Date: 20111202

File: 566-02-605

Citation: 2011 PSLRB 137

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

THU-CÙC LÂM

Grievor

and

DEPUTY HEAD
(Public Health Agency of Canada)

Respondent

Indexed as
Lâm v. Deputy Head (Public Health Agency of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: James G. Cameron, counsel

For the Respondent: Adrian Bieniasiewicz, counsel

Heard at Montreal, Quebec,
April 11 to 15, 2011.
Written submissions filed June 3, 24 and 30, 2011.
(PSLRB Translation)

I. Application for remedy

[1] The grievor, Thu-Cùc Lâm, was terminated from her employment with the federal public service on July 12, 2006. As the adjudicator, I ruled that the termination was unjustified. However, I refused to order her reinstatement for the reasons outlined in my decision (see *Lâm v. Deputy Head (Public Health Agency of Canada)*, 2008 PSLRB 61). The grievor applied for judicial review of my decision on the grounds that I did not give her the opportunity to make arguments about her reinstatement.

[2] The Federal Court allowed the application for judicial review in part (see *Lâm v. Canada (Attorney General),* 2009 FC 913) and ordered a hearing scheduled to hear the parties on the appropriate remedy. The grievor appealed that decision. The Federal Court of Appeal set aside the Federal Court's decision and ordered the matter referred back to me to redetermine the appropriate remedy (see *Lâm v. Canada (Attorney General)*, 2010 FCA 222). The Court of Appeal's judgment is as follows:

> *[1] We are of the view that the judge of the Federal Court, having found that the adjudicator had failed to allow the parties to make submissions on the issue of the appropriate remedy, had to refer the case back to the adjudicator for redetermination.*
>
> *[2] It is therefore appropriate to allow the appeal, to set aside the decision of the Federal Court and to order that the matter be referred back to the same adjudicator for redetermination of the issue of the appropriate remedy.*
>
> . . .

[3] Although the Federal Court judge ruled on the merits of broadening an adjudicator's jurisdiction in termination cases to include damages rather than just reinstatement, the Federal Court of Appeal did not address this issue. Therefore, the issue of an adjudicator's authority to award damages rather than having to order reinstatement for an unjustified termination remains outstanding.

[4] The hearing on the issue of the appropriate remedy was held from April 11 to 15, 2011, and proceeded as follows. I first heard the parties' arguments on my authority. After hearing counsels' arguments, I reserved my decision and asked them to present me with written submissions on the following specific issues:

(i) The distinctions between the legislative provisions of section 11 of the old *Financial Administration Act* ("the old *FAA*") and section 92 of the

Public Service Staff Relations Act (*PSSRA*), cited by the Federal Court of Appeal in *Gannon v. Canada (Attorney General),* 2004 FCA 417, and the provisions of section 12 of the new *Financial Administration Act* ("the new *FAA*") and section 209 of the *Public Service Labour Relations Act* (*PSLRA*), which replaced them on April 1, 2005.

(ii) If applicable, the impact of those distinctions on an adjudicator's authority to order compensation rather than reinstatement for a grievor wrongfully dismissed, as held in *Gannon*.

The parties then presented oral evidence and their arguments on the merits of the appropriate remedy.

[5] After the hearing, the employer made its written submissions on June 3, 2011. The bargaining agent made its written submissions on June 24, 2011. The employer made its rebuttal on June 30, 2011.

II. Summary of the testimonies

[6] The employer had six employees testify. They were the grievor's colleagues before she was terminated. They spoke of the difficulties that they experienced when working with her. The grievor also testified.

Simon Jacques' testimony

[7] Simon Jacques is a program consultant, and his job is classified PM-4. He has worked for the Public Health Agency of Canada ("the Agency") since 2000. He monitors and evaluates projects in both community organizations and those involved in the Quebec Health Network. He worked with the grievor from 2000 to 2006. Starting in 2003, his work area was located in front of that of the grievor. Mr. Jacques testified about the following incidents that contributed to a tense relationship with the grievor and that made him avoid her as much as possible.

[8] In spring 2001, the grievor lashed out at Mr. Jacques at a regional issue table on project renewal. She interrupted him sharply and told him to be quiet because he did not have the floor. In November 2001, without explanation, the grievor placed a newspaper article on his and other co-workers' mail slots about the large number of suicides linked to workplace violence. Mr. Jacques felt extremely uncomfortable about it. In 2002, the grievor organized a meeting with the female program consultants. She left out the three male consultants in the group because, in her view, they tended to dominate meetings. Mr. Jacques said that being left out insulted him.

[9] In 2004, Mr. Jacques was the acting the team leader. The grievor stopped by his door and asked him what he was doing in the team leader's office. The grievor told Mr. Jacques that she should have been the acting team leader because she had more seniority than him. Later, the grievor vigorously contested Mr. Jacques' decision to not automatically grant her the telework days that she had asked for.

[10] On April 15, 2005, the grievor took the floor at a program officer meeting and contested the success rate put forward by one of the managers in attendance, telling him that it was baseless. When another manager commented on the tone of the meeting and the respect due colleagues, the grievor raised her voice and accused management of threatening her personal safety and her job. She then left the meeting in a huff. Mr. Jacques testified that that example of tense, even acrimonious, team meetings resulted from the grievor's behaviour. After she was gone, meetings went smoothly. Mr. Jacques testified that, were the grievor reinstated, weekly meetings would be full of apprehension.

[11] In cross-examination, Mr. Jacques admitted that he had posted a joke in his work area about women that was in bad taste. He took it down when the grievor complained. Mr. Jacques also served as the union steward between 2001 and 2005, but he was not involved in the grievor's termination.

Isabelle Lamontagne's testimony

[12] Isabelle Lamontagne is a program consultant, and her job is classified PM-4. She has worked at the Agency since 2000. She worked with the grievor from October 2004 to June 2006. Ms. Lamontagne used to attend team meetings with the grievor each week. Although all the other consultants came into work before 09:00 and wanted the meetings to start at 09:00, the grievor insisted on starting them at 09:30, because that is when she arrived. Despite all the efforts to accommodate her, she showed up late for the meetings. Ms. Lamontagne stated that, when the grievor attended, "[translation] you could cut the air with a knife." The grievor would object to every item on the agenda, make comments and ask either for changes or to return to an item. It was virtually impossible to cover all the agenda items because of her actions. The meetings did not progress, and more often than not, they would last into the afternoon. When other team members intervened on items that the grievor raised, she invariably threatened to file a grievance and to file a complaint with the Human Rights Commission or the Public Service Alliance of Canada. The grievor would discuss

endlessly with management, to the point of dominating meetings. Ms. Lamontagne said that she felt powerless to say anything and that the atmosphere was unbearable. She testified that the grievor acted disrespectfully towards a highly respected manager at a meeting on April 15, 2005, and called him incompetent.

[13] Ms. Lamontagne testified that, since the grievor's departure, the work atmosphere has been relaxed, the team of program officers has worked well together, meetings have gone smoothly and all agenda items have been handled before noon. According to her, managers are no longer constantly engaged by the grievor. Ms. Lamontagne added that, as much as she likes working at the Agency, she would look for another job if the grievor came back to work in her unit.

[14] In cross-examination, Ms. Lamontagne testified that she was not aware of the administrative investigation's conclusions about the grievor or of the decision rendered with respect to her. She admitted that she had been warned about the grievor's conduct when she began working with the program officer team. She said that she would not hesitate to look for another job were the grievor reinstated on the team.

Nathalie Pelletier's testimony

[15] Nathalie Pelletier is a program consultant, and her job is classified PM-4. She has worked at the Agency since 2000. She worked with the grievor in the same program between February 2002 and January 2003. Between 2003 and 2006, her program responsibilities changed; however, her office was located near that of the grievor. Ms. Pelletier would run into the grievor in the corridors. During their conversations, banal as they were, Ms. Pelletier felt judged, humiliated and incompetent. If Ms. Pelletier did not understand immediately what the grievor was saying, the grievor would say, "[translation] . . . it's simple enough, you should understand, let me explain it to you another way. . . ." During an incident in the records room, the grievor criticized her for a document that she thought had been incorrectly filed. In Ms. Pelletier's opinion, since the grievor was not her supervisor, how a document was filed was no business of hers.

[16] The grievor usually showed up late for team meetings. She then had to be given a complete summary before she could participate. During meetings, the grievor would constantly interrupt the person speaking and would make disparaging and

condescending remarks about the person or their opinions. A few times, participants frustrated by the lack of progress simply left. On one occasion, the grievor objected to Ms. Pelletier communicating with a regional representative even though she was authorized to do so. Ms. Pelletier felt humiliated in front of her colleagues. Since the grievor's departure, meetings have been effective, and participants have been able to speak openly.

[17] Before Ms. Pelletier became an indeterminate employee, the grievor taunted her several times about her contractual status and boasted about how she was an indeterminate employee.

[18] Ms. Pelletier testified that, as much as she liked her work, she would look for another job were the grievor reinstated, because she no longer wanted to live with the stress of daily contact with the grievor. Ms. Pelletier learned on March 11, 2011 that the grievor might return to work. That news disturbed her all weekend. She updated her resume in case she had to look for a new job. She sought psychological help. A group psychology session was held on March 14, 2011, for employees potentially affected by the grievor's return to work. Ms. Pelletier also emailed the bargaining agent, expressing her discomfort about the grievor returning to work.

[19] In cross-examination, Ms. Pelletier testified that she told the grievor that her comments made her uncomfortable, but the grievor did not respond. Ms. Pelletier provided details of the incident that erupted over filing a document in a report to her supervisor. Ms. Pelletier said that she was unaware whether the incident was ever brought to the grievor's attention. Ms. Pelletier testified that she did not know of the actions taken with the grievor about her conduct.

Dominique Parisien's testimony

[20] Dominique Parisien is a manager, and her job is classified EC-7. She has worked for the Agency since 1998. Between 2000 and 2004, she was part of the group that evaluated children's programs and was classified ES-4. At that time, she worked adjacent to the grievor's office. On one occasion, the grievor, who was always smartly dressed and coiffed, congratulated her because she was finally dressing like a young woman, which Ms. Parisien found condescending. Ms. Parisien observed that the grievor often adopted a dry tone when dealing with co-workers and clients.

[21] Ms. Parisien participated in team meetings with her co-workers, including the grievor, who systematically contested the work procedures put forward by the group. The grievor remarked that her supervisor made bad decisions. Since she would arrive late and disrupt team meetings after they were already well under way and would make a scene, the meetings were rescheduled to 09:30.

[22] Ms. Parisien testified about the grievor's lack of collaboration. Unlike the other program officers, the grievor did not respond to project analysis requests within the prescribed three weeks; she refused to attend training sessions on the pretext that she was already familiar with the subject matter or the information to be provided. The grievor was always too busy to respond to requests for information. After several reminders, she would answer that the information was already on file.

[23] On one occasion, the grievor emailed a university student working as an intern in the unit, and copied Ms. Parisien, telling her that her work was good "for a college internship" but useless for the purposes of her work. The student's work was eventually used to create essential work tools. Ms. Parisien testified that she had been upset about the newspaper article on the large number of suicides linked to workplace violence that the grievor had put in her mailbox, especially the highlighted part about workplace violence. Ms. Parisien was afraid that the grievor would act violently towards her.

[24] Ms. Parisien testified that the grievor was offended when Ms. Parisien contacted a regional director. The grievor raised her voice and pointed her finger, claiming that the director was her exclusive contact and that everything had to go through her. She forbade Ms. Parisien from meeting with her in the future.

[25] On April 15, 2006, the grievor took part in a quarterly meeting of the program units. She openly criticized the management team for making errors or omissions in certain files, including the management of contracts between the Agency and certain contractors, a program evaluation synthesis, the validity of the data used for that evaluation, the disclosure to consultants of a provincial protocol and the official date of use of certain operational procedures. As a result of the grievor's lack of respect, the meeting was interrupted, and some participants withdrew. The grievor's behaviour was investigated. The investigation concluded that her conduct undermined team spirit and discouraged participation by certain team members, who feared being misinterpreted.

[26] Ms. Parisien could not believe it when she learned that the grievor might be reinstated following her termination. She did not understand why the grievor would want to return to a workplace about which she had been so critical. Ms. Parisien no longer wanted to relive, and did not want her employees to relive, difficult moments with the grievor. She consulted a psychologist through the employee assistance program. Ms. Parisien said that she was still upset over the possibility of having to reinstate the grievor in an Agency team.

Anne Turmaine's testimony

[27] Anne Turmaine is a manager for children's programs. She manages a team of 22 employees, and she reports to the Quebec regional director. Ms. Turmaine started working for the Agency as a PM-4 on October 30, 1998, at the same time as the grievor and five other program officers. During the first week on the job, the new program officers were asked to make a team presentation. The grievor stepped forward and wanted to divide the work in seven, so that each person would work separately. That was her idea of teamwork. Every time files had to be shared, exchanged or transferred, the grievor made demands, wanted changes and made the other consultants ill at ease.

[28] The grievor did not want to collaborate with the university student. Every time she was asked to collaborate, management had to be called in to make it happen. She questioned everything, including the division of files, the assignment to the regions and the relations with the regional board. For the grievor, her files were her own private domain, to the point that no one could access them except for her. A perpetual conflict existed over co-workers accessing her files.

[29] Ms. Turmaine testified about the difficulties that she encountered getting the grievor to collaborate for an important meeting that was held in Québec in 2001. The grievor sent email after email asking for specific information on all items, instead of waiting to be provided with it.

[30] Ms. Turmaine was upset to find in her mailbox, without explanation, the newspaper article on the large number of suicides linked to workplace violence. She believed that the grievor was targeting her by the content of the article and wondered if the grievor would commit a violent act.

[31] Team meetings were very stressful because the grievor arrived late. She questioned everything that had been discussed before she arrived, as well as the decisions made by the managers. She constantly put down her co-workers. Ms. Turmaine described that aspect of the grievor in the following words: "[translation] Politely, always politely, but puts you down politely." The grievor's conduct created so much tension that Ms. Turmaine left some of the meetings to escape the stress. The meetings did not progress.

[32] Ms. Turmaine testified that she spoke to the grievor about the need for interpretation to discuss a project that was being carried out in English, one of seven to be discussed at a meeting. The grievor was categorical about the requirements of the *Official Languages Act* no matter the project's importance. She then admitted that explanations would be sufficient if any participant failed to understand.

[33] After the Federal Court of Appeal's decision, Ms. Turmaine announced to the employees that the grievor might possibly return to work. All the employees that she met with, including those who testified, were shocked, and many became anxious. Ms. Turmaine contacted a psychologist to meet with the employees in a group and individually, if necessary.

[34] In cross-examination, Ms. Turmaine admitted that the incident over the meeting in Québec was not major and that it happened 10 years ago. She testified that the team meetings with the grievor became increasingly unpleasant and that the grievor did not budge when management tried to restore order. At that time (2002 to 2006), Ms. Turmaine was a PM-4, like the grievor. Her role was not to reprimand or intervene. However, Ms. Turmaine complained to her team leader and the director general about the grievor's behaviour and explained to them how working with her had become intolerable.

Danielle Gagnon's testimony

[35] Danielle Gagnon has been the director of the Quebec Region since May 2008. She is in charge of emergency preparedness programs and federal-provincial relations for the Agency. Ms. Gagnon testified that she worked with the grievor in 1997 and 1998, while the grievor was a human resources coordinator on special issues linked to the regional health program managed by Ms. Gagnon on diversity and employment

equity. The grievor constantly gave her instructions. Ms. Gagnon complained to her manager about the grievor's constant interventions.

[36] Ms. Gagnon testified about a management-union meeting in 2004 that the grievor attended. One of the key agenda topics was skills training. The grievor took the floor and lectured the directors present on how the training should be given. She insinuated that the directors were inferior and that they did not know how to do their jobs. Her conduct visibly irritated those in attendance. The matter was closed.

[37] Ms. Gagnon learned that the grievor might possibly return when the Federal Court made its decision. She discussed it with Ms. Turmaine and the team leader, Aline Bernier. Ms. Bernier stated immediately that she would quit if the grievor returned to work; she feared for her physical safety. She shared the information about the grievor's return with the employees on the team. They reacted badly. They consulted a psychologist. Ms. Gagnon fears that the work climate will deteriorate again if the grievor returns.

[38] In cross-examination, Ms. Gagnon testified that she never spoke with the grievor about the incident at the management-union meeting in 2004. Answering the suggestion that the grievor's behaviour might be controlled if she returned to work, Ms. Gagnon stated that her return would have an immediate negative impact on the work team, regardless of the disciplinary processes at her disposal. Responding to the suggestion that other management tools were available, Ms. Gagnon stated that the harm to the work climate would be felt immediately, regardless of the tools used, whether the tool is the employee assistance program, the services of a coach or even deploying the grievor. In any case, she has no control over those "tools," and results are not guaranteed.

Caroline Boucher's testimony

[39] Caroline Boucher is a program consultant, and her job is classified PM-4. She has worked at the Agency since 2003. She reports to Ms. Turmaine. She had contact with the grievor between 2003 and 2005 and described the following incidents. She testified that, to meet the grievor's demands about meeting start times, the one on July 16, 2004 was scheduled for 09:15. An email confirming the meeting was sent to all participants, including the grievor. She contested the scheduled start time for the

meeting in an email. On the day of the meeting, the grievor showed up at 12:05 without explanation or apology.

[40] On July 21, 2004, Ms. Boucher reviewed cases that had been assigned to the grievor. Ms. Boucher threw out duplicates and documents no longer useful for the program officers in their work. She knew that the originals were in the master file and that Financial Services had copies. The grievor rummaged through Ms. Boucher's wastebaskets and found documents that had been thrown out. The grievor reported the incident to Ms. Bernier, Ms. Boucher's team leader, and told her that she no longer took responsibility for the accuracy of transferred files. Ms. Bernier asked Ms. Boucher for an explanation. Ms. Boucher said that she was being spied on and that she was humiliated, even though she did not throw out anything of importance and committed no error. The grievor was disrespectful to her by reporting the incident without speaking to her about it.

[41] On or about July 29, 2004, while directing a committee, Ms. Boucher asked the support team to review old files, to make copies of a certain type of report and to place them in a file titled, "Alberta." She instructed that a green sheet was to be inserted to indicate that a report was missing. The grievor decided to consult her old files and was outraged when she discovered a sheet indicating that her file did not contain the report in question. In fact, the document had been filed elsewhere; it had been the grievor's mistake. The grievor filed a complaint against Ms. Boucher. To avoid future run-ins with the grievor, Ms. Boucher changed her way of handling files. Following that incident, Ms. Boucher asked for the grievor to be removed from the committee. Her request was granted.

[42] Ms. Boucher testified about raucous team meetings involving the grievor. For example, on April 5, 2005, the grievor threatened to leave the meeting because the facilitator tried to call a participant to order. On April 15, 2005, the grievor intervened and insulted a manager, telling him that she rejected the cross-sectional analysis that was imposed because she considered it unscientific, and she refused to let the evaluation team provide training in her region. After a break, Ms. Bernier called the grievor to order. The grievor stood up and said that she was leaving the meeting for her personal safety. After speaking with Ms. Bernier outside the room, she did not return.

[43] On March 18, 2011, Ms. Boucher wrote a letter to the bargaining agent's national president, speaking out against the grievor's return to the workplace. Ms. Boucher is afraid that the grievor's return will upset her life at work.

[44] In cross-examination, Ms. Boucher said that she did not voice her discontent directly to the grievor. She admitted that she did not copy the grievor on her complaint emails, just as the grievor did not copy her when she made a complaint.

The grievor's testimony

[45] The grievor began her employment in April 1998 as a diversity officer. In September 1998, she became a PM-4 program officer. She became an indeterminate employee in 1999. She was dismissed in 2006. She now works as an intercultural interpreter for the Ministère de la Santé et des Services Sociaux for the Montreal Island area.

[46] The grievor testified that she has a continuous sense of shame associated with her dismissal. She never discussed her dismissal with anyone, including her family. In Asian culture, a person's family name is very important, and she comes from a well-known Montreal family. Her brother works for Health Canada, and she did not want to cause him any trouble. She has put her studies on hold for the moment. Her income has dropped. She would like to pursue a career as an analyst with the federal public service. When she was dismissed, her career and retirement plans unravelled.

[47] The grievor would like to be reinstated in her position at the Agency so that she could hold her head high, free from the shame of being dismissed, and repair the situation with her family. The grievor feels alone and abandoned.

[48] The grievor testified that she understood the feelings expressed by her co-workers, after listening to their testimonies. She always felt excluded by her co-workers without understanding why. Her impression was that management communicated differently with her co-workers than it did with her. She said that she had never seen the evidence adduced in support of the incidents reported in the testimonies, other than two exhibits introduced in a previous adjudication, dealing with a disciplinary measure.

[49] The grievor defended distributing the newspaper article on the high number of suicides linked to violence in the workplace, stating that she gave it to all employees

and that she did not target anyone in particular. She wanted to draw their attention to work-related stress and the need for awareness.

[50] The grievor said that she was aware of the joke posted in Mr. Jacques' cubicle. She complained, and it was removed.

[51] The grievor explained that the university student worked an initial internship while she was studying at a CEGEP. She returned to work while attending university. That was why the grievor considered her work student work.

[52] The grievor said that she found the photocopies from Ms. Boucher's files in the wastebasket while she was at the printer. The grievor defended complaining to Ms. Bernier, because the complaint involved her file. She expected Ms. Bernier to state that it was improper and to devise a solution. The grievor said that this was the first time she heard how the incident ended.

[53] As for the other four exhibits that were introduced, the grievor testified that she had not been aware of their existence. She explained her conduct as follows: "[translation] It was in my nature, and I'm a minority, it's up to me to validate things and find out what people are saying."

[54] The grievor testified that, were she allowed to return to her position, she would meet with her manager to ask for assistance and to learn. She would like to receive a coaching session and to identify other assistance that she could receive for a limited time. She would look for another PM-4 position. That said, the grievor is confident that she would be able to adapt to any situation, since she has much potential and is a visible minority. She desires to remain in the federal public service at all costs.

[55] When cross-examined, the grievor said that, although her dismissal was public, it was not common knowledge in her community, since few people were interested in legal proceedings, and several members of her family and friends do not know how to read. She repeated that she had been dismissed without cause and that she was fully entitled to reinstatement.

[56] The grievor testified that she had been unaware of why management had been unhappy with her. She was quite surprised by her co-workers' testimonies at the hearing. She finally understood management's attitude toward her. She was unhappy that management failed to contact her to discuss the unsatisfactory incidents as they

occurred and to provide her with further details. The grievor justified digging into the wastebasket because she had seen her signature on one of the discarded documents. She justified looking into Ms. Boucher's files because Ms. Boucher might not have been as current on the files as she was, and she wanted to avoid any other problems with her.

[57] The grievor testified that she was surprised at how her co-workers were affected by the newspaper article on the high number of suicides linked to violence in the workplace. She did not recall to whom she gave the article. It was a harmless gesture. As union secretary, she was allowed to post it on the bulletin board.

[58] The grievor admitted to entering Mr. Jacques' cubicle without his knowledge, removing the joke on his wall and making a copy for her personal files. She reported the incident to a union representative, who then reported it to management. She was relieved when it was taken down.

[59] The grievor testified that she did not need to arrive at 09:00 for team meetings since nothing important was discussed between 09:00 and 09:30. She knew her co-workers and felt that she could afford to be late.

[60] In response to a question about the tone of certain emails addressed to management, the grievor said that she had a right to express herself that way. She justified referring to herself as "[translation] more positive than average" because she had noticed after some reflection that she was more positive than average. The grievor added that her emails needed to be taken in context.

III. Arguments about the adjudicator's authority to order compensation in lieu of reinstatement

A. For the employer

[61] The employer states that significant differences exist between subsection 92(1) of the *PSSRA* and subsection 209(1) of the *PSLRA*, which was introduced on April 1, 2005, replacing subsection 92(1) of the *PSSRA*. As mentioned in both section 92 of the *PSSRA* and section 209 of the *PSLRA*, a grievor can refer to adjudication a grievance about a disciplinary measure. However, the wording of paragraph 92(1)(*b*) of the *PSSRA*, analyzed by the Federal Court of Appeal in *Gannon*, is much more precise than the wording of paragraph 209(1)(*b*) of the *PSLRA*, under which the grievor referred her grievance to adjudication. Mr. Gannon referred his grievance to adjudication

specifically under paragraphs 11(2)(*f*) and (*g*) of the old *FAA*, which provided for termination for breaches of discipline or reasons other than breaches of discipline or misconduct. The grievor's referral of this case to adjudication under paragraph 209(1)(*b*) is more general in nature and does not refer any provision of the new *FAA*.

[62] With respect to legislative changes about an adjudicator's authority to order compensation in lieu of reinstatement, the employer argues that, since the *PSLRA* came into force on April 1, 2005, it is within an adjudicator's authority to order that compensation be awarded in lieu of reinstatement. The deputy head's responsibility to show just cause for disciplinary action taken under paragraphs 12(1)(*c*), (*d*) and (*e*) of the new *FAA*, as provided for in subsection 12(3) of that *Act*, has no bearing on arbitral authority, which is delegated exclusively under the *PSLRA*. The employer submits that the legislator intentionally removed from paragraph 209(1)(*b*) of the *PSLRA* any references to the new *FAA* dealing with disciplinary action against an employee (e.g., 12(1)(*c*)) to eliminate any confusion as to an adjudicator's remedial powers. It should be noted that the provisions of the *PSSRA* were still in effect when *Gannon* was decided. In the absence of a reference to the new *FAA*, the adjudicator has extensive remedial powers, including the authority of compensating instead of reinstating a dismissed employee.

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

[63] The grievor argues that the federal public service work environment is exceptional. In *Canada (Attorney General) v. Public Service Alliance of Canada,* [1989] 2 F.C. 633 (C.A.) ("*Econosult*"), the Federal Court of Appeal ruled that statutes applying to federal employees must be interpreted and applied jointly, to reflect the federal public service's unique work environment. Within that legislative framework, the legislator created a detailed set of rules for appointing and dismissing federal employees.

[64] In *Gannon*, the Federal Court of Appeal pointed out that, under the old *FAA*, disciplinary action could be taken only for cause. In this case, the employer showed cause for the grievor's dismissal by providing disciplinary reasons. The grievor argues that, when an adjudicator determines that a dismissal was without cause, as in the grievor's case, then the employer's decision is void *ab initio*. The grievor submits that, despite the modifications to the new *FAA*, the provisions on the need for cause to terminate employment are identical in wording. The only difference is the authority establishing the disciplinary action, i.e., the Treasury Board under the old *FAA*, and the

deputy head under the new *FAA*. The grievor argues that that change did not affect *Gannon*, since the legislative text analyzed by the Federal Court of Appeal did not change. The grievor points out that the legislator did not modify the *PSSRA* in response to *Gannon*, which was decided after the *PSLRA* received royal assent in November 2003.

[65] Furthermore, the bargaining agent submits that that modification was not sufficient to provide an adjudicator with the authority to disallow a reinstatement when the employee's alleged acts did not justify dismissal. The grievor submits that the employer's interpretation that the *PSSRA* and the *PSLRA* differ fundamentally in how they refer to the *FAA* goes against jurisprudence that has recognized the distinct nature of the legislative framework for federal public service employees and that has imposed a combined interpretation and application of the different statutes. The grievor submits that nothing in the *PSLRA* precludes applying the provisions of the new *FAA*. On the contrary, clear legislative text would be required to set aside the provisions of the *FAA*. Without clear legislative text in the *PSLRA*, an adjudicator has no choice but to order a reinstatement when an employee is dismissed without cause. The grievor adds that, even after the modifications made in 2005, the provisions of the *PSLRA* and the new *FAA* remain essentially the same.

[66] The grievor submits that the provisions about an adjudicator's authority also remained the same. Under the *PSSRA*, the adjudicator had to render a decision. Under the *PSLRA*, the adjudicator must examine the grievance and make an order that he or she considers appropriate. The addition of the expression, "that he or she considers appropriate," does not suffice to set aside a decision by the Federal Court of Appeal. Under both the *PSSRA* and the *PSLRA*, adjudicators always had discretionary authority with respect to their decisions. Adjudicators' authority under the *PSLRA* is still distinct from that provided under subsection 242(4) of the *Canada Labour Code* and that studied by the Supreme Court of Canada in *Alberta Union of Provincial Employees v. Lethbridge Community College,* 2004 SCC 28. In other words, if an adjudicator finds that an employee has been dismissed without cause, the employee must be reinstated, since the *PSLRA* does not grant new authority.

[67] The grievor claims that the employer's interpretation was neither reasonable nor compatible with the provisions of the *PSLRA*. The employer will always be able to argue at adjudication that the bond of trust with the dismissed employee was broken,

that reinstatement would not be viable and that compensation would be more appropriate.

IV. Arguments on whether the grievor should be reinstated

A. For the employer

[68] The employer claims that ordering compensation in lieu of reinstatement is common practice in labour law.

[69] The grievor knew that her conduct was inappropriate. It is clear that the relationship between the employees and the grievor has been broken. All who worked with the grievor unanimously stated that they no longer wish to work with her. Their interactions with her were disturbing, unpleasant and inappropriate for a workplace. The incidents affected their health. Emotions remain high even though five years have passed since the grievor was dismissed. Every employee consulted a psychologist after learning that the grievor might return to work.

[70] If the grievor returns to her position, she will work with the same people. Given the evidence, it would be dysfunctional to return her to a work environment in which she is no longer welcome. Returning the grievor to her position would go against the objectives of harmonious labour-management relations and the efficient resolution of grievances, as stated in the preamble of the *PSLRA*.

[71] One reason for requesting the grievor's reinstatement is to restore her pride and rid her of shame. The decision that cleared her is sufficient to accomplish that goal. Since there was no cause for dismissal, the grievor will be compensated.

[72] The employer points out that the grievor continued to deny that she was aware of the conduct of which she was being accused, even though she had been told more than once and had even received more than one disciplinary measure. The employer argues that the grievor was perfectly aware of how her co-workers were affected by her words and malicious intimations and of her inappropriate comments about management. The grievor showed a lack of respect toward her co-workers by constantly arriving late for team meetings. She expressed no regrets for her behaviour. She also showed a lack of respect by circulating the newspaper article on the high number of suicides linked to violence in the workplace without providing an explanation, by entering Mr. Jacques'

cubicle without being invited and by making false accusations about Ms. Boucher because of a document found in the garbage.

[73] Mr. Jacques testified that the grievor never told him that she took offence with the joke posted in his office. When questioned, the grievor said that she made a photocopy and that she passed it on to others. When cross-examined, the grievor denied circulating it. She said that she simply photocopied it and put it in her files. The grievor contradicted herself in her testimony. Therefore, I should give more weight to the testimony of Mr. Jacques, who is more credible.

[74] The employer argues that the option of reinstating the grievor is neither reasonable nor viable in the long term. Returning the grievor to her substantive position would not result in a final and efficient resolution of the grievance. The employer requests an order of compensation instead of reinstatement.

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

[75] The grievor argues that the general rule of reinstating an employee when there is no cause for termination still applies and is supported by the jurisprudence under both the *PSSRA* and the *PSLRA*. The Federal Court of Appeal clearly favours reinstatement, except if exceptional circumstances clearly show the contrary. The grievor argues that she should not lose her job for insufficient cause.

[76] The grievor argues that five factors reveal the employer's weak position. First, without questioning the sincerity of the individuals who testified, the grievor points out that six of the seven witnesses took part in a group intervention with a psychologist before testifying. Therefore, it follows that their testimonies are similar and that their emotions would be higher and more vivid, because of that intervention.

[77] Second, the grievor points out that management and the team of program officers had a major communication problem. The grievor was not familiar with 16 of the 22 exhibits that the employer adduced.

[78] Third, six of the seven other documents were adduced as evidence before adjudicator Tessier, with regard to a disciplinary penalty. Hence, considering those six documents would be equivalent to punishing the grievor twice for the same incidents. Adjudicator Tessier's decision was made after the grievor was dismissed.

[79] Fourth, the grievor points out that the jurisprudence states that an employee must not be taken by surprise. In this case, the grievor did not receive clear instructions that she needed to change her behaviour and was not informed of the consequences that she would face if she did not. The grievor did not learn the results of a disciplinary penalty upheld by an adjudicator until a year after her dismissal. How was she supposed to change her behaviour if she was unaware of the adjudicator's decision? The grievor did not receive progressive discipline, as she should have.

[80] Fifth, the grievor argues that no evidence shows that she would be incapable of working for the federal public service. The grievor is an employee of the Treasury Board and not the Agency and its managers.

[81] The grievor argues that, were she reinstated, she would be able to hold her head high and let go of her feelings of shame. Her relationship with her family has been seriously affected. She has been unable to discuss her situation with her mother, children or brother. If she returned to work, she would be able to talk about it, and she could seek their support. In terms of the community, returning to work would allow her to clear her name. At the economic level, returning to work would help her re-establish her career, resulting in a better pension.

[82] The grievor asks that I consider testimonies to the effect that a person could change and learn from their mistakes. She also asks that I consider that management has changed and that it is possible for a PM-4 to find another job within the federal public service. The grievor deplores the closed communications between management and the individual members of the team.

[83] The grievor argues that management had the proper tools to ensure a healthy reinstatement, including coaching, group mediation, an employee assistance program and a diversity awareness program. If those methods fail, employees can file a grievance or a harassment complaint. None of those processes was used in the past.

[84] In summary, the general rule is that, when a grievor has been dismissed without just and sufficient cause, he or she must be reinstated, barring exceptional circumstances. The grievor argues that the employer's evidence did not show exceptional circumstances. In any case, her remaining years of service are now limited due to her age. Therefore, she would not spend many years with this team. The grievor feels that the assistance she requests to facilitate her reinstatement would be required

for two weeks at the most and that she would be able to reassure management that its concerns were unfounded.

[85] The grievor argues that, if she is not returned to work, the consequences will be disastrous for her, both personally and professionally. The grievor requests that I order her reinstatement.

C. Employer's response

[86] The employer argues that reinstating the grievor would create problems other than those described in the cited decisions. Her reinstatement would be a catastrophe. The employer argues that it demonstrated exceptional circumstances for which the grievor should not be reinstated in her position.

[87] The employer argues that presenting documents involved in another adjudicator's decision does not result in the grievor receiving a double penalty. The only issue is whether the grievor should return to work or receive compensation. The facts are simple. If she were ordered back to work, she would once again work with individuals who testified clearly that they can no longer work with her.

[88] There is no guarantee that the grievor will improve or seek work elsewhere in the public service if she returns to work. The employer argues that the grievor did not understand from the testimonies that she heard that her behaviour was inappropriate and that her co-workers did not like her. It is wilful blindness. The employer argues that the solution was not to return the grievor to the workplace, where she would once again be faced with discipline and complaints. The employer doubts that the grievor can suddenly change her behaviour if she returns to work, given her past conduct. The employer repeats its request that the grievor be awarded compensation rather than ordered back to work.

V. Reasons

A. Adjudicator's authority to order compensation in lieu of reinstatement

[89] Before analyzing the effects of *Gannon* and its impact on subsequent jurisprudence and this case, it is worthwhile to briefly review it. Mr. Gannon, a federal employee, was suspended, then dismissed. The adjudicator concluded that there was cause for the suspension but not for the termination. The adjudicator examined the principle of progressive discipline and Mr. Gannon's misconduct and decided that it

was not appropriate for him to be reinstated in his position. Therefore, she awarded him six months' pay, considering certain mitigating circumstances, such as his years of service, employment record and the problems he would likely face trying to re-enter the labour force. The adjudicator's decision was subject to a judicial review, which upheld the decision. However, the Federal Court of Appeal set aside the remedial order, indicating that it was groundless and therefore was irrational. The Federal Court of Appeal overturned the decision of the Federal Court judge and forwarded the adjudicator's decision on the termination without cause to a new adjudicator for a re-examination of the remedy.

[90] The Federal Court of Appeal based its decision on the provisions of the *PSSRA* and the old *FAA*. Briefly, the Federal Court of Appeal found that paragraph 100(3)(*c*) of the *PSSRA* gave the Public Service Staff Relations Board the authority to establish regulations with respect to "the procedure to be followed by adjudicators" and "the form of decisions rendered by adjudicators." The *P.S.S.R.B. Regulations and Rules of Procedure (1993)*, in effect at that time, did not clearly specify the remedial powers of an adjudicator faced with a case of dismissal without cause. Furthermore, the Federal Court of Appeal pointed out that the *PSSRA* did not contain any provisions similar to those found in Part III of the *Canada Labour Code* granting the adjudicator extensive remedial powers, including the authority to order compensation in lieu of reinstatement.

[91] Given that the employer invoked no point of law that responded "effectively" to Mr. Gannon's argument, the Federal Court of Appeal upheld his argument, stating that subsection 11(4) of the old *FAA* abrogated the common law rule to the extent that it deprived the employer of the lawful authority to terminate his employment except for cause. In other words, failing to present just cause for terminating employment voided the dismissal and left the adjudicator with the only option of substituting a lesser disciplinary action. According to the Federal Court of Appeal, ". . . the principles of progressive discipline cannot trump subsection 11(4) of the FAA." It concluded that the adjudicator ignored subsection 11(4) and that no other law gave her the right to impose a monetary payment in lieu of reinstatement.

[92] *Gannon* has since been the leading authority in support of reinstatement.

[93] It should be noted that, when the Federal Court of Appeal made its decision in 2004, the *PSLRA* and the new *FAA* had received royal assent, but they came into force only on April 1, 2005, after the Federal Court of Appeal made its decision.

[94] The following are the relevant provisions of the old and new *FAA* and the *PSSRA* and *PSRLA*:

[Provisions of the old *FAA*]

. . .

11. *(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service. . . .*

. . ,

*(*f*) establish standards of discipline in the public service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct, and the circumstances and manner in which and the authority by which or whom those penalties may be applied or may be varied or rescinded in whole or in part;*

*(*g*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part. . . .*

[Provisions of the new *FAA*]

. . .

12. *(1) Subject to paragraphs 11.1(1)(*f*) and (*g*), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*

. . .

*(*c*) establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties;*

*(*d*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory;*

*(*e*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct. . . .*

. . .

(4) Disciplinary action against, and termination of employment or demotion of, any person pursuant to paragraph (2)(f) *or (*g*) shall be for cause.*

. . .

[Provisions of the *PSSRA*]

. . .

92. *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*

*(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*

*(*b*) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4), disciplinary action resulting in suspension or a financial penalty, or termination of employment or demotion pursuant to paragraph 11(2)*(f) *or (*g*) of the* Financial Administration Act*, or*

*(*c*) in the case of an employee not described in paragraph (*b*), disciplinary action resulting in termination of employment, suspension or a financial penalty . . . .*

. . .

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

. . .

[Provisions of the *PSLRA*]

. . .

209. *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*

*(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*

*(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*

*(*c*) in the case of an employee in the core public administration*

(i) demotion or termination under paragraph 12(1)(d) *of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)*(e) *of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*

(ii) deployment under the Public Service Employment Act *without the employee's consent where consent is required; or*

*(*d*) in the case of an employee of a separate agency designated under*

subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

. . .

. . .

97. *(2) After considering the grievance, the adjudicator shall render a decision thereon and*

*(*a*) send a copy thereof to each party, to the representative of each party and to the bargaining agent, if any, for the bargaining unit to which the employee, whose grievance it is, belongs. . . .*

. . .

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. The adjudicator must then*

*(*a*) send a copy of the order and, if there are written reasons for the decision, a copy of the reasons, to each party, to the representative of each party and to the bargaining agent, if any, for the bargaining unit to which the employee whose grievance it is belongs; and*

*(*b*) deposit a copy of the order and, if there are written reasons for the decision, a copy of the reasons, with the Executive Director of the Board.*

. . .

[95] I take the view that the Supreme Court's majority decision in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, marks an evolution in jurisprudence with respect to an adjudicator's authority and that the principles stated in that case are just as relevant for the federal public service since the *PSLRA* came into force.

[96] In *Parry Sound*, the Supreme Court majority was mindful of the wording stated by the Supreme Court majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, which was that the purpose of a grievance arbitration system is ". . . to secure prompt, final and binding settlement of disputes . . ." arising from a collective agreement. Then, in *Alberta Union of Provincial Employees*, the Supreme Court repeated that wording, adding as follows that there is social value to a final settlement of grievances through arbitration:

. . .

34. . . . Finality in the resolution of labour disputes is of paramount significance both to the parties and to society as a whole. Grievance arbitration is the means to this end; see Brown and Beatty, supra*, at §2:1401, that "[t]his legislative framework has been recognized and accepted as establishing an arbitral mandate to fashion effective remedies, including the power to award damages, so as to provide redress for violations of the collective agreement beyond mere declaratory relief". . .*

35. Clearly, the overarching purpose and scheme of the Code lend considerable support for the arbitrator to fashion a remedy to suit the particular circumstances of the labour dispute in question.

. . .

40. This Court's jurisprudence has recognized the broad remedial powers required to give effect to the grievance arbitration process. The need for restraint in the fettering of arbitral remedial authority was initially acknowledged by Dickson J. (as he then was) in Heustis, supra*, at p. 781, wherein the policy rationale for judicial restraint was explained thus:*

> *The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final, and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained.*

This Court's approach in Heustis *foreshadowed an expansion of arbitral authority.*

41. For instance, in St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, the Court expressly recognized the arbitrator's heightened competence in adjudicating breach of rights under collective agreements. Decisions such as* Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, its companion case* New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967, and* Parry Sound, supra*, further explain how the arbitrator's role has grown to fill its mandate. In* Weber*, the Court acknowledged that arbitrators have exclusive jurisdiction over disputes arising from the interpretation, application, administration or violation of the collective agreement.* Parry Sound *expanded the scope of the arbitrator's jurisdiction to include human rights and other employment-related legislation. These decisions mark a trend in the jurisprudence toward conferring on arbitrators broad remedial and jurisdictional authority. Moreover, I cannot help but reiterate this Court's*

> *oft-repeated recognition of the fundamental importance of arbitral dispute resolution; see* Heustis, supra*; see also* Blanchard v. Control Data Canada Ltd. *[1984] 2 S.C.R. 476;* Toronto Board of Education, supra*, and* Parry Sound. *Arming arbitrators with the means to carry out their mandate lies at the very core of resolving workplace disputes.*
>
> . . .
>
> [Emphasis in the original]

[97] In *Gannon,* the Federal Court of Appeal ruled that, under the *PSSRA*, arbitral authority was limited to ordering the reinstatement of a grievor terminated without cause because, among other reasons, the remedial authority provided under that *Act* was not as broad as that provided under subsection 242(2) of the *Canada Labour Code*. The Federal Court of Appeal cited *Alberta Union of Provincial Employees* to support its analysis of the standard of review of the decision that was clearly unreasonable, to conclude that the adjudicator's decision to award salary compensation was unreasonable. However, the Federal Court of Appeal did not analyze that decision in terms of arbitral remedial authority under the *PSLRA*. Therefore, I find that the legal scope of *Gannon* is limited with respect to an adjudicator's remedial authority since the *PSLRA* came into force.

[98] In my opinion, the *PSLRA* adds a nuance to arbitral authority in subsection 228(2) — the adjudicator must render a decision on the grievance ". . . and make the order that he or she considers appropriate in the circumstances." In *Amos v. Canada (Attorney General)*, 2011 FCA 38, the Federal Court of Appeal recognized at paragraph 75 that adjudicators have remedial authority not limited to a specified list.

[99] Furthermore, the legislator updated the *PSLRA* by adding a preamble similar to those of other labour laws, including the new *Canada Labour Code,* the Ontario *Labour Relations Act* and the Alberta *Labour Relations Code*, which was discussed in *Alberta Union of Provincial Employees*. The preamble of the *PSLRA* establishes its guiding principles, which are a commitment ". . . to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment" and ". . . harmonious labour-management relations is essential to a productive and effective public service."

[100] Therefore, it is now possible to be inspired by the Supreme Court's conclusions in *Alberta Union of Provincial Employees* when deciding the extent of arbitral authority under section 228(2) of the *PSLRA* to award a remedy that is not only final but also appropriate in the circumstances of each case.

[101] Given those principles, I find that it would be contrary to the purpose and spirit of the *PSLRA* and that it would disregard the labour relations expertise recognized by our courts to limit an adjudicator's discretion to reinstating a grievor for each termination without cause, even when, in the adjudicator's opinion, this not viable, because of the circumstances of the case. Consequently, although reinstatement is to be favoured, this right is tempered by evidence that re-establishing the employment relationship does not have a reasonable chance of success.

B. <u>Determining whether to reinstate the grievor</u>

[102] To decide whether it would be appropriate to reinstate the grievor, I must apply the above-mentioned principles to decide whether her reinstatement would likely have a reasonable chance of success. This analysis considers management's confidence and the grievor's capacity to return to her workplace, given all the circumstances.

[103] When deciding whether the grievance was founded, I decided the following:

. . .

> *[205] In this case, I have concluded that the grievor's dismissal was without cause and that, accordingly, she should normally be entitled to reinstatement. On the other hand, I consider that the evidence demonstrated that the PHAC doggedly persisted in doing everything it could to dismiss the grievor to such an extent, seldom seen, that her return to the same workplace would not be a reasonable and viable measure; it could cause her more harm than the dismissal itself. It must be remembered that several months following the incidents, the PHAC asked the grievor to answer for numerous incidents that, when considered alone, did not warrant disciplinary measures. She was asked this at the precise moment that she had to appear before Adjudicator Tessier for the three suspension grievances. Because there are only a few employees at the PHAC office for the Quebec Region, it is difficult, if not impossible, to order a reinstatement free of the hassles that led to the grievor's dismissal. Considering these circumstances, I am of the opinion that ordering her reinstatement is not a reasonable or viable option and that it is more appropriate*

> *to consider what remedy may properly compensate the grievor in the circumstances.*
>
> . . .

[104] At the hearing on the merits of the grievance, I heard testimony from managers supporting the grievor's dismissal. I concluded that there was no cause for dismissal since the facts presented did not warrant a disciplinary penalty. I also concluded that the workplace had become unhealthy to the point of it being no longer viable to return the grievor to such an environment.

[105] This hearing on redress was my first opportunity to hear testimony from the grievor's co-workers, who described situations whereby the grievor displayed a fundamental lack of respect toward them. I understood that, when the grievor was dismissed, the witnesses had very strong feelings about her and that management did not want to stress them by having them testify. That said, I now have a better understanding of why the employer believed that the grievor could no longer remain in the work environment.

[106] This raises the issue of whether I must consider this new evidence when assessing the appropriate remedy. The issue can be resolved by returning to the principles of *Alberta Union of Provincial Employees*, which state that one of the purposes of the grievance process is to secure a final settlement of a dispute. The adjudicator's role is to fashion a remedy to suit the circumstances.

[107] When applying those principles, I must consider all relevant factors, those being the circumstances that led to the grievor's dismissal and how her co-workers would be affected if she returned to work. I must weigh the effect of a reinstatement order on the final settlement of the dispute and my role of fashioning an appropriate remedy. I find that, even though the grievor was not systematically disciplined for each incident reported in her co-workers' testimony, her overall past behaviour was incompatible with a healthy workplace.

[108] The grievor did not offer any explanation or justification for how she behaved at team meetings and for being late for no reason. She did not acknowledge that she disturbed her co-workers by circulating a newspaper article about the high number of suicides linked to violence in the workplace. The grievor displayed an attitude of superiority toward her co-workers. She did not apologize for the degrading tone of her

emails to management. She said that she learned at the hearing that her co-workers did appreciate her. She testified that she was still not aware of her alleged misconduct. She accused management of failing to communicate with her and stated that her conduct had been appropriate. She also insisted that her actions at team meetings were justified and that nothing could be held against her. She minimized her co-workers' testimony, alleging that their participation at a group meeting with a psychologist diminished its value.

[109] Although my decision on the merits of the grievance invalidated the grievor's termination, given the evidence heard at this hearing, I am not convinced that reinstating her would end her dispute with her employer and co-workers. For a reinstatement to be successful, both parties must show good faith. The grievor's testimony did not convince me that she truly wants to return to the workplace; the situation struck me as more of a battle of wills. I note the grievor's clear lack of compassion for her co-workers and management.

[110] Overall, the real reasons for the grievor's request to return to work are to save face, to eventually reconcile with her family and her cultural community, and to obtain a satisfactory pension. Those reasons do not convince me that she has a genuine desire to see her co-workers once again and to adopt a positive attitude when working with them. The grievor pointed out more than once in her testimony that she had been exonerated and that her employer had to accommodate her. Her attitude left me skeptical as to the short-term effectiveness of the tools that she suggested for her rehabilitation, i.e., coaching, an employee assistance program and meetings with management.

[111] The grievor's testimony did not reassure me that returning her to an environment in which she would be disciplined for any future infraction would settle her dispute with the employer. I am also not convinced that her behaviour is likely to change overnight, as she claims it will. I do not accept the fact that her career drawing to an end is a determining element in ordering reinstatement.

[112] Although the grievor was dismissed without cause, the experiences of Ms. Parisien, Ms. Turmaine and Ms. Gagnon as managers showed that management's trust in the grievor was breached and that the grievor is not likely to change in the short term, regardless of the circumstances. On that point, I was struck by how the grievor's co-workers testified that they did not trust her, that they would be greatly

upset if she returned and that several of them would change jobs if she returned. Those factors reflect directly on the element of trust that is fundamental to teamwork, an essential element of a program officer's job. That has important weight when determining the viability of a reinstatement.

[113] Given all the circumstances, I find a lack of trust on the part of management and the team of co-workers, who are part of the grievor's daily routine. That trust would be required to ensure a healthy reinstatement. Consequently, ordering the grievor to return to work is not a viable option in this case, and reinstating the working relationship would not have a reasonable chance of success.

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

(The Order appears on the next page)

VI. Order

[115] The grievor's request to be reinstated in her position is dismissed.

[116] I will retain jurisdiction in this matter to decide an appropriate remedy, but I will allow the parties 30 days following this decision to reach an agreement. If an agreement is not reached, a hearing will be held to hear the parties solely on the matter of determining an appropriate remedy to compensate the grievor for the termination of her employment.

December 2, 2011.

PSLRB Translation

Michele A. Pineau,
adjudicator