Date: 20140319

File: 566-02-7020

Citation: 2014 PSLRB 32

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

SHELLEY HASSARD

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Hassard v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, adjudicator

For the Grievor: Stephen Moreau and Sharon Naipaul, counsel

For the Employer: Caroline Engmann, counsel

Heard at Toronto, Ontario,
August 19 to 22, 2013
Supplementary written submissions: February 6, 2014

I. Individual grievance referred to adjudication

[1] This is an individual grievance presented pursuant to section 208 of the *Public Service Labour Relations Act* ("the *Act*"). The grievor was formerly the director of the Enhanced Services Unit on Keele Street in Toronto of the Correctional Service of Canada (CSC or "the employer"). Her position was classified at group and level WP-06. It was a managerial position. In 2011, some of the grievor's actions came to be investigated as a result of a complaint made under the *Public Servants Disclosure Protection Act,* S.C. 2005, c. 46 (the *PSDPA*), sometimes referred to as the whistle-blower protection legislation. The investigation produced a report that was eventually reviewed by Lori MacDonald, then Acting Regional Deputy Director (Ontario) of the CSC in its Kingston office. Ms. MacDonald decided that discipline was in order. On October 14, 2011, she demoted the grievor to the non-managerial position of Ontario Senior Project Officer, at group and level AS-06, working at a different CSC office in Toronto. Rather than accept that position, the grievor retired on October 21, 2011. On November 16, 2011, she filed the grievance before me.

[2] In her grievance, the grievor stated the following, among other things:

a) that she was unjustly disciplined and unjustly demoted;

b) her demotion amounted to a constructive dismissal;

c) that she was unfairly treated by the CSC and by the investigation; and

d) that the CSC breached an agreement it had entered into with her, as follows (Exhibit G1, Tab 35):

> *Contract entered into, and offer made, for an option whereby the grievor could retire in exchange for no discipline being imposed; however, Correctional Services Canada reneged on the terms. of this contract and offer and attempted to make the grievor's retirement conditional on her signing a Full and Final Release of all rights in order to obtain the removal of discipline.*

[3] As the proceedings unfolded, the grievor added an argument that her retirement on or about October 21, 2011 had not been voluntary but instead had been coerced by the employer, who had planned all along to force her to retire when she did not want to.

[4] By way of remedy, the grievor sought the following ((Exhibit G1, Tab 35):

> *a) . . . reinstatement to original position of Director, Enhanced Services Unit with back pay and benefits from the date of the demotion to the date of reinstatement.*
>
> *b) General, aggravated and moral damages for stress, emotional distress, and loss of reputation.*
>
> *c) Strike/remove discipline and remove all disciplinary notes from file;*
>
> *d) In the alternative to* [removing disciplinary notes], *reduce or substitute the discipline imposed for a more reasonable penalty given the grievor's long, discipline-free employment history.*
>
> *e) Such further and other relief as is reasonable to remedy this grievance and to make the grievor whole.*

[5] The employer's position is that the grievor's retirement effective October 2011 was voluntary, not coerced. The grievor filed her grievance after she had retired and hence, after she had ceased to be an employee. The employer's position was that I had no jurisdiction to hear a grievance filed by someone who had voluntarily — by way of retirement — ceased to be an employee. In the alternative, if I did have jurisdiction, the employer stated that there is no room for the doctrine of constructive dismissal in cases involving public servants, that it was entitled to rely upon the findings set out in the investigation report and that the discipline imposed was entirely reasonable.

[6] There were two preliminary matters, one dealing with bifurcation, the other dealing with documentary exhibits and, in particular, a sealing order.

II. Bifurcation

[7] This matter originally came on before me on February 21 - 22, 2013 as a pre-hearing application to bifurcate the proceedings so as to deal first with the jurisdictional issue, among others, and then, if jurisdiction was found, to deal with the grievance on its merits. For reasons reported in 2013 PSLRB 29, I decided to split the proceedings into two stages. During the first stage, I would hear evidence and submissions concerning the following issues:

a) Does the common law doctrine of constructive dismissal apply to grievances governed by the *Act* so as to convert, potentially, the grievor's demotion into a termination within the meaning of the *Act*?

b) Was the grievor's resignation coerced, and if it was, does that give me jurisdiction to hear the grievance on its merits?

c) Can the grievor go behind the report, or are she and I bound to accept its findings as findings of fact?

III. Excluded documents and sealing order

[8] The first stage came before me in August 2013. At the start of the hearing, books of exhibits were entered into evidence by the grievor (Exhibit G1) and the employer (Exhibit E2). Counsel for the employer objected to some of the documents under certain tabs in Exhibit G1.

[9] One of the objections related to a document at Tab 6, which consisted of a memo to file by Mr. Moreau, counsel for the grievor, dated September 26, 2011. The memo purported to detail a conversation between Mr. Moreau and Ms. MacDonald. The memo constituted hearsay. It also would have made Mr. Moreau a witness in a matter in which he was also counsel. Given that the conversation related to an issue that was central to the dispute between the grievor and the employer, it would have been problematic for Mr. Moreau to act as both witness and counsel. In the end, the parties agreed to remove the document from Exhibit G1. Evidence concerning the conversation to which the memo related came up during the hearing and, as detailed later in this decision, was dealt with by way of a stipulation. One other document — Tab 34 — was removed by agreement. I did not read either document before they were removed.

[10] Exhibit G1 also contained a copy of an investigation report that had been prepared pursuant to the whistle-blower complaint made under the *PSDPA* (Tab 1), together with a detailed response to that report, which had been prepared and submitted by Mr. Moreau on October 6, 2011 (Tab 8). The parties agreed that given the confidentiality provisions of the *PSDPA,* it would be appropriate to issue a sealing order with respect to the report at Tab 1. I raised a concern that since Mr. Moreau's submissions at Tab 8 referred extensively to passages in the report, similar issues of confidentiality might be triggered. In the end, it was agreed that a sealing order with

respect to Tabs 1 and 8 ought to be issued, in part because of the confidentiality provisions of the *PSDPA* and in part because the substance of the report would not become an issue unless and until the hearing moved on to stage 2 in the event that the employer's objection to my jurisdiction were dismissed.

IV. The hearing

[11] In addition to the two books of documents mentioned earlier, the parties also entered into evidence a number of loose exhibits.

[12] On behalf of the grievor, I heard the evidence of the grievor and John Dixon.

[13] Mr. Dixon is a retired business person and a community volunteer supporter of the Keele Community Correctional Centre ("the Keele Centre") who had gotten to know Ms. Hassard through his volunteer activities.

[14] On behalf of the employer I heard the evidence of Christopher Staley, at the relevant time Regional Manager, Labour Relations CSC, and Lori MacDonald, at the relevant time Acting Regional Deputy Commissioner (Ontario), CSC.

[15] I should note that because of scheduling conflicts, two witnesses were called out of order. Mr. Staley was called on behalf of the employer during the grievor's case, and Mr. Dixon was called on behalf of the grievor during the employer's case. Had that not been done, there was a serious risk that the hearing might not have been completed during the four allotted days. Both counsel and the parties are to be commended for their cooperation.

[16] While there were a few areas of disagreement among the witnesses, most of their testimony pertained in large part to facts that were uncontested. Much of what was said had already been committed to writing by way of several pieces of correspondence, memos and email that were put into evidence. Overall, there was a great deal of agreement as to what happened and when it happened. That being the case, I do not see the need to provide detailed summaries of each witness's testimony. I prefer instead to simply set out my findings of fact, reserving my detailed analysis of the testimonies of the witnesses to those areas where their evidence diverged in material ways.

A. <u>The facts</u>

[17] The grievor first came to work in the corrections field in 1975, when she was hired by the then Parole Board as a parole officer. She worked in that capacity for 10 years. She then applied for and received a position as acting co-ordinator of community services. From that point, she was involved in management within the CSC. She was on maternity leave in 1990 and 1991, returning to work as Director of the CSC's newly formed Peele office in Mississauga, Ontario. She moved through a number of different management positions in the CSC in the Toronto area.

[18] The grievor has one daughter, who lives at home. She is currently enrolled in a master's program and is considering a Ph.D. after that. Ms. Hassard has supported and continues to support her daughter financially.

[19] On September 14, 1999, the grievor was offered — and accepted — the position of Director of the Keele Centre at the WP-05 group and level. Her salary was protected at the WP-05 group and level in accordance with a workplace adjustment directive (Exhibit E2, Tab 4). The Keele Centre houses high-risk offenders, many of whom are sex offenders, and works to assist them to rehabilitate themselves and reintegrate into the community.

[20] On or about July 24, 2001, her position was reclassified. Her title changed to Director, Enhanced Service Unit, at the Keele Centre, at the WP-06 group and level. Since she met the language requirements of the position, she was entitled to an annual bilingualism bonus of $800.00 (Exhibit E2, Tab 5).

[21] In 2005, the grievor's age and years of service satisfied "the rule of 85," which meant that she could, if she wished, retire with a full pension. She did not retire at that point because, she testified, she could not afford to. Her daughter was just finishing high school and intended to go to university. The grievor's mother was in hospital and required financial assistance. Moreover, the grievor enjoyed her work and had no interest in stopping work. She agreed that she did attend a couple of retirement seminars provided by the employer for employees who had reached or were close to retirement under the rule of 85. However, she maintained that it was only for information and financial planning purposes. She had no intention of retiring then or in 2011.

[22] On January 12, 2011, a complaint was filed against the grievor under the *PSDPA*. The complainant alleged that the grievor had breached the CSC's *Standards of Professional Conduct* between January 2007 and January 12, 2011. The complaint led to the issuance of a "Convening Order". The order created a "Board of Investigation." Pursuant to the terms of the Convening Order, the Board of Investigation was to investigate the complaint and report to Tim Leis, who was the CSC Senior Officer for Disclosure under the *PSDPA*. The Board of Investigation was chaired by Carla Di Cesno. John Sleziak was appointed to act as an investigator for the Board of Investigation.

[23] The grievor was advised of the complaint. She was, she said, "stunned." It was suggested that given the nature of the complaint, it might be better if she temporarily moved to the CSC office on Dundas Street, in Toronto. She agreed that it would be a good idea. She was also told not to communicate with any of the staff at the Keele Centre office while the investigation was ongoing. At the time, she thought that the investigation would take only a few weeks. In the end, it took six months.

[24] The investigation proved very stressful for the grievor. She also came to believe that staff at the Dundas Street office would be aware of what was going on at the Keele Centre, making it difficult for her to carry on with her duties. Her blood pressure spiked. She felt depressed by what was happening. In the end, she went on stress leave in February 2011.

[25] The investigation was indeed stressful. The grievor was interviewed five times by the Board of Investigation or its investigator over the course of the investigation. She was told that certain employees had complained about her conduct, but the identities of her accusers were not revealed. Some of the interviews took almost a day to complete. She testified that she was often questioned aggressively and in a condescending tone. She was permitted to have a support person during the interviews, but neither she nor the support person was permitted to ask questions or challenge the information that the unnamed sources had provided to the Board of Investigation. At one point, Mr. Dixon, who was one of the grievor's support people, interjected during one of the interviews. The grievor testified that the investigator told him to be quiet and "just listen." He was not permitted to ask questions. Mr. Dixon agreed that that had occurred.

[26] The Board of Investigation provided the grievor with a draft report on April 29, 2011. She was provided with an hour to review it. She then asked for a week

to file a response to the allegations and findings set out in it. She was provided with that week. She filed a long response, portions of which appear to have found their way into the final report.

[27] The Board of Investigation's final report was 109 pages. It was provided first to Mr. Leis, who then forwarded it to Ms. MacDonald in or about mid-August. Ms. MacDonald, in her capacity as Acting Regional Deputy Commissioner (Ontario) of the CSC, had been aware that the investigation was ongoing, but had not been part of the process. She testified that she took a week to read and digest the report. She then provided Ms. Hassard with a copy of it by letter dated August 25, 2011. She asked Ms. Hassard to provide her comments by September 2. She advised her that after receiving those comments, her office would contact Ms. Hassard to schedule a discipline meeting. She advised Ms. Hassard that she was entitled to have a representative present at the meeting (Exhibit E2, Tab 7).

[28] I pause to note the nomenclature. Ms. MacDonald clarified in her testimony that discipline meetings are held before decisions to discipline, if any, are made. They are intended to afford the subject of an investigation a chance to provide any additional comments, responses or evidence that he or she considers relevant to a consideration of the report and to any decision management might make. By way of contrast, a discipline hearing takes place after the discipline decision has been made. Its purpose is simply to communicate the decision to the subject of the investigation.

[29] The grievor asked for an extension of time to file her reply to the formal report, which was granted. At some point, she retained Mr. Moreau, a solicitor with a well-known labour law firm in Toronto. On September 16, 2011, Ms. MacDonald received a request from Mr. Moreau, who identified himself as Ms. Hassard's counsel ". . . with respect to [Ms. MacDonald's] letter of August 25, 2011 and all matters related to [the grievors's] employment." He asked that she "direct all communications on this matter" to him. He noted the seriousness of the allegations that had been made against Ms. Hassard, the complexity of the case and the large amount of material to review. He asked for an extension of the time to respond to October 7. He asked her to respond to his request by September 19 (Exhibit G1, Tab 3).

[30] Ms. MacDonald did respond on September 19, granting "one further extension" to October 7 (Exhibit G1, Tab 4). Mr. Moreau responded on the same day, stating that he had already started drafting a response and asking her whether she was ". . . in a

position to speak to [him] directly in the next couple of days about this" (Exhibit G1, Tab 5).

[31] Ms. MacDonald testified at that point that she and Mr. Moreau did speak the next week, on September 26. At that point in her testimony, counsel for the employer wanted to proceed to investigate what took place during that discussion. Counsel for Ms. Hassard objected. He submitted that the contents of the conversation were hearsay and were in any event privileged because they included settlement discussions or negotiations. He submitted that the discussions were analogous to those that take place during the stages of a grievance process and that, for that reason, they ought to be privileged.

[32] The difficulty with Mr. Moreau's objection was that one of the issues that was squarely before me was whether a settlement offer had been made by the employer, and if so, what that offer was and whether it had been accepted. And again, if so, whether the employer had reneged upon that offer to the prejudice of Ms. Hassard. It would have been difficult if not impossible for me in fairness to the parties to decide such an issue if the discussions that led to the offer that Ms. Hassard said had been made were not put into evidence. The other difficulty, of course, was that such evidence would have required Mr. Moreau to testify as to what he and Ms. MacDonald had discussed, which in turn would have made him a witness in a case in which he was also acting as counsel.

[33] Counsel for the employer responded to Mr. Moreau's objection by submitting that the discussion between Ms. MacDonald and Mr. Moreau took place too early for the settlement negotiation privilege to have arisen. However, she acknowledged that her position might put Mr. Moreau in an awkward position and was prepared to proceed on the basis of a stipulation as to what had been discussed.

[34] In the end, and following further submissions and discussion, counsel for Ms. Hassard and for the employer agreed to stipulate that during the discussion between Ms. MacDonald and Mr. Moreau, settlement discussions took place; that retirement was one of the many issues raised; that a settlement package was also one of many other issues raised; and that it was clear that a discipline hearing would be held, although the date of it was not certain at that point.

[35] On October 6, 2011, Ms. MacDonald received from Mr. Moreau a large and detailed response to the investigation report (Exhibit G1, Tab 8). She testified that she reviewed it and placed it in the file of materials and documents she had organized with respect to the matter.

B. <u>The October 7 discipline meeting</u>

[36] The discipline meeting took place on October 7, 2011. Present were Ms. MacDonald, Mr. Staley, Ms. Hassard, and her representative, Mr. Dixon.

[37] Both Ms. MacDonald and Ms. Hassard testified that the discussions at the meeting were about the allegations in the investigation report. Ms. MacDonald asked Ms. Hassard questions about those allegations, and Ms. Hassard provided her answers. Ms. MacDonald also discussed the results of a security audit of the unit that had been conducted while the grievor was on leave. The grievor was surprised and upset about this part of the discussion, given that the audit had nothing to do with the investigation report and, moreover, had been conducted in the fall during her absence and was a matter over which she hence had no control.

[38] At the very end of the meeting, the issue of retirement came up. Because it was a central spoke in the grievor's case that the employer and not she first raised the possibility of retirement, it is necessary to delve into the testimony concerning this issue in more detail.

[39] Ms. Hassard testified that Ms. MacDonald suggested that if she wished to retire, she could, and finish her career with retirement rather than discipline "with [her] head held high." Ms. Hassard testified that she replied that she had felt that the investigation was "shaming" and that it had created for her a toxic work environment. The grievor testified that Ms. MacDonald also said that if she retired, the public disclosure that would be published on the CSC website referring to the investigation would mention only that she had retired, not that she had been disciplined.

[40] I pause to explain that at some point, the issue of how public notice of the investigation was to be given came up. Pursuant to the *PSDPA,* public notice of an investigation, its findings and recommendations, and the actions taken as a result have to be posted online. The notice had to be detailed enough to give some idea of what the alleged wrongdoing was and what (if anything) had been done about it, but vague

enough to maintain the confidentiality of the informants and the subject of the investigation. The grievor was concerned about such publicity. The CSC's Ontario Region is small and interconnected enough that staff and management would likely have been able to guess her identity. An online posting that stated that she had retired, as opposed to stating that she had been disciplined, would have gone some way towards mitigating the adverse impact on her personal reputation of the fact that an investigation had been conducted.

[41] Returning to the testimonies of the witnesses, for her part, Ms. MacDonald testified that at the very end of the meeting, she asked Ms. Hassard whether she had any final comments. Ms. Hassard replied that she would be prepared to retire. Ms. MacDonald testified that she did not respond to Ms. Hassard's statement. She added in cross-examination that as Mr. Dixon was leaving the room, he turned to her and asked when Ms. Hassard had to make a decision with respect to retirement. She testified that she replied that it would have to be done before discipline was imposed, because after that she would need an agreement to undo the imposition of discipline.

[42] Mr. Dixon testified that towards the end of the hearing, Ms. MacDonald "sympathetically said at one point, or words to this effect, why not retire?" He testified that at that point "what was likely to happen was clear." He added that he found Ms. MacDonald "professional, fair and firm." He recalled that Ms. Hassard did not take up "the offer . . . she said something like 'I will consider it.'" He was not cross-examined.

[43] Ms. Hassard was on sick leave at the time of the meeting. Ms. MacDonald testified that she did not discuss the grievor's return to duty. Ms. MacDonald then drove back to Kingston with Mr. Staley. She was ill with the flu, and, according to her, spent virtually no time discussing the meeting with Mr. Staley.

[44] The only notes or written record of the meeting put into evidence were those of Mr. Staley. In chronological order, they include the handwritten notes he took at the meeting (Exhibit E8), a typed memo incorporating most (but not all) of those notes that was prepared about a week after the meeting (Exhibit E2, Tab 8), and a typed transcription of the handwritten notes that he prepared on August 19, 2012 (Exhibit E9), the day before his testimony at the hearing before me. A fair amount of time was spent in direct examination and in cross-examination of the witnesses, including in particular Mr. Staley, over the issue of how accurate the notes were and

whether anything had been left out. However, the central point was whether the issue of retirement was raised first by the grievor or by Ms. MacDonald. I will deal with this issue later in my decision.

[45] On October 8, 2011, Ms. Hassard forwarded to Ms. MacDonald an email that had been circulated by a parole officer about Ms. Hassard in January 2011. I think it is not necessary to detail the contents of that email other than to note that it was critical of the grievor. Ms. Hassard offered it to Ms. MacDonald as an example in her words, of how her "reputation has been irreparably damaged." She suggested that if she did return to work, other staff (on the basis of the email) might declare the workplace "an unsafe work environment." Ms. Hassard continued as follows (Exhibit G1,Tab 9):

> *. . . Also I would not want to be part of an organization where inexperienced staff, such as* [the parole officer who had sent the email]*, are able to thwart oversight of their work in such a manner, and where their professional judgment is taken more seriously than someone with 36 years of seniority. I will not re-iterate* [*sic*] *the other serious issues with* [the parole officer in question]*, of which you are already aware.* Exhibit G1, Tab 9.

[46] Ms. Hassard copied Mr. Moreau on the email. Mr. Moreau then emailed Ms. MacDonald (copying his client), stating that he did not know ". . . the context behind [his] client's email to [her] copying the [parole officer's] email." He pointed out that the parole officer's email was in any event factually incorrect and that its assertions had not been reviewed in the investigation report. He concluded by stating the following (Exhibit G1, Tab 9): "What I am saying is that the [parole officer's] email is a reason to be concerned about returning Ms. Hassard to her previous work environment, and this is an issue that goes beyond anything the Board [of Investigation] may have found."

[47] On October 11, 2011, Ms. MacDonald advised Ms. Hassard by letter that a discipline hearing would take place on Friday, October 14 (Exhibit G1, Tab 10 and Exhibit E5). Ms. Hassard testified that when she received the letter, she understood that "serious discipline would be imposed". She said that she "didn't know what to expect, but [she] understood it would be serious."

[48] Shortly after sending the letter, Ms. MacDonald received an email inquiry from Mr. Moreau. He asked whether ". . . the meeting set out in [her] letter will be one at which Ms. Hassard will simply be advised, orally and/or in writing, of discipline? Is she

expected to respond? Can she bring someone?" (Exhibit E5). Ms. MacDonald replied on the same day that ". . . the intent of this meeting is to simply award discipline and yes she can bring someone." She added that she had received and would review his ". . . letter and attached information and will review that as part of the determinations with respect to awarding discipline" (Exhibit E5).

[49] The morning of October 13, at 09:10, Ms. Hassard emailed Ms. MacDonald. She stated as follows (Exhibit E4): "I know my position has been red-circled and my reputation irreparably damaged, both within CSC, and by a Crown Attorney who had been fed the gossip, and who has slandered me in open court with a lie that will be easy to disprove. The lie is in the transcripts. I would be prepared to consider retirement if a fair resolution of all outstanding matters could be worked out. Thank you, and I appreciate your coming to Toronto [for the meeting] again."

[50] This email was not on its face copied to Mr. Moreau. Ms. MacDonald responded with an email asking Ms. Hassard whether she would be available for a call at noon. Ms. Hassard said that she would be and provided her cell phone number at 12:09 p.m. Ms. MacDonald then called Ms. Hassard, see Exhibit E4.

[51] Ms. MacDonald testified that they had "a serious conversation." She testified that she told Ms. Hassard that she could not offer compensation, that they were going into a discipline hearing and that that was not a place where she could offer compensation. She told Ms. Hassard that she could retire or that she could go to the discipline meeting and "let it unfold." It was Ms. Hassard's decision, but she "could not have a foot in both camps." Ms. Hassard could not wait to find out what the discipline was, decide she did not like it and then opt instead retroactively for retirement. As Ms. MacDonald explained in cross examination, she said those things because Ms. Hassard wanted to know what the discipline would be before she made a decision as to whether she would retire.

[52] The grievor testified that during the conversation, Ms. MacDonald repeated the offer that if Ms. Hassard retired, Ms. MacDonald would "close the file" rather than proceed with discipline, that the CSC file would be shredded; and that the website link would reflect that the grievor had retired rather than been disciplined. A reference to discipline would have damaged her reputation since the grievor was convinced that even though the link would not mention her name, people within the organization would be able to determine who she was.

[53] On October 13, 2011 at 14:43, Ms. Hassard emailed Ms. MacDonald under the subject line "Friday's meeting." She asked whether Ms. MacDonald could confirm ". . . that if I retire next week I will receive the 28 weeks of pay, that is separate from any monies already received? If you can do so I am in a better position to make a decision" (Exhibit G1, Tab 11).

[54] Ms. MacDonald testified that she took the email to be a reference to her earlier discussion with Ms. Hassard. At that time, she had told Ms. Hassard that if she retired, she would receive everything that retiring employees were entitled to receive. One of the entitlements was a retirement allowance equal to 28 weeks of pay. At the time of that discussion Ms. MacDonald did not know (and Ms. Hassard had not told her) that Ms. Hassard had already received that allowance some time before (when a number of other employees had elected to receive it as well). Subsequent to that conversation, she had learned from the compensation department that Ms. Hassard had already received the allowance. Accordingly, when she received Ms. Hassard's inquiry, she replied as follows: "No that is not the case. The 28 weeks [*sic*] severance is what each employee gets. I indicated that you would get that not knowing that you had recently cashed in your severance. I can't give it to you twice. Is that what you are asking for?" (Exhibit G1, Tab 11).

[55] Ms. Hassard responded as follows: "Yes it is. If this was offered I would be prepared to retire. This is a unique situation" (Exhibit G1, Tab 12). Ms. MacDonald replied as follows: "No I am not able to offer any additional compensation beyond what you would be entitled to at retirement. Given you have just recently taken your severance I can't give it to you again" (Exhibit G1, Tab 13).

[56] The grievor also testified that at about that time, she spoke to Mr. Staley to ask him whether she could lose her pension if she were disciplined. She said that he told her that it was possible. However, she also said that she "didn't believe it to be true" but since that was what he told her she felt that she "was being manipulated and bullied."

[57] Mr. Moreau had been copied on the exchange of emails between Ms. MacDonald and his client. At this point, he interjected, sending the following to Ms. MacDonald (and his client) (Exhibit G1, Tab 14):

Surely there is some flexibility at your end to see this end so

> *soon and amicably for both sides? Accepting a 28 week payout, as Shelley is proposing, is exceptionally generous when compared with the alternative that faces both sides should there be discipline and the fallout thereof.*

[58] Ms. MacDonald replied as follows (Exhibit G1, Tab 15):

> *Stephen what is being asked for her is compensation in lieu of discipline? – I am not prepared to offer any compensation. Should Shelley submit her letter of retirement today or tomorrow with an effective date of next week I am prepared to close the file on this. I will continue with my plans to be present tomorrow for the disciplinary hearing. Thank you."*

[59] Mr. Moreau then replied (ExhibitG1, Tab 16):

> *What was being requested was not in lieu of discipline. Retirement is I suppose what is "in lieu." What I was presenting was a pre-emptive attempt to, to use ordinary parlance, "package her out" ie. a severance deal before she is terminated or constructively terminated. Doing it now saves all sides a lot of trouble."*

[60] I note that this email chain was between Ms. MacDonald and Ms. Hassard and Mr. Moreau, whether by direct correspondence or by copy. All of it took place on October 13, the day before the scheduled Friday, October 14 disciplinary hearing and was under the subject heading, "Friday's meeting."

C. <u>The October 14 discipline hearing</u>

[61] The discipline hearing took place on October 14, 2011. Present were Ms. MacDonald, Mr. Staley, Ms. Hassard, and her personal representative, Mr. Dixon.

[62] The meeting did not take long. Ms. MacDonald handed Ms. Hassard two letters. The first, dated October 14, was the discipline letter. In the letter, Ms. MacDonald stated that she concurred with the findings of the report and that the findings constituted infractions of the *Code of Discipline* and the *Values and Ethics Code*. She went on as follows:

> *In determining an appropriate disciplinary measure, I have taken into consideration all facts, including your years of service, employment record and your personal statements. There is a higher expectation within the Management group to uphold the values and ethics of the Service and to demonstrate behaviour which promotes those value [sic] and*

> *ethics of the service and earn the trust of senior managers. Demotion is a corrective measure to remove you from a role which places you in charge of the offenders and staff and is an opportunity for you to reassess your roles, responsibilities and obligations as an employee of the Correctional Service of Canada.*

[63] Ms. MacDonald concluded by advising that she was demoting Ms. Hassard to a position of Ontario Senior Project Officer classified AS-06, effective October 17, 2011. The demotion allowed Ms. Hassard to remain employed within the CSC (Exhibit E2, Tab 9).

[64] Ms. MacDonald added that under clause 18.24 of the collective agreement Ms. Hassard had the right to grieve the demotion and that if she required assistance, she could avail herself of the Employee Assistance Program (EAP) (Exhibit E2, Tab 9). (The grievor acknowledged in her testimony that Ms. MacDonald also told her that she had the right to grieve the demotion.)

[65] The second letter handed to Ms. Hassard noted the demotion and had attached a copy of a brief summary of the conditions of employment of the position into which she had been demoted. Those included her work location (the CSC's Central Ontario District Office, 180 Dundas Street, Toronto), whom she was to report to (Regional Headquarters) and the salary range of the position. However, it was not a job description (Exhibit E2, Tab 9).

[66] Ms. MacDonald testified that Ms. Hassard had some questions about the position she was being demoted into. She tried to answer some and said that she would get back to the grievor with more detail.

[67] Ms. MacDonald testified that at the very end of the meeting, she told Ms. Hassard that she understood that Ms. Hassard was undergoing a difficult time. She told her that if she wanted to consider retirement, Ms. MacDonald could still consider it after discipline had been imposed but that at that point it would be more difficult because the disciplinary decision and its consequences would have to be unwound. It would require "an agreement to take it off the file." She told Ms. Hassard that she would be prepared to keep the offer open for a week after October 14 "and then that's the end of it for [her]." Ms. MacDonald was adamant that she did not ask Ms. Hassard to retire and that asking so was not her place. Rather, she provided the grievor with the option of choosing one route or the other.

[68] The grievor agreed that the issue of retirement came up again at the meeting. She testified that Ms. MacDonald said that if she still wanted to consider retirement, Ms. MacDonald would keep the deadline for accepting the offer open until the following Friday. The grievor added that "because [Ms. MacDonald] kept extending the offer of retirement, [she] felt that it was being made in the best interests of the organization and not of [her]. . . [she] felt it was self-serving for [Ms. MacDonald] to offer it. . . [Ms. MacDonald] mentioned it as a favour to [the grievor], which made [her] suspicious."

[69] The grievor also testified that at some point Ms. MacDonald told her that she would need a memorandum of understanding "to undo the discipline that had been imposed, because administratively it had been imposed."

D. Events after the October 14 disciplinary hearing

[70] Ms. Hassard did not take up the new position to which she had been demoted effective Monday, October 17.

[71] Instead, on that day, she emailed Ms. MacDonald, with the subject "Clarification needed." She asked for clarification with respect to a number of issues, including what her salary in the AS-06 position would be, whether she would lose the bilingual bonus and the danger pay associated with her position as Director at the Keele Centre, what other losses "would be incurred with the new position", what union she would be in and what the normal union dues would be, whom she would be reporting to from the 180 Dundas Street office in Toronto, and what the nature of her duties and responsibilities would be, "to determine who [she] would be working or consulting with and the nature of the role" (Exhibit G1, Tab 17).

[72] Ms. MacDonald responded the same day, stating that she would follow up and get back to Ms. Hassard by Wednesday (Exhibit G1, Tab 18). Moments later, Mr. Moreau sent Ms. MacDonald the following email: "Your offer on retirement and the discipline that would or would not result–can that be deferred please even to Friday [October 21] given Shelley's very important questions? We appreciate your assistance and responsiveness on these" (Exhibit G1, Tab 19).

[73] Ms. MacDonald replied as follows: "Yes I can do that" (Exhibit G1, Tab 19).

[74] On Thursday, October 20, Ms. MacDonald emailed Ms. Hassard with the answers to the questions she had posed on October 17. She also advised that a copy of the work description for the AS-06 position would be sent separately by Mr. Staley outlining its duties (Exhibit G1, Tab 20). That same day, Mr. Staley sent a copy of the work description (Exhibit G1, Tab 20). The position title "Regional Senior Project Officer" had been changed at some point to "Ontario Senior Project Officer." The position profile referred to the work description as being a "Generic Work Description." The basic object of the position was "[t]he conduct of studies and the preparation of papers or reports to support the articulation and development of the strategic direction and operational integrity of the Region and related advice, analysis, methodology, expertise and project management services" (Exhibit G1, Tab 21).

[75] On the same day, Mr. Moreau asked Ms. MacDonald "what, broadly, are the benefits' [*sic*] differences?" Ms. MacDonald replied again on October 20 that there was ". . . no benefit difference other than the supplementary death benefit (2x salary) is based on the salary [on the] date of death" (Exhibit G1, Tab 22).

[76] Ms. Hassard then asked some follow-up questions to the answers that Ms. MacDonald had supplied in her email of October 20 as follows (ExhibitG1, Tab 23):

> *Lori–can you please advise what benefits would be lost or altered as a result of the demotion. I know there is a specific package for managers, but the new position is not managerial so I am assuming that the benefit package would also change. I guess that is the final question–how would the benefit package change with the demotion?*

[77] Ms. MacDonald responded on October 20, advising that there was ". . . no benefits change [to] Long term [*sic*] disability, Public Service Health Care Plan, Dental Care Plan, Public Service Management Insurance (if [the grievor] had it) all remain the same. Hope this is helpful" (Exhibit G1, Tab 25).

[78] On Friday, October 21, Mr. Moreau provided his response to the demotion letter of October 14. He stated that Ms. Hassard had informed him that she had been ". . . demoted effective immediately as a result of the findings of an investigation into her alleged inappropriate conduct." He went on to say that he had advised Ms. Hassard "that this demotion is disciplinary in nature." He continued at some length to explain why this position was "radically different" from the one she had held as director of the Keele Centre. He pointed out that the widespread nature of the investigation and the

fact that Ms. Hassard had gone on leave meant that ". . . there is no doubt that staff know all about what has transpired." He went on to say that given all of this he had advised Ms. Hassard that ". . . her demotion amounts to a constructive dismissal. . . The move to a non-managerial position is clearly a punishment and disciplinary response" (Exhibit G1, Tab 26).

[79] Mr. Moreau then went on as follows (Exhibit G1, Tab 26):

> *Due to these circumstances and the long term destruction of Ms. Hassard's reputation owing to a demotion after nearly a year of investigations, we have advised Ms. Hassard that she ought to treat herself as having been constructively dismissed. She simply cannot take the position that you are demoting her to.*
>
> *Ms. Hassard is, as we understand it, dealing with a serious medical situation at the moment. Her intention, once she is fit to return to the workforce, is to look for work elsewhere. Her prolonged absence from the workforce will no doubt significantly impact her ability to find alternative employment, and particularly employment with comparable remuneration.*
>
> *At this early date, and out of courtesy, we are simply advising you of our position and letting you know that we are exploring Ms. Hassard's options with her and will write to you in due course concerning her next steps.*

[80] This letter was emailed to Ms. Hassard. Since it was dated October 21, I find that it was sent on that day. On the same day, at 14:49, Ms. Hassard sent Ms. MacDonald the following email under the subject, "Retirement–Director of the Enhanced Services Unit" (Exhibit G1, Tab 27):

> *After careful consideration, I write to advise you that I am retiring from my employment, effective immediately. Please let me know who I should contact to canvass my pension options and to set up the collection of pension benefits.*
>
> *I am grateful to you for your offers last week by telephone, and in person at the October 14 meeting we had, to close the discipline file, not discipline me, and to publish an anonymous finding of "retired" to close off the whistleblower process, in the event of my retiring. I accept your offer and would appreciate confirmation that my understanding of the offer is correct, and that you will abide by that offer in accordance with this agreement.*

[81] The grievor testified that shortly after she sent her email, Ms. MacDonald called her to say that the retirement would not be effective until Ms. MacDonald accepted it. Ms. MacDonald told her that she had to sign a memorandum of understanding first.

[82] For her part, Ms. MacDonald testified that she was confused by the letter. She called Ms. Hassard and said that she could not accept the letter of resignation "because [she] couldn't tell what [Ms. Hassard] was talking about . . . was [the grievor] retiring at AS-06 level from her demoted position or from her former position as Director." She wanted "to ensure that we all knew what we were talking about." She asked her human resources staff to prepare a memorandum of agreement (MOA) "that would take into consideration the discipline that had been imposed and remove it so that [Ms. Hassard] would be able to retire from her former position [as Director]."

[83] The grievor testified that on October 28, Ms. MacDonald called to say that human resources was working on an MOA. The matter had to go to legal services; the discipline had to be undone, and that this had to be done before Ms. MacDonald could accept her retirement. She mentioned that it would have been better if the grievor had retired before the discipline had been imposed, because now an MOA was required: "It was more complicated now that discipline had been imposed."

[84] On October 31, 2011, Mr. Staley emailed Ms. Hassard a copy of an MOA, copying Ms. MacDonald and Ms. Hassard's solicitor Mr. Moreau. After a preamble setting out some of the background and noting that the parties ". . . wish to resolve any and all matters related to the Employee's employment with CSC and the *Public* [sic] *Disclosure Protection Act* process," the MOA went on to recite that the employer offered the following (Exhibit E2, Tab 11.

> *a) To acknowledge receipt and accept the Employee's retirement effective October 21, 2011;*
>
> *b) To rescind the discipline awarded to the Employee on October 14, 2011 and shred all existing copies of relating documentation;*
>
> *c) To rescind the letter of offer delivered to the Employee on October 14, 2011 whereby the Employee was demoted to the Ontario Senior Project Officer Position #20959, such demotion being effective October 17, 2011;*
>
> *d) To notify CSC Compensation and Staffing that the above-mentioned letter of offer has been rescinded.*

[85] The grievor testified in direct examination that she reviewed the MOA. Her counsel asked her whether it differed in any way from what she thought she had been offered by Ms. MacDonald. She identified only two items of difference: a confidentiality clause, and a release that she was to grant the employer as follows (Exhibit E2, Tab11)

> *. . . from any action, claim or demand of whatever kind or nature that she had, now has, or can, shall or may thereafter have, with respect to, by reason of, as a result of, or in any way arising out of her employment with the Employer and the* Public Servants Disclosure Protection Act *process.*

[86] Ms. MacDonald testified that Ms. Hassard was "quite bothered" by the contents of the MOA and "the terms that we wanted in order to rescind the discipline." She explained that it was the employer's practice, when discipline that had been imposed was being taken back, "to look for a release so as not to be sued after all that by the employee."

[87] For her part, the grievor testified that she objected to the two clauses because neither the issue of confidentiality nor the question of a release had been part of her discussions with Ms. MacDonald. In particular, according to her (which evidence I accept), Ms. MacDonald never mentioned the need for it in their discussions up to that point.

[88] On November 2, 2011, Mr. Moreau wrote to Ms. MacDonald on behalf of his client. He advised that Ms. Hassard would not execute the MOA, ". . . which contains for the first time a full and final release by Ms. Hassard to the benefit of her employer." He advised that "[o]ur position is that Ms. Hassard exercised her right of retirement on the strength of your offers that she would not be disciplined if she did so [i.e., if she retired]" (Exhibit G1, Tab 30).

[89] Mr. Moreau then set out his understanding of the discussions — oral and in writing — that had taken place between Ms. Hassard and Ms. MacDonald between October 12 and October 28. Insofar as his account was based on what his client had told him had taken place, it was based on hearsay. The rest was based on written communication (whether email, faxes or correspondence) that was introduced into evidence before me at the hearing.

[90] After setting out his understanding or interpretation of those events, Mr. Moreau arrived at the MOA. He stated the following:

> *This MOU contains a provision that says that the MOU is a full and final settlement of all claims Ms. Hassard may have. This is not in keeping with your offer to Ms. Hassard.*

[91] Mr. Moreau went on as follows (Exhibit G1, Tab 30):

> *It is our understanding that you take the position that Ms. Hassard should have retired on October 14, 2011 if she wished to preserve her rights: however, it is clear from the above outline that this was never communicated to her, nor was that ever the offer on the table.*
>
> *It is clear that your comments to Ms. Hassard from October 13, 2011 and subsequently, had formed an offer that was capable of acceptance by Ms. Hassard. You offered her extended time on October 14, 2011 to consider whether to accept this offer and ultimately gave her until October 21, 2011 to accept.*
>
> *There never was any suggestion that the offer was different leading up to Oct. 14, 2011 or for the week after that date until October 21, 2011. Your offer was that Ms. Hassard would receive no discipline if she retired with no other conditions attached. The offer was never that there would be no discipline and no lawsuits or grievances.*
>
> *As a result, Ms. Hassard will not be signing the MOU, however, she does intend to retire. We demand that you honour your agreement regarding discipline. We hasten to add that, as Ms. Hassard is actually retired, we question your power to discipline her at this point or the value of* [*sic*] *any discipline will serve. Any decision to discipline Ms. Hassard contrary to the agreement and offers set out above will no doubt be used by our client as part of any grievance or complaint against her employer's conduct*

[92] I pause to note that in the two-and-a-half page letter, no mention is made of the confidentiality clause or of any objection to it.

[93] On November 8, 2011, Ms. MacDonald responded to Mr. Moreau's letter of November 2. She set out her own understanding and position with respect to the discussions and offers that had been made. She stated that she had been clear in her discussions with Ms. Hassard that ". . . if [Ms. Hassard] did not retire prior to a quantum of discipline being rendered, any actions taken after that time would need to be articulated and confirmed in a MOA between CSC and Ms. Hassard" (Exhibit G1, Tab 31). She added that:

> *". . . [If Ms. Hassard] is willing to sign the MOA, then the*

> *Correctional Service of Canada will comply with the provisions contained therein. For more clarity, in the absence of a duly executed MOA as drafted, the discipline will not be rescinded. The link to the Public Servants Disclosure Protection Act process will reflect the discipline imposed in this case.*

[94] Ms. MacDonald concluded by stating that if Ms. Hassard's intent was to retire, ". . . she must submit a signed intent to retire to [Ms. MacDonald's] attention by November 11, 2011" (Exhibit G1, Tab 31).

[95] After a few false steps that are not material to the issues in this case, Ms. MacDonald accepted the grievor's letter of resignation on November 10, 2011, with an effective date of October 21, 2011 (Exhibit G1, Tab 33).

[96] On November 17, 2011, Ms. Hassard filed the grievance that forms the basis of this hearing.

E. Summary of the submissions

1. For the grievor

[97] Counsel for the grievor broke his submissions into three parts:

a) a factual overview;

b) the evidentiary status of the investigation report in the event that I determined I did have jurisdiction to hear the grievance; and

c) whether I did have jurisdiction.

a. Factual overview

[98] Counsel for the grievor submitted that for the most part there was a fair amount of agreement on the facts. I agree. Many of the facts have already been set out in this decision. For that reason, I will touch only on those facts that counsel for the grievor placed particular emphasis upon.

[99] Counsel for the grievor submitted that the whistle-blower investigation had been demoralizing. It had caused undue personal and emotional stress to Ms. Hassard. The process was new to her. She had no idea what to expect in January 2011 when the investigation commenced. Neither she nor her representative was allowed to ask

questions. She was expected to answer questions, not ask them. The identities of her accusers were kept secret. Her office was rummaged through. When she was provided with the draft report by the investigators, she was initially provided with only one hour to respond. She was later provided with more time to respond, but after her response on May 24, she heard nothing for over three months. She was kept in the dark until the phone call from Ms. MacDonald on about August 24, telling her that the report had been received and was on its way to her.

[100] No wonder then that by August 24 Ms. Hassard should have felt the victim of a witch hunt or that she had been blacklisted. Ms. MacDonald's evidence supported a conclusion that by that time, Ms. Hassard had been put through a wringer. She was no longer a logical, objective person.

[101] It is against that backdrop that counsel for the grievor urged me to place the issue of retirement, who first raised it and whether Ms. Hassard had in fact been coerced into it. Counsel submitted that the evidence was clear that Ms. Hassard had not intended to retire when she did. In 2011, retirement had only been a concept on the horizon. She could have retired in or about 2005 when she had reached the age plus years of service rule of 85. She did not because she could not afford to. She had decided to support her daughter's progress through university, from a B.A. to an M.A. to a Ph.D. The financial burden placed upon Ms. Hassard by that commitment meant that she could not accept the drop in income that retirement would have brought.

[102] The question of who first raised the issue of retirement was an important element of counsel for the grievor's submission that Ms. Hassard's retirement had been coerced. He acknowledged that if retirement had been Ms. Hassard's idea, then it might be difficult to see her as being coerced into it. On the other hand, if Ms. Hassard's retirement was first in Ms. MacDonald's mind, and if it was her goal and intention, then the retirement could be seen as having been coerced.

[103] Counsel for the grievor submitted that the evidence was clear that Ms. MacDonald first raised the possibility of retirement with Ms. Hassard. Ms. MacDonald had already read the reference to possible retirement in the investigation report. So the idea was already in her head when she spoke to Ms. Hassard. But when Ms. Hassard asked her what would be discussed at the October 7 meeting, she was told that it would touch upon only the allegations contained in the report, and nothing more. Ms. Hassard was, counsel submitted, misled

by Ms. MacDonald into thinking that only the report would be discussed. Instead, the entirely unrelated issue of the personal alarms was raised (an issue over which the grievor had no control, having been away from work until that point). Ms. Hassard felt blindsided. And then Ms. MacDonald raised the issue of retirement at the very end of the meeting. As a result, Ms. Hassard emerged from the meeting with the feeling that they were out to get her. And it was in the context of that feeling that Ms. Hassard felt that she had no option but to retire.

[104] Counsel for the grievor pointed to other examples of what he suggested was evidence of bad faith on the part of the employer and of an intent on its part to coerce Ms. Hassard into retirement. First, at the October 17 meeting, she asked for a work description, which should have been easily available to the employer. Instead, it took three days to provide her with a generic work description. Second, Ms. MacDonald refused to accept Ms. Hassard's retirement letter of October 21 unless Ms. Hassard gave up her rights. Third, the MOA contained elements (the shredding of files) that were, accordingly to counsel, in fact illegal under the *PSDPA*.

[105] Accordingly, counsel for the grievor submitted that since the grievor had been provided with only bits and pieces of information, she needed to consider her options, and since she had been given an offer that was not legal, I could conclude that she was being manipulated and bullied into retiring. Additional support for such a conclusion could be found in Ms. Hassard's conduct after her resignation. She did not wait months or years to come to regret the decision. Rather, she grieved six days after her retirement letter was officially accepted. There was no delay on her part. It was not regret from afar. He submitted that what had happened was simply that Ms. Hassard had decided "to get out of there to preserve her sanity and health, but was going to fight it."

b. <u>The status of the investigation report</u>

[106] Counsel submitted that in the event that I concluded I had jurisdiction to hear Ms. Hassard's grievance, it was clear that the employer would have to prove its case in the ordinary course based on independent evidence. It could not simply rely on the report. The *PSDPA* did not afford the report any special status or make it anything other than hearsay opinion that could not alone form the basis of a disciplinary decision.

[107] Counsel for the grievor pointed first to the situation in which an employer, governed by either a collective agreement or the *Act* or both, finds itself when it wishes to justify a disciplinary decision. The general rule is that the onus is on the employer to prove cause, to prove that the penalty imposed was just, and to prove those two points with real, direct evidence. It cannot rely on hearsay or innuendo; Brown and Beatty, *Canadian Labour Arbitration*, at para 7:2300 ("Burden of Proof"), 7:2500 ("Standard of Proof") and 7:4000 ("Disciplinary Penalties"). The rule applied as well to proceedings before the Public Service Labour Relations Board ("the Board"), inasmuch as the Board is required to afford the parties before it with a high degree of procedural fairness; see *Canada (Attorney General) v. Timson,* 2012 FC 719, at para 14 and 15. None of those requirements can be satisfied if an employer relies solely on hearsay evidence contained in an investigation report; see *Better Beef Ltd. v. United Food & Commercial Workers International Union, Local 175* (2003), 119 L.A.C. (4th) 361, at 368.

[108] Counsel for the grievor submitted that the weight and tradition of such jurisprudence was so strong that it would take clear and strong language in the *PSDPA* to overrule it that, he submitted, is not to be found.

[109] Counsel for the grievor submitted that the focus of the *PSDPA* is on protecting a person who files a complaint of "wrongdoing" within the meaning of section 8 of the *PSDPA* (commonly called a "whistle-blower"). However, the *PSDPA* does not expressly deny the rights that the respondent to such a complaint might otherwise expect, absent the *Act*. Section 9 provides that a public servant who commits a wrongdoing "is subject to appropriate disciplinary action," and "appropriate" must be taken as incorporating the normal rules of procedural fairness. Paragraph 11(1)(*a*) in fact expressly states as follows:

> ***11.****(1) Each chief executive must*
>
> *(*a*) subject to paragraph (*c*) [*which pertain to publication of the results of an investigation*] and any other Act of Parliament* ***and to the principles of procedural fairness and natural justice****, protect the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses* ***and persons alleged to be responsible for wrongdoings . . . .***
>
> [Emphasis added]

[110] Counsel for the grievor went on to note that the purpose of investigation reports under the *PSDPA* is, pursuant to subsection 26(1) of the *PSDPA*, to bring ". . . the existence of wrongdoings to the attention of chief executives and making recommendations concerning corrective measures to be taken by them" (emphasis added). But making a recommendation as to the course of action that should be followed is not the same thing as making a decision that has to be followed. Moreover, paragraph 51(*a*) of the *PSDPA* expressly states that nothing in that Act ". . . is to be construed as prohibiting (*a*) the presentation of an individual grievance under subsection 208(1) of the *Public Service Labour Relations Act . . . .*" To read the *PSDPA* as authorizing discipline based solely on the recommendations of an investigation report would be to gut the right to present grievances under the *Act*.

[111] Counsel for the grievor acknowledged that in the event that I concluded that I did not have jurisdiction to hear the grievance, I would not have to deal with the issue of the report's evidentiary status. However, given the importance of the issue, he submitted that I ought nevertheless to consider and rule on the question.

c. Jurisdiction

[112] Counsel for Ms. Hassard submitted that my jurisdiction could be established in three ways.

[113] First, I could find that the word "termination" in paragraph 209(1)(*b*) of the *Act* included the concept of constructive dismissal and that the grievor's demotion was in effect, via that concept, a termination.

[114] Second, and in reliance upon Board jurisprudence, I could find that a retirement that had been coerced was not freely made.

[115] Third (although it is in some ways simply an extension of the first two points), I could find that, on the facts, there had been no meeting of the minds. Ms. Hassard did not voluntarily resign; she was forced to.

[116] Turning to the first point, counsel for the grievor relied heavily upon the following discussion of the word "termination" in *Alberta Union of Public Employees v. The Government of the Province of Alberta* (2009), 206 L.A.C. (4th) 111, at para 28:

> *[28] In common industrial relations parlance, "termination" is the broadest word available to describe the ending of an*

> *employee's employment relationship. It includes the employer-initiated action of discharge, with which the word "dismissal" is more or less synonymous. Discharge may be categorized as disciplinary (for misconduct) or non-disciplinary. "Termination," though, also includes employee-initiated acts like resignation or retirement. And it includes the category of employer-initiated dismissals that do not involve culpable conduct: like permanent layoff for lack of work; discharge for inability or for non-culpable absence that frustrates the employment relationship; or termination at the instance of a bargaining agent enforcing a union security clause. . . .*

[117] Counsel also pointed to the decision of the Supreme Court of Canada in *Farber v. Royal Trust Co.,* [1997] 1 S.C.R. 846, at para 33, which reads as follows:

> *33. . . where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment–a change that violates the contract's terms–the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed. . . .*

[118] Counsel for the grievor also referred to a passage from *Rubel Bronze and Metal Co. v. Vos,* [1918] 1 K.B. 315, also cited in *Farber* at para 33, in which it was said that in cases of wrongful dismissal founded on repudiation of the contract of employment by the employer, ". . . the question to be asked . . . is 'whether the acts and conduct of the party evince an intention no longer to be bound by the contract'."

[119] Accordingly, counsel for the grievor submitted that the word "termination" in paragraph 209(1)(*b*) of the *Act* must be taken as including a fundamental change — a fundamental breach — of the employment contract that evinces an intention on the part of the employer to no longer to be bound by the contract. Counsel pointed out that Parliament could have used the word "dismissal" but did not. Instead, it chose "termination" and so must have intended to include such concepts as constructive dismissal. In support of this submission, counsel also pointed to the French version of paragraph 209(1)(*b*), which uses the word "*licenciement*" rather than "*congédiement*." The former has a meaning of "[translation] discharge; layoff; termination of employment; job loss," while the latter has a meaning of "[translation] discharge; dismissal; dismissal for cause"; see Dion, *Dictionnaire Canadien des relations du travail* (2nd Ed., 1986).

[120] Counsel for the grievor contrasted that with paragraph 186(2)(*c*) of the *Act* under Division 12 ("Unfair Labour Practices"). Pursuant to that section, an employer (among others) is barred from interfering by "threat of dismissal" with an employee's right to complain of an unfair labour practice. The French version uses the phrase "*par menace de congédiement*." Counsel submitted that that contrast demonstrates that when Parliament dealt with a situation in which an employer initiated the cessation of employment, it used the word "dismissal" ("*congédiement*"), as it did in paragraph 186(2)(*c*). On the other hand, when it dealt with a situation in which the cessation of employment flowed from discipline — or indeed any reason — it used the broader word "termination" ("*licenciement*").

[121] In other words, Parliament intended, by using the word "termination" or "licenciement" in paragraph 209(1)(*b*) of the *Act,* to grant jurisdiction to an adjudicator to consider not only termination for cause but any and all cessations of employment, whether or not for cause. Conduct on the part of an employer that evinced an intention to no longer to be bound by the employment contract — conduct that would at common law amount to constructive dismissal — must then be included within the scope of the word "termination."

[122] When questioned whether that interpretation of the word "termination" in paragraph 209(1)(*b*) of the *Act* made the word "demotion" (also used in that section) redundant, counsel for the grievor responded in the negative. He submitted that it was simply an example of overlap in meanings. The overlap arose because of the need to cover demotions that in effect were cessations of employment initiated by the employer. The example he posed was a demotion that had someone in Ms. Hassard's position as a director of a halfway house demoted to cleaning toilets in a jail. Such a demotion, he submitted, would in reality be a termination. He submitted that it could not be right that an employee could be forced to take such a job by way of a demotion.

[123] Turning to the facts, counsel for the grievor submitted that the demotion was clearly disciplinary in intent. The demotion represented a fundamental change to the grievor's employment status. It removed any managerial responsibilities from her. It put her back into a union after years of being excluded by reason of those responsibilities. Moreover, it put her in close proximity to the union office and hence to people who no doubt had complained about her to the investigators. It was work she had never done before. Her salary dropped from roughly $105 400.00 to roughly

$88 200.00 per year — a drop of approximately 16%. For Ms. Hassard to return to work with such radically different duties, and under such circumstances, would have been humiliating. Accordingly, she just could not do it. Nor was she required, he submitted, to accept such a humiliating demotion and work under such conditions while waiting for the Board to hear her grievance.

[124] Counsel for the grievor also submitted that the demotion did not represent progressive discipline. No attempt was made to rehabilitate her or to provide her with the training necessary to correct the faults for which the employer was supposedly disciplining her.

[125] Counsel for the grievor submitted that in a case like this, if an employer initiates a demotion that is a constructive dismissal — if the employer in effect resiles from the employment contract — then it could not be said that Ms. Hassard's retirement was voluntary. Rather, it resulted from the constructive dismissal. In other words, the fact that Ms. Hassard retired after she was in effect terminated (by virtue of the constructive dismissal) had no consequence. For if she was in effect terminated, what did it matter what she did after that point? Nothing in paragraph 209(1)(*b*) of the *Act* suggests that if an employee retires after he or she is terminated (within the meaning urged upon me by counsel), an adjudicator would lose jurisdiction.

[126] Counsel for the grievor submitted that he could find only one case in which the Board had made any attempt to define the word "termination" in paragraph 209(1)(*b*) of the *Act*. In *Monteiro v. Treasury Board (Canadian Space Agency),* 2005 PSSRB 27, the grievor was a term employee whose contract expired. He grieved the employer's failure to renew his contract, saying that he had been the victim of a constructive dismissal. The employer objected to the Board's jurisdiction on the grounds that the employee had not been terminated. At paragraph 12, the Board referred to the decisions in *Dansereau v. National Film Board,* [1979] 1 F.C. 100 (C.A.), and to *Eskasoni School Board/Eskasoni Band Council v. MacIsaac,* [1986] F.C.J. No. 263 (C.A.)(QL), and said that "[t]he concept of termination of employment implies a unilateral decision by an employer to terminate an employment contract that would otherwise have continued to exist." Since by agreement a term contract does not continue to exist after its expiry date, there could have been no termination. Counsel for Ms. Hassard dismissed that conclusion as "clearly wrong."

[127] Counsel for the grievor then dismissed as unconvincing the decisions in *Monteiro*, *McNab v. Treasury Board (Transport Canada),* PSSRB File No. 166-02-14343 (19840224), *Charron v. House of Commons,* 2002 PSSRB 90, *Mangat v. Canada Revenue Agency*, 2010 PSLRB 86, *Rinke and Vanderwoude v. Canadian Food Inspection Agency,* 2004 PSSRB 143, *Arsenault v. Treasury Board (Solicitor General - Correctional Service Canada),* PSSRB File No. 166-02-23957 (19930722) and *Bodner v. Treasury Board (Transport Canada),* PSSRB File No. 166-02-21332 (19910607). In those decisions, the Board concluded that it had no jurisdiction because each grievor had resigned (or, as in *Monteiro*, had not been renewed). Counsel submitted that in all those cases, the grievors had been self-represented (or, he later acknowledged, had union representatives). As a consequence, the grievors had had no chance of winning because neither they nor their non-lawyer representatives had known how to read or interpret statutes or case law.

[128] Counsel for the grievor then turned to his submission that jurisdiction could be found if I concluded that Ms. Hassard's retirement had been coerced. Counsel noted that the possibility that a resignation that had been coerced might be a "termination" within the meaning of paragraph 209(1)(*b*) of the *Act* had been hinted at in such cases as *McNab*, *Charron*, *Mangat* and *Rinke* but that the facts in those cases had not supported such an argument. He submitted that those decisions suggested that there had to be pressure from the employer by way of threats or some element of misrepresentation, deception or undue duress, to establish that a resignation was not voluntary (so as to establish jurisdiction); see *Halsbury's Laws of Canada*, HEM-286, HRE-102 and HO-146.

[129] In the case before me, counsel for the grievor submitted that there was more than enough evidence to establish that Ms. Hassard's retirement had not been voluntary and that it had been coerced. He submitted that I had to ask myself what had turned Ms. Hassard from being someone in 2010 with no intention of retiring into someone who was eager to retire by October 2011. He noted that by that time Ms. Hassard was, to the knowledge of the employer, on sick leave because of the stress associated with the investigation and resulting report. He submitted that in the midst of that pressure and stress, Ms. MacDonald planted the seed of retirement and allowed it to germinate with promises that she could not keep. She kept up the pressure by demanding speedy responses from Ms. Hassard while providing her with minimal information. As a result, Ms. Hassard felt that she was being manipulated into retiring,

a feeling exacerbated during the October 7 meeting because she was asked questions about the security audit at the Keele Centre that had taken place when she was absent, which had nothing to do with her and over which she had had no control at the time. The impression in her mind was that she was not wanted and that Ms. MacDonald asked her about retirement because that is what she wanted her to do. On that point, counsel emphasized repeatedly that the issue of retirement was first raised by Ms. MacDonald. He acknowledged that his submission about coercion turned in large part on the employer being the one who first raised the possibility of retirement. He urged me to accept the evidence of Ms. Hassard and Mr. Dixon on that point over that of Ms. MacDonald or Mr. Staley.

[130] Counsel for the grievor submitted that the employer's promise, as set out in the MOA, to close the file and shred its contents could not be kept because it was in fact illegal. He pointed to sections of the *PSDPA* that he said meant that the employer's file could not have been destroyed. (The sections in question were paragraph 11(*c*), section 36 and subsection 38(1)). He submitted that Ms. MacDonald's offer "was a sweet deal that happened to be illegal." There was also the question of the website link. Ms. Hassard was concerned that if she did not accept Ms. MacDonald's offer, the website link would refer to her being disciplined, rather than simply retiring.

[131] This leads to counsel for the grievor's third position, which was that Ms. Hassard's retirement was involuntary. The pressure on Ms. Hassard had converted her from someone with no interest in retirement to someone who was desperate to get out. She found herself in that position because the employer had made her misleading or illegal promises and clearly wanted her to go. In effect, she was coerced into an involuntary retirement. In other words, no meeting of the minds occurred insofar as the employer and Ms. Hassard were concerned. That being the case, the Board has jurisdiction to hear her grievance.

2. <u>For the employer</u>

[132] Counsel for the employer focused her submissions on the following three issues that had been outlined in my initial order:

a) Did the doctrine of constructive dismissal apply?

b) What was the evidentiary status of the investigation report?

c) Was Ms. Hassard's retirement coerced?

a. Constructive dismissal

[133] Counsel for the employer did not disagree with the elements of the doctrine of constructive dismissal. However, she submitted that it was a common law doctrine that had been developed to provide a remedy of sorts for employees whose terms of employment had been changed unilaterally and to their detriment by their employers. The public sector is different. There, the employer's powers — and the contract of employment — are defined, circumscribed and governed by a welter of statutes, collective agreements, regulations, and Treasury Board guidelines and policies. Thus, there is no need — and no room — for the doctrine of constructive dismissal; see, for example, *Gaskin v. Canada Revenue Agency,* 2008 PSLRB 96, at para 69, and *Canada (Attorney General) v. Public Service Alliance of Canada,* [1991] 1 S.C.R. 614.

[134] Counsel for the employer submitted that for public servants, the events of termination (whether for cause or otherwise), resignation and retirement are governed by statute. For example, the employer's powers to define the terms and conditions of employment in the public service — and to provide for termination — are established by paragraph 12 of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*). Similarly, a public employee's resignation is governed by section 63 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 which provides 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 acceptance.*

[135] Counsel for the employer submitted that because a person becomes a public servant by virtue of the provisions of one public statute and ceases to be an employee by that statute or by virtue of a resignation under another public statute, there is no room for any other way to cease to be an employee.

[136] Counsel for the employer acknowledged that when a government, as an employer, enters into a specific contract of employment, it is possible that a fundamental change to that contract might open the door to the doctrine of constructive dismissal; see *Wells v. Newfoundland,* [1999] 3 S.C.R. 199. However,

Ms. Hassard's position — classified as either WP-06 or AS-06 — was within a bargaining unit governed by a collective agreement. Her managerial responsibilities — and those alone — had excluded her from the bargaining unit but not from the provisions of the relevant collective agreement that would otherwise apply. In other words, she was not — as in *Wells* — in a managerial position by virtue of a separate, individual contract of employment. Had she been, there might be room to apply the doctrine of constructive dismissal in an appropriate case. But, in this case, her conditions of employment were established under a collective agreement and by statute. On that point, counsel pointed to the offers of an indeterminate position at the Keele Centre at the WP-05 level (September 14, 1999) and at the WP-06 (July 24, 2001), both of which had stated that "[t]he terms and conditions of most employees in the Public Service are now determined in large part by the provisions of collective agreements" (Exhibit E2, Tabs 4 and 5). Thus, no discrete, individual contract of employment had to be fundamentally altered by the employer.

b. <u>The status of the investigation report</u>

[137] Counsel for the employer submitted that if this matter moved on to the second stage (that is, if I ruled that I had jurisdiction to hear the grievance), the employer was entitled to rely upon the findings in the investigation report. She submitted that the *PSDPA,* by its structure, anticipates that discipline could result from the findings of an investigation. It is equally concerned with protecting the identities and confidentiality of whistle-blowers. She submitted that, in any event, concern about the conduct of the investigation had to be separated from — and did not affect — the conclusions in the eventual report, especially since in this case Ms. Hassard had agreed with the facts as found and not with the conclusions that were drawn.

[138] Counsel for the employer also submitted that the position advanced by counsel for Ms. Hassard would force the employer to justify its discipline by redoing the investigation, which would violate the confidentiality provisions of the *PSDPA*. And even if the employer did so, it would not be out of the woods, because the grievor might then argue that discipline was being justified on evidence or facts that were different from those that underlay the original discipline. It would put the employer in a catch-22. It could rest its case on the report (which had formed the basis for the discipline) and lose (because it was hearsay), or it could present independent evidence to justify the discipline and lose (because it had not in fact relied upon that evidence).

c. Was the retirement coerced?

[139] Counsel for the employer then turned to what she submitted was the crux of the issue before me: Was Ms. Hassard coerced into retirement?

[140] Counsel for the employer had no difficulty with the law with respect to coercion and its impact on decisions that had been coerced. However, she disagreed with counsel for Ms. Hassard's characterization of the evidence and facts.

[141] Counsel for the employer focused first on the grievor's demotion. She submitted that counsel for Ms. Hassard's interpretation of the scope of the word "termination" in paragraph 209(1)(*b*) of the *Act* was not persuasive because it ignored the word "disciplinary." She submitted that paragraph 209(1)(*b*) deals with ". . . a disciplinary action resulting in termination, demotion, suspension or financial penalty" (emphasis added). What happened in this case was clearly a disciplinary demotion, not a disciplinary termination. Demotions are commonplace in the public service. The demotion in question was not arbitrary or unreasonable. It did not mean that the grievor was to be permanently confined to the demoted position. It was chosen and designed to provide Ms. Hassard with a chance to reassess her role as a manager. It was designed to rehabilitate her. A comparison of the job description of the new position with that of the old revealed that the principal difference lay in the removal of managerial responsibility over staff. That decision was reasonable, given the findings in the report.

[142] Counsel for the employer then turned to the evidence that Ms. Hassard's counsel called coercive. Counsel for the employer pointed out that regardless of who first raised the issue of retirement, Ms. Hassard was never directed to retire. She was never told she had to retire.

[143] Counsel for the employer submitted that the quality of the evidence that was said to constitute duress or undue influence was crucial. Referring to *Lawton v. Canada Revenue Agency,* 2012 FC 1074, at para 43 to 46, counsel submitted that duress required a threat of death or serious physical injury; coercion, intimidation or the application of illegitimate pressure; or an ability of one person to dominate the will of another. She said that there was no such evidence in this case.

[144] The suggestion that Ms. Hassard might have feared losing her pension if she were disciplined was not supported on the evidence. Mr. Staley did not recall any such discussion. And even if any such discussion had occurred, the grievor had not believed it. Moreover, if Ms. Hassard had had such a fear, one would have expected to see some reference to the issue in her detailed email correspondence with Ms. MacDonald. But no reference was made. The fact that the website link might have referred to discipline was not a threat; it was a simple statement of what would happen if discipline were in fact imposed.

[145] Nor was there anything in the evidence to suggest that Ms. Hassard's will was overborne or dominated by Ms. MacDonald or by anyone else. Ms. Hassard was a senior manager. She knew about and had participated in the discipline process on other occasions in the past. She was experienced. She knew what questions to ask and how to defend herself against the allegations made in the report. She retained seasoned and experienced counsel, and both she and her counsel mounted a vigorous response to the report's conclusions. There was no evidence that Ms. Hassard was mentally incompetent. Nor was there any evidence that she had told Ms. MacDonald about the financial concerns about retirement that she stated she had.

[146] It was also perfectly reasonable in the circumstances for Ms. MacDonald to discuss the possibility of retirement with Ms. Hassard. Nor did it matter who first raised the issue. To the knowledge of her managers, Ms. Hassard had already attended retirement seminars. She had mentioned an intention to retire in the near future to the investigators. She was entitled to a full pension. With those facts in mind, and faced with disciplinary action that might have proved embarrassing, it was perfectly reasonable for the employer to discuss retirement as an alternative to the discipline process.

[147] Counsel for the employer submitted that Ms. MacDonald had no obligation to tell Ms. Hassard before the discipline meeting what penalty she had decided to impose. Ms. Hassard had retained counsel, whom she could and obviously did consult.

[148] Counsel for the employer submitted that it was clear from the email correspondence after October 7 that Ms. Hassard and her counsel were initially trying to negotiate "a package" with Ms. MacDonald. But that in turn presupposes an intent and understanding on their part that termination — that is, the cessation of employment — would be the result, since that is what a package is all about. In other

words, both the employer and the employee had cessation of employment in mind as a possible result of the employer's decision to proceed with discipline after the October 7 meeting. And that intent continued in Ms. Hassard's mind after discipline was imposed on October 14, inasmuch as she did not grieve the demotion (which she was entitled to do). Rather, she eventually retired. Nor did her letter of retirement state anything about duress.

[149] Counsel for the employer next turned to the evidence that counsel for Ms. Hassard put forth as signs of coercion. First, while Ms. Hassard might not have been ready to retire, she never told Ms. MacDonald that she was not ready or that there would be financial pressure associated with retirement while her daughter was still in school. Second, with respect to extensions of time, Ms. Hassard and her counsel were always granted the extensions they requested. Third, while there was a difference in salaries between the two positions, the difference would have had no impact on her pension. Pension entitlement is calculated on an employee's best five years, not the last five years. Ms. Hassard could have taken the demoted position and, in the event of retirement, would still have received the same pension. Fourth, while the demoted position might have put her next door to the union's office, the position was chosen in part because of Ms. Hassard's desire to remain in Toronto. Ms. Hassard did not object to that particular location; she just rejected the demotion in general. And finally, the fact that she was given a generic job description was of no importance. Such job descriptions are common in the public service.

[150] Accordingly, counsel for the employer submitted that the only reasonable conclusion was that Ms. Hassard, represented by experienced counsel, knew exactly what she was doing when she decided to retire. She chose that option, over that of working at the demoted position, of her own free will. Her letter of resignation was a clear and unequivocal intention to end the employment relationship; see, for example, *Grewal v. Khalsa Credit Union,* 2011 BCSC 648, at para 97 to 99.

[151] Turning to the decisions discussed by counsel for Ms. Hassard, counsel for the employer pointed out that in most of them, the grievors were in fact represented. (He had suggested that they were all self-represented.) She also noted that in *McNab*, the grievor was a probationary employee who had been caught sleeping on the job. The employer at that point had the right to reject him on probation, but it offered him the option of resignation instead. The grievor (who was represented) chose that option but

then grieved. Those facts were analogous to those before me, and in that case, the Board ruled that the resignation was voluntary and that accordingly it had no jurisdiction. Counsel also pointed out that regret subsequent to a resignation — or the stress of resignation — is not in itself sufficient to invalidate a resignation; see *Mangat,* at para 28 to 30 and 32.

[152] Counsel for the employer concluded by submitting that there was no evidence of coercion sufficient to vitiate Ms. Hassard's retirement. That being the case, I have no jurisdiction, both because she had retired and because she had not been terminated within the meaning of paragraph 209(1)(*b*) of the *Act*. While I would have jurisdiction to hear a grievance about her demotion, that is not what Ms. Hassard chose to grieve. She retired instead. Accordingly, I should uphold the objection to jurisdiction.

3. Reply of Ms. Hassard

[153] In his reply, counsel for the grievor focused on his submission that Ms. MacDonald had made an offer that he submitted she could not make. He submitted that coercion could be found in a good offer that could not legally be made, at least if the offer were made with the intent to extract retirement. The offer contained in the MOA represented a breach of the provisions of the *PSDPA*. It was manipulative and abusive. Ms. MacDonald was two levels above Ms. Hassard. She had all the information necessary for Ms. Hassard to consider whether to accept the demotion. He submitted that those facts constituted a presumption of undue influence. Ms. Hassard's retirement letter was brought about only as a result of a bad, illegal offer made without providing her with all the information she needed by someone in a superior rank and position. It was not voluntary.

V. Analysis and decision

[154] The grievor submitted her retirement request on October 21, 2011, and it was eventually accepted by Ms. MacDonald. That acceptance flowed from — and could have been made only by virtue of — section 63 of the *PSEA*, which provides 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.*

[155] Since the grievor's retirement was a cessation of employment — in effect, a termination — under the *PSEA,* I would in normal course lack jurisdiction to hear any grievance about it by virtue of paragraph 211(*a*) of the *Act*, which provides as follows:

> ***211.*** *Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*
>
> *(*a*) any termination of employment under the* Public Service Employment Act. . . .

[156] A recent application of this may be found in *Mutart v. Treasury Board (Department of Public Works and Government Services),* 2013 PSLRB 90.

[157] However, the grievor asserted that I do have jurisdiction, at least in a case in which the resignation or retirement was not voluntary or was in reality the result of a termination, or both.

[158] The grievor's submissions relate to four principal issues or questions. The first two — whether Ms. Hassard's retirement was voluntary or coerced and whether her demotion was in fact a constructive dismissal — relate to my jurisdiction. The third, which overlaps the first two, is whether the employer reneged on a settlement offer that the grievor stated was made by Ms. MacDonald and accepted by the grievor. The fourth — whether the employer can rely upon the investigation report — relates to the second stage of the process that is to be followed in the event that I find I have jurisdiction. I will consider those issues in that order.

A. <u>Was Ms. Hassard's retirement voluntary or coerced?</u>

[159] In considering the evidence — both oral and documentary — I have tended to place more weight on the contemporaneous correspondence between the parties. Ms. Hassard's testimony as to her understanding of what was happening at the time was not overly helpful, in part because what really counts in any conversation or agreement is what the parties actually said (or wrote) to each other and partly because evidence about a past understanding is almost invariably hindsight evidence that is or has been influenced by what has happened since the relevant events. That is not to say that I have neglected or ignored such evidence but only that, in general, I have placed less weight upon it.

[160] I turn first to the grievor's submission that during her discussions with Ms. MacDonald, the latter was the first to raise the issue of retirement as an option to discipline. On balance I am satisfied that at the October 7 meeting, Ms. MacDonald first raised the issue of retirement as a possible option. That is not to say that Ms. Hassard had not considered the possibility. It is only to say that, at that meeting, Ms. MacDonald mentioned it first. I come to this conclusion in part because of Mr. Dixon's evidence. While called to give evidence on behalf of Ms. Hassard, he did so only under subpoena. His objectivity is emphasized by the fact that his comment about Ms. MacDonald's professionalism was not particularly helpful to Ms. Hassard's position. More importantly, however, it makes sense to me that Ms. MacDonald would have been the one to first raise the issue. She was the person charged with imposing discipline. By reason of her earlier discussions with Ms. Hassard, she knew how difficult the grievor had found the investigation process. She knew that Ms. Hassard had accumulated the necessary age and years of service to enable retirement with a full pension. Moreover, the issue of retirement had been raised in the conversation between Mr. Moreau and Ms. MacDonald on September 26. It strikes me then as more likely than not that a "professional, firm, fair" manager in Ms. MacDonald's position would suggest retirement "with one's head held high" as a possible option to the shame of discipline and demotion.

[161] That said, I was not convinced that the fact that Ms. MacDonald was the first to raise the possibility of retirement created or added to any coercive pressure that forced the grievor to do something she did not want to do. In weighing all the evidence, including the fact that Ms. MacDonald first raised the issue, I have concluded that Ms. Hassard's decision on October 21 to retire was made voluntarily and without coercion on the part of the employer. It might have been a decision the grievor would have preferred not to make. It might have been a decision that she would not have made had the whistle-blower investigation and report not happened. But the fact that she chose retirement to avoid having to work in a demoted position does not mean that the choice was coerced.

[162] I come to this conclusion for a number of reasons.

[163] First, there was simply no evidence of coercion, as that term is legally understood. Neither the grievor nor someone near and dear to her was threatened with physical harm. She was not deceived as to the relevant facts. She was not subject to

any undue duress. The discipline process was not something new and hence possibly confusing to her. She was familiar with the process and had herself participated in it in the past as a manager. And she was championed throughout by skilled and knowledgeable legal counsel who was in close contact with her and with Ms. MacDonald. Against such a background, it cannot be said that the grievor's free will was rendered defective by fear, ignorance or lack of support.

[164] The fact that the grievor's decision to retire was made during a time of great stress for her does not mean that the decision was coerced. Discipline is always stressful for employees. The amount of stress no doubt increases with the severity of the discipline imposed. But such stress is an inevitable product of the discipline process. It is, on its own, a neutral fact. Of course, if the stress is such as to trigger a mental or emotional breakdown, then one might be able to say that the person was no longer mentally or physically fit to make a reasoned decision. But there was no such evidence in this case. No medical reports were filed. Nothing beyond the grievor's own passing references to stress, high blood pressure or high cholesterol (all of which are common in the population at large) suggested that the stress she was experiencing had affected her mental or physical capacity to make rational, logical decisions.

[165] Indeed, the evidence was clearly to the contrary. The grievor prepared detailed responses to the investigation report. She retained competent counsel. She must have assisted him in the preparation of the response he filed on her behalf. She negotiated with Ms. MacDonald. None of that suggests or supports a conclusion that her mind and will were addled or overborne by fear or undue duress or ignorance.

[166] In his submissions, Mr. Moreau put forward the example of someone in the grievor's position being demoted into a cleaner's position inside a jail. I acknowledge that if something like that had happened in this case, one might consider the possibility that a retirement to avoid such a demotion was coerced. But that is not what happened. While the demoted position was a step down in salary and responsibility, it was not, in my view, so far down the scale as to render it coercive in the way suggested by counsel's example. Indeed, even the drop in salary might not have been as dramatic as suggested by counsel, inasmuch as what counts in an employee's economic life is net income, not gross. Without knowing the grievor's tax status, and her particular deductions, one cannot know whether the drop in gross income was mirrored by a similarly dramatic drop in net income. In the same vein, I

note that the demoted position did not alter her benefits. Nor would it have had any impact on her pension entitlement, which was based on her five best years of salary, not her five last years.

[167] The second point is, were I to find that the simple threat of being demoted was in itself a threat sufficient to amount to coercion, I would neuter the employer's power to demote an employee for disciplinary reasons, which is provided by section 12 of the *PSEA* and recognized by paragraph 209(1)(*b*) of the *Act*. Each demotion — and its impact on the employee's reasoning ability — must be measured on its facts. A demotion such as the one in this case was not, as noted earlier, so terrible a prospect as to be considered coercive in its impact on the grievor. Nor did it in fact have that impact upon her.

B. Was the demotion a termination via the doctrine of constructive dismissal?

[168] That leads me to the related submission on behalf of the grievor that stated that the demotion constituted a constructive dismissal and hence a termination within the meaning of paragraph 209(1)(*b*) of the *Act*. The grievor's basic position is that the word "termination" in paragraph 209(1)(*b*) is broad enough to include a situation in which an employer changes an employee's position so drastically and negatively (both in job description and in pay) that one could say that the contract of employment is being fundamentally breached.

[169] Several conceptual difficulties arise with that position.

[170] First, a negative change in a job or position is in normal parlance termed "demotion," not "termination." A demotion presupposes the continuation of the employment relationship, albeit in respect of a different job. A termination presupposes the end of that relationship. Paragraph 209(1)(*b*) of the *Act* recognizes that distinction, inasmuch as it uses both the word "termination" and the word "demotion." To accept the grievor's position would be, in effect, to read the word "demotion" out of the legislation. But Parliament used two words, not one, and in doing so, it must have intended them to have separate meanings and separate applications.

[171] Second, and flowing from the first, to adopt the grievor's position would also be to deny to the employer a disciplinary power that Parliament clearly intended it have:

the right to demote an employee for disciplinary reasons. That right is found in section 12 of the *FAA*, as amended, which provides as follows:

> ***12.*** *(1) Subject to paragraphs 11.1(1)*(f) *and* (g)*, every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*
>
> . . .
>
> *(*c*) establish standards of discipline and set penalties, <u>including</u> termination of employment, suspension, <u>demotion to a position at a lower maximum rate of pay</u> and financial penalties;*
>
> *(*d*) provide for the termination of employment, <u>or the demotion to a position at a lower maximum rate of pay</u>, of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory;*
>
> *(*e*) provide for the termination of employment, <u>or the demotion to a position at a lower maximum rate of pay</u>, of persons employed in the public service for reasons other than breaches of discipline or misconduct. . . .*
>
> *(2) Subject to any terms and conditions that the Governor in Council may direct, every deputy head of a separate agency, and every deputy head designated under paragraph 11(2)*(b)*, may, with respect to the portion of the federal public administration for which he or she is deputy head,*
>
> . . .
>
> *(*c*) establish standards of discipline and set penalties, including termination of employment, suspension, <u>demotion to a position at a lower maximum rate of pay</u> and financial penalties; and*
>
> *(*d*) provide for the termination of employment, <u>or the demotion to a position at a lower maximum rate of pay</u>, of persons employed in the public service for reasons other than breaches of discipline or misconduct.*
>
> *(3) Disciplinary action against, or the termination of employment <u>or the demotion of</u>, any person under paragraph (1)*(c)*,* (d) *or* (e) *or (2)*(c) *or* (d) *<u>may only be for cause</u>.*
>
> [Emphasis added]

[172] Parliament was careful in that legislation to provide for both termination and demotion. Accordingly, it strikes me as all the more unlikely that Parliament thought or intended that the word "termination" could take the place of the word "demotion" or that a demotion would or could be equated to a termination.

[173] Third, there is a real question as to whether the doctrine of constructive dismissal has any place in the public sector.

[174] The doctrine is a creature of the world of common law employment contracts between an individual employee and his or her employer. Such contracts are usually a collection of express and implied terms. Such contracts can be terminated at will by the employer, the only caveat being that in the absence of cause proper notice (or pay in lieu of notice) must be given. Those contracts most often relate to a particular position with defined tasks, responsibilities and pay. They rarely if ever include terms that permit the employer to unilaterally change them. So, for example, a significant reduction of the duties and responsibilities of an employee could be considered a fundamental breach of the existing contract. Such a breach would entitle the employee to consider himself or herself terminated — that is, constructively dismissed. That in turn would entitle him or her to sue for wrongful dismissal.

[175] The doctrine has its advantages for employees. It prevents an employer from unilaterally changing the terms of the contract of employment, on pain of being found to have in effect dismissed the employee and hence becoming liable to pay damages in lieu of notice. It also protects an employee who walks away from the changed job and sues for wrongful dismissal. Normally, an employee in such a case would be met with the defence that he or she had voluntarily left the job. The doctrine enables that employee to, in popular parlance, say that he or she did not quit but was fired.

[176] That then is the situation in the private sector. But the contract of employment in the public sector is significantly different. For the most part, it is governed by statutes, regulations and collective agreements, which spell out the terms of employment in great detail and that govern or limit the rights and obligations of both employers and employees. Some of those terms are rarely found in the private sector. Perhaps one of the most important differences is that discipline, up to and including termination, in many if not most cases must be for cause. And, in addition to the usual spectrum of discipline, running from verbal reprimands to termination, Parliament has

provided the employer with one additional disciplinary power: the right to demote an employee for just cause.

[177] In short, and unlike in the private sector, in the public sector, the employer's right to demote is in fact part of the employment contract. The employee in effect agreed at the commencement of his or her employment that the employer did have the right to demote him or her for disciplinary purposes, provided it was for just cause. Hence, a demotion could not constitute a fundamental breach — or any breach — of the employment contract.

[178] Fourth, and flowing from the third, Parliament also provided employees who were subject to demotion with a remedy — the right to grieve that demotion. Employees subject to disciplinary demotions were entitled to challenge the demotion and, indeed, were provided with a right not available in the private sector: the right on a successful challenge to get their old jobs back. (For a recent discussion of the power to demote and of an employee's related rights, see *Gauthier v. Deputy Head (Department of National Defence),* 2013 PSLRB 94.) The right to grieve a demotion thus limits to a large degree (if not eliminating it altogether) the need for the doctrine of constructive dismissal in the public sector — at least in cases not involving individual contracts of employment, as in *Wells*.

[179] Having said that, I am not prepared to — and nor do I think it necessary to — rule definitively on the question of whether the doctrine of constructive dismissal has any role to play in employment contracts in the public sector. I say so because the question of whether a particular action of the employer constitutes a termination or a demotion under paragraph 209(1)(*b*) of the *Act* is a question of law that in turn depends upon the facts. It is a question of substance, not form. So, for example, the demotion of a senior manager to a cleaner's position in a jail might in law be considered a termination rather than a demotion within the meaning of paragraph 209(1)(*b*). But in normal course, a reduction in responsibility and pay by one or two levels or ranks will, in my view, be what anyone would normally call it — a demotion. Certainly, and for the same reasons discussed earlier in respect of the issue of coercion, the demotion of the grievor in issue was just that — a demotion. It was not a termination within the meaning of paragraph 209(1)(*b*).

C. <u>Did the employer renege on an offer that the grievor had accepted?</u>

[180] As noted at the beginning of this decision, the grievor complained in part that the employer breached an agreement it had entered into with her, as follows (Exhibit G1, Tab 35):

> *Contract entered into, and offer made, for an option whereby the grievor could retire in exchange for no discipline being imposed; however, Correctional Services Canada reneged on the terms of this contract and offer and attempted to make the grievor's retirement conditional on her signing a Full and Final Release of all rights in order to obtain the removal of discipline.*

[181] In his cross-examination and in his closing submissions, counsel for the grievor focused on what he alleged were the illegal aspects of the offer that Ms. MacDonald made and on what he suggested was her failure to follow through with what she promised she would do. For her part, the grievor focused on what she said was Ms. MacDonald's attempt to renege on her offer or to sneak new conditions into the offer once the grievor had accepted it — to wit, a requirement that she sign an MOA containing a release and a confidentiality clause. The grievor suggested in her testimony that she was induced to retire in reliance on Ms. MacDonald's offer "to close the discipline file, not discipline [her], and to publish an anonymous finding of 'retired' to close off the whistle-blower process, in the event of [her] retiring." She stated that she accepted that offer but that the employer reneged on it by making the MOA (and in particular its release clause) a requirement of acceptance, and by its subsequent failure to remove the discipline or any reference to it from her file and from the website.

[182] I do not accept the grievor's submission on that point.

[183] I am satisfied on the evidence and so find that before the imposition of discipline on the grievor on October 14, Ms. MacDonald in effect made the following offer:

a) if the grievor retired before discipline was imposed no disciplinary action would be taken; she would be considered as retired from her position as Director of the Keele Centre; and the website reference would mention only that a retirement had taken place, not that discipline had been imposed;

b) if the grievor retired after discipline was imposed, Ms. MacDonald would be prepared to unwind the discipline, treating it as never having happened, and

would proceed as outlined in the first option, the only difference being that a formal agreement would have to be executed in order to unravel the discipline decision.

[184] The only witnesses to the conversations in which the offer was made were Ms. MacDonald and the grievor. Neither reproduced those conversations or the offer to writing before the grievor's attempt to accept the offer on October 21. However, the testimony of both of them — right down to the discussion of a need for some kind of agreement if the offer were accepted after discipline was imposed — was to the same effect.

[185] It is also clear that the formal MOA did reflect the offer made by Ms. MacDonald. The demotion was to be rescinded, the file was to be shredded and the grievor was to be permitted to retire as if the discipline had never happened. In her testimony, the grievor did not say that the MOA failed to incorporate Ms. MacDonald's offer, the offer she stated that she relied upon when she retired. She was given the opportunity to explain how the MOA differed from the offer, and all she could point to were the confidentiality clause and the release clause.

[186] The grievor's objection to the confidentiality clause was clearly something that she came up with after the fact. No such objection was registered by Mr. Moreau in his letter of October 21. More importantly, her objection lacks credibility, given her repeated concerns about CSC staff being able to identify her in any online reference to the *PSDPA* investigation. Surely, given such concerns, she would have expected and indeed demanded such a clause in any formal agreement between the parties.

[187] The real crux of the grievor's objection lies in the release clause. Her objection to it means in effect that her position is that the employer, in the MOA, would do the following:

a) reverse the discipline and shred the discipline file;

b) enable her to retire without a discipline record; and

c) allow her to sue the employer for constructive dismissal, damages and the return of her old position as if she had not been disciplined and had not retired.

[188] In my opinion, the grievor's position on that point is untenable and lacks any credibility.

[189] First, both witnesses to the discussions agreed that if the grievor accepted the offer after she had been disciplined — that is, after the employer had taken a step that had an adverse impact on her employment — the grievor and the employer would have had to execute some kind of document in writing to unwind or reverse that step.

[190] Of course, that evidence raises the question of what kind of document and, more to the point, what would be in it.

[191] Given the discussions and correspondence between the grievor, her counsel Mr. Moreau and Ms. MacDonald, I would have thought that it was obvious by October 14 if not earlier that any such document would include a release clause. The grievor had counsel. As stipulated, her counsel had engaged Ms. MacDonald in discussions of a settlement package in late September. It was clear by October 7 that serious discipline was in the offing. On October 13, her counsel had corresponded with Ms. MacDonald to suggest that a payment equal to 28 weeks of pay was ". . . exceptionally generous when compared with the alternative that faces both sides should there be discipline and the fallout thereof." As he said later that day, it was ". . . a severance deal before [the grievor] is terminated or constructively terminated," adding that "[d]oing it now saves all sides a lot of trouble." In short, the offering that Ms. MacDonald made on or about October 13 and that she promised on October 14 to keep open for a week, was made in the context of negotiations to settle what was impliedly if not expressly threatened — a lawsuit over the grievor's "constructive dismissal."

[192] In my opinion, no party and no counsel could have been surprised to see a release clause in any document that purported to formalize an offer that had been made within the context of such negotiations. They would indeed have expected such a clause. Being discussed and negotiated was the settlement of a dispute over the imposition of discipline by the employer. The settlement of a dispute, as any lawyer worth his or her salt will tell his or her client, as a general rule presupposes a release of any rights that might have accrued as a result of that dispute. To suggest that a party would settle without a release is to pose the question, "Why settle then at all"?

[193] In essence, what the grievor is saying is that she thought that, as the saying goes, she could have her cake and eat it too. She wanted the employer to not only do something for her — reverse the discipline it had imposed — but also allow her to sue it for the discipline it had reversed. I cannot accept that in ordinary course any objective person would think or assume that such a result would be contemplated. The suggestion is in my mind so unusual and out of the ordinary that one would expect it to have been expressly raised during the discussions. But there was no evidence to the effect that either the grievor or her lawyer told Ms. MacDonald that once she had imposed discipline they expected her to (a) reverse her decision, but (b) let them sue her for it, and with good reason. No one in Ms. MacDonald's position would have made the offer that she did had he or she been told that he or she would then be sued for that very decision. What possible reason could anyone have for reversing a decision that would then ground a lawsuit against it? Surely in a case like this, any employer would request, as consideration for its agreeing to reverse a disciplinary decision, an agreement on the employee's part not to sue — in effect, a release.

[194] Accordingly, I am of the opinion that the employer did not renege on its offer to the grievor. The MOA that was drafted set out exactly what it had agreed to do in the event that the grievor decided to retire after discipline was imposed. Neither the confidentiality clause nor the release clause, alone or together, changed or added to the offer in any way. Those terms were implied in the offer, given the context in which the offer was made. The grievor's purported attempt to accept Ms. MacDonald's offer on October 21 (an offer that had not been rendered in writing by that point) was in fact an attempt to accept a different offer, one that had not been made. Or, alternatively, her subsequent refusal to accept the MOA represented an attempt on her part (not the employer's part) to arrive at a new agreement, one that did not include a release. In either event, the grievor, not the employer, failed to abide by or to accept the offer that had been made.

D. <u>Conclusion with respect to resignation</u>

[195] For these reasons I am satisfied that Ms. Hassard, voluntarily and of her own free will, with the benefit of experienced counsel, submitted her resignation and retirement effective October 21, 2011. That resignation was accepted by the employer. There was no coercion. Nor was there any breach of any agreement with respect to that retirement, since Ms. Hassard, not the employer, failed to follow through with the

terms–express or implied–in the offer made by Ms. MacDonald. And by voluntarily and freely resigning Ms. Hassard thereby severed the employment relationship and ended her status as an employee.

[196] That brings us to the question of what impact that finding has on that part of the grievance dealing with the demotion.

[197] On the one hand, there is a long line of decisions by this Board and its predecessor that have found there is no jurisdiction where an employee, given a choice between discipline up to and including termination on the one hand, and voluntary resignation on the other, chose the latter: see, for e.g., *Monteiro v. Treasury Board (Canadian Space Agency),* 2005 PSSRB 27; *McNab v. Treasury Board (Transport Canada),* PSSRB File No. 166-2-14343 (19840224); *Charron v. House of Commons,* 2002 PSSRB 90; *Mangat v. Canada Revenue Agency,* 2010 PSLRB 52; *Rinke and Vanderwoude v. Canadian Food Inspection Agency,* 2004 PSSRB 143; *Arsenault v. Treasury Board (Solicitor General - Correctional Service Canada),* PSSRB File No. 166-2-23957 (19930722) and *Bodner v. Treasury Board (Transport Canada),* PSSRB File No. 166-2-21332 (19910607), all cases referred to by the grievor.

[198] On the other hand, there is the decision of the Federal Court in *The Queen v. Lavoie,* [1978] 1 F.C. 778 (CA.). That decision has been interpreted as holding that a former employee has the right to raise a grievance against his or her former employer with respect to a matter that occurred while he or she was an employee: see, for e.g., *Glowinski v. Treasury Board (Department of Industry)*, 2007 PSLRB 91; *Crawley v. Treasury Board (Department of Fisheries and Oceans)*, 2013 PSLRB 135. I must say–and with respect– that it is not clear to me that *Lavoie* actually meant what it is taken to have said; or that if it did, it was correctly decided. Nor is it clear to me how that interpretation can be squared with the *Monteiro*, *supra* line of decisions, since to my mind there is no substantive difference between a resignation and a retirement, at least where both are voluntary. Both sever the employment relationship. And if this Board lacks jurisdiction to consider a grievance when the grievor chose resignation rather than accept the discipline that had been proposed by the employer in the alternative, I have difficulty understanding how it can have jurisdiction when the employee chose to retire rather that resign.

[199] Be that as it may, both parties in their written submissions on the point dated February 6, 2014 agreed that the above-noted interpretation of *Lavoie* was the correct

one. It is not for me to depart from that agreement, particularly where it has structured the approach of counsel to the issue at hand. The fact then that Ms. Hassard was no longer an employee when she filed her grievance does not in the circumstances of this case bar her from grieving the decision to demote her–nor does it deny me jurisdiction to hear such a grievance.

[200] This conclusion thus brings us to the fourth issue–the status of the investigation report.

E. Status of the Investigative Report

[201] This brings us to the third issue to be determined: can the grievor go behind the investigation report, or are she and I as adjudicator bound to accept the report's findings as findings of fact.

[202] This issue in reality contains two related but distinct questions. The first concerns whether the findings in the report must be accepted as, in a sense, found facts, such that the grievor is estopped from contesting them–and I as adjudicator am bound to accept them. A decision that the facts are not binding in that fashion leads us to the second question, which is more one of evidence. The fundamental question here is whether the employer is able to rely upon the evidence set out in the investigation report to support its decision to discipline Ms. Hassard–or whether it is required to support its decision with independent evidence (by which I mean other than the evidence set out in the report).

[203] Turning to the first question, I am not satisfied that the findings of fact set out in the investigation report are in and of themselves–as "facts"–binding on either the grievor or an adjudicator. Section 51 of the *PSDPA* provides as follows:

> *51. Subjection to subsections 19.1(4) and 21.8(4), nothing in this Act is to be construed as prohibiting*
>
> *(a) the presentation of an individual grievance under subsection 208(1) of the* Public Service Labour Relations Act*, or*
>
> *(b) an adjudicator from considering a complaint under s.242 of the* Canada Labour Code*.*

[204] In enacting this section Parliament clearly contemplated that an employee subject to discipline stemming from an investigation under the *PSDPA* might in response file a grievance with the Board. Parliament indeed was at pains to make clear that ***nothing*** in the *PSDPA* should be taken as prohibiting the presentation of such a grievance. In so providing Parliament must be taken as having accepted that a grievance stemming from discipline imposed as a result of a *PSDPA* would be handled in the same way as any other grievance under s. 208(1) of the *PSLRA*. In any such proceeding the employer is required to establish just cause–and an adjudicator is required to afford the parties a high degree of procedural fairness: *Timson*, *supra* at para. 15. To treat the findings set out in an investigation report–the product of a process based on unknown witnesses the grievor was not permitted to question, conducted by persons independent of the employer–as binding would be to violate fundamental principles of procedural fairness.

[205] I am accordingly satisfied that the grievor is not bound by any findings of fact made in the investigation report. Nor is an adjudicator required to accept such findings as binding on him or her.

[206] This conclusion leads us to the second question, which concerns what use, if any, the employer *can* make of the investigation report.

[207] As I interpret the submissions on this point made on behalf of the grievor there was in essence one basic objection to the investigative report–and hence to the employer's reliance upon it: the report is, in essence, hearsay based on hearsay. The report and its conclusions are based on the evidence of witnesses who are not identified and who Ms. Hassard was not permitted to face or to question. The employer cannot rely upon evidence contained in the report because it is hearsay.

[208] In my view this submission mixes two overlapping but distinct issues:

a. whether an employer is entitled to rely on hearsay evidence to justify a disciplinary decision, and

b. whether in the circumstances of the case before me the employer can rely upon all or part of the investigation report to support its decision to discipline Ms. Hassard.

[209] Dealing with the first point, it is true that while adjudicators are entitled to consider hearsay evidence they become reluctant to do so when it is the only evidence offered by the employer. This reluctance is particularly marked where the alleged offence and the resulting penalty are severe: see, for e.g., *Charlebois v. Treasury Board (Department of Human Resources and Skills Development)* 2006 PSLRB 19 at para. 111. An employer who relies solely upon hearsay evidence to justify the imposition of such serious discipline as demotion or discipline will accordingly have difficulty meeting the burden of proof that is on it: see for e.g., *Re B.C. Rail Ltd. and United Transportation Union, Locals 1778 and 1923,* (1984) 17 L.A.C. (3d) 402 (Munroe) at pp. 413-14; *Re Company A and UFCW-Can, Local 401,* (2013) 232 L.A.C. (4th) 70 (Ponak), and procedural fairness includes the recognition that it is dangerous for an adjudicator to rely upon untested and uncorroborated hearsay evidence.

[210] However, and this brings me to the second point, none of this is to say that hearsay evidence can never form *part* of the evidence used by an employer to support a decision to impose discipline. The weight to be accorded hearsay evidence will vary from case to case. It will depend upon such factors as necessity, reliability (whether threshold or ultimate), as well as on the seriousness of the alleged offence. It will also depend on the grievor's own testimony in response to such evidence. So, for example, much more caution would be required on the part of an adjudicator where the grievor flatly denies the hearsay evidence that is offered against him or her than would be the case where the grievor admits, qualifies or adds to the hearsay evidence. In the latter case the hearsay serves as much as a prompt that elicits direct evidence (that of the grievor) as it does evidence that may be relied upon to establish a finding of fact.

[211] In the case before me the hearsay evidence contained in the investigation report falls more into the latter category. The report is over 100 pages long. It contains significant amounts of Ms Hassard's own response to the hearsay allegations made against her. While she may have denied some of the incidents alleged in the hearsay statements contained in the report, she admitted or at least acknowledged others, seeking rather to explain, qualify, modify or justify them. That being the case it cannot be said that the report contains no evidence that could be safely considered by an adjudicator in deciding whether the employer can satisfy the burden upon it of establishing just cause.

[212] This does not mean that Ms. Hassard is not entitled to grieve the employer's decision to demote her, or to quarrel with the evidence in the report upon which the employer relied–at least in part–in reaching that decision. Nor does it mean that the grievor is barred from presenting evidence or making submissions that would have the effect of challenging the reasonableness of the employer's decision based on the evidence before it. She is entitled to grieve the demotion, and to put the employer to the burden of justifying both its decision to discipline her and the penalty it imposed.

[213] However, and by the same token, it does not mean that the employer cannot rely upon the report as part of the evidence it may offer to establish just cause. As already noted, the report is lengthy. It contains the direct evidence of Ms. Hassard in response to the wrongdoing she was alleged to have committed. It accordingly contains evidence upon which the employer may rely when it seeks to establish just cause.

[214] This conclusion is not to be taken as a finding that the employer's decision *was* justified. I make no finding on that point here. It is only to say that the report and the evidence contained in it has some weight. The amount of weight to be accorded to it, as well as to the other evidence obtained by the employer–the statements of Ms. Hassard in her counsel's submissions to Ms. MacDonald dated October 6, 2011 or those made by her to Ms. MacDonald in the meeting on October 6th–has yet to be determined. So too is the question of whether the employer can–on the basis of that evidence–justify the discipline it settled upon.

[215] I note at this point that I heard no submissions on the issue of whether Ms. Hassard could claim general, aggravated and moral damages for stress, emotional distress and loss of reputation in the event that a finding was made that there was no just cause for her demotion. That being the case I make no determination on the point at this time. That is an issue best left to be determined if Ms. Hassard elects to continue with her grievance insofar as it relates to the demotion.

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

(The Order appears on the next page)

VI. Order

[217] The grievor is entitled to proceed with only that part of her grievance relating to the employer's decision to discipline her, and to impose the penalty of demotion in respect of that decision.

[218] The extent of the sealing order made with respect to the investigation report and Ms. Hassard's response may be revisited in the event that Ms. Hassard elects to proceed with that part of her grievance dealing with the demotion.

[219] I remained seized of this grievance in the event that the grievor elects to proceed with it.

March 19, 2014.

Augustus Richardson,
adjudicator