Date: 20120501

File: 566-02-417

Citation: 2012 PSLRB 53

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

BALKAR SINGH BASRA

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Basra v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Paul Love, adjudicator

For the Grievor: G. James Baugh, counsel

For the Respondent: Richard E. Fader, counsel

Decided on the basis of written submissions
filed January 21, February 29 and March 16, 2011.

I. Issue before the adjudicator

[1] Balkar Singh Basra ("the grievor") was suspended indefinitely without pay from his position as a correctional officer (classified CX-01) at Matsqui Institution following the receipt of a letter dated March 24, 2006 ("the privacy coordinator's letter", Exhibit E-7) from a privacy coordinator and Crown counsel ("the privacy coordinator") alleging that a sexual assault occurred. In *Basra v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 70 ("the original decision"), I found that the decision to suspend the grievor indefinitely without pay pending an investigation became a disciplinary action because of the lengthy failure of the Correctional Service of Canada (CSC) to adequately conduct an investigation. I ordered:

. . .

> *[140] The grievance is upheld. Mr. Basra is ordered reinstated to his position as a CX-01 effective May 3, 2006, with back pay, full benefits and with interest. I reserve jurisdiction over the implementation of this decision for a period of 90 days.*

. . .

[2] The deputy head of the Correctional Service of Canada ("the deputy head") sought judicial review of the original decision. The Federal Court allowed the judicial review application in *Canada (Attorney General) v. Basra*, 2008 FC 606. The grievor appealed that decision. In *Basra v. Canada (Attorney General)*, 2010 FCA 24, the Federal Court of Appeal found that the following findings at paragraphs 120 and 129 of the original decision were in error:

> *[120] While the rules of evidence are relaxed in an adjudication hearing under the* Act*, in my view it would be an adjudicative error to use hearsay evidence to prove a fundamental material fact. . . . The weight that can be attached to hearsay evidence for establishing material disputed facts is minimal, and I place no weight on the hearsay evidence for establishing facts.*
>
> *[129] . . . There is no evidence that Mr. Basra deceived the police in their investigation. There is no duty on him to "take responsibility," if in fact he is innocent of the offence, and he is presumed innocent until proven guilty. . . .*

The Federal Court of Appeal was of the view that I had incorrectly decided to not consider the privacy coordinator's letter (Exhibit E-7) ". . . simply because it was

hearsay." The Federal Court of Appeal remitted the matter to me for a new determination, with the following directions:

. . .

> *[31] The appeal will therefore be dismissed but the order of the Federal Court Judge will be varied so as to provide that the matter be remitted to the original adjudicator, or another adjudicator if he is unavailable to act, so that it may be decided again in conformity with these reasons, based on the existing record or such other evidence as the adjudicator may decide to allow. . . .*

. . .

The Federal Court of Appeal described the adjudicative task as follows:

. . .

> *[29] As a result, the adjudicator's first task upon rehearing the matter is to determine if the employer has proven that there has been a breach of the Code of Discipline or Standards of Professional Conduct. If the employer satisfies that burden, the next question is whether the discipline measure imposed was excessive. If not, the measure stands. If the adjudicator finds that the measure is excessive, then the adjudicator must address the question of the appropriate measure. These are discrete questions, each of which merits careful consideration. . . .*

. . .

[3] On April 12, 2010, I proposed to the parties to base the new determination directed by the Federal Court of Appeal on written submissions. On April 26, 2010, the parties provided their views. The grievor agreed with the proposed approach. The deputy head requested a full oral rehearing on the merits of the grievance. On my directions, the Registry of the Public Service Labour Relations Board ("the Registry") issued a letter on May 13, 2010, scheduling the matter for written submissions. On May 17, 2010, the deputy head wrote to the Registry, indicating that proceeding by way of written submissions on the existing record would be a denial of procedural fairness, and it requested a case management conference. The deputy head wished to present further evidence and referred me to *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 S.C.R. 1095 ("*Québec Cartier*").

[4] After convening a case management conference on June 29, 2010, and after hearing submissions from the deputy head and the grievor, I denied the deputy head's request to present post-hearing evidence and I directed that the matter proceed by way of written submissions. I issued reasons for decision following the prehearing hearing conference in *Basra v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 131, and stated the following at paragraph 11:

> *[11] The purpose of this new determination is to correct errors that the Federal Court and the Federal Court of Appeal found in the decision-making process that led to 2007 PSLRB 70. Both courts found that the hearsay evidence (in 2007 PSLRB 70, at paragraphs 120 and 129) was treated in error. The Federal Court of Appeal also found that the wrong test was applied in the original decision and that the case should not have been decided in accordance with the* Larson *factors (*Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9) but rather in accordance with the usual approach to disciplinary grievances, as set out in* Wm. Scott & Co Ltd. v. Canadian Food and Allied Workers Union, Local P-162, *[1977] 1 C.L.R.B.R. 1. Bearing in mind the purpose of this new determination, in my view there is an evidentiary foundation from the original hearing in this case to which I can apply the factors in* Wm. Scott & Co Ltd. *referred to in the Federal Court* [*sic*] *Appeal decision, with the assistance of submissions from the parties. Those factors are:*
>
> - *Has the deputy head proven that the Correctional Service of Canada* Code of Discipline *or* Standards of Professional Conduct *was breached?*
> - *If the deputy head has proven that the Correctional Service of Canada* Code of Discipline *or* Standards of Professional Conduct *was breached, was the disciplinary measure imposed excessive?*
> - *If the disciplinary measure imposed was excessive, what measure would be appropriate in the circumstances?*

[5] I note that, despite my ruling denying its request to present post-hearing evidence, the deputy head continues in its written submissions to refer to facts that arose from a hearing in a criminal case after I issued the original decision on this grievance. I do not have a certificate of conviction; nor do I have the reasons given in the criminal case. That evidence is not admissible before me under the analysis set out in *Québec Cartier*. The evidence in the case before me is set out in paragraphs 4 to 86 of the original decision. I note that the grievance before me is solely about the grievor's

indefinite disciplinary suspension without pay and that the record is based on the evidence adduced at the hearing held in this matter from October 25 to 27, 2007 ("the original hearing") and reported in the original decision, together with the further written submissions of the parties. The deputy head's counsel advised me that the CSC has terminated the grievor and that a grievance has been filed against that termination. I was not appointed to hear and decide that grievance. My jurisdiction relates solely to the grievance that the grievor filed after the CSC suspended him indefinitely without pay on learning that he was charged with a criminal offence.

II. Evidence

[6] It is essential that I set out some facts established at the original hearing and reported in the original decision.

[7] The grievor has been employed at Matsqui Institution since he became an indeterminate employee on August 24, 1999. Matsqui Institution is a medium-security penitentiary for male inmates in the CSC Pacific Region.

[8] At the original hearing, the deputy head called as its only witness Glen Brown, Warden of Matsqui Institution. Mr. Brown received the privacy coordinator's letter (Exhibit E-7). It related some circumstances and enclosed a copy of information sworn on March 17, 2006, alleging that the grievor sexually assaulted a female complainant on September 10, 2004, in Surrey, British Columbia, contrary to section 271 of the *Criminal Code*, R.S.C., 1985, c. C-46. The privacy coordinator's letter (Exhibit E-7) contained the following synopsis of the allegations:

. . .

> *According to the Police report, Mr. Basra first had contact with the complainant through a chat line. They eventually met for an evening of drinking and clubbing. On the second meeting the couple were at Mr. Basra's house having a few drinks before going out for dinner. After a few sips of the third drink which Mr. Basra made for her, the complainant began to fade, feeling unfocused and hazy. She awoke the next morning naked on Mr. Basra's bed. She was unable to remember most of the previous evening after the point of sipping the third drink.*
>
> *Reportedly, Mr. Basra gave the complainant a false name; however, the police were able to locate him from the complainant's cell phone records. When questioned by the*

> *police, Mr. Basra denied having had sex with the complaint* [*sic*] *or even knowing her and refused to give a DNA sample. A DNA warrant was obtained and Mr. Basra's DNA was found to match an exhibit taken from the complainant.*
>
> *A warrant has been issued for Mr. Basra's arrest. You may wish to contact the Surrey Provincial Court Registry . . . if further information is required concerning details as to the progress of this case.*
>
> *This information is provided to you pursuant to our policy; you may wish to share this information with Mr. Basra, to allow him to respond in the appropriate forum.*
>
> . . .

[9] The charge was for off-duty criminal conduct that allegedly occurred 18 months before the information was sworn. The complainant is not an employee at Matsqui Institution. There is no indication that the grievor has been involved in any problem within or outside the workplace since the alleged criminal conduct took place. The privacy coordinator's letter (Exhibit E-7) is the only written documentation that the CSC obtained during its investigation. The CSC did not obtain any information about the terms of the grievor's form of release or about any conditions of his judicial interim release.

[10] Mr. Brown was away from Matsqui Institution when the privacy coordinator's letter (Exhibit E-7) arrived. Randie Scott, Acting Warden, received it. At a meeting on April 3, 2006, Mr. Scott suspended the grievor indefinitely without pay by letter dated that day ("the suspension letter", Exhibit E-6). It is important to consider the text of the suspension letter (Exhibit E-6), as it makes it clear as follows that the CSC was convening a disciplinary investigation and that the grievor would be contacted by the investigating manager in due course:

> . . .
>
> *This is to advise that you are hereby suspended indefinitely without pay effective immediately, pending the completion of a disciplinary investigation, which has been convened to establish the facts surrounding your involvement in the allegation that you have contravened the Correctional Service of Canada's Standard of Professional Conduct.*
>
> *Information received from the Crown Counsel, Ministry of Attorney General this date advises you have been charged with*

> *sexual assault under Section 271 of the Criminal Code of Canada.*
>
> *During this period of suspension you are not to enter CSC premises without the permission of the Warden or his representative.*
>
> *You will be contacted by the investigating manager in due course.*

. . .

[11] In an April 3, 2006 email (Exhibit G-3) to Donna Mynott, a human resources officer at Matsqui Institution, Mr. Scott explained that he went over the gist of the suspension letter (Exhibit E-6) with the grievor at the meeting of that day. During the meeting, the grievor volunteered that the matter related to an allegation from 2004, that he had fully cooperated in the original matter, that he had not heard anything for the last year-and-a-half and that he thought that the matter was over. Mr. Scott advised him that a formal investigation into his actions would be launched. Mr. Scott advised the grievor to call him if he had any questions.

[12] On April 24, 2006, Mr. Scott directed Jason Strijack, Acting Associate Unit Director, PI/RTC, and Jim Farrell, Security Investigative Officer, Mountain Institution, to commence a disciplinary investigation into the grievor's involvement in the following two allegations (Exhibit E-8):

. . .

> 1. *That on March 17, 2006 Mr. Basra was charged with sexual assault under Section 271 of the Criminal Code. The sexual assault is alleged to have occurred on or about September 10, 2004 at or near Surrey, British Columbia.*
>
> 2. *That Mr. Basra failed to advise his supervisor, before resuming his or her duties, of being charged with a criminal offence.*

. . .

[13] A report of the investigation was due by May 31, 2006. By the time of the original hearing, neither investigator had yet prepared a written report in connection with the disciplinary investigation. Mr. Brown was absent from Matsqui Institution when the order was given to start the disciplinary investigation.

[14] The grievor was notified by letter dated April 24, 2006 (Exhibit E-9) of the appointment of the investigators and the allegations to be investigated under the "Code of Professional Conduct". The grievor was notified of the names of the investigators but was not provided with their contact information. The letter also stated that he would be contacted in due course to arrange an interview. He was also advised of his right to bring a representative to the interview.

[15] Neither Mr. Strijack nor Mr. Farrell interviewed the grievor about the allegations, sent a letter to him requesting his presence for an interview or notified him of a date for an interview. The best that can be said of the investigation was that Mr. Strijack and Mr. Farrell attended at the courthouse in Surrey from time to time to monitor the criminal proceedings against the grievor and that they made phone calls to the Royal Canadian Mounted Police.

[16] At paragraphs 111 to 115 of the original decision, I found as follows:

> *[111] I am not satisfied that the respondent has shown under the third* [deputy head's duty to investigate the criminal charge to the best of its abilities, in a genuine attempt to assess the risk of continued employment] *and fifth* [deputy head's continuing duty to objectively consider the possibility of reinstatement, within a reasonable period following the suspension, in light of new facts or circumstances] Larson *criteria that the CSC has done its best to ascertain the facts in order to make a risk assessment concerning Mr. Basra. While Mr. Scott appointed investigators in a timely way, I am concerned that the investigation did not yield sufficiently reliable information to make a risk assessment decision. The problem seems to be with the quality of the investigation undertaken by the CSC. It seems that in terms of investigating the disciplinary matter, the investigators did little more than attend court, request information from the RCMP, which never was received, and possibly ask Mr. Clements at court to tell Mr. Basra that the investigators wished to speak to him. I use the word "possibly" since the investigators were not called to give evidence as to what they did or did not do.*
>
> *[112] I am concerned that the investigators made no attempt to directly contact Mr. Basra to obtain his side of the story. I am not prepared to speculate as to what he may or may not have said had the CSC attempted to contact him. I put no weight on Exhibit E-14, which contains speculation by Ms. Mynott in an email to Ms. Chima that:*
>
> . . .

> Sometimes in case [sic] such as these lawyers advise their clients not to discussing [sic] disciplinary investigations until the court case has been completed.
>
> . . .
>
> *[113] The investigators had the power to set a meeting with Mr. Basra, advise him of the time and place of the meeting and notify him that he could bring a bargaining agent representative with him. This was never done, and no explanation was given as to why. The investigators were never called as witnesses to explain what they did. I draw an adverse inference against the respondent for failing to call the investigators to explain their investigation.*
>
> *[114] Mr. Basra did provide some information to Mr. Scott at the meeting where Mr. Basra was suspended. Mr. Basra also had Mr. Clements provide information as to when he became aware of the charge. Mr. Scott also informed Mr. Basra, both orally and in writing, that an investigation had commenced and that the investigators would talk to him. It appears that the investigators did not bother to contact Mr. Basra directly. They have not even reported on their findings.*
>
> *[115] This is not a case where Mr. Basra instructed the CSC not to deal with him directly but to deal with his lawyer. In my view, in the absence of this instruction, there is no duty on the CSC to deal only with the employee's lawyer.*

[17] In essence, in the original decision, I found that the decision to suspend the grievor indefinitely without pay became disciplinary as of May 3, 2006 because, 30 days after it began, the CSC still had not attempted to obtain information from the grievor about the facts alleged in the privacy coordinator's letter (Exhibit E-7) and that the sole basis for the indefinite suspension without pay was that letter.

III. Summary of the arguments

A. For the deputy head

[18] The discipline at issue was an interim disciplinary measure, imposed pending the outcome of a disciplinary investigation. The deputy head submits that the privacy coordinator's letter (Exhibit E-7) provided a sufficient basis for the interim indefinite disciplinary suspension without pay. The deputy head points out that elements of that letter are uncontradicted and do not appear controversial, relying on statements to

that effect from the Federal Court of Appeal at paragraph 21 of 2010 FCA 24, as follows:

> *[21] . . . The issue is whether it is reliable. In this respect, we note that there are elements of information contained in the letter from Crown counsel's office which are not contradicted and do not appear to be controversial. . . .*

[19] The deputy head wrote that the privacy coordinator's letter (Exhibit E-7) establishes the following:

> . . .
>
> 1. *It is evident from the sworn information that the Crown elected to proceed by indictment against the grievor for a violation of section 271 of the* Criminal Code *(sexual assault).*
>
> 2. *The letter cites a police report which indicates that: "After a few sips of the third drink which Mr. Basra made for her, the complainant began to fade, feeling unfocused and hazy. . . ." Clearly, this is the statement the victim gave to the police during their investigation when she made the allegation that she was sexually assaulted.*
>
> 3. *The grievor gave the police a false name when he was first questioned by them.*
>
> 4. *The grievor "...denied having had sex with the complainant or even knowing her and refused to give a DNA sample." Having lied to the police about his name the grievor took the position that never had sex with the victim and that he didn't even know her.*
>
> 5. *The letter goes on to indicate that: "A DNA warrant was obtained and Mr. Basra was found to match an exhibit taken from the complainant." It is respectfully submitted that the evidence flowing from the DNA warrant is sufficient for the interim disciplinary measure imposed in this case. The grievor is a Correctional Officer (a peace officer as defined in section 2 of the* Canadian Criminal Code [*sic*]*) yet he lied to the police about his name, has lied about knowing the victim and lied about having had sex with the victim. The grievor's DNA was taken from the victim. Clearly the grievor had sex with the victim and chose to lie to the police about it in the context of an investigation into an alleged sexual assault.*
>
> . . .

[20] The deputy head submits that it has proven that the *Code of Discipline in the Correctional Service of Canada* ("the *Code of Discipline*") and the *Standards of Professional Conduct in the Correctional Service of Canada* ("the *Standards of Professional Conduct*") were breached. The deputy head states that it has the right to have CSC employees' conduct assessed against those standards whether or not the conduct occurred off-duty: see *Tobin v. Canada (Attorney General)*, 2009 FCA 254, at para 47. The deputy head submits that, in the context of a sexual assault investigation, the grievor lied to the police about his name, about knowing the victim and about not having sex with her. Those facts, together with the DNA sample, constitute sufficient information. It is not a mere allegation. On a simple balance of probabilities standard (as detailed in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.)), it is clear that the grievor had sex with the victim, lied to the police about it and was charged with sexual assault. His conduct violated the *Standards of Professional Conduct* and the *Code of Discipline*. The deputy head submits that, although employers do not usually impose an interim disciplinary suspension without pay, one is warranted if police charge an employee with a criminal offence: see *McManus v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File Nos. 166-02-8048 and 8078 (19800310), at pages 21-22.

[21] The deputy head argues as follows:

. . .

> *. . . The facts of this case reveal a far more serious situation for the employer. This is an employee charged with a violent sexual assault who when first questioned by the police lied about his name, lied about knowing the victim and lied about not having had sex with the victim. This raises the seriousness far beyond what was required in the* McManus *decision.*

. . .

[22] The deputy head submits that the discipline imposed was not excessive, was reasonable given the evidence and should not be tinkered with by an adjudicator: see *Wilson v. Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File No. 166-02-25841 (19950301). The deputy head submitted as follows that the only evidence available to the CSC was provided by the police:

. . .

> *. . . As in all cases of sexual assault there may be competing versions of events and in some case* [*sic*]*, such as this one, DNA evidence. The important point is that none of this is available to the employer. Police agencies are not going to compromise their investigations or expose victims to internal disciplinary investigations during the course of their own investigations. As a result, the employer did the only thing it could do in the circumstances, wait for the resolution of the criminal matter and monitor court proceedings.*
>
> . . .

[23] The deputy head also stated as follows:

> . . .
>
> *. . . it remains the position of the employer that it is a denial of procedural fairness not to allow the employer to rely on the grievor's criminal convictions to "shed light" on the disciplinary suspension at issue. It is important to point out that the employer did not make a strategic decision not to rely on this information when the case was first presented. The convictions post-date the original hearing. The employer did not have the option of relying on convictions that did not exist at the time.*
>
> *As noted by the Supreme Court of Canada in* Toronto (City) *a criminal conviction is conclusive and the issues cannot be re-litigated at adjudication. The Supreme Court was also clear that post discharge evidence is relevant: ". . . if it helps shed light on the reasonableness and appropriateness of the dismissal under review at the time it was implemented." Subsequent to the suspension (and subsequent to the original hearing on this matter) the grievor was convicted of a violent sexual assault contrary to Section 271 of the* Criminal Code*, R.S.C. 1985, c. C-46:* R. v. Basra *(2008), 78 W.C.B. (2d) 194, decision released July 11, 2008. On November 7, 2008, the appellant was sentenced to two years less one day and was placed on probation for a period of three years following his release, with a number of statutory conditions:* R. v. Basra *2008 BCSC 1526.*
>
> *It is respectfully submitted that this evidence is relevant and should be considered in the disposition of the suspension grievance as this evidence "sheds light" on the decision at the time it was made. Furthermore, the fact that the grievor was convicted of violent sexual assault is dispositive of the matters at issue in this adjudication, i.e., clearly this behaviour warrants discipline and the disciplinary suspension imposed is justified on the facts of the case.*
>
> . . .

[*Sic* throughout]

[Footnotes omitted]

[24] The grievor did not contradict the facts. The adjudicator may accept less-than-satisfactory evidence given that the grievor could have testified and shed light on the matter: see Brown and Beatty, *Canadian Labour Arbitration*, Fourth Edition, at para 3:5120; and *Ayangma v. Treasury Board of Canada (Department of Health)*, 2006 PSLRB 64, at para 62. An adverse inference should be drawn against the grievor.

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

[25] The grievor argued that the Federal Court of Appeal held that I had correctly considered the CSC's intent when I determined that the CSC's indefinite suspension of him, without pay, became disciplinary as of May 3, 2006. The Federal Court of Appeal upheld that the grievor had been subject to a disciplinary suspension.

[26] The grievor argued that the Federal Court of Appeal stated that I was not bound to accept the hearsay evidence contained in the privacy coordinator's letter (Exhibit E-7) relied upon by the deputy head. It was admissible, but it was for me to determine the weight to attach to it.

[27] The grievor argued that, when it reheard the matter, the Federal Court of Appeal noted that the deputy head ". . . bears the onus of proving the underlying facts which are invoked to justify the imposition of discipline . . . [t]his applies to both the facts justifying the imposition of the discipline as well as the appropriateness of the discipline." As the deputy head did not satisfy the onus to justify the discipline or its appropriateness, it was not necessary for the grievor to give evidence: see *Labatt Alberta Brewery v. Local 250 Brewery Workers*, [2004] A.G.A.A. No. 63 (QL), at paras 63-64. In 2010 PSLRB 131, I issued directions for the hearing of this matter and held at paragraph 10 that ". . . the purpose of this new determination, ordered by the Federal Court of Appeal, is not to allow the deputy head to start again without considering that a hearing has already been held. . . ."

[28] The grievor argues that, by continuing to refer to his subsequent criminal conviction and his discharge, the deputy head is relying on evidence that is not part of the record and that it has deliberately flouted the directions for the hearing. Alternatively, the grievor argues that ". . . an arbitrator 'is required to determine

whether or not the Company had just and sufficient cause for dismissing the employee as at the time when the employee was actually dismissed' or disciplined. . . ." To allow the deputy head to rely on subsequent-event evidence ". . . would be to accept that the result of a grievance concerning the dismissal of an employee could vary depending on when it is filed and the time lag between the initial filing and the final hearing by the arbitrator." The grievor argues that the deputy head should not be allowed to take advantage of the delays arising from its own actions. A subsequent conviction does not shed any light on the appropriateness or justification for the indefinite disciplinary suspension without pay. The suspension must be assessed based on the circumstances known when it was imposed, which was April 2006: see *Ayangma*, and *Legault v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 82, at para 315.

[29] The grievor's termination because of his criminal conviction is the subject of a separate grievance, and I have no jurisdiction over that grievance: see *Ayangma*, at para 82. The grievor submits that my role is limited to reviewing the evidence on the record about the indefinite disciplinary suspension grievance.

[30] The grievor stated that the deputy head's repeated claim that the grievor gave a false name to the police is contradicted by the contents of the privacy coordinator's letter (Exhibit E-7) and that I rejected that claim. The grievor argues that I found at paragraphs 49 and 51 of the original decision that the grievor did not give a false name to the police.

[31] The grievor states that, even though the privacy coordinator's letter (Exhibit E-7) is admissible, it should be given no weight, as it contains double and triple hearsay on the main points that the deputy head relied on. The privacy coordinator's letter (Exhibit E-7) indicates as follows: "Reportedly, Mr. Basra gave the complainant a false name . . . ."

[32] The grievor notes that the deputy head relies on comments in the Federal Court of Appeal decision that the facts set out in the privacy coordinator's letter (Exhibit E-7) were uncontested. The grievor states as follows:

. . .

> *. . . All the Federal Court of Appeal said was that there are "elements of information" in the letter from Crown Counsel*

> *that are not contradicted and "do not appear controversial" (at paragraph 21). Such a general statement cannot be translated into the proposition that all of the facts set forth in the letter from Crown Counsel were not contested or must be accepted as true. The problem facing the employer is that the letter from Crown Counsel does not constitute clear, cogent or convincing evidence that would establish that the grievor lied to the police about his name, lied to the police about knowing the victim and lied to the police about not having had sex with her. The evidence shows that the grievor did not lie to the police about his name at all. Furthermore, the employer has failed to prove, on a balance of probabilities, through clear, cogent and convincing evidence, that the grievor lied to the police about knowing the victim and about not having had sex with her.*
>
> . . .

[33] The grievor further notes as follows:

> . . .
>
> *I pause to note that the employer has clearly abandoned the primary justification for the lengthy suspension without pay that it relied upon at the original hearing, namely the allegation that the grievor failed to advise his supervisor of being charged with a criminal offence (2007 PSLRB 70, at paragraph 16). As you stated in the original decision, "the respondent has no case against Mr. Basra on the point of whether he went to work without informing the CSC of the charge. The evidence establishes that the CSC learned of the charge before Mr. Basra did" (at paragraph 109).*
>
> . . .

[34] The grievor submits that the evidence must be sufficiently clear, convincing and cogent: see *F.H. v. McDougall*, 2008 SCC 53, at para 46. He submits that the grievance should be upheld with the same remedy that was originally determined, namely, that he be reinstated to his CX-01 position effective May 3, 2006, with back pay, full benefits and interest, until the date of his termination.

[35] Contrary to what the deputy head argued, the grievor submits that an adverse inference should not be drawn from his failure to testify at the original hearing. The onus is on the deputy head to prove the facts justifying the discipline and its appropriateness. I am required to make findings based on the evidence. The deputy head failed to satisfy the onus, and a failure to testify cannot fill a gap in the case of the party bearing the burden of proof: see *Labatt Alberta Brewery* and *Burns Meats, a*

division of Burns Foods (1985) Ltd. v. United Food and Commercial Workers Union, Local 832 (1993), 38 L.A.C. (4th) 172 ("*Burns Meats*"), at 183-184. The deputy head bears the onus, and the failure of the grievor to testify cannot be ". . . a basis for raising the 'blameworthiness' or 'seriousness' of the conduct beyond what the objective evidence discloses . . .": see *Burns Meats*, at page 184.

[36] The grievor submits in the alternative that, if he breached the *Code of Discipline* or the *Standards of Professional Conduct*, then the indefinite disciplinary suspension without pay was excessive. Such a drastic action can be justified only if he were unable to continue in his job. I dealt with that issue at paragraphs 37 and 128 to 130 of the original decision. The grievor wrote the following:

. . .

> *. . . As noted in* [the original] *decision, the grievor was not detained in custody after the charges were laid against him, he worked for an 18 month period after the alleged sexual assault and before the charge was laid with an unblemished work record, he did not have unrestricted access to confidential information, he was not a liaison officer with the RCMP, he did not have unsupervised access with visitors, and many of the posts he worked at involved little inmate interaction (at paragraphs 128 – 129). There were at least 3 positions available in which the grievor could have been posted with no contact with visitors, female staff or inmates (at paragraph 130). There was no evidence on the record that would suggest that female correctional officers would be unwilling to work with the grievor or feel that their safety would be jeopardized. In fact, one female co-worker, Ms. Enns, testified that she would not have any concerns working with the grievor (at paragraph 130).*

. . .

[37] In this case, the grievor was suspended indefinitely without pay on April 3, 2006, pending the completion of a disciplinary report, which had not been provided as of the dates of the original hearing, October 25 to 27, 2006. I drew an adverse inference from the deputy head's failure to call the investigators to testify about their investigation or to explain the delay. Mitigating factors are present, including the failure to complete an investigation within a reasonable time, the grievor's unblemished work record, which included a period of 18 months after the alleged misconduct, and his better–than–average attendance. The deputy head also abandoned one of its primary justifications for the indefinite suspension without pay on which it

relied at the original hearing — the allegation that the grievor attended work without advising his supervisor that he had been criminally charged (see paragraphs 16 and 109 of the original decision).

C. Deputy head's rebuttal

[38] The deputy head replies that it is not flouting any ruling by attempting to introduce evidence of a conviction. The deputy head states that parties are not permitted to seek judicial review of interlocutory rulings, that an adjudicator is not *functus officio* until a final decision is made and that it remains of the view that the information should have been considered.

[39] The deputy head states that the conviction sheds light on the suspension decision. Although the conviction occurred after the date of the indefinite suspension without pay, it is proof that the events before the conviction occurred. Therefore, it is not new evidence. The deputy head states that the grievor has been convicted of the offence and that it is not required to prove the offence: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63. The fact that a conviction will feature prominently in a hearing about the grievor's termination does not mean that it cannot be introduced in the hearing for the suspension grievance. The indefinite suspension without pay was an interim measure, and an indefinite suspension and a termination constitute one penalty: see *Côté v. Treasury Board (Employment and Immigration Canada)*, PSSRB File Nos. 166-02-9811 to 9813 and 10178 (19831017). The deputy head states that, if the grievor wished to attack the reliability of evidence obtained through a DNA warrant, he could have testified at the original hearing. Principles that the grievor cited, related to criminal law, are not easily transferrable to labour arbitration adjudication proceedings; proceedings before an adjudicator are summary in nature, and adjudicators are not bound by the same rules of evidence as are the criminal courts.

IV. Reasons

[40] The CSC originally suspended the grievor indefinitely without pay for two reasons: he was charged with sexual assault, and he failed to advise his supervisor before resuming his duties that he had been charged with a criminal offence.

[41] I determined in the original decision that the deputy head did not prove the grievor's failure to disclose the criminal charge before he returned to work.

[42] This case is about the sufficiency and quality of the information tendered by the deputy head at the original hearing to support an indefinite disciplinary suspension of the grievor without pay, after he was charged with sexual assault. In the original decision, I found that the indefinite suspension pending investigation became disciplinary as of May 3, 2006, 30 days after it was imposed. The original decision invalidated the disciplinary part of the indefinite suspension without pay. Given the CSC's approach, particularly that it did nothing to investigate, the indefinite disciplinary suspension without pay would have continued until the date on which a court resolved the grievor's criminal charge. The CSC's decision rested entirely on the privacy coordinator's letter (Exhibit E-7). The deputy head's only witness, Mr. Brown, was not personally involved with the initial decision to suspend the grievor indefinitely without pay or to order an investigation.

A. Post-hearing evidence

[43] Despite my ruling provided in 2010 PSLRB 131, the deputy head persists in submitting information about the grievor's conviction, which occurred more than two years after the date on which he was indefinitely suspended without pay. I see no basis to conclude that an event that occurred two years later — a conviction — justifies the indefinite disciplinary suspension without pay at the time it was imposed. The CSC clearly did not possess that information when it decided to suspend the grievor. My task is to review the CSC's decision in the context of when it was made, based on the information available at that time, and not on a set of facts as of today, six years after the date of the indefinite disciplinary suspension without pay: see *Québec Cartier*.

[44] The treatment of the admission of subsequent-event information is set out in *Québec Cartier*, at pages 1101-1102, as follows:

. . .

> *This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented. Accordingly, once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he*

> *cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator, fair and equitable. In these circumstances, an arbitrator would be exceeding his jurisdiction if he relied on subsequent-event evidence as grounds for annulling the dismissal. To hold otherwise would be to accept that the result of a grievance concerning the dismissal of an employee could vary depending on when it is filed and the time lag between the initial filing and the final hearing by the arbitrator. . . .*
>
> . . .

[45] It is possible that information about the grievor's conviction could be relevant to his termination grievance. However, I was not appointed to hear or decide his termination grievance. My jurisdiction is over the grievor's indefinite disciplinary suspension without pay only. This review is based on the information that the CSC had when it imposed the indefinite disciplinary suspension without pay and continued it. Because of directions for hearing in my ruling provided in 2010 PSLRB 131, I have not relied on the information provided by the deputy head about the grievor's conviction and sentencing, including the cited cases, which apparently relate to his conviction and sentencing hearing.

B. <u>Privacy coordinator's letter (Exhibit E-7)</u>

[46] This matter was referred back to me by the Federal Court of Appeal because it found an adjudicative error in the treatment of hearsay evidence in the original decision. The Court stated as follows at paragraphs 21 and 22 of 2010 FCA 24:

> *[21] In characterizing the use of hearsay evidence to establish a material fact as an adjudicative error, the adjudicator was articulating a principle which is at odds with paragraph 226(1)(*d*) of the PSLRA which provides that an adjudicator may accept any evidence, whether admissible in a court of law or not. The adjudicator is not bound to accept hearsay evidence but he cannot reject it out of hand simply because it is hearsay. The issue is whether it is reliable. In this respect, we note that there are elements of information contained in the letter from Crown counsel's office which are not contradicted and do not appear to be controversial. It was unreasonable, and an error of law, for the adjudicator to conclude that the evidence was not to be considered simply because it was hearsay.*
>
> *[22] Later in the same paragraph, the adjudicator comments that the weight to be attached to hearsay evidence is minimal*

> *and that he attaches no weight to hearsay evidence. It is trite law that it is for the adjudicator to weigh the evidence before him, but it is equally trite that in order to do so, he must consider it. He can not* [*sic*] *dismiss it out of hand because it is hearsay evidence. In this case, one of the issues raised was whether the appellant had deceived the police. The adjudicator held that there was no evidence on point, thereby ignoring the contents of the letter from Crown counsel's office, which was material to that issue.*

[47] I believe that the Court's direction is to weigh the evidence and to come to a reasoned determination as to the effect of the evidence tendered, keeping in mind the three questions that must be determined when assessing whether the deputy head proved just cause for the indefinite disciplinary suspension without pay, as specified in *Wm. Scott & Co Ltd. v. Canadian Food and Allied Workers Union, Local P-162,* [1977] 1 Can. L.R.B.R. 1 ("*William Scott*"). I pause to note that the *William Scott* questions are disjunctive. If the deputy head fails to establish an event meriting discipline, then there is no need to consider the remaining two questions.

[48] The first *William Scott* criterion is primarily a factual inquiry ". . . about whether the employee actually engaged in the conduct which triggered the discharge . . .": see *William Scott.* The Federal Court of Appeal referred to certain of the evidence as "not . . . controversial." At the original hearing, the grievor did not admit to any facts; nor was I made aware of any pre-hearing admissions made to the CSC during its investigatory process or during the grievance process. This means that all the evidence was disputed and that the deputy head had the burden of proving by sufficiently clear, convincing and cogent evidence all the elements of its case on a balance of probabilities: see *F.H v. McDougall.*

[49] Generally, evidence is reliable when it is espoused by a witness who observed facts and whose ability to observe and recall can be tested through cross-examination. When determining whether evidence is credible and reliable, adjudicators often apply the test in *Faryna* when assessing disputed testimony. Adjudicators examine whether the information provided by a witness makes sense in the context of the circumstances. I cannot apply that approach because no testimony was given concerning the facts of the alleged misconduct. I note that I do not even have the words of several witnesses in statements from which I could possibly make some use of the *Faryna* test, as the information in the privacy coordinator's letter (Exhibit E-7) was edited.

[50] Hearsay evidence is admissible at adjudication pursuant to paragraph 226(1)(*d*) of the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, which reads as follows:

> ***226.*** *(1) An adjudicator may, in relation to any matter referred to adjudication,*
>
> *. . .*
>
> *(*d*) accept any evidence, whether admissible in a court of law or not . . .*
>
> *. . .*

[51] At the original hearing, the privacy coordinator's letter (Exhibit E-7) was received, was marked as an exhibit (Exhibit E-7) and was part of the evidence before me. The grievor did not object to the deputy head tendering it. I was not asked to rule on its admissibility. No limits were placed on the use of the evidence. Had I been asked for a ruling, I would have determined that the document was admissible. I note that the privacy coordinator's letter (Exhibit E-7) would have been admissible in court, either as a business record under the *Canada Evidence Act*, R.S.C., 1985, c. C-5, or as part of the *res gestae*, meaning matters leading up to and forming part of the narrative that led to the indefinite disciplinary suspension without pay.

[52] The evidence is not barred from consideration simply because it contains hearsay. It is a question of what the privacy coordinator's letter (Exhibit E-7) shows and what fair and proper inferences can be drawn from it, given that the deputy head has a burden to establish by sufficiently clear, convincing and cogent evidence just cause for an indefinite disciplinary suspension without pay, on a balance of probabilities. An approach to hearsay evidence, which I believe is the proper course, is set out as follows in *Canadian Labour Arbitration,* at para 3:4310:

> *. . .*
>
> *More recently, the analysis in relation to both admissibility and weight has been carried out by application of the criteria of "necessity" and "reliability", as developed by the Supreme Court of Canada in criminal cases. Hearsay evidence may also be admitted pursuant to the* res gestae *doctrine and other exceptions. . . .*
>
> *Although admissible, in light of the general acceptance by arbitrators of the purposes of the hearsay rule, typically they*

> *refuse to base a finding of critical facts on hearsay evidence, particularly when those facts could have been established either by calling an employee or by an admission by the grievor. Indeed, even when hearsay evidence is admitted, arbitrators have generally been reluctant to give hearsay evidence much weight, given the inherent unfairness of not being able to test it by cross-examination and the tendency of arbitrators to act in accordance with the "best evidence rule".*
>
> . . .
>
> [Footnotes omitted]

[53] The principled approach to admitting hearsay evidence is based on the criminal law cases of *R. v. Khan*, [1990] 2 S.C.R. 531, and *R. v. Smith*, [1992] 2 S.C.R. 915. In *Khan*, the Supreme Court of Canada wrote as follows at page 548:

> . . .
>
> *I conclude that hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence. . . .*
>
> *I conclude that the mother's statement in the case at bar should have been received. It was necessary, the child's* viva voce *evidence having been rejected. It was also reliable; the child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability.*
>
> . . .

[54] In *Smith*, the Supreme Court of Canada held as follows at pages 933-934:

> . . .
>
> *This Court's decision in* Khan, *therefore, signaled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity. A few words about these criteria are in order.*
>
> *The criterion of "reliability"—or, in Wigmore's terminology, the circumstantial guarantee of trustworthiness—is a function of the circumstances under which the statement in*

question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established. The evidence of the infant complainant in Khan *was found to be reliable on this basis.*

The companion criterion of "necessity" refers to the necessity of the hearsay evidence to prove a fact in issue. Thus, in Khan, *the infant complainant was found by the trial judge not to be competent to testify herself. In this sense, hearsay evidence of her statements was necessary, in that what she said to her mother could not be adduced through her. It was her inability to testify that governed the situation.*

The criterion of necessity, however, does not have the sense of "necessary to the prosecution's case". If this were the case, uncorroborated hearsay evidence which satisfied the criterion of reliability would be admissible if uncorroborated, but might no longer be "necessary" to the prosecution's case if corroborated by other independent evidence. Such an interpretation of the criterion of "necessity" would thus produce the illogical result that uncorroborated hearsay evidence would be admissible, but could become inadmissible if corroborated. This is not what was intended by this Court's decision in Khan.

As indicated above, the criterion of necessity must be given a flexible definition, capable of encompassing diverse situations. What these situations will have in common is that the relevant direct evidence is not, for a variety of reasons, available. Necessity of this nature may arise in a number of situations. Wigmore, while not attempting an exhaustive enumeration, suggested at § 1421 the following categories:

> *(1) The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing [by cross-examination]. This is the commoner and more palpable reason . . . .*
>
> *(2) The assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources . . . . The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.*

Clearly the categories of necessity are not closed. In Khan, *for instance, this Court recognized the necessity of receiving*

> *hearsay evidence of a child's statements when the child was not herself a competent witness. We also suggested that such hearsay evidence might become necessary when the emotional trauma that would result to the child if forced to give* viva voce *testimony would be great. Whether a necessity of this kind arises, however, is a question of law for determination by the trial judge.*
>
> . . .

[55] When determining whether the deputy head has proven by sufficiently clear, convincing and cogent evidence, on a balance of probabilities, misconduct supporting an indefinite disciplinary suspension without pay, I must decide the weight to attach to the privacy coordinator's letter (Exhibit E-7). It is important to scrutinize it with care, as there is no other evidence of misconduct by the grievor. He was a good employee, with some seniority and a good attendance record. He received commendations from the CSC. He appears to have treated female co-workers with respect. There was evidence that a female co-worker did not feel at risk working with him, even though she knew of the criminal charge against him. It was an "older allegation" that was about a misconduct that occurred outside the workplace. The grievor had received a judicial interim release pending the determination of his criminal charge. The deputy head did not interview the grievor or the complainant. Nor did it gather any evidence or information. The deputy head could have taken many steps to ascertain the allegation's reliability or trustworthiness, but nothing was done. A proper investigation was not conducted. Nor were the investigators called as witnesses to explain their investigation.

[56] When weighing the privacy coordinator's letter (Exhibit E-7), I considered a number of points, as follows, that bear on the reliability of the allegations that it contains:

- Who wrote it?
- What was that person's duty?
- Are there any guarantees that that person accurately summarized the allegations against the grievor?
- Are the details sufficiently set out?

- Did the CSC provide the grievor an opportunity to challenge or respond to the privacy coordinator's letter's (Exhibit E-7) contents before the indefinite disciplinary suspension without pay was imposed?

I note that I considered these issues in a vacuum as the deputy head failed to call the privacy coordinator at the original hearing and simply introduced his letter (Exhibit E-7) by calling its recipient to testify, who obviously could have shed no light on the reliability of its allegations.

1. Office and duty of the privacy coordinator

[57] I note that the privacy coordinator is a provincial government official who is a Crown counsel and a privacy coordinator. It appears that his letter (Exhibit E-7) was written in the ordinary course of business, pursuant to a protocol to inform Crown employers of charges faced by an employee. Presumably, a privacy coordinator has to balance a duty to be accurate with a duty to preserve the complainant's privacy. Presumably, the privacy coordinator's letter (Exhibit E-7) was carefully crafted with a view to protect that privacy, as it was heavily edited. I use "presumably" because I have no information before me to assist me on these points. I would have liked to hear from the privacy coordinator at the original hearing as his letter (Exhibit E-7) was the sole source of proof of misconduct.

2. Guarantees that the privacy coordinator accurately summarized the allegations against the grievor

[58] I take adjudicative notice that, in British Columbia, the decision to lay a criminal charge rests with the Crown and not with a complainant or the police. A Crown counsel makes a decision based on the reviewed evidence, presumably taking into account a standard of reviewing evidence.

[59] There is no evidence before me that the privacy coordinator was the Crown counsel who made the charging decision. There is no evidence before me of the standard used by the Crown in assessing the information collected by the police to determine whether a charge should be laid. There is no evidence before me that the privacy coordinator reviewed the substance of the evidence collected by the police to determine whether the evidence collected met the Crown's standards for laying a criminal charge.

[60] There is no evidence before me that the privacy coordinator reviewed any of the evidence or source documents other than a "police report," which is not actual evidence but a summary. Without evidence, I am not prepared to infer that the police summary was actually prepared by an officer who dealt directly with either the complainant or the grievor. It could have been prepared by a liaison officer with no connection to the investigation. Given that there is no evidence of a personal review of the evidence or of the charging process by the privacy coordinator, then there is no circumstantial guarantee as to the reliability of his letter's (Exhibit E-7) contents. It contains mere allegations of misconduct on the part of the grievor in his dealings with the complainant or the police.

[61] One could say that the privacy coordinator's letter (Exhibit E-7) is a business record. Although business records are admissible in proceedings, there is no legal presumption that the contents of a document are accurate and truthful. Adjudicators are often required to make decisions about documents that purport to prove something other than what they are. On examining the privacy coordinator's letter (Exhibit E-7), I can discern that a government official is communicating facts to the CSC that an indictable offence was laid against the grievor. Some heavily edited information is given about the investigation and the underlying facts. Further information about the standards used in assessing the information would have helped me assess whether a substantial guarantee was made as to the trustworthiness of the allegations.

[62] I thought that, at the original hearing, where it was clear that the indefinite suspension without pay was being grieved as a disciplinary penalty, the deputy head would call the privacy coordinator as a witness to explain and elaborate on the contents of his letter (Exhibit E-7). The deputy head might have wanted to call the Crown prosecutor who approved the charge, or some evidence of the standard used. The deputy head might have called a police officer knowledgeable about the investigation. This is particularly important, because the CSC relied on the privacy coordinator's letter (Exhibit E-7) as its sole proof of misconduct and because the grievor had some seniority and a good record. His rights were substantially impacted by the CSC's decision to impose an indefinite disciplinary suspension without pay.

3. <u>Sufficiency of details set out in the privacy coordinator's letter</u>

[63] On examination, it becomes apparent that the privacy coordinator's letter (Exhibit E-7) contains different types of information. It has been heavily edited, and it

apparently discloses information that can be characterized as second–, third– or fourth–hand hearsay.

a. Information about the Crown's dealings with the grievor

[64] There is information in the privacy coordinator's letter (Exhibit E-7) that purports to set out dealings between the Crown and the grievor. The grievor was charged with the indictable offence of sexual assault, which is confirmed by the information attached to the privacy coordinator's letter (Exhibit E-7) and by a letter that the grievor's counsel provided to the CSC (Exhibit E-10). That is beyond dispute and is within the privacy coordinator's knowledge.

[65] However, I note that the privacy coordinator's letter (Exhibit E-7) does not contain the full details of the interaction between the Crown and the grievor. The grievor had apparently hired a lawyer to monitor whether charges were to be laid, and the lawyer repeatedly asked to be informed in advance so that the grievor could appear to face the charges. The grievor was not actually advised of the charge by the Crown, but the CSC was informed directly by the privacy coordinator's letter (Exhibit E-7). The grievor did not become aware of the charge until the CSC suspended him indefinitely without pay (Exhibit E-10).

[66] It is clear from Exhibit E-10 that the grievor gave a statement to the police in 2004, that he was released on a promise to appear, that no information had been laid as of the appearance date, that the grievor's lawyer monitored the situation monthly to determine whether charges were contemplated, and that he was advised in early March 2006 that no report had been received and no charge laid. I note that the privacy coordinator's letter (Exhibit E-7) is uncontradicted proof that the grievor was charged with an offence, but it is an edited version of events that occurred between the grievor and the Crown.

b. Information about the dealings between the grievor and the complainant

[67] The privacy coordinator's letter (Exhibit E-7) also contains information about the grievor's dealings with the complainant. The only source referred to in the privacy coordinator's letter (Exhibit E-7) for that information is the police report. The information consists of the following:

- chat–line contact between the complainant and the grievor;

- a date between the complainant and the grievor;
- a further meeting at the grievor's residence involving the grievor providing drinks to the complainant and her feeling "unfocused and hazy" and waking up naked on the grievor's bed;
- the complainant not knowing the grievor's name or having an incorrect name for him;
- the complainant having the grievor's telephone number;
- the grievor's DNA matching a sample obtained from the complainant; and
- a warrant having been issued for the grievor's arrest.

I note that those allegations, if proven, could constitute the criminal offence of sexual assault. Although it is not stated expressly in the privacy coordinator's letter (Exhibit E-7), an issue at a criminal trial might be the complainant's capacity to consent and whether a substance intoxicated her.

[68] The information provided in the privacy coordinator's letter (Exhibit E-7) is heavily edited. Because of that, I could not see any hallmarks suggesting that its information is reliable. For example, I note that, in *Khan*, a hallmark of reliability was the detailed account given in the child's words that was not normally within a young child's knowledge. For example, nothing in the privacy coordinator's letter (Exhibit E-7) assists me with determining how soon the alleged offence was reported to the police. Had I had the complainant's statement, I might have been able to determine whether there were hallmarks suggesting that the information in the privacy coordinator's letter (Exhibit E-7) is reliable.

[69] I note that the deputy head's argument continues to gloss or spin the information the CSC received beyond reasonable inferences that can be drawn from the privacy coordinator's letter (Exhibit E-7). The deputy head argues as follows:

. . .

> *. . . The facts of this case reveal a far more serious situation for the employer. This is an employee charged with a violent sexual assault who when first questioned by the police lied about his name, lied about knowing the victim and lied about*

> *not having had sex with the victim. This raises the seriousness far beyond what was required in the* McManus *decision.*
>
> . . .
>
> [Emphasis added]

[70] With respect to that argument, I note that, although the grievor was charged with sexual assault, there is no indication in the privacy coordinator's letter (Exhibit E-7) that the charge was of violent sexual assault. The definition of sexual assault in the *Criminal Code* encompasses a variety of acts, from an unwanted kiss to groping or vaginal intercourse. I can infer that the allegations are serious because they raise the issue of consent to sexual acts possibly being vitiated because of the administration of a substance. As I pointed out in the original decision, I cannot infer that it was a violent sexual assault just because the Crown chose to proceed by indictment. A lengthy period passed between the date of the alleged offence and the date on which a charge was laid. I take adjudicative notice that there is a six-month limitation period for summary conviction offences, and the Crown may simply have chosen to proceed by indictment because of the expiration of the limitation period.

[71] The deputy head alleged that the grievor lied about his name to the police. That allegation has no support in the privacy coordinator's letter (Exhibit E-7).

[72] Sometimes evidence disclosed immediately after an alleged event is reliable. I do not have such information, as details of when the complainant disclosed information are not provided in the privacy coordinator's letter (Exhibit E-7). Sometimes, peculiar hallmarks exist that suggest an inherent reliability to an allegation. This is the case with young children alleging sexual offences who would not ordinarily be expected to be able to provide details. The heavily edited information in the privacy coordinator's letter (Exhibit E-7) precludes me from finding a detailed or peculiar description of events that would amount to a hallmark of reliability. Had I had the complainant's original statement, I might have been able to discern such hallmark.

[73] The deputy head points to the presence of DNA evidence. Sometimes testing provides a good indicator of probable guilt, such as a DNA analysis of seminal fluid collected from swabbing a complainant's vagina. The privacy coordinator's letter (Exhibit E-7) does not disclose what part if any of the complainant's body was swabbed during the testing process. Given the lack of detail in the privacy coordinator's letter

(Exhibit E-7), I cannot conclude that the DNA testing rises to the level of clarity, cogency and convincingness of proving that sexual activity occurred.

[74] I cannot rely on a privacy coordinator's summary of a report to Crown counsel that summarized information provided by the police alleging that the grievor reacted in a certain way and that he made certain statements during a police investigation. It could well be highly cogent evidence that would establish probable misconduct, if I had the details. There is too much guesswork to take it as reliable, as much might depend on the actual words used by the grievor and the police officer, the context in which the words were spoken, the police officer's conduct, and whether the interview was videotaped or recorded in the police officer's notes. All of that is unknown to me. Further, it appears that the information was edited on its journey from the police officer to the report to Crown counsel and then on to the privacy coordinator and to his letter. Therefore, it lacks clarity, cogency and convincingness.

[75] A good example of the reliability of layered information is that the deputy head maintains in its argument that the grievor misled the police officer as to his identity, which was surmised from the privacy coordinator's letter (Exhibit E-7), when that letter does not state that information. I note that it would have taken little or no effort for the deputy head to ascertain the identity of the police officer and to issue a summons to that officer to appear at the original hearing to testify on that point.

[76] On the point of the false name, it is clear that the grievor did not give one to the police but that he might have to the complainant. It is unclear from the privacy coordinator's letter (Exhibit E-7) when the grievor allegedly gave a false name, as it does not contain that information. In my view, there may well be a difference between a person using a "handle" or a "user name" in a chat-line context and providing a false name in a face-to-face meeting or on a date. The complainant had a telephone number for the grievor and therefore the means to identify him easily. That point remains unclear to me, particularly since the privacy coordinator couched his letter (Exhibit E-7) in less-than-clear terms by stating the following: "Reportedly, Mr. Basra gave the complainant a false name . . . ." No details are given; nor are the circumstances. It is clearly a less probative statement than: "Mr. Basra gave the complainant a false name." The deputy head relies strongly on this point, but the privacy coordinator's letter (Exhibit E-7) is unclear. The deputy head could have dealt with that issue by calling the privacy coordinator or the investigating officer to give evidence at the original hearing.

The burden of proof rests with the deputy head, which is bound to prove all the facts supporting the indefinite disciplinary suspension without pay. The CSC could easily have obtained or sought to obtain the grievor's version of the facts. It did not.

[77] In the privacy coordinator's letter, there is a synopsis of dealings between the grievor and the police during an investigation. Some of this information might have been collected by a police officer or others during an investigative process. This information consists of the following:

- the grievor's denial that he knew the complainant;
- the grievor's denial that he had sex with the complainant;
- the grievor's refusal to provide a DNA sample;
- the obtaining of a DNA warrant;
- the taking of DNA samples; and
- the analysis and interpretation of the DNA samples.

Again, there must be a source of information for those points, including a statement from the grievor or, alternatively, police officers' notes, a report to Crown counsel, a DNA warrant and the information relied upon to obtain the warrant, information concerning the samples and what body part if any the sampling was taken from, and a report analyzing the samples. For example, I note that the deputy head submitted that ". . . the DNA warrant establishes that [the grievor] did have sex with the victim." The privacy coordinator's letter (Exhibit E-7) states only that a sample from the grievor matched a sample taken from the complainant. It states nothing about what part if any of her body was sampled.

[78] Particularly germane in the synopsis description would have been the precise words or gestures that the grievor allegedly used about denying knowing the complainant, denying that sex occurred and refusing to provide a DNA sample. I note that the CSC relied on those key points for indefinitely suspending the grievor without pay and that the information was heavily edited by someone with apparently no firsthand knowledge of the case. The information may well be third-hand information – originating with an investigator and then passing to an officer who prepared the report to Crown counsel, and finally to the privacy coordinator who reviewed it and to his letter.

[79] The evidence is mixed on whether the grievor misled the police. I do not have the actual information provided to the police. Information in a letter from the grievor's counsel dated April 27, 2006 (Exhibit E-10), indicates that the grievor gave a statement to the police on November 18, 2004.

[80] I accept that there is no controversy that the grievor was charged with an offence. However, the deputy head used second-, third- and fourth-hand material in the privacy coordinator's letter (Exhibit E-7) to attempt to establish the material fact that the grievor probably committed sexual assault. I note that sexual assault is a serious matter and that, generally, in a civil sexual assault case, the assault must be established by clear, cogent and convincing evidence: see *F.H. v. McDougall*.

4. Grievor's opportunity to challenge or respond to the privacy coordinator's letter's contents before the indefinite disciplinary suspension without pay was imposed

[81] Generally, before a decision maker makes findings, he or she hears from both sides. The CSC appears to have recognized the seriousness of the situation by appointing an investigation panel, which did little or nothing for months. The CSC did not seek out the grievor's side of the story; it simply suspended him indefinitely without pay. In my view, its intent was to suspend him indefinitely without pay until the matter was dealt with in criminal court. My view is that the investigators did not intend to interview the grievor before the matter was dealt with in criminal court.

[82] To the extent that the privacy coordinator's letter (Exhibit E-7) is uncontradicted, this is the direct result of the CSC failure to investigate and obtain the grievor's side of the story. Further, at the original hearing, the deputy head introduced the privacy coordinator's letter (Exhibit E-7) by calling its recipient to testify. The deputy head did not call the privacy coordinator. The deputy head deprived the grievor of the opportunity to challenge the underlying facts that alleged his misconduct by cross-examining a witness.

[83] I found that method particularly unfair when combined with the deputy head's opening statement that the grievor had been given an opportunity to respond to the allegations when, in fact, no disciplinary meeting was ever held and the investigators did not ask him for his side of the story.

[84] The grievor did not adduce any evidence to contradict the contents of the privacy coordinator's letter (Exhibit E-7). In our adversarial system, a grievor is not required to testify. However, I note that the burden of proof in disciplinary matters rests with the deputy head to establish by clear, cogent and convincing evidence its case on a balance of probabilities. The question is whether the evidence tendered by the deputy head is sufficiently reliable to discipline the grievor by suspending him indefinitely without pay. My concern remains with the quality of evidence used by the CSC to suspend him.

[85] Apparently beyond controversy or dispute is that the grievor was charged with a sexual offence, which was proceeding to trial. Any sexual assault is serious. My concern is that the CSC did nothing to attempt to ascertain the facts, other than having Mr. Scott read the privacy coordinator's letter (Exhibit E-7) and appoint investigators who did little or nothing to ascertain the facts. From time to time, the indefinite disciplinary suspension without pay was renewed based on no new information coming to the CSC's attention. It seems that the CSC simply accepted the contents of the privacy coordinator's letter (Exhibit E-7) as proven facts.

[86] Further, the CSC leapt to certain conclusions, which were not supported by the evidence. For example, it concluded that the grievor had a duty to disclose to the CSC that he was being investigated by the police, that he was dishonest by withholding that information and that he failed to disclose that he had been charged with a criminal offence. I dealt with those points in the original decision, which led me to conclude (and I remain of the view) that the CSC should not have suspended the grievor indefinitely without pay just because, according to Mr. Scott, he ". . . failed to advise his supervisor, before resuming his or her duties, of being charged with a criminal offence . . .", as no facts justify that assertion.

[87] I reject the deputy head's argument that little could be done in the investigation except to await the disposition of the criminal charge. I commented on the inadequate investigation in the original decision as follows:

. . .

> *[28] There was no proof tendered in this proceeding that the CSC obtained an answer from the RCMP. From what was tendered before me, it is clear that the CSC never had in its possession a police report or any of the Crown disclosure package provided in connection with the criminal charge.*

> *There is no clear explanation of the CSC's failure to collect further information. If the investigators had been called as witnesses, perhaps there would have been clearer information at the hearing as to the steps that they took to ascertain the facts.*
>
> . . .

[88] I am mystified by the CSC's failure to interview the grievor. I note that the importance of doing so was highlighted in the privacy coordinator's letter (Exhibit E-7), which set out that ". . . you may wish to share this information with Mr. Basra, to allow him to respond in the appropriate forum." The grievor was given notice at the outset of his indefinite suspension without pay that he would be called to a disciplinary meeting. In a letter dated April 24, 2006 (Exhibit E-9), he was advised that a disciplinary investigation had been commenced. He was notified as to who was conducting it. He was told the following: ". . . [y]ou will be contacted in due course to arrange an interview . . . [y]ou have the right to bring a representative to the interview." By the time of the original hearing, the grievor had not been contacted for an interview, the investigators had not reported and Mr. Brown had not extended the time for their report. At the original hearing, Sherry Enns, a bargaining agent steward, described the process that the CSC used to call disciplinary meetings, which is set out as follows at paragraph 83 of the original decision:

> *[83] Ms. Enns, a CX-02, testified on behalf of Mr. Basra. As well as working at Matsqui Institution she is Local President of the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN, Mr. Basra's bargaining agent. She testified that in her experience when the CSC wishes to talk to an employee about a disciplinary matter, it sends the employee a letter and also sends a copy to the bargaining agent. The CSC usually gives 48 hours' notice, and sets a time, date and place for a meeting. Other than grievance meetings, Ms. Enns is not aware of any investigation or disciplinary meetings called by the CSC concerning Mr. Basra in which the bargaining agent was asked to participate; she is only aware of grievance meetings.*

The deputy head's witness, Mr. Brown, also testified that he did not extend the time frame for the investigation. I found as follows at paragraph 65: ". . . Mr. Brown indicated that the usual process during an investigation is to request that the employee attend an interview and that a time, date and place are set for it. . . ."

[89] The CSC should have provided the grievor with the privacy coordinator's letter (Exhibit E-7), called the grievor to a meeting and asked him if he had any information to assist it in its decision on his work status. The CSC could have requested that the grievor supply it with all documents relating to the criminal charge. That could have included a copy of the statement that the grievor apparently gave to the police during the investigation or a copy of written information that the Crown must have disclosed to the grievor during the course of the criminal case. The CSC could have asked the grievor to answer its questions. The CSC could have obtained information from such a meeting and found it helpful to assessing the risk of maintaining the grievor in the workplace. Had the grievor failed to cooperate, the CSC could have considered that when determining whether it was necessary to suspend him indefinitely without pay.

[90] In my view, an employer should be concerned, when an employee is charged with a criminal offence, about whether the employee can remain in the workplace pending the resolution of the charge, whether the employee should be suspended with or without pay, and for how long, and whether the employee's duties need changing to address any risks. At the time of the charge, until the moment of conviction, an employee is presumed innocent in the criminal law context. An accused person is not obliged to assist the police with an investigation.

[91] Criminal charges can have employment law consequences. Although an employee has the right to be silent in a criminal proceeding, unless there is an express duty to speak, it is not an absolute and unqualified right in the employment law context. An employer must have just cause to discipline an employee. Generally, it means that an employer has an obligation to investigate if it wishes to discipline an employee. An employee is obligated to answer his or her employer's questions, particularly if the alleged misconduct could impact his or her employer's legitimate business interests: see *British Columbia Ferry Services Inc. v. British Columbia Ferry and Marine Workers' Union* (2007), 159 L.A.C. (4th) 165. At the original hearing, the deputy head's view was that the grievor's conduct impacted the CSC operations. Mr. Brown gave extensive evidence on that point.

[92] I am left to decide whether the CSC had grounds to discipline an employee based on a letter written by a privacy coordinator alleging the commission of a criminal offence and reporting that a charge had been laid. In effect, I am being asked to accept that the privacy coordinator's letter (Exhibit E-7) is sufficiently clear, cogent

and convincing to establish on a balance of probabilities that the grievor committed a sexual assault in the circumstances alleged, therefore violating the *Code of Discipline* or the *Standards of Professional Conduct*, without the CSC even bothering to interview the grievor to determine whether there was any substance to the allegation.

[93] I am extremely uncomfortable with the proposition suggested by the deputy head that an employer may simply receive a letter from another government official outlining that a charge has been laid and suspend an employee indefinitely without pay, without any further investigation and in particular without interviewing the employee. The CSC recognized the need for a disciplinary investigation by immediately appointing investigators, who failed to conduct a disciplinary investigation. In this case, the CSC's approach of suspending the grievor indefinitely without pay and of failing to investigate was abusive of the concept of just cause, which underlies disciplining employees.

[94] I find that the deputy head did not establish on a balance of probabilities, with sufficiently clear, cogent and convincing evidence available to the CSC at the time it imposed the indefinite disciplinary suspension without pay, that the grievor committed the alleged sexual assault. Given that failure, the deputy head did not establish a breach of the *Code of Discipline* or the *Standards of Professional Conduct*: the deputy head did not meet the first part of the *William Scott* test.

[95] At minimum in a case such as this, I would expect the CSC to attempt to clarify the contents of a privacy coordinator's letter (Exhibit E-7) and to obtain more details. I would expect the deputy head to call the privacy coordinator as a witness at an adjudication hearing. I would think it prudent for the deputy head to call also the investigating officers to testify. Further, at minimum, I would expect the CSC to attempt to interview the grievor within a reasonable time.

[96] Because of my finding, it is not necessary to consider the remaining parts of the *William Scott* test. Had the deputy head established on a balance of probabilities, by clear, cogent and convincing evidence available to the CSC at the time it imposed the indefinite disciplinary suspension without pay, that the grievor breached the *Code of Discipline* or the *Standards of Professional Conduct,* it would have been necessary to determine whether the indefinite disciplinary suspension without pay imposed was inordinate and, if so, a sanction that should be substituted. The grievor shall be

reinstated to his position as of May 3, 2006, which is the date on which the indefinite suspension without pay became disciplinary.

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

(The Order appears on the next page)

V. Order

[98] The grievance is upheld. The grievor is ordered reinstated to his position as a CX-01 effective to May 3, 2006, with back pay, full benefits and with interest. I reserve jurisdiction over the implementation of this decision for a period of 90 days, to the extent specified above.

May 1, 2012.

Paul Love,
adjudicator