Date: 20100902

File: 566-34-2198

Citation: 2010 PSLRB 97

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

DIANE PILON

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Pilon v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Steven B. Katkin, adjudicator

For the Grievor: John Haunholter, counsel

For the Employer: Michel Girard, counsel

Heard at Ottawa, Ontario.
July 22, 2010

I. Grievance referred to adjudication

[1] On March 1, 2007, Diane Pilon ("the grievor") filed a grievance (Exhibit G-1) in which she contested a half-day (3.75 hours) suspension issued to her on February 27, 2007. At that time, the grievor worked in the Verification and Validation Division at the Ottawa Technology Centre of the Canada Revenue Agency ("CRA" or "the employer").

[2] The letter of suspension, dated February 27, 2007 and signed by Luc Durand, Manager in the Verification and Validation Division at the Ottawa Technology Centre of the CRA (Exhibit E-1-4), reads as follows:

> *This is further to the disciplinary hearing meeting we had on February 22nd, 2007 regarding unprofessional emails sent on February 13th, 2007 to a Calgary TSO agent.*
>
> *The agent sent an e-mail requesting to combine SIN numbers. Further to his request, the agent felt that your replies were not professional and he did not appreciate your tone. During February 22nd, 2007 meeting you admitted that you have been met previously regarding the same issues. Furthermore, you have been given a written reprimand on June 23rd, 2006 in regards with unprofessional emails sent to your team leader.*
>
> *This type of behaviour is unacceptable and will not be tolerated. They contravene CRA values of professionalism and respect as stated in the code of ethics and conduct.*
>
> *Issues of not being professional and respectful with your emails have been discussed in the past and action taken. You are hereby advised to correct your behaviour in the workplace.*
>
> *Considering the very serious nature of your actions, which constitute misconduct according to the Agency Standards of Conduct, you are hereby suspended without pay from your duties for a period of half a day (3.75 hours). You will serve the suspension on Thursday, March 1st, 2007. You are expected to return to work on Thursday March 1, 2007 at 10:45 a.m.*
>
> *A copy of this letter will be placed on your Human Resources file for a period of two years. Please be advised that this half a day suspension will not count as pensionable service.*
>
> *In the future, should you fail to adhere to the departmental Standards of Conduct, you could be subject to more severe*

> *disciplinary action up to and including termination of your employment with the Public Service.*
>
> . . .

[3] In addition to the usual corrective actions requested, i.e., the rescinding of the letter of suspension, the removal of related documentation from the employer's files, the reimbursement for loss of salary and benefits, and the other corrective actions reasonable in the circumstances, the grievor requested the following:

> - *That the employer remove those responsible for issuing this letter of suspension from any and all positions that have supervisory responsibilities;*
> - *That the employer issue a public apology in the form of an Infozone bulletin recognizing that I was unjustly accused of wrongdoing;*
> - *That the employer ensures that those responsible for unjustly issuing this letter of suspension have their unjust actions reflected in their performance assessment.*

[4] The grievance was referred to adjudication on July 14, 2008.

II. Preliminary issue

[5] At the outset of the hearing, counsel for the grievor indicated that he wished to confer with me and with counsel for the employer. At that conference, counsel for the grievor raised the issue of a flawed disciplinary process, alleging that the grievor had not benefited from union representation at the disciplinary meeting or at the meeting at which she received the letter of suspension. He advanced that that issue should be dealt with before hearing the evidence.

[6] Counsel for the employer stated that the issue had never been raised previously in the grievance or in the grievance procedure and that the nature of the grievance could not be changed at this stage. Counsel for the employer added that, in any event, the hearing was *de novo*.

[7] I ruled that the hearing would proceed and that both counsel could address the issue in evidence and argument.

III. Summary of the evidence

[8] The evidence was adduced under an order for the exclusion of witnesses. Counsel for the employer called three witnesses: Sharon McClelland, Team Leader; Mr. Durand, Manager and Nadine Saintot, Manager. The grievor was the sole witness on her own behalf.

A. For the employer

1. Sharon McClelland's testimony

[9] Ms. McClelland had been the grievor's team leader since October 2005. At the time of the incident, she occupied the position of Team Leader, Data Assessment and Verification and Validation Division Evaluation Program, CRA, and supervised approximately 15 employees. She stated that her group carried out work for other sections of the CRA.

[10] She testified that the matter was initially brought to her attention on February 13, 2007 via a call from James David, a CRA employee in Calgary, who complained about an email that the grievor had sent him. Ms. McClelland stated that she had had no previous dealings with Mr. David and that the CRA's website would have allowed him to determine that she was the grievor's immediate supervisor. Under cross-examination, she admitted that she had not taken notes of her discussion with Mr. David.

[11] Ms. McClelland testified that, in response to her telephone discussion with Mr. David, she met the same day with her manager, Mr. Durand, to bring the matter to his attention.

[12] She stated that, after her meeting with Mr. Durand, she received an email from Mr. David to which was attached the grievor's email about which he had complained. She further stated that, during their telephone discussion, Mr. David had not indicated that he would forward the email to her. Ms. McClelland then forwarded that email to Mr. Durand.

[13] Ms. McClelland stated that, while Mr. David's initial email had not been directly addressed to the grievor but rather to the office's general email address for its

Northern Ontario Region, his query would have been assigned to the grievor as the next employee in the queue.

[14] In cross-examination, Ms. McClelland stated that she had no further telephone discussions with Mr. David or further emails from him about his complaint. She further stated that, to her knowledge, no one else in management had email correspondence or telephone discussions with Mr. David about the matter. Asked about the grievor's work performance, Ms. McClelland stated that, while she performed the work assigned to her, she largely kept to herself. She also stated that, during her time as a team leader, the only complaints she ever received were about the grievor, although she did not specify the nature of those complaints.

[16] Ms. McClelland stated that, on February 20, 2007, as directed by Mr. Durand, she sent an email to the grievor, informing her that she was required to attend a disciplinary meeting with Mr. Durand and Ms. Saintot on February 22, 2007 to discuss the matter of the email that she had sent to Mr. David (Exhibit G-3). Ms. McClelland's email informed the grievor that she was entitled to have a union representative present. Ms. McClelland stated that she had no involvement in the disciplinary process and that she did not attend the disciplinary meeting.

[17] The email that Mr. David sent on February 12, 2007 at 16:57 reads as follows (I have omitted all information that would identify the subject of the email):

> *Subject: SIN Combine*
>
> *To whom it may concern:*
>
> *Client has three social insurance numbers under his account: [1], [2] and [3]. It seems that the [2] and the [3] SIN numbers are combined correctly, but the [1] SIN is not, and this SIN is the one associated to wife's CCTB [Canada Child Tax Benefit]. System keeps sending them notifications saying that we need his [year] Return to be filed, the problem is, it has been filed and processed under his [2] and [3] SIN numbers. Please combine all three SINs correctly. Thank you.*

[18] The grievor's reply, sent to Mr. David on February 13, 2007 at 06:08, reads as follows:

> *Firstly, the ttn* [temporary tax number] *you provided is incorrect, the correct ttn is [1], this is a ttn not a sin. All accts. belong to [name and date of birth of taxpayer] & I have already taken action to combine the correct ttn to sin [3] which will only show on the system after conversion. Therefore, you are mistaken as all combine actions have already been taken correctly.*

[19] While the grievor's reply set out in the preceding paragraph was the primary basis for the discipline imposed on her, it is appropriate to reproduce the ensuing email exchange between Mr. David and the grievor, since it formed part of the email that Ms. McClelland testified she forwarded to Mr. Durand.

[20] On February 13, 2007 at 09:19, Mr. David sent the following email to the grievor:

> *First off, I don't appreciate your tone, I apologize that I typed down the incorrect ttn, and secondly, as of yesterday conversion is over – thus the combine should already be showing and obviously it is not. So with that said, I am not mistaken.*

[21] At 11:42 on the same day, the grievor replied to Mr. David as follows:

> *I'm sorry if you do not appreciate the facts as I presented them, no tone as you put it was intended and you are mistaken. Conversion is not over where combines are concerned, as it does not end until end of March 2007 & it may be longer, therefore the combine would not be showing until end of conversion as per my original response. Not everyone has the same conversion period. Once again I repeat that all actions have been taken correctly.*
>
> *P.S. You should verify the facts before sending such a response. As far as our responsibility is concerned all is in order.*

[22] At 12:00, Mr. David forwarded the email exchange to Ms. McClelland with the following note:

> *Dear Sharon,*
>
> *I just thought you'd like to get a copy of the response that Diane Pilon sent to me for your records. I do feel that the tone is a little better, but still seems a bit unprofessional, but all of that is in the past – just as long as the client's account is being looked after. Just wanted to let you know. I do appreciate the call, thank you so much. Hope you have a wonderful day.*

2. Luc Durand's testimony

[23] At the time of the incident, Luc Durand was Manager, Verification & Validation Division at the Ottawa Technology Centre of the CRA, and had been since January 22, 2007. In that role, he was Ms. McClelland's immediate supervisor. He had been a manager since 2002.

[24] Mr. Durand stated that, on February 13, 2007, Ms. McClelland informed him about the telephone call from Mr. David and that he read the series of emails, which Mrs. McClelland later forwarded to him (Exhibit E-2). That same day, he reviewed the grievor's file for previous incidents of a similar nature. Mr. Durand stated that his personal view was that the grievor's email was inappropriate.

[25] With respect to the disciplinary meeting that took place on February 22, 2007, Mr. Durand stated that its purpose was to clarify the facts and to obtain the grievor's reasons for acting as she did. He said that, before the meeting, he had prepared the questions to be asked of the grievor. He stated that the grievor, a union representative, whose name he did not recall and Ms. Saintot attended the meeting with him. Ms. Saintot's task was to take notes of the meeting. He further stated that he had read Ms. Saintot's notes and that they were accurate. Mr. Durand stated that, during the meeting, he told the grievor that he had not yet decided whether to impose discipline.

[26] Mr. Durand stated that his decision to issue the letter of suspension to the grievor was based on the disciplinary meeting as well as on the fact that the grievor had previously received oral warnings and a written reprimand for similar incidents. He further stated that he consulted his immediate supervisor, François Ranger, who was familiar with the grievor's file, as well as a labour relations advisor, for guidance.

[27] Mr. Durand said that, in selecting suspension as the appropriate disciplinary measure, he relied on the CRA's *Discipline Policy*, dated March 23, 2006 (Exhibit E-1-9), particularly on the tables set out in Appendix C of that document. In Table 1, entitled "Examples of Acts of Misconduct," Mr. Durand pointed to Box 4, entitled "Personal Misconduct." He referred to the "use of abusive language or profanity" as the category that related to the grievor's misconduct.

[28] Mr. Durand then referred to Table 2, entitled "Disciplinary Measures Considered Appropriate for Single Acts of Misconduct" [emphasis in the original], which indicates the appropriate range of disciplinary measures for the different categories of

misconduct set out in Table 1. He stated that, for the category of misconduct ascribed to the grievor, and in view of her previous oral warnings and written reprimand, the range for the grievor set out in Table 2 was a suspension of one to two days. Mr. Durand was unaware of whether the CRA's *Discipline Policy* was provided to employees.

[29] Mr. Durand stated that, in selecting the disciplinary measure, he also relied on the CRA's *Code of Ethics and Conduct* ("the *Code*"), dated February 22, 2001 (Exhibit E-1-10), particularly on the CRA's values of integrity, professionalism and respect set out at section 2, entitled "Our Mission, Vision, and Values."

[30] In cross-examination, Mr. Durand stated that his exchanges with the labour relations advisor concerning imposing discipline on the grievor consisted of both telephone discussions and emails but he could not produce the emails.

[31] Mr. Durand stated that, before imposing the suspension, he consulted the grievor's complete personnel file and not merely the previous disciplinary measures administered to her. He admitted that the grievor's suspension was the first disciplinary measure that he imposed after assuming his position.

[32] Mr. Durand stated that he did not contact Mr. David as part of his fact-finding into the incident. Mr. Durand said that he had not felt it necessary even after reading Mr. David's email to Ms. McClelland, which counsel for the grievor suggested indicated that Mr. David had put the matter behind him. Mr. Durand did not recall whether Mr. David's email to Ms. McClelland was forwarded to the grievor but affirmed that he made her aware of it during the meeting on February 22, 2007.

[33] Mr. Durand stated that he selected the category of "use of abusive language or profanity" for the grievor's conduct because, as the *Discipline Policy*'s list is not exhaustive, he found that to be the most logical and least serious category available to him. According to Mr. Durand, whether language used in the email is characterized as abusive depends on the recipient's perception. Mr. Durand maintained that it was irrelevant to him whether or not the information contained in the grievor's email to Mr. David was correct, as he found her tone unprofessional.

[34] In response to questions by counsel for the grievor as to what precisely he found objectionable about the email, Mr. Durand specified several elements. He stated

that the grievor should not have begun her reply to Mr. David by using the word "Firstly." As a manager, he expected the grievor to have begun with a greeting such as "Good Morning" or a similar term. He had no objection to the remainder of the first sentence or to the second sentence. As for the third and final sentence, Mr. Durand objected to the phrase "Therefore you are mistaken." He stated that, in his view, the grievor should have written, "If you have any questions, please contact me," or, "Have you considered …," or some similar statement.

[35] Mr. Durand stated that the grievor and other employees had been provided with guidelines on writing emails, a copy of which was placed in each employee's file. Those guidelines were not adduced into evidence.

[36] With respect to the meeting of February 27, 2007, which he said was attended by Ms. Saintot and a union representative, Mr. Durand stated that he read the suspension letter to the grievor and that the grievor refused to sign an acknowledgement of receipt of the letter, stating that she would bring the matter to a higher level. A handwritten notation on the letter of suspension confirms that the grievor refused to sign it.

3. <u>Nadine Saintot's testimony</u>

[37] Nadine Saintot had been the grievor's manager from September 2005 until January 2007, when she moved to another section and was replaced by Mr. Durand. She stated that, as part of the normal transition process, she had reviewed each employee's file with Mr. Durand, including that of the grievor.

[38] Ms. Saintot stated that she had been involved in a previous incident concerning the grievor for which she had imposed a written reprimand. That disciplinary letter, dated June 23, 2006 and signed by Ms. Saintot (Exhibit E-1-12), reads as follows:

> *This is further to the incident that occurred Tuesday June 20, 2006 addressing your unacceptable behaviour in the workplace.*
>
> *Your team leader slipped a work list in your locked drawer and you sent her unprofessional emails challenging her actions and give her instructions on how to proceed. You then showed disrespect by raising your voice at her what you did acknowledge on June 23, 2006 at our meeting.*

> *These types of behaviour are unacceptable and will not be tolerated. They contravened CRA values of professionalism and respect as stated in the Code of Ethics and Conduct. Issues of being disrespectful have been discussed with you in the past and will not be tolerated. You are hereby advised to correct your behaviour in the workplace.*
>
> *Considering the very serious nature of your actions, which constitute misconduct according to the Agency Standards of Conduct, you are hereby presented with a written reprimand.*
>
> [*sic* throughout]

. . .

[39] Ms. Saintot added that, before the incident resulting in the written reprimand, she had issued oral warnings to the grievor for conduct, that she characterized as similar, the details of which were not described.

[40] Under cross-examination, Ms. Saintot stated that, with respect to her notes of the disciplinary meeting of February 22, 2007 (Exhibit E-3), she felt that she had recorded the relevant information but that some details might be missing.

[41] Ms. Saintot stated that she could not recall whether at that meeting Mr. Durand brought to the grievor's attention the email that Mr. David had sent to Ms. McClelland.

[42] In re-examination, Ms. Saintot stated that employees always have the right to union representation at a disciplinary meeting, but did not recall whether there had been communication with a union representative in this case.

[43] Upon conclusion of the employer's evidence, counsel for the grievor indicated his intention to bring a motion for non-suit. After submissions, I indicated that, in my view, the employer had made out at least a *prima facie* case for discipline. Counsel for the grievor then proceeded to enter the grievor's evidence.

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

[44] The grievor, Diane Pilon, stated that she had begun employment with the CRA at a very young age and that she had occupied her current position for approximately 18 to 19 years. She acknowledged writing the emails to Mr. David.

[45] When referred to the email from Mr. David to Ms. McClelland, the grievor stated that it had never been shared with her by anyone in management and that she had first seen it when it was brought to her attention by her counsel some two weeks earlier, during preparation for this hearing.

[46] The grievor stated that she had had no previous contact with Mr. David and that his query would have been assigned to her either by her team leader or by the control clerk.

[47] The grievor stated that she had dealt with situations such as Mr. David's query on many previous occasions and that, based on her experience her answer had been correct.

[48] When referred to the first email that she sent to Mr. David at 06:08 on February 13, 2007, and particularly to its first sentence thereof, the grievor disagreed that she had been unprofessional or abusive. She stated that the email reflected her manner of speaking, namely straightforward and direct. As for the last sentence of her reply to Mr. David, the grievor stated that the information provided by Mr. David in his query was not quite correct as he had stipulated it and that she had attempted to correct it.

[49] The grievor stated that she sent her email of 09:42 to Mr. David because, upon reading his email of 09:19, she felt that he was upset, and she wanted to further correct matters as he had provided erroneous information in that email.

[50] When referred to the CRA's *Discipline Policy*, the grievor had no recollection of that policy ever having been presented to her.

[51] The grievor stated that she did not recall receiving any material concerning guidelines for writing emails nor did she have a specific recollection of receiving any staff training courses or attending staff meetings on politeness. She did recall

attending discussions of the employer's harassment in the workplace policy several years ago.

[52] The grievor acknowledged receiving the written reprimand dated June 23, 2006.

[53] The grievor stated that, following Ms. McClelland's email of February 20, 2007 informing her of a disciplinary meeting and her required attendance at that meeting, she had no further contact with management until February 27, 2007, when she received the letter of suspension.

[54] The grievor did not offer any testimony or documentary evidence regarding the remedial measures that are set out in the bullet points in paragraph 3 of this decision.

[55] In cross-examination, when referred to the *Code*, the grievor acknowledged having some familiarity with it. The grievor further acknowledged formerly being a union representative and being generally aware of how the employer disciplined employees.

[56] The grievor stated that, after following her second email to Mr. David, she had no further contact with him and did not ask him why he was upset.

IV. Summary of the arguments

A. For the employer

[57] Counsel for the employer began his submissions by referring me to *Bahniuk v. Canada Revenue Agency*, 2009 PSLRB 14, particularly to paragraph 129, which sets out as follows the determinations to be made by the adjudicator:

> *First, I must determine whether the grievor engaged in some form of work-related misconduct . . . If the answer is yes, then I must decide whether the misconduct warranted the discipline that was imposed.*

[58] Counsel for the employer submitted that the grievor had displayed misconduct and that the employer had properly administered discipline in the form of a half-day suspension.

[59] Counsel for the employer referred to the CRA's values of integrity, professionalism and respect set out in section 2 of the *Code*. Those values read as follows:

> ***Integrity*** *is the cornerstone of our administration. It means treating people fairly and applying the law fairly.*
>
> ***Professionalism*** *is the key to success in achieving our mission. It means being committed to the highest standards of achievement.*
>
> ***Respect*** *is the basis for our dealings with employees, colleagues and clients. It means being sensitive and responsive to the rights of individuals.*
>
> [Emphasis in the original]

[60] Counsel for the employer also referred to section 4 of the *Code*, specifically to its first paragraph which states the following:

> ***A great deal of trust is placed on you in the performance of your duties.*** *We expect that you, like employees generally, will adhere to the Code of Ethics and Conduct, and to the principles and ethics, CRA Values, and CRA policies which underlie it.*
>
> [Emphasis in the original]

[61] Counsel for the employer further submitted that Mr. Durand had considered the grievor's actions as constituting misconduct after he conducted a fact-finding inquiry, consulted a labour relations advisor as well as his supervisor, and held a disciplinary meeting. He advanced that Mr. Durand applied a progressive approach to discipline as set out in the CRA *Discipline Policy* and that he selected a disciplinary measure that was less than the suggested measure set out in Appendix C of that policy.

[62] Counsel for the employer submitted that Mr. Durand had also considered as an aggravating factor the grievor's lack of remorse, namely that she felt that she had not done anything wrong. On that point, he referred me to *Metikosh v. Treasury Board (Employment and Immigration Commission)*, PSSRB File No. 166-02-14166 (19831230), which upheld a one-day suspension imposed on the grievor, who believed that he had not been discourteous when he dealt with a member of the public.

[63] Counsel for the employer submitted that what Mr. David felt about the grievor's reply as expressed in his email to Ms. McClelland was hearsay. He stated that the only element to be considered was the grievor's initial email to Mr. David. Counsel for the employer submitted that, considering all the circumstances, the grievance should be denied.

[64] Turning to the issue raised by counsel for the grievor that the disciplinary process was flawed due to the alleged lack of union representation, counsel for the employer stated that, since the grievor failed to raise that issue at any stage of the grievance procedure, she could not make that argument before the adjudicator. On that point, he referred to *Burchill v. Canada*, [1981] 1 F.C. 109 (C.A.), and *Shneidman v. Canada (Attorney General)*, 2007 FCA 192. He also cited *Mohan v. Canada Customs and Revenue Agency*, 2005 PSLRB 172.

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

[65] Counsel for the grievor characterized the email that the grievor sent in reply to Mr. David's initial query as curt and direct but not abusive, unprofessional or disrespectful. Counsel for the grievor submitted that by its very nature an email is intended to be a rapid exchange of information. In counsel for the grievor's submission, the grievor's email was a response made in good faith to a query, and it was not contrary to the CRA *Discipline Policy* and cannot reasonably be considered abusive.

[66] Counsel for the grievor referred to the second paragraph of the letter of suspension, in which it is stated that Mr. David felt that the grievor's replies were unprofessional and that he did not appreciate her tone. Counsel for the grievor stated that, during his fact-finding, Mr. Durand should have contacted Mr. David, especially in view of Mr. David's email to Ms. McClelland in which, according to counsel for the grievor, Mr. David indicated that he no longer harboured the same feelings toward the grievor. On that point, counsel for the grievor stressed that Ms. McClelland had spoken with Mr. David before the grievor's second email to him, in which she stated that she had not intended the tone that he had perceived in her first email. In counsel for the grievor's submission, Mr. Durand's failure to contact Mr. David or even consider his email to Ms. McClelland in administering discipline resulted in an incomplete and fatally flawed investigation of the facts, which in itself is sufficient to void the discipline imposed.

[67] With respect to the employer's *Discipline Policy* and the tables in its Appendix C, counsel for the grievor submitted that it does not stipulate that, when a written reprimand has been administered to an employee, the next disciplinary measure to impose on that employee must necessarily be a suspension. He pointed out that the tables were intended only as guidelines. Counsel for the grievor further referred to

Section III of the *Discipline Policy*, where it is stated that applicable collective agreements, including the one covering the grievor, require that management inform local representatives when taking certain forms of disciplinary action. He stated that there was no evidence that had been done for the grievor.

[68] Counsel for the grievor referred me to the following authorities: *Sidorski v. Treasury Board (Canadian Grain Commission)*, 2007 PSLRB 107, specifically to paragraph 87, concerning the employer's burden of proof; *Byfield v. Canada Revenue Agency*, 2006 PSLRB 119; *Madden v. Canada Customs and Revenue Agency*, 2000 PSSRB 93; *Cyr v. Parks Canada Agency*, 2005 PSSRB 16; *Lockwood v. Treasury Board (Human Resources Development Canada*, PSSRB File No. 166-02-27701 (19990304); and *Grover v. National Research Council of Canada*, 2008 PSLRB 59. Most involved discipline imposed for insubordination. Counsel for the grievor submitted that *Metikosh*, cited by the employer, could be distinguished on the facts.

[69] Counsel for the grievor submitted that, under all the circumstances, the grievance should be allowed. He did not address the corrective measures set out in the bullet points in paragraph 3 of this decision.

V. Reply of the employer

[70] In rebuttal, counsel for the employer submitted that Mr. David had considered the tone of the grievor's email serious enough to call her team leader.

[71] With respect to the attendance of a union representative at the disciplinary meeting and the meeting at which the suspension was imposed, counsel for the employer submitted that there was no evidence of a lack of union representation and that the grievor's counsel had not questioned her about that matter. Counsel for the employer argued that I should prefer the evidence of Mr. Durand, who affirmed that there was a union representative in attendance on both occasions. He further argued that the grievor had been given the opportunity to provide her version of the events.

[72] Counsel for the employer submitted that Mr. Durand considered all relevant elements when imposing the discipline and that he selected a measure less than that recommended by the CRA *Discipline Policy*.

VI. Reasons

[73] First, I shall deal with the issue raised by counsel for the grievor concerning the alleged lack of union representation at the disciplinary meeting and the meeting at which the letter of suspension was presented to the grievor.

[74] As stated in paragraph 16 of this decision, on February 20, 2007, Ms. McClelland informed the grievor by email that she was required to attend a disciplinary meeting on February 22, 2007 and that she could have a union representative present at that meeting.

[75] It was Mr. Durand's uncontradicted testimony that a union representative, whose name he could not recall, was present at both the February 22, 2007 and the February 27, 2007 meetings, at the second of which the letter of suspension was presented to the grievor.

[76] As stated as follows at paragraph 93 of *Mohan* and cited by counsel for the employer:

> *. . . it has long - been held in the Board's jurisprudence that the adjudication hearing is a* de novo *hearing to determine whether the employer had just cause to impose discipline, and the hearing is not designed to determine whether the proper process was followed (see* Tipple (supra*)) …*

I therefore find that the grievor's argument that the disciplinary process was flawed is without foundation. I turn now to the merits of the case.

[77] The letter of suspension issued to the grievor stipulates in each of its first three paragraphs that the disciplinary measure was imposed for lack of professionalism and of respect in her emails to Mr. David, thus contravening the CRA's values of professionalism and respect set out in the *Code*. The second paragraph of the letter adds that Mr. David did not appreciate the grievor's tone. The fourth paragraph of the letter of discipline states that the grievor's actions constituted ". . . misconduct according to the Agency Standards of Conduct . . . ." That document was not adduced into evidence. The only document in evidence referring to employee misconduct is the employer's *Discipline Policy* (Exhibit E-1-9). The grievor did not recall ever having been provided a copy of that policy and Mr. Durand was unaware of whether it had been provided to employees.

[78] In consulting the employer's *Discipline Policy*, Mr. Durand selected the category of personal misconduct described as "use of abusive language or profanity" as the most apt for the grievor's misconduct. He also affirmed that the characterization of the language is dependent on the perception of the recipient of the email.

[79] While I recognize that, in relying upon the employer's *Discipline Policy* to determine the grievor's misconduct, Mr. Durand felt limited by the list of categories of personal misconduct, nevertheless, there are serious difficulties with his characterization of the language of the grievor's email as abusive. First, the grounds justifying the discipline imposed on the grievor set out in the letter of suspension do not include the use of abusive language. Second, contrary to Mr. Durand's assertion, there is no evidence whatsoever that the recipient of the email, Mr. David, perceived the grievor's email as containing abusive language. Mr. David was not called as a witness by the employer, and Mr. Durand did not deem it necessary to contact him as part of his fact-finding exercise. The only evidence of Mr. David's perception of the grievor's email is contained in two of his emails. In his reply to the grievor at 09:19 on February 13, 2007, Mr. David writes, "First off, I don't appreciate your tone . . . ." In his email to Ms. McClelland on the same day at 12:11, he writes, "I do feel that the tone is a little better, but still seems … unprofessional." Therefore, I find that there is no evidentiary basis to support the employer's characterization of the language of the grievor's email as abusive. The *Canadian Oxford* Dictionary (2nd edition, 2004), defines the word "abusive" as "using or containing insulting language." I am of the view that, on a plain reading, the language used by the grievor in her email does not meet this definition and furthermore that it cannot be characterized as abusive by any reasonable measure.

[80] I must now determine whether, as stated in the letter of suspension, the grievor's conduct contravened the employer's values of professionalism and respect set out in the *Code.*

[81] The evidence adduced by the employer of the lack of professionalism and respect in the grievor's email was based on Mr. Durand's testimony. He stated that, upon reading her email, he personally found it inappropriate and its tone unprofessional. His objections to the grievor's email were twofold: the grievor should have begun her initial reply to Mr. David with a greeting such as "Good Morning" instead of "Firstly," and instead of the words "you are mistaken" in the final sentence,

she should have used another phrase to bring Mr. David's error to his attention. Although Mr. Durand asserted that employees had been provided with guidelines for writing emails and that a copy had been placed in each employee's file, those guidelines were not introduced into evidence.

[82] The grievor disagreed that her email to Mr. David was unprofessional or disrespectful. In her view, she had been straightforward and direct. The notes of the Disciplinary Meeting of February 22, 2007, recorded by Ms. Saintot (Exhibit E-3), indicate that the grievor had clearly stated so during the meeting. According to Ms. Saintot's notes, the grievor repeated on several occasions that she was simply providing Mr. David with the facts in her normal manner. She felt that Mr. David had overreacted and that he was likely upset because she had pointed out that he was mistaken.

[83] As mentioned earlier in this decision, Mr. Durand did not deem it necessary to contact Mr. David during his fact-finding. It appears to me that his decision not to rendered his fact-finding incomplete. By calling Ms. McClelland, Mr. David became the initiator of the complaint against the grievor. When Mr. David stated in his email to the grievor that he didn't appreciate her tone, the grievor replied 23 minutes later that "I'm sorry if you do not appreciate the facts as I presented them, no tone as you put it was intended . . . ." There is no evidence that Ms. McClelland or any other supervisor instructed the grievor to reply to Mr. David in that manner. In addition, in his email to Ms. McClelland, which she immediately forwarded to Mr. Durand, Mr. David appeared to have attenuated whatever initial complaint he may have had with respect to the grievor's reply to his query when he wrote, "I do feel that the tone is a little better, but still seems a bit unprofessional, but all of that is in the past . . ." For the sake of completeness of the fact-finding inquiry, and in light of Mr. Durand's testimony that the characterization of the language of the email is dependent on the perception of the recipient, in my view this information should have prompted him to contact Mr. David to obtain his first-hand views of the matter.

[84] Professionalism is defined in the *Code* as ". . . being committed to the highest standards of achievement" while the definition of respect is ". . . being sensitive and responsive to the rights of individuals."

[85] Based on the available evidence, I fail to see how the grievor's email contravenes the employer's values. After having being assigned to answer a query, she formulated a

factual reply based on her experience and, as she testified, based on similar situations that she dealt with on many previous occasions. Mr. Durand testified that, in imposing discipline on the grievor, it was irrelevant to him whether the information contained in her reply was correct. The only justification for the lack of professionalism alleged by the employer was the language used in the grievor's email. That is also the sole justification for the grievor's alleged lack of respect.

[86] I cannot agree with the employer that the failure to begin an email with a greeting constitutes a lack of professionalism or respect. I see nothing wrong with beginning an email with the word "Firstly." This was a case of a query addressed "to whom it may concern" being assigned to the grievor for reply to a CRA employee with whom she had never previously dealt. In the circumstances, I find nothing disrespectful or unprofessional by the grievor beginning her reply with "Firstly", especially as she was conveying more than one element of information. I note that, in his reply to the grievor, Mr. David began with the words, "First off."

[87] The employer's remaining justification for the grievor's lack of professionalism and respect is for stating "you are mistaken" in her reply to Mr. David instead of using a euphemistic expression to convey the same meaning. The grievor's phrasing may readily be described as curt, direct and to the point. However, in my view, it does not constitute a lack of professionalism or respect and therefore does not contravene the employer's values set out in the *Code*.

[88] I find that the employer failed to establish, on a balance of probabilities, that the grievor engaged in the misconduct set out in the letter of suspension dated February 27, 2007. Accordingly, her grievance will succeed.

[89] I wish to address the matter of the corrective actions sought by the grievor as set out in the bullet points of paragraph 3 of this decision. As I stated earlier in this decision, the grievor did not offer any evidence whatever in support of those remedies and counsel for the grievor did not make any representations in that regard during his argument. As the grievor is made whole by the remedy given in the Order, in my view it is not necessary to deal with those remedial measures.

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

(The Order appears on the next page)

VII. Order

[91] The grievance is allowed, and the grievor is to be compensated for the loss of one-half-day's pay and any related benefits.

[92] The employer is directed to remove the letter of suspension dated February 27, 2007 and any related documentation from the grievor's file.

September 2, 2010.

Steven B. Katkin
adjudicator