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**File:** 566-02-4248

**Citation:** 2014 PSLRB 6



*Public Service  
Labour Relations Act*

Before an adjudicator

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BETWEEN

**MOHAMED BALIKWISHA PATANGULI**

Grievor

and

**DEPUTY HEAD  
(Department of Citizenship and Immigration)**

Employer

Indexed as

*Balikwisha Patanguli v. Deputy Head (Department of Citizenship and Immigration)*

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** Linda Gobeil, adjudicator

***For the Grievor:*** Chantal Homier Nehmé, Public Service Alliance of Canada

***For the Employer:*** Martin Desmeules, counsel

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Heard at Calgary, Alberta,  
September 10 to 13, 2013.  
(PSLRB Translation)

## **I. Individual grievance referred to adjudication**

[1] This grievance was referred to adjudication under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (“the Act”). Mohamed Balikwisha Patanguli (or “the grievor”) disputed the employer’s decision to dismiss him. In the letter of dismissal dated April 19, 2010, the employer reproached the grievor for inappropriately obtaining the questions and answers for a staffing selection process and for using those questions and answers so that he could prepare for that selection process.

[2] On May 11, 2010, Mr. Balikwisha Patanguli filed a grievance against the decision that reads as follows:

[Translation]

*I contest the letter of dismissal dated April 19, 2010, and signed by Ms. Claudette Deschênes, which Mr. Bram Strain gave me on April 19, 2010. I submit that the disciplinary sanction of dismissing me as of the end of the workday on April 19, 2010, was far too severe.*

*I ask that I be reinstated in my substantive position, retroactive to the date of my dismissal; that any mention of discipline be stricken from my personnel file; that I be reimbursed for the pay, benefits and pension credits of which I was deprived by the dismissal; and that I receive compensation for pain and mental suffering.*

[3] At his dismissal on April 19, 2010, the grievor held a pre-removal risk assessment officer position classified at the PM-04 group and level with the Department of Citizenship and Immigration (“the employer” or “the department”) in Calgary.

[4] At the start of the hearing, the grievor admitted to receiving the questions and answers from the selection process exam in which he participated. However, he denied stealing those questions and answers from his co-worker’s computer.

## **II. Summary of the evidence**

### **A. Employer’s evidence**

[5] Guylaine Lasonde was the employer’s first witness. She testified that from April 2009 to November 2010, like the grievor, she was a pre-removal risk assessment officer with the employer in Calgary. Ms. Lasonde was one of the grievor’s co-workers. She explained that the work of a pre-removal risk assessment officer consists of

analyzing the risks to an applicant's safety in a situation in which a removal decision to the country of origin is made against him or her. The pre-removal risk assessment officer's decision can be subject to judicial review in the Federal Court.

[6] Ms. Lasonde testified that in March 2009, she participated in a selection process for a PM-05 group and level position in Ottawa (Exhibit E-1). According to her, two of her co-workers, Joyce Lewis and Mr. Balikwisha Patanguli, also took part in the selection process. Ms. Lasonde explained that since few openings arise at the PM-05 group and level, she and her two co-workers discussed the selection process and the fact that they would all take part in it.

[7] Ms. Lasonde explained that the participants wrote the exam at their individual computers, in their respective offices. The exam was sent to them at a date and time set in advance. Claude-Henri Cormier managed the exam process from Ottawa. It was an open-book exam and was to be written alone, within a time determined by Mr. Cormier. Naturally, the questions were not available before the exam started. The answers were sent from each participant's computer to Mr. Cormier's attention.

[8] Ms. Lasonde testified that on June 26, 2009, she was advised that she would write the exam in her office on July 8, 2009. Since she was excited about it, she sent the exam notice to her co-worker, Mr. Balikwisha Patanguli (Exhibit E-2). Ms. Lasonde testified that her relationship with the grievor was that of co-workers and that it was cordial, but nothing more. Ms. Lasonde indicated that she learned that Ms. Lewis and Mr. Balikwisha Patanguli would also write the exam on July 8, 2009. However, for the grievor, the exam had to be postponed because he had injured his right arm and was unable to use his computer on July 8, 2009.

[9] Ms. Lasonde testified that on July 8, 2009, she completed the selection process exam and emailed it to the person responsible for the selection process, Mr. Cormier. Ms. Lasonde indicated that the exam instructions were very clear and that they indicated that the questions and answers were not to be shared (Exhibit E-3, p. 3).

[10] Ms. Lasonde categorically denied ever sharing the questions and answers from the selection process exam with anyone. She also categorically denied sending an email on August 7, 2009, to Mr. Balikwisha Patanguli, containing as attachments the questions and answers from her exam (Exhibit E-3).

[11] Ms. Lasonde testified that on Monday, August 10, 2009, while emptying her email trash folder, she noticed that the questions and answers from her exam had been sent to the grievor the Friday before, on August 7, 2009. Ms. Lasonde stated that she was completely surprised to see that the questions and answers had been sent to Mr. Balikwisha Patanguli in that way. Ms. Lasonde affirmed that although the time indicated on the email of August 7, 2009, was 13:09, in reality, the email had been sent at 12:09. The difference was because although those responsible for informatics in Winnipeg printed the email, it had been sent on Calgary time. It should be noted that the question of when the email was sent is not in dispute and that the parties agree that the email of August 7, 2009, was indeed sent at 12:09 Calgary time (Exhibit E-3).

[12] Ms. Lasonde indicated that she was shocked when she realized that the email including the questions and answers from the exam had been sent on Friday, August 7, 2009. She stated that at 12:09 on Friday, August 7, 2009, she had not been in her office; she had left for lunch. She stated that her lunch hour was always organized the same way and that she left every day at the same time to meet her friend, Lise Grixti, and that they used the time to take a walk. Ms. Lasonde mentioned that on August 7, 2009, she left her office as usual at around 11:55 to meet Ms. Grixti and that the two went to City Hall to pay a ticket that Ms. Grixti had received. Ms. Lasonde affirmed that she returned from her walk at around 13:05.

[13] Ms. Lasonde testified that on August 10, 2009, when she saw that an email had been sent to the grievor with the questions and answers from her exam attached, she immediately went to see her supervisor, Jeremy Fraser, to tell him what she had just found out. Ms. Lasonde indicated that she was upset by her discovery, because she felt that her integrity had been compromised. She categorically rejected the idea that she could have sent the email by mistake. According to her, had that been the case, the email would have been found in the “sent” section of her email application, rather than in the “trash” section. Ms. Lasonde testified that she went home after speaking with Mr. Fraser because she was so upset. Mr. Fraser told her that he would raise the matter with his supervisor, Robert Fergusson. Ms. Lasonde indicated that following her meeting with Mr. Fraser, Mr. Fergusson called for her. He wanted to hear her account of the facts of the matter.

[14] Ms. Lasonde explained that a password was needed to access her computer and that she had never shared it or had even written it down. Ms. Lasonde indicated that on

August 11, 2009, she tested her computer and realized that it took about 10 minutes before it locked and the password had to be entered again to obtain access. In other words, Ms. Lasonde explained that about 10 minutes would pass after the last transaction was made on her computer before her password had to be entered to access it again. Ms. Lasonde also asked Ms. Grixti for a copy of the proof that the ticket was paid on Friday, August 7, 2009, to show that she was not at her desk during lunch hour on August 7, 2009, and that therefore she could not have sent the grievor an email at 12:09. The receipt for the ticket payment indicates that the payment was made at 12:19 on August 7, 2009 (Exhibit E-5). Ms. Lasonde explained that in August 2009, she occupied a closed office located right next to the office of Mr. Balikwisha Patanguli and that she did not close the door when she left (Exhibit E-4). Ms. Lasonde added that an access card was required to access the floor on which her office as well as those of the grievor, her supervisors and other co-workers were located.

[15] In cross-examination, Ms. Lasonde mentioned that on Monday, August 10, 2009, Mr. Balikwisha Patanguli was not in the office. He went to see her the next day, but she was busy on the phone and did not talk to him; he did not try to contact her after that. According to Ms. Lasonde, only the grievor had an interest in sending the email containing the questions and answers from her exam.

[16] Ms. Grixti also testified for the employer. Ms. Grixti worked for the employer in 2009 and has known Ms. Lasonde since 2008. She testified that she was a friend and colleague of Ms. Lasonde and that they were in the habit of having lunch together and then going for a walk. Ms. Grixti affirmed that she went with Ms. Lasonde on Friday, August 7, 2009, to pay a ticket at City Hall, which is about a five- to eight-minute walk away. She indicated that she met Ms. Lasonde at the building entrance between 11:50 and 12:10. Ms. Grixti testified that she was surprised to learn that the grievor allegedly sent himself the questions and answers from Ms. Lasonde's exam, because she respected him a great deal and trusted him. According to her, Mr. Balikwisha Patanguli knew the field better than Ms. Lasonde did because he was more experienced. According to Ms. Grixti, only employees from the department had access to the floor on which Ms. Lasonde and the grievor worked.

[17] Jeffrey Mitchell also testified for the employer. At the time of the facts in question in 2009, Mr. Mitchell was the regional information technology manager for the Prairies and Northwest Territories for the employer.

[18] Basically, according to Mr. Mitchell's testimony, in August 2009, Barb Pirt-Horodyski, the chief of labour relations for the employer, asked him to copy information from the email accounts of Ms. Lasonde, Mr. Balikwisha Patanguli and Ms. Lewis onto a disc, which was done on August 11 and 12, 2009. Mr. Mitchell gave the disc to Human Resources.

[19] Mr. Mitchell explained that the email of August 7, 2009, indicated 13:09 because it was printed in Winnipeg. But the email was actually sent at 12:09, Calgary time (Exhibit E-3).

[20] Mr. Fergusson testified for the employer. In 2009, he was the assistant director of operations for the employer. At that time, about 55 employees reported to him, including four supervisors, of which Mr. Fraser was one.

[21] Mr. Fergusson testified that he has known the grievor since 2007 and that the grievor was promoted to the PM-04 group and level in 2008 (Exhibit E-10). He indicated that although Mr. Balikwisha Patanguli spoke French, the language requirement for the PM-04 position was English essential, and his unit's working language was English. Mr. Fergusson stated that the grievor's tasks were to review written submissions to determine whether the safety of persons was at risk for whom a decision had been made to return them to their home countries. Mr. Fergusson stressed the importance of the decisions of a pre-removal risk assessment officer, given the impact of such a decision on the applicant's safety. Mr. Fergusson testified that the grievor's performance was good and that he was a good addition to their team.

[22] Mr. Fergusson indicated that he was on vacation on Monday, August 10, 2009. On his return the next day, Mr. Fraser informed him about the situation involving the email of August 7, 2009. Mr. Fergusson then contacted Human Resources, which in turn contacted Mr. Mitchell in the information technology group.

[23] On August 13, 2009, Mr. Fergusson received the results of Mr. Mitchell's research, which revealed that on August 7, 2009, an email from Ms. Lasonde's account was sent to Mr. Balikwisha Patanguli's office account and that attached to it were the

questions and answers from Ms. Lasonde's exam for the selection process for the PM-05 position (Exhibit E-3). Mr. Fergusson also testified to being informed that Mr. Mitchell had found an email on Mr. Balikwisha Patanguli's computer, also dated August 7, 2009, sent from his office computer to his personal home email address. It contained the questions and answers from Ms. Lasonde's exam (Exhibit E-12).

[24] Mr. Fergusson testified that he met with the grievor on Thursday, August 13, 2009, in the early afternoon, right after the grievor wrote the exam for the selection process (Exhibit E-14), to obtain his version of the facts. Mr. Fergusson stated that he questioned the grievor about the initial email of August 7, 2009, sent to the grievor at 12:09 Calgary time (Exhibit E-3). According to Mr. Fergusson, the grievor denied seeing the email and the second email that was also sent on August 7, 2009, from his office computer to his personal home email address (Exhibit E-12). Mr. Fergusson made it clear that he informed Mr. Balikwisha Patanguli that the matter was serious and that he would discuss it with Human Resources and then get back to him.

[25] In his testimony, Mr. Fergusson also said that he received from Human Resources a copy of another email from Mr. Balikwisha Patanguli, dated August 12, 2009. According to Mr. Fergusson, that email shows that the day before his meeting with the grievor on August 13, 2009, the grievor re-sent the exam questions as well as the answers that he had prepared in advance from his personal home email address to his office email address. According to Mr. Fergusson, that evidence clearly demonstrates that contrary to what Mr. Balikwisha Patanguli claimed on August 13, 2009, he not only read the email of August 7, 2009, but also used it to prepare his own answers for his exam, which took place in the morning of August 13, 2009.

[26] Mr. Fergusson testified that later in the evening of August 13, 2009, he received an email from Mr. Balikwisha Patanguli admitting that he had received the first email of August 7, 2009, which contained the questions and answers from Ms. Lasonde's exam. Mr. Fergusson noted that the grievor admitted in his email to erring when he decided to write the exam while already possessing the questions and that it was an error in judgment on his part (Exhibit E-15).

[27] Mr. Fergusson testified that an administrative investigation was conducted (Exhibit E-17) and that a meeting on the subject was held on Monday, August 31, 2009. Mr. Fergusson, Mr. Balikwisha Patanguli and his union representative, Sandy McDonald, and Ms. Pirt-Horodyski attended the meeting.

[28] According to Mr. Fergusson, during the meeting, the grievor indicated that he saw nothing wrong with obtaining the questions in advance because the selection process was “open book.” Additionally, according to Mr. Fergusson, Mr. Balikwisha Patanguli denied sending himself the exam questions and answers using Ms. Lasonde’s computer. The grievor apparently said that he had no idea how the exam questions and answers ended up on his computer. According to him, the only plausible explanation was that Ms. Lasonde sent them to him.

[29] According to Mr. Fergusson, after meeting with Mses. Lasonde, Grixti and Lewis, Ms. Pirt-Horodyski and he met with the grievor and his union representative one more time. During the meeting, the grievor admitted to an error in judgment and stated that he regretted it, but he insisted that he did not know how Ms. Lasonde’s questions and answers ended up on his computer, and that, in any event, with his experience, he did not need them. He explained that on the morning of August 13, 2009, he did not admit to Mr. Fergusson that he had read the email of August 7, 2009, and that he used the questions to prepare because he wanted to protect Ms. Lasonde, thus implying that she had sent him the email of August 7, 2009.

[30] Mr. Fergusson also testified that his investigation revealed that the grievor had also tried to obtain the exam questions from the third person to take part in the selection process, namely, Ms. Lewis. Mr. Fergusson explained that since Mr. Balikwisha Patanguli had hurt his arm, he was unable to take the exam at the same time as the two others, on July 8, 2009. Instead, he wrote the exam the morning of August 13, 2009, right before his meeting with Mr. Fergusson. According to Mr. Fergusson, the grievor apparently emailed Ms. Lewis on July 8, 2009, to ask her how the exam had gone and whether she could share the questions with him (Exhibit E-20). It is important to note that on July 8, 2009, Ms. Lewis did not know that because of his arm injury, the grievor had obtained an extension and would write the exam at a later date. The July 8 email reads as follows:

[Translation]

**From:** Balikwisha Patanguli.Mohamed

**Sent:** July 8, 2009, at 12:16

**To:** Lewis.Joyce **Subject:** Processus de sélection 2009-IMC-IA-DM-08772 - PM-05 conseiller principal / conseillère principale de politique / de programme / Selection Process 2009-IMC-IA-DM-08772 - PM-05 Senior Policy / Program Advisor



*Hi Joyce,  
Right after the exam, I went to see you to give you a hug and congratulate you but you weren't in your office. I'm sure that you did very well. I also wanted to check your questions; could you send them to me? Thanks. I'll come see you after lunch.  
Mohamed*

*Mohamed Balikwisha Patanguli  
Agent d'examen des risques avant renvoi (ERAR) /  
Pre-Removal Risk Assessment (PRRA Officer)  
Citoyenneté et Immigration Canada / Citizenship and  
Immigration Canada*

[31] Mr. Fergusson testified that he handed the grievor a preliminary investigation report on December 3, 2009. Mr. Balikwisha Patanguli submitted his comments on December 6 and 21, 2009 (Exhibits E-24 to 27).

[32] According to Mr. Fergusson, Mr. Balikwisha Patanguli's comments did not include any new information. Consequently, on January 26, 2010, a final investigation report (Exhibit E-28) was submitted, in which management found that Mr. Balikwisha Patanguli accessed Ms. Lasonde's computer in her absence on August 7, 2009, emailed the exam questions and answers to his personal email address, and used the questions and answers to prepare for his exam. To that end, he emailed the answers from his personal address to his office email address on August 12, 2009, in anticipation of his exam, which was to be held the next morning. On July 8, 2009, the grievor attempted in vain to obtain the questions from the other candidate, Ms. Lewis. Under the circumstances, in Mr. Fergusson's opinion and given that Mr. Balikwisha Patanguli initially denied his involvement, the relationship of trust between him and management was definitively broken.

[33] In cross-examination, Mr. Fergusson admitted that Mr. Balikwisha Patanguli was an experienced employee and that he had good relationships with his co-workers. Mr. Fergusson also agreed that the grievor was part of the unit recommended for the Deputy Minister's Recognition Award in 2009. Mr. Fergusson further explained that while he received information about the grievor's conduct on August 11, 2009, he did not know that the grievor was a candidate in the selection process, which was why management did not prevent him from taking the exam on the morning of August 13, 2009. Mr. Fergusson admitted that at the interview on August 31, 2009, the grievor expressed the desire to be heard in French. According to Mr. Fergusson, the grievor occupied a position with English as the working language. The grievor made

the request only at the meeting of August 31, 2009, and his representative did not have a problem with the interview being held in English. According to Mr. Fergusson, the fact that the grievor later admitted to receiving the exam questions and answers did not excuse his conduct. He still has not acknowledged initiating the situation by entering Ms. Lasonde's office and sending himself the questions and answers. For Mr. Fergusson, the circumstances of this case are such that the grievor can no longer be trusted.

[34] Claudette Deschênes was the employer's last witness. She is now retired. At that time, she was Assistant Deputy Minister, Operations, and made the decision to dismiss Mr. Balikwisha Patanguli (Exhibit E-38).

[35] Ms. Deschênes explained that she read the investigation report (Exhibit E-28) as well as all of its appendices, along with the *Values and Ethics Code for the Public Service*, the *CIC Code of Conduct*, and the *Policy on the Use of Electronic Networks* (Exhibits E-35 to 37).

[36] Ms. Deschênes explained that she terminated the grievor's employment because he appropriated the questions and answers from Ms. Lasonde's exam and used them to prepare for his own exam. For Ms. Deschênes, his actions were grave and seriously undermined the employer's trust in him.

[37] Ms. Deschênes testified that the grievor's job, namely, to review submissions from applicants who claim that removal to their countries would result in serious risks to their safety, requires that the decision maker demonstrate ethics and judgment. For Ms. Deschênes, the outcome of that work has a grave and serious impact on the person applying for the review. Therefore, the employee making the decision has to be credible and must demonstrate a high level of integrity. However, according to Ms. Deschênes, the employer lost confidence in the grievor. The employer's opinion is that Mr. Balikwisha Patanguli no longer has the credibility required to do his job.

[38] For Ms. Deschênes, the grievor first refused to acknowledge his wrongdoing when Mr. Fergusson confronted him on August 13, 2009. Only later did he partially acknowledge his wrongdoing. For Ms. Deschênes, the grievor still does not realize the seriousness of his actions and still refuses to take full responsibility for them, preferring to blame Ms. Lasonde.

Ms. Deschênes explained that while the employer had no direct proof that Mr. Balikwisha Patanguli entered Ms. Lasonde's office on August 7, 2009, to steal the exam questions and answers, the fact remained that, on a balance of probabilities, the employer was entitled to conclude that he did. In addition, according to Ms. Deschênes, it was admitted that the grievor possessed Ms. Lasonde's questions and answers, that he sent them to his personal home email address, and that he used them for his own exam. All of that is, in and of itself, serious enough to warrant dismissal. Ms. Deschênes concluded her testimony by stating that she had thought carefully about what sanction to impose on the grievor. Given the seriousness of the offence and the fact that the grievor still did not take full responsibility for his actions and that the employer no longer trusted him to perform work that has serious impacts on peoples' lives, she had no choice other than to terminate his employment.

### **B. Grievor's evidence**

[39] Ms. Lewis testified for the grievor. She stated that until 2011, she was the grievor's colleague and was a pre-removal risk assessment officer with the employer.

[40] Ms. Lewis explained that when Mr. Balikwisha Patanguli arrived, they worked together, and that he helped her with her files on several occasions. According to Ms. Lewis, he was rather quiet but quite knowledgeable and was willing to help others.

[41] Ms. Lewis testified that she participated in the selection process on July 8, 2009, for the position in Ottawa classified at the PM-05 group and level.

[42] Ms. Lewis stated that on July 8, 2009, she received an email from the grievor asking her how the exam had gone and whether she could give him the exam questions (Exhibit E-20). Ms. Lewis explained that at that instant she did not pay attention to the email's contents, but that she now realizes that the grievor sought the exam questions. However, she did not give them to him.

[43] Ms. Lewis explained that the grievor came to see her on July 9, 2009. He then told her that he had not yet taken the exam because his right arm was in a cast. Ms. Lewis stated that at that meeting, the grievor did not pressure her for the exam questions. In cross-examination, Ms. Lewis admitted that the grievor came to see her on July 9, 2009, to discuss the exam.

[44] Mr. Balikwisha Patanguli arrived in Canada in 1997. In 2003, he joined the federal public service, specifically, the Department of Citizenship and Immigration and, in 2004, took on a position classified at the CR-05 group and level. When he was dismissed in 2010, he was employed as a pre-removal risk assessment officer at the PM-04 group and level. The grievor has been unemployed since his dismissal.

[45] Mr. Balikwisha Patanguli testified that during his employment at the Calgary office as a PM-04, he always maintained good relations with his co-workers, and that he performed well in his job.

[46] He stated that his workdays began at 07:00 and ended at 15:00 and that he took his lunch break from 12:00 to 12:30. He stated that given his financial situation and the fact that he had a dependent family, he never went out to lunch with the others and would simply take a walk during his lunch break.

[47] He testified that on Friday, August 7, 2009, he left his office and that he returned around 11:58. He then left his office again and returned for good at 12:31, as shown in Exhibit E-34a, which indicates the entrances on the floor where the offices of the grievor and Ms. Lasonde were located.

[48] According to the grievor, the lunch hour was always very busy, and many employees would come and go, walking past his and Ms. Lasonde's offices. He denied entering Ms. Lasonde's office during the lunch hour on August 7, 2009.

[49] According to him, on August 7, 2009, he returned from his walk at 12:31, sat down at his desk and turned on his computer. He then noticed that he had received an email from Ms. Lasonde with the heading "[translation] Selection Process" that was addressed to the selection process coordinator, Mr. Cormier. According to the grievor, at around 12:34, he went to Ms. Lasonde's office to talk to her about the email. Ms. Lasonde was not in her office, so he returned to his office. The grievor stated that at that moment, he did not know that the email attachments contained Ms. Lasonde's exam questions and answers.

[50] Mr. Balikwisha Patanguli affirmed that he then forwarded Ms. Lasonde's email to his "Hotmail" home account. According to him, each time he received an email that was unrelated to his work, he forwarded it to his personal email address to read it later. The grievor stated that while he knew that the email was related to the selection

process for the PM-05 position, he did not know that it contained Ms. Lasonde's questions and answers, as he had not opened the attachments. He stated that he briefly spoke to Ms. Lasonde shortly before 15:00 on August 7, 2009, without mentioning the email about the selection process, however, because he did not want to be late for his train.

[51] The grievor testified that on August 10, 2009, he was absent for medical reasons. When he arrived at the office on Tuesday, August 11, 2009, he wanted to talk to Ms. Lasonde about the email, but she did not want to talk to him and said that she was busy. According to the grievor, Ms. Lasonde's tone was aggressive, and her door was closed. He stated that he was also unable to speak to her on August 12, 2009, because her door remained closed.

[52] Mr. Balikwisha Patanguli testified that because of the injury to his right arm, he was unable to take the exam for the PM-05 selection process on July 8, 2009, like the others. In his case, the exam was deferred to Wednesday, August 13, 2009, from 09:00 to 11:00.

[53] The grievor testified that on the day before the exam, that is, on the evening of August 12, 2009, while preparing for the next day, he opened the attachments to Ms. Lasonde's email of August 7, 2009, for the first time. He then realized that he had Ms. Lasonde's exam questions and answers. The grievor testified that he thought to himself, "[translation] What luck to have the exam questions and answers."

[54] The grievor stated that he read the questions. According to him, they were not complicated, especially since it was an open-book exam, so preparing for it did not require "intense" effort.

[55] Mr. Balikwisha Patanguli testified that he prepared his answers for the next day's exam based on the questions received and that he sent them to his office email address. He stated that the next day, after making sure that the exam questions were the same as those he had received as an attachment to Ms. Lasonde's email, he wrote his exam using the answers prepared the day before and sent them to Mr. Cormier in Ottawa. In response to his representative, the grievor agreed that what he did was wrong and that he should not have done it.

[56] Mr. Balikwisha Patanguli testified that as soon as he completed his exam, he received a call from Mr. Fergusson, who wanted to see him at 13:00. According to the grievor, at the meeting, Mr. Fergusson showed him the emails of August 7, 2009, namely, the one from Ms. Lasonde to the grievor and the one from the grievor to his home email address (Exhibits E-12 and 13), and asked him whether they meant anything to him. The grievor testified that he denied seeing Ms. Lasonde's email (Exhibit E-12), to protect her. With respect to the email sent to the grievor's personal home email address (Exhibit E-13), he simply acknowledged that that was indeed his email address, and nothing more. According to him, after Mr. Fergusson learned that he had written the exam that same morning, he told him that he was eliminated from the selection process and that Human Resources would examine the matter.

[57] The grievor testified that he went home after his meeting with Mr. Fergusson and that he then felt remorseful. Therefore, he decided to email Mr. Fergusson. He admitted receiving the exam questions and using them for the exam that very morning (Exhibit E-15). Mr. Balikwisha Patanguli stated that he felt awful and that he was emotionally distressed.

[58] It should be noted that in his testimony, the grievor affirmed that he made a mistake by using the exam questions. However, he maintained that while he received and used the exam questions, he did not send the questions and answers from Ms. Lasonde's computer, implying that Ms. Lasonde sent the questions and answers to him. With respect to his email of July 8, 2009, to Ms. Lewis, the grievor stated that he had meant it as a joke.

[59] Mr. Balikwisha Patanguli testified that he was called to Mr. Fergusson's office on August 27, 2009. He was informed that a committee would investigate his conduct and that he was requested to attend an interview with the committee on August 31, 2009. The grievor affirmed that he requested that the interview be held in French, since he was more at ease in French than in English, but that Mr. Fergusson apparently answered that it would be held in English, since he occupied an English-essential position for language requirement purposes.

[60] Mr. Balikwisha Patanguli testified that he attended the interview on August 31, 2009, with his union representative, Ms. McDonald. Mr. Fergusson and Ms. Pirt-Horodyski also attended, representing the employer. The grievor testified that at that meeting, he affirmed that Mr. Fergusson had already found him guilty on the

afternoon of August 13, 2009, when he eliminated him from the competition. In addition, the grievor apparently again mentioned that he wanted the interview to be held in French but was once again told that for language requirements purposes, his position was designated English essential and that Calgary was not designated a bilingual city. Consequently, the interview was held in English.

[61] Mr. Balikwisha Patanguli testified that he received the final investigation report on February 2, 2010 (Exhibit E-28) and that he then went on sick leave until March 24, 2010. He insisted that before the August 7, 2009 incident, he had good relations with his co-workers and good performance evaluations, including a nomination, along with his co-workers, for the Deputy Minister's Recognition Award (Exhibit G-3). The grievor concluded by affirming that the incident devastated him and his family, both emotionally and financially.

[62] In cross-examination, the grievor agreed that a pre-removal risk assessment officer's decision could result in a claimant living or dying. The grievor also maintained that at the August 13, 2009, meeting with Mr. Fergusson, he did not acknowledge possessing the exam questions in order to protect Ms. Lasonde and that she was responsible for her computer.

### **III. Summary of the arguments**

#### **A. For the employer**

[63] According to counsel for the employer, the evidence is clear. The grievor emailed himself the questions and answers from Ms. Lasonde's exam for the selection process from her computer while she was out for lunch. The grievor then sent the questions and answers to his personal email address so that he could use them to prepare to write the exam. The day before the exam, on August 12, 2009, he sent the answers he had prepared for next-day's exam to his office email address.

[64] The employer's counsel submitted that the grievor's actions constituted cheating and were very serious and that they warranted dismissal.

[65] According to the employer's counsel, it is not disputed that Mr. Balikwisha Patanguli used the exam questions. That in itself is so serious that it alone would justify his dismissal, because it irretrievably broke the relationship of trust. I was referred to *Rivard v. Treasury Board (Solicitor General of Canada -*

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*Correctional Service*), 2002 PSSRB 75, and to *Thomas v. House of Commons*, PSSRB File No. 466-H-155 (19910415).

[66] With respect to knowing whether the grievor entered Ms. Lasonde's office on August 7, 2009, to send himself the exam questions and answers, the employer's counsel asked me to make that determination given the fact that except for Ms. Lewis, no one other than the grievor had an interest in obtaining the questions in advance. Furthermore, Mr. Balikwisha Patanguli had tried earlier on to obtain the exam questions from Ms. Lewis.

[67] With respect to the grievor's argument that Ms. Lasonde sent him the email with the attachments on August 7, 2009, the employer's counsel pointed out that given the evidence, it was practically impossible, and that under the circumstances and on the balance of probabilities, I should find that the grievor not only used the exam questions for personal purposes but also entered Ms. Lasonde's office on August 7, 2009, to send himself the questions and answers from the selection process exam.

[68] According to the employer's counsel, not only did Mr. Balikwisha Patanguli fail to tell the truth when Mr. Fergusson confronted him on the afternoon of August 13, 2009, he still continues to minimize the impact of his actions, namely, by refusing to accept full responsibility for what he did, by accusing Ms. Lasonde of sending the email, and by claiming that having the questions in advance did not give him much of an advantage over the others since he was already very knowledgeable and it was an open-book exam. According to counsel, all those factors favour upholding the dismissal and support the proposition that Mr. Balikwisha Patanguli cannot be reinstated because the relationship of trust with the employer is broken. The employer's counsel referred me to *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43.

[69] The employer's counsel asked me to consider the fact that the grievor performed duties that could have had life-or-death consequences for someone requesting a pre-removal risk assessment. According to the employer's counsel, it is crucial that the officer making the decision in such cases be above reproach and be completely credible. In this case, the employer would never know if the grievor were putting his personal interests before those of persons under removal orders.



[70] With respect to the grievor's argument that he was not permitted to express himself in French at the meeting with the investigation committee, the employer's counsel maintained that a grievance hearing before an adjudicator is a hearing *de novo*, which corrects any procedural errors that might have been committed earlier.

[71] According to the employer's counsel, the grievor's acts were calculated and were not a momentary aberration. Had Mr. Fergusson not contacted him on August 13, 2009, the grievor never would have admitted anything. Under the circumstances, the dismissal must be upheld.

[72] The employer's counsel referred me to *Faryna v. Chorny* [1952] 2 D.L.R. 354, and to *Trenholm v. Staff of the Non-Public Funds, Canadian Forces*, 2006 PSLRB 66.

### **B. For the grievor**

[73] The grievor's representative started by insisting that before the grievor's dismissal, he had been an exemplary employee appreciated by his co-workers and that he had received very good performance appraisals from his supervisors.

[74] According to the grievor's representative, although it is acknowledged that the grievor possessed the questions and answers from Ms. Lasonde's exam and that he used them to prepare for his exam on August 13, 2009, there is no evidence that he entered Ms. Lasonde's office on August 7, 2009, around noon, and sent himself her exam questions and answers. According to the grievor's representative, by applying the test of the balance of probabilities to the employer's evidence to determine if Mr. Balikwisha Patanguli entered Ms. Lasonde's office and sent himself the email, I have to conclude that the employer's evidence does not meet the "balance of probabilities" test and that it is based only on suspicions and doubts. According to Mr. Balikwisha Patanguli's representative, it is not sufficient for the employer to state that the grievor had the opportunity and the motive to send himself the exam questions from the computer in Ms. Lasonde's office; it must prove it.

[75] According to Mr. Balikwisha Patanguli's representative, it is crucial that the employer did not show that the grievor sent himself the questions and answers from Ms. Lasonde's exam. The employer provided two grounds for dismissal in its letter of April 19, 2010 (Exhibit E-38), but could not prove one of those grounds, namely, that Mr. Balikwisha Patanguli entered Ms. Lasonde's office on August 7, 2009, and sent

himself the questions and answers. Under the circumstances, the grievor's representative maintained that the employer had to provide unequivocal proof of both infractions cited in the letter of dismissal. As it was not shown that the grievor entered Ms. Lasonde's office and sent himself the exam questions and answers, dismissal was no longer an appropriate disciplinary measure.

[76] With respect to the allegation that the grievor admitted that he used the exam questions to prepare for his own exam, his representative maintained that it was up to the employer to prevent the grievor from taking the exam on the morning of August 13, 2009, because as of then, the employer had known since August 11, 2009 that Mr. Balikwisha Patanguli possessed Ms. Lasonde's exam questions and answers. By not acting, the employer made the situation even more difficult, which further supports reducing the disciplinary action taken against the grievor.

[77] The grievor's representative argued that even if the grievor did not immediately admit to Mr. Fergusson on August 13, 2009 that he possessed the exam questions and that he had used them, the grievor nonetheless showed signs of sincere remorse barely a few hours after his meeting with Mr. Fergusson. According to her, the fact that that very evening the grievor emailed Mr. Fergusson, acknowledging his error and expressing his apologies (Exhibit E-15), shows that he was sincerely remorseful, which should work in the grievor's favour.

[78] The grievor's representative also pointed out that the grievor had not been permitted to express himself in French during the investigation, which constituted a serious breach of her client's rights. She maintained that it is not simply a question of a work position but a violation of the grievor's language rights. She referred me to the Supreme Court of Canada's decision in *Reference re Secession of Quebec*, [1998] 2 SCR 217.

[79] The grievor's representative argued that since only one of the grounds of dismissal had been proved, namely, using the exam questions, it is debatable whether the relationship of trust was truly broken, as the employer claimed. In her opinion, in such a case, it would have been more reasonable to apply the principle of progressive discipline, especially given the grievor's good work record. According to the grievor's representative, since the grievor admitted his error and bitterly regretted it, he showed that he could be rehabilitated. Not all breaches of a code of conduct warrant dismissal.

[80] The representative referred me to *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124, *Canadian Pacific Railway*, 2000 GLB 12148, *Dosanjh v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 16, *Archambault v. Treasury Board (Solicitor General Canada Correctional Service)*, PSSRB File No. 166-02-17692 (19881118), *Hampton v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File No. 166-02-28445 (19981123), and to *Hickling v. Canadian Food Inspection Agency*, 2007 PSLRB 67.

#### **IV. Reasons**

[81] I have no hesitation denying this grievance. Despite the valiant efforts of Mr. Balikwisha Patanguli's representative, not only is the evidence against the grievor simply overwhelming, but also there is no doubt in my mind that the allegations made and proven, on a balance of probabilities, are serious and that they irretrievably damaged the relationship of trust that must exist between an employee and his or her employer.

[82] Based on the evidence heard in this case, I have no difficulty, on a balance of probabilities, finding that on August 7, 2009, Mr. Balikwisha Patanguli took advantage of Ms. Lasonde's anticipated absence, entered her office, and sent the questions and answers from her PM-05 selection process exam to his personal home email address. According to Ms. Lasonde's uncontradicted testimony, she takes her lunch hour every day around noon, and it takes about 10 minutes for her computer to lock. The grievor knew it and acted while she was away.

[83] I agree that no employer witness saw Mr. Balikwisha Patanguli enter Ms. Lasonde's office at noon on August 7, 2009. However, the evidence showed that although the grievor exited his floor just before noon on August 7, 2009, he returned to the work area, where his office was located right next to Ms. Lasonde's, at 11:58 (Exhibit E-34A). The email of August 7, 2009, was sent from Ms. Lasonde's computer at 12:09 that day. Therefore, it is very plausible to believe that the grievor was near Ms. Lasonde's office when the email was sent. Another overwhelming fact is that it was not disputed that Mr. Balikwisha Patanguli already tried, unsuccessfully, to obtain the exam questions from Ms. Lewis on July 9, 2009. Finally, all the remaining undisputed evidence showing that the grievor sent the exam questions and answers to his home on August 7, 2009, that he prepared for his exam on August 12, 2009, based on those questions and answers, and that he denied seeing the emails of August 7, 2009, to Mr.

Fergusson, leads me to believe that not only did Mr. Balikwisha Patanguli use the questions and answers from the selection process exam, he also entered Ms. Lasonde's office and sent the email with the questions and answers. In my opinion, that was a very grave and serious action.

[84] On that note, during the investigation and the hearing, the grievor certainly tried to suggest that Ms. Lasonde sent the email at 12:09 on August 7, 2009, in error or otherwise. I do not believe it for an instant. At the hearing, Ms. Lasonde impressed as being credible and a principled individual. Her testimony was unequivocal. Furthermore, her reaction when she discovered the email on Monday, August 10, 2009, was to hurry to see her supervisor, Mr. Fraser, which suggests that she was truly shocked by her discovery and that she immediately informed management of the situation. It is also obvious that Ms. Lasonde had no reason or motivation to share the exam questions with the grievor, whom she was competing against in a selection process.

[85] With respect to the undisputed portion of the facts, namely, that once in possession of the exam questions and answers on August 7, 2009, the grievor sent them to his personal home email address, prepared his answers the day before the exam, sent the prepared answers to his office email address and used them to write the selection process exam, it was a very grave transgression that must be treated seriously.

[86] It should be pointed out that grievor's misconduct did not stop there. Indeed, Mr. Balikwisha Patanguli not only claimed during his interview with Mr. Fergusson on the afternoon of August 13, 2009 that he had never seen the first email of August 7, 2009, sent from Ms. Lasonde's computer, but also denied seeing the email that he admitted at the hearing sending to his personal home email account. In my opinion, that shows that he intended to continue to deny the evidence and to admit to his wrongdoing only when no other avenue was open to him. I agree with the employer's counsel that had Mr. Fergusson not confronted the grievor on the afternoon of August 13, 2009, the grievor would never have taken the initiative of admitting part of his misconduct.

[87] With respect to the argument by Mr. Balikwisha Patanguli's representative that since the employer did not prove that, in fact, the grievor sent the first email of August 7, 2009, milder disciplinary action should have been taken, as mentioned earlier, I have

no hesitation in finding that, based on the whole of the evidence, Mr. Balikwisha Patanguli sent the first email from Ms. Lasonde's computer. I must also admit that I am still not convinced that, even today, the grievor has fully realized the seriousness of his acts. In my opinion, the fact that Mr. Balikwisha Patanguli minimized the importance of having the questions and answers before the exam, said that he knew it all anyway and that it was an open-book exam, and implied that Ms. Lasonde would have sent the questions and answers, leaves me quite perplexed as to the grievor's attitude in this case and the sincerity of his "remorse."

[88] In that respect, I agree with Ms. Deschênes' comments that Mr. Balikwisha Patanguli's actions were serious and that they broke the relationship of trust between the employer and its employee. I would add that given the nature of the duties of pre-removal risk assessment officers and the impacts of their decisions on claimants' lives, the employer must be able to fully trust its employees.

[89] With respect to the grievor's argument that the employer should have prevented him from writing the exam on the morning of August 13, 2009, the uncontradicted evidence showed that on the afternoon of August 13, 2009, Mr. Fergusson did not know that the grievor wrote the exam just that morning. Under the circumstances, it had no impact on the decision to dismiss the grievor.

[90] Finally, with respect to the argument that the interview and investigation should have been conducted in French, in accordance with Mr. Balikwisha Patanguli's request, I must ask myself why that request was not granted. It would have been very easy to do, and I hope that the employer will reconsider doing so in the future. That said, it is generally agreed that the hearing before me was a hearing *de novo*, during which the grievor was able to express himself and to make his arguments in French. Therefore, I feel that although the grievor should have been able to express himself in French during the investigation, the hearing before me remedied that procedural error, and that Mr. Balikwisha Patanguli had the opportunity to submit full and complete evidence in French. In conclusion, the grievor raised no allegation to the effect that conducting the meeting in English prejudiced him and provided no evidence or jurisprudence in support of his argument that that would justify that the dismissal be declared void *ab initio*.

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

*(The Order appears on the following page)*

**V. Order**

[92] The grievance is dismissed. I order the file closed.

January 20, 2014.

PSLRB Translation

**Linda Gobeil,  
adjudicator**