Date: 20140606

Files: 566-02-6703 to 6706

Citation: 2014 PSLRB 61

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

MARC GRAVELLE

Grievor

and

DEPUTY HEAD
(Department of Justice)

Respondent

Indexed as
Gravelle v. Deputy Head (Department of Justice)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: David Yazbeck, counsel

For the Respondent: Lesa Brown, counsel

Heard at Ottawa, Ontario,
February 25 to March 1, October 21 to 25, and December 23, 2013, and
March 3 and April 11, 2014.

I. Individual grievances referred to adjudication

[1] Marc Gravelle ("the grievor") was a human resources (HR) assistant at the Department of Justice ("the respondent" or "the employer"). The employer terminated the grievor's employment on July 6, 2011. It also revoked his reliability status on July 7, 2011. Previously, effective February 8, 2011, the employer had suspended the grievor, pending an investigation. It had also imposed on him a one-day suspension on January 26, 2011. The grievor grieved those four employer decisions.

[2] The grievor's HR assistant position was classified at the CR-05 group and level. He was covered by the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") for the Program and Administrative Services Group (expiry date: June 20, 2011).

II. Summary of the evidence

[3] The hearing lasted 13 days, including 12 days during which the parties presented evidence. As the heading indicates, this is only a summary of that evidence. The grievor testified. The employer called Denis Ouellette, Mélanie Stethem, Valerie Schubert, Denis Roussel, Michel Provencher, Ivan Sicard and Scott Hebner as witnesses. At the relevant time, they were all its employees. Ms. Schubert was Director of Client Operations and Senior Management Services. Ms. Stethem reported to Ms. Schubert. She was the manager of Client Services. Mr. Ouellette reported to Ms. Stethem. From April 2010 to September 2011, he was the HR "Fast-Track" unit supervisor and the grievor's direct supervisor. Mr. Provencher was a senior labour relations advisor. Mr. Roussel was the chief of technology security. Mr. Sicard was Director of Safety and Security. Mr. Hebner was a senior security and emergency analyst. He reported to Mr. Sicard.

[4] The parties adduced in evidence more than 120 documents, including a 392-page investigation report prepared by Mr. Roussel.

[5] The testimonial and documentary evidence will be summarized under the following five categories: the grievor's work performance and attendance, his use of the employer's electronic network, the decision to terminate him, the revocation of his reliability status, and the events related to the one-day suspension.

A. <u>The grievor's work performance and attendance</u>

[6] Part of the evidence adduced at the hearing related to the grievor's performance, even though his termination was not related to performance problems.

[7] Between 2006 and January 2010, the grievor was an HR assistant working with HR specialists on staffing files. In January 2010, he accepted a one-year temporary assignment to the staffing fast-track unit. That unit handled simple, non-complex staffing files. Mr. Ouellette, Ms. Stethem and Ms. Schubert testified that they had not been completely satisfied with the grievor's performance, his attendance and his respect of his hours of work while he worked in the fast-track unit. The grievor testified that he had a very short period to learn that new job. It worked out fine at the beginning. However, after Ms. Stethem and Mr. Ouellette arrived, he stated that the situation deteriorated.

[8] Shortly after he began supervising the grievor, Mr. Ouellette testified that he began to receive messages from clients stating that there were errors in the grievor's work. He made more errors than his colleagues did. In addition, Mr. Ouellette testified that the grievor was late with his work. He had to take away some of the grievor's work and give it to another employee. The grievor's work had to be completed within five days. Mr. Ouellette noticed that the grievor tended to start his work on the day that it was due. Mr. Ouellette kept Ms. Stethem aware of the concerns that he had with the grievor, who testified that Mr. Ouellette and Ms. Stethem constantly changed the procedures. It became very confusing for him as he tried to understand the expectations. He also testified that sometimes, he did not have the tools to do his work.

[9] The employer provided the grievor with a detailed letter of expectations in December 2010. In addition, Mr. Ouellette, Ms. Stethem or both of them met often with the grievor between April and December 2010 to discuss the issues that the employer had with him. At one meeting, on December 8, 2010, they required that the grievor complete several late files by the end of the day, Friday, December 10, 2010. He did not complete them, and he left work for the weekend without notifying them of the status of his work. On January 10, 2011, Ms. Schubert reprimanded him in writing for that. The same day, she also served him another written reprimand for allegedly having made offensive comments against members of management before the

December 8, 2010, meeting and for allegedly spreading false information after that meeting.

[10] On November 24, 2010, the grievor asked that his assignment in the fast-track unit be terminated. On December 1, 2010, Ms. Schubert refused the grievor's request for operational reasons. The grievor testified that those operational reasons were never explained to him.

[11] In January 2011, Mr. Ouellette and the grievor switched offices and phone numbers. One day, Mr. Ouellette received a phone call for the grievor. He gave the grievor's new phone number to the caller. Very shortly after that, the grievor's phone rang, and he answered. The discussion was related to car repairs. Mr. Ouellette talked to Ms. Stethem about it. He had a feeling that the grievor was involved in some form of car business. On some occasions, he went to the grievor's workstation, where he saw the grievor consulting "Used Ottawa" or "Kijiji" ads. However, neither Mr. Ouellette nor Ms. Stethem raised that issue with the grievor. The grievor testified that the only remark made to him in that respect came from Ms. Schubert, who told him at the end of a meeting in late January 2011 not to use his Internet access or email account for personal business and to be careful about phone calls about cars. He also testified that he remembered that the phone call to which Mr. Ouellette referred was with his father, who had called to discuss some car repairs.

[12] Ms. Stethem was appointed to her position in July 2010. She noticed on several occasions that the grievor was absent. She was not always satisfied with his explanations to justify his absences. In September 2010, she gave him detailed written instructions on what she expected from him with respect to hours of work and absences. However, she took no precise measures with respect to the grievor's use of the Internet or to his possible car business.

B. <u>The grievor's use of the employer's electronic network</u>

[13] Ms. Schubert testified that she made the decision to request that the Information Technology (IT) Security section inquire into the grievor's use of the IT network. She had concerns with his productivity and performance, and she was preoccupied by the phone call that Mr. Ouellette received about car parts or repairs. She thought that the grievor might have been using the employer's network for personal matters, particularly to conduct an outside business. Some supervisors had

reported to her that the grievor spent a lot of time on the Internet every day. The departmental security officer granted Ms. Schubert's request.

[14] On January 19, 2011, Mr. Roussel was given the mandate to conduct an IT investigation about the grievor. In his final report dated February 14, 2011, Mr. Roussel describe the "incident" that he had to inquire into as follows:

. . .

> *Department of Justice Canada employee "Marc Gravelle" had been reported by his management for strong suspicion of conducting personal business with the aim of personal financial gain using the computer and network asset privileges entrusted to him for his employment.*

. . .

[15] On January 25, 2011, Mr. Roussel made a copy of the grievor's entire email account. On January 28, 2011, he recovered the September 2010 and the October 2010 backups of Mr. Gravelle's email. At 14:30 that same day, Mr. Roussel took possession of the grievor's work computer and replaced it with a different one. At 17:06, Mr. Roussel made another copy of the grievor's entire email account. On February 5, 2011, Mr. Roussel made a third copy of the grievor's entire email account.

[16] Mr. Roussel analyzed all the information that he gathered on the grievor. He started that analysis on January 25, 2011, and completed it on February 6, 2011. He presented a draft report of his analysis to Ms. Schubert and Mr. Provencher on February 7, 2011. His final report was produced a week later, on February 14, 2011.

[17] In his final report, Mr. Roussel wrote that the grievor's Internet usage was abnormally high in comparison to other employees. From September 1, 2010, to January 26, 2011, the grievor's user account ". . . generated a total sum in excess of 445,208 hits over the production network internet gateway." Of those hits, 315 864 occurred during the grievor's expected working hours, and the rest occurred outside his working hours.

[18] According to Mr. Roussel's report, the greater part of that Internet activity consisted of using Google to find and visit websites in the "Shopping," "Automobile" or "Vehicles" categories. The highest traffic was with Google, Kijiji and Used Ottawa classified ads. According to Mr. Roussel's analysis, the main search criteria were used

vehicles, yard equipment, engines, engine parts and accessories, tools, and anything of interest that was related to mechanics.

[19] The grievor adduced in evidence a technical paper entitled, "Managing Internet Usage with Reliable Metrics." According to that document, there are no universally accepted definitions of the terms "hit" and "visit." A hit is any browser-related action or data display associated with a website visit activity. It is not necessarily a visit to a website. The document provides an example of a visit to a non-complex web page, which generates 1 hit, and to a more complex page, which generates 23 hits. Mr. Roussel agreed with the document's interpretation of a "hit." He testified that even though the grievor averaged more daily hits than IT employees, who are very big Internet users, he could not say how much time the grievor spent on the Internet every day. He could say only that the odds are that a person with more hits spends more time on the Internet. Mr. Roussel also testified that if an employee leaves work without logging out and without closing a website, it is possible that hits could continue to come in from the websites that are still open.

[20] Mr. Roussel reviewed the grievor's email dating back to summer 2009. He found that the grievor used his office email to contact sellers or buyers on Kijiji, Used Ottawa and eBay. Mr. Roussel also found three Kijiji postings in the grievor's deleted emails. The ads were easily found on Kijiji. The grievor used the Department of Justice postal code (K1A 0H8) for the ads, some of which were adduced in evidence. In an email, he invited a seller to meet him at the building where he worked. He also communicated on a regular basis with another employee about buying or selling cars and equipment and making a profit. Between August 2009 and January 2011, that employee and the grievor exchanged 2633 emails, more than 300 of them on January 19, 20 and 21, 2011. Of those 2633 emails, 394 had the word "Kijiji" in the message body and 391 had the words "Used Ottawa." Ms. Schubert testified that she did not know how much time the grievor spent completing personal business while at work. However, she knew that the grievor's productivity was very low when compared to other employees.

[21] The grievor testified that it was a well-known fact in his division that he had a lot of knowledge about cars, other motor vehicles and mechanical equipment. The employer's witnesses did not contradict that evidence. Evidence was also adduced that the grievor's previous director even consulted him on a boat that her husband had for sale. The grievor also testified that his supervisor, his manager and some directors

discussed car issues at times with him at work. He testified that he had a strong interest in cars and other motor vehicles. In fact, he has been working full-time at a car dealership since March 21, 2011. He started as a "Level 1 apprentice," and he is now a licensed mechanic and auto technician. He also admitted that he often went on the Internet to verify car ads and often exchanged emails with a work colleague about cars or vehicles. He testified that he was not on the Internet for long periods at a time. It was in his words only "one minute here, one minute there." He denied having run a car business with that colleague while at work. He testified that that was a hobby to escape from work and a form of distraction and excitement when he was at work. He admitted that he had a few items for sale on Kijiji but not that he made a business out of it.

[22] When verifying the grievor's email account, Mr. Roussel saw that the "Personal Storage Table" (PST) file size shrunk from 829 MB to 127 MB between October and November 2010. It diminished substantially a second time from 94 MB on January 28, 2011 to 28 MB on February 5, 2011. In computing, a PST file is an open proprietary file format used to store copies of messages, calendar events, and other items within Microsoft Outlook. The employer adduced in evidence a letter signed by Ms. Schubert, dated January 28, 2011, and sent to the grievor, advising him that it was strictly forbidden for him or another party to change or destroy any files associated with his email account. Mr. Roussel testified that in his investigation he found that the grievor did not delete or alter those emails but rather archived them. The grievor testified that he was under the impression that the January 28 directive from Ms. Schubert was only that he could not delete any emails. He also testified that he had the habit of archiving his emails monthly. He thought that that would explain those reductions in the size of his email account when its size was compared over different months.

[23] Mr. Roussel wrote in his report that he was certain that based on the evidence that he reviewed, the grievor used the employer's network and Internet access ". . . for personal purposes with the aim of personal financial gain and that there were several other breaches of the 'Policy on Acceptable Use of the Electronic Network.'" He concluded that the grievor ". . . was conducting trade and/or business activities using his Departmental [*sic*] of Justice Canada email."

[24] During his investigation into the grievor, Mr. Roussel also found that the grievor "was collecting and storing MP3 files" on the employer's common drive in a folder in

his name and under his control. That folder took 10.36 GB (11,253,634,962 bytes) of storage space on the employer's network and contained 2236 music files. Mr. Roussel wrote in his report that those files could have contravened copyright legislation. The grievor testified that a former employee from the pay and benefit section had created the original folder. He testified that he was told that that employee had received permission to create that folder. He admitted to placing some music files in the folder but stated that many other employees had done the same thing. He also explained that the folder was part of a larger folder under his former supervisor's name. Some evidence was adduced at the hearing that two senior labour relations advisors had asked the grievor for access to that music.

[25] Mr. Roussel also found emails that the grievor had sent from his office email account to one of his personal email accounts. Those emails included information related to AS-02 and AS-03 staffing competitions to which the grievor had applied. On November 19, 2009, at 13:37, the grievor sent an email with the following Microsoft Word files attached: "AS-02, Draft rating guide AS-02 Staff…," "Draft rating guide AS-02 Staff…," and "examen as-02 hr, RATING SCALE." The same day, at 13:50, he sent the following email to his personal email address:

> *1.) Open a protected document in Word.*
>
> *2.) Choose the Save As Web Page (*.htm; *.html) option and close Word.*
>
> *3.) Open the HTML document in any text editor.*
>
> *4.) Search the <w:UnprotectPassword> tag for a line that looks like: <w:UnprotectPassword>ABCDEF01<w:UnprotectPassword >. Gather the password.*
>
> *5.) Open the original .doc documents with any hex editor.*
>
> *6.) Search for hex values of the password (reverse order).*
>
> *7.) Overwrite all four double-bytes with 0X00. Save and close.*
>
> *8.) Open the documents in Word. Select Tools, Unprotect document. Password is blank.*

[26] Mr. Roussel tested that procedure; it did not work. He also found that between November 26 and December 17, 2009, the grievor sent from his office email account to his home email several emails including attachments entitled as follows: "Draft rating guide AS-03 – Fas…," "AS-03 Fast Tracking Unit Super…," "AS-02 Coordinator Staffing Sup…," "AS-02 Business Reporting Analy…," "Fast Track Phase II workingshe…," and

"AS-03 SOMC fasttrack.doc." On December 17, 2009, at 06:52, the grievor also sent himself the following documents, which include some that were already sent: "screened out emails.doc," "AS-03 SOMC fast track.doc," "Draft rating guide AS-03 - Fas…," "Exam Instructions.doc.," "Final Masterlist – AS-03.xls," "PRE SCREENINGSHEET.doc," and "Presence Sheet – Written Exam…."

[27] All the documents attached to the November and December emails were adduced in evidence at the hearing. Ms. Schubert testified that the titles of some of them refer to some competitions to which the grievor had applied. He should not have accessed those files and sent them to his personal email. Furthermore, for Ms. Schubert, the email that he sent himself on November 19, 2009, at 13:50, was to illegally access a document that he could not otherwise access. According to Ms. Schubert, that would have given him an unfair advantage in the competitive process. Mr. Provencher testified that he consulted those documents, which contained copies of the exams, the expected answers and a list of all candidates. Ms. Schubert also testified that the grievor did not write the exam for the AS-03 competition, which was held on December 17, 2009. Ms. Stethem testified that the grievor applied to that competition and that he was screened out because he did not meet two of the basic criteria for the position. She also testified that she met with the grievor during the week before December 21, 2009, to explain to him why he was screened out.

[28] The grievor adduced in evidence an employer document showing that he was screened out of the AS-03 competition process on December 9, 2009. He also testified that he was not given access to his email after his departure. He could not verify if the documents that the employer accused him of transferring to his home email, including those of November 19 (13:37) and December 17, 2009 (06:52), were the emails that it said were transferred. On that point, the grievor did not remember sending those documents to his home email. He testified that he might have sent blank or template forms to his home email but not the ones that he was accused of having sent. He testified that he never saw those documents in a completed format.

[29] After the grievor testified, Mr. Roussel was called back as a witness to clarify whether he had proof that the grievor had sent to his home address the documents that the employer claimed he had sent. Mr. Roussel testified that after using "EnCase" software, he became convinced that the documents that the grievor was accused of sending to his home email were in fact sent, not blanks or template forms, as the

grievor claimed he sent. Law enforcement agencies use EnCase for forensic examination. At the hearing, Mr. Roussel demonstrated using EnCase and the information from backup tapes that the confidential documents that the grievor was accused of sending to his home email address were sent from his office email account on November 19 and December 17, 2009, respectively. Mr. Roussel carried out the EnCase analysis in early 2014 in preparation for the March 3, 2014, hearing. He testified that all those emails, with attachments, were provided to the grievor on a CD-ROM after he was suspended indefinitely. Mr. Roussel testified that the grievor could have found that information on the CD-ROM by using Microsoft Outlook to read the "pst" file and by using Word or Microsoft Excel to read the attachments.

[30] One of the December 17, 2009, files included protected personal information on 108 candidates in a staffing process. That file, like the others mentioned in the last paragraph, were sent to an external ("Yahoo") unsecured server. Ms. Schubert testified that she had to notify each of the 108 candidates of that security breach. She also reported the incident to the Office of the Privacy Commissioner of Canada. She testified that the incident created an embarrassment to the employer.

[31] Mr. Roussel also investigated several other issues when he analyzed the grievor's emails. Among them, he found that one of the grievor's former colleagues contacted him in February, March and April 2010, because that colleague had applied for a job at the Department of Justice and wanted to be screened in via the selection process. He also asked the grievor for a contact number for feedback on his application. On April 14, 2010, the grievor answered his former colleague and gave him the name and the phone number of the female HR advisor responsible for that process. His former colleague asked him how nice she was. The grievor answered that she was "[v]ery Nice, not too bright though."

[32] Mr. Roussel also found many emails in which the grievor used inappropriate terms or profanity, wrote that he disliked his job, and expressed himself on his personal finances. The grievor admitted to using improper expressions in some of his communications. I have reviewed those many emails, and most of them include vulgarities and unacceptable language. I will not cite any of those vulgarities in this decision.

[33] The employer adduced in evidence its policy on the use of its electronic network and the Treasury Board policy on the same topic. According to the employer's policy,

while it is recognized that employees may use its network for limited personal use, they must act reasonably and fairly and incur negligible expense in their use of the system, keeping in mind that it is a corporate resource. In its Appendix "B," the employer's policy provides examples of unacceptable activities that can take place on the electronic network, such as sending classified information on unsecured networks, sending abusive or sexist messages, and using the network for private business or personal gain. The employer also adduced in evidence the banner that appears on the computer screen when an employee accesses its network. By accessing the network, an employee agrees to the principles and conditions of the employer's policy on the use of its electronic network. The grievor testified that he never paid attention to that message and that he never read it or the policy.

C. <u>The decision to terminate the grievor</u>

[34] Ms. Schubert received a draft version of Mr. Roussel's report on February 7, 2011. After reviewing it, she suspended the grievor without pay, effective February 8, 2011, pending further investigation. The grievor testified that his last day at work was February 7, 2011. In the suspension letter, Ms. Schubert wrote that Mr. Roussel's report was sufficient to raise important concerns about inappropriate and excessive use of the employer's electronic network. In addition, Ms. Schubert testified that the grievor had altered hundreds of emails and files in his email account after being formally advised on January 28, 2011, not to delete anything from it. She testified that she could not trust him anymore and could not let him continue to use the employer's electronic network. In addition, no significant work could be assigned to him that did not involve a computer and access to the employer's network.

[35] In early February 2011, the grievor asked for parental leave starting on March 1, 2011. Mr. Provencher testified that the grievor had previously asked that his parental leave begin on April 1, 2011. The employer's reaction to his request was to state that he wanted to avoid participating in the investigation process by going on leave for 37 weeks. The employer did not accept or refuse the grievor's request since it never replied to it. The grievor's new child was born on February 23, 2011. On January 28, 2011, he had asked for one week off for the upcoming birth of his child. Ms. Stethem had denied his request.

[36] On February 18, 2011, Ms. Schubert sent a copy of Mr. Roussel's final report to the grievor. She informed him that a meeting would take place on February 24, 2011,

to obtain his comments on the allegations against him about the inappropriate and excessive use of the employer's electronic network. Ms. Schubert testified that the grievor did not show up for the meeting. The employer decided to postpone the meeting to February 28, 2011. The grievor advised that he would not be able to attend, and he mandated his bargaining agent representative to attend on his behalf. He testified that he could not make it because freezing rain fell that day, and he would not drive in it for 45 minutes. Ms. Schubert testified that she never had the opportunity to discuss Mr. Roussel's report with the grievor, who testified that he was never offered a real opportunity to reply to Mr. Roussel's investigation and report.

[37] On the basis of Mr. Roussel's report and of her other facts, Ms. Schubert, in consultation with Mr. Provencher, recommended that the grievor's employment be terminated for misconduct. Mr. Provencher wrote a detailed briefing note to Myles Kirvan, the deputy minister, on May 2, 2011, recommending that the grievor be terminated. Mr. Kirvan terminated the grievor's employment on July 6, 2011.

[38] In his testimony, Mr. Provencher explained his detailed briefing note to Mr. Kirvan. He summarized the evidence presented at the hearing. He wrote that the grievor unduly overloaded the employer's network by using it abusively and inappropriately, that he disclosed personal information that he was not authorized to disclose, that he had considerable difficulties following the rules imposed upon him, that he had been disciplined before, and that he violated the employer's electronic networks policy and its "Code of Ethics and Values" by his action.

[39] Even though the termination letter was dated July 6, 2011, Mr. Kirvan wrote that his decision to terminate the grievor's employment was effective retroactively to the close of business on February 8, 2011. He referred to the grievor's excessive and inappropriate use of the employer's electronic network to engage in business-type activities. He also referred to the grievor forwarding to his personal email on two occasions information of a personal nature about candidates in a staffing process, as well as documents related to another staffing process in which he was a candidate. Mr. Kirvan wrote that he reviewed Mr. Roussel's report and that the evidence gathered supported the findings of the investigation. He concluded that the grievor's conduct breached the employer's electronic networks policy and its "Code of Ethics and Values." For Mr. Kirvan, the grievor's behaviour and actions demonstrated a lack of integrity and trust and constituted serious misconduct. On that basis, he decided to

terminate the grievor's employment. He wrote that in arriving at that decision, he considered the grievor's performance record and his discipline record.

[40] Mr. Provencher testified that the problems related to the grievor's poor performance and his difficulties following directives or procedures, along with his use of the shared drive to store MP3 files, played no role in the employer's decision to terminate him.

D. <u>The revocation of the grievor's reliability clearance</u>

[41] On February 28, 2011, Mr. Provencher wrote to Jeff Laviolette at the Treasury Board stating that, among other things, "[o]ur Security Service fells [*sic*] that this security breach is sufficient to revoke the employee's security clearance." Mr. Provencher testified that, at the time, he probably received that information from Mr. Sicard.

[42] On May 16, 2011, Ms. Schubert wrote to Mr. Sicard about possibly revoking the grievor's reliability security clearance. She wrote that her view was that he could no longer be trusted in the workplace. She also wrote that he spent a significant amount of time at work on his personal business, that he was reprimanded several times, and that he caused a privacy breach by accessing and forwarding to his personal email electronic documents containing the personal information of over 100 employees. After writing to Mr. Sicard, Ms. Schubert testified that she had no more involvement in the process leading to the revocation of the grievor's security clearance. Mr. Provencher also testified that he was not involved in that process, which was conducted separately from the discipline process.

[43] Mr. Sicard received a copy of Mr. Roussel's report around the time it was released. He was particularly concerned about the security breach that happened when the grievor sent some confidential documents to his home email address.

[44] Mr. Sicard explained that when he receives new information on employees, he can reassess their reliability status. On February 28, 2011, Mr. Sicard wrote to the grievor to inform him that his division would be conducting an assessment of his reliability status, commencing immediately. In his letter, he stated that the grievor would be given an opportunity to explain adverse information before a decision was

reached. He provided the grievor with a link to a website, which included the complete government policy on security.

[45] Mr. Sicard hired an outside firm, Glencastle Security, to conduct the investigation. On March 15, 2011, he met with Mr. Provencher, Mr. Hebner and Darrell Booth, an investigator working for Glencastle. The information that the employer possessed about the grievor, including Mr. Roussel's report, was then shared.

[46] Mr. Booth and Mr. Hebner met with the grievor about his reliability status on April 26, 2011. Mr. Hebner testified that his role was limited to cautioning the grievor on what reliability status is for and on its impact. At the meeting, he went through an employer document entitled, "Caution for the revocation of reliability status." That document states that reliability status is a condition of employment, that the findings of the interview and of the investigation would be used as part of the decision-making process on whether to revoke the grievor's reliability status, and that the government must ensure that employees are reliable and trustworthy.

[47] Mr. Hebner was present for the entirety of the April 26, 2011, interview. He testified that with the exception of his role in giving the grievor the caution, Mr. Booth conducted the interview. It took place in a hotel room not far from the grievor's residence. According to Mr. Hebner, the interview started at 18:00 and lasted for 1 hour. The next day, Mr. Hebner wrote a note to file. He then wrote that Mr. Booth informed the grievor that he was entitled to representation. The grievor answered that because of the timing of the meeting, it was not possible for him to obtain representation, but that he was comfortable proceeding alone. Mr. Hebner also wrote that the grievor was very polite and cordial during the interview. However, according to Mr. Hebner, the grievor could not provide details or answers to some of the questions posed by Mr. Booth. He also wrote that the grievor seemed truthful in some of his responses but less forthcoming in others.

[48] Mr. Booth did not testify at the hearing. The employer wanted to adduce in evidence four reports that he completed following interviews that he conducted during his investigation. The grievor's counsel objected to those documents being adduced in evidence on the basis that Mr. Booth had not been called to testify. I accepted the objection, and I refused allowing the four reports to be entered in evidence.

[49] Mr. Sicard testified that he reviewed Mr. Booth's reports and the documents that he consulted. Those documents were all part of Mr. Roussel's report. Mr. Sicard testified that his review caused him to believe that the grievor, among other things, used the Internet for his personal business, that he used vulgarity and inappropriate language in emails, and that he sent protected documents containing private information on 108 individuals to his personal unsecured email address.

[50] After receiving Mr. Kirvan's concurrence, Mr. Sicard wrote to the grievor on July 7, 2011, informing him that a decision had been made to revoke his reliability status. The essence of that letter reads as follows:

. . .

> *As a result of security concerns initially identified, combined with additional information gathered within the subsequent administrative investigation, this security assessment is now complete. Based on a thorough review, in accordance with Section 5 of the Standard on Personnel Security entitled "*Revocations*", a decision has been made to revoke your reliability status, with respect to conditions of employment issues, this decision will be shared the applicable human resources authorities.*

. . .

[51] Mr. Booth interviewed Ms. Schubert and Ms. Stethem and wrote a report of those interviews. Mr. Sicard admitted in cross-examination that copies of those reports were not provided to the grievor for his interview of April 26, 2011. He testified that the information gathered during those two interviews was not used in the decision to revoke the grievor's reliability status. Mr. Sicard said that instead, he based his decision on the information contained in Mr. Roussel's report. Mr. Sicard testified that the grievor was not given the opportunity to comment on the report that Mr. Booth wrote after he interviewed him.

[52] According to the grievor, during the April 26, 2011, meeting, Mr. Booth asked him to confirm that some email accounts belonged to him. Mr. Booth also asked him questions about the music found on a computer drive under his name and on his use of the Internet for personal reasons. The grievor wrote in a note after that meeting that the computer that the employer seized on January 28, 2011, was in no way his personal computer and that many other employees had used it either on his compressed days off or while he was on parental leave. The grievor also wrote in that

note that he denied ever having seen some of the documents that were allegedly found on his computer. The grievor told Mr. Booth that the documents that were presented to him during that interview could have come from anywhere, not necessarily from his computer.

E. <u>The events related to the one-day suspension</u>

[53] On January 26, 2011, the employer imposed a one-day suspension on the grievor for having taken a long lunch on December 22, 2010.

[54] Mr. Ouellette was on training on December 22, 2010. However, he testified that he saw the grievor coming back late from lunch that day. Ms. Stethem testified that Mr. Ouellette reported to her that the grievor took 1 hour and 45 minutes for lunch that day. Ms. Schubert testified that Ms. Stethem passed that information to her that same day. When the grievor came back from lunch, he did not advise either Ms. Stethem or Mr. Ouellette that he was late returning from lunch.

[55] Ms. Stethem testified that the grievor's lunch period was 30 minutes. The written evidence also supported that he had 30 minutes for lunch. The grievor testified that he had 1 hour for lunch since, most of the time, he did not take his two 15-minute breaks. In cross-examination, he admitted that he occasionally took coffee breaks. He testified that he normally took 1 hour for lunch by combining the 30-minute lunch period with the two 15-minute coffee breaks. He said that it was common practice at the employer to do that and that most employees acted as he did. That information was not contradicted.

[56] Ms. Stethem did not recall other situations when the grievor took longer lunch periods than he was entitled to. However, he had been formally advised to respect his hours of work. The grievor's pay was reduced by 45 minutes for his long lunch on December 22, 2010. Ms. Shubert made that decision. She testified that it should have been 1 hour and 15 minutes on the basis that the grievor had 30 minutes for lunch. On January 10, 2011, Ms. Stethem emailed Mr. Provencher that the grievor took an extra 45 minutes for lunch.

[57] The grievor testified that the first time that he heard that the employer had a concern with his lunch of December 22, 2010, was on January 7, 2011, the same day he was scheduled to return to his substantive position in another work unit. He testified

that he was supposed to go for lunch with his sister on the day at issue. However, she cancelled because she was too busy. Around 12:00 to 12:15, one his former co-workers called him and asked him if he wanted to go for lunch. He accepted and left his office around 12:15. He and his friend went to a restaurant not too far from the office. The grievor admitted to not having advised anybody that he was going out for lunch. He had never done so before that day. Nor did he advise anybody that he came back late from lunch that day. He testified that he was absent for 90 minutes for lunch. He admitted that he was 30 minutes late since the service was extremely slow at the restaurant because it was right before Christmas. Mr. Provencher testified that the grievor admitted his wrongdoing only after the employer confronted him with the evidence that he was wrong. At that time, the grievor said that he was sorry for being late on December 22, 2010.

[58] Ms. Schubert testified that contrary to what the grievor said to the employer at the disciplinary hearing on January 18, 2011, he had planned that lunch ahead of time. Ms. Schubert stated that the grievor had lied to her about his December 22, 2010, lunch. As part of his investigation and on a request from the employer's labour relations division to look for it, Mr. Roussel found an exchange of emails dated December 22, 2010, between the grievor and his sister about their plan to go for lunch that day. He also found an email dated January 18, 2011, from the grievor to his bargaining agent representative explaining that on December 22, 2010, he went out for lunch with a former co-worker.

[59] Ms. Schubert testified that the December 22, 2010, incident and the one-day suspension imposed on the grievor were not relevant to the decision to terminate him. Mr. Provencher testified that the grievor never served that one-day suspension since he had already been suspended indefinitely effective February 8, 2011.

III. Summary of the arguments

A. For the employer

[60] The employer argued that I do not have jurisdiction to decide the grievance filed against its decision to administratively suspend the grievor effective February 8, 2011, pending an ongoing investigation. That suspension was administrative, and it did not fall under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* ("the *Act*"). The employer had concerns about the grievor's presence in the workplace because he

had changed and destroyed files from his email account, contrary to the instructions the employer had given to him on January 18, 2011. The grievor could no longer be trusted, and he was sent home. In the alternative, the employer argued that the grievance against the administrative suspension is moot since the termination date was retroactive to February 8, 2011.

[61] The employer also argued that I have no jurisdiction over the revocation of the grievor's reliability status since that decision was administrative and did not fall under paragraph 209(1)(*b*) of the *Act*. The employer reminded me that it informed the grievor that a review of his reliability status would be conducted. He was invited to attend a meeting, and he was offered the opportunity to explain himself. At the end of the review process, Mr. Sicard made the decision to revoke the grievor's reliability status on the basis that he could no longer be trusted.

[62] The employer argued that the one-day suspension was fully justified. At the time of the suspension, the grievor's performance was closely managed. He was formally advised that he was expected to be at work for 7.5 hours and that he had half an hour for lunch. On December 22, 2010, he took 1 hour 45 minutes for lunch, and he did not inform his supervisor or his manager that he was late returning from lunch. In addition, contrary to what he said at the hearing, the evidence showed that the grievor knew ahead of time that he had a lunch scheduled for that day.

[63] The employer had cause to terminate the grievor since he committed serious misconduct. As the letter of termination indicates, he used the employer's electronic network to conduct business activities, and he forwarded confidential information about a staffing process to his home email address.

[64] The employer reminded me of its policy on its employees' use of its Internet access and electronic network. The grievor knew the policy and did not respect it. He knew that the employer could monitor his network usage. He also knew what usage was admissible and what was not. The grievor used the network for his personal business. He also used it to send or receive thousands of personal emails during working hours at a time when his productivity was very low. His work did not require him to use the Internet, but the evidence showed that his usage of it was considerably higher than that of the other employees.

[65] The employer argued that the evidence clearly showed that the grievor sent from his work email to his home email a procedure to unlock password-protected files. He also sent to his home email, which is located on an unsecured server, files containing the names of 108 candidates in a staffing process, including their personal identification numbers and email addresses, which was contrary to the employer's policy and created a security breach. Furthermore, those emails contained information about the questions and answers in a staffing process in which the grievor was a candidate.

[66] By his actions, the grievor broke the bond of trust. He lacks rehabilitation potential. He did not admit to most of his wrongdoing. He clearly lacks forthrightness.

[67] The employer referred me to the following decisions; *Basra v. Attorney General of Canada*, 2010 FCA 24; *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28 ("*Basra* 2014"); *Bahniuk v. Canada Revenue Agency*, 2012 PSLRB 107; *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62; *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63; *Shaver v. Deputy Head (Department of Human Resources and Skills Development),* 2011 PSLRB 43; *Andrews v. Deputy Head (Department of Citizenship and Immigration),* 2011 PSLRB 100; *Newman v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 88; *Ontario Power Generation v. Power Workers' Union* (2004), 125 L.A.C. (4th) 286; *Telus Communications Inc. v. Telecommunications Workers Union* (2005), 143 L.A.C. (4th) 299; *Sheridan College Institute of Technology and Advanced Learning v. Ontario Public Service Employees Union*, (2010), 201 L.A.C. (4th) 243; and *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9.

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

[68] The grievor argued that the employer had no basis to impose a one-day suspension on him for being late from lunch on December 22, 2010. It never confronted him with some of its information. It assumed that he lied about the person that he had lunch with. The grievor clearly explained why he was late. He had no control over the time that it took to be served and to receive his bill at the restaurant.

[69] The grievor argued that the employer had no cause to terminate his employment. The evidence did not support the employer's thesis that he abused his

use of its network, including using it to operate a personal business. Furthermore, the employer did not respect the principles of progressive discipline. It progressed from a one-day suspension to termination. It viewed the grievor in a bad light consistently, and its intent was to terminate him. For that purpose, it used Mr. Roussel's investigation report, which is full of flaws.

[70] The grievor argued that the employer knew that he had an interest and knowledge in cars and mechanics. It was common knowledge in his workplace. Some managers had heard him discussing topics related to cars or car parts over the phone. Others had consulted him on those topics. If the employer had concerns about it, it should have told him rather than launching an investigation into his use of the network. The employer never raised any concerns with him about his use of the network or the time he spent on the Internet while at work, even though it was aware that he used the network for purposes not related to his work. In doing so, the employer condoned his behaviour.

[71] The employer launched an investigation into the grievor's use of its IT network. It gave no specific instructions to Mr. Roussel about protecting the grievor's privacy. According to the most recent jurisprudence, employees have an expectation of privacy about the personal information contained on work computers on which personal use is permitted and reasonably expected, including when browsing the Internet and storing personal information. The jurisprudence also accepts that employees can reasonably use their employers' networks for personal purposes.

[72] In this case, the employer had no evidence about how much time the grievor spent on the Internet or sending or receiving personal emails while he was at work.

[73] The grievor asked for parental leave. The employer refused and chose to suspend him, pending the investigation. Ms. Schubert justified her decision by stating that the employer would not have been able to investigate the grievor while he was on leave. In addition, the employer based its decision on the fact that he destroyed emails after being told not to. The evidence showed that he did not destroy emails but rather that he archived them. Furthermore, the employer decided to backdate the termination to February 2011. In doing so, it tried to deprive the grievor of his right to argue jurisdiction over the suspension grievance that he filed in February 2011.

[74] The grievor argued that on the basis of the jurisprudence, I have jurisdiction over the employer's decision to revoke his reliability status, especially with respect to the fairness of the process and bad faith. The employer did not give him full opportunity to express himself on the evidence it had on him when it conducted its investigation into his reliability status. He was not provided with all the information that the employer had on him, including the results of the interviews that the investigator conducted with Ms. Stethem or Ms. Schubert. That is contrary to the employer's policy, which requires that employees be provided with all the adverse information so that they can comment on all of it. The grievor also argued that the legislation does not distinguish between a review on fairness or reasonableness grounds and a review on the merits.

[75] The grievor referred me to the following decisions: *Andrews*; *Unite Here Local 75 v. Fairmont Royal York Hotel*, 2012 CanLII 3872 (ON LA); *Health Employers' Association of British Columbia v. Health Sciences Association of British Columbia* (2011), 213 L.A.C. (4th) 390; *Health Sciences Association of Saskatchewan v. Sunrise Regional Health Authority,* 2012 CanLII 48715 (SK LA); *McIntyre v. Hockin* (1889), 16 O.A.R. 498; *Miller v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-02-13697 (19830222); *Frito-Lay Canada Ltd. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1975), 10 L.A.C. (2d) 234; *Ontario (Ministry of Natural Resources) v. Ontario Public Service Employees Union* (2005), 143 L.A.C. (4th) 14; *Wm. Scott v. Co.*, [1976] B.C.L.R.B.D. No. 98 (QL); *Gauthier v. Deputy Head (Department of National Defence)*, 2013 PSLRB 94; *Amalgamated Transit Union, Local 508 v. Halifax Regional Municipality Metro Transit* (2007), 158 L.A.C. (4th) 431; *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62; *Shaver*; *Ahmad v. Canada (Public Service Commission Appeal Board)*, [1974] 2 F.C. 644 (C.A.); *Kampman v. Canada*, [1993] F.C.J. No. 66 (C.A.) (QL); *Kampman v. Canada (Treasury Board)*, [1995] 1 F.C. 306 (T.D.); *Kampman v. Canada (Treasury Board)*, [1996] 2 F.C. 798 (C.A.); *Kampman v. Treasury Board (Solicitor General - Correctional Service Canada)*, PSSRB File Nos. 166-02-21656 and 21771 (19920110); *Heustis v. New Brunswick (Electric Power Commission)*, [1979] 2 S.C.R. 768; *Deering v. Treasury Board (National Defence)*, PSSRB File No. 166-02-26518 (19960208); *Gunderson v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File Nos. 166-02-26327 and 26328 (19950912); *O'Connell v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File Nos. 166-02-27507, 27508 and 27519

(19970819); *Copp v. Canada Customs and Revenue Agency*, 2003 PSSRB 8; *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 81; *Sullivan v. Canadian Security Intelligence Service*, 2003 PSSRB 26; *Braun*; *Nasrallah v. Deputy Head (Department of Human Resources and Skills Development)*, 2012 PSLRB 12; *Bergey v. Treasury Board (Royal Canadian Mounted Police) and Deputy Head (Royal Canadian Mounted Police)*, 2013 PSLRB 80; *Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151; *R. v. Cole*, 2012 SCC 53; *Health Employers' Association of British Columbia v. Health Sciences Association of British Columbia*, [2011] B.C.C.A.A.A. No. 60 (QL); *University of British Columbia (Re)*, 2007 CanLII 42407 (BC IPC); *Parkland Regional Library*, 2005 CanLII 78636 (AB OIPC); and *New Brunswick (Department of Education and Early Childhood Development) v. Canadian Union of Public Employees, Local 2745*, 2014 NBQB 34. He also referred me to paragraph 7:4422 of Brown and Beatty, *Canadian Labour Arbitration*, 4th edition.

IV. Reasons

[76] I will first deal with the grievor's termination, then with the indefinite suspension, the revocation of his reliability status and his one-day suspension. For reasons that I will explain later, I dismiss the termination grievance, the indefinite suspension grievance and the grievance related to the revocation of the reliability status but allow the one-day suspension grievance.

[77] The parties referred me to some 40 decisions. I carefully reviewed all of them. With a few exceptions, I will not refer specifically to them, even though I fully considered and respected the legal logic that they are based on.

A. The termination of employment

[78] On July 6, 2011, the employer informed the grievor that his employment was terminated for cause. The termination letter shows that the employer based its decision on the following reasons:

- the grievor's excessive and inappropriate use of the employer's electronic network to engage in business-type activities; and
- on two occasions, the grievor forwarded to his personal email account information of a personal nature about candidates in a staffing process,

as well as documents related to another staffing process in which he was a candidate.

[79] The employer concluded that the grievor's conduct was in breach of its electronic networks policy and its "Code of Ethics and Values" and that his behaviour demonstrated a lack of integrity and trust and constituted serious misconduct. On that basis, it decided to terminate his employment. Mr. Kirvan wrote in the termination letter that in arriving at his decision, he considered the grievor's performance record as well as his disciplinary record, including the one-day suspension. Mr. Provencher testified that the problems related to the grievor's poor performance played no role in the employer's decision to terminate him.

[80] I will first determine, on the basis of the evidence adduced at the hearing, whether the grievor did what he is accused of doing. If he did, I will then decide whether it was a sufficient cause for termination.

[81] The evidence clearly showed that the grievor made abundant use of the Internet while at work, even though his functions did not require using it. The evidence further showed that most of his Internet use was spent consulting ads for motor vehicles for sale. The evidence also showed that he exchanged hundreds of personal emails about buying or selling motor vehicles with another employee. He did not challenge that evidence. However, he denied running a car business from his work. Rather, he said that it was a hobby to escape from his work.

[82] The employer's policy recognizes that employees may use its electronic network for limited personal use and that they must act reasonably and fairly, keeping in mind that the network is its resource. Even though no evidence showed how much time the grievor spent every day surfing the Internet or receiving and sending personal emails, the evidence supports that his personal use of the employer's network was much more intense or frequent than limited. Rather, I find that the grievor did not act reasonably by abusing his Internet access for personal use. The evidence showed that he averaged more daily hits than IT employees, who were big users of the Internet for their work. At a minimum, that proves that the grievor was a big user of the Internet while at work, even though his work did not require him to use it. The evidence also showed that he regularly and frequently used his email to exchange with another employee about buying or selling motor vehicles or parts. In January 2011, the grievor and that

employee exchanged more than 300 emails. That cannot be qualified as limited or reasonable personal use of the employer's electronic resources.

[83] The grievor testified that he never paid attention to the message that appeared on his computer when accessing the employer's network. That message states that by accessing the network, employees agree with the principles and conditions of the employer's policy on the use of the network. The grievor testified that he never read that policy. That is not an excuse. The grievor is deemed to have read that message and that policy and to have agreed to respect it.

[84] The evidence did not clearly support the employer's allegation that the grievor used its network to engage in business or commercial activities. Rather, I tend to believe the grievor's explanation that the activities were a hobby and not a business. No direct evidence was adduced at the hearing supporting any commercial or business transaction done while at work or via the employer's network. That does not mean that the grievor's behaviours or actions were acceptable. His "hobby" took place during working hours, using the employer's network.

[85] The grievor argued that the employer condoned his behaviour. I do not agree, even though I believe that the employer knew that, to some extent, the grievor was wasting time on the Internet for activities not related to his work. The evidence showed that the employer had not taken disciplinary action against him for his internet usage because it had not been, until the investigation, aware of just high his usage was. That does not mean that the employer condoned his prior behaviour. I find that the employer became aware of the frequency and the intensity of his usage of its network only after it received Mr. Roussel's report. Even though I find that the employer may have had earlier indications of inappropriate usage of its network, the evidence did not support a conclusion that the employer condoned his use of its network.

[86] The employer also terminated the grievor on the basis that on two occasions he forwarded to his personal email information of a personal nature about candidates in a staffing process as well as documents related to another staffing process in which he was a candidate. On a balance of probabilities, the evidence supported that the grievor forwarded that information from his work email to his personal email.

[87] The evidence showed that the grievor sent from his work email to his personal email information related to two staffing competitions to which he had applied. He

had access to those documents because he worked in HR. The titles of those documents are accurate reflections of their content. The grievor sent to his personal email draft rating guides, a rating scale, exam instructions, candidate lists and results of a pre-screening process for staffing competitions to which he had applied. He also sent himself a procedure to unlock protected electronic documents.

[88] The grievor testified that he was not given access to his email after his departure, that he could not verify the contents of the documents that he was alleged to have sent and that he did not remember sending those documents to his home address. I give little weight to those explanations, and they are far from sufficient when compared to the technical analysis done by Mr. Roussel and to his testimony. When I balance all the evidence in front of me, I am convinced that the grievor sent those documents to his home address.

[89] Considering all that, I find that the employer had cause to terminate the grievor. He broke the bond of trust required to maintain the employee-employer relationship. As an HR assistant, he had access to confidential documents related to competitive processes. He used that privilege for his own purposes and sent confidential documents to his home address. That constitutes a lack of integrity and very serious misconduct. He offered no explanation to justify his behaviour. Rather, he said that he did not remember sending those documents to his home email. The evidence adduced at the hearing convinced me that he did. His actions also created an embarrassment for the employer, which had to report the incident to the Office of the Privacy Commissioner of Canada and had to advise 108 employees that their personal information had been sent to an external unsecured server. All of that is enough to justify the termination.

[90] Even though the employer failed to prove that the grievor used its network to engage in business-type activities, it proved that, contrary to its policy, the grievor excessively used the network for his personal needs. That would in itself justify suspending the grievor but not terminating him. At this point, it does not matter much since the grievor sending the staffing documents to his home email was enough to justify his termination.

[91] Other evidence was adduced at the hearing about the grievor's misconduct. He gave information to a former work colleague, which he was privileged to, about the name and phone number of the officer handling a competition. He also wrote sexist

and inappropriate comments about that officer. The evidence also showed that he wrote many emails that contained vulgarities and unacceptable language. As I wrote earlier, that does not matter much at this point since sending the staffing documents was enough to justify his termination.

[92] The grievor argued that the employer did not respect the principles of progressive discipline because it progressed from a one-day suspension to a termination. Progressive discipline does not apply to this case since very serious misconduct occurred. In such cases, employers can terminate employees who have no disciplinary records or a light disciplinary record, as was the case with the grievor.

[93] The grievor also raised concerns about the lack of concern that the employer showed for his privacy, specifically that it gave no specific instructions to Mr. Roussel about protecting the grievor's privacy when Mr. Roussel conducted his investigation. I am also concerned about it. Furthermore, in the absence of such instructions, Mr. Roussel included in his report personal information about the grievor that had nothing to do with the purpose of the investigation, which was to inquire into the grievor conducting personal business using the employer's network. I did not report on it since it was irrelevant to deciding the four grievances in front of me. However, this lack of respect for the grievor's privacy does not reduce the seriousness of his misconduct. At this point, I can recommend only that in the future, the employer take employees' privacy under consideration when conducting that type of investigation.

B. <u>The indefinite suspension</u>

[94] The employer suspended the grievor indefinitely effective February 8, 2011. In the suspension letter, Ms. Schubert wrote that Mr. Roussel's report was sufficient to raise important concerns about the grievor's inappropriate and excessive use of the employer's electronic network. Ms. Schubert testified that the grievor had altered hundreds of emails and files from his email account after being formally advised on January 28, 2011, not to delete anything from that account. She testified that she could not allow him to continue using the employer's electronic network and that no significant work could have been assigned to him that did not involve using a computer and accessing the employer's network.

[95] The grievor testified that he was under the impression that the January 28, 2011, directive meant that he could not delete any emails. He also testified

that he was in the habit of archiving his emails monthly. He thought that that would explain the reductions in the size of his email account when that size was compared over different months. Nothing in Mr. Roussel's testimony or report contradicts what the grievor said he did. According to Mr. Roussel, the grievor did not delete or alter any emails after January 28. Rather, he archived them. He testified that he was in the habit of archiving his emails monthly, which he did between January 28 and February 5, 2011.

[96] Ms. Schubert's key reason for suspending the grievor indefinitely had to do with the fact that he deleted a large number of emails from his account. The evidence showed that he did not.

[97] The grievor asked for parental leave starting March 1, 2011. The employer never answered his request. It thought that he wanted to avoid participating in the investigation process. He also asked for one week of annual leave for the upcoming birth of his child. His request was denied. His child was born on February 23, 2011.

[98] The grievor grieved the indefinite suspension on February 8, 2011. About one week later, the employer received Mr. Roussel's report. Its decision to terminate him five months later, in July, was based on that report.

[99] The employer argued that this grievance is moot since it terminated the grievor retroactively to February 8, 2011. In *Basra* 2014, the adjudicator endorsed the employer's decision to backdate the termination to the beginning of the suspension pending an investigation. She stated that the employer had that authority since the facts upon which the termination was based existed on the date on which it chose to give effect to the termination. In *Brazeau*, the adjudicator also accepted the employer's decision to backdate the termination. She agreed with the employer's decision that the grievance against the suspension was moot. In *Shaver,* the adjudicator also found that the grievance against the suspension pending an investigation was moot because the employer made the termination retroactive to the first day of the suspension. The adjudicator noted that had there been no just cause for discipline against the grievor, he would have been entitled to be made whole retroactively. In *Bahniuk,* the adjudicator also agreed with the employer's decision that the grievance against the suspension was moot. He referred to *Brazeau* and *Shaver*.

[100] The employer did not make reasonable efforts to obtain the grievor's point of view as to why his email account shrunk between late January and early February 2011. It simply concluded that he had violated its directive. The employer had other options for removing the grievor from the workplace. It could have accepted his leave request. The objective reality is that his spouse gave birth on February 23, 2011. He did not make that up. The employer could have accepted that leave after obtaining a clear written commitment from the grievor that he would participate in the investigation process while on leave, but it did not explore that option.

[101] Even though the employer's approach regarding the February 8, 2011 suspension is questionable, the jurisprudence cited earlier leads me to conclude that the suspension grievance is moot because the termination was effective retroactively to the first day of the suspension. In acting the way it did, the employer rendered the suspension pending the investigation and the termination into a unique and single disciplinary measure. As the adjudicator in *Shaver* stated, it is opened to me to annul the suspension together with the termination in the event that I conclude that there was no just cause for discipline against the grievor. I would then have the ability to order remedies retroactively to February 8, 2011. In that sense, contrary to what the grievor argued, he is not deprived of his right to argue the suspension grievance that he filed on February 8, 2011.

[102] I found no federal public service jurisprudence supporting an argument that, in a case like this, the employer cannot backdate the termination. However, that does not mean that an adjudicator is without jurisdiction to examine such a suspension. In fact, adjudicators have that power since the suspension period becomes part of the termination.

C. <u>The revocation of the grievor's reliability status</u>

[103] The *Act* does not give me jurisdiction to review administrative decision made by the employer, such as an employer's decision to revoke an employee's reliability status. The only way that I could have jurisdiction over it would be if the revocation were disguised discipline. In the past, some adjudicators have examined whether employers acted with procedural fairness during investigation processes that led to such a revocation. I would say that that examination would be relevant only in the context of an argument of disguised discipline. Otherwise, I do not find that an

adjudicator has jurisdiction to examine an administrative process that led to a decision over which he or she has no jurisdiction.

[104] The grievor argued that the employer did not give him full opportunity to react to some of the information it had on him, more precisely to the results of the interviews that the investigator conducted with Ms. Stethem or Ms. Schubert. The grievor stated that that was contrary to the employer's policy. However, the grievor did not make any direct argument that that omission was done in bad faith and was somehow related to discipline. Furthermore, there was absolutely no evidence to support the allegation that the employer wanted to discipline the grievor in omitting to confront him with the results of Ms. Stethem and Ms. Schubert interviews. I see no bad faith in that omission. Considering that the employer's decision to revoke the reliability status was purely administrative and not disciplinary, I conclude that I have no jurisdiction to examine it.

D. <u>The one-day suspension</u>

[105] The employer imposed a one-day suspension on the grievor for taking a long lunch on December 22, 2010. According to Mr. Provencher, the grievor never served that suspension.

[106] According to the grievor, he was away from his office for 1.5 hours for lunch on December 22, 2010. According to Ms. Stethem, he was gone for 1.75 hours. According to the grievor, he had one hour for lunch since he did not take coffee breaks. According to the employer, he had 30 minutes for lunch. With those figures in mind, the grievor's version would imply that he was 30 minutes late, and the employer's version would imply that he was 1.25 hours late.

[107] On the other hand, Ms. Stethem wrote to Mr. Provencher that the grievor took an extra 45 minutes for lunch that day, and Ms. Schubert made the decision to reduce his pay by 45 minutes for his long lunch on December 22, 2010. The grievor did not grieve the fact that his pay was reduced by 45 minutes rather than 30, as per his testimony. All of that leads me to believe that the grievor was late by 45 minutes on December 22, 2010, and that the employer's practice was to allow him to normally take a one-hour lunch break.

[108] It does not matter much with whom the grievor had lunch that day or whether the lunch was planned well in advance. I believe him that it was extremely slow at the restaurant that day because it was right before Christmas. It simply makes sense. In that context, I do not find that that constitutes misconduct on his part. He had little control over being late coming back from his one-hour lunch break that day. The employer could have asked the grievor to work those extra 45 minutes to make up for the time lost. It chose to cut his pay. That was its right, but I find that it was abusive to impose a one-day suspension on top of that.

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

(The Order appears on the next page)

V. Order

[110] The termination grievance is dismissed.

[111] The indefinite suspension grievance is moot.

[112] I have no jurisdiction over the grievance about the revocation of the grievor's reliability status.

[113] The one-day suspension grievance is allowed.

[114] I order PSLRB File Nos. 566-02-6703 to 6706 closed.

June 06, 2014.

Renaud Paquet,
adjudicator