators have required pre-hearing disclosure of information and documents that are necessary to enable a party to participate properly in the adjudicative process. ...

...

3:1420 Production of documents

The purpose of production of documents is somewhat different from the requirement that particulars be provided, in that, production of documents assists a party in actually preparing its case, whereas particulars simply inform the other side of the case it will be required to meet. ...

...

3:1422 Ordering production

The basic criterion for ordering production of documents is a determination of whether they may be relevant to the issues in dispute. And in that regard, the test at the pre-hearing stage would appear to be either "arguably relevant" or "potentially relevant". ...

...

[Footnotes omitted]

[18] I acknowledge that the grievance is very important for the grievor, who has lost her employment. I am also mindful of the grievor's right to benefit from a fair hearing and to have a real opportunity to make her case. That being said, while I have no doubt that the PPP binder is relevant to the reason why the respondent terminated the grievor's employment, I am not satisfied at this point that the full contents of the PPP binder are arguably relevant to the merits of the grievance and that having access to the documents that the respondent refused to disclose would help the grievor prepare efficiently for her case.

[19] Considering the position taken by the respondent, the following portions of the PPP binder remain at issue:

- (a) PPP SPL data sheets;
- (b) records of destruction for PPP call notepad;
- (c) the SPL;
- (e) the PPP alphabetical list of persons on the SPL;
- (f) the PPP numerical list of persons on the SPL;
- (j) three samples of the ED for the three criteria;
- (k) the USB key containing electronic versions of the SPL, the data sheets and the standard operating procedures; and
- (l) the keys for entry into the high-security zone.

[20] Two of the reasons that the respondent invoked for terminating the grievor's employment refer as follows to the PPP binder:

- the grievor allegedly removed classified material without following the security policy requirements; and
- by doing so, the grievor put the respondent at risk because she allegedly placed classified material in a position where it could have been lost, stolen or otherwise compromised, which could allegedly have cause serious injury to national interests.

It is not disputed that the classified information referred to by the respondent is the PPP binder.

[21] I will discuss the relevance of the documents at issue with respect to each of the two above-mentioned reasons invoked by the respondent.

[22] With respect to the first reason, I find that the PPP binder is relevant to the case at hand as it is the "classified material" that the grievor allegedly removed from the workplace without respecting the appropriate policy and procedures. I am satisfied

that the classified nature of the PPP binder is important since the respondent's allegation about the security breach relies on the "classified" nature of the PPP binder. However, considering the reason given and the grievor's admission of the classified nature of the PPP binder, I fail to see how its actual contents would be relevant to assess whether the termination of the grievor's employment was justified in the circumstances.

[23] The grievor indicated in her submission that she wanted to access the PPP binder to check "... whether there were any policies or procedures contained in the binder which outlined the nature of the restrictions on the use, distribution or communication of the information in the binder ..." and "... whether there was any training or other material in the binder regarding how the information in the binder ought to be, stored or secured." The respondent admitted that the PPP binder did not contain any such information.

[24] The grievor alleged that it would be inappropriate for me to allow counsel for the respondent to give evidence while acting as the respondent's advocate. I consider that representatives of parties may make official admissions on questions of fact on behalf of the party they represent and that such statements act as admissions binding on the party. Therefore, unless the grievor intends to question the veracity of the admissions made by the respondent, I consider that the respondent is bound by the admissions made by its counsel and that those admissions can serve as evidence. Thus, considering the respondent's admission that the PPP binder does not contain "... policies or procedures ... which outlined the nature of the restrictions on the use, distribution or communication of the information in the binder ..." or any "... training or other material ... regarding how the information in the binder ought to be, stored or secured ...", I find that there is no need to review the PPP binder for that matter.

[25] With respect to the physical aspect of the binder, the respondent stated that the document was marked "Secret," has offered to disclose the empty binder before May 10, 2010 and has agreed to let the grievor review the binder in its office. Considering the grievor's admission that the PPP binder is classified, and considering the respondent's offer, I do not see the purpose of reviewing the actual contents of the PPP binder.

[26] The question about the relevance of the contents of the PPP binder differs with respect to the respondent's second reason, which was that the grievor's action could have resulted in a serious injury to national interests.

[27] Considering that I have not yet heard any evidence, I cannot assess at this point whether the entirety of the PPP binder might be relevant, but I can find that the PPP binder contains some documents that are arguably relevant to determining whether an injury to national interests could have occurred and, should that be the case, to measuring the degree of seriousness of the injury. The grievor contended that the very nature of the information that she allegedly removed without authorization led to the severity of the disciplinary measure imposed on her. In that context, I find that information about the contents of the PPP binder is arguably relevant to the merits of the grievance. However, that does not mean that disclosing or reviewing the full contents of the binder is necessary to allow the grievor to prepare her case efficiently.

[28] The respondent agreed to disclose the following documents contained in the PPP binder:

- the guidelines under which individuals have been added to the SPL;
- the ED (generic) for carriers; and
- the ED for individuals.

Furthermore, the respondent has also already provided the grievor with a copy of the PPP SOP V.8.0 (Standard Operating Procedure), but certain information was redacted due to the allegedly "high sensitivity of the information."

[29] However, the respondent refused to disclose the following material:

- PPP SPL data sheets;
- records of destruction for PPP call notepad;
- the SPL;
- the PPP alphabetical list of persons on the SPL;
- the PPP numerical list of persons on the SPL;

- three samples of the ED for the three criteria;
- the USB key containing electronic versions of the SPL, the data sheets and the standard operating procedures; and
- the keys for entry into the high-security zone.

[30] With the exception of the keys for entering the high-security zone and the samples of the ED for the three criteria, all the material at issue relates to the SPL. I can understand how the description of the SPL, its purpose and the context in which it is created and used, etc., are relevant to the grievor's case. However, I fail to see how disclosing the actual SPL with the names of the persons that were, or still are, on it could be relevant to enabling the grievor to prepare her case efficiently.

[31] Turning now to the samples of the ED, I fail to see how they could be relevant to the grievor's efficient preparation of her case considering that the respondent agreed to disclose the ED (generic) for carriers and the ED for individuals.

[32] For all these reasons, I find that the information that the respondent already provided to the grievor and the material that the respondent has agreed to disclose to her are sufficient at this point to allow the grievor to prepare for her case efficiently and benefit from a fair hearing.

[33] One more point. In response to the grievor's question about the changes made to the contents of the PPP binder since her dismissal, the respondent replied as follows:

...

23. . . . the PPP Binder is an "evergreen document" that is regularly updated. Between January 31, 2008 and June 16, 2008, updates were made to the PPP binder. The Employer can account for the chain of custody of the PPP Binder from June 16, 2008 to the present.

24. The PPP Binder was taken out of service on June 16, 2008 and a replacement binder was put in place. A section on the security of information was added to Standard Operating Procedure (SOP) 3 on July 18, 2008 by Chris Free, Manager of the PPP. Mr. Free will be a witness for the Employer at the hearing on the merits. Another part was added to the same SOP addressing business continuity. In

addition, other non-essential information was removed from the Binder.

...

The respondent stated that it provided a copy of the PPP SOP V.8.0 (Standard Operating Procedures) to the grievor on August 10, 2009 and admitted that portions of it were redacted.

[34] In her submissions, the grievor referred to the new section on the security of the information that was added to the standard operating procedures. Without directly alleging how the new section on the security of information would be relevant to the case at hand, the grievor alluded to it in the following manner:

...

The respondent has submitted at paragraph 24 of its submissions that the PPP binder was taken out of service on June 16, 2008 and a replacement binder was put in place which included information on the security of information. This is information that apparently was not previously in the binder. The bargaining agent submits that this action was taken by the Employer less than two months after the grievor was fired.

...

[35] I do not know if the version of the PPP SOP V.8.0 (Standard Operating Procedures) that the respondent handed to the grievor on August 19, 2009 contained the new section or if it was the version in force when the grievor was dismissed. Nor can I determine at this point if the redacted portions of the PPP SOP V.8.0 (Standard Operating Procedures) have any relevance to the case at hand. However, the respondent indicated that Chris Free, Manager of the PPP, would testify at the hearing. The grievor will have the opportunity to cross-examine that witness about the standard operating procedures. I am prepared to hear any grievor's new request for disclosure if, after hearing from that witness, she still believes that the redacted portions of the PPP SOP V.8.0 (Standard Operating Procedures) or that the latest version of the standard operating procedures are relevant to her case.

[36] I am similarly prepared to hear any grievor's new request for disclosure if, after hearing the respondent's evidence, she still believes that the other documents contained in the PPP binder that the respondent has refused to disclose are relevant to

her case. Although I am not satisfied at this stage that the documents that remain at issue are arguably relevant to the grievor's case, it does not prevent the grievor from claiming later on that those documents have become relevant in light of the events that will unfold at the hearing. Should that occur, I will rule on the issue of relevance in light of the evidence and the arguments put before me at that time.

[37] Given my findings on the question of the relevance of the documents and the respondent's agreement to disclosing some of the documents requested, there is no need for me to rule on the respondent's objection to my jurisdiction to compel disclosure of the PPP binder. However, considering that the question about the relevance of the PPP binder may not be definitely resolved, I wish to add the following comments.

[38] The respondent alleged that the PPP binder contains "potentially injurious information" and "sensitive information" as defined in section 38 of the *CEA*. The respondent also indicated that, should I order disclosure of the PPP binder, it intends to invoke section 38 of the *CEA* and give notice to the Attorney General pursuant to section 38.01 of the *CEA*. The respondent contends that the Federal Court would then have the exclusive jurisdiction to rule on the disclosure of the PPP binder.

[39] Under such circumstances, I consider that, although I have jurisdiction to compel disclosure of documents that are relevant to the issues raised by the grievance, I would not have jurisdiction to determine whether the material contains "sensitive information" or "potentially injurious information" as defined in section 38 of the *CEA*. The exclusive jurisdiction to rule whether information is protected under the *CEA* rests with the Federal Court under the comprehensive regime provided at sections 38 to 38.16 of the *CEA*.

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

(The Order appears on the next page)

Order

[41] The request for disclosure of the PPP binder is granted to the extent that the respondent is ordered to allow the grievor and her representative to view the empty PPP binder prior to May 10, 2010.

[42] Further, the respondent is ordered to disclose to the grievor, prior to May 10, 2010, the following material contained in the PPP binder:

- the guidelines under which individuals have been added to the SPL;
- the ED (generic) for carriers; and
- the ED for individuals.

March 29, 2010.

**Marie-Josée Bédard,
adjudicator**