Date: 20100615

File: 166-02-37432

Citation: **2010 PSLRB 78**

Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

MATT BYGRAVE

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Bygrave v. Treasury Board (Canada Border Services Agency)

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

REASONS FOR DECISION

Before: Michel Paquette, adjudicator

For the Grievor: Debra Seaboyer and Allison Dewar, Public Service Alliance of Canada

For the Employer: Isabel Blanchard, Treasury Board

Heard at Vancouver, British Columbia,
April 28 to May 1 and December 1, 2009, and March 2 and 3, 2010.

Grievance referred to adjudication

[1] On January 9, 2007, Matt Bygrave ("the grievor") referred his grievance dated January 28, 2005 to adjudication. The grievance reads as follows:

> *I grieve that my employment has been terminated. I grieve that the employer has failed to accommodate my disability.*

The grievor seeks the following corrective action:

> *I request that the termination be rescinded, that I be repaid all lost wages and benefits, that any mention of the termination be removed from file and that I be made whole.*

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

[3] The Public Service Labour Relations Board has unsuccessfully attempted, on several occasions, to schedule a hearing for this case. Notably, its Chairperson accepted a request from the grievor's bargaining agent to postpone the hearing scheduled for May 13 to 16, 2008, due to the inability of the grievor to attend a lengthy hearing and assist in his own defence. A hearing was conducted from April 28 to May 1, 2009, but a continuation was required. The continuation hearing that was scheduled for August 17 to 21, 2009 was postponed due to the incapacity of the grievor's representative, Debra Seaboyer, to pursue the case. She was replaced by Allison Dewar. Another hearing, scheduled for December 1 to 4, 2009, was also postponed because of the grievor's health. He was once again unable to attend and assist in his own defence. The hearing was finally concluded on March 2 and 3, 2010.

Summary of the evidence

[4] The following facts were revealed during the hearing through the testimony of eight witnesses for the Canada Border Services Agency (CBSA) and two for the grievor, including himself. Since the facts were not disputed, I will summarize them in this section.

[5] Before December 2003, the responsibility for the free flow of persons and goods to and from Canada resided with the Canada Customs and Revenue Agency (CCRA).

The CCRA had a code of ethics and a disciplinary policy. In December 2003, a new agency, the CBSA, was created to handle that responsibility. It incorporated the code of ethics and the disciplinary policy as its own.

[6] The grievor became an employee of the CCRA in April 2000 as a customs inspector (CI) at the PM-02 group and level at the Vancouver International Airport (VIA). The main work of ensuring the access of goods and people to Canada at the VIA is divided into two units: Traffic Operations for individuals and Commercial Operations for goods. Customs inspectors work in teams and report to customs superintendents (SI), who in turn report to a chief of operations (CO) who reports to the director of the VIA. The director reports to the regional director general (RDG), Pacific Region, for the CBSA. The witnesses for the CBSA were, as follows, the incumbents at the relevant time: the RDG, the Director of the VIA, the different COs in Traffic and Commercial Operations, one SI from each of Traffic and Commercial Operations and finally one CI from Commercial Operations.

[7] The grievor was considered a good employee and had no disciplinary record until a series of events that started in December 2003 and that led to his termination in January 2005.

[8] On December 24, 2003, the grievor was involved in a heated confrontation with a client, and on December 25, he behaved in a loud and unprofessional fashion in a public area. The Acting Chief at that time spoke with the grievor on December 26, and found him very agitated and convinced that people were conspiring against him. The Acting Chief assured him that he enjoyed a good reputation but on December 31, while meeting with his direct supervisor, the grievor became loud and irrational. He stated that management was out to get him.

[9] Management met with the grievor on January 7, 2004, as his recent behaviour was not in keeping with his previous workplace conduct. Management had concerns for his well-being and that of other staff working with him. The grievor was accompanied by a bargaining agent representative. He indicated that he was dealing with serious health problems and family issues. He was to be hospitalized for two weeks starting January 9, 2004, followed by a few weeks at home to recuperate. Management informed the grievor that it was reluctant to impose discipline because his recent behaviour was out of character and because it may have been related to a medical issue. For that reason, it provided him with a letter to present to his doctor

requesting a confirmation of whether he was fit to work. The grievor went on sick leave and was hospitalized in January 2004.

[10] The grievor was ready to return to work in early February 2004. He communicated with his supervisor, and a meeting was held on February 3 at which he signed the appropriate forms for a Fitness to Work Evaluation (FTWE) with Health Canada. These forms were sent on February 4, 2004.

[11] On February 11, 2004, the grievor informed the CBSA that he would not submit to the FTWE but that he would provide a letter from his own doctor. A meeting was arranged for February 12, 2004, and the grievor declined to have a bargaining agent representative present when offered the option. He presented a note from his doctor stating that he ". . . is able to return to work February 11, 2004." He also indicated that his behaviour was directly related to the pain that he had endured since the previous spring and the medication that he had been taking for it, which he was no longer taking. Management was not satisfied with the short note from the doctor, and after a discussion, it decided to call the doctor. The grievor's work conditions were reviewed with the doctor, who stated that the grievor did not require accommodation and that he had agreed to take an anger-management course. The doctor concluded that the grievor was emotionally and physically fit to return to work. Management was satisfied but informed the grievor that any new outburst would be dealt with through the disciplinary process up to and including termination of employment, to which he agreed.

[12] An incident of insubordination occurred with an acting SI on February 19, 2004. On February 24, 2004, the grievor met with a bargaining agent representative. He was given a written reprimand on February 25, 2004, warning him of further disciplinary action, up to and including the termination of his employment, which he did not grieve.

[13] On February 25, 2004, the grievor presented management with a letter from his doctor suggesting a temporary assignment of three to six months in Commercial Operations to facilitate his recovery, as he needed a slower pace and regular hours. Management agreed, and the paperwork was filed for a six-month secondment in Commercial Operations starting on March 1, 2004.

[14] On August 3, 2004, co-workers overheard the grievor using profanity in a loud voice over the phone and within hearing distance of the public counter at the VIA's Air Cargo Operations. Later that same afternoon, he requested leave for a medical appointment. Instead of seeking medical care, he went to a collection agency to pursue a personal matter, and he became aggressive. Someone from the collection agency called 911. The Vancouver Police arrived and arrested and handcuffed him. The shirt and shoulder flashes of his uniform were exposed and collection agency staff and the Police saw them. He was removed from the premises but was released and was asked to report the incident to the CBSA due to his status as a peace officer. He returned to work and informed the SI that he had lied, and apologized.

[15] On August 18, 2004, the grievor wrote a letter to the RDG indicating that he had been a witness in a harassment complaint in 2003 and that he felt that it had not been dealt with appropriately. He expressed his feelings to that effect. He mentioned that, since then, he had been the victim of retaliation, including discipline.

[16] The grievor met with the CO, one SI and was accompanied by a bargaining agent representative on August 19 and 20, 2004, to discuss the incident, but the grievor was uncooperative, belligerent and showed no remorse. He was given a five-day suspension on September 9, 2004, to be served between September 13 and 17. Again, he was warned that further incidents of a similar nature could lead to more severe disciplinary action. He did not grieve the suspension.

[17] The acting RDG acknowledged receipt of the grievor's letter dated August 18, 2004, commented that it did not contain many details and asked for more information with respect to the incidents in order to respond. The grievor sent an email to the RDG on September 7, 2004, with same subject but without details.

[18] Another incident took place on September 9, 2004, while on training. The instructor and other class participants expressed concern and discomfort about the grievor's irrational comments and erratic behaviour.

[19] On September 10, 2004, on a call from the CO who was following up on a report that stated that the grievor felt that he needed hospitalization, the grievor was hostile, belligerent and was using extensive profanity. He also called the office that evening and asked the officer that answered to tell everyone that he was suspended and that

he would take others down with him. Management interpreted his call as a veiled threat.

[20] While suspended, on September 14, 2004, the grievor received a letter from the CO indicating that the incidents of September 9 and 10, 2004, were under review for possible disciplinary action, that management was again concerned about his health and safety, and that it needed either a certificate from his doctor that he was fit to return to work on September 20, or the grievor's consent to submit to an FTWE at Heath Canada before September 20, 2004. The grievor informed the CBSA that he would consent to an FTWE by Health Canada, and one was arranged for September 20, 2004.

[21] The Acting Director of Finance and Administration, who was responsible for the prevention of harassment in the Pacific Region, emailed the grievor on September 17, 2004, reiterating the need for more details before starting an investigation into the allegations of harassment.

[22] The grievor presented himself for the FTWE at the offices of Health Canada on September 20, 2004, but did not sign the consent forms. Therefore, no assessment was performed. Health Canada informed the CBSA of that fact on the same day.

[23] On September 21, 2004, the grievor submitted more details about his complaint of harassment.

[24] On September 29, 2004, the RDG's answer to the harassment issue was that, as the grievor was only a witness to the incident in 2003, he was not entitled to receive information on the findings and corrective measures, if any. Since the grievor did not bring up the issue with him again, the RDG could only assume that it had been resolved to the grievor's satisfaction. As for a second incident, involving a CI, since the grievor was not a witness, the RDG could not consider the information. Finally, on the alleged reprisal because of the grievor's involvement in the 2003 incident, the RDG required more details before proceeding with an investigation.

[25] On November 4, 2004, the grievor sent a letter of apology for his behaviour to the Director of the VIA and to the RDG.

[26] On November 5, 2004, a letter from a psychologist was sent to the CO in Commercial Operations attesting to the psychological fitness of the grievor to return to full duties, with no restrictions of a psychological nature.

[27] On November 9, 2004, the Acting CO sent a letter to the grievor to educate him about the disciplinary process and the expected standard of conduct in the CBSA before his return to work, which was scheduled for that same day. The letter indicated again, the possibility of progressive discipline up to and including termination.

[28] The grievor returned to the workplace on November 9, 2004. He was warned that his use of profanity and demeaning language toward management was inappropriate and unacceptable. He initially reacted with an outburst but calmed down and acknowledged responsibility for his actions and apologized. He agreed to conduct himself in a professional manner in the future. The CO advised him that such behaviour in the future would result in disciplinary action up to and including termination.

[29] On the morning of November 15, 2004, the grievor entered his SI's office and yelled at his SI in a disrespectful and insubordinate manner. He then left the office abruptly and had a confrontation with a co-worker.

[30] Later that day, in a fact-finding meeting with the CO, the SI and a bargaining agent representative, the grievor yelled profanities and directed abusive and demeaning language toward the CO and the SI. He slammed his notebook and threw it about the office. Others rushed to the CO's office to render assistance. The grievor also challenged and degraded the CO on his procedural knowledge of addressing complaints.

[31] The next day, the grievor uttered profanities in response to an inquiry made by his SI. He was advised that the matter was under review and that discipline might follow.

[32] That same afternoon, during a disciplinary hearing into the incidents of November 15, 2004, the grievor apologized for his actions.

[33] On November 19, 2004, the grievor approached his SI in a hostile and belligerent manner and proceeded to scold him using extensive profanity in a demeaning manner. The grievor was removed from the workplace. That afternoon, he called the CO,

directed profanities towards him and made demeaning comments. He also threatened the CO and accused him of corruption.

[34] The grievor was suspended from work pending an FTWE from Health Canada on November 22, 2004, and without pay starting on November 23. His written consent was sought and obtained. Pending disciplinary matters were put in abeyance.

[35] The grievor agreed to an occupational psychiatric assessment and met with a psychiatrist hired by Health Canada on December 20, 2004. The CBSA obtained the results (not the report) of the assessment on January 5, 2005. The grievor was found fit for his usual duties without any restrictions or accommodations. The psychiatrist also testified at the hearing on behalf of the grievor. He referred to his report of December 20, 2004, and pointed out that "[b]y history, there is suggestive but not conclusive evidence of two episodes of hypomania with no depressive episodes in his life . . . There has been no evidence of this problem for the last three weeks." The psychiatrist had not treated the grievor at the time or since and therefore could not confirm a diagnostic. The grievor admitted in cross-examination that he had not been completely truthful because he had wanted to return to work and to not be considered unfit to work.

[36] The grievor's employment with the CBSA was terminated on January 10, 2005, based on progressive discipline.

[37] The grievor wrote a letter to the RDG on January 17, 2005, to apologize for his behaviour in 2004 and to explain that his change in behaviour was caused by a medical condition and that it was heightened by his medication.

[38] The grievor filed his grievance on January 28, 2005.

[39] The grievor realized only in March 2005 what he had done, and he sought medical help. He was treated for depression in fall 2005. He feels better today.

[40] I would add that all the CBSA's witnesses stated that they would not work with the grievor again following his behaviour in 2004.

Summary of the arguments

[41] The grievor's representative indicated before beginning her arguments that she would not argue the allegation of failure to accommodate but only the termination. I would add that, had she tried to argue that point, I would not have had jurisdiction on a matter under the *Canadian Human Right Act* (CHRA) under the old *Act,* given the decision of *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27.

[42] Counsel for the employer indicated that this was a termination for disciplinary reasons under paragraph 11(2)(*f*) of the *Financial Administration Act* (*FAA*). I must find answers to the following two questions: 1) Did the alleged actions occur? 2) If so, was the penalty justified?

[43] The answer to the first question is clear. They did occur and the grievor admitted that fact.

[44] As for the second question, counsel for the employer argued that the penalty was justified based on the facts at the time of the termination and the progressive discipline imposed. The employment relationship had deteriorated beyond repair. The insubordination, abusive language and aggressive behaviour were not disputed. The employer was concerned about the health and safety of the grievor and his co-workers and asked three times for an FTWE. Each FTWE declared the grievor fit to work without accommodation. Faced with escalating insubordination, appropriate discipline and warnings of further action up to and including termination, no medical evidence of a condition to explain the change in behaviour and a lack of success in altering the grievor's behaviour by ordinary procedures, the employer had no option other than terminating his employment.

[45] As for mitigating factors, counsel for the employer referred me to sections 7:3430 and 7:3660 of Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., entitled "Aggressive and abusive behaviour" and "Insolent and defiant behaviour" respectively, in particular to the following:

. . .

> *As a general principle, it has been suggested that discharge may be appropriate where it can be said that the employee's conduct, viewed in its totality, is "sufficiently contemptuous*

> *of authority as to justify the conclusion that the ongoing employment relationship... should be terminated."*
>
> . . .

[46] Counsel for the employer stated that there was serious and offensive insubordination, that the behaviour was confrontational and defiant toward management, that it created anxiety and even fear in his co-workers, and that the grievor never acted on the many opportunities that he was given to correct his behaviour. Based on the three FTWEs, there was no evidence of a medical condition to explain the abnormal behaviour. Therefore, management had no mitigating factors to allow it to change its decision to terminate.

[47] Counsel for the employer also referred me to the following passage from *Compagnie minière Québec Cartier v. Québec (Grievance arbitrator),* [1995] 2 S.C.R. 1095, to remind me of the jurisprudence on subsequent-event evidence:

> . . .
>
> *In reviewing the company's decision to dismiss an employee, an arbitrator is required to determine whether or not the company had "just and sufficient cause" for dismissing the employee at the time it did so. In his ruling, the arbitrator can rely on subsequent-event evidence but only where it is relevant to the issue before him, i.e., where such evidence helps to shed light on the reasonableness and appropriateness of the dismissal at the time it was implemented.*
>
> . . .

[48] Counsel for the employer also cited *Funnell v. Treasury Board (Department of Justice),* PSSRB File No. 166-2-25762 (19950818), and *Casey v. Treasury Board (Public Works and Government Services Canada),* 2005 PSLRB 46, on subsequent-event evidence.

[49] Finally, counsel for the employer cited *Doucette v. Treasury Board (Department of National Defence),* 2003 PSSRB 66, at paragraphs 103 and 104, if I decided to overturn the termination:

> *[103] If an adjudicator finds that discharge is not justified, the presumption is in favour of reinstatement unless there are grounds for determining that it is not appropriate. The Federal Court reviewed the jurisdiction of the Board to*

> *award compensation in lieu of reinstatement most recently in* Bellavance v Canada, *[2000] F.C.J. No. 1284. In that case, the Curt did not interfere with the adjudicator's decision to order compensation in lieu of reinstatement. In its reasons, the Court referred to the reasons of Justice Létourneau in the Federal Court of Appeal decision of* Atomic Energy of Canada v. Sheikholeslami, *[1998] 3 F.C. 349*:
>
> > It is true that reinstatement is not a right even after a finding of unjust dismissal, but, as I. Christie et al. properly point out, the exception to reinstatement should be applied very cautiously otherwise the risk exists that an unjustly dismissed employee will be penalized by losing his job... . Indeed, a finding of unjust dismissal is a finding that the work relationship should not have been severed in the first place. In such cases, the presumption is, in my view, clearly in favour of reinstatement unless there is clear evidence to the contrary.
>
> *[104] The test that has been articulated by adjudicators is whether the bond of trust has been irretrievably or irrevocably broken (for example, see* McIntyre *(Board file 166-2-25417) and* Amarteifio *(Board File 166-2-25829).*

[50] Counsel for the employer stated that, since the bond of trust has been broken with the grievor, I should not order reinstatement but pay in lieu. Based on five years of service, that amount should be in the range of three to five months' salary at the rate of pay for the PM-02 classification at the time of termination.

[51] The grievor's representative agreed that this was a termination for disciplinary reasons under paragraph 11(2)(*f*) of the *FAA* and that the facts are not disputed. However, she pointed out that the termination should be based solely on the incidents indicated in the January 10, 2005 letter of termination, which took place on November 15, 16 and 19, 2004. What happened previously is context as the grievor had already been disciplined for them.

[52] The grievor's representative stated that, at issue is not whether the discipline imposed was justified based on the acts committed. Rather, the issue is whether the misconduct that occurred in November 2004 was attributable to a medical condition, making it immune from discipline. If this is a case of escalating discipline, as suggested by the employer, where is the evidence identifying the failure of the discipline to correct the behaviour? It is not clear that a failure of progressive discipline occurred. It did not fail because the grievor is a stubborn, insolent individual

with no respect for the code of ethics but because of an underlying medical condition that affected him and that the employer suspected of existing. The evidence shows that the grievor's behaviour was considered out of character by many employer witnesses, and the employer went so far as to request an FTWE three times. This case is more complicated than a failure of discipline.

[53] The grievor did not dispute the chronology of events but submitted that his behaviour was immune from discipline because of a medical condition. His behaviour started to change in late 2003, and many red flags appeared in 2004. The employer should have done more than just ask for an FTWE. It should have questioned and described the behaviour and asked for an expert opinion on mental disorders. The employer should have asked for the December 20, 2004 report from the psychiatrist before deciding to terminate the grievor's employment. It would have seen evidence suggesting that the grievor was suffering from Bipolar Affective Disorder, more specifically, hypomanic episodes. It would have been reasonable to reach that conclusion based on his uncharacteristic behaviour, therefore mitigating his situation and avoiding termination. The employer did not "dig" enough before proceeding with the termination.

[54] The grievor's representative stated that the employer used jurisprudence for uncomplicated case of insubordination but that this is not such a case.

[55] The grievor's representative referred me to *Douglas v. Treasury Board (Human Resources Development Canada)*, 2004 PSSRB 60, in which the adjudicator ruled to reinstate the grievor after acknowledging that her Bipolar Disorder had played a role in her behaviour.

[56] The grievor's representative then turned my attention to the following part of *Spawn v. Parks Canada Agency*, 2004 PSSRB 25, to explain the medical defence test:

. . .

> *[173] Then the employer turned to page 114-115 of the* Canada Post *decision where the arbitrator quoted a four-prong test taken from a decision by arbitrator Ish in* Re Canada Safeway Ltd. And R.W.D.S.U. *(MacNeil) (1999), 82 L.A.C. (4th)1:*
>
> > *1. It must be established that there was an illness, or condition, or situation being experienced by the grievor. Sometimes this is a true illness while other times it might*

be circumstances in a person's life that cause considerable psychological strain and can be as debilitating as a fully recognizable illness.

2. Once an illness or condition has been established, then a linkage or nexus must be drawn between the illness or condition and the aberrant conduct. The mere existence of psychological stress does not automatically lead to improper behaviour such as theft. Again, most commonly this is established by expert evidence. This is not a scientific test and often an arbitration board must, as the finder of fact, draw certain inferences which lead it in one direction or another.

3. If a linkage between aberrant conduct and the illness or condition is established, an arbitration board must still be persuaded that there was a sufficient displacement of responsibility from the grievor to render the grievor's conduct less culpable. even if a gambling or alcohol addiction [page 115] is established, and it is established that but for the condition the aberrant conduct, such as theft, would not have occurred, it still may be concluded that the grievor possesses sufficient responsibility for his or her actions so that a substitution of penalty is not appropriate. This was precisely what occurred in the SaskTel case [Ish, unpublished, July 14, 1998] where it was accepted that the grievor had a pathological or compulsive gambling addiction and that it contributed to his acts of theft but it was concluded that he was still responsible because he had been fully aware of his problem and he was fully aware of the avenues open to him to have his problem dealt with. In other words, the mere existence of an addiction does not in itself explain or justify serious aberrant conduct. There are many people with alcohol, narcotic and gambling addictions but a very small number of those people steal money.

4. Assuming the three elements set out above have been established, the arbitration must be satisfied that the grievor has been rehabilitated. This involves an acceptance by the arbitration board that the grievor's fundamental problems are under control. Of course there can never be absolute certainty on this count nor should absolute certainty be required. However there must be a sufficient degree of confidence that the employee can return to the workplace as a fruitful employee and that the underlying problems that led to the improper behaviour in the first place have been resolved so that the risk of that behaviour, or similar behaviour, occurring in the future is minimized. Again, in addition to the evidence of the grievor, it is usual that expert evidence would be submitted to establish that rehabilitation has occurred.

. . .

[57] The grievor's representative then explained that an illness, hypomania and bipolar disorder, existed when the conduct occurred. The hypomanic episodes affected the grievor's conduct at work, as evidenced by the change in his character. The psychiatrist testified that people suffering from Bipolar Affective Disorder have no idea that they are behaving incorrectly. The same witness confirmed that, with treatment, those affected by Bipolar Affective Disorder can be productive. The grievor's representative went on to submit that the medical defence applies, that the grievor's conduct was non-culpable and that there was no just cause for termination.

[58] In the alternative, if I do not accept the defence of the medical condition combined with a prior clean record, the grievor's candidness and remorse should be sufficient mitigating circumstances to lessen the penalty. The grievor's representative again cited *Douglas* in which the penalty was reduced and conditions were imposed on the grievor to satisfy the employer that the illness was being treated. She suggested that I could do the same thing. She also referred to *Millar v. Treasury Board (Human Resources Development Canada)*, 2001 PSSRB 120, which detailed the same approach.

[59] In response to the employer's position that I should not provide for reinstatement, the grievor's representative stated that, in *Wentges v. Deputy Head (Department of Health)*, 2010 PSLRB 24, there is a strong presumption in favour of reinstatement and that compensation in lieu of reinstatement is the exception.

[60] Were I to find reinstatement not appropriate, the grievor's representative presented the following cases, which detailed the formulas that I should use, especially concerning the loss of rights under a collective agreement: *Canvil v. International Assn. of Machinists and Aerospace Workers, Lodge 1547 (Stone) (Re)* (2006), 152 L.A.C. (4th) 378; *Cassellholme Home for the Aged (District of East Nipissing) v. Canadian Union of Public Employees, Local 146 (Morabito) (Re)* (2007), 159 L.A.C. (4th) 252.

[61] Counsel for the employer replied that, even had it asked the right questions, the grievor was not cooperative and did not want his condition known, so there would still have been no evidence of a medical condition. As for the medical defence, the first requirement is the existence of a medical condition. There is no such definite evidence, just suggestive evidence according to the psychiatrist. Finally, for pay in lieu of reinstatement, the employer does not pay interest.

Reasons

[62] This is a termination for disciplinary reasons under paragraph 11(2)(*f*) of the *FAA*. I must determine the following:

1) Did the grievor commit the alleged acts of insubordination?

2) Is there a medical defence?

3) Was termination an appropriate disciplinary penalty in the circumstances?

4) If termination is not appropriate, is reinstatement appropriate in this case?

[63] The answer to the first question is easily answered as the grievor admitted to all the facts adduced by the employer's witnesses. Therefore, he is guilty of the acts of insubordination committed on November 15, 16 and 19, 2004, following a series of incidents where the grievor displayed hostile behaviour. In one instance, he received a five-day suspension.

[64] For the second question, I looked at the cases brought forward by the grievor's representative. In the *Douglas* decision, I note that the adjudicator took jurisdiction on the human right matter because the grievor had also filed a complaint to the Canadian Human Rights Commission (CHRC) who used its discretion under paragraph 41(1)(*b*) of the *CHRA* not to deal with the complaint at the time. He also had evidence that a medical condition existed at the time of the incidents leading to the termination. As for the *Spawn* decision, the adjudicator looked at the medical evidence which was established as present at the time of the grievor's alleged misconduct as mitigation in reducing the penalty.

[65] The case at hand is different. The first element of the medical defence test is to establish that there was an illness, or condition, or situation being experienced by the grievor.

[66] Unfortunately, that is not the case. The only medical evidence I have before me is the report and the testimony of the psychiatrist who assessed the grievor on December 20, 2004. The psychiatrist's conclusion was that there was a possibility that the grievor was suffering from "episodes of hypomania or bipolar disorder" in 2004, but he could not make such a conclusion. The grievor was part of the problem. He admitted in testimony that he had not been truthful and that he had not provided all

the necessary information to the psychiatrist because he had wanted to return to work and had not wanted to be identified as unfit to work. Therefore, he was the architect of his own demise.

[67] With respect to the third and fourth questions, I believe that termination was appropriate under the circumstances. I find that the grievor's behaviour from December 2003 to November 2004 escalated to a point where his attitude toward management was so contemptuous of authority that the bond of trust was irrevocably broken. Management tried to understand and to find an explanation for the change of behaviour in a previously very good employee. None was provided, and progressive discipline did not correct the behaviour. It actually seemed to make it worse. Therefore, the employer had no choice but to terminate.

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

(The Order appears on the next page)

Order

[69] The grievance is dismissed.

June 15, 2010.

Michel Paquette,
adjudicator