Date: 20120131

File: 566-02-4825

Citation: 2012 PSLRB 12

Public Service
Labour Relations Act

Before and adjudicator

BETWEEN

NAZIH NASRALLAH

Grievor

and

DEPUTY HEAD
(Department of Human Resources and Skills Development)

Respondent

Indexed as
Nasrallah v. Deputy Head (Department of Human Resources and Skills Development)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Linda Gobeil, adjudicator

For the Grievor: Fiona Campbell and Jean-Michel Corbeil, counsel

For the Respondent: Michel Girard, counsel

Heard at Ottawa, Ontario,
September 26 to 28, 2011.

I. Grievance referred to adjudication

[1] This grievance concerns the termination of employment of Nazih Nasrallah ("the grievor"). At the time of the termination, Mr. Nasrallah was employed as a senior policy analyst advisor at the EC-7 level with the Department of Human Resources and Skills Development ("HRSDC" or "the employer"). Mr. Nasrallah was an employee of the HRSDC from November 2005 until his termination on June 28, 2010.

[2] The reason for the grievor's termination was stated in a letter dated June 28, 2010 from Jacques Paquette, Senior Assistant Deputy Minister, HRSDC. The letter states that Mr. Nasrallah's reliability status was revoked based on a reliability reassessment and that, since the reliability status is a condition of employment for all positions in the federal public service, his employment was terminated as of June 28, 2010.

[3] On July 6, 2010, Mr. Nasrallah filed a grievance under subparagraph 209(1)(*c*)(i) of the *Public Service Staff Relations Act* ("the *Act*") contesting the employer's decision to terminate his employment and requesting reinstatement in his position. The grievance is worded as follows:

> *I grieve the letter of termination issued by my employer dated June 28, 2010. That the letter of termination be rescinded and destroyed,*
>
> *That I be reinstated in my position retroactively to August 3, 2009,*
>
> *That I receive full pay and benefits retroactively to August 3, 2009,*
>
> *That all information related thereto, including electronic information, be removed from all files held by the employer and its representatives and destroyed,*
>
> *That I be made whole.*

[4] On November 15, 2010, the grievance was referred to the Public Service Labour Relations Board ("the Board") for adjudication under subparagraph 209(1)(*c*)(i) of the *Act.*

[5] On January 5, 2011, the employer objected to the jurisdiction of the Board to hear the grievance on the basis that the adjudicator, under section 209 of the *Act*, does not have jurisdiction to hear the matter. The employer argued that the grievor's

employment was terminated as the result of the revocation of his reliability status, which constitutes a condition of employment for all federal public service positions, and that the grievor was given an opportunity to respond to the allegations filed against him. In support of its position, the employer cited *Braun v. Deputy Head (Royal Canadian Mounted Police),* 2010 PSLRB 63.

[6] On January 18, 2011, a representative for the grievor's bargaining agent submitted that the facts of this case differ from those in *Braun* and that, in this case, breaches of procedural fairness occurred. Representative for the grievor argued that, in Mr. Nasrallah's case, the decision to terminate his employment was never justified by serious or real security concerns communicated to the grievor. Moreover, it is argued by representative for the grievor that the employer never provided Mr. Nasrallah with the reasons for terminating his employment. The representative for the grievor referred me to *Gill v. Treasury Board (Department of Human Resources and Skills Development),* 2009 PSLRB 19 and concluded by maintaining that I have jurisdiction to hear the grievance.

[7] Before the hearing took place, two pre-hearing teleconferences were held, on August 8, 2011 and September 9, 2011 respectively. At the August 8, 2011 conference, I was informed that Mr. Nasrallah had referred a complaint to the Security Intelligence Review Committee (SIRC) about the revocation of his secret security clearance by the Deputy Minister, HRSDC, on August 7, 2009.

[8] At the pre-hearing conference held on September 9, 2011, I asked the parties, among other things, what impact the proceedings before the SIRC would have on Mr. Nasrallah's grievance. The employer took the position that the proceedings before the adjudicator should be held in abeyance, pending the results of the matter before the SIRC. Counsel for Mr. Nasrallah took the opposite view, stating that the proceedings before the SIRC are separate from those before the adjudicator, that it is unknown when the SIRC proceedings will be completed and that Mr. Nasrallah waited long enough to have his grievance dealt with. Counsel for Mr. Nasrallah indicated further that she would seek aggravated damages as remedy.

[9] I agreed with the reasons expressed by counsel for Mr. Nasrallah with respect to the proceedings before the adjudicator and informed the parties that the hearing would take place as scheduled.

II. Preliminary objections

A. Employer's position

[10] At the hearing, counsel for the employer reiterated that the grievance should be dismissed for the following reasons: the adjudicator does not have the jurisdiction to hear and to grant the remedy requested by the grievor. Mr. Nasrallah's secret clearance has been revoked. That decision is being challenged before the SIRC. Moreover, Mr. Nasrallah's reliability status has also been revoked. The adjudicator does not have jurisdiction over security clearance matters. Therefore it cannot order the grievor reinstated. Counsel for the employer referred me to *Zhang v. Treasury Board (Privy Council Office)*, 2005 PSLRB 173, at para 70, and to the Board's later decision in *Zhang v. Treasury Board (Privy Council Office)*, 2009 PSLRB 22 at para 68.

[11] Counsel for the employer also argued that the revocation of the grievor's reliability status was an administrative decision by the employer over which I have no jurisdiction. I should not examine the merits of the employer's decision. Furthermore, I lack jurisdiction to reinstate the grievor's reliability status.

[12] Counsel for the employer maintained that Mr. Nasrallah no longer has reliability status, which is the minimum security standard in the public service, as noted in *Hillis v. Treasury Board (Department of Human Resources and Skills Development)),* 2004 PSSRB 151. Therefore, the grievor no longer meets an essential condition of employment which constitutes the cause as per subsection 12(3) of the *Financial Administration Act, R.S.C. 1985, (FAA).* Once I am satisfied that Mr. Nasrallah no longer meets the conditions of his employment, I must conclude that there was cause for the termination under subsection 12(3) of the *FAA*. There is no need for me to proceed further.

[13] Counsel for the employer also argued that the proper redress when reliability status has been revoked would have been for Mr. Nasrallah to file a grievance under section 208 of the *Act* and then, if the matter were still unresolved, to seek judicial review with the Federal Court.

[14] Counsel for the employer maintained that the only way I would have jurisdiction would be if it had been argued that the revocation of the grievor's reliability status was in fact disguised discipline. In support of his argument, counsel for the employer

referred me to *Hillis,* at paragraph 143, to *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43 at para 126 to 129, and to *Braun,* at paragraphs 140 and 199. Counsel for the employer argued that, in this case, no claim was made that the employer's decision was disguised discipline; moreover, the grievance was not referred to adjudication under paragraph 209(1)(*b*) of the *Act.*

[15] Counsel for the employer contended that the issue of procedural fairness or bad faith should not be considered. He referred to *Shaver* at paragraph 130, in which the adjudicator decided that an adjudicator cannot find jurisdiction over procedural issues without jurisdiction over an administrative situation.

[16] In the alternative, counsel for the employer stated, if I were to consider the issue of procedural fairness or bad faith, I would need to consider discipline. However, discipline was never alleged in this grievance. *Braun,* at paragraph 141 refers to those issues.

[17] Finally, on the issue of aggravated damages, requested as a remedy, counsel for the employer concluded by stating that, at this point, the grievor cannot ask for a different remedy without changing the nature of the grievance. That was decided by the Federal Court of Appeal in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.) and by the Federal Court in *Scheuneman v. Attorney General of Canada*, [2000] 2 F.C. 365.

B. Grievor's response

[18] Counsel for Mr. Nasrallah disagreed with the employer's position and maintained that I have jurisdiction to hear the grievance. Although counsel for Mr. Nasrallah agreed with the employer that this case deals with a non-disciplinary matter, nonetheless, subparagraph 209(1)(*c*)(i) of the *Act* clearly allows for the reference to adjudication of terminations of employment under paragraph 12(1)(*e*) of the *FAA* for reasons other than a breach of discipline or misconduct. Counsel for Mr. Nasrallah stated that the Board has jurisdiction based in subparagraph 209(1)(*c*)(i) of the *Act*.

[19] Counsel for Mr. Nasrallah drew an analogy between this case and the Federal Court of Appeal judgment in *Kampman v. Canada,* [1996] 2 F.C. 798 (C.A.), in which the Court confirmed that non-disciplinary matters, such as a release for incapacity or

incompetence under section 31 of the former *Public Service Employment Act* R.S.C. 1989, C.P-33, could be reviewed by employment tribunals. Counsel for the grievor also referred me to the Federal Court decision in *Singh v. Attorney General of Canada*, 2001 FCT 577, in which the Court confirmed that an adjudicator has jurisdiction to hear grievances concerning terminations of employment for reasons other than breaches of discipline or misconduct, including revocation of security status.

[20] Counsel for Mr. Nasrallah also referred me to *Gunderson v. Treasury Board (Revenue Canada - Customs and Excise*), (1995) 28 PSSRB 25, in which the Public Service Staff Relations Board ("the former Board") confirmed its jurisdiction to review the reasonableness of a termination of employment for a non-disciplinary reason, such as incapacity. Counsel for Mr. Nasrallah also referred me to *Zhang,* 2005 PSLRB 173, in which the Board took jurisdiction and examined the merits of the case involving a termination where there had been revocation of security status.

[21] Counsel for the grievor pointed out that, to come before the adjudicator, one may either grieve a termination, as per paragraph 209(1)(*b*) of the *Act*, or grieve the termination as a result of the revocation of security clearance, as per subparagraph 209(1)(*c*)(i).

[22] Counsel for the grievor also distinguished this case from *Shaver*, referred to by the employer, in which the grievor's reliability status was revoked one month after the termination of employment. Having decided that the termination was for cause, the adjudicator concluded that the issue of the revocation of the grievor's reliability status was therefore moot. Counsel for the grievor stated that the facts are different in this case.

[23] In conclusion, counsel for Mr. Nasrallah argued that subparagraph 209(1)(*c*)(i) of the *Act* is clear about the adjudicator's jurisdiction over non-disciplinary terminations of employment include the revocation of an employee's reliability status. This position is also consistent with cases that have considered earlier similar legislation, such as *Singh*, *Kampman* and *Gunderson*. Those cases are distinguishable from the jurisprudence cited by the employer because they do not cover situations in which revocation of reliability status was accompanied by a termination.

[24] In response to counsel for the employer's comments about remedy, counsel for the grievor reviewed the grievance and pointed out that the requested remedy is not

limited to reinstating Mr. Nasrallah. The requested remedy cannot determine whether the adjudicator has jurisdiction; it should be dealt with at the end of the case and is not the factor that should determine whether or not this Board has jurisdiction.

C. Employer's rebuttal

[25] In reply, counsel for the employer pointed out that the revocation of an employee's reliability status and a termination are two different things. The revocation of the grievor's reliability status should have been grieved separately. Revoking an employee's reliability status is an administrative decision, done in accordance with the relevant policies, and the Board is prevented from examining the merits of that type of decision. In support of his position, counsel for the employer referred me to *Braun*, *Hillis* and *Gill*.

[26] As for *Gunderson*, counsel for the employer maintained that more recent jurisprudence applies. He pointed out that *Singh* and *Zhang* decisions dealt with the revocation of a secret security clearance. At the time of those decisions, the employer's policy required it to look for other potential positions where the employee meets the security requirements. This meant that at the time of these decisions, the employer had further obligations upon revocation of a secret security clearance. Since those cases, the policy has been changed; it no longer requires the employer to look for another position. Moreover, in this case, reliability status is a requirement for all positions within the federal public service. Therefore, without reliability status, there cannot be employment in the federal public service.

[27] I informed the parties that I would take the employer's objections under advisement and invited the parties to proceed with the case on the merits.

III. Summary of the evidence

[28] The parties filed an agreed statement of facts. In addition, counsel for the employer called two witnesses and filed one exhibit (one binder of documents). Counsel for Mr. Nasrallah called the grievor as a witness and filed seven exhibits.

A. For the employer

1. Opening statement

[29] Counsel for the employer asked that I dismiss the grievance based on its preliminary objections to my jurisdiction.

[30] In the alternative, counsel for the employer argued that, if I were to decide on the merits of the case, I should consider only whether the employer's decision was tainted by bad faith or by a lack of procedural fairness.

[31] Counsel for the employer indicated that the evidence would demonstrate that the decision to revoke the grievor's reliability status was based on a misrepresentation and on the misappropriation of funds by Mr. Nasrallah when he used the Canada Student Loan Program (CSLP), a program administered by the HRSDC. Counsel submitted that the evidence would demonstrate that the grievor was informed that his reliability status would be reassessed following the revocation of his secret security clearance. He was informed of the possible consequences of the reassessment and was provided with a copy of the report and an opportunity to comment on it, which he did. Counsel submitted that there was no evidence of bad faith or procedural unfairness. Therefore, the Board's jurisdiction should end there. I should not examine the reasonableness of the decision. In the alternative, counsel argued, the decision was reasonable.

2. Employer's witness

[32] Mr. Paquette testified for the employer. He is currently Senior Assistant Deputy Minister, Income and Security Social Development, HRSDC. He has been in that position since 2009 and is responsible for developing social policies.

[33] Mr. Paquette testified that on June 28, 2010, Rita Whittle, the Departmental Security Officer (DSO), informed him that she had revoked Mr. Nasrallah's reliability status. In turn, he informed Mr. Nasrallah of Ms. Whittle's decision. Mr. Paquette indicated that, on the same day, he sent another letter to the grievor, informing him that, since his reliability status was revoked, he no longer met a condition of employment and that, as a consequence, Mr. Nasrallah's employment was terminated.

[34] Mr. Paquette indicated that the decision to terminate the grievor's employment was based on the report he received from the DSO as well as on some advice provided to him by Human Resources (HR).

[35] In cross-examination, Mr. Paquette admitted that he never dealt with Mr. Nasrallah directly. As to whether Mr. Paquette was familiar with the *Personnel Security Standard* (PSS), he indicated that his only knowledge about it came from what HR told him.

[36] Mr. Paquette testified that he was not in a position to know whether procedural safeguards as per section 2.7 of the *PSS* were in place since he did not reassess Mr. Nasrallah's reliability status; it is the DSO's role to undertake the procedures pursuant to the *PSS*. The witness also indicated that he thought that the consultation referred to in section 5 of the *PSS* was done.

[37] Mr. Paquette also indicated that he did not talk to Ms. Whittle and that the only involvement he had with her was to receive a note of June 28, 2010. With the revocation of his reliability status, the grievor no longer met a condition of employment, which is why Mr. Paquette terminated his employment.

[38] As for whether Mr. Paquette checked whether the process to revoke the grievor's reliability status was fair, he indicated that, although he did not do it himself, he had worked with that DSO in the past on other issues and assumed that she did her work correctly.

[39] Examining the letter of termination dated June 28, 2010, Mr. Paquette admitted that it did not specify the reasoning behind the revocation of the grievor's reliability status.

[40] Ms. Whittle was called as the employer's second and final witness. She explained that she is Director General, Internal Integrity, HRSDC, and is the DSO at the HRSDC. She has been in that position for three years. She is also responsible for the HRSDC's Office of Values and Ethics. Ms. Whittle indicated that she was formally delegated DSO authority from the deputy minister of the HRSDC.

[41] Ms. Whittle explained that although she has assessed the reliability of employees many times in the past and has probably granted employees reliability status more than 100 times, the grievor's case was the first time she had to reassess an

employee's reliability status following the revocation of a secret clearance. She stated that she had no investigation experience. Her role is to supervise investigations.

[42] Ms. Whittle indicated that she became involved in assessing Mr. Nasrallah's reliability status on August 3, 2009. On that day, she received a copy of a letter sent to Mr. Nasrallah by Ms. Marie Gauthier, Director General of Strategic Integration, Planning and Accountability, HRSDC, informing him that the HRSDC had received information that triggered a mandatory review of his reliability status under section 2.8 of the *PSS*. The letter reads as follows:

> *Dear Mr. Nasrallah*
>
> *This letter is to inform you that Human Resources and Skills Development Canada (HRSDC) has received information which is triggering a mandatory review of your reliability status pursuant to section 2.8 of the* Personnel Security Standard *under the Government Security Policy.*
>
> *In light of this information and at the conclusion of this review, administrative decisions may be made, up to and including the revocation of your reliability status and termination of your employment. You are hereby advised that effective immediately you are suspended from duty without pay pending completion of this review. If the results of the review indicate that the information does not negatively impact your reliability status, the period during which you were relieved from duty will be retroactively considered to have been off duty status with pay. You will be informed in writing of your right of access to review or redress mechanisms where a decision to revoke your reliability status has been reached.*
>
> *The review is being conducted by representatives of the Special Investigations Unit (SIU) of the Integrity Services Branch of Service Canada. It is expected that you will make yourself available for an interview, during which you can be accompanied by a person of your choice. You will be informed of the time and place of the interview. Other witnesses as/if deemed necessary by the investigators may be called to an interview.*
>
> *You are encouraged to cooperate fully in this review. It is the Department's intention that the review be thorough and timely.*
>
> *In the interim, and consistent with security measures taken during a review of this nature, you are immediately required to temporarily surrender any government equipment or identification in your possession and your access to HRSDC's*

> *electronic network will be suspended. You are reminded that your obligations under the Values and Ethics Code for the Public Service and other related standards continue to apply even though you are suspended, pending completion of the review.*
>
> *During the course of this investigation, you will not be permitted access to HRDSC premises unless you are officially invited to attend a meeting by Claude Campeau, Manager of the SIU and or myself. Claude Campeau can be reached at 819-997-1935 and I can be reached at 613-954-0885.*
>
> *Once the review is completed, you will be afforded an opportunity to present any information that you feel has not been addressed in the course of the review. Subsequently, the Departmental Security Officer (DSO) for HRSDC will make a decision with respect to your continued Reliability Status.*
>
> *I have asked Ginette Régimbald, manager of compensation and benefits, to contact you to arrange for counseling concerning the impact of your being suspended from duty without pay may have on your benefits and insurances. If you do not immediately hear from her, you may contact her at (819) 994-2202.*
>
> *Given that matters of this nature are difficult for all parties and lend themselves to emotional stress, you are reminded that the Employee Assistance program is available to assist staff and their family. The EAP service is confidential and is available 24 hours a day. The contact number is 1-800-268-7708.*

[43] Ms. Whittle reviewed Ms. Gauthier's letter and pointed out that it indicated in its second paragraph that, as a result of the investigation, the grievor's reliability status might be revoked and his employment terminated.

[44] The DSO also indicated that the Special Investigations Unit (SIU) referred to in Ms. Gauthier's letter consists of a group that reports to her and that carries out all investigations for her. She specified that the SIU includes ex-RCMP officers or ex-Ottawa police officers for whom the SIU is a second career.

[45] The SIU investigates and decides who to interview. Moreover, Ms. Whittle indicated that the final decision rests with her.

[46] Ms. Whittle specified that the SIU sets the timelines for investigations. The amount of time required for an investigation depends on what is involved. For instance, if an issue arises about a criminal conviction, the investigation could take

longer. The DSO specified that, in this case, she was involved very little in the investigation. Normally, the investigators consult her if they need to.

[47] The DSO recalled that the investigators asked her to intervene with the CSLP representatives so that the investigators would receive their required information faster. Answering a question from counsel for Mr. Nasrallah, Ms. Whittle insisted that while investigations must be done quickly, they have to be right. Ms. Whittle also pointed out that, in this case, Wendy Heon and Claude Campeau were the investigators.

[48] Ms. Whittle indicated that, once she received Ms. Gauthier's letter, she then had no discretion and as per section 2.8 of the *PSS,* she had to reassess Mr. Nasrallah's reliability status.

[49] Ms. Whittle explained that the *PSS* falls under the *Treasury Board's Government Security Policy*. She indicated that the *PSS* is the guide that the SIU applies when investigating. It relies on the *PSS*; it is its "bible," and it guides the decisions made in an investigation.

[50] Ms. Whittle also indicated that, as the DSO, her authority is limited to granting, denying or revoking an employee's reliability status. The authority to grant, deny or revoke a secret clearance resides with the deputy minister of a given department and cannot be delegated.

[51] Ms. Whittle explained that reassessing an employee's reliability status can be only done if there is a reason to do so. In this case, Mr. Nasrallah was informed by a letter from the Deputy Minister dated August, 7 2009 that, based on information received from the Canadian Security Intelligence Service (CSIS), his secret level security clearance was revoked. As a result, Ms. Whittle explained that, under section 2.8 of the *PSS*, it was mandatory for her to reassess Mr. Nasrallah's reliability status.

[52] The DSO indicated that reliability status is the minimum security standard in the public service and that it is critical that an employee who works at the HRSDC maintain that minimum standard. The witness explained that the old standard, "enhanced reliability status," has been replaced by "reliability status".

[53] Ms. Whittle stated that since reliability status is the minimum requirement at the HRSDC and any other department, once an employee's reliability status has been revoked, the employee can no longer perform any function within the HRSDC.

[54] Ms. Whittle explained that, when the SIU team conducts an investigation, it normally gathers facts, speaks with managers and past colleagues, checks employees' criminal records, etc. It considers all pertinent information, such as the employees' education and documents already on file at the HRSDC.

[55] Once the SIU prepares its report, it gives it to Ms. Whittle for review. She makes a decision once the concerned employee comments on the draft report.

[56] In this case, the DSO indicated that that process was followed. She also indicated that, as part of its investigation, the SIU interviewed Mr. Nasrallah.

[57] Ms. Whittle explained that, as the DSO, she signed investigation reports prepared by the SIU team. She testified that Ms. Heon, from the SIU team, prepared a draft report in March 2010 and provided it to her for review. Ms. Whittle insisted that she never approved or signed the March 2010 report. She also testified in cross-examination that normally draft reports are not retained.

[58] Questioned by counsel for the employer about her impressions of the findings in the March 2010 draft report, Ms. Whittle reiterated that she has the final sign off on any such report. She always expects her team to consider the relevant facts. She then decides whether she has everything she needs to make a decision. Ms. Whittle indicated that, after reviewing the March 2010 draft report, she concluded that a lot of the information was not necessary for her decision. She removed the information that she considered irrelevant.

[59] Ms. Whittle also testified that, since the grievor's reassessment could have resulted in revoking his reliability status, she sought legal advice.

[60] Ms. Whittle referred to pages 9 and 10 of the March 2010 draft report, which mentioned that the SIU realized that, at some point during the investigation, Mr. Nasrallah had a student loan. The SIU explored further and, following discussions with a CSLP representative, which is part of the HRSDC, realized that Mr. Nasrallah had misrepresented his salary to CSLP officials. As a result, he misappropriated funds at both the federal and provincial levels.

[61] As for how Mr. Nasrallah misappropriated the funds, Ms. Whittle explained that the Interest Relief Program is administered by the CSLP. It helps those who have student loans, like Mr. Nasrallah, who face difficulties in making repayments. If the borrower qualifies for interest relief, the government pays the interest on the loan. That means that the borrower does not have to pay interest or principal for six months at a time. In this case, to qualify for the Interest Relief Program, Mr. Nasrallah had to inform the CSLP of his gross salary every 6 months to receive confirmation that he continued to qualify.

[62] Ms. Whittle testified that the investigation revealed that, from November 2006 to May 2009, Mr. Nasrallah, contrary to what was asked on the form, provided the CSLP with his net salary; while he should have given his gross salary. As a result, he qualified for interest relief and a repayment assistance plan.

[63] As a result of the grievor's misrepresentation, the DSO indicated that he received $13 658.59 from the federal and provincial governments to which he was not entitled. Ms. Whittle also mentioned that the investigation revealed that Mr. Nasrallah had reported being single even though he was married, a fact which was later corrected.

[64] Asked whether she provided the March 2010 draft report to the grievor, the DSO testified that, in addition to the information about his student loan, she found that the March 2010 draft report contained information that she considered unnecessary for her decision. For that reason, the March 2010 draft report was never provided to the grievor. She testified that this would have been normal, since she had not approved it.

[65] Ms. Whittle testified that due to the communication between the SIU and the CSLP representatives needed to confirm the amount involved, it took time before she received the final draft of the report for her review and decision. The DSO indicated that it was important when dealing with the specifics of a program like student loans that the calculations are done correctly. It was complicated, so the continuing communication was part of the due diligence required in the circumstances. Ms. Whittle also indicated that, during that period, she consulted her legal advisors.

[66] Ms. Whittle then explained that, on April 20, 2010, she wrote to Mr. Nasrallah, asking for his comments on a draft report dated April 2010. Answering a question

from the grievor's counsel, the DSO pointed out that she asked for Mr. Nasrallah's comments before finalizing the report.

[67] Ms. Whittle testified that, she received, on May 5, 2010, a letter from Michel Drapeau, counsel for Mr. Nasrallah, including the grievor's own comments on the April 2010 draft report. Among other representations, the grievor alleged that the error regarding the application was the result of his ". . . not paying sufficient attention and due care to the documents he signed…" and that ". . . he continued the error until it was brought to his attention."

[68] Ms. Whittle testified that, on receiving Mr. Nasrallah's comments and his legal counsel's comments on the April 2010 draft report, she looked at the application form for student loan relief and concluded that the form and the requirement to provide the gross salary as opposed to the net salary was clear and that Mr. Nasrallah had provided the wrong amount, every six months, for three years. Moreover, Ms. Whittle indicated that, given his EC-7 classification, he ought to have known the difference between gross and net salary. In the DSO's mind, it was a clear case of misappropriation. The grievor's explanation did not change her findings or influence her decision.

[69] Referring to paragraph 3 of Appendix B of the *PSS*, *Guidance on Use of Information for Reliability Checks*, Ms. Whittle indicated that one of her concerns, as the DSO making the decision over reliability status, is that an employee be trusted in his or her employment.

[70] Ms. Whittle indicated that a lot of sensitive information about individual Canadians, for example information about disability, employment insurance and social programs, is stored at the HRSDC. She indicated that the HRSDC is the largest holder of information on Canadians.

[71] Ms. Whittle testified that, as the DSO, she had to be able to count on employees' honesty because of the nature of the information that the HRSDC gathers. She indicated that, if there is doubt about the honesty of an employee, the employer must take action. Ms. Whittle explained that, if she loses faith in an employee and the facts support her conclusion, then she has no choice as the DSO but to revoke the employee's reliability status. Ms. Whittle testified that she would not introduce a risk to the employer by maintaining even one employee's questionable reliability status.

[72] In this case, the DSO testified that the grievor misappropriated funds from his own employer since the HRSDC administers the CSLP. The grievor ought to have known the meaning of gross salary and the consequences of his actions. A situation in which an employee misappropriates funds from his or her employer cannot be overlooked. As the DSO, she could not trust him and had to revoke his reliability status.

[73] In cross-examination, Ms. Whittle indicated that she was not involved in the decision to suspend Mr. Nasrallah pending the investigation since it was a management issue.

[74] Answering counsel for the grievor about whether Mr. Campeau told the grievor that the investigation would be completed in a matter of weeks, the DSO indicated that she was not aware that Mr. Campeau had said that and that it would surprise her if he did. She indicated that she was aware that some pressure existed to release the report in March from the bargaining agent and counsel for the grievor. She testified that those reports take time and that the motivation is to release the best report, even though it may take time.

[75] Questioned by counsel for the grievor about Exhibit G-1, which refers to a timeline for the investigation, the DSO indicated that she did not recall seeing that document before but presumed that the SIU would have prepared it for Mr. Labelle. Ms. Whittle also did not recall seeing any draft report dated November 13, 2009. The only draft report that she remembered was dated March 2010. Ms. Whittle testified that it is possible that other draft reports existed. If so, they would normally have been destroyed since the HRSDC does not retain all drafts. However, the witness specified that the HRSDC would never destroy evidence.

[76] As for the draft report of March 2010, Ms. Whittle indicated in cross-examination that, for her, due process meant removing any reference in the draft report that was not necessary for her decision, which she did.

[77] In cross-examination, Ms. Whittle reiterated that the other facts in the March 2010 draft report were not behind why she withdrew Mr. Nasrallah's reliability status. The misappropriation of funds was the basis for the revocation. Ms. Whittle admitted that although she did not consider them in her decision, the other facts paint a picture of an employee who was less than honest. Ms. Whittle also admitted that the

misrepresentation of his marital status was a minor element and that it did not impact her decision. She admitted that she believed the grievor on that point.

[78] As for the final report of April 2010, Ms. Whittle indicated that she gave Mr. Nasrallah the opportunity to comment on its findings. When asked by counsel for the grievor whether the fact that he made an innocent mistake when he stated his net salary instead of his gross salary changed her mind, Ms. Whittle answered that she did not believe Mr. Nasrallah's explanation. She reiterated that she based her decision on the fact that his misappropriation took place over three years, he gained a financial benefit and he was in a senior position. He ought to have known better.

[79] Ms. Whittle admitted that she never told Mr. Nasrallah that, based on his education and level, she did not believe that he could have made that mistake. As for the grievor's offer to repay the money, she indicated that she had no idea as to whether his offer was genuine.

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

1. <u>Opening statement</u>

[80] In her opening statement, counsel for Mr. Nasrallah made the point that the grievor is grieving his abrupt termination of June 28, 2010, which closely followed a reassessment of his reliability status and its subsequent revocation. Counsel reminded me that Mr. Nasrallah had held his security clearance since his first job in the public service in 2001.

[81] Counsel for the grievor maintained her position that the adjudicator has full jurisdiction to hear the matter as a non-disciplinary case. She indicated that, on the merits, the adjudicator has the power of review based on reasonableness and on procedural grounds. Counsel also argued that the grievor is entitled to full redress because the decision was tainted with procedural unfairness and unreasonableness.

[82] Counsel for the grievor indicated that the evidence would demonstrate that the grievor was never given a meaningful reason for the termination. Moreover, although the process that led to the revocation of his reliability status took 10 months to complete and involved interviews with people as well as lengthy interviews with Mr. Nasrallah, it produced only a 4-page report with only 2 allegations, one about misrepresentation and the other about marital status.

[83] Counsel for Mr. Nasrallah argued that, in the April 2010 report, no analysis was made of the facts dealing with personal security. The report made no representation and drew no conclusion about the grievor's reliability.

[84] Counsel for Mr. Nasrallah indicated that, when the grievor received the report, he presented the employer with his position. However, in its decision to terminate the employment, the employer made no reference to his explanation, and no reason other than the reassessment of his reliability status pursuant to section 2.7 and 2.8 of the *PSS* is provided.

[85] On the issue of procedural fairness, counsel for Mr. Nasrallah argued that, based on the circumstances of the case, the employer considered improper facts and denied the grievor procedural fairness by not disclosing all the information to him.

[86] Counsel for Mr. Nasrallah maintained that the employer had more information than what was given to Mr. Nasrallah, information that might had weight in the decision to terminate his employment. Counsel submitted that the employer never shared that information or gave an opportunity to the grievor to comment on it. For instance, the employer questioned him about alleged relationships with organizations with ties to terrorism. Never was Mr. Nasrallah provided with that information, and he never had a chance to respond to it. Counsel urged me to conclude that more information was gathered during the investigation, which was never shared with Mr. Nasrallah and on which he never had a chance to comment. That denied him his procedural fairness rights.

[87] As for the reasonableness of the employer's decision, although counsel for the grievor admitted that the employer enjoys a certain level of discretion. However, in this case, the employer's decision was completely unreasonable. Counsel contended that the grievor made an innocent error and took steps to repay the money. It was not a strong enough reason to jeopardize the employer's trust toward its employee. Moreover, counsel for Mr. Nasrallah stated that the evidence would demonstrate that, since his termination, another department granted the grievor reliability status.

[88] Finally, counsel for the grievor argued that the medical reports would show that the loss of his employment affected his health and that the fact that the employer was not even prepared to confirm Mr. Nasrallah's employment with it to potential employers contributed to his physical and psychological pain. For those reasons,

counsel reiterated that, were the grievance allowed, she would ask for aggravated damages.

2. Grievor's testimony

[89] Mr. Nasrallah testified next. He explained that he holds a degree in psychology and another in sociology and that he has started his Ph.D. at Carleton University but has not yet completed it.

[90] The grievor indicated that he began looking for employment in the public service in 2001. His first position was with the Department of Heritage as a term employee. His first indeterminate position was in January 2003 with Health Canada as an ES-3. In 2005, he went to the HRSDC as an acting ES-4. He then became an indeterminate ES-4 in early 2006. After becoming an ES-5 in 2007, he won an ES-6 competition and became a senior policy advisor still at the HRSDC. He then became an ES-7 through a conversion in May 2008.

[91] In May 2008, the grievor went on parental leave and came back on August 3, 2009, still at the HRSDC.

[92] Mr. Nasrallah indicated that, before his termination, he was part of a group at the HRSDC responsible for preparing policy research papers for the assistant deputy minister. He also sometimes represented the HRSDC at meetings with other departments.

[93] The grievor indicated that, in his duties, he had no financial authorities and that he received his reliability status in 2001 and obtained his secret clearance in March 2006.

[94] Mr. Nasrallah testified that the CSIS contacted him in April 2009. It had some questions for him about his security clearance. He indicated that CSIS representative interviewed him at a CSIS building.

[95] Mr. Nasrallah indicated that the CSIS asked closed questions about his loyalty to Canada. The CSIS also questioned him about his involvement in and relationship with the Lebanese and Arab Muslim communities. He indicated that he did not think that his security clearance was in trouble at that point.

[96] Mr. Nasrallah testified that, on August 3, 2009, he returned to work from parental leave. He indicated that he reported to work normally and that he went to his office located in Place Vanier in Ottawa. He indicated that he tried his ID card to get to his office but that did not work. He then went downstairs to security. They did not know why his ID card did not work.

[97] Mr. Nasrallah indicated that, at that point, the head of security came out of his office accompanied by Ms. Heon.

[98] Ms. Heon asked him to follow her. They were in the corridor, and it was around 08:00 to 08:30. The grievor testified that a lot of people were in the corridor at that time and that he avoided eye contact; he felt embarrassed.

[99] Mr. Nasrallah indicated that he then went with Ms. Heon into another room in another tower. There they met with Mr. Campeau and the grievor's supervisor.

[100] Mr. Nasrallah testified that, at that point, they gave him the letter dated August 3, 2009 and signed by Ms. Gauthier and told him that they had bad news for him. They stated that they received information from CSIS about his status. The grievor testified that he asked what specific information they had received and was told that they could not tell him.

[101] Mr. Nasrallah indicated that he was told that, pending the investigation, he would be on leave without pay and that he could contact his bargaining agent or the Employee Assistance Program.

[102] Mr. Nasrallah testified that he was in shock and that he was overwhelmed. He indicated that he was worried about the financial consequences since he is the sole supporter of a family with two young children. He also mentioned that he was worried about his reputation and that he wondered what his colleagues would think of him. The grievor stated that he was told that his colleagues would be informed that he was on personal leave and that the investigators told him that they hoped that the investigation could conclude in a matter of weeks.

[103] Mr. Nasrallah testified that, at one point he asked his supervisor if it had anything to do with performance at work, to which his supervisor answered in the negative and added that it was totally out of his hands.

[104] The grievor indicated that the employer's security staff made an appointment with him to meet at his home to retrieve the HRSDC's computer. He was then escorted out of the building and did not have a chance to say goodbye to his colleagues. He was also told to stay away from the premises while the investigation was conducted. Shortly after, Ms. Heon and Mr. Campeau came to his house to retrieve the computer.

[105] Mr. Nasrallah testified that it was a devastating and humiliating experience. He was overwhelmed. It came from nowhere, and he was not provided with an explanation. He indicated that, the effect of the enforced leave was more than financial; his job was a big part of his life.

[106] Referring to the August 7, 2009 letter signed by the Deputy Minister, Mr. Nasrallah mentioned that he did not know about the information that the CSIS would have provided to the Deputy Minister. He also pointed out that the letter did not say much about the basis for the revocation of his secret clearance.

[107] Referring to his meeting with the SIU investigators, Mr. Nasrallah specified that two meetings were held at which Ms. Heon and Mr. Campeau as well as his counsel, Mr. Drapeau were present. Mr. Nasrallah indicated that at the first meeting, which lasted about two or three hours, he was asked many questions about his qualifications, some of his duties outlined in his c.v., his financial situation, how he met his financial obligations, how he spent his money, etc.

[108] As for the second meeting, the grievor testified that more questions were asked about his Lebanese and Muslim ties and whether he had any relationship with a certain member of Hezbollah with the same last name. Mr. Nasrallah denied any relationship with Hezbollah and indicated that, in Lebanon, the "Nasrallah" name is very common; it is like the name "Smith" in English. The grievor indicated that he was asked if he was a member of a terrorist organization, to which he replied in the negative. As to whether he was asked questions about the student loan issue, specifically about the interest relief application, he answered that few questions were asked about it. The grievor indicated that the second meeting lasted about one to two hours.

[109] Mr. Nasrallah testified that, contrary to what he was initially told, it took more than a matter of weeks before the investigation was completed. He mentioned that his bargaining agent and its counsel made several unsuccessful attempts to establish the timeline for the investigation and to obtain the final report.

[110] As for the March 2010 draft report, Mr. Nasrallah testified that he saw it for the first time through a request under *Access to Information Act,* R.S.C. 1985 c. A-1, and as for the undated report (Exhibit G-2), the grievor indicated that he did not remember seeing it.

[111] Mr. Nasrallah indicated that he received on April 22, 2010, via a messenger, Ms. Whittle's letter of April 20, 2010, along with the April 2010 draft report for his comments.

[112] Mr. Nasrallah indicated that the April 2010 draft report mentioned two anomalies about his student loan. The first was about how his marital status has been reported. Although, the form initially reported that he was single, it was later corrected to indicate that he was married. Mr. Nasrallah testified that the mistake was made because the information was initially gathered by phone. Then, a pre-filled form was sent to him, indicating that he was single. He initially did not notice the error. It was corrected in the next six-month application, in May 2006.

[113] As for the second anomaly, which was about the interest relief and the fact that he indicated his net salary instead of his gross salary as required, Mr. Nasrallah indicated that, the income part of the form was not provided to him pre-filled. He simply thought that the net salary figure was required, not the gross. It was an honest mistake.

[114] Mr. Nasrallah indicated that he realized the error regarding the net/gross salary around the time the April 2010 draft report was released. He testified that he noticed the error after his wife had a discussion about her own application with CSLP officials and was told that the gross salary was to be reported.

[115] The grievor testified that, after a discussion with his wife, he checked his application, realized the mistake and drafted a letter to CSLP officials informing them of the error before he received the April 2010 draft report. In his testimony, Mr. Nasrallah indicated that his letter to the CSLP dated April 22, 2010 was sent just hours after he received the April 2010 draft report from the DSO.

[116] As for counsel for the employer's question as to why the grievor referred only to May 2010 in his letter to the CSLP and did not tell them about the other years in

which he misstated his salary, the grievor responded that he always provided what CSLP officials asked from him.

[117] Mr. Nasrallah indicated that on May 5, 2010, he provided Ms. Whittle with his comments on the April 2010 report. He stated that, although he did not want to condone what happened, he never intended to misappropriate funds, and he offered restitution.

[118] On the April 2010 report, Mr. Nasrallah indicated that he was expecting a report subsequent to the one he received since that report did not appear substantive; it contained no analysis and no recommendation. In cross-examination, Mr. Nasrallah agreed that the April 2010 report contained two allegations, one about his marital status, and one about the misappropriation of funds.

[119] The grievor indicated that the employer never acknowledged his comments of May 5, 2010.

[120] Mr. Nasrallah testified that he contacted the CSLP for the details about how much he owed. On September 27, 2010, the CSLP informed him that he was required to pay back $13 658.59 within 60 days. Otherwise the matter would be referred to the Canada Revenue Agency for collection. The grievor indicated that he tried, unsuccessfully to negotiate the repayment. Without a salary, and having been on leave without pay since August 3, 2009, Mr. Nasrallah indicated that he had difficulties paying what he owed. He had to borrow the money. In cross-examination on the issue of the CSLP asking for repayment within 60 days, the grievor admitted that, obviously, the CSLP took everything seriously.

[121] Mr. Nasrallah testified that he heard from the employer next through Mr. Paquette's letter dated June 28, 2010, informing him that his reliability status had been revoked, and in another letter from Mr. Paquette also dated June 28, 2010 that his employment was terminated. He pointed out that the letters did not provide the reasons for the revocation of his reliability status.

[122] Mr. Nasrallah indicated that, through his bargaining agent, he filed a grievance against the HRSDC and that the Deputy Minister heard the matter in September 2010.

[123] Mr. Nasrallah testified that, after being suspended without pay in August 2009, he tried to find employment with other departments. He also tried a placement agency.

He indicated that, at some point, he received an offer through the placement agency for a contract with the Department of Fisheries and Oceans (DFO). However, the placement agency informed him that the DFO required further security checks and that the contract never materialized.

[124] The grievor testified that, since September 2009, the department of Public Works and Government Services Canada (PWGSC) granted him on three occasions, through the placement agency, reliability status (Exhibit G-7). The reliability status never materialized; he indicated that at some point the chief of security at PWGSC informed him that there was no reason not to grant him the reliability status but that they were waiting for information from the HRSDC**.** In cross-examination, Mr. Nasrallah explained that he did not sign the forms referred to in Exhibit G-7 because he faxed the signed versions. He also indicated that the names of the persons on the form are people from the placement agency.

[125] The grievor indicated that, since his employment was terminated, he tried to find work outside the public service, without success.

[126] Mr. Nasrallah also testified that in his quest for other work, he tried to obtain confirmation of his employment from the HRSDC, without success despite his and his bargaining agent's attempts. He indicated that the HRSDC told him that it would not provide him with confirmation of his employment.

[127] The grievor indicated that, since his suspension from work in August 2009, he has been diagnosed with mental stress and depression and that he has been seeing a psychologist and doctor and has been taking medication for two years. He testified that he has different problems, like trouble concentrating or sleeping, parenting problems, etc. Moreover, he indicated that this situation has had an adverse effect on his skills set and abilities for future employment. It has been very destructive to him and his immediate family.

[128] Mr. Nasrallah testified that the fact that this whole situation took so long adversely affected him. It perpetuated fear and the unknown. It created a lot of mistrust issues.

[129] Mr. Nasrallah concluded by saying that, since 2009, he has been on long term disability.

[130] At the end of Mr. Nasrallah's testimony, his counsel wanted to produce as exhibits two certificates about his health, one from T. Hall from Blossom Counselling, and another from Dr. S. Kasbia. Counsel for the employer objected to the filing of those documents on the basis that the two authors were not present, which would deny his right to cross-examination.

[131] I allowed the filing of the two certificates but indicated that, in the absence of their authors, without any justification, they would have very little weight as evidence.

IV. Summary of the arguments

A. For the employer

[132] Counsel for the employer asked that the grievance be dismissed for the reasons stated in his preliminary objections.

[133] Moreover, although counsel for the employer agreed that the adjudicator has jurisdiction over non-disciplinary matters under paragraph 209(1)(*c*) of the *Act,* he submitted that the adjudicator's discretion extends only to determining whether there is cause for the termination as specified in subsection 12(3) of the *FAA.*

[134] Counsel for the employer maintained that this case warranted termination since, with the loss of his reliability status, Mr. Nasrallah no longer met a condition of his employment. Therefore, in counsel's view, the grievor's failure to meet that condition of employment constituted the cause as prescribed in subsection 12(3) of the *FAA.*

[135] Counsel for the employer pointed out that my analysis and jurisdiction end there. I do not have the jurisdiction to consider the merits of the employer's decision to revoke the grievor's reliability status since it was an administrative decision over which the adjudicator lacks jurisdiction.

[136] In the alternative, counsel for the employer suggested that, if I decide to examine the merit of the decision, my jurisdiction is limited to determining whether there was a violation of procedural fairness or whether the decision was tainted by bad faith. Counsel referred me to *Gill,* at paragraphs 151 and 152. According to counsel, that case is similar, in that the termination came after the revocation of the grievor's reliability status. Counsel also referred me to *Hillis*, at paragraph 155, which confirms

that an employer can resort to an administrative measure to terminate an employee's employment.

[137] Turning to counsel for Mr. Nasrallah's argument that the employer's decision was made in bad faith and that it did not respect the procedural fairness principle, counsel for the employer referred me to *Shaver,* at paragraph 133, in which the adjudicator referred to the reasoning put forward in *Tipple v. Canada (Treasury Board),* [1985] F.C.J. No.818, (C.A.)(QL) and in *Braun*, in which it was decided that, even if procedural unfairness occurs during an investigation, the unfairness is cured by a hearing *de novo* before an adjudicator.

[138] Counsel for the employer then walked me through the letter sent to Mr. Nasrallah on August 3, 2009 in which he was told why the employer was reviewing of his reliability status. The letter set out the consequences was his reliability status revoked. The letter also indicated that Mr. Nasrallah would be given a chance to provide his side of the story, which he did. Finally, the letter specified who would make the decision.

[139] Counsel for the employer reviewed Ms. Whittle's testimony, pointing out that, once an employee's secret security clearance is revoked, the employer must reassess the employee's reliability status.

[140] Counsel for the employer submitted that the evidence demonstrated that Ms. Whittle reviewed the SIU's steps, including twice interviewing the grievor in the presence of his legal counsel. When the SIU carried out its investigation, it uncovered the misrepresentation made by Mr. Nasrallah about his student loan.

[141] As for the draft report of March 2010, counsel for the employer maintained that Ms. Wittle never approved it. She had the final say on all reports. Counsel for the employer argued that the DSO, after viewing the March 2010 draft report, disregarded the extraneous information and kept only the information relevant to the issue of the grievor's reliability status. According to counsel for the employer, Ms. Whittle did not consider factors other than the findings about the grievor's student loan.

[142] Counsel for the employer argued that no evidence showed that the employer considered improper facts or that it considered information from the CSIS. On the

contrary, Ms. Whittle indicated that she did not talk to the CSIS which is not responsible for reliability assessments.

[143] Counsel for the employer reviewed Ms. Whittle's steps after the draft March 2010 investigation report was submitted to her, including the discussions she had with the CSLP representatives. Counsel for the employer pointed out that the misrepresentation took place for close to three years and that it was repeated every six months during that period.

[144] Counsel for the employer submitted that Ms. Whittle wrote the April 20, 2010 investigation report and that she sent it with a letter to Mr. Nasrallah in which she indicated that she would make a decision about his reliability status that would consider the comments that he would provide.

[145] Counsel for the employer submitted that the April 20, 2010 report was clear about the HRSDC's focus on with the misrepresentation on the grievor's student loan interest relief application, which was made very clear to Mr. Nasrallah.

[146] Counsel for the employer indicated that Ms. Whittle's letter to Mr. Nasrallah was very clear about the fact that a decision would be made once his comments were received.

[147] Counsel for the employer indicated that Mr. Nasrallah's explanation in his letter to Ms. Whittle dated May 5, 2010 accompanied by a letter from the grievor's counsel also dated May 5, 2010, did not change her finding that Mr. Nasrallah had misappropriated funds from his employer. Counsel for the employer disagreed with two sentences written by counsel for Mr. Nasrallah in his letter to Ms. Whittle in which he wrote of the "mild reaction from CSLP" and stated that the "allegations were groundless."

[148] Counsel for the employer questioned counsel for the grievor's affirmations, especially given that, on September 27, 2010, the manager of Program and Integrity and Compliance at the CSLP wrote to the grievor and asked him to repay $13 658.59 within 60 days, otherwise Mr. Nasrallah would be considered in default of payment, and the outstanding balance would be sent to the Canada Revenue Agency for collection.

[149] Counsel for the employer argued that, moreover, the fact that the CSLP did not prosecute the grievor for the misappropriation of funds is irrelevant. The HRSDC's review of his reliability status and the CSLP's actions were distinct processes. Counsel for the employer referred me to *Braun*, in which the employee had his reliability status revoked and was initially criminally charged. The criminal charges were later stayed. The employer still had concerns with the employee's honesty and revoked the employee's reliability status. The fact that the criminal charges were stayed was not relevant to the adjudicator's decision. She concluded that she did not have jurisdiction over the administrative decision to revoke the employee's reliability status. Counsel for the employer concluded that, regardless of whether or not the CSLP pressed charges against Mr. Nasrallah, it certainly asked for the money back.

[150] Counsel for the employer argued that the grievor abused the trust placed in him by his employer. He misrepresented his gross salary every six months for three years. Mr. Nasrallah is educated; he held a position at a senior level. The CSLP is part of the grievor's employer. Mr. Nasrallah was responsible for informing himself about the CSLP.

[151] Counsel for the employer questioned Mr. Nasrallah's motives when he sent a letter to the CSLP on April 22, 2010 that referred only to the mistake made in May 2010 and that was silent about the three years in which he had misrepresented his salary, even though, at that point, the grievor had received the report from Ms. Whittle.

[152] In response to counsel for Mr. Nasrallah, who maintained that the grievor was never given meaningful reasons for the revocation of his reliability status, counsel for the employer indicated that the grievor knew very well the employer's reasons. Counsel for the employer referred to the letter of June 28, 2010 in which Mr. Paquette informed Mr. Nasrallah that his reliability status was revoked. Counsel for the employer maintained that the grievor must have known that it was revoked because of the misappropriation of funds as was described in the April 2010 report

[153] In addition, counsel for the employer argued that no lack of procedural fairness occurred. The grievor was told why his reliability status was reassessed, how it would be done and who would make the final decision and that Mr. Nasrallah would be provided an opportunity to respond. The fact that the grievor's comments to the DSO did not change her mind does not mean that procedural fairness was violated.

[154] Counsel for the employer distinguished Mr. Nasrallah's situation from *Gill*, in which the adjudicator found that the grievor had not been provided with a chance to comment on the draft investigation report. The adjudicator in that case found that the rules of procedural fairness were breached. Counsel for the employer concluded that that is not so in this case. Mr. Nasrallah was given a chance to comment on the report, which he did. At any rate, were I to conclude that there was a lack of procedural fairness, it was cured by the hearing *de novo* before me as the Federal Court wrote in *Tipple*, as the Board noted in *Braun* and *Shaver*, and as the former Board noted in *Chenier v. Treasury Board (Solicitor General Canada - Correctional Service),* 2002 PSSRB 40.

[155] Counsel for the employer also argued that I do not have jurisdiction to determine if the decision to revoke the grievor's reliability status was reasonable. My jurisdiction, according to counsel for the employer, is limited to considering whether a lack of procedural fairness occurred or whether the decision was tainted by bad faith. Counsel referred me to *Braun,* at paragraph 199.

[156] In the alternative, counsel for the employer maintained that the decision was reasonable given Mr. Nasrallah's behaviour with the HRSDC. It was reasonable for the DSO to conclude that the grievor was not trustworthy or reliable because of his action, which he repeated every six months for three years. Counsel for the employer also rejected the proposition that the employer acted in bad faith. He argued that I would have needed clear and cogent evidence that proved on a balance of probabilities that the decision was made in bad faith. Counsel for the employer submitted that no such evidence was adduced.

[157] As for the remedy and the fact that counsel for Mr. Nasrallah indicated at the outset that she would be claiming aggravated damages, counsel for the employer opposed such a claim, point indicating that nothing in the grievance mentioned anything about aggravated damages. Counsel for the grievor argued that asking for aggravated damages would be tantamount to changing the grievance. In support of his argument, counsel for the employer referred me to the Federal Court of Appeal decision in *Burchill*.

[158] In the alternative, counsel for the employer indicated that the test for aggravated damages is quite onerous. In counsel for the employer's view, this case is clearly not a situation in which aggravated damages should be awarded. Mr. Nasrallah's

conduct led to the revocation of his reliability status, and then his employment was terminated. It is not the employer's fault if he is depressed. Mr. Nasrallah committed the misrepresentation and the misappropriation of funds and gained a financial benefit. His medical situation is attributable to his own actions. In addition, counsel urged me to give no weight to the medical certificates introduced by the grievor's counsel under objection on his part, on the basis that counsel for the employer did not have a chance to cross-examine the authors of the certificates. They are all hearsay.

[159] As for the time it took to complete the investigation, counsel for the employer argued that the DSO, in her testimony, indicated that it took a long time to validate the information between HR and the CSLP. The DSO needed to ensure that the information was correct. The investigation was done as quickly as possible.

[160] Counsel for the employer argued that the fact that the PWGSC granted the grievor the reliability status on three occasions afterward is irrelevant. The revocation of an employee's reliability status is the responsibility of the deputy head who, in this case, delegated that power to the DSO. That power is within the discretion of the deputy head or the DSO and is specific to each department. The PWGSC does not have the same type of information as the HRSDC. In support of that argument, counsel for the employer referred me to *Kampman* and *Hillis*.

[161] In closing, counsel for the employer reiterated that reliability status is a condition of employment that Mr. Nasrallah no longer meets. The *PSS,* as confirmed in *Hillis*, no longer requires that the employer, when an employee had his or her reliability status revoked, to search for alternate employment at a lower level of security. Moreover, since the minimum requirement for any position in the federal public service is reliability status, Mr. Nasrallah cannot be employed by the HRSDC.

[162] Counsel for the employer also took the view that I have no jurisdiction to order Mr. Nasrallah's appointment to another position. Nor do I have the jurisdiction to reinstate him. In support of his argument, counsel for the employer referred me to *Zhang* at paragraph 70, and *Singh* at paragraph 16, and *Gill*, at paragraph 170.

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

[163] Counsel for Mr. Nasrallah reiterated her position that the Board has jurisdiction to hear his grievance and to grant the requested remedy.

[164] Counsel for Mr. Nasrallah maintained that the evidence demonstrated that, in this case, the employer not only acted in bad faith when it decided to revoke the grievor's reliability status but also that the process was tainted with procedural unfairness and that, on that basis, I should allow the grievance.

[165] Counsel for the grievor reviewed subparagraph 209(1)(*c*)(i) of the *Act* and argued that the Board clearly has jurisdiction to hear a case of a termination for non-disciplinary matters, such as this case.

[166] Counsel for Mr. Nasrallah then referred me to subsection 12(3) of the *FAA* and maintained that terminations have to be for cause. In support of her argument, counsel referred me to *Hillis* and *Gill*, similar cases in which the former Board took jurisdiction.

[167] Counsel for Mr. Nasrallah disagreed with the employer's proposition that the fact that Mr. Nasrallah no longer met a condition of employment constituted the cause referred to in subsection 12(3) of the *FAA* and that that should be enough. She maintained that that interpretation made no sense in light of subparagraph 209(1)(*c*)(i) of the *Act* and subsection 12(3) of the *FAA* and that, since a right to adjudication clearly exists, under subparagraph 209(1)(*c*)(i) of the *Act*, a *bona fide* cause is required under subsection 12(3) of the *FAA.* Counsel for Mr. Nasrallah maintained that the employer's interpretation would take away the purpose behind subparagraph 209(1)(*c*)(i) of the *Act.* If there is a right under that subparagraph, there must be a valid remedy under subsection 12(3) of the *FAA.*

[168] Counsel for Mr. Nasrallah disagreed with the employer's position that the appropriate process should have been separate grievances about the revocation of the grievor's reliability status and his termination. Counsel for the grievor referred me to *Hillis* in which only one grievance has been filed for both a revocation of security status and a termination. Counsel for Mr. Nasrallah maintained that it makes sense to file only one grievance, for the termination, since the cause of the termination was the revocation of the grievor's reliability status.

[169] Counsel for Mr. Nasrallah also contended that it is not in dispute that the Board has jurisdiction to examine procedural fairness and whether the decision to terminate the employment for cause was made in bad faith. She also stated that the applicable standard of fairness is related to the importance and the impact of the decision on the employee. For instance, for termination, the impact on the employee is extremely

important. Therefore, the standard of fairness is greater than minimal due to the consequences on the employee. In support of her argument, counsel referred me to the Federal Court judgment in *Myers v. Attorney General of Canada*, 2007 FC 947, and to *Gill*.

[170] Counsel for Mr. Nasrallah stated that the DSO provided no satisfactory response as to why the investigation process took so long. No explanation was provided why, after the Head of HR promised that, in response to ongoing queries by the grievor's bargaining agent as to when the report would be completed, it would be provided to the grievor within a week of March 8, 2010, it was provided only on April 20, 2010, after the matter was brought to the deputy minister.

[171] Moreover, counsel for the grievor argued that, it is very hard to understand why it took eight months to complete the investigation when the final product was a mere four-page report.

[172] Counsel for the grievor drew my attention to the March 10, 2010 draft report. According to her, the draft report indicated that the SIU interviewed many witnesses and that it covered a wide range of issues. For example, the report referred to questions put to Mr. Nasrallah about whether he had a connection with Hezbollah and about his purchase of a condo in Beirut, Lebanon.

[173] Counsel for the grievor stated that, in her testimony, the DSO admitted that she read that draft report of March 2010 and that she concluded that a number of issues could have led to the revocation of Mr. Nasrallah's reliability status.

[174] According to counsel for the grievor, the DSO, after reviewing the March 2010 draft report, formed an impression that Mr. Nasrallah was not honest based on both the student loan matter and on the other issues in the March 2010 report. According to that counsel, it must be concluded that the DSO surely based her decision on issues other than the misappropriation of funds. If so, then the DSO never gave Mr. Nasrallah a chance to comment on a report that covered issues other than the student loan matter. In counsel for the grievor's view, that constitutes a blatant denial of procedural fairness and bad faith by the employer.

[175] Turning now to the April 2010 investigation report that was provided to Mr. Nasrallah, his counsel argued that his testimony is that he received the report on

April 22, 2010. Counsel for the grievor contended that her client must be believed when he testified that he realized his mistake about the gross versus net salary just before he received the draft report dated April 20, 2010. He drafted a letter to the CSLP admitting the error and offering restitution.

[176] Counsel for Mr. Nasrallah also noted that the April 2010 report is much shorter than the March 2010, that a lot of the issues stated in the draft March 2010 report are not reiterated in the April report; and that the April report contained only bare facts and no analysis or conclusion. Moreover, the April 2010 report does not mention the misappropriation of funds. Only at the hearing was it revealed that the DSO did not rely on the issue of marital status in her report and that someone occupying a position classified EC-7 cannot make a mistake.

[177] Counsel for Mr. Nasrallah also contended that, even though the grievor had an opportunity to respond to the April 2010 report, nothing that he could have said would have made a difference, since the DSO had already made up her mind. In counsel's view, the DSO had already concluded in March 2010 that she did not believe Mr. Nasrallah.

[178] Counsel for the grievor contended that the DSO did not consider the relevant elements. As for Ms. Whittle's statement that the grievor should have known better, counsel for Mr. Nasrallah replied that she never considered the student loan misappropriation as an honest mistake by Mr. Nasrallah. She never gave the grievor a chance to explain how he should have known better.

[179] Counsel for Mr. Nasrallah took the position that the DSO considered more than the misappropriation when she made her determination, but again, it was never shared with the grievor. Therefore, how could he have explained himself to the DSO without knowing her thoughts? According to counsel, this procedural injustice issue ought to be considered.

[180] Counsel for Mr. Nasrallah also maintained that, contrary to the allegations, the grievor must be believed when he states that he found out about the mistake about the student loan only shortly before he received the report and that, as soon as he found out, he contacted the CSLP about his application and tried to obtain from them a breakdown of what he owed. In his letter dated May 5, 2010, he again admitted the

mistake and offered to make restitution. Despite his efforts, it took 5 months for the CSLP to respond about the breakdown.

[181] Counsel for M. Nasrallah argued that the CSLP's reaction was "mild." In fact, counsel for Mr. Nasrallah suggested that the CSLP could have brought criminal charges against him and that they decided not to.

[182] Counsel for Mr. Nasrallah insisted that, throughout the grievor's testimony, he was credible. Anyone can make an honest mistake, she argued, and mistakes are not limited to people occupying positions at a lower level.

[183] As for the April 2010 report, counsel for the grievor once again claimed that no meaningful reasons were provided to the grievor. Mr. Paquette's letters about the revocation of the grievor's reliability status and his termination also provide no reasons. Nowhere is mention made of a misappropriation of funds. This is another example of procedural unfairness.

[184] According the grievor's counsel, Ms. Whittle made her decision in bad faith. She had her mind made up, and she did not consider the correct factors.

[185] Counsel for Mr. Nasrallah also argued that, not only do I have jurisdiction over the merits of the decision and can determine whether procedural fairness was respected, I also have jurisdiction to examine whether the decision was reasonable. In support of that argument, counsel for the grievor referred me to *Gunderson,* in which the adjudicator decided that he had jurisdiction to review whether the decision to terminate was fair and reasonable. Although counsel for the grievor agreed that the decision dates from 1995, she maintained that the legislation at that time was essentially identical to today's and that the principles and reasons enunciated in *Gunderson* are still good law.

[186] Counsel for Mr. Nasrallah maintained that *Gunderson* is an important decision to consider, especially at pages 17 and 18, since the adjudicator considered at the entire legislation and concluded that he could review the employer's decision in full.

[187] As an example that the decision to revoke the grievor's reliability status was unreasonable, counsel for the grievor mentioned the fact that another department, the PWGSC, granted reliability status to the grievor three times after his termination. Although counsel for the grievor admitted that the discretion to grant reliability status

rests with each department, she nevertheless concluded that the PWGSC's action was very relevant and that it should be considered in deciding this matter.

[188] As for Mr. Paquette's letters, both dated June 28, 2010, counsel for Mr. Nasrallah concluded that, unfortunately, no discretion was exercised in them and that the letters just rubber-stamped Ms. Whittle's decision.

[189] On the issue of appropriate remedies, at the outset, and in response to counsel for the employer's objection that Mr. Nasrallah cannot ask for aggravated damages since no reference was made to aggravated damages in his grievance, counsel for the grievor replied that the grievor's reference in the grievance that, as a remedy, he wanted to "be made whole" encompassed the notion of aggravated damages. In support of his argument, counsel for Mr. Nasrallah referred me to *Grover v. National Research Council of Canada,* 2006 PSLRB 117. In counsel for the grievor's view, the employer ought to have known that aggravated damages were part of the remedies sought. Aggravated damages are the consequences of the employer's actions. Counsel for Mr. Nasrallah also referred me to *Mount Sinai Hospital v. Ontario Nurses Association,* 2000 CLB 12752.

[190] Counsel for Mr. Nasrallah asked that, were I to conclude that the employer's decision about his reliability status lacked procedural fairness, was made in bad faith or, alternatively, was unreasonable, I set aside the decision and reinstate him in his position and that I grant him aggravated damages.

[191] In terms of the remedy, counsel for Mr. Nasrallah claimed that I should set aside the decision to revoke the grievor's reliability status for the reasons set out, i.e., a lack of procedural fairness or bad faith, or alternatively, on the basis that the decision was unreasonable. Moreover, once I conclude that the decision to revoke the grievor's reliability status was wrong, then there is no longer cause under subsection 12(3) of the *FAA.* Therefore, the decision to terminate the grievor's employment must also be quashed. Therefore, I am being asked to order the grievor's reinstatement, with full back pay from the date on which his employment was terminated. Counsel for the grievor referred me to *Gill.*

[192] Alternatively, as stated in *Myers*, I am being asked to set aside the decision to revoke Mr. Nasrallah's reliability status and to refer the matter back to the Department

to redetermine the decision by providing Mr. Nasrallah with an opportunity to respond to the allegations against him.

[193] Counsel for Mr. Nasrallah also maintained that he is entitled to aggravated damages for the pain inflicted by the employer's decision to dismiss him. On that point, counsel argued that I have the jurisdiction to award such a remedy. In support of that argument, counsel referred me to *Attorney General of Canada v. Tipple*, 2011 FC 762.

[194] Counsel also took the position that in this case, the medical reports and the grievor's testimony demonstrated that he suffered after his employment was terminated.

[195] Counsel for Mr. Nasrallah argued that the manner in which the grievor was approached at work about his reliability status was wrong. Counsel argued that the grievor was taken by surprise. He was escorted out and did not have a chance to say goodbye to his colleagues. Mr. Nasrallah was humiliated. The employer's approach was cruel. Surely, things could have been done differently.

[196] Counsel for the grievor also maintained that the length of the process that led to the grievor's termination was too long. Despite the fact that the grievor was promised that it would take weeks for the process to complete, it took eight months to complete and then another two months for the final decision. Counsel for the grievor stated that there is simply no explanation to justify that length of time. Once an employee is on leave without pay pending an investigation, the employer has to act quickly and diligently to complete its investigation and to make a final determination.

[197] Counsel for Mr. Nasrallah also argued that it is completely unacceptable that the employer refused to confirm the grievor's employment with potential employers. That acknowledgement would have helped Mr. Nasrallah secure other employment. The employer's actions should be taken into consideration when awarding aggravated damages.

[198] Counsel argued that the employer's actions took a toll on Mr. Nasrallah's health, as proven by the medical certificates. In light of everything, counsel asked that I award $25 000 to the grievor as aggravated damages. In support of that claim, counsel referred me to *Chapell v. Canadian Pacific Railway Company*, 2010 ABQB 441, in which

a finding was made that the employer in that case acted in bad faith. As a result, the plaintiff was awarded $20 000.

[199] Counsel for Mr. Nasrallah also referred me to *Pagliaroli v. Rite-Pak Produce Co.,* 2010 ONSC 3729, in which it was also found that the employer acted in bad faith. The plaintiff was awarded $25 000 in aggravated damages. Given the jurisprudence, counsel for Mr. Nasrallah argued that, in this case, $25 000 is also reasonable.

C. Employer's rebuttal

[200] Counsel for the employer disagreed with the statement made by the grievor's counsel and stated that the DSO indicated in her testimony that she had not made up her mind before receiving the grievor's feedback on the April 2010 investigation report. Counsel for the employer insisted that the basis of the DSO's decision was the misappropriation of funds from the CSLP.

[201] Counsel for the employer also insisted that no evidence supports the claim that the DSO tried to harm the grievor and that she acted in bad faith. Counsel for the employer maintained that the DSO's actions were guided by the *PSS* and that she acted accordingly.

[202] As for the remedy, counsel for the employer reiterated that I do not have the jurisdiction to appoint Mr. Nasrallah to a position and that I do not have the jurisdiction to appoint someone to a position who does not meet a condition of employment, such as reliability status. Nor do I have the jurisdiction to reinstate an employee who has had his or her reliability status revoked.

[203] As for *Myer*s, counsel for the employer stated that that decision supports his point about the Board's jurisdiction to hear a grievance about the revocation of an employee's reliability status. For counsel for the employer, the *Myers* confirms that the available recourse when a reliability status has been revoked is before the Federal Court, not before the Board. Counsel for the employer maintained that just because a matter can be grieved under section 208 of the *Act* does not make it adjudicable before the Board.

[204] Finally, counsel for the employer stated that the jurisprudence since *Gunderson* has evolved. Subsequent decisions by the former Board and this Board, such as *Hillis*,

Zhang, *Gill* and *Braun* have all confirmed that revoking reliability status is an administrative decision over which the Board does not have jurisdiction.

V. Reasons

A. Background

[205] It should be pointed out at the outset that neither party adduced evidence or any argument as to why Mr. Nasrallah's secret clearance status was revoked. Nor was any reference made to his subsequent actions with respect to that revocation, except that the matter was referred to and is pending before the SIRC.

[206] As stated, counsel for Mr. Nasrallah took the position that the complaint before the SIRC was a separate process, that it had no impact on the proceedings before the Board and that the Board should hear the present grievance despite it.

[207] I should also point out that, in answer to my question to both counsels about how to deal with the period for which Mr. Nasrallah was placed on leave without pay, that is, from August 3, 2009 until his employment was terminated on June 28, 2010, the parties indicated that they reached an agreement with respect to that issue. Therefore, there was no need for me to look into it.

[208] Finally, at the end of the hearing both parties asked that, was I to allow the grievance, I would not decide the remedy but would instead give the parties 30 days from the date of the decision to resolve the matter and that I would remain seized if no agreement were reached. If that happened, the parties agreed that no further evidence would be adduced.

B. Decision

[209] This case can be summarized as follows. In August 2009, Mr. Nasrallah was informed that his employer, the HRSDC, received from the CSIS adverse information about his loyalty to Canada. In August 2009, while the matter was being investigated, Mr. Nasrallah was placed on leave without pay. On August 7 2009, he was informed by the Deputy Minister that, based on information received by the CSIS, his secret clearance was being revoked. Mr. Nasrallah filed a complaint with the SIRC. The grievor was informed that, as a result of his secret clearance revocation, the HRSDC had to reassess his reliability status, which it did.

[210] In March 2010, a draft report was provided to the DSO. She decided that it contained unnecessary and irrelevant information, which she removed, and she prepared a new one dated April 2010. The April 2010 report referred to the fact that Mr. Nasrallah provided the CSLP, from 2006 to 2009, his net salary, as opposed to his gross salary, with the result that it qualified him to receive $13 658.59 as interest relief from the federal government, to which he was not entitled.

[211] In his comments on the April 2010 report and at the hearing, Mr. Nasrallah did not deny that he provided the CSLP with the wrong information about his salary but claimed that it was a mistake and that he was prepared to pay back the money.

[212] After she had Mr. Nasrallah's comments, and comments from his legal counsel, Ms. Whittle decided nevertheless to revoke his reliability status. On June 28, 2010, the Assistant Deputy Minister decided to terminate Mr. Nasrallah's employment on the basis that, without reliability status, he no longer met a condition of employment. The grievor filed a grievance under subparagraph 209(1)(*c*)(i) of the *Act* and paragraph 12(1)(*d*) and subsection 12(3) of the *FAA.*

[213] Arguments were made about my jurisdiction.

C. <u>The Board's jurisdiction over the revocation of an employee's reliability status</u>

[214] The issue of whether the revocation of an employee's reliability status falls within the jurisdiction of an adjudicator has been examined numerous times by the courts and the Board.

[215] The Board has always recognized that adjudicators have very limited jurisdiction when it comes to terminations involving security status revocations. Essentially, unless evidence supports characterizing the employer's decision as disguised discipline or as tainted by procedural unfairness or bad faith to a point that it cannot be remedied at the *de novo* hearing before an adjudicator, the jurisprudence is essentially to the effect that this Board lacks jurisdiction over the decision to revoke the reliability status.

[216] In *Leblanc v. Treasury Board*, PSSRB File No. 166-02-25267 (19940615), the adjudicator concluded as follows:

…

> *I have examined all the evidence and the relevant decisions cited to me. The granting and revocation of enhanced reliability security clearance is the exclusive right of the employer and, as such, is an administrative measure. Revocation of security clearance is not therefore covered by section 92 of the* Public Service Staff Relations Act. *Having said this, I might have jurisdiction to hear the case only if the employer had exercised its discretion in bad faith (see Jacmain, supra and Penner, supra)….*

[217] In *Hillis*, the adjudicator had to decide whether the decision to terminate the employment following the revocation of reliability status was in fact disguised discipline. The adjudicator concluded as follows at paragraph 149:

> *[149] I have found no bad faith on the part of the employer leading me to conclude that the termination was a disguised disciplinary measure or that it was intended as such. I have also concluded that the process by which the employer reached this decision was fair despite the flaws, which have been appropriately remedied by this adjudication process. I would have no authority, or reason in any case, to reinstate the grievor's reliability status.*

[218] In *Zhang* (2005 PSLRB 173), at paragraph 56, the adjudicator concluded as follows:

> *[56]… How the revocation of her security clearance came about is not within my jurisdiction and is a matter that has already been dealt with by the SIRC. The role of an adjudicator in the case of the termination as a result of the revocation of a security clearance is a narrow one, according to the Federal Court in* Singh (supra). . . .

[219] In *Gill*, although the adjudicator concluded that the grievor's procedural rights were breached, the adjudicator nevertheless stated as follows at paragraph 152:

> *[152] I conclude that terminating the grievor's employment was an administrative action and that it was done for non-disciplinary reasons. To retain jurisdiction, I would have to be convinced that the employer acted in bad faith or breached the grievor's right to procedural fairness.*

[220] In *Braun*, at paragraph 140, the adjudicator had to decide whether the employer's decision to suspend the grievor without pay and then revoke his reliability status was either an administrative decision or amounted to disguised discipline. She wrote as follows:

> *[140] I can take jurisdiction over the grievances only if the evidence supports a conclusion of disguised discipline. In addition, as the Federal Court stated in* Frazee "*… an employee's feelings about being unfairly treated do not convert administrative action into discipline. . . .*"

[221] In *Shaver*, the employee had his reliability status revoked after his employment was terminated. The employer objected to the adjudicator's jurisdiction to deal with the grievor's reliability status. The adjudicator concluded as follows at paragraphs 128, 129 and 141:

> *[128] I was not presented with any decisions of this Board that have decided it has jurisdiction over the revocation of an employee's reliability status. I acknowledge that this is a case where the grievor's reliability status was revoked after his termination, whereas other decisions involved the revocation before termination from employment... However, in my view, that is a difference with no particular consequence to the issue of jurisdiction.*
>
> *[129] … However, in my view, the respondent's decision was an administrative action taken in response to the findings of the grievor's admitted breach of the security policies of the respondent. Similarly, I am unable to find that the revocation of the grievor's reliability status was disguised discipline. It is the case that the revocation of reliability status is related to the termination of employment to the extent that the former relied on the facts of the latter. However, this means the same facts created two results, not that the revocation was disciplinary.*
>
> *…*
>
> *[141] With regards to the revocation of the grievor's reliability status, that issue is moot as a result of the conclusion that there was just cause to terminate the grievor's employment. In any event, I find that I do not have jurisdiction to consider that issue.*

[222] I appreciate that while the above cited decisions dealt mainly with situations in which discipline was alleged as the real motive for the termination; adjudicators nevertheless concluded that the decisions to revoke reliability status were administrative in their nature to which principles of natural justice applied.

[223] I agree with the above jurisprudence that the decision to revoke the reliability status is of administrative nature and whether or not discipline is alleged does not change, in my view, it's administrative nature.

[224] I will now examine the legal authority under which Mr. Nasrallah's grievance was referred to adjudication.

[225] Subparagraph 209(1)(*c*)(i) of the *Act* reads as follows:

> ***209.****(1) An employee may refer to adjudication an individual grievance... related to*
>
> *(*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. . . .*

[226] Paragraphs 12(1)(*d*) and (*e*) of the *FAA* read as follows:

> ***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,*
>
> *(*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. . . .*

[227] Subsection 12(3) of the *FAA* reads as follows:

> ***12.****(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.*

[228] After reviewing that legislation, I agree with counsel for Mr. Nasrallah that subparagraph 209(1)(*c*)(i) of the *Act* clearly allows for filing a grievance dealing with an employee's termination for a reason that was not disciplinary.

[229] I also agree with counsel for Mr. Nasrallah that a termination of employment has to be for cause as specified in 12(3) of the *FAA*.

[230] Although counsel for the employer argued that the cause here is that, following the revocation of the grievor's reliability status, he no longer met a condition of employment, counsel for Mr. Nasrallah maintained that there is no cause since the decision to withdraw his reliability status did not respect the principles of natural justice and was tainted by bad faith. Alternatively, it was unreasonable.

[231] The parties agreed that Mr. Nasrallah's position at the HRSDC required him to hold reliability status and a secret security clearance. It is also not disputed that reliability status is the minimum security standard in the public service and that it constitutes a condition of employment throughout the public service.

[232] I have therefore to decide whether the grievor's termination of employment was for cause as per 12(3) of the *FAA*. The employer contended that the cause is that, with the revocation of the grievor reliability status, he no longer met a condition of employment at the HRSDC and in the whole public service. As stated above, the parties have agreed in their joint statement of facts that Mr. Nasrallah's position at HRSDC required him to hold enhanced reliability status and secret security clearance. In the circumstances, and given that reliability status is the minimum standard to hold a position in the public service, I find that by no longer holding reliability status, Mr.Nasrallah no longer meet a condition of employment. Therefore the employer had cause pursuant to 12(3) *FAA* to terminate his employment.

[233] In other words, in this case, the cause for the termination is that the employee no longer meets an essential condition of employment.

[234] In her argument, counsel for the grievor argued that the employer's decision to revoke the grievor's security status and later to terminate his employment lacked procedural fairness, was tainted by bad faith and was unreasonable and as such should be put aside.

[235] In my view, unless it can be sustained that the determination that the employee no longer met the condition of his employment due to his loss of reliability status is tainted by procedural unfairness or bad faith, an adjudicator's jurisdiction ends once cause has been properly established.

[236] Based on the jurisprudence cited above, I believe that since the decision to revoke the reliability status is clearly an element that lead to the determination that

the grievor no longer met the requirement of his position and ultimately to his termination of employment, I must consider all the process that led to the termination of employment. In other words, I must consider whether procedural fairness and good faith were present in the context surrounding the revocation of the reliability status.

D. Procedural fairness or bad faith

[237] Counsel for Mr. Nasrallah argued that the decision to revoke his reliability status was tainted by procedural unfairness and bad faith. For instance, counsel for the grievor stated that Ms. Whittle made up her mind about Ms. Nasrallah's honesty before he had a chance to respond to the April 2010 report, which denied him a fair chance to respond to the allegation against him.

[238] Counsel for the grievor added that the DSO based her decision on facts that were never shared with the grievor, depriving him of his procedural rights to respond to all the allegations. Counsel for Mr. Nasrallah referred to the fact that the March 2010 draft report contained more information about the grievor and that the DSO must have been influenced when she made her decision by the other allegations, such as his alleged ties with terrorists organizations, the fact that he bought a condo in Beirut, and his alleged relationship with members of Hezbollah.

[239] In my view, it is not in dispute that under section 2.8 of the *PSS*, Ms. Whittle had no discretion; she had to reassess Mr. Nasrallah's reliability status once his secret clearance had been revoked. Although Ms. Whittle agreed that other elements in the March 2010 draft report could have been reasons for revoking the grievor's reliability status, she was adamant in her examination in chief and her cross-examination, that the misappropriation of funds was the reason for her decision to revoke his reliability status. She testified that the investigation revealed that Mr. Nasrallah was not honest with his employer when he misappropriated funds. She did not believe his explanation regarding his alleged mistake regarding gross vs. net salary, especially considering his employment level at the HRSDC. As the DSO for the HRSDC, she was concerned about an employee who was not honest with his employer. She testified that, as part of her responsibilities as the DSO, she did not want to expose the employer to someone in whom she had lost faith especially since the HRSDC' mandate is to deal with sensitive information about Canadians.

[240] In my opinion, although a different conclusion could be reached regarding Mr. Nasrallah's reliability status, no persuasive evidence was adduced that contradicted Ms. Whittle's statement as to the reasons why she revoked the reliability status or that showed that her decision to revoke the grievor's reliability status was biased or unfounded. As such, unless I were convinced that the DSO's decision was tainted by procedural unfairness or in bad faith, I believe that I should defer to her decision and not substitute it with my own.

[241] As stated as follows in *Kampman*:

…

> … *By contrast, a reliability assessment is the responsibility of the institution concerned and a so-called enhanced reliability status is essentially an attestation that, in the subjective opinion of the deputy head of the institution, a high degree of confidence or reliance may be placed on the individual involved. The revocation of that status in the case of an employee is a prerogative of the deputy head and merely reflects a change in that opinion, a loss of confidence in the employee's reliability.*

…

[242] Ms. Whittle was clear in her testimony that, as the HRSDC's DSO, the pillar of the April 2010 draft report and of her decision was that Mr. Nasrallah, over a period of 3 years, misappropriated a sum of $13 658.59 and, that he had the chance to correct the information every six months of that period but only did so after receiving the April 2010 report. The DSO explained that she was concerned with the misappropriation of funds and that, after reviewing paragraph 3 of Appendix B of the *PSS,* she evaluated the risk and concluded that she could not trust Mr. Nasrallah.

[243] Mr. Nasrallah testified that he realized his mistake when his wife filed an application with the CSLP that coincided with the release of the April 2010 report. I must say that I question Mr. Nasrallah's explanation. I find it hard to believe that, coincidently, he realized through his wife's application the mistake that had been ongoing for three years, at the same time that the DSO's April 2010 report was issued and which noted the discrepancies. In my view, he acted only after learning of the findings of the April 2010 report.

[244] Ms. Whittle was also categorical that the decision to revoke the reliability status was hers and that at no time did she speak with the CSIS about Mr. Nasrallah's situation. Her testimony was not contradicted.

[245] In my view, the DSO enjoyed some discretion when determining security requirements for a given department within the boundaries of procedural fairness and good faith. In the present case, the DSO's actions were in keeping with the authority delegated to her by the *PSS*. It is not sufficient, without persuasive evidence to support it, to infer some other motives than the one stated by Ms. Whittle. As stated as follows in *Hillis,* at paragraphs 132 and 133:

> *[132] The Federal Court of Appeal in* Kampman (supra) *has confirmed the decisional authority and prerogative in this matter on the part of the DSO. It has established standards of review for examination by the adjudicator. As such, in order to succeed in having this decision reviewed, the grievor had to demonstrate that the employer failed to comply with the rules of procedural fairness and reasonableness.*
>
> *[133] As long as the Departmental Security Officer's actions are in keeping with the authority delegated to him by the* Government Security Policy *and the* Personnel Security Standard*; he has the authority to rescind the grievor's reliability status. Given the information uncovered through the disciplinary investigation and subsequent events, a new determination had to be made as to whether the employee was still a reliable person to whom government assets could continue to be entrusted, including the very sensitive personal information provided by citizens. This determination was at the discretion of the DSO and the test to be met is the one found in those policies.*

[246] Furthermore, it was not demonstrated that Ms. Whittle's concerns over the risk that Mr. Nasrallah represented for a department such as the HRSDC were not genuine or were based on irrelevant concerns, and were thus possibly making her determination in bad faith. Ms. Whittle clearly testified that she was particularly concerned about Mr. Nasralla's reliability due to the nature of the information held by the HRSDC. This is in keeping with the findings regarding the sensitive nature of the HRSDC information and the HRSDC's obligations regarding this information in *Gill* where at paragraph 140, it was found:

> *[140] It is abundantly clear that both the HRDC and the RCMP are mandated to protect the confidential and personal*

> *information of Canadian citizens and to ensure the integrity of employees who have access to that information.*

[247] Counsel for the grievor also contended that nowhere in the April 2010 report or in the letter of June 28, 2010 is there a reference to the misappropriation of funds. Therefore, that denied him his procedural rights to know the allegations against him. After reviewing the documentation and hearing the evidence, I do not agree with that proposition. In my view, and contrary to the situation in *Gunderson*, Mr. Nasrallah ought to have known that misrepresenting funds was alleged against him, since that is virtually the only matter addressed in the April 2010 report. Interestingly, the misappropriation of funds is basically the only matter addressed by the grievor and his counsel in their May 5, 2010 comments to the DSO. I also note that Mr. Nasrallah was informed of the possibility of the revocation of his reliability status and its consequences early in the process in Ms. Gauthier's letter of August 3, 2009 and in Ms. Whittle's letter dated April 20, 2010. In the letter of April 20, 2010, it was clearly indicated that reliability status is the minimum security level required to hold employment in the public service.

[248] Counsel for Mr. Nasrallah argued that about 10 months passed after he was suspended without pay and before his employment was terminated. The long delay, it was contended, constituted a breach of his procedural rights. Although the employer has an obligation to act expeditiously when dealing with a situation in which an employee is placed on leave without pay pending an investigation, I do not believe that the delay was tantamount to a denial of procedural fairness. Ms. Whittle explained that, in addition to the usual verification, this case involved other players, i.e., CSLP officials, and consultations occurred back and forth with the SIU and officials to get everything right. Ms. Whittle testified that it took time and that she even had to get involved to speed things up. I find that, in the circumstances, such method of proceeding was appropriate.

[249] The following cases address the issue of procedural fairness in situations such as this case:

> [*Tipple v. Canada (Treasury Board):*]
> *Assuming* that *there was procedural unfairness in obtaining the statements taken from the applicant by his superiors … that unfairness was wholly cured by the hearing de novo before the Adjudicator at which the Applicant had full notice*

> *of the allegations against him and full opportunity to respond to them. . . .*
>
> [*Hillis, at paragraph 137:*]
> *[137] The grievor has now had this opportunity during a three-day hearing process before this Board, where she was fully aware of all allegations against her and had the opportunity to call any witness and state her case fully.*
>
> [*Braun, at paragraph 192:*]
> *[192] I will now discuss the allegation about the procedural fairness, because the grievor raised it at length during the hearing. I conclude that there was no breach of procedural fairness, but had there been such a breach, the jurisprudence has established that a hearing before an adjudicator serves to cure any unfairness in the process. . . .*

[250] I find that the decision to terminate Mr. Nasrallah's employment based on his longer meeting a term and condition of employment due to the revocation of his reliability status was not tainted by procedural unfairness or bad faith. In addition, I note that throughout the investigation and the procedures that followed, Mr. Nasrallah was represented by counsel or his bargaining agent. Furthermore, in the present case, Mr. Nasrallah had the full opportunity, as part of the hearing, to know the allegations made against him, to challenge them, to call witnesses and to state his case in full. Therefore, any alleged procedural flaws, which I have found not to exist in the present case, would have been fully remedied by the present hearing.

[251] Finally, counsel for Mr. Nasrallah argued that, alternatively, the decision to revoke Mr. Nasrallah's reliability status and based on such to terminate the grievor's employment was not reasonable. In support of her argument, counsel for the grievor pointed out that, on three occasions since his employment was terminated, the PWGSC granted Mr. Nasrallah reliability status. I am not convinced that that fact makes the HRSDC's decision unreasonable. First, I would only comment that *Kampman* at paragraph 12, and *Hillis,* at paragraphs 132 and 133, stated that the decision to revoke secret status or reliability status is within a deputy minister's or a delegated DSO's authority. When it comes to security, each department has specific needs, and each security assessment needs to consider the department's specific needs. In this case, it is not disputed that the HRSDC holds sensitive information about Canadians. Although the DSO indicated that that was one of her concerns, it could be different for another department that does not need to store the same information. The *PSS* also refers to each department's authority when it comes to security assessments.

[252] Second, on the issue of reasonableness, I note the following comments made by the adjudicator in *Braun* at paragraph 139, about an adjudicator's role in deciding whether a decision to revoke a reliability status was reasonable:

> *[139] It is important to note that my role is not to decide whether I agree with the decisions or whether they were reasonable. I do not sit in appeal or in judicial review of those decisions. I am dealing with an objection to my jurisdiction….*

[253] No evidence was adduced to convince me that the decision to terminate Mr. Nasrallah's employment on the basis that he no longer met a condition of employment due to the loss of his reliability status was unreasonable.

[254] In this case, I do not accept that another department's determination of Mr. Nasrallah's reliability status renders the ER's decision unreasonable. I note the comments made in *Kampman*:

…

> *… By contrast, a reliability assessment is the responsibility of the institution concerned and a so-called enhanced reliability status is essentially an attestation that, in the subjective opinion of the deputy head of the institution, a high degree of confidence or reliance may be placed on the individual involved. The revocation of that status in the case of an employee is a prerogative of the deputy head and merely reflects a change in that opinion, a loss of confidence in the employee's reliability.*

…

[255] Having concluded that the employer's decision to revoke the grievor's reliability status was administrative, that no breach of procedural fairness or bad faith was established and that reliability status is a condition of employment in the public service, I conclude that the employer had cause under subsection 12(3) of the *FAA* to terminate Mr. Nasrallah's employment on June 28, 2010.

[256] In light of the above, the issue of remedies, including aggravated damages, is moot.

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

(The Order appears on the next page)

V. Order

[258] The grievance is dismissed.

January 31, 2012.

Linda Gobeil,
adjudicator