Date: 20130905

File: 566-02-7021

Citation: 2013 PSLRB 101

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

GISÈLE GATIEN

Grievor

and

DEPUTY HEAD
(Department of Human Resources and Skills Development)

Respondent

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Joseph W. Potter, adjudicator

For the Grievor: Paul Champ, counsel

For the Respondent: Martin Desmeules, counsel

Heard at Ottawa, Ontario,
July 9 to 12, 2013.

I. Individual grievance referred to adjudication

[1] On July 8, 2011, Gisèle Gatien ("the grievor") barricaded some offices in her work unit using cardboard boxes and tape. The reason for her actions will be explained in this decision, but for her actions, she received a 10-day suspension in November 2011, which she grieved on December 9, 2011 (Exhibit E-1, T-25).

[2] The grievor's grievance reads as follows:

> . . .
>
> *10-day disciplinary suspension without pay levied by Danica Shimbashi, Director General, Regional Operations and Compliance Directorate, and Brenda Marcoux, Director, Centre of Expertise in Labour Relations, in an undated letter received on November 17, 2011.*
>
> *Disciplinary action was levied in bad faith and without proper regard to context, senior management's role in incident, and grievor's lack of disciplinary record. Senior managers knew or ought to have known that the disciplinary action would cause mental suffering and unfair loss of professional standing to the grievor.*
>
> *Failed to exercise progressive discipline and penalty too severe under any circumstances.*
>
> *Grievor was suffering from disability at the time due to workplace violence.*
>
> . . .
>
> [*Sic* throughout]

[3] The requested corrective action reads as follows:

> . . .
>
> *Discipline be rescinded; 10 day loss of earnings be reinstated and grievor made whole; documents removed from personnel file; and general damages for mental suffering and loss of professional standing*
>
> . . .

[4] The grievor occupied the position of Manager, Federal Workers Compensation Program, Ontario Region, Human Resources and Skills Development Canada (HRSDC), and was physically located in Ottawa; her supervisor, Anna Ananiadis, was located in Toronto. Just to complete the reporting relationship, Ms. Ananiadis reported to

Danica Shimbashi, Director General, Regional Operations and Compliance Directorate, Labour Program, HRSDC. One of Ms. Shimbashi's areas of responsibility included the administration federally of section 20.9 of Part XX of the *Canada Occupational Health and Safety Regulations*, SOR 86-304, entitled, "Violence Prevention in the Workplace". Ms. Shimbashi was located in Ottawa.

[5] The facts of the case are not materially in dispute and are as follows.

II. Summary of the evidence

[6] As mentioned, the grievor was a manager at the HRSDC, supervising up to 10 unionized employees. She was classified at the AS-05 group and level and was not unionized. Her unit was responsible for processing claims made to the Workplace Safety Insurance Board (WSIB). The grievor became a manager in 1995.

[7] In or about July 2009, an employee - whom I will simply identify as "AB" - began working in the grievor's unit. AB was classified at the AS-02 group and level and reported to the grievor.

[8] Newly hired employees are subject to a one-year probationary period, and as such, AB was a probationary employee up to approximately July 2010. During that one-year period, the grievor testified that things went well and that she had a good working relationship with AB. The grievor also stated that, during the first year, AB performed well on the job.

[9] In the fall of 2010, shortly after AB's probation, behaviour issues with AB surfaced. Some of the work that AB was doing involved interacting with external clients and one client - the Department of Justice - complained to the director general, Ms. Shimbashi, about AB's behaviour. The grievor was experiencing similar behaviour problems with AB in the work unit as well. She began to performance manage AB, keeping her boss - the regional director in Toronto, Ms. Ananiadis - in the loop.

[10] By March 2011, the grievor was in virtually daily contact with labour relations advisors seeking assistance on performance managing AB's behaviour. Three oral reprimands had not had the positive effect that the grievor had hoped for, and she testified that the more frequently she addressed the discipline, the more the aggression exhibited by AB in the workplace escalated.

[11] In late March 2011, the grievor was getting ready to increase the progressive discipline and had received assistance from her Labour Relations section in drafting a letter to be sent to AB with respect to conducting an interview to discuss workplace conduct (Exhibit G-23). Before the letter could be sent, Ms. Ananiadis called the grievor and instructed her to stop the disciplinary process. No reason was given to the grievor as to why it had to stop.

[12] Unfortunately, the difficulty in the workplace appears not to have stopped, as the grievor and some of her employees filed complaints about AB's behaviour. In an email dated April 19, 2011 (Exhibit E-4), an employee of the grievor wrote to her, stating as follows:

. . .

> *Given the situation I find myself in, (as outlined in my complaints) - it is of importance that management clearly understand the background and environment from which these complaints arose. I have ben (sic) subjected to bullying from one individual in this office, and that bullying is clear in all of the complaints. . . I have reported the complaints to management as required, and as such, expect the Employer to take steps to address these complaints and ensure me a safe workplace. As it stands now, I believe that the workplace is not safe under the present conditions. . . You have always supported your team in the past and continue to do so. Your ongoing efforts in this regard is* [sic] *much appreciated.*

. . .

[13] The complaints were sent to the regional director, Ms. Ananiadis, and she replied on May 6, 2011, stating as follows (Exhibit E-4): "This is to acknowledge your complaint has been received and will be addressed under Section 20.9 of Part XX of the Canada Occupational Health and Safety Regulations - Violence Prevention in the Workplace."

[14] Ms. Ananiadis commenced an investigation into the complaints, but in a very short period, the files were transferred to the Occupational Health and Safety Committee at the HRSDC.

[15] That was the workplace situation in April and early May 2011. The grievor testified that she was highly stressed by AB's behaviour and testified that "one must be emotionally equipped to deal with [AB]." She also testified that, throughout this

difficult period, Ms. Ananiadis provided much support and assured her that everything was being communicated to Ms. Shimbashi and to Labour Relations. That was confirmed by Ms. Shimbashi, who testified that Ms. Ananiadis was indeed updating her on the events in the grievor's unit and that Ms. Shimbashi knew about the complaints filed under the violence in the workplace provisions.

[16] The grievor testified that things were getting worse in her unit. On May 11, 2011, Margaret Lochrie, an employee in the grievor's unit, wrote to the grievor, stating the following (Exhibit G-3):

. . .

> *I am writing to advise you that I no longer feel safe in this office because of* [AB's] *escalating behaviour. I am extremely concerned that she will snap and that I will be the victim of an attack. . . I have been concerned for months that she will snap, and that I will be on the receiving end of a verbal and/or physical attacks (sic) . . . Something has to be done about* [AB's] *behaviour in the workplace.*

. . .

[17] The grievor forwarded the email to Ms. Ananiadis.

[18] The following day, May 12, 2011, Isobel Courchene, an employee in the grievor's unit, wrote an email to the grievor, stating as follows (Exhibit G-4):

. . .

> *Further to my complaint given to you verbally via telephone from my office to yours yesterday afternoon, please consider this my formal written complaint against* [AB]. . . *This is the second complaint that I am making under the "Violence in the Workplace" Part II of the regulations. This individual remains at her station, among us, and intimidates at will. While I acknowledge that she has rights in the workplace, but so also do I.*
>
> *I've had enough, I am no longer willing to tolerate this any further.*

. . .

[19] The grievor also forwarded that email to Ms. Ananiadis.

[20] In the early evening of May 11, 2011, the grievor sent the following email to her manager, to Labour Relations and to security (Exhibit G-5):

. . .

> *URGENT*
>
> *This situation is no longer safe. Due to a series of intimidation actions directed at me and other staff members today, the situation with respect to our safety is severely compromised. Staff members are no longer safe. I received two complaints about safety from staff members and in addition to my own.*
>
> *Effective at the end of* [AB's] *business day tomorrow (Thursday, May 12, 2011) she will be given a letter prior to her departure that until further notice she is not to report to work and remain off-site until further notice.*
>
> . . . *We need direction immediately on how to proceed pending a consentual medical assessment is obtained.*
>
> . . .
>
> [*Sic* throughout]

[21] The grievor did not have the authority to remove someone from the workplace, so the issue went to HRSDC Headquarters, where, the grievor stated, it simply "died." Nothing was done.

[22] In cross-examination, Ms. Shimbashi testified that the issue of separation in the workplace was not raised with her and that she could not recall seeing Ms. Lochrie's email of May 11, 2011, stating that she no longer felt safe in the workplace (Exhibit G-3). She also said she did not recall seeing Ms. Courchene's email of May 12, 2011, filing a second complaint under "Violence in the Workplace" (Exhibit G-4). Ms. Shimbashi stated that if someone is to be removed from the workplace she has to be involved, and she did not recall ever speaking to Ms. Ananiadis about it.

[23] Another email followed on May 24, 2011, from the grievor to Ms. Ananiadis, asking that AB be relocated to another site (Exhibit G-6).

[24] Also on May 24, 2011, the grievor was getting ready to meet with AB the following day, intending to issue a written reprimand. On May 25, 2011, the grievor's labour relations advisor sent her an email offering suggestions for the meeting (Exhibit G-33). However, shortly after that, Ms. Ananiadis told the grievor to stop all disciplinary proceedings with respect to AB. No reason was given. The grievor sent

Ms. Ananiadis an email asking why no further disciplinary action should be taken against AB (Exhibit G-15). She never received a response.

[25] The grievor testified that, at approximately 15:00 on May 26, 2011, AB physically assaulted her. She was returning to her office with some files in her hands when, in her words, AB walked by and "pulled my hair and whacked me over the head and walked out."

[26] The grievor called Ms. Ananiadis and reported the assault. Ms. Ananiadis wrote the following email (Exhibit G-8) to security and to labour relations advisors in Ottawa:

. . .

> *At 3:00 p.m. today, a Manager in my Ottawa office reported to me by telephone that one of her direct reports walked behind her, grabbed her hair and left the office. No words were exchanged. The manager is in shock and in tears.*
>
> *Your urgent assistance is needed.*

. . .

[27] The grievor also called the police, who attended at her office.

[28] When Ms. Shimbashi was made aware of the incident, she convened a conference call with the HRSDC's Labour Relations, Occupational Health and Safety, and Legal branches. A decision was made to remove AB from the workplace, and the locks were changed in the office. Initially, AB was placed on leave with pay, but eventually, she was moved to another worksite. The work that AB was doing in the grievor's office continued, and the grievor was required to bundle the work up and send it to another manager who, in turn, gave it to AB to complete.

[29] On May 27, 2011, the day after the incident, the grievor wrote to her manager, asking that AB not be allowed to return to the office (Exhibit E-2). Ms. Shimbashi wrote to the grievor later that day, stating as follows (Exhibit E-3):

. . .

> *Until the appropriate fact finding investigations have been completed, I will be managing the situation on a day-to-day basis. As you know, the Unican door lock combinations have been changed and . . . access to the . . . building for the employee has been temporarily removed until further notice. . .*

> *I recognize this has been a difficult situation for you and I want to encourage you to take advantage of the confidential counselling services offered. . . .*
>
> . . .

[30] The grievor was under the impression that there was a possibility that management would return AB to the worksite within a short period, which caused her to send an email to Ms. Ananiadis (Exhibit G-16) stating, ". . . on behalf of myself and the others from this office . . . we are COMPELLED TO PLEAD/BEG you and senior management to PLEASE NOT RETURN the employee to this workplace. . . ."

[31] Both Ms. Courchene and Ms. Lochrie wrote emails to the director general, Ms. Shimbashi, expressing the same concern with respect to AB's possible return to the workplace (Exhibits G-17 and G-18).

[32] I will state at this point in the decision that the May 26, 2011, incident was investigated by the HRSDC's security branch. Interviews were conducted, and AB denied the incident. Security concluded as follows: "The findings on the allegation of assault are inconclusive," (page 22 of Exhibit G-34). That finding was reached in July 2011.

[33] Meanwhile, the employees were concerned about the possibility of AB returning to the worksite.

[34] Following the May 26, 2011, incident, the grievor went to see her family physician and was referred to a location that offered psychological services. She filled out a WSIB claim form, and her boss signed it on June 6, 2011. The grievor testified that the WSIB approved the claim in September 2011. The grievor began seeing a psychologist - Dr. Frances Smyth - starting on July 18, 2011. Initially, the visits were weekly, then they changed to biweekly. Dr. Smyth testified that the WSIB paid her for her services.

[35] On July 8, 2011, the grievor received a telephone call from Ms. Ananiadis, who said that AB was returning to the workplace to collect her personal belongings. The grievor informed Ms. Ananiadis that there were no personal items in the office and asked if other items could simply be boxed up and sent to AB. Ms. Ananiadis stated that that was not possible and instructed the grievor to let the staff go early and that

AB would be in the office after hours, accompanied by the director of Labour Relations and a union representative.

[36] The grievor testified that she felt awful and that she was upset. She said that the bullying employee was being allowed back in.

[37] The grievor's reaction was to barricade the office. She taped up the filing cabinets and taped six boxes together to build a wall and put paper with arrows on them pointing to AB's office as a guide. The grievor testified that she also removed program files from AB's office. She also testified that she should not have done it, as it was "over the top" and "a bit exaggerated." Nevertheless, that was the sight that greeted AB, the union representative and Brenda Marcoux, Director of Labour Relations, when they went to the office around 17:00.

[38] Ms. Marcoux testified that, when they arrived at AB's office, no one was there. When she opened the office door, she said that she saw the following: "The office was somewhat barricaded. There were boxes, tape and chairs blocking access to desks other than [AB's]." Ms. Marcoux stated that that surprised her, and that AB was upset and crying. The union representative was quite upset as well and took two photographs of the barricades (Exhibit E-1, Tab 10).

[39] Ms. Marcoux called Ms. Shimbashi to report what she saw, then packed up what items were left in AB's office and left. It occurred on Friday, July 8, 2011.

[40] On Monday, July 11, 2011, Ms. Marcoux met with Ms. Shimbashi to discuss the barricading incident and what to do about it. They decided to launch a fact-finding investigation, and the grievor was sent an email (Exhibit E-1, Tab 4) asking her to attend a meeting that afternoon ". . . to discuss the state in which Ms. Marcoux found the office." The grievor was told that she could be accompanied by a representative.

[41] The grievor showed up unaccompanied but then realized that she preferred to have the meeting with a representative present. They agreed to reschedule the meeting for the next day, Tuesday, July 12, 2011. Ms. Marcoux took notes during the meeting and transcribed them immediately afterwards. They are found in Exhibit E-1, Tab 5.

[42] Ms. Shimbashi asked the questions, and the notes indicate that the first question she asked was, "Who was involved in barricading the office?" The grievor replied that she was responsible for taping the office and the boxes and that no one

else was involved. The notes indicate as well that both Ms. Shimbashi and Ms. Marcoux asked questions about the incident and that the grievor responded.

[43] Ms. Marcoux stated that it was a short meeting and that the grievor was evasive in her responses. She noted that the grievor did not demonstrate remorse for her actions. In addition, Ms. Marcoux said that the grievor did not seem to understand the gravity of the situation.

[44] Ms. Marcoux and Ms. Shimbashi decided to investigate the matter further and felt it advisable to interview Ms. Courchene and Ms. Lochrie (Exhibit E-1, Tabs 8 and 9). A meeting was set for July 15, 2011, to interview each employee.

[45] Those meetings took place, and again Ms. Marcoux took notes (Exhibit E-1, Tabs 11 and 13).

[46] Also, on July 15, 2011, the grievor sent the following email to both Ms. Marcoux and Ms. Shimbashi (Exhibit E-1, Tab 14):

. . .

> *I wish to express remorse and regret. A week ago, I was informed that* [AB] *would be returning to the office. This caused me stress beyond all thoughts. I genuinely felt that I was doing the right thing, exercising due diligence. I have a fear of* [AB]. *I did something that I would not normally do. I was guided and influenced by the historical experiences that I have had with* [AB] *over a long time. It was not the best decision. I will never do it again.*

. . .

[47] The grievor testified that she never received a reply to her email.

[48] On July 21, 2011, Ms. Marcoux wrote to Ms. Shimbashi, suggesting that they have another meeting with the grievor to allow her to respond to the facts gathered when they met with Ms. Courchene and Ms. Lochrie. It was to be a meeting ". . . prior to the official disciplinary meeting where discipline will be provided" (Exhibit E-1, Tab 15).

[49] The grievor testified that nothing happened after she sent her email of apology until mid-August 2011, when her violence in the workplace complaint, along with the complaints of her employees, were formally investigated (Exhibit E-1, Tab 16). The

investigation findings were not released until March 2012. A number of allegations were deemed founded, while others were not (Exhibit G-2).

[50] On October 14, 2011, a pre-disciplinary meeting was held with the grievor, her representative, Ms. Shimbashi and Ms. Marcoux. Again, Ms. Marcoux took notes (Exhibit E-1, Tab 20). Ms. Marcoux stated that the grievor was evasive in her replies to Ms. Shimbasi's questions, and the meeting lasted less than one hour.

[51] Ms. Shimbashi's recollection of the meeting was that the grievor was evasive and that she did not answer the questions she was asked. The grievor's email expressing remorse was in contradiction to what Ms. Shimbashi observed at the meeting. Ms. Shimbashi hoped to see an expression of remorse and regret, but she did not.

[52] After the meeting, Ms. Marcoux prepared a draft letter for Ms. Shimbashi to sign, suspending the grievor for 10 working days. The letter sent to the grievor states in part as follows (Exhibit E-1, Tab 21):

. . .

> *This letter is to inform you of my decision regarding the incident of July 8, 2011, where the office in the Podium Building was found barricaded. . . You confirmed that you were responsible for barricading the office.*
>
> *In rendering my decision, I have taken into account your discipline free record and your years of service; I have however also considered the fact that you were evasive during the interview and not forthcoming in providing information. Your actions were totally inappropriate, especially on the part of a manager who must demonstrate exemplary behaviour for their staff.*

. . .

[53] The grievor filed her grievance on December 9, 2011.

[54] After serving the suspension, the grievor went on reduced hours, pursuant to advice from her doctor. She then went on sick leave but continued to see Dr. Smyth.

[55] Dr. Smyth wrote that she diagnosed the grievor ". . . as suffering from Posttraumatic Stress Disorder [*sic*] . . . as a result of an assault by one of the workers she supervised on May 26, 2011" (Exhibit E-1, Tab 28). That statement is contained in her letter, dated June 4, 2013. The letter also states as follows: "At this point in time,

I feel that the major source of Ms. Gatien's problem is not the assault itself so much as her employer's refusal to recognize the harm that was done to her and to protect her from further harm in the workplace."

[56] Returning to the issue of the 10-day suspension, Ms. Shimbashi stated that she appreciated that it was a difficult working environment that the grievor found herself in, but the grievor never raised the issue of the alleged assault at either interview as a mitigating factor. The decision to impose a 10-day suspension took into account the grievor's long, discipline-free record, but the grievor did not exhibit remorse in either interview. She was evasive in her replies to questions, and she did not appreciate the gravity of what she had done. The grievor never mentioned that she was suffering from a disability at either interview.

[57] Ms. Shimbashi was asked if she felt that it was an embarrassment that allegations of workplace violence were made in the very area that regulated workplace violence in the federal service. She denied that it was an embarrassment and stated that she manages issues that are in front of her. It was then put to her that the severity of the discipline was related to the fact that Ms. Shimbashi felt that the grievor had mishandled the managerial situation with AB. Ms. Shimbashi denied that and testified that it was related to the barricading issue.

[58] Ms. Shimbashi was then shown a document that she authored in preparation for the grievance hearing (Exhibit G-22). In it she wrote as follows at page 4, when describing the grievor's work unit:

. . .

> *. . . it is above all the immediate supervisor's responsibility to demonstrate good judgement and leadership in seeking the resolution as soon as possible, and to inform the senior management in a timely manner in an effort to obtain the necessary support. Unfortunately, Ms. Gatien has not only failed to demonstrate the required judgement and leadership, which were critical in this situation, but has also participated in aggravating the circumstances by ignoring the gravity of the problems which loomed in the team and furthermore by not informing the senior management in a timely manner.*

. . .

[59] Ms. Shimbashi was asked what the grievor failed to inform senior management about. She replied that the grievor could have notified senior management when the problem in the work unit first arose. She also wrote this in the report at page 3, the column entitled "comments":

. . .

> *It would appear that during 2010, the actions and behaviours of* [AB] *were not addressed by Ms. Gatien, nor were they brought to the attention of management to have been addressed sooner.*

. . .

[60] At page 5 of Ms. Shimbashi's document, she wrote as follows (Exhibit G-22):

. . .

> *Although the senior management's involvement may appear to have been rather slow at the beginning, in fact, the principal reason for that impression would rather be the fact that the employee withheld the information and did not inform the senior management in a timely manner, which in turn helped in aggravating the situation.*

. . .

[61] In responding to the question about what information the grievor had withheld, Ms. Shimbashi stated that any information about AB's behaviour would have helped. In her view, the grievor mismanaged the situation; however, the discipline was issued in consideration of all the facts available at the time.

III. Summary of the arguments

A. For the respondent

[62] Progressive discipline does not mean that one must start with an oral reprimand, then progress to a written reprimand, followed by a one-day suspension, and then gradually increase the quantum. Discipline has to be corrective. In some cases, the actions are serious enough to warrant a high level of discipline.

[63] Discipline was issued to the grievor because the respondent deemed that the grievor's actions were inappropriate. The grievor is a manager, and has been for 20 years. She ought to have known about fairness and impartiality, which she did not

exhibit when she barricaded the office. The grievor was aware that AB was to be accompanied by both a labour relations representative as well as a union representative, so there was no reason to erect barricades to protect government property.

[64] Management wants to treat all employees fairly, and the grievor's actions made it look like AB was not being treated fairly.

[65] In terms of mitigating factors, Ms. Shimbashi was fully aware of the alleged assault in the unit. The respondent acknowledged that it was a difficult environment and that action was taken against AB to address it.

[66] No mention was made at any of the meetings with the grievor that she was receiving medical or psychological care as a result of the events at issue. Had the respondent been made aware, the result could have been different. There was no way of knowing that imposing discipline on the grievor would cause her mental suffering. An employer cannot guess if an employee is suffering from a condition. The grievor certainly did not look vulnerable when the respondent met with her concerning the events of July 8, 2011.

[67] The grievor was not forthcoming at her interviews. As a manager, she knew the consequences of not cooperating in the investigative process.

[68] In terms of remorse, there is the grievor's email (Exhibit E-1, Tab 14) expressing her remorse and regret, but both Ms. Shimbashi and Ms. Marcoux said that the grievor showed no evidence of remorse at either interview.

[69] The matter was not prejudged. Management sought to obtain the grievor's version of events and interviewed potential witnesses. Then another meeting was held with the grievor to go over new facts. Had the grievor explained her state of mind and acknowledged and expressed remorse for her actions, a resolution might have been found. Instead, the grievor came to the meeting irritated and defensive and stated that she had answered all the questions.

[70] Based on those events, the 10-day suspension was imposed. It is a serious penalty, but it was imposed to ensure that the grievor understood the seriousness of her actions and, hopefully, to ensure that they would not reoccur.

[71] With respect to the issue of damages, the available medical information (Exhibit E-1, Tab 28) is dated June 4, 2013, which is well after the fact, so the respondent cannot be blamed for not considering it because it was never put to the respondent.

[72] The respondent acted in good faith based on the information available to it and based on the evidence at the interviews. The grievor did not mention that she was seeking medical or psychological help, and the respondent could not guess that she was suffering from any kind of condition at that time.

[73] A suggestion was made that what happened was, in fact, the respondent's fault. Counsel for the respondent argued that the respondent acted promptly upon receipt of the complaint of violence in the workplace. An employer does not remove an employee because of allegations that the employee is rude, unprofessional or a bully. An employer investigates, because fairness is owed to everyone. In this case, the respondent could not predict that there would be a physical assault based on employees' emails. Before complaints are made, a manager must manage difficult situations. Resources were available to the grievor, and she was using them. She was not left on her own.

[74] When an employer imposes discipline, it does not mean that the discipline is compensable by damages. The adjudicator must find a separate, actionable course of conduct. In this case, the respondent imposed discipline for reprehensible actions and nothing more. The respondent deemed the grievor's actions inappropriate and worthy of discipline.

[75] Even if an adjudicator reduces a penalty, it does not mean that the discipline imposed was harsh, vindictive, reprehensible or malicious.

[76] As stated as follows paragraph 103 of *Wallace v. United Grain Growers Ltd.,* [1997] 3 S.C.R. 701: "It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself . . . ." Similarly, hurt feelings from receiving a 10-day suspension are not an injury for which an employee is entitled to compensation. At the end of paragraph 103, the Supreme Court goes on to state as follows: "In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer." Compensation does not flow from the suspension itself

but rather from the manner of imposing it. In this case, the suspension was imposed after giving due consideration to all the mitigating factors, and it was done fairly.

[77] As stated at paragraph 57 of *Honda Canada Inc. v. Keays,* 2008 SCC 39, damages occur only ". . . where the employer engages in conduct during the course of dismissal that is 'unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive'." In this case, the respondent was not insensitive, as it was aware of the situation and took action. In addition, the grievor never mentioned that she was affected by a medical or psychological condition.

[78] Paragraph 68 of *Honda Canada Inc.* discusses the issue of punitive damages and states that ". . . this Court has stated that punitive damages should 'receive the most careful consideration and the discretion to award them should be most cautiously exercised . . . ." All the respondent did in this case was respond to an action deemed inappropriate. The action was taken in good faith.

[79] A decision of the Saskatchewan Court of Queen's Bench (*Fox v. Silver Sage Housing Corporation*, 2008 SKQB 321) dealt with a case concerning William Fox, who filed a claim for wrongful termination. At paragraph 44 of the decision it states that: "As bad as this employer's behaviour was towards Mr. Fox, he has not proven that the stress and depression he suffered is related to the manner in which he was treated." Any stress suffered by the grievor must be related to the process of imposing discipline, not the discipline itself, and the evidence in this case does not support such a claim. The respondent showed no bad faith in imposing the discipline on the grievor.

[80] Counsel for the respondent filed the following case law: *Noel v. Treasury Board (Human Resources Development Canada)*, 2002 PSSRB 26; *Wallace*; *Honda Canada Inc.*; *Canada (Attorney General) v. Tipple*, 2012 FCA 158; *Canada (Attorney General) v. Tipple*, 2011 FC 762; *Clendenning v. Lowndes Lambert (B.C.) Ltd.*, 2000 BCCA 644; *Chenier v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 27; *Slepenkova v. Ivanov*, [2007] O.J. No. 4708 (QL); *Fox*; *Mulvihill v. Ottawa (City)*, 2008 ONCA 201; *Merrill Lynch Canada Inc. v. Soost*, 2010 ABCA 251; and *"B" v. Canadian Security Intelligence Service*, 2013 PSLRB 75.

B. For the grievor

[81] There are two parts to the grievance. The first part seeks a reduction in the penalty, and the second part seeks damages.

[82] Ms. Shimbashi stated that she placed no weight on the assault as the employer's report held that the allegation that it took place was unfounded, as the respondent's internal report was "inconclusive." The grievor should have been given the benefit of the doubt concerning the assault, so not placing any weight on it was an error. The grievor was impacted by the assault when it took place on July 8, 2011.

[83] If senior management had not waited until a physical assault took place, the July 8, 2011, incident would not have happened. The work location is in the Labour Program, which has responsibility for violence in the workplace prevention, so management should have reacted earlier.

[84] There was a lack of progressive discipline; the grievor had lengthy service and an unblemished record, yet she still received a 10-day suspension, which is very severe. The respondent simply stated that it considered mitigating factors; that does not mean that it truly considered them.

[85] The purpose of discipline is corrective. Does the respondent seriously believe that such behaviour will happen again? The grievor said that it would not in her email of July 15, 2011.

[86] The grievor admitted to her conduct. She admitted that it was misconduct and that it was a bad decision. However, the penalty was too severe; an appropriate penalty would be an oral reprimand.

[87] Counsel for the grievor reviewed the events that led up to the July 8, 2011, incident. I have decided not to reiterate them, as they are summarized in the first part of this decision. Counsel did state that the evidence showed that the grievor was trying to do everything that she could to stop AB's behaviour, but she was left unprotected. When she tried to impose progressive discipline, she was told to stop.

[88] After the July incident, the grievor sent an email stating that she was stressed, that her behaviour was out of character and that she would never do it again. Why did

the respondent contest what she wrote? Senior management never acknowledged the email.

[89] During the interview process, the grievor was forthcoming. She admitted her actions, but she did have some questions, which she raised.

[90] The next issue is damages. Counsel for the grievor said that the primary case law concerns terminations of employment, with *Wallace* and *Honda Canada Inc.* being the main cases. In response to a question I posed, counsel for the grievor stated that he could not find any cases dealing with damages in situations involving suspensions.

[91] Applying the same principles as found in *Wallace* and *Honda Canada Inc.*, discipline that is excessively harsh and that is imposed in bad faith can lead to what counsel for the grievor described as bad faith damages.

[92] In *Wallace*, at paragraph 88, the Supreme Court wrote as follows:

> *88. The appellant urged this Court to recognize the ability of a dismissed employee to sue in contract or alternatively in tort for "bad faith discharge." Although I have rejected both as avenues for recovery, by no means do I condone the behaviour of employers who subject employees to callous and insensitive treatment in their dismissal, showing no regard for their welfare. Rather, I believe that such bad faith conduct in the manner of dismissal is another factor that is properly compensated for by an addition to the notice period.*

In this case, the grievor's position was that the respondent acted callously and insensitively, hence the need for "bad faith damages."

[93] Exhibit G-22 clearly shows what Ms. Shimbashi thought of the July 2011 incident and the workplace that the grievor supervised. She was embarrassed by the situation in that workplace violence occurred in an area responsible for administering legislation dealing with violence in the workplace. Ms. Shimbashi's disciplinary response was unduly insensitive in that the penalty was excessive.

[94] There can be no doubt that the process had a significant impact on the grievor. She was assaulted in the workplace, and the respondent should have acted sooner. Those exceptional circumstances call for exceptional damages. The grievor stated that she seeks $100 000 in "bad faith damages."

[95] Counsel for the grievor cited the following case law: *Tipple* (2011); *Tipple* (2012); *Downham v. Lennox and Addington (County)*, [2005] O.J. No. 5227 (QL); *Elgert v. Home Hardware Stores Limited*, 2010 ABQB 73; *Hughes v. Gemini Food Corp.,* [1997] O.J. No. 414 (QL); *Mellon v. Human Resources Development Canada*, 2006 CHRT 3; *Pike v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 1; and *Telus Corp. v. International Brotherhood of Electrical Workers, Local 348*, [2000] C.L.A.D. No. 421 (QL).

C. Rebuttal of the respondent

[96] The internal investigation report (Exhibit G-34) made an inconclusive finding on the allegation of assault. No witness could independently verify that an assault took place.

[97] The grievor has acknowledged that her actions on July 8, 2011, were reprehensible but submitted that only an oral reprimand is warranted. At what point is the respondent's action reprehensible? There were grounds for discipline, but if the discipline was too severe, the adjudicator has the power to reduce it. The respondent displayed no bad faith or malicious intent.

IV. Reasons

[98] The grievance is divided into two parts, with the first being a request to reduce the disciplinary sanction and the second being a request for damages. I will deal with each one separately.

A. Suspension

[99] Both parties acknowledged that the work environment the grievor found herself in during at least 2011, if not earlier, was difficult. As seen in many different exhibits (Exhibits G-3, G-4, G-6, G-9, G-16, G-17 and G-18), employees reporting to the grievor, and the grievor herself, expressed concern and fear with respect to AB's conduct in the workplace. The grievor sent all the concerns to senior management. It was not disputed that the grievor's supervisor, Ms. Ananiadis, kept her own supervisor, Ms. Shimbashi, fully apprised of the workplace events. I have no hesitation in concluding that Ms. Shimbashi knew of the situation in the grievor's office as it progressed.

[100] The grievor was addressing the situation with AB in the form of progressive discipline, and as seen in Exhibit G-15, when she was about to impose written discipline, the grievor was instructed to stop. She was given no reason for that instruction.

[101] A number of resources were available to the grievor, which should have assisted her in addressing the workplace issue. Senior management should have provided her with assistance. While the exhibits indicate that Ms. Ananiadis did provide encouragement and support in some written correspondence, she was situated in Toronto, and the grievor was in Ottawa. When Ms. Ananiadis reported the issues to Ms. Shimbashi, someone in Ottawa should have gone to see what was happening. Labour Relations did provide the grievor with some written suggestions on what to do, yet there is no evidence that anyone from Labour Relations took the time to visit the grievor and investigate what was going on. In the end, when progressive discipline was about to be applied to AB, the rug was pulled out from under the grievor without any explanation whatsoever. Both senior management and Labour Relations let the grievor down, in my view.

[102] Certainly, something took place on May 26, 2011, in the workplace. Exhibit G-8 is an email from Ms. Ananiadis, and it states as follows:

. . .

> *At 3:00 p.m. today a Manager in my Ottawa office reported to me by telephone that one of her direct reports walked behind her, grabbed her hair and left the office. No words were exchanged. The manager is in shock and in tears. . . .*

. . .

[103] The internal investigation was inconclusive as to whether an assault actually took place, but certainly something serious did occur, which resulted in an emotional grievor calling her supervisor.

[104] Senior management did react positively at that point by removing AB from the workplace while the matter was being investigated. Approximately six weeks later, the grievor was informed that AB was returning to the workplace, accompanied by a union representative and a labour relations representative, to collect some items from her workstation.

[105] There is no dispute as to what the grievor did. She barricaded the office, and the evidence did not dispute where the barricades were situated and what was used to create them. The grievor testified that her reaction was over the top and that it was not the right thing to do.

[106] Upon hearing about the barricades, Ms. Shimbashi decided to investigate the matter by interviewing the grievor. There is nothing wrong with that reaction, and it is simply good labour relations practice to conduct such an interview.

[107] The only notes of the interview that were introduced are those of the director of labour relations, Ms. Marcoux (Exhibit E-1, Tab 5). I note that the very first question asked by Ms. Shimbashi was, "Who was involved in barricading the office?" The grievor replied, "I was responsible for taping the office and the boxes. Nobody else was involved."

[108] Both Ms. Shimbashi and Ms. Marcoux testified that they felt that the grievor was not forthcoming in the interview, which is also reflected in Ms. Marcoux's notes at the end of the interview. Perhaps the grievor was not forthcoming on some issues discussed, but on the critical issue – the one first asked by Ms. Shimbashi – the grievor was very forthcoming and replied that she was responsible for the barricading.

[109] The notes also indicate that the grievor was not remorseful during the interview, and based on the notes, I think that is accurate. However, on July 15, 2011, which was just a few days after her July 12 interview with Ms. Shimbashi and Ms. Marcoux, the grievor sent them an email, the title of which was, "Remorse and Regret." She wrote (Exhibit E-1, Tab 14), "I wish to express remorse and regret. . . I did something that I would not normally do. . . It was not the best decision. I will never do it again."

[110] To me, that is a very clear expression of contrition. In my view, one could not ask for a clearer expression of remorse, yet that email, sent to both Ms. Shimbashi and Ms. Marcoux, was never even acknowledged. At the very least, management could have

replied to the grievor as follows: "Thank you for your email. We will take it into consideration." However, it chose to ignore it.

[111] Another interview was held with the grievor some three months later. It was another positive step in the process, in that the grievor was interviewed again so that she could respond to any new facts or tie up loose ends. However, I find it very strange that the email Ms. Shimbashi wrote to the grievor informing her of the second meeting also stated that "[t]he purpose of the pre-disciplinary meeting is to allow you the opportunity to provide any clarification/explanations" (Exhibit E-1, Tab 19). A pre-disciplinary meeting? It sounds to me as if a decision on disciplining the grievor had already been made. Why did she not simply state, "The purpose of the meeting is. . . ." After all, the grievor might have had a good explanation for whatever concerns Ms. Shimbashi and Ms. Marcoux had.

[112] Following that meeting, a 10-day suspension was imposed on the grievor. The grievor was a 35-year employee with a discipline-free record, who had readily admitted to barricading the office, who had expressed remorse and who had stated that it would not happen again, and yet, she was met with a severe disciplinary response. Additionally, the grievor's evidence was that she was in a highly emotional state given management's inaction and I find this is understandable in this case and serves to confirm that her action was impulsive, emotional and out of character. If the purpose of discipline is corrective, I feel the reaction of imposing a 10-day suspension was excessive. The grievor's position was that she did something wrong, and she recognized that some response was appropriate. She felt that an oral reprimand would achieve the purpose of addressing the issue, and I agree with her. Therefore, I order that the 10-day suspension be replaced by an oral reprimand.

B. Damages

[113] The grievor asked for $100 000 in damages as a result of the respondent's bad faith in imposing the discipline. She relied on Exhibit G-22 as support for the proposition that Ms. Shimbashi was embarrassed to find violence in her work area, when she was responsible for administering the violence in the workplace provisions of the *Canada Occupational Health and Safety Regulations*.

[114] One of the leading cases concerning the application of damages is *Wallace*. In fact, damages awarded are sometimes referred to as "Wallace damages." (See, for

example, paragraph 40 in *Tipple (2011)*.) I note at this point that all the case law on the subject of damages referred to by both counsel dealt with terminations of employment. I am aware of no case law in which damages were awarded in a case involving a suspension.

[115] I suspect at least one of the reasons damages have not been awarded in suspensions is that adjudicators have the authority to modify suspensions if they are deemed too severe, as I have done. There is no loss of employment in cases of suspension, and the grievors can recover some or all of the monies lost if the penalty is altered. Such is not the case in terminations.

[116] The respondent argued that it acted in good faith based on the information it had available at the time the disciplinary action was taken. In this case, the issue of damages may apply only if there was a separate actionable course of conduct apart from the issuance of discipline itself that caused mental distress or suffering.

[117] I believe that that is an accurate reflection of the statement found at paragraph 73 of *Wallace*. The grievor argued that the imposition of the 10-day suspension was unduly harsh and vindictive. While I did agree that it was excessive, given the facts in this case, it cannot lead to damages because it is not a "separate actionable course of conduct."

[118] Counsel for the grievor argued for bad faith damages, as the respondent had acted in bad faith throughout the events at issue. I do not agree. While I think that both senior management and Labour Relations did not do everything they could have done to assist the grievor in handling her workplace situation, it is a far cry from acting in bad faith. The evidence showed that, at the very least, senior management and labour relations provided moral support to the grievor, as well as written advice (see, for example, Exhibits G-23 and G-28).

[119] In *Honda Canada Inc.*, the Supreme Court wrote as follows, at paragraphs 59 and 60:

> *[59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal*

> *are always to be awarded under the* Hadley *principle. . . Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance. . . .*
>
> . . .
>
> *[60] In light of the above discussion, the confusion between damages for conduct in dismissal and punitive damages is unsurprising, given that both have to do with conduct at the time of dismissal. . . The Court must avoid the pitfall of double-compensation . . . .*

[120] In this case, I have deemed the imposition of the 10-day suspension excessive, and I have reduced it to an oral reprimand, so monies lost by the imposition of the suspension have been restored.

[121] The examples of conduct that could attract compensable damages, as cited in *Honda Canada Inc.,* are far removed, I believe, from what exists in this case. The grievor's reputation was not attacked; nor was there any intent to deprive her of a pension, for example. Management took action with respect to the grievor's behaviour, which she herself acknowledged was worthy of some discipline. The fact that the discipline imposed was excessive is compensated by modifying the penalty. That has been done.

[122] In her grievance, the grievor stated that the respondent ought to have known that imposing discipline would cause her mental suffering and unfair loss of professional standing. Counsel for the respondent stated that there was no way for the respondent to know that imposing discipline on the grievor could lead to mental suffering. I agree. The respondent did not have any medical information about the grievor at the time of the disciplinary meeting, and it could not have guessed that imposing discipline would be the cause of any further mental anguish. Furthermore, the manner in which the suspension was imposed was not egregious, or over the top, as was the situation in much of the case law reviewed. The grievor has failed to prove

that her reaction was caused by the suspension.

[123] With respect to the statement that the grievor felt that having discipline imposed on her resulted in an unfair loss of professional standing, there is simply no evidence to support this claim. Even if there were, the modification of the penalty in this decision should serve to restore whatever loss the grievor felt she suffered.

[124] The grievor said that she was suffering from a disability at the time of the July 2011 incident. She never raised that issue at either interview, as seen in Ms. Marcoux's notes (Exhibits E-1, Tabs 5 and 20). The only letter supporting the grievor's statement that she suffered from a medical condition is from her psychologist, Dr. Smyth, and is dated June 4, 2013, which is well after the fact. The respondent could not have known about her disability, as she never raised it as a mitigating factor.

[125] In light of those facts, the request for bad faith damages is denied.

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

(The Order appears on the next page)

V. Order

[127] The aspect of the grievance dealing with the 10-day suspension is sustained to the extent that the suspension is reduced to an oral reprimand, and the employer shall immediately reimburse Ms. Gatien for lost wages and benefits.

[128] The aspect of the grievance dealing with a request for damages in denied.

September 5, 2013.

Joseph W. Potter,
adjudicator