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Citation: 2014 PSLRB 30



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

TERRY HORNE

Grievor

and

PARKS CANADA AGENCY

Employer

Indexed as
Horne v. Parks Canada Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Paul Love, adjudicator

For the Grievor: Ray Domeij, Public Service Alliance of Canada

For the Employer: Richard Fader, counsel

Heard at Victoria, British Columbia,
November 19 to 21, 2013.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Terry Horne (“the grievor”) grieved his termination from his position of Asset Support Technician with the Parks Canada Agency (“the respondent”) at Pacific Rim National Park Reserve (“Pacific Rim”). The respondent terminated the grievor by a letter dated November 15, 2012, from Helen Davies, Field Unit Superintendent, Coastal B.C. Field Unit of the respondent (Exhibit E-1, Tab 6), for misuse of government-issued local purchase order authority (LPOA) and financial delegated authority, fraud and theft, and wilful and intentional dishonesty and deception. Ms. Davies concluded that the grievor breached the *Parks Canada Agency Code of Ethics*, the *Financial Administration Act*, R.S.C., 1985, c. F-11 (FAA), and the *Government of Canada Oath or Affirmation*, under which he pledged to faithfully and honestly fulfill his duties. Ms. Davies wrote, in part, as follows:

...

On April 18, 2012, you completed and signed under your delegated financial authority LPOA #205181 which included the purchase of four speciality (4) Cooper AT3 tires (value of \$757.12). The invoice for these tires was paid on May 8, 2012 and you signed for this payment under Section 34 of the FAA as per your authority as a Cost Centre Manager. You subsequently installed these tires on your personal vehicle. This conduct is unacceptable and constitutes both fraud and theft.

...

I have carefully reviewed all the information concerning this matter and am satisfied that there is overwhelming evidence of your wilfull misconduct as stated. I have considered your employment record, the nature of your duties and the fact that over a period of five months you were intentionally dishonest and deceptive on activities involved [sic] fraud and theft. Consequently I find that the seriousness of your wrongdoing and lack of integrity and honesty on your part has [sic] irreparably severed the relationship of trust that must exist between an employee and the employer.

...

[2] In his grievance, the grievor requested the following: “I request that the above-noted letter be rescinded, all copies of it be destroyed, full reinstatement in my position with no loss of pay and benefits, that I not suffer from any prejudice as a result of having filed this grievance and that I be made whole.”

[3] It is clear that the grievor seeks the rescinding of his termination so that he can retire and obtain a severance payment under the relevant collective agreement of approximately \$30 000.

II. Hearing

[4] On behalf of the respondent, I heard testimony from Scott Stevenson, who at the relevant time was Asset Manager at Pacific Rim; John Aldag, who was Acting Park Superintendent at Pacific Rim; Kathy Hansen, Human Resources Manager for the respondent's Coastal B.C. Field Unit; and Helen Davies, Field Unit Superintendent for the Coastal B.C. Field Unit. The grievor testified on his own behalf.

A. Background

[5] Pacific Rim is located on the west coast of Vancouver Island, British Columbia, and consists of three geographically dispersed areas: Long Beach, the Broken Group Islands and the West Coast Trail. The respondent operates Pacific Rim with approximately 80 employees in the summer and less than half that number in the winter. The grievor was employed as an asset support technician, a position classified at the EG-03 group and level, with responsibility for purchasing goods of up to \$25 000. He also supervised contracts. He had access to security codes, keys and passwords.

[6] The duties of an asset support technician are described in a master generic work description (Exhibit 1, Tab 1). Generally, the work includes purchasing assets, maintaining inventories and supervising contracts.

[7] The grievor was a cost centre manager, which means that he "... has been assigned a specific role and a financial budget allocated by the Fund Centre Manager. This also includes a project manager" according to the *Parks Canada Agency Instrument of Delegation - Finance and Administration Financial Signing Authorities* (Exhibit E-2). He exercised his spending authority as a delegated authority. He has significant training as a cost centre manager and as a project manager (Exhibit E-10).

[8] The grievor was bound by the *Parks Canada Agency Code of Ethics* (Exhibit E-1, Tab 7). He signed an *Oath of Allegiance* and an *Oath of Office and Secrecy* (Exhibit E-1, Tab 1a).

[9] One of the instruments used to purchase assets is a LPOA, which is a booklet containing payment invoices. It has to be signed by a person with delegated authority.

[10] At all material times, the grievor was trained in the use of the LPOA with delegated authority to purchase assets. He reported to Mr. Stevenson.

[11] In 2012, the respondent was experiencing constraints on its budget and was cost sensitive about purchasing assets.

B. Summary of the evidence

1. Mr. Stevenson

a. Examination-in-chief

[12] In May 2012, Mr. Stevenson needed to travel from park headquarters to the West Coast Trail portion of Pacific Rim. He borrowed the grievor's Agency vehicle because no fleet vehicle was available at the time. Mr. Stevenson was waiting in Nanaimo for another asset support technician employee to join him when he received an unpleasant telephone call from the grievor about the use of the truck. The grievor hung up on Mr. Stevenson, and Mr. Stevenson phoned him back.

[13] At some point while waiting in Nanaimo, Mr. Stevenson opened the LPOA booklet issued to the grievor and stored in his Agency truck.

[14] Mr. Stevenson noted in the LPOA that the grievor had paid for the repair of a dump truck tire and had purchased four Cooper AT3 tires ("the Cooper tires") from Jack's Tires in Port Alberni, B.C. (Exhibit E-1, Tab 3a), on April 18, 2012, at what appeared to be a premium price. They were not the tires that the respondent usually used, which on 90% of its light passenger vehicles at Pacific Rim were Adventuro tires. Mr. Stevenson noted that the Cooper tires were premium tires and that it was unusual for the grievor to have purchased them in a time of budgetary restraint.

[15] At a meeting on May 15, 2012, Mr. Stevenson showed the grievor the LPOA and asked him about the purchase. Mr. Stevenson asked him what the Cooper tires were for, and the grievor stated that they had been put on his Parks Canada vehicle. Mr. Stevenson asked to see the tires. Both he and the grievor went and looked at the grievor's Agency vehicle. The grievor then noted that the tires were the Adventuro tires

and that he had placed the Cooper tires in “cold storage” at the respondent’s compound.

[16] Mr. Stevenson asked the grievor to produce the Cooper tires. A few days later, the grievor told Mr. Stevenson that the Cooper tires were not in cold storage. It was clear to Mr. Stevenson from the information the grievor provided that Mr. Horne was the last person to have seen the tires.

[17] During the course of three meetings with the grievor, Mr. Stevenson made further inquiries of him about the Cooper tires. Mr. Stevenson thought it would be an easy task to locate the tires as they should have been either on an respondent vehicle or in storage.

[18] Shortly after those meetings, Mr. Stevenson issued an email to all employees with a description of the Cooper tires, asking for information about their whereabouts.

[19] Mr. Stevenson received information from another manager, indicating that tires matching the description in his email were on the grievor’s personal vehicle, which was parked in the administration building parking lot.

[20] Mr. Stevenson asked the grievor for his LPOA book and his Parks Canada credit card and the grievor gave them to him. At this point, the grievor’s spending privileges were curtailed, and his work was more closely monitored.

[21] Mr. Stevenson made a request to the Finance section to determine the grievor’s spending.

[22] On September 12, 2012, the grievor was invited to a meeting on September 13, 2012, by a letter from Renee Wissink, Park Superintendent (Exhibit E-5). The letter reads in part as follows:

...

This letter is to inform you that we are currently gathering facts about the inventory of tires at Pacific Rim, in particular tires that are unaccounted for.

...

The objective of the meeting is to gather facts pertinent to any missing inventory. You may be accompanied by your union representative or a person of your choice. Their role in

this meeting is to be present as an observer and to provide support to you.

...

[23] On September 13, 2012, Mr. Stevenson, then Acting Superintendent, Jackie Godfrey, Acting Asset Manager, and Ms. Hansen, from Human Resources, met with the grievor and his bargaining agent representative, Lise Edwards. The respondent took minutes of this meeting (Exhibit E-6). Mr. Stevenson indicated that he told the grievor that an awkward situation had developed and that tires matching the description of those missing were located on the grievor's personal vehicle. The grievor advised that he had bought the Cooper tires at a garage sale in Nanaimo, with his girlfriend, over a year earlier at half price. The grievor could not recall exactly who had installed the tires, but stated that he believed it was Cal Tires in Nanaimo and that he had them installed on spare rims.

[24] The minutes note that Ms. Davies advised the grievor that the Cooper tires were a newer model, were not ordinarily carried by Jack's Tires and were a special order, and she asked the grievor why he had placed the special order. He replied that he purchased the tires to see if they would stand up on the gravel roads used by the rangers in the area near the West Coast Trail.

[25] Ms. Hansen asked the grievor for details about the garage sale and about which Cal Tire location was used for the installation. The grievor stated that he could not remember. Ms. Hansen also asked the grievor whether the respondent could obtain information from his partner; he indicated that he did not want to involve her in the matter.

[26] Mr. Stevenson testified that Ms. Hansen advised the grievor that a serial number on the Cooper tires would indicate their date of manufacture.

[27] Mr. Stevenson testified that between May and September of 2012, several things transpired. It was a serious matter to accuse the grievor of taking the Cooper tires, so the employer wished to carry out a full investigation. It also conducted a financial audit to determine if there were other irregularities. It wished to provide an opportunity for the tires to reappear following the email. It also raised the tire issue with the grievor on at least three separate occasions during meetings about other matters.

[28] During the September 2012 meeting, Mr. Stevenson obtained the grievor's permission to read the serial numbers off the Cooper tires on his vehicle. Mr. Stevenson and Ms. Davies recorded information from the tires. The grievor was told that the respondent would be continuing the investigation.

[29] During the course of the meeting, the grievor advised that 80% of Pacific Rim staff had access to the cold storage building. He advised that the Cooper tires were a common variety, that they would fit any 15-inch rim, that they could be used on any Ford Ranger truck, that the respondent owned many such trucks and that some employees had personal trucks that could use this type of tire.

[30] Mr. Stevenson testified that, after the meeting, Ms. Hansen followed up with the supplier and distributor of the Cooper tires.

[31] The respondent arranged for a meeting on October 16, 2012, with the grievor and his bargaining agent representative, John McIntosh, and Mr. Aldag, Mr. Stevenson and Ms. Hansen. At the meeting, the grievor admitted that he had taken the Cooper tires from cold storage and had placed them on his personal vehicle. He stated that he had done so because of financial stress. He also expressed regret at what he had done. At the meeting, he read a statement that he had drafted (Exhibit E-1, Tab 5) and signed and that was dated October 16, 2012. The statement reads as follows:

Regarding the tires that are missing, Due to a severe personal financial situation, I removed them from the airport compound the last week of April, 2012 and installed them on my personal vehicle. I had planned for this to be a very temporary situation as I had tires that were showing cords through in a couple of places and couldn't take the chance of an accident. I was going to replace the tires after 2 months when I would have the funds to do so. When it was discovered that the tires were missing, I couldn't find the means to admit to it. In doing so, I lied and tried to cover it up. When myself and Lise Edwards (Union Rep) met with Kathy Hansen, Scott Stevenson, Jackie Godfrey in the middle of September 2012, I was again asked about the tires. I lied and tried to cover it up. From the time of the first meeting in May 2012 with Scott Stevenson, I have been under considerable stress. Up until the last week of April, 2012, I have lived my life and conducted my work by a very straight forward set of morals and values. The last week of April 2012, those morals and values seemed to elude me. I have always intended to replace the tires, however, once the tires were discovered gone, I was at a loss as to how to come

forward. I take full and complete responsibility for my actions.

[32] Mr. Stevenson testified that a high degree of trust is placed in an asset technician. The asset technician has a substantial budget, can purchase items up to \$25 000 and is responsible for administering outside service contracts up to \$100 000.

[33] Mr. Stevenson stated that 20 individuals reported to him at the relevant time.

[34] Mr. Stevenson identified on LPOA 205181 (Exhibit E-1, Tab 3) the cost centre coding of "52502," which was assigned to the grievor. Mr. Stevenson also pointed out the grievor's signature on the LPOA and on the "Specimen Signature Form" (Exhibit E-1, Tab 2), which authorizes payment under section 32 or 34 of the *FAA*.

[35] Mr. Stevenson identified the invoice for the charges, dated April 18, 2012 (Exhibit 1, Tab 4a), which was paid by LPOA 205181 (Exhibit E-1, Tab 3). Mr. Stevenson identified the grievor's personal vehicle on which the Cooper tires were installed (Exhibit 1, Tab 4) by identifying a photograph taken in May 2012.

b. Cross-examination

[36] Mr. Stevenson was cross-examined, but it did not add any information germane to this case or cast any doubt on the evidence that he gave during his examination-in-chief.

2. Mr. Aldag's testimony

a. Examination-in-chief

[37] Mr. Aldag, currently the manager of National Historic Sites, Pacific Region of the respondent, was Acting Park Superintendent at Pacific Rim for 2012, but he was on leave from mid-June to mid-September of that year. Mr. Aldag became involved in this case when he returned from leave in September 2012. He tried to make telephone contact with the grievor, who was out of the office, as the respondent needed to continue its investigation concerning the Cooper tires.

[38] Mr. Aldag was present at the October 16, 2012, meeting. At this meeting, the grievor surrendered his codes and keys and assisted with setting up Mr. Aldag as the administrator.

b. Cross-examination

[39] Mr. Aldag confirmed that he understood that the grievor was coming to the October 16, 2012, meeting to make a statement. Mr. Aldag was unaware of the details of whether the grievor had already made a confession.

[40] Mr. Aldag confirmed that the grievor did pay for the Cooper tires after he was terminated.

[41] Mr. Aldag was not involved in the meeting at which the grievor was terminated and did not recall seeing a letter of resignation provided by the grievor.

[42] Mr. Aldag was not aware of any operational reason that the grievor's resignation (Exhibit G-1) could not have been accepted. Mr. Aldag stated that he did not have the delegated authority to dismiss the grievor. However, he was concerned about the grievor's theft and the breaking of the bond of trust.

[43] Mr. Aldag was questioned as to whether the respondent had made an offer to the grievor to resign. Mr. Aldag testified that no offer was made. His notes of the fact finding meeting of October 16, 2012 (Exhibit E-7) indicate that the respondent intended to recover the cost of the tires. The notes also read as follows:

...

Kathy stated that we have these issues at hand to deal with and that moving ahead it may involve administrative action up to and including dismissal. Terry acknowledged the statement. Kathy stated that there were options he could pursue moving forward that he could discuss with his union. When asked what options, Kathy stated such as resignation. Kathy stated that we haven't as yet gone ahead to the police that this might proceed with talking this to the police.

[Sic throughout]

...

3. Ms. Hansen's testimony**a. Examination-in-chief**

[44] Ms. Hansen, Human Resources Manager, Coastal B.C. Field Unit of the respondent, first became aware of this matter in April 2012, when Mr. Stevenson

contacted her to advise her of his suspicions that the grievor had used an LPOA to purchase tires for his personal use.

[45] Ms. Hansen was involved in giving advice and directions to Mr. Stevenson concerning the investigation. She indicated that a fact-finding process was needed concerning the tire inventory and that a determination was needed as to whether other items were missing and whether there were other concerns. She contacted the financial manager for the field unit and had him conduct an audit of the asset section.

[46] Ms. Hansen also conducted some research. She determined that each tire bears a serial number indicating the month and year of manufacture. She was at the meeting in September 2012, and she took down some further information off the Cooper tires installed on the grievor's personal vehicle. She later found that further information was required as the information was on the whitewall or interior side of the installed tires.

[47] Mr. Horne contacted Ms. Hansen by telephone on October 11, 2012. Her notes of that call (Exhibit E-8) indicate that he confessed to taking the Cooper tires, with a plan to replace them. Ms. Hansen asked him to write out a statement and tentatively scheduled a meeting for "Tuesday morning." Ms. Hansen also encouraged him to seek assistance from the Employee Family Assistance Plan (EFAP).

[48] Ms. Hansen indicated that until the October 11, 2012, telephone call, Mr. Horne had maintained the position that the Cooper tires were missing, that someone else might have taken them, and that he had purchased them at a garage sale. However, her investigation revealed that the Cooper tires were a new model, introduced in 2012.

[49] Ms. Hansen prepared a report entitled, "Administrative Investigation Report into the Allegations of Misconduct - Terry Horne, Asset Support Technician (EG-03), Pacific Rim National Park Reserve" (Exhibit E-1, Tab 5a; "investigation report"), which was intended as a summary of the facts.

[50] Ms. Hansen set up a meeting for November 15, 2012, at the Kwisitis Visitor Centre. This was a relatively private location, away from Pacific Rim headquarters. She and Karen Haugen, Acting Superintendent, attended in person, and Ms. Davies, Field Unit Superintendent, attended by telephone. The grievor attended with his bargaining agent representative, Mr. McIntosh.

[51] At the November 15 meeting, Ms. Haugen presented the investigation report to the grievor and his bargaining agent representative and allowed time for a review of the document. After the grievor reviewed the document, he confirmed that the summary was correct. Ms. Hansen recorded his remarks in her notes (Exhibit E-9), which were that the report was correct and that “it is what it is.” She also noted that he stated the following: “Wish it could be redone but [sic] can’t.”

[52] Ms. Hansen testified that a termination letter had been prepared, based on the facts known to the respondent, before the meeting. If the facts had changed, the respondent might have taken a different approach; however, it presented its prepared letter of termination to the grievor, terminating his employment effective November 15, 2012 (Exhibit E-1, Tab 6).

b. Cross-examination

[53] Ms. Hansen testified that the photographs of the grievor’s vehicle with the Cooper tires were taken on May 15, 2012. At the time of the May 15, 2012, meeting, he was a person of interest in the respondent’s investigation as the Cooper tires on his vehicle were similar in nature to the tires in the LPOA.

[54] Ms. Hansen admitted that Jack’s Tires had given some conflicting information during her investigation.

[55] Ms. Hansen confirmed that she had reviewed notes made of the September 13 2012, meeting (Exhibit E-6) and that they were accurate but were a compilation of the notes of the respondent’s representatives at the meeting.

[56] Ms. Hansen confirmed that the grievor telephoned her prior to submitting a letter of retirement (Exhibit G-1). She testified that he had requested to put in his retirement and she told him that he could do that but she had no authority to accept it and it should be addressed to the delegated authority Ms. Davies.

[57] Ms. Hansen confirmed that she received a handwritten letter addressed to her and faxed by the grievor on or about November 2, 2012 (Exhibit G-1). The letter reads as follows: “I would like to submit the date of November 21, 2012 as my last day of work due to retirement.”

[58] Ms. Hansen confirmed that while she received it after the fact-finding meeting

of October 16, 2012, she confirmed that she did not ask for his resignation at the October 16 meeting. Ms. Hansen stated that she told the grievor that the respondent had options moving forward, which might include administrative action up to and including dismissal and the recovery of the value of the Cooper tires and that the theft might be taken to the police. She stated that he had options moving forward that he could discuss with his bargaining agent, which might include resignation. However, she did not offer that the grievor may resign to avoid disciplinary action.

[59] Ms. Hansen stated that she did not have the delegated authority to accept a resignation tendered by the grievor. She said that the ability to accept a resignation depends on the instrument of delegation. She said that only a level 3A manager has the authority to accept a resignation, and for the Coastal B.C. Field Unit, it was Ms. Davies. Ms. Hansen stated that Ms. Davies made the decision to terminate the grievor. She is aware that Ms. Davies was provided with the investigation report (Exhibit E-1, Tab 5a) as well as with advice.

[60] The bargaining agent's representative sought to elicit advice given by Ms. Hansen to Ms. Davies, the respondent objected. The bargaining agent's representative argued that the case rested on the advice given to Ms. Davies. The respondent's representative argued that irrespective of advice, a case had to be determined on the facts. I determined that a privilege applied. I note that the parties did not provide me with any authorities on this point during argument at the hearing.

[61] A labour relations privilege extends to advice given by a labour relations specialist to a manager as it meets the "Wigmore conditions." These have been expressed in Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., at para 3:4340. (1) The communications must originate in a confidence that they will not be disclosed. (2) The element of confidentiality must be essential to the full and satisfactory relationship of the parties. (3) The relationship must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[62] I noted at the hearing that this case turned on the facts proven and on an assessment of the applicable law, irrespective of any advice Ms. Davies received from Ms. Hansen. I note that managers ought to be able to seek out advice of labour relations advisors and be assured that the advice is confidential, in order to ensure

that employees are fairly treated for example during investigations or in decisions arising from investigations. Likewise an employee ought to be able to seek the advice of his bargaining agent without fear of the risk that such advice will be compellable at a hearing. In my view the injury that would be caused by the disclosure of the information far exceeds the benefit of disclosure of advice which is not particularly relevant to the assessment of facts proven and law.

[63] Ms. Hansen stated that Ms. Davies knew that the grievor was on leave at the November 15, 2012, meeting. Ms. Hansen was unaware of whether Ms. Davies knew that the grievor had taken stress leave that year. Ms. Hansen stated that Ms. Davies was aware that the grievor had tendered his resignation before the November 15, 2012 meeting.

[64] Ms. Hansen stated that nothing was on file concerning a disciplinary record for the grievor. She also stated that documents were kept for only two years, unless there was a subsequent action within the two-year period. He had a discipline-free record.

[65] The bargaining agent made an application for the production of all the materials that Ms. Hansen used to refresh her memory. One was a day book or diary that included matters unrelated to this grievance. I ordered that the entries for April 21, 2012, and May 15, 2012, with any irrelevant materials blacked out, be produced to the respondent's counsel, with a view to determining whether there was any objection based on privilege. The material was to be provided to the bargaining agent's representative the next day. While it largely appeared to be an application in the nature of a fishing expedition, the grievor was entitled to test the evidence of Ms. Hansen, subject to the proviso that there was a need to protect or preserve documents that were in the nature of policy advice or documents unrelated to the grievance. On the next day, the bargaining agent raised no further issues concerning disclosure.

[66] Ms. Hansen stated that the grievor had made a telephone request to her concerning retirement. She said that he could put it in writing but that she had no authority to accept it. The date of the telephone call is not before me in evidence, but it must have occurred at some point between the October 16 fact finding meeting and the grievor's termination on November 15, 2012.

[67] In re-examination, Ms. Hansen stated that at no time did the grievor raise a

medical or stress defence concerning taking sick leave.

4. Ms. Davies' testimony

a. Examination-in-chief

[68] Ms. Davies was Field Unit Superintendent in 2012 and was classified at the PCX-03 group and level. She reported to Mr. Anderson, Vice President of Operations, Northern and Western Canada for the respondent.

[69] Ms. Davies said that a high level of trust is required for the asset technician position. She said given the operational nature of the position and the geography of Pacific Rim, it is not possible to modify the nature of the duties; the asset technician must exercise all the duties, which include a purchasing authority of up to \$25 000. The position includes the responsibility for managing external contracts as well as access to all buildings. The position has responsibility for the purchase and inventory of all marine and terrestrial assets. Ms. Davies said that she does not trust the grievor because he stole the Cooper tires and deceived the employer for more than five months. She said that he did not live up to his oath of office and that he violated his authority under the *FAA*.

[70] Ms. Davies said that the matter first came to her attention through a briefing on May 15, 2012. At the time, she believed it was a very serious allegation. She said that it was critically important to carry out a full investigation and not to rush to judgement. She directed Ms. Hansen to work with the asset manager and park superintendent to investigate the allegations.

[71] Ms. Davies said that over the course of five months, the respondent conducted an investigation, which included emailing all employees, an audit, a physical inventory of assets, research, and contact with Jack's Tires. The material was gathered by September 12, 2012, and the grievor was invited to a fact-finding meeting. Ms. Davies understood that at this meeting, after the respondent's material was shared with the grievor, he explained that he had purchased the Cooper tires at a garage sale. When he was asked for further information, he provided very general details.

[72] Following the September 13, 2012, meeting, the respondent engaged in further investigation. In October, the grievor's bargaining agent representative, Mr. McIntosh, contacted Ms. Hansen and indicated that the grievor wished to make a statement.

[73] Ms. Davies stated that throughout the investigation, she was briefed regularly. She gave the direction to investigate, but she had no direct contact with the grievor.

[74] Ms. Davies stated that she was briefed concerning the outcome of the October 16, 2012, meeting and that, at that time, she weighed the information she had. She saw it as a very serious matter, which continued over a period of five months, during which the grievor had not stepped forward to take responsibility but had pointed his finger at others.

[75] The grievor received an email notice of the November 15, 2012, meeting (Exhibit E-12). The salient part of that email reads as follows:

...

Re: Administrative Investigation into Alleged Misconduct

We would like to schedule a meeting for final clarification and review of facts and to follow-up on your request for a decision as soon as possible.

As you have been on sick leave, we ask that you confirm you are well enough to attend a meeting with the employer, which can be scheduled as early as Thursday November 15, 2012

...

[76] The grievor confirmed that he was able to attend the meeting (Exhibit E-12).

[77] Ms. Davies stated that at the November 15, 2012, meeting, the grievor was provided with the investigation report and was afforded time — 15 minutes — to review it. The conference call terminated, and Ms. Davies later phoned back to determine if the grievor had any further questions or information. As the grievor provided no further information, she terminated him, effective the end of the business day. She provided him with the termination letter (Exhibit E-1, Tab 6). She also sent a letter to the Coastal B.C. Field Unit advising it of the termination and advising it to take appropriate compensation actions (Exhibit G-2).

[78] Ms. Davies stated that the outcome of the investigation was not predetermined but that the termination letter was prepared in advance. She stated that if new information had been presented, she would have been prepared to consider it.

[79] Ms. Davies stated that the rationale for not suspending the grievor during the course of the investigation was that the respondent removed his LPOA and his acquisition card and monitored his actions. She stated that this was sufficient to protect the employer's interests, and suspending the grievor was not warranted.

[80] However, Ms. Davies was not prepared to keep those measures in place indefinitely, as the allegation was a breach of trust. Once the respondent became aware of the fullness of the situation after the September and October meetings, it considered that the breach of trust was so profound that a suspension was not an option and that termination was the only appropriate sanction. Ms. Davies stated that she considered the option of demoting the grievor and concluded that positions in the federal public service require trust and ethical integrity, regardless of the position. To Ms. Davies, demotion was not an appropriate employer response.

[81] Ms. Davies testified that she considered the 27 years of service given by the grievor and his discipline-free record and that he had been under some pressure at the relevant time.

[82] Ms. Davies stated that she considered accepting the grievor's letter of resignation. She stated that a disciplinary process was underway and that it was appropriate for that process to continue, particularly given that the grievor had not stepped forward over the five-month period. She stated that she believed it was premature to accept the November 2, 2012, letter of resignation when the respondent had not presented the results of its investigation to the grievor. Ms. Davies stated that the ethical thing to do was to continue with the process to its conclusion.

[83] Ms. Davies stated that according to the "Interim Modifications to the Instrument of Delegation of Human Resources Authorities" (Exhibit E-11), the authority to accept a resignation or a withdrawal of a resignation was delegated to a manager at the 3A level.

[84] Ms. Davies stated that the grievor did not raise any issue about sick leave or about being unable to attend any of the meetings.

[85] Ms. Davies stated that she believes that the grievor violated the following sections of the *Parks Canada Agency Code of Ethics* (Exhibit 1, Tab 7, p. 7 to 9):

...

- *Professional Qualities:* Serving with competence, excellence . . . and impartiality.

...

- *Within the scope of their authority, all Parks Canada employees must ensure the proper, effective and efficient use of public money.*

...

- *Ethical Qualities:* Acting at all times in such a way as to uphold the public trust.

...

- *All Parks Canada employees shall act at all times in a manner that will bear the closest public scrutiny.*

- *All Parks Canada employees shall, in fulfilling their official duties and responsibilities, make decisions in the public interest. If a conflict should arise between their private interests and their official duties, employees will resolve the conflict in favour of the public interest.*

...

- *All Parks Canada employees shall treat public property with care and respect, recognizing that it belongs to the people of Canada.*

...

[86] Ms. Davies stated that the *Parks Canada Agency Code of Ethics* forms part of an employee's conditions of employment (Exhibit 1, Tab 7, p. 11). She stated that the grievor signed an *Oath of Allegiance* and *Oath of Office and Secrecy* (Exhibit 1, Tab 1a) and that he has violated the requirement that he honestly fulfill his duties.

b. Cross-examination

[87] Ms. Davies testified that Ms. Hansen kept her informed of the investigation. She stated that she did not know whether the grievor had a bargaining agent representative present at all his meetings with Mr. Stevenson before the September 13, 2012, meeting.

[88] The grievor's representative questioned Ms. Davies about the termination letter (Exhibit 1, Tab 6), which referred to handing in all equipment and items belonging to the respondent, when the grievor had already handed them all in in October. Ms. Davies stated that it was her responsibility to ensure that this was done. She said

that she was not aware of whether it had already occurred, and she thought it important not to assume that it had already been done.

[89] Ms. Davies was not aware that the grievor's doctor had advised him not to attend the November meeting with the employer. No evidence was tendered on this point during the grievor's testimony.

[90] Ms. Davies agreed that there was nothing wrong with the form of the grievor's letter of resignation, but she did not acknowledge it or respond to it. She has the responsibility to deal with resignations. She said that issues of termination and demotion come through her, but retirements do not. She stated that the delegated manager can accept a retirement.

[91] Ms. Davies agreed that she believes that it is important for employees to come forward with a "confession" in a trusting work environment.

[92] Ms. Davies was asked why she did not see the grievor's "confession" as a mitigating factor. She responded that he had numerous opportunities to come forward and that his response was wilful deception. She said that he came forward only when the evidence was piling up and it looked like he would be caught.

[93] Ms. Davies was asked whether any further irregularities were found in the audit. Ms. Davies replied in the negative but stated that the inventory was poorly kept.

[94] Ms. Davies was aware that the grievor had earned sick leave credits and was on sick leave at the time of his dismissal, but she was not aware of the extent of his earned credits. She stated that he did not raise any issues about a medical condition impacting his health at the meeting of November 15, 2012, or in its scheduling. Ms. Davies stated that she expected that if the grievor had concerns about being able to attend the meeting, he would have communicated those concerns. She was not aware of any health history for the grievor.

[95] Ms. Davies agreed that while the grievor was on sick leave, he was not a threat or risk to the respondent's assets.

[96] Ms. Davies was asked why the grievor was terminated on November 15, 2012, when he was not posing a risk to the respondent's assets, and she replied that it was important to have timely resolution to the issue and that it had taken five months to

diligently investigate the matter.

[97] Ms. Davies stated that the respondent strives to impose discipline based on the facts of the case and the management issue involved.

[98] Ms. Davies did not know whether the grievor's letter of resignation was transmitted to the respondent's compensation advisors. She did not accept or deny the resignation but took it into consideration as part of the bigger investigation that was underway.

[99] Ms. Davies was asked whether the grievor's entitlement to severance pay was taken into account in the decision to terminate him. Ms. Davies said that the amount was not taken into consideration, but she considered whether it was appropriate to substitute a suspension or resignation for a termination.

[100] Ms. Davies was asked whether she asked for a calculation of the grievor's severance pay entitlement. Ms. Davies stated that she believed it was in the range of \$30 000.

[101] Ms. Davies confirmed that nothing short of termination would have sufficed in these circumstances.

[102] Ms. Davies confirmed that the grievor expressed remorse and apologized at the October 16 2012, meeting. She confirmed that the respondent was concerned that he did not come forward sooner. She confirmed that he ensured that there could be no repeat of the situation by giving up his keys and codes to Mr. Stevenson on October 16, 2012. At no time did the respondent take steps to revoke the grievor's security status.

c. Re-examination

[103] Ms. Davies indicated that the Interim Modifications to the Instrument of Delegation of Human Resources Authorities (Exhibit E-11) was in place for several months before the grievor's termination.

5. The grievor's testimony

a. Examination-in-chief

[104] The grievor confirmed that he had the Cooper tires placed on his vehicle without the respondent's knowledge or consent. At the time, his intention was to keep them on his vehicle for four to five months, at which time he would have been able to replace them. He testified that it was extremely poor judgement and stupidity on his part.

[105] The grievor explained that he had some issues in his family life that depleted his financial resources.

[106] The grievor claimed that he had some trust issues with Mr. Stevenson and that he did not disclose his conduct when Mr. Stevenson asked him about the Cooper tires. He also said that this was not an excuse and confirmed that he lied to Mr. Stevenson.

[107] The grievor provided the LPOA and credit card to Mr. Stevenson when he asked for them in May 2012.

[108] The grievor stated that the whole situation was eating him up and that he took leave in September 2012 as his blood pressure was elevated and he was experiencing stress. He confirmed that this was a result of his own conduct and that it was not due to anything else occurring at his work.

[109] The grievor said that the only way he could reconcile everything was to come clean, so he contacted Ms. Davies after he consulted with Mr. McIntosh, his bargaining agent representative. Ms. Davies asked him to write out his statement and to bring it to a meeting that she would organize.

[110] The grievor attended the meeting on October 16, 2012, at which he explained some things that had been going on in his life and took responsibility for his actions. He suggested that the respondent change his security codes and assisted the respondent in doing so.

[111] Following the October 16 meeting, the grievor stated that he talked to his bargaining agent about his options, one of which was resignation. His bargaining agent reiterated that the respondent had options which included disciplinary action up to

termination and it could also go to the police. The grievor spoke to his doctor, who gave him a note stating that he should not return to work. I pause to note that this note was tendered as part of the evidence.

[112] The grievor talked to, in his words, the “superannuation people” and asked them how he could go about collecting his pension. He was advised to give notice to the respondent. He asked whether November 21, 2012, would work for the respondent, and he was told that that was sufficient time. He contacted Ms. Hansen by telephone on November 2, 2012, and told her he would like to put in his resignation. The grievor stated that he asked whether it would be accepted. He said that Ms. Hansen told him that she did not have the authority to accept his resignation; it would have to go up the management line. The grievor said Ms. Hansen told him that his resignation would be viewed favourably. This portion of the grievor’s evidence, about a favourable view of his resignation, was never put to Ms. Hansen in cross-examination.

[113] The grievor stated that Ms. Hansen phoned him a couple of days before the November 15 meeting and asked him if he could attend a meeting and about his state of mind. He stated that he was on stress leave but that he would attend the meeting if it meant a resolution could be found.

[114] The grievor stated that he had nothing to add to the investigation report (Exhibit E-1, Tab 5a), as for the most part, it was factual. He confirmed that Ms. Haugen gave him the termination letter (Exhibit E-1, Tab 6).

[115] The grievor stated that he did not receive a reply to his request to resign or any explanation from the respondent as to why it had not accepted his resignation.

[116] The grievor stated that he decided to file a grievance because he acted on an option that the respondent presented to him and later reneged.

[117] After the October 16, 2012, meeting, he did not hear anything more from Mr. Stevenson about his security status, and he could still enter the Pacific Rim reception office, like anyone else. The grievor stated that during his last year of employment, he worked without identification and with an expired security status.

[118] The grievor stated that he does not want to return to work for Parks Canada. He confirmed that he paid the respondent back for the cost of the Cooper tires about a week-and-a-half after the October 16, 2012, meeting.

[119] The grievor stated that he was to move out of staff housing by December 15, 2012, but that he left by December 1, 2012.

[120] In response to a question from his representative as to whether he would learn his lesson if the adjudicator reduced the penalty, the grievor indicated that he has learned his lesson and that he continues to live with what he has done. He appeared generally upset and remorseful.

[121] The grievor said that after the May meeting with Mr. Stevenson, he did not have any instruments to purchase but still had his purchasing authority. He had the authority to sign and approve invoices, but any purchases had to go through Mr. Stevenson.

[122] The grievor stated that he did not avoid phone calls from Mr. Stevenson but that he was sick at the relevant time and was staying with his girlfriend in Port Alberni and effectively was engaged in telephone tag with Mr. Stevenson.

b. Cross-examination

[123] In cross-examination, the grievor stated that Jack's Tires is located in Port Alberni, about 85 kilometers from Pacific Rim headquarters. The drive can take from less than an hour up to an hour and twenty minutes, depending on traffic.

[124] The grievor confirmed that he bought the Cooper tires with the intention of trying them on the rangers' vehicles. He confirmed that he did not seek Mr. Stevenson's permission before buying them. He did not recall being required to inform Mr. Stevenson when he made purchases.

[125] The grievor confirmed that he made the decision to put the Cooper tires on his vehicle on April 18 or 19, shortly after picking them up. He denied considering doing so when he purchased the tires. He said that it was a time of year when the respondent stocked up on tires that they might not have money for later in the year.

[126] The grievor agreed that Mr. Stevenson raised the issue of the Cooper tires at many meetings and that he never grieved the issue of the lack of a bargaining unit representative at any of the meetings.

[127] The grievor said that in his mind, Ms. Hansen made an offer for him to resign at the October 16 meeting. He could not specifically recall the words that she used. He recalled what was in the minutes, which was that the employer could have taken action up to and including termination and that it could have reported the theft to the police.

[128] The grievor confirmed that Ms. Hansen told him that she did not have the authority to accept his resignation.

[129] The grievor could not recall whether he ever returned to work from sick leave after the September meeting.

C. Summary of the arguments

1. For the respondent

[130] The respondent stated that it has established just cause for terminating the grievor, on a balance of probabilities. All three elements of the reasons for dismissal have been established. The respondent argued that this is ultimately a quantum of discipline case, and the adjudicator should not interfere with an employer's decision unless it is unreasonable or wrong, just because he or she might assess a different sanction. Discipline is an art and not a science; see *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119; and *Wilson v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-25841 (19950301).

[131] The respondent stated that a case in which a grievor immediately confesses to misconduct is substantially different from this case, in which a huge delay passed before the confession, dishonesty and finger pointing at others. When the grievor stated that others had access to the cold storage, that any vehicle that used 15-inch rims could have used the Cooper tires and that 90% of the respondent's vehicles used these rims, he was finger pointing.

[132] The grievor made a contrition of convenience when he knew that the evidence was piling up. He made it five months after his initial explanation, when it was clear that his false explanations were not convincing to the employer.

[133] The grievor breached sections 32 and 34 of the *FAA*. Those sections reach back to the will of Parliament, and persons with spending authority must authorize

payments. This type of case is akin to conflict of interest cases, such as *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62.

[134] There is no dispute that absent serious mitigating circumstances, fraud and theft are very serious employment offences, justifying termination of the employment relationship; see *Spawn v. Parks Canada Agency*, 2004 PSSRB 25, at para 275, 279 and 280. *Spawn* was a case of theft in which the grievor was reinstated, but it was factually distinct, as at the time of the offence, the grievor suffered from depression, was candid and did not conceal his involvement.

[135] The facts in this case were serious, and the grievor's actions were premeditated; thus, discharge was warranted; see *Moore v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-23658 (19940317); and *Zakoor v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-25882 (19941121). Honesty is a core value of employment in the public service, and termination is justified when a breach of trust occurs, due to theft; see *Renouf v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File Nos. 166-02-27766 and 27865 (19980608), at pages 2, 8 and 9.

[136] The respondent relied on the following excerpt from *King v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-25956 (19950125), at page 32:

...

Clearly the arbitral jurisprudence recognizes discharge as an acceptable penalty in cases where an employee defrauds his/her employer. Accordingly, I am satisfied that the penalty imposed in the instant case was within the parameters open to the employer. As already indicated the grievor was employed in a position of trust that required a high level of honesty and integrity. The deceit and fraud committed by the grievor has effectively destroyed the bond of trust required of that position. . . .

...

[137] Sympathy for the grievor alone is not a sufficient reason to modify an employer's decision if the employer has considered all the relevant factors and has concluded, not unreasonably, that it can no longer trust the grievor; see *Fauteux v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File

No. 166-02-26211 (19950620); and *Gannon v. Treasury Board (National Defence)*, 2002 PSSRB 32.

[138] If a grievor alleges that he or she has acted in a moment of confused thinking, it is helpful to assess and consider the detailed steps that the grievor must have taken in order to commit the employment-related offence; see *Bisson v. Treasury Board (Canadian Transport Commission)*, PSSRB File Nos. 166-02-15706 and 15707 (19860623).

[139] It is not manifestly unjust or unreasonable for an employer to terminate an employee who took items from it for personal or for others' use; see *Lynch v. Treasury Board (National Defence)*, PSSRB File No. 166-02-27803 (19971114).

[140] If there is any dispute about just cause for the termination in light of the grievor's long service of 27 years and his lack of a disciplinary record, it is laid to rest by the grievor's dishonesty during the employer's investigation of the missing tires. After the initial false story, the grievor's story became more elaborate; he created detail to mislead the employer, and he pointed his finger at others. The employer pointed to the unchallenged evidence of Mr. Stevenson.

[141] The respondent stated that the grievor has a duty of good faith and fidelity that is owed to the employer and that lack of candour in an investigation is a serious matter to consider when assessing the weight of other mitigating factors; see *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124. The grievor's lack of forthrightness and inaccurate and misleading statements made during the course of the investigation were determinate factors going to his rehabilitation and to the bond of trust; see *Brazeau*, at para 191. Lack of cooperation with an employer's investigation may irreparably break the bonds of trust; see *Way v. Canada Revenue Agency*, 2008 PSLRB 39.

2. For the grievor

[142] The grievor argued that this would be an open and shut case but for his resignation.

[143] The grievor submitted that if the employer had not put the resignation option on the table, he might not have resigned. The notes of the meeting of October 16, 2012 (Exhibit E-7), demonstrate that the respondent put this option on the table.

[144] The grievor was not vague or evasive about his admission of wrongdoing at the October 16, 2012, meeting, as he made it orally and in writing.

[145] The grievor stated that there was no need for witnesses to be called to prove his misconduct as he has admitted to it. He did not commit three separate employment offences; there was only one theft, of tires. He did only one thing wrong in his 27 years of employment.

[146] The grievor was not in a position of trust when he was terminated. He was on sick leave, and the employer had removed his purchasing instruments. He submitted that the element of trust is irrelevant because he was not in the workplace and because he does not seek reinstatement.

[147] It stretches credibility to suggest that the grievor pointed his finger at anyone else.

[148] At a series of meetings in May, the grievor had no bargaining agent representation, and it is shady to say the least that the respondent continued its investigation when it knew all the facts. The employer had no more information in its possession in September or October 2012 than it had had in May 2012. The grievor confessed at the first opportunity, which was in October 2012.

[149] The grievor argued that the penalty of termination was outrageous in the circumstances of him admitting to the misconduct and communicating his intention to retire. There was no corrective aspect to the discipline; it was purely punitive. It was manifestly unjust and unreasonable.

[150] The grievor argued that termination was an inordinate punishment in the circumstances of this case.

[151] The grievor argued that in a discipline case, an adjudicator must determine whether the employee has actually done something requiring discipline, and if so, whether the discipline imposed violates the relevant collective agreement; see Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., at para 7:0000.

[152] In *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162* (1976), [1977] 1 Can. L.R.B.R. 1 (“*William Scott*”), which refers to *United Steelworkers of America, Local 3257 v. The Steel Equipment Co. Ltd.* (1964),

14 L.A.C. 356, three questions are set out for consideration in a discipline case, which the grievor's representative simplified to the following:

- (1) Did it happen?
- (2) Was the punishment properly invoked?
- (3) Was the penalty appropriate?

[153] The grievor argued that he had a good record and that it was an isolated incident in a 27-year employment history. His evidence was uncontradicted that he needed the Cooper tires. In terms of the seriousness of the offence, in the *Spawn* case, which involved a Parks Canada employee and an allegation of theft, one employee was demoted, and one was allowed to retire. The respondent has never provided an adequate explanation as to why the grievor's resignation was not accepted.

[154] The grievor submitted that it was a serious offence but that it was not premeditated, and he did not have a disciplinary record. The respondent singled him out for termination but did not treat the firefighters in *Spawn* the same way.

[155] The grievor argued that deterrence can be a factor in assessing a disciplinary sanction but that the reasonableness of the penalty should be considered. In this case, there was no history of similar misconduct by other employees and, therefore, no need to generally deter others from similar misconduct. Deterrence could have been accomplished by a less serious sanction. The grievor relied on *Brown and Beatty*, at para 7:4500.

[156] The grievor referred to *Friole v. Treasury Board (Solicitor General of Canada - Correctional Service)*, 2002 PSSRB 85, which contained a list of cases in which adjudicators did not uphold dismissal as the only possible sanction. In this case, dismissal was an excessive penalty, and all the respondent needed to do was to note on the grievor's record that he had committed the offence.

[157] The grievor relied on *Canada Safeway Ltd. v. United Foods [sic] and Commercial Workers Union, Local 401*, [1998] A.G.A.A. No. 88 (QL), in which termination was held to be an excessive penalty if a grievor immediately confessed to a theft.

[158] The grievor also relied on *Foothills Provincial General Hospital v. Alberta Union*

of *Provincial Employees, Local 055*, [1999] A.G.A.A. No. 41 (QL), in which the arbitrator found no need to terminate an employee when an employer failed to prove that the employee intended to steal property.

[159] The grievor argued that there is a long-standing rule that just as the employer is the only party who can dismiss an employee, an employee is the only party who can resign; see *Brown and Beatty*, at para 7:7100. The grievor referred to section 63 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13, which reads as follows:

63. *An employee may resign from the public service by giving the deputy head notice in writing of his or her intention to resign, and the employee ceases to be an employee on the date specified by the deputy head in writing on accepting the resignation, regardless of the date of the acceptance.*

[160] The respondent gave the grievor an option to resign. He gave a clear intent to resign verbally and by letter. The employer had no ground to terminate him, as he had resigned.

[161] The employer had the onus to establish that the grievor did something wrong and the onus to establish that the penalty was correct. There is no evidence that another penalty would not have established its concern. A short suspension and a letter of reprimand would have been sufficient to meet its concerns.

3. Respondent's rebuttal

[162] The respondent submitted that the proper test is determining whether the termination was manifestly unreasonable.

[163] The employer assessed just cause against the employment offence and the duties assigned to the position. The assessment was not with respect to the position modified by the interim measures the respondent put into place for its protection.

[164] The grievor could not argue a lack of bargaining agent representation as a defence in this case as it was not raised in the grievance; see *Shneidman v. Canada (Attorney General)*, 2007 FCA 192, at para 12 and 26 to 30. The respondent submitted that the meetings between Mr. Stevenson and the grievor in May 2012 were not disciplinary in nature, and no grievance was filed about a lack of bargaining agent representation.

[165] The respondent did not argue that the grievor evaded Mr. Aldag's inquiries by failing to respond to his calls in September 2012. However, the respondent stated that the grievor must have been aware that the investigation was closing in on him.

[166] The respondent submitted that each case must be considered on the applicable facts and law. Prior discipline issued by the respondent in *Spawn* related to the facts of the case in *Spawn*.

[167] The respondent submitted that deterrence can be an important factor in assessing an appropriate disciplinary sanction.

[168] The respondent did not accept the grievor's resignation, which is a requirement of the instruments of delegation. The grievor's authority, Brown and Beatty, at topic 7:7100, demonstrates that it is open to an employer to refuse a resignation.

[169] Looking at the facts, the grievor's dismissal took place before the effective date of his resignation.

[170] The respondent submitted that it is a separate employer, that its authority over terms and conditions of employment is broadly defined, and that it may do anything not specifically or inferentially prohibited by statute; see *Peck v. Parks Canada*, 2009 FC 686, at para 32 and 33.

[171] In cases of serious misconduct, an employer should be able to proceed with the termination of an employee, as termination is a management right. There is supporting authority that termination is a management right in the *Parks Canada Agency Act*, S.C. 1998, c. 31, s. 13, as follows:

HUMAN RESOURCES

13. (1) The Chief Executive Officer has exclusive authority to

(a) appoint, lay-off or terminate the employment of the employees of the Agency; and

(b) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of employment otherwise than for cause, of employees.

...

(3) Subsections 11.1(1) and 12(2) of the Financial Administration Act do not apply with respect to the Agency and the Chief Executive Officer may

...

(c) provide for any other matters that the Chief Executive Officer considers necessary for effective human resources management in the Agency.

[172] The respondent stated that it is not obliged to accept the resignation of an employee under active investigation.

[173] There is no evidence that termination was a contrived mechanism used by the employer as an abuse of its rights.

[174] Furthermore, while Ms. Hansen did not make a resignation offer to the grievor, at any rate, she had no authority to make such an offer, and therefore, even if it was made, it has no effect.

4. The grievor's further reply

[175] The grievor argued that the delegated authority is different under section 63 of the *Public Service Employment Act*. The *Parks Canada Agency Act* does not contain that section 63, and it should not be read into that legislation.

III. Reasons

A. Tendering a resignation or retirement during the investigation

[176] The grievor testified that he filed the grievance because the respondent allegedly tabled an option for him to resign. I do not accept his testimony that this was an offer made by the respondent.

[177] A substantial difference exists between the grievor's testimony and the testimonies of other witnesses, in particular, Ms. Hansen, on the issue of whether the respondent asked him to resign. I have considered and applied the following credibility test, found in *Faryna v. Chorny* (1961), [1952] 2 D.L.R. 354, at page 357:

...

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the

test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

...

[178] I accept that there was discussion of options moving forward - the respondent had options and the grievor had options. I do not accept the grievor's testimony that Ms. Hansen made an offer on behalf of the respondent that he could resign. In assessing the circumstances prevailing at the relevant time, I observe that before the meeting of October 16, 2012, the respondent had a strong circumstantial case supporting terminating the grievor for theft and fraud and for misleading the employer during the course of the investigation. After the meeting of October 16, 2012, the respondent had a strong case for dismissal.

[179] Ms. Hansen is a very experienced human resources manager. There is no doubt that she said that the respondent would be moving ahead and that its findings could include actions up to dismissal. She also indicated that the grievor might wish to contact the EFAP and consult with his bargaining agent. If the respondent had asked for the grievor's resignation or had tabled an offer that he resign, it would have been

made in clearer terms and on a conditional basis, subject to obtaining the authority from a properly delegated person, who in this case was Ms. Davies. Ms. Hansen was well aware that she did not have the delegated authority to dismiss an employee or to accept an employee's resignation and she was aware that Ms. Davies had that delegated authority. I note that the grievor did not cross-examine Ms. Hansen on his evidence that he discussed providing a resignation on the phone on November 2, 2012 and that Ms. Hansen said that the respondent would have looked favourably on a resignation.

[180] The grievor appears to have a substantial financial interest in the outcome of this grievance, whereas Ms. Hansen has no financial interest.

[181] It may well be that after taking advice from his bargaining agent, the grievor concluded that it was in his financial interest to resign, but that is a far cry from the respondent offering to accept his resignation if he chose to resign. I see the grievor's testimony as simply part of his continuing deception. At no time did Ms. Hansen make an offer to the grievor to resign to avoid the consequences of termination or advise the grievor that the respondent would accept the grievor's resignation. Mr. Aldag's notes of the meeting on October 16, 2012, contain comments by Ms. Hansen about options which in my view were in the nature of comments to bring closure to this meeting. They were made at a point when the respondent had all it needed to move forward to consider the information presented by the grievor at the meeting. Ms. Hansen had obtained the grievor's admissions concerning the theft and conversion, The grievor added more information than he had set out in his October 16, 2012 statement (Exhibit E-1, Tab 5). He added that the tires were installed on rims at Jack's Tires during the last week of April 2012. He also advised the respondent that he took the tires because he had some issues in his family life that depleted his financial resources. Ms. Hansen suggested that the grievor contact the EFAP and stated that there were issues that the respondent had to deal with and options that he could discuss with his bargaining agent. I note that this was a fact finding meeting and none of the persons present had the authority to terminate the grievor or accept a resignation. The respondent seemed committed to pursue its process to a conclusion.

[182] The grievor lied and manipulated the respondent during the course of the investigation and the respondent's allegations are of dishonest and fraudulent conduct. I am mindful of the court's comments in *Faryna* as to the care needed in

evaluating the evidence of persons who are "...quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. . . ." In my view, the grievor's testimony about his perception that the employer tabled an offer was simply motivated by an attempt to obtain a substantial severance payment to which he would have been entitled had his employment not been terminated by the respondent.

[183] This grievance appears to have been driven primarily by the grievor's desire to receive severance pay under the relevant collective agreement in the amount of about \$30 000. His grievance reads as follows:

I grieve the letter of termination of employment dated November 15, 2012 signed by Helen Davies - Field Unit Superintendent which was effective on November 15, 2012. Level 2 (final level) consultation is requested on this grievance with Denis J. McCarthy, Special Advisor, Union of National Employees (UNE), Ottawa, Ont.

[184] It appears that during the grievance process, his concern was specific to the Field Unit Superintendent not accepting his request to retire, which would have allowed for severance pay. This is apparent from the final-level decision of Tracy Thiessen, A/Vice-President Operations, Western & Northern Canada:

...

It is noted that prior to the termination of your employment you acknowledged that the summary of facts surrounding this matter was accurate. At the final level consultation, it was presented that neither the termination letter nor the facts associated with this decision were contested. Your concern was specific to the Field Unit Superintendent not accepting your request to retire which would have allowed for severance pay as per the Collective Agreement. You acknowledged that there was no guarantee of your preferred outcome. No further information was provided in support this request.

...

...In light of the circumstances surrounding your misconduct, it would not be appropriate for me to substitute a suspension instead of termination so that you could retire from Parks Canada in order to collect severance pay.

...

[185] The grievor has argued that he should not have been terminated, as he resigned from his position. Generally, it is open for an employee to resign from his or her employment. An employer cannot compel an employee to perform work. This case does not involve the respondent compelling work as the grievor was on sick leave at the time of his termination. However, I note that he stated an intention to retire, which he communicated on November 2, 2012. His retirement was to be effective on November 21, 2012.

[186] This grievance raises the issue of whether resignation or retirement is effective on the terms communicated by a grievor or whether an employer must accept it before it becomes effective. Considering the terms of the grievor's resignation, it would not have become effective until November 21, 2012. It was open to him at any time before that to rescind his resignation, as the respondent had not accepted it.

[187] In my view, there is no legal obligation for an employer to accept a resignation or retirement tendered during an investigative process. It cannot compel an employee who has resigned to work, but that is not an issue in this case.

[188] I note that subsections 13(1) and (3) of the *Parks Canada Agency Act* read in part as follows:

HUMAN RESOURCES

13. (1) The Chief Executive Officer has exclusive authority to

(a) appoint, lay-off or terminate the employment of the employees of the Agency

. . .

(3) Subsections 11.1(1) and 12(2) of the Financial Administration Act do not apply with respect to the Agency and the Chief Executive Officer may

. . .

(c) provide for any other matters that the Chief Executive Officer considers necessary for effective human resources management for the Agency.

[189] The Interim Modifications to the Instrument of Delegation of Human Resources Authorities (Exhibit E-11) delegates to the 3A level — Ms. Davies for example — the authority to accept a resignation or withdrawal of a resignation, under “Termination of

Employment and Demotion.”

[190] The chief executive officer has a wide power of delegation, as noted as follows in subsection 12(4) of the *Parks Canada Agency Act*:

12. (4) The Chief Executive Officer may delegate to any person any power, duty or function conferred on the Chief Executive Officer under this Act or any other Act or regulation.

[191] The human resources management authority given to the respondent’s chief executive officer is a broad power and clearly can embrace resignations under paragraph 13(1)(a) “appoint, layoff or terminate the employment of employees” and the basket paragraph of “. . . provide for any other matters that the Chief Executive Officer considers necessary for effective human resources management”

[192] In my view, the grievor’s communication of his intent to retire did not deprive the respondent of its right to impose discipline for an employment-related offence committed during the course of his employment, at least while he remained an employee. I note that, particularly, the retirement notice was communicated after the respondent conducted a fact-finding session in September. The respondent did not request the grievor’s retirement, and it was not offered in exchange for the respondent ceasing its investigation. The grievor remained an employee of the respondent until the date he was terminated. Until then, he could have rescinded his retirement as the respondent had not accepted it. If the respondent had imposed a suspension or simply a warning, for example, on November 15, he could have immediately rescinded his notice to retire.

[193] For all the above reasons, in the circumstances of this case, I find that the notice given by the grievor to retire did not prevent the respondent from disciplining him with respect to his conduct. I note that neither he nor the respondent supplied me with any authorities as to whether the resignation became effective on the date it was delivered or on the date the respondent would have accepted it.

B. Just cause for the dismissal

[194] I must analyze this termination case in accordance with the usual approach, as set out as follows in *William Scott*:

- Was there conduct that gave rise to discipline?
- If so, was termination an excessive response in the circumstances?
- If so, what alternative remedy should be substituted?

[195] The respondent had the burden of proof of establishing the facts on a balance of probabilities. The facts are not substantially in dispute, although the witnesses were vigorously cross-examined.

[196] The grievor's argument about applying the *William Scott* questions is muddled. In assessing those questions, one has to assess the employment relationship between the parties at the time of the alleged misconduct. The grievor was employed as an asset support technician. He had a duty of integrity in that position. The respondent took interim steps to protect its position once the grievor's conduct raised questions concerning his honesty. It temporarily modified his duties by removing his purchasing instruments. It also monitored his performance. I have to consider the *William Scott* questions as applied to an employee who exercised a duty with respect to spending money, not an employee who was deprived of his purchasing instruments on a temporary basis and who, at the time of the termination, was out of the workplace, on leave. Clearly, at the time of the termination, the grievor presented little or no risk to the employer's operation, because he was not working. It is of course open to me to consider the grievor's conduct during the period of his modified duties in assessing issues of mitigating or aggravating factors, whether the response was excessive, or the consideration of substituting penalties.

C. Was there conduct that gave rise to discipline?

[197] There is no doubt that the grievor misappropriated the Cooper tires and lied during the course of the employer's investigation. There is no innocent explanation for possessing the tires. I find that the respondent established that the grievor's conduct gave rise to the need for discipline.

D. Was termination an excessive response in the circumstances?

[198] In my view, the disciplinary action was justified, in the circumstances. Any conversation about resignation did not detract from the employer's right to impose discipline for misconduct that occurred during the course of the grievor's employment.

[199] The grievor said that there was no reason to terminate him because he resigned, and he posed no risk to the employer because he was on sick leave and because it removed from him the instruments of purchasing. The respondent is entitled to consider whether he met the requirements to exercise his full job duties, including spending its money. However, the point is that the respondent was engaged in investigating the grievor's misconduct. It seems clear that the respondent did not respond to his letter of resignation. In my view, it was not bound to accept his resignation; it was open for it to continue its investigation and to terminate him for misconduct.

[200] The general thrust of the arbitral jurisprudence is that termination is a usual sanction for dishonesty, absent serious mitigating factors.

[201] The grievor was a long-term employee who engaged in dishonesty. He was entrusted by the respondent with purchasing powers. He dishonestly converted the Cooper tires to his possession. He lied during the course of an investigation. He caused the employer to make a more detailed and lengthy investigation than it should have had to do. He only admitted to the misconduct about a month after he was presented with uncontroverted facts, which was many months after his theft.

[202] The grievor has argued that there was a lengthy delay, which was prejudicial to him, but the facts are that the employer was careful in its investigation. It did not want to accuse the grievor until it had all the facts. The fact that the grievor did not steal anything else from the employer during the course of the investigation is irrelevant as the employer had removed all the grievor's purchasing tools.

[203] The employer is entitled to be able to trust an employee. In my view, it was substantially inconvenienced by the need to carry out an investigation and to function with an employee who was supposed to be able to engage in purchasing but whom they could not entrust with the usual purchasing tools.

[204] Dishonesty during an investigation is a serious employment offence. The dishonesty in this case relates also to a fundamental part of the employment relationship, which is purchasing government property. The respondent has to place substantial trust in its purchaser. There is no room for dishonesty in the purchasing or investigative process.

[205] The grievor had some seniority. He found himself in difficult circumstances and made the wrong choice. However, in my view, this cannot be characterized as a spur of the moment employment offence. The grievor first had to make the decision to convert the Cooper tires from government property to his benefit; he had to go to cold storage, put the tires in his personal vehicle, drive more than an hour to Port Alberni and arrange for their installation. That requires some degree of planning to avoid detection or at least the abuse of knowledge of workplace routines to avoid detection. He had many opportunities during the process when he could have disengaged and not completed the conversion of government property to his benefit.

[206] It is true that the grievor had no further incidents, but the respondent took interim protective measures, which removed the tools of purchasing from him. I regretfully conclude that the grievor has no rehabilitation potential.

[207] Obviously, the termination had a personal impact on the grievor and his family, and I am empathetic to those personal circumstances. It appears that one of his underlying concerns is that by terminating him, rather than accepting his resignation, the respondent disintitiled him to severance pay in the approximate amount of \$30 000.

[208] I find that termination was not an excessive response in the circumstances of this case. The employer's decision to terminate the grievor was not excessive. The bond of trust was clearly broken by his misconduct. The penalty was an appropriate one for theft of government property (extremely serious misconduct), deceiving the employer during the course of the investigation, and attempting to cast the blame on others when it was clear that he was caught.

[209] It is my view that termination was not an excessive response in the circumstances of this case and therefore it is not necessary to consider the question of another alternative sanction. I am not prepared to substitute a suspension simply to permit the grievor the option to retire and collect his severance pay. This was an option for the respondent to consider, and it chose not to.

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

(The Order appears on the next page)

IV. Order

[211] The grievance is dismissed.

March 13, 2014.

**Paul Love,
adjudicator**