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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

HAIYAN ZHANG

Grievor

and

DEPUTY HEAD
(Privy Council Office)

Respondent

Indexed as
Zhang v. Deputy Head (Privy Council Office)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: Daniel Fisher, Public Service Alliance of Canada

For the Employer: Richard E. Fader, counsel

Heard at Ottawa, Ontario,
May 18 to 21 and August 10, 2010.

I. Introduction

[1] The grievor, Haiyan Zhang, filed two grievances disputing respectively the definitive termination of her employment on April 13, 2006 and the cancellation of her Reliability status on April 18, 2006. These grievances resulted from an earlier adjudication award with respect to a previous termination of her employment on November 28, 2003 (*Zhang v. Treasury Board (Privy Council Office)*, 2005 PSLRB 173 (*Zhang #1*).

[2] To provide a better understanding of the context of the grievances that are the subject of this adjudication, it is useful to summarize the events that led to *Zhang #1*, and to two subsequent rulings by an adjudicator in this matter: *Zhang v. Treasury Board (Privy Council Office)*, 2009 PSLRB 22 (*Zhang #2*), and *Zhang v. Treasury Board (Privy Council Office)*, 2010 PSLRB 46 (*Zhang #3*).

[3] On November 28, 2003, the grievor was terminated for non-disciplinary reasons from her position classified at the IS-05 group and level. She was acting at the IS-06 group and level) as a senior analyst at the Privy Council Office (PCO) as a result of the revocation of her Secret security clearance and the denial of a Top Secret security clearance. The circumstances are the following.

[4] When she commenced her position at the PCO on February 24, 2003, the grievor obtained a Secret security clearance. As her work required that she have access to classified documents, she applied for a Top Secret security clearance. The Canadian Security Intelligence Service's (CSIS) security assessment recommended denying a Top Secret security clearance based on adverse information that it had received. On August 28, 2003, following a recommendation made to the Clerk of the Privy Council, the Top Secret security assessment was used to revoke the grievor's Secret clearance, with the result that the grievor could no longer work at the PCO because a Secret security clearance was the minimum requirement. The grievor was placed on leave with pay and denied access to PCO work sites. Based on the security assessment, the Clerk of the Privy Council also decided that he could not recommend the grievor for employment elsewhere in the federal public service, and consequently, no further steps were taken to find alternate employment for the grievor. On October 16, 2003, the grievor's employment was terminated pursuant to paragraph 11(2)(*g*) of the *Financial Administration Act*. The grievor filed a complaint with the Security Intelligence Review Committee on October 16, 2003. That complaint was dismissed on

March 4, 2005, for the reason that the Clerk of the Privy Council had reasonable grounds for deciding to deny the grievor a Top Secret security clearance and for revoking her Secret clearance.

[5] In *Zhang #1*, the adjudicator allowed the grievance in part and ordered the grievor reinstated in her leave with pay status, effective November 28, 2003, until the employer completed a search for an alternate position. The adjudicator also ordered that the employer conduct a "diligent search" for an alternate position for the grievor at an equivalent or lower level than her substantive IS-05 group and level position for a period of two months from the date of the decision. The grievor was reinstated to leave with pay status effective November 28, 2003.

[6] The adjudicator's decision was the subject of a judicial review. In a decision dated March 1, 2009, the Federal Court held that, given the reinstatement of the grievor, the adjudicator's decision had been "more than fully implemented" and that the PCO's application for judicial review had become moot. Accordingly, the application was dismissed (see *Canada (Attorney General) v. Zhang*, 2007 FC 235). By way of background, at that date, the grievor had found alternate employment with Service Canada, part of the Department of Human Resources and Skills Development (Service Canada). The grievor has since been terminated from that department. However, her grievance concerning that termination is not the subject of this adjudication.

[7] *Zhang #2* concerned two objections filed by the employer with respect to the two grievances that are the subject of this adjudication. The first objection concerned the appropriateness of joining the two grievances, and the second concerned the jurisdiction of an adjudicator to hear them. With respect to the first objection, the adjudicator held that the grievance disputing the cancellation of the grievor's Reliability status was intertwined with the allegations of the grievance challenging the grievor's termination and that the grievances should be heard together. With respect to the second objection, the adjudicator decided that the second termination raised two distinct issues within an adjudicator's jurisdiction: whether the employer had conducted a diligent search for alternate employment for the grievor and whether the second termination was for just cause.

[8] *Zhang #3* concerned the employer's objection to the pre-hearing production of documents on the grounds of labour relations privilege. The adjudicator held that the

documents should be disclosed to the grievor as they were arguably relevant to the issue being litigated and that the documents over which privilege was being claimed did not meet the conditions for establishing a particular class of privilege in that case.

[9] Accordingly, this decision focuses on the merits of the two grievances.

II. Summary of the evidence

A. Testimony of Michael Wernick

[10] At the time the grievances were filed, Michael Wernick was the deputy secretary, plans and consultation, and one of several deputy secretaries reporting to the Clerk of the Privy Council. The grievor reported to Assistant Secretary Mario Laguë, who in turn reported to Mr. Wernick. Mr. Wernick was involved in the revocation of the grievor's security clearance in 2003. He explained that, at that time, the grievor was unable to continue in her position as a senior analyst without a Top Secret security clearance.

[11] After being apprised of the decision in *Zhang #1*, the PCO decided to abide by that ruling and asked the Treasury Board Secretariat to take up the search for the grievor in its place.

[12] The search began on February 14, 2006 and terminated on April 13, 2006. On April 7, 2006, Mr. Wernick advised the grievor of her employment status and the upcoming consequences of the job search in these terms:

> *Dear Ms. Zhang:*
>
> *In his decision dated December 8, 2005, Adjudicator Ian R. Mackenzie ordered the Employer to conduct a diligent search for a period of two months to assist you in finding an alternate position at an equivalent (IS-5) or lower level. He further ordered a reinstatement of your employment and that you be placed on leave with pay until the search is completed. Your status has been amended to comply with the Adjudicator's order and you should receive the appropriate compensation in the near future.*
>
> *The search for alternate employment was undertaken on February 14, 2006 and will cease on April 13, 2006. This letter is to advise you that unless you can provide the Privy Council Office with proof that you were successful in securing employment in another department, you will cease to be an employee of the Public Service at the end of the day on April 13, 2006.*

> *You are therefore requested to provide the necessary information by Wednesday, April 12, 2006, to Chantal Butler, Labour Relations Advisor,* [address omitted]. *If you have been unsuccessful in your job search, you will be receiving another letter on April 13, 2006, informing you of the termination of your employment.*
>
> *If you have any questions with respect to the above, please contact Mr. Jeff Laviolette, Senior Employment Representation Officer, Treasury Board Secretariat* [telephone number omitted].

[13] The grievor did not respond to this letter.

[14] On April 13, 2006, the grievor was advised by Mr. Wernick of the termination of her employment as follows:

> *Dear Ms. Zhang:*
>
> *This letter is further to my letter dated April 7, 2006, requesting information with respect to your success in securing alternate employment.*
>
> *As you were unable to provide us with the necessary proof confirming that you had found a position in another part of the public service, I am therefore writing to inform you that, pursuant to the authority delegated to me by the Clerk of the Privy Council Office and Secretary to the Cabinet, your employment as a Senior Analyst with the Privy council Office will cease at the end of the day today, April 13, 2006.*
>
> *The termination of employment is made pursuant to section 12(1)(e) of the Financial Administration Act. If you wish to contest this termination, you have the right to present a grievance within twenty-five (25) days from the date on which you receive notice of this decision.*

[15] On April 18, 2006, the grievor's reliability status was administratively cancelled. The grievor was informed of it in the following letter, dated April 18, 2006:

> *Dear Ms. Zhang:*
>
> *This letter is to inform you that, because you are not longer employed with the Privy Council Office, your reliability status has been administratively cancelled effective April 18, 2006.*
>
> *This cancellation is in accordance with the termination of employment provisions described in Section 8 of the Treasury Board Personnel Security Standard.*

[16] Mr. Wernick testified that, as a result of *Zhang #1*, the PCO sought to amend the Treasury Board *Personnel Security Standard*, given the following context.

[17] When the grievor's employment was terminated on November 28, 2003, the Treasury Board *Personnel Security Stand*ard, issued under the *Government Security Policy*, prescribed that a Reliability status could not be reversed based on adverse information uncovered as a result of a check not authorized for reliability, including a CSIS security assessment. Accordingly, when the grievor's Top Secret status was denied, she did not automatically lose her Reliability status because the CSIS only examined her ability to hold a Top Secret clearance. In Mr. Wernick's opinion, an order for a diligent search for alternate positions would not have been possible had the grievor's Reliability status been revoked simultaneously with the denial of her Top Secret status.

[18] Sometime in January 2006, the PCO proposed to the Secretary of the Treasury Board an amendment that would allow for the reassessment, and if warranted, the revocation of an individual's Reliability status based on adverse reliability information gathered in the course of any security clearance assessment determination. The amendment came into force in March 2006.

[19] Mr. Wernick testified that, on April 12, 2006, Jeff Laviolette made two recommendations to assist the grievor in finding employment. The first was to extend her status of leave with pay for two months to allow her to continue her search for employment and the second was to agree to a two-year secondment on a joint Treasury Board Secretariat and Public Service Alliance Canada initiative. The second recommendation was quickly withdrawn, and Mr. Wernick made the decision, after seeking labour relations advice, not to extend the grievor's leave with pay status for another two months because, in his words, "this could go on forever."

B. <u>Testimony of Jeff Laviolette</u>

[20] Mr. Laviolette is the senior employment representation officer at the Treasury Board Secretariat. As such, he provides guidance and advice to departments on disciplinary matters and collective agreement interpretation.

[21] Mr. Laviolette explained that the search for employment for the grievor was delayed because the judicial review of *Zhang #1* was being discussed and the PCO was reviewing the possibility of a settlement with the grievor.

[22] Mr. Laviolette was eventually tasked with conducting the diligent search on behalf of the employer. This meant a daily review of the Publiservice database operated by the Public Service Commission (PSC), which posts all position vacancies in the federal public service not open to the public. Searches are based on selected criteria. In the case of the grievor, a daily search of all position vacancies classified IS-03 to IS-05 was conducted between February 14 and April 13, 2006. In pursuing his efforts to place the grievor, Mr. Laviolette mentioned her availability at a bimonthly meeting with other labour relations directors in February 2006. He also approached the directors of human resources of the Department of Industry, the Department of National Defence, the Canada Border Services Agency, and the Department of Public Works and Government Services to solicit their interest and to apprise them of the case that had come before the Public Service Labour Relations Board ("the Board"). None of those directors expressed interest in hiring the grievor. In his testimony, Mr. Laviolette emphasized that he had been asked to conduct an employment search, not to market the grievor's talents.

[23] In the process of his daily consultations of Publiservice, Mr. Laviolette, or his assistant, Virginia Emiel, would screen out positions that required a security clearance higher than Reliability status or that were outside the National Capital Region, as the grievor had indicated that she wished to be employed in the Ottawa area. Positions that were open for competition only to employees of particular departments or agencies were also not referred to the grievor. Suitable positions were emailed to the grievor. Because she was not present on the PCO's premises, the grievor could not access Publiservice on her own and relied on Mr. Laviolette's screening of the positions.

[24] Although the grievor contacted Mr. Laviolette to expand the search to positions in other classifications, he could not agree to her suggestion because he did not have the resources to conduct a public-service-wide search of every available position in every category. Mr. Laviolette also took the view that the grievor's best chances for employment were in the areas in which she could demonstrate some experience, namely, in the IS category.

[25] Mr. Laviolette approached the PSC to have the grievor placed on a priority list. After an exchange of correspondence, he was told that she did not qualify for any priority placement. Moreover, to be eligible for priority placement, her position would

have had to have been staffed permanently, which was not the case when he inquired. As well, she could not be seconded to another position as she did not hold a position at the PCO, her status being merely on leave with pay.

[26] The grievor's name was put forward for a two-year assignment on a combined Public Service Alliance of Canada and Public Service Human Resources Management Agency of Canada initiative, but the organizations were uninterested in the grievor for the assignment.

[27] During the search period, Mr. Laviolette made the grievor's representative, Daniel Fisher, aware of his search efforts. Mr. Fisher did not express any concerns about how the search was being conducted. Mr. Laviolette's contacts with the grievor were cordial throughout the search process. During the course of the search, information about seven potential positions was forwarded to her.

[28] The grievor was advised of the administrative cancellation of her Reliability status after her employment was terminated, it no longer being required or useful once she had left the federal public service. If she became reemployed, the new employer could make its own inquiry to reinstate the status.

[29] Mr. Laviolette's search for a position continued until the day before the grievor's termination. Notably, for any internal competition for which the grievor applied while still within the public service, she was considered an internal candidate and had priority over an external candidate. Mr. Laviolette was not consulted before the grievor was terminated on April 13, 2006. Mr. Wernick relied on the advice of Chantal Butler to make that decision.

[30] Mr. Laviolette admitted that, although the grievor had been reinstated, the PCO did not favour her returning to the federal public service because she still represented a significant security risk. While Mr. Laviolette also admitted that he would have preferred that the PCO conduct the "diligent search," once tasked with the search, he did not report to the PCO and conducted the search as thoroughly as he could. The adjudicator's ruling was not an order to conduct a collaborative search with the grievor; it was entirely the employer's responsibility.

[31] When the grievor was declared the successful candidate for the position of Marketing Manager at Service Canada, she contacted Annette Marquis, a labour

relations officer at the PCO, with a request to be reinstated so that she could be seconded to Service Canada until the formalities for appointment were completed. It would have meant that she could have started working immediately. The director of communications for Service Canada, Jean Valin, contacted Mr. Laviolette with the same request. Mr. Laviolette apprised Mr. Valin of the grievor's background, the Board's decision and the revocation of her security clearance. Mr. Laviolette conveyed Mr. Valin's request to Ms. Butler. After three months, the request was denied because the grievor could not legally be reinstated in any substantive position. Mr. Laviolette explained that the adjudication order was not to put the grievor back into her substantive position but to give her quasi-employee status for the duration of the diligent search, in order for her to apply as an internal candidate for positions within the federal public service during a two-month period.

[32] Mr. Laviolette stated that he recommended the secondment option to the PCO on the basis of labour relations considerations and not on the basis of the employment rules that govern the federal public service. It was not for him to decide how the PCO should handle the request. All Mr. Laviolette asked for was that the PCO be diligent in responding to Service Canada's request. Mr. Laviolette stated that the grievor did not need a secondment to commence new employment; she could have been hired as a term or as a casual while the formalities were being taken care of. The PCO denied the secondment request in its response at the final level of the grievance process.

C. Testimony of Margaret Biggs

[33] In August 2006, Margaret Biggs was Deputy Secretary to the Cabinet of Plans and Consultations at the PCO. She held the third-level grievance hearing with respect to the PCO's decision to terminate the grievor's employment on April 13, 2006. Although she did not sign the formal reply, she made the decision to rescind the grievor's termination and to replace it with leave without pay from April 14 to September 4, 2006 for compassionate reasons to bridge the grievor's pension rights in her new position at Service Canada. This decision was communicated to the grievor on August 31, 2006. Ms. Biggs took the view that the grievor could not be reinstated on leave with pay because she was unable to hold a position at the PCO due to the cancellation of her Reliability status. The only reason that the grievor received pay until April 13, 2006, was the adjudicator's award; the grievor had no other status as an employee.

D. Testimony of Ginette Ménard

[34] Ginette Ménard has been a corporate staffing advisor for the PCO since 2007. Her testimony consisted of an explanation of the staffing process as it relates to a secondment and the obtaining of a security clearance upon appointment. Ms. Ménard had no direct knowledge of this matter.

E. Testimony of Chantal Butler

[35] At the time the grievor was an employee of the PCO, Ms. Butler was the chief of labour relations and had provided advice and guidance to all managers involved in this matter since 2003. Ms. Butler testified that the *Personnel Security Standard* was modified in 2006 as a result of the adjudication decision reinstating the grievor. The change that was made was to allow the employer to also revoke a Reliability status based on information obtained about a security clearance. The modified *Personnel Security Standard* was in effect at the time of the grievor's second termination on April 13, 2006.

[36] Ms. Butler testified that the PCO took the view that it could not undertake the diligent search because the grievor could not occupy a position within that department as she was not technically one of its employees. Her position had been staffed by an acting appointment. The grievor remained at the IS-05 group and level only on paper, to allow the pay process to occur. Moreover, because of the existing provisions of the *Personnel Security Standard*, the grievor continued to hold Reliability status for the period of the search.

[37] Ms. Butler admitted that, while Mr. Laviolette was conducting the "diligent search," the PCO was looking into the means of terminating the grievor's employment once the search period ended.

[38] Ms. Butler did not favour a secondment for the grievor because it would have required that the grievor hold an actual position within the PCO with the added consequence that the grievor would have been entitled to return to her position at the PCO after the secondment or to continue an indefinite search for employment in the federal public service. While Ms. Butler had no personal views about the grievor

working elsewhere in the federal public service, the grievor could not under any circumstances return to work at the PCO.

[39] Ms. Butler testified that the termination of the grievor's employment was based entirely on the fact that she had not found employment in the federal public service during the diligent search period of two months. After receiving the notification letter dated April 7, 2006, the grievor did not inform the PCO that she was seriously being considered for a position. The PCO had no responsibility for ensuring a continued search for employment beyond the diligent search window of two months or for facilitating her employment through a secondment agreement. It was not deemed necessary to review the results of the job search until a response to the grievance disputing the termination of the grievor's employment was required. The final-level response was delayed because a legal opinion was being sought.

F. Testimony of the grievor

[40] The grievor is currently unemployed. Her position at Service Canada was terminated on August 15, 2008 for alleged security concerns.

[41] As a result of the adjudication decision in her favour, the grievor expected a serious and extensive job search to be conducted on her behalf, which would include any job classified up to the IS-05 group and level or equivalent. The only limit that she had imposed was that the job be in the National Capital Region. The grievor testified that she was disappointed with the results as she received only seven postings, all limited to the IS classification category. In the grievor's view, she was qualified for many more positions than those that were sent to her. She was not contacted about her progress in the job search until she received a letter on April 10, 2006 from the PCO dated April 7, 2006. The grievor was of the opinion that the PCO was putting the onus of the diligent search on her, rather than assuming the responsibility.

[42] The grievor applied on her own for positions advertised on the PSC's website that were open to the public, which is how she came to apply for a position at Service Canada at the end of March 2006. She wrote an exam and successfully passed language testing. She was called for an interview, at which she fully divulged her situation with the PCO and the adjudicator's decision. She was offered the position of marketing manager, starting immediately. She expected that the PCO would facilitate her transition to a new employment opportunity. However, that did not happen. The PCO

never responded to her request for a secondment until she received the reply to her termination grievance at the final level of the grievance process.

[43] The grievor testified that the PCO's delay in responding to her request for a secondment caused her to lose substantial income. As a new employee, she had to go through a new Reliability status application and start as a probationary employee. The grievor saw the PCO's refusal to facilitate her transition to new employment as bad faith.

[44] The grievor stated that she has now been terminated three times for reasons beyond her control and that it has affected her ability to find alternate employment.

G. Testimony of Patrick Borbey

[45] Patrick Borbey was Assistant Deputy Minister, Corporate Services, when the PCO made recommendations to modify the Treasury Board *Personnel Security Standard*. When it was brought to his attention, he recommended that the inconsistency in the Treasury Board *Personnel Security Standard* noted by the adjudicator be resolved.

[46] Mr. Borbey explained that the delay in starting the diligent search process was attributable to the fact that advice was sought about the implementation of the decision and because of the transition period after an election. Mr. Borbey ignored the details of how the grievor was terminated on April 13, 2006, but he was confident that Ms. Butler had made all the proper inquiries. Even though Mr. Laviolette recommended extending the grievor's leave period and facilitating a secondment, Mr. Borbey disagreed with that because the grievor no longer had the required security clearance for a position within the PCO. The grievor's employee status when she was reinstated was essentially an administrative accommodation so that she could be paid during the leave-with-pay period. The PCO had no other obligation toward the grievor if she did not find a position during the diligent search period.

H. Testimony of Jean Valin

[47] When he hired the grievor on September 5, 2006, Jean Valin was Director of Marketing and Communications at Service Canada. When he transferred to another position outside Service Canada, the grievor was on leave with pay while an investigation was being conducted.

[48] The grievor was hired from an external pool of candidates that were evaluated by an outside consultant. She was the successful candidate. She fully revealed her employment history. Mr. Valin communicated with Mr. Laviolette to facilitate a secondment from the PCO so that the grievor could begin employment at the earliest opportunity. However, Mr. Laviolette's attempts to convince the PCO were unsuccessful. Therefore, the grievor was hired as an external candidate. The only caution he received was that the grievor's references and the security check should guide him in his choice to hire her.

I. Testimony of Norman Couture

[49] Norman Couture is a senior human resources officer. He testified that a non-advertised appointment process is one of many staffing options. This type of appointment is not posted; nor is it open to the public. After a notice of appointment is issued, a complaint process is posted on Publiservice.

[50] Mr. Couture testified that, on March 15, 2006, a notice of intention to appoint was issued for Gregory Jack to be appointed to the position of Senior Analyst (classified at the IS-05 group and level), the position previously held by the grievor. Mr. Jack was acting in the position at the time he was proposed for appointment. He was appointed to the position, effective March 23, 2006, at the behest of Dale Eisler, Assistant Secretary to the Cabinet.

III. Summary of the arguments

A. For the respondent

[51] The PCO argues that *Zhang #1* was very specific: the grievor was to be reinstated on leave with pay retroactively to her date of termination, and the employer was ordered to conduct a diligent search for an alternate position over a two-month period from the date of that decision. The grievor was not ordered reinstated in her position at the PCO but only reinstated for the limited purpose of conducting the search for employment and for her pay administration. A preliminary decision in the matter of the two grievances that are the subject of this adjudication narrowed the grievances' issues to whether the employer had in fact conducted a diligent search to find an alternate position for the grievor and whether the grievor's second termination on April 13, 2006 was for just cause.

[52] The PCO argues that it respected the adjudicator's order to conduct a two-month diligent search. Since there were no prospects of employment brought to its attention and since the grievor was not in a position to perform the duties of her former substantive position or of any position in her home department, her employment was terminated and her Reliability status cancelled administratively.

[53] The PCO submits that neither the grievor nor her representative ever expressed any dissatisfaction with Mr. Laviolette's efforts during the search period. Therefore, it is not open to the grievor to allege after the fact that the search was deficient. The grievor had an obligation to raise her dissatisfaction during the search period. Therefore, the PCO argues that the grievor is now estopped from taking the position that it failed to conduct a diligent search.

[54] The search for alternative employment did not begin immediately because of settlement discussions. The grievor benefited from this extended period, as the diligent search period commenced only after settlement discussions were unfruitful. During that time, Mr. Laviolette requested an updated copy of the grievor's résumé for the express purpose of inquiring with a number of directors of labour relations and heads of human resources to see if they had any positions for which the grievor might be considered.

[55] During the diligent search period, Mr. Laviolette or his assistant searched Publiservice daily in accordance with the search parameters and within the NCR, as indicated by the grievor's representative. Seven opportunities were presented to the grievor. Mr. Laviolette explored the possibility of a priority for appointment entitlement placement with the PSC. However, the grievor did not meet the criteria. The PCO argues that the term diligent search is not a term of art and that it left the employer considerable latitude in deciding how to conduct an appropriate search.

[56] The PCO argues that, once the two-month search for an alternative position ended, it had just cause to terminate the grievor's employment. The PCO had no obligation to maintain the grievor in a unique employment status if she could not meet the requirements of her former position and had no authority to appoint her to any other position in the federal public service. The PCO was entitled to some finality and gave notice to the grievor of this before the expiry of the diligent search period. While still employed in the public service, the grievor was considered as an internal

candidate for all jobs for which she applied, even if her employment was later terminated.

[57] The PCO denies that it had any obligation to reinstate the grievor two-and-a-half months after her termination to facilitate a secondment to Service Canada. The PCO argues that such a decision would have put it in the untenable position of having to reinstate the grievor in her former position, for which she did not meet the criteria for appointment, and then to run the risk of having her return to her substantive position if she were unhappy with her job at Service Canada. It was open to Service Canada to appoint the grievor to a short-term appointment or as a casual if it wanted to hire her more quickly.

[58] The PCO submits that the partial granting of the termination grievance by way of reinstating the grievor on leave without pay from the day after her termination (April 14, 2006) to the day before the start of her employment at Service Canada (September 4, 2006) was a goodwill gesture to bridge the continuity of the grievor's employment for pension purposes and that it should not compromise the position taken by the PCO at adjudication.

[59] The PCO argues in the final instance that the grievor's Reliability status was cancelled administratively because her employment came to an end. The grievor was not terminated because her Reliability status was revoked. The cancellation was done pursuant to the Treasury Board *Personnel Security Standard* and not with the intention of disciplining the grievor. As the hiring department, Service Canada was responsible for its own security clearance process, which had nothing to do with the PCO.

[60] The PCO asks that the two individual grievances be dismissed.

[61] In support of its position, the PCO cited the following decisions: *Brescia v. Canada (Treasury Board)*, 2005 FCA 236; *Myers v. Canada (Attorney General)*, 2007 FC 947; *Vaughan v. Canada*, 2005 SCC 11; *Canada (Attorney General) v. Assh*, 2005 FC 734; *Canada (Attorney General) v. Boutilier et al.*, [2000] 3 F.C. 27 (C.A.); and *Kampman v. Canada (Treasury Board)*, [1996] 2 F.C. 798 (C.A.).

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

[62] The grievor submits that she did not tacitly accept the job search being done by Mr. Laviolette and that she voiced her suggestions for an expanded search on March 2,

2006. The grievor's representative had voiced similar concerns on February 28, 2006, when he requested that the employer enlist the assistance of the PSC or any other sources to canvass all vacancies in the federal public service for which the grievor was qualified.

[63] The grievor had no control over the extent of the search, and it was the employer's responsibility to conduct a thorough search before terminating the grievor's employment. Mr. Laviolette was saddled by a responsibility that he did not really want and did not engage all possible resources, as he could have. He did not make the grievor or her representative aware of any difficulties in placing her. By not giving the grievor access to Publiservice at a remote location as he could have, Mr. Laviolette did not facilitate the grievor's chances to finding an alternate position. For these reasons, the PCO failed to establish just cause for terminating the grievor. In support of her argument, the grievor cited paragraph 20 of the Federal Court's decision on judicial review that recognized the eminent qualifications of the grievor and the fact that she found employment elsewhere based on those qualifications (*Canada (Attorney General) v. Zhang*, cited above at paragraph 6).

[64] The grievor argues that it is clear from the evidence that the PCO did not want her working within the federal public service and that it took every step to prevent that from happening. This observation is supported by the fact that the PCO undertook to have the *Personnel Security Standard* amended following the decision reinstating the grievor and that it attempted to have it apply retroactively to her, to avoid having to conduct a search for alternate employment.

[65] The grievor disputes the PCO's position that the delay in conducting the diligent search was due only to settlement discussions. She suggests that it was because the PCO was seeking a means to avoid conducting the search. The grievor refers to the draft of an internal memo directed to the Clerk of the Privy Council, which she obtained through an access to information request.

[66] The grievor argues that the PCO was not obligated to terminate her employment at the end of the diligent search period and that the adjudicator in a preliminary decision rendered on February 16, 2009 recognized that (*Zhang #2*, at paragraph 61). If the ruling in *Zhang #1* had meant for her employment to end at the conclusion of the search period, it would have stated so clearly. The PCO acted in bad faith by not allowing the staffing process at Service Canada to run its course. The fact that the

grievor could not demonstrate on April 7, 2006 that she had found employment elsewhere in the federal public service was not a ground that justified terminating her employment.

[67] The grievor faults the PCO for not inquiring into the results of the search for alternate employment until she filed a grievance. The grievor argues that the PCO was not forthcoming about information that her substantive position had indeed been backfilled; a condition that she alleges would have allowed her to access priority staffing lists and to find an alternate position. The PCO negatively affected an opportunity for employment by not agreeing to a secondment arrangement. Ms. Biggs' delay in responding to the grievance contributed to the financial prejudice suffered by the grievor because she was unable to resume employment quickly after her termination.

[68] In the grievor's view, Ms. Butler was seriously biased, as all her recommendations to senior management were intended to prevent the grievor from obtaining employment within the federal public service, despite a recommendation from Mr. Laviolette that it facilitate the grievor's employment opportunity at Service Canada.

[69] Even though the grievor was eventually employed by Service Canada and no longer seeks reinstatement at the PCO, she asks to be compensated for the period during which she remained unemployed, that is, from April 14, 2006 (the day that followed her termination) to September 4, 2006 (the day before her employment at Service Canada) at the IS-06 group and level, which is the level to which she was promoted upon starting her employment at Service Canada. In the alternative, the grievor requests that she be paid at the IS-05 group and level, which was her entry classification at Service Canada.

[70] The grievor asks that I consider awarding damages for mental distress in accordance with *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, as it concerns the acts and omissions of the employer.

[71] The grievor also asks that I award damages for the unnecessary revocation of her Reliability status, the consequence of which was to cause further delays to the commencement of her employment at Service Canada.

[72] The grievor asks that both her grievances be allowed.

[73] The grievor further cited the following decisions in support of her position: *Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151; *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63; *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2009 PSLRB 19; and *Roberts v. Deputy Head (Department of Human Resources and Skills Development)*, 2009 PSLRB 108.

C. Respondent's rebuttal

[74] In response to the grievor's arguments, the PCO argues that suggesting to Mr. Laviolette that the search be widened to other positions within the federal public service was not a request for an undertaking. The PCO argues that the adjudication order referred to positions classified at the IS-05 group and level or lower and not to all other available positions in the federal public service. During the search period, only seven positions met the search criteria, and all those positions were referred to the grievor for follow up.

[75] Even though the grievor may allege that the PCO wished to exclude her from employment within the federal public service, nonetheless, it did not interfere in the diligent search process. Any post-termination events do not taint the search itself. Mr. Laviolette conducted the diligent search in good faith, whether or not he agreed with it being assigned to him. The search was performed according to the broad terms of the decision in *Zhang #1*. The employer exercised its judgment in performing the search, and there is no evidence that the PCO interfered in any way in the process. The grievor's reinstatement was to include the search period and not a period covering the outcome of a staffing process.

[76] The request for a secondment came two-and-a-half months after the termination of the grievor's employment. Service Canada had several options to hire the grievor, of which a secondment was but one.

[77] The changes to the Treasury Board *Personnel Security Standard* did not interfere with the diligent search process, and nothing ominous can be attributed to the change in policy. The cancellation of the grievor's Reliability status was an administrative measure as a consequence of the termination of her employment. The grievor's

termination was not the result of the revocation of her Reliability status, as she has implied.

[78] The PCO opposes the grievor's claim for an award of damages for mental distress as it was not requested in her grievance, and the PCO did not have the opportunity of leading evidence concerning this claim. The manner of termination does not suggest egregious conduct that compares to the decisions in *Wallace* and *Honda Canada Inc. v. Keays*, 2008 SCC 39. The grievor's original claim was for a compensatory amount of four-and-a-half months pay, nothing else.

IV. Reasons

[79] The order rendered on December 8, 2005, in *Zhang #1* is the essence of the dispute between the parties and reads as follows:

. . .

> *[76] I order that the employer conduct a diligent search for an alternative position for the grievor at an equivalent (IS-5) or lower level within the parts of the public service for which it is the employer, for a period of two months from the date of this decision.*
>
> *[77] I order the employer to reinstate Ms. Zhang in her leave with pay status effective November 28, 2003, until the employer has completed its search for an alternate position.*

. . .

[80] The substantive part of the first grievance (PSLRB File No. 566-02-602), dated May 6, 2006, disputing the PCO's application of the order, states the following:

. . .

> *This termination of my employment was done without just and sufficient Cause. In addition, the letter of termination is contrary to the decision made on December 8th, 2005, by Ian R. Mackenzie, adjudicator for the Public service Labour Relations Board (PSLRB), in file number 166-2-32992.*

. . .

[81] Accordingly, the first grievance raises two issues, first, whether the termination of the grievor's employment was for "just and sufficient cause," and second, whether the decision to terminate the grievor was contrary to the order in *Zhang #1*.

[82] Arbitral jurisprudence has traditionally associated the notion of termination for cause with a termination for disciplinary reasons or behaviour inconsistent with the legitimate business interests of the employer, leaving an arbitrator with broad jurisdiction to assess whether just cause has been established. (For a discussion, see Mitchnick and Etherington, *Labour Arbitration in Canada*, Lancaster House (2006), pages 157 to 160.)

[83] In the circumstances of this case, it is obvious that the termination of the grievor's employment did not relate to disciplinary action but rather was a consequence of the grievor being unable to find employment in the federal public service at the end of a two-month diligent search for alternative employment. Stated otherwise, the termination flowed from the consequences of the adjudicator's decision and not from disciplinary action. To the extent that the employer performed a diligent search, I am of the view that nothing reprehensible, injurious or unexpected occurred in ending the grievor's employment after the search period, for the following reasons.

[84] The grievor was given advance notice of the termination action in a letter addressed to her on April 7, 2006, which she allegedly received on April 10, 2006. The grievor admitted not responding to this letter. In the absence of a response, the PCO followed up with a letter of termination dated April 13, 2006. While the wording of the April 7, 2006 letter may have seemed to impose the burden of finding alternative employment on the grievor, this does not detract from the fact that, at the end of the search period, whether through the employer's search efforts or the grievor's own, she had not found employment within the federal public service. The grievor's first contact with the PCO concerning her success at finding employment came on June 2, 2006, when she contacted Annette Marquis, a labour relations officer at the PCO, with a request to be reinstated, so that she could be seconded to Service Canada until the formalities for appointment were completed.

[85] It was not until June 28, 2006, at the request of the PCO for information that it came to light that the grievor had in fact applied for a position at Service Canada on March 29, 2006. Given the PCO's lack of knowledge of the grievor's situation at that time of her employment termination, the PCO cannot be faulted for the action that it took on April 13, 2006.

[86] As to whether the employer conducted a diligent search, the order in *Zhang #1* contains no terms of art. The terms used must be given their plain meaning, that is,

the employer (Treasury Board) was to conduct a two-month diligent search for an alternative position classified at the IS-05 group and level or lower ". . . within the parts of the public service for which it is the employer . . . ." The method of search was not specified in the order, and I have no evidence that the grievor ever questioned the search method other than to suggest that the search should be expanded beyond her classification category to encompass all positions within the federal public service for which she might have been qualified.

[87] What the grievor claims to be entitled to is beyond what was ordered. The ordered diligent search was for an alternative position classified at the IS-05 group and level or lower. By specifying the classification category, in my view, the order was limited to a search at those levels. In that respect, I agree with Mr. Laviolette's testimony that the grievor's antecedents were in that category and that that is where she had marketable experience. Thus, the employer had no obligation to enlarge the search for an alternate position outside the IS classification. I also find that the order was for a search for employment and not an obligation to engage in a marketing strategy to find employment for the grievor. The steps taken by Mr. Laviolette to check Publiservice daily and to make the grievor's availability for employment known to directors of labour relations and heads of human resources constituted a diligent search. The Oxford English Dictionary defines "diligent" as "careful and persistent application or effort." I am satisfied that the employer fully satisfied these criteria. The fact that there were but seven positions for which the grievor qualified during the search period does not infer that Mr. Laviolette did not assiduously search for alternative employment. I also take into account that there were severe restrictions to the grievor's employment elsewhere, namely, that she was unable to hold any other security status than a Reliability status and that employment opportunities were restricted to the National Capital Region. The employer is not answerable for those restrictions to the grievor's employment.

[88] The grievor asked that I take into consideration subsequent-event evidence that frustrated an opportunity for employment, that is, the decision of the PCO not to agree to a secondment arrangement and the delay in responding to the grievance.

[89] In *LaBranche v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2010 PSLRB 65, I reviewed the principles of post-termination evidence as

examined by the Supreme Court of Canada in *Cie minière Québec Cartier v. Québec*, [1995] 2 S.C.R. 1095. The Supreme Court stated the following:

. . .

> *This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, an arbitrator can rely on such evidence, but only where it . . . helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented. Accordingly, once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator, fair and equitable. In these circumstances, an arbitrator would be exceeding his jurisdiction if he relied on subsequent-event evidence as grounds for annulling the dismissal. To hold otherwise, would be to accept that the result of a grievance concerning the dismissal of an employee could vary depending on when it is filed and time lag between the initial filing and final hearing by the arbitrator. . . .*
>
> . . .
>
> [Emphasis added]

[90] In *LaBranche*, I concluded that the Supreme Court had enunciated a broad evidentiary principle that applies to the scope of all arbitral authority, that is, that, before deciding the outcome of a grievance, the adjudicator must consider all the relevant evidence.

[91] While an administrative tribunal has some flexibility in applying the rules specified by the courts, an administrative tribunal cannot simply ignore the traditional canons upon which decisions are made. The integrity of a decision relies first and foremost on the relevance and reliability of the evidence. In the case of the *Public Service Labour Relations Act* (*PSLRA*), the procedure and conduct before the adjudicator is permissive. Paragraph 226(1)(*d*) of the *PSLRA* states the following:

> ***226.****(1) An adjudicator may, in relation to any matter referred to adjudication,*
>
> . . .

> (d) *accept any evidence, whether admissible in a court of law or not;*

This provision gives the adjudicator the discretion to admit evidence into the record that would not otherwise satisfy the strict evidentiary test of admissibility, the only caveat being that it must be relevant to the subject matter of the proceedings.

[92] The discretion of the adjudicator is further enhanced by subsection 228(2) of the *PSLRA* that defines as follows the decision-making power of the adjudicator:

> ***228.****(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. . . .*

These provisions, together with the principle articulated by the Supreme Court, in my view, leave the door open for an adjudicator to consider subsequent-event evidence that may shed light on the context of a grievance.

[93] In this case, the subsequent-event evidence put forward by the grievor consists of an opportunity for employment that occurred after her termination and for which she applied during the search period. The request for a secondment arrangement was made on June 8, 2006, two months after her termination. The PCO considered the request for some time before deciding that it was not in its interest. The reasons for its decision were that a secondment required reinstatement in her former position, which would have provided the grievor with a continuing opportunity to apply for different positions during her secondment, and that she would have had the option of deciding to return to her former position at any time during the secondment period. It considered that scenario too risky. Moreover, the main difficulty was that the grievor could not be reinstated in her former position without at least a Secret security clearance. To this impediment it should be added that, at the time of her request, she had been replaced in her former position since March 23, 2006.

[94] While a secondment would surely have paved the way for earlier reemployment, in these circumstances, the position taken by the PCO was not unreasonable or illegal. Furthermore, a secondment was not the only option available to Service Canada had it wished to employ the grievor quickly. Facilitating a secondment may be considered a more humane way to deal with the grievor, but I do not have the authority to vary a decision taken by the PCO that precisely follows the provisions of an established Treasury Board policy.

[95] Had the grievor requested an extension of her status of leave with pay before termination because a staffing action was imminent, I may have taken a different view of the situation. Unfortunately, she did not, and consequently, I do not find that the PCO acted in bad faith when it did not agree to her request. I find that, in this case, the subsequent-event evidence is not persuasive or relevant to the grievance at hand.

[96] The substantive part of the second grievance (PSLRB File No. 566-02-603), dated May 11, 2006, disputing the cancellation of the grievor's Reliability status after her termination, states the following:

. . .

> *I grieve the letter of cancellation of my reliability Status; this letter being dated April 18, 2006 and signed by Raymond Lamb, Director Security Operations, PCO. This cancellation is done without just and sufficient cause. In addition, this letter is in direct violation of Treasury Board Personnel Security Standard (6.1) as the employer failed to informed me in writing of my rights of access to review or redress mechanisms.*

[97] The evidence is that, in January 2006, the PCO proposed to the Secretary of the Treasury Board that the Treasury Board *Personnel Security Standard*, issued under the *Government Security Policy*, be amended to allow for the reassessment, and if warranted, the revocation of an individual's Reliability status based on adverse information gathered in the course of a security clearance assessment determination. The amendment preceded the grievor's termination and was made as a result of the successful adjudication of the grievor's first termination grievance.

[98] I have no doubt that making such an amendment must have appeared very harsh to the grievor. Nonetheless, no evidence was put forward that the amendment was illegal or untoward. For reasons that are entirely at the government's discretion, it decided to amend the policy, and I have no jurisdiction to reverse or disregard it. Furthermore, according to the *Personnel Security Standard*, the administrative cancellation of a security clearance may be the subject of a grievance. However, it is excluded from recourse under subsection 209(1) of the *PSLRA*, unless it is tied to the outcome of a termination grievance (see *Roberts*).

[99] As I have decided that the termination grievance is unfounded, it follows that the grievor had no standing to file a grievance disputing the cancellation of her

Reliability status since she was no longer an employee when the decision was made. Therefore, I consider myself without jurisdiction to decide that grievance.

[100] I agree with the grievor that section 6.1 of the *Personnel Security Standard* requires that she be given notice in writing of her right of access to review or redress as to the revocation of her Reliability status. However, in the circumstances of this case, this is a moot issue.

[101] I find that the decisions in *Hillis*, *Braun* and *Gill* cited by the grievor are unpersuasive in this case because they deal with the termination of employment as a result of the revocation of Reliability status, which is a different issue from the administrative cancellation of Reliability status after employment has been terminated.

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

(The Order appears on the next page)

V. Order

[103] The grievances are dismissed.

September 10, 2010.

Michele A. Pineau,
adjudicator