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*Public Service Labour Relations
and Employment Board Act and
Public Service Labour Relations Act*



Before a panel of the
Public Service Labour Relations
and Employment Board

BETWEEN

IAN MURDOCH

Grievor

and

**DEPUTY HEAD
(Canada Border Services Agency)**

Respondent

Indexed as

Murdoch v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, a panel of the Public Service Labour Relations and
Employment Board

For the Grievor: Dan Fisher, Public Service Alliance of Canada

For the Respondent: Lesa Brown, counsel

Heard at Toronto, Ontario,
January 20 to 22, 2015.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Ian Murdoch (“the grievor”) was employed by the Canada Border Services Agency (CBSA) as an inland enforcement officer (IEO) at the Border Services Officer (“FB”) 03 group and level at the Greater Toronto Enforcement Centre (GTEC) in the Security Monitoring Unit (SMU). On June 27, 2011, the grievor was terminated from his position for misconduct.

[2] On July 6, 2011, the grievor filed a grievance against his termination and requested that:

1. he be reinstated to his position;
2. all documents relating to the disciplinary action be destroyed;
3. he be compensated for loss of wages and benefits;
4. he be compensated for pain and suffering;
5. he be awarded punitive damages; and
6. he be granted all other remedies deemed appropriate.

[3] On June 25, 2012, the grievor referred his grievance to the Public Service Labour Relations Board (“the PSLRB”) for adjudication under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the *PSLRA*”).

[4] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (“the Board”) to replace the former PSLRB as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[5] At the outset of the hearing, the grievor withdrew his claim for punitive damages and for pain and suffering. During closing submissions, the grievor withdrew his claim for compensation for loss of wages and benefits. In the end, the only relief the grievor was seeking was reinstatement.

II. Summary of the evidence

[6] The facts of this matter are straightforward and largely uncontested. The respondent called three witnesses, and the grievor testified on his own behalf.

[7] The grievor was hired by the CBSA in 2005 in a term position at the GTEC. In late 2007 or early 2008, he competed for and was successful in obtaining an indeterminate position with the CBSA as an IEO at the GTEC at the FB-03 group and level.

[8] Exhibit E-2 was the generic work description that applied to the grievor's position as an IEO and outlined in general the duties and responsibilities of an IEO. In May 2010, the grievor moved into the SMU. In addition to the generic description of the duties as set out in Exhibit E-2, IEOs assigned to the SMU are responsible for specific duties directly related to the mandate of the SMU.

[9] The grievor's position carries a peace officer designation.

[10] The SMU is responsible for the monitoring of individuals subject to a "Security Certificate" (ISSC) issued by the Minister of Citizenship and Immigration or the Minister of Public Safety. The Security Certificate is a tool used with respect to individuals who are deemed to be a threat to the national security of Canada. If the Federal Court determines that a Security Certificate issued with respect to a person is reasonable, that person can be removed from Canada to their country of origin. Cases involving an ISSC are generally high profile, complex and quite litigious and get frequent media attention.

[11] The SMU provides compliance monitoring of ISSCs 24 hours a day, 7 days a week (24/7), through a continuous on-shift and on-call process involving IEOs and managers.

[12] As part of the compliance monitoring, ISSCs are fitted with global positioning system (GPS) ankle bracelets. The ankle bracelets send continuous information back to

the SMU, which is monitored on a computer system. This is done daily and in the evenings by IEOs at the SMU and by supervisors during off-duty hours. Each IEO and supervisor who works at the SMU has their own login code, which identifies them in the system. IEOs are required to log in when they want to monitor or view the information and are required to log out when they are done. There is therefore a record that captures who logged into the system, on which date and at what time, and when they logged out.

[13] The GPS ankle bracelets generate an alert if the bracelet is being tampered with (“tamper alert”). In addition to the tamper alert being generated on the live computer feed, it is also sent via telephone to designated SMU telephone lines. When a tamper alert is received, standard procedure is for an IEO on duty to contact the ISSC to confirm the whereabouts and then to attend with a fellow IEO the place of residence of the ISSC to ensure the ankle bracelet is still intact and attached to the ISSC.

[14] Some ISSCs also have video surveillance cameras installed in their residence. As part of the monitoring coverage, the IEOs monitor live feed video and as well as review the recorded video.

[15] The IEOs record any pertinent information they see either in the video surveillance or the GPS surveillance in their notebooks, into the daily logbooks for each ISSC and into a Word document report, which is maintained on the SMU computer system “G drive.”

[16] The IEOs are also responsible for responding to calls from ISSCs.

[17] The GTEC is located in a large facility known as the International Centre. The SMU office is located in the same building as the GTEC, but is a separate and secure office. It is located on the 2nd floor of the GTEC. There are only two doors that permit access to the SMU. Both of these doors are accessed through the same hallway. These doors are identified as “JFO staff entrance No. 1” (“JFO 1”) and “JFO staff entrance No. 3” (“JFO 3”). JFO 1 is the closest entrance to the stairway from the first floor of GTEC.

[18] To access the SMU through either JFO 1 or JFO 3, an employee must have an electronic access card (“key card”) and must swipe the key card at the card reader adjacent to the door to unlock it. If entering through JFO 1, an entrant to the SMU is

immediately required to go through a second locked door, “JFO staff entrance No. 2” (“JFO 2”), which is also locked and can only be opened with the key card at the card reader adjacent to it. The entrance to the SMU at JFO 1 and JFO 2 is commonly known as the front entrance and the entrance to the SMU at JFO 3, which is a little further down the hallway, is commonly known as the back entrance. Use of a key card is not necessary to exit the SMU offices.

[19] The CBSA staff have their own reserved parking lot, which is controlled by key card. This parking lot is directly adjacent to the GTEC entrance known as “2C.” Entrance 2C is the closest entrance into the GTEC to allow access to the SMU office.

[20] The entrances to the GTEC and SMU offices that require a key card electronically record all key card activity. Each employee’s key card contains information specific to identify that employee. When the key card is swiped at an access point, the electronic record created identifies the following:

1. key card no.;
2. identity of the employee issued the key card;
3. location the key card is being used; and
4. date and time the key card is used.

[21] Most but not all entrances into GTEC are monitored by video cameras, which are date and time stamped. The entrance at 2C has a video camera monitoring it.

[22] Exhibit E-4 is the CBSA “Code of Conduct” (“the Code”). On page 7 of the Code, it sets out the following:

...

Accountability

You are responsible for behaving ethically and in keeping with the values and standards set out in the Values and Ethics Code for the Public Service, which forms part of the conditions of employment in the Public Service of Canada. The CBSA Code of Conduct is an extension of the Values and Ethics Code for the Public Service and both codes apply to all public servants working at the CBSA.

Public Service Values

...

- **Professional values:** *Serving with competence, excellence, efficiency, objectivity and impartiality*
- **Ethical values:** *Acting at all times in such a way as to uphold the public trust.*

...

CBSA Values

- **Integrity:** *We exercise our authority in a principled, open and fair manner. We accept responsibility for our actions in order to build and maintain a reputation of trustworthiness and accountability.*

...

[23] Under the general heading of “Expected Standards of Conduct,” at page 14 of the Code, is the sub-heading entitled “Hours of Work,” which states as follows:

Hours of Work

...

You must be punctual so you can be relied upon by the people for whom you work or for the people who work for you. Whenever you need to change your regular work schedule, such as to request leave, leave work early or change your break or meal periods, you must do so in accordance with the established procedures in your workplace.

If you are to be absent from work because of illness or emergency, you need to explain the circumstances to your supervisor and inform him or her in advance of when you expect to return to work.

[24] At page 16 and 17 of the Code, under the heading of “Disclosure of Information Concerning Wrongdoing in the Workplace,” it states as follows:

When you have reasonable grounds to believe that another person has committed a wrongdoing in the workplace, you should first talk to your manager.

...

It is the policy of the CBSA that all allegations or evidence of employee misconduct or malfeasance must be investigated to ensure that the professional reputation of CBSA employees and the integrity of CBSA operations are protected. . . .

[25] Exhibit E-5 is a copy of the attendance sheet for Code of Conduct training, which took place on December 18, 2007. The grievor was shown the Code on cross-examination and admitted that he had received a copy of the Code, was familiar with the Code and did attend the Code training session on December 18, 2007.

[26] The grievor's supervisor was Alison Scoburgh. Ms. Scoburgh in turn reported to Madeleine Kiameh, Chief of Operations for the SMU.

[27] On September 24, 2010, Ms. Kiameh sent an email (Exhibit E-1, Tab 1C) to all members of the SMU, which dealt with a number of issues, one of which addressed working through lunch (meal) breaks. The relevant portion stated as follows:

. . .

Lunch Allowance and OT:

Several employees are working during their lunch period while on an outing or surveillance activity. The dedication to the performing of your duties is greatly appreciated, however you are entitled to eat and have a break for lunch. It should be on very rare occasions that the Supervisor approves your working through lunch.

Effective immediately please ensure that you take the meal you are entitle [sic] to. Pre approval [sic] to work through your lunch must be sought beforehand.

. . .

[28] On Sunday, November 7, 2010, the grievor was working in the SMU from 4:00 p.m. until midnight ("the evening shift"). During the evening shift, there are supposed to be two IEOs on duty; however, on this evening, the grievor was working alone. While the shift is eight (8) hours, the grievor was entitled to a half-hour lunch (meal) break, and as such, the actual work time was seven and one half (7.5) hours.

[29] At 11:10 p.m., a tamper alert was generated from one of the GPS ankle bracelets worn by an ISSC. The tamper alert was received by the grievor on his work cellular telephone and as well was received by his supervisor, Ms. Scoburgh, via email. At 11:11 p.m., Ms. Scoburgh contacted the grievor to confirm he had received the alert

and to confirm that he was required to attend at the ISSC's residence to check the ankle bracelet. The grievor advised Ms. Scoburgh that he was about to contact the ISSC to confirm his whereabouts. Upon completing his telephone call with the ISSC, the grievor called Ms. Scoburgh back and confirmed that he had spoken with the ISSC and that the ISSC advised him he was at his residence and had accidentally knocked the ankle bracelet on a bathroom fixture.

[30] During the second telephone conversation between the grievor and Ms. Scoburgh, the grievor was instructed by Ms. Scoburgh to go into her office and obtain the name of another IEO, whom the grievor could contact and meet up with and then the two of them could attend at the ISSC's residence to confirm that he was still there and the ankle bracelet was still intact. At this juncture, the grievor advised Ms. Scoburgh that he was not at the SMU, having left early because he had worked through his lunch (meal) break.

[31] Ms. Scoburgh testified that given that there were no IEOs in the office, she decided that a visit to the ISSC's residence would not be carried out until the start of the day shift at 8:00 a.m. the following morning. She testified that she monitored the ISSC's ankle bracelet GPS over her laptop the balance of that night.

[32] November 8 and 9, 2010, were days of rest for the grievor.

[33] Ms. Scoburgh testified that after November 7, 2010, the grievor was placed on restricted duties. He was not permitted to work on his own and was only scheduled to work when a supervisor was present in the SMU. He was also not permitted to carry out any escort duties.

[34] On November 10, 2010, the grievor was asked by Ms. Scoburgh to prepare a report as to what occurred on November 7, 2010, which report is found at Exhibit E-1, Tab 1A. The report does not reference his early departure from the SMU before the end of his shift.

[35] On November 26, 2010, the grievor participated in a fact-finding meeting with Ms. Scoburgh with respect to the events of November 7, 2010. During this meeting, the grievor was asked questions about his work hours and attendance on November 7, 2010. The grievor confirmed that his hours of work that day were from 4:00 p.m. to 12:00 midnight (the evening shift) and that he departed work at just

before 11:00 p.m. The grievor confirmed that he did not seek authorization from his supervisor to leave work early and that he left early because he worked through his lunch break. The grievor was also asked if he had ever left work early on other occasions, which he answered that he hadn't. At the end of the interview, the grievor was asked if the information he provided was true and correct to the best of his knowledge, and he stated that it was.

[36] On December 2, 2010, the grievor participated in a second fact-finding meeting with respect to the events of November 7, 2010, this time with Ms. Scoburgh and Ms. Kiameh. In addition, a bargaining agent representative, Richard Ivory, was also present. At this meeting, the grievor again stated that the reason for his early departure from work was because he had worked through his lunch (meal) break. Ms. Kiameh asked the grievor if he recalled the September 24, 2010 email about the requirement of receiving pre-approval before working through his meal break. The grievor responded by stating that there were several policies about lunch, and as such, he wasn't sure which one was being followed. The grievor was also asked if he had ever left the workplace early on other occasions, to which he answered, "No."

[37] On January 7, 2011, the grievor participated in a third fact-finding meeting with respect to the events of November 7, 2010. Both Ms. Scoburgh and Ms. Kiameh were present, as was John Panteleit, a bargaining agent representative. At this meeting, the grievor was asked what time he arrived at work, what entrance he used and what his initial tasks were upon arrival. He was once again asked at what time he left work, to which he responded: "It was around 11:00 p.m." The grievor was also asked if he remained in the SMU the whole time of his shift and what exit he used to leave the GTEC building. The grievor responded that he had worked his entire shift in the SMU and assumed he exited using Entrance 2C.

[38] During the January 7, 2011 meeting, the grievor was also asked why he did not seek authorization to leave early, to which he stated that it was a lack of judgement on his part. The grievor was once again asked if he had on any other occasions left work early, to which he stated again "No"; however, he then stated that he may have left 10-15 minutes earlier on occasion.

[39] On January 21, 2011, the grievor participated in a fourth fact-finding meeting with respect to the events of November 7, 2010. In attendance at the meeting, in

addition to the grievor, were Ms. Scoburgh, Ms. Kiameh and Mr. Panteleit. At this meeting, Ms. Kiameh advised the grievor that they had uncovered evidence that the grievor was not at work until at or about 11:00 p.m. on November 7, 2010, as he had previously advised them. The grievor responded by stating that while he may not have been at his desk, he was outside in the parking lot and did not leave until just before 11:00 p.m. He stated that he was out in the parking lot and had the phone with him and since it was his last day on the evening shift, he may have been sitting in his car smoking and listening to music.

[40] On February 8, 2011, the grievor participated in a fifth fact-finding meeting with respect to the events of November 7, 2010. In addition to the grievor, Ms. Scoburgh, Ms. Kiameh and Mr. Ivory were all present. At this meeting, the grievor was advised that the ongoing investigation had uncovered his early departure from work on four other occasions, August 19 and 26, 2010, and November 2 and 5, 2010. The grievor was shown a chart, which set out the details of the early departures.

[41] On March 7, 2011, the grievor participated in a sixth fact-finding meeting with respect to not only the events of November 7, 2010, but also the alleged early departures on August 19 and 26, 2010, and November 2 and 5, 2010. In addition to the grievor, Ms. Scoburgh, Ms. Kiameh and Mr. Ivory were all present. At this meeting, Ms. Scoburgh advised the grievor of the evidence that had been uncovered by the investigation.

[42] An investigation report (“the report”) was authored by Ms. Kiameh, with the assistance of Ms. Scoburgh. The report is found at Exhibit E-1, Tab 1, and includes appendices A through P. During the course of this hearing, the report itself, found at Exhibit E-1, Tab 1, was identified, as were appendices A through M. Appendices N, O and P were not identified; nor was any evidence tendered with respect to them, and as such, they were removed from Exhibit E-1 and returned to counsel.

[43] The report disclosed that on five separate occasions, the grievor left the SMU workplace early before the end of his evening shift, without authorization. For each of those occasions, the report sets out the particulars of video surveillance that captures the grievor leaving the GTEC building after exiting the SMU offices and particulars of the grievor’s key card access to the SMU offices on those same dates.

[44] Exhibits E-6, E-7 and E-8 are DVDs containing video camera surveillance of the grievor departing the GTEC building after departing the SMU offices. The video surveillance is date and time stamped and was all identified by Ms. Scoburgh. Ms. Scoburgh identified the grievor as the person on the video departing the building, on the dates and at the times shown on the videos, which times are set out in the report.

[45] Exhibit E-1, Tabs 3, 4, 5, 6 and 7, are copies of all access records to the GTEC and SMU areas controlled by key card access on August 19, 2010, August 26, 2010, November 2, 2010, November 5, 2010, and November 7, 2010 from 3:00 p.m. until midnight. Exhibit E-1, Tab 8, is a copy of only the grievor's key card access for the evening shifts from August 18, 2010 to August 22, 2010. Exhibit E-1, Tab 9, is a copy of only the grievor's key card access for the evening shifts from August 26, 2010 to August 27, 2010. Exhibit E-1, Tab 10, is a copy of only the grievor's key card access for the evening shifts from November 1, 2, 4 and 5, 2010. Exhibit E-1, Tab 11, is a copy of only the grievor's key card access for the evening shift on November 7, 2010.

[46] On August 19, 2010, the grievor's last key card access to the SMU was recorded at 6:29 p.m., and video surveillance shows the grievor exiting the GTEC building after exiting the SMU offices at 8:01 p.m.

[47] On August 26, 2010, the grievor's last key card access to the SMU was recorded at 9:01 p.m., and video surveillance shows the grievor exiting the GTEC building after exiting the SMU offices at 9:47 p.m.

[48] On November 2, 2010, the grievor's last key card access to the SMU was recorded at 9:36 p.m., and video surveillance shows the grievor exiting the GTEC building after exiting the SMU offices at 9:39 p.m.

[49] On November 5, 2010, the grievor's last key card access to the SMU was recorded at 8:46 p.m., and video surveillance shows the grievor exiting the GTEC building after exiting the SMU offices at 9:30 p.m.

[50] On November 7, 2010, the grievor's last key card access to the SMU was recorded at 6:23 p.m., and video surveillance shows the grievor exiting the GTEC building after exiting the SMU offices at 6:26 p.m.

[51] Ms. Scoburgh testified that she viewed all of the recorded video surveillance for all five of the evening shifts in question and did not see the grievor re-enter the building at any of the entrances that are captured by video surveillance. None of the key card records shows the grievor's key card being used to re-enter the SMU on any of the dates in question after the time the video surveillance depicts the grievor exiting the GTEC building.

[52] Exhibit E-1, Tab 1J, contains the GPS monitoring system login records for August 19, August 26, and November 2, 5 and 7, 2010. The grievor is not shown as logging in to view the GPS ankle bracelet activity on any of these dates.

[53] Each IEO is also required to carry a notebook in which he or she is to log significant events in the course of his or her work as contemporaneously as possible with events as they occur. In addition, each IEO is also required to transcribe his or her notes into a Word document on the SMU computer system G drive. Copies of the grievor's notebook entries and G drive entries for August 19 and 26, 2010 as well as November 2, 5 and 7, 2010 are found at Exhibit E-1, Tab 1I.

[54] The grievor's notebook entries were reviewed by Ms. Scoburgh during the course of the investigation. The grievor admitted during the course of the investigation that at times he would sometimes make notes directly in the G drive without making them in his notebook. A review of the grievor's notebook entries and G drive entries shows that there are no entries for times after the time Ms. Scoburgh determined the grievor had left the SMU on each of the days in question.

[55] Exhibit E-1, Tab 1L, contains copies of the grievor's time sheets for the weeks that include August 19 and 26, 2010, and November 2, 5 and 7, 2010. The grievor testified that he fills in the time sheet as an electronic document and then prints it, signs it and delivers it to his supervisor. For each entry for each day that the grievor left early, August 19 and 26, 2010, and November 2, 5 and 7, 2010, the grievor filled in his time sheet for those days indicating that he had worked a full seven and one-half (7.5) hour shift.

[56] Under the collective agreement, anyone working on the evening shift and on a weekend is entitled to be paid a premium for every hour worked. The grievor, in addition to claiming he worked the full evening shift, also claimed for the full evening shift premium for each of August 19 and 26, 2010, and November 2, 5 and 7, 2010. In

addition, for November 7, 2010, the grievor also claimed a weekend shift premium, as that was a Sunday.

[57] During the course of the investigation, the grievor was asked at the meetings of December 2, 2010 and January 7, 2011 if he was aware of any other SMU employee leaving work early. The grievor denied any knowledge of such activities. During the course of the hearing, the grievor was asked about this, and he confirmed to me that he was not being truthful about this. He testified that there was a “culture” in the SMU of taking liberties when IEOs were working the evening shift. He stated that when he was questioned about it during the course of the investigation, he wasn’t prepared to open his colleagues up to an investigation due to his actions. He stated he was prepared to take the punishment to avoid an investigation.

[58] On May 26, 2011, the grievor, together with his bargaining agent representative, Mr. Panteleit, attended a meeting with Ms. Kiameh and CBSA Enforcement Supervisor Anne Raposo. At this meeting, the grievor was asked to provide any mitigating information, prior to discipline being determined. The grievor advised Ms. Kiameh and Ms. Raposo that he regretted his errors in judgement and apologized for his bad decisions. He advised that other than these actions, he had been a good employee for five-and-a-half years and had received excellent performance appraisals. The grievor advised that he had volunteered for extra tasks and that he had worked over the Christmas holiday. In addition, he and his wife had just bought a new house and were expecting a baby.

[59] The grievor stated in the meeting of May 26, 2011 and also in his evidence before me that the transition to the SMU was difficult for him as he had previously been in a very active unit doing investigations on the road, and the SMU was a much slower pace.

[60] Goran Vragovic is Regional Director General for CBSA operations in the Greater Toronto Area (GTA). The GTEC and SMU fall under his area of responsibility. Mr. Vragovic was the delegated authority who decided to terminate the grievor’s employment.

[61] Mr. Vragovic testified that he became aware of the incidents involving the grievor in or about April 2011. He further confirmed that sometime in June 2011, he would have received and reviewed the report.

[62] Mr. Vragovic testified as to why he decided to terminate the grievor's employment. He was concerned not only that the grievor had absented himself from the work location on the five occasions without authorization but that the grievor had deliberately withheld information and provided misinformation during the investigation. The grievor's actions bring into question his integrity. He was intentionally deceitful and falsified documents on a number of occasions. Further, the grievor was unable to explain why he conducted himself in the manner that he did.

[63] Mr. Vragovic stated that the grievor breached a number of different sections of the Code, and specifically referred to those sections that deal with hours of work, accountability and CBSA values in general. Mr. Vragovic's evidence was that while all employees are held to a high standard and are expected to be honest and trustworthy, those who hold positions that have peace officer status are expected to have an elevated level due to the fact that they are likely to be working on their own or with only one other person and could find themselves responsible for the safety and well-being of others. IEOs are expected to conduct themselves in a manner that is beyond reproach.

[64] The grievor testified about the investigation process. He testified that he was taken aback at the first meeting on November 26, 2010. He stated that he thought the issue had been dealt with, as time had passed and nothing had come of it.

[65] The grievor testified that his participation in the investigation process was guarded and defensive. He admitted that he could have been more straightforward if he had realized the severity of the situation he was in. He stated that if he could go back in time, he would have answered the questions differently.

[66] The grievor stated that he had made an error in judgement when he falsified his time sheets. He stated that his rationale was that he responded to the incident, and as such, his action was acceptable. In hindsight, he realizes it was not, as he was not in the office or doing his duties.

[67] During his evidence-in-chief, the grievor was brought to those parts of the meeting notes that referenced him being asked about whether he had left work early on other occasions and him denying that it had occurred. He was asked about his denials. He stated that he was fearful and answered without thinking.

[68] The grievor was also asked by his representative why he left early on the days he did. His answer was that it was his fault that he left early and that there was a culture in the unit. It was open and available to the employees; however, it was not appropriate, and it was unbecoming behaviour.

[69] The grievor testified that there was a culture in the unit that if they asked to leave early they would be allowed to leave early as long as one of the IEOs had the phone. Ms. Scoburgh testified that depending on the situation, IEOs may be authorized by their supervisor to leave work early on occasion. Ms. Scoburgh testified about one occasion, November 6, 2010, where the grievor asked to leave early and she authorized that early departure.

[70] In cross-examination, Ms. Kiameh was shown Exhibit G-1, an email dated January 7, 2011 that she sent to Reg Williams, Director of Enforcement for the GTA. In this email, Ms. Kiameh refers to the November 7, 2010 incident and as well the incident of leaving early on November 2, 2010. She recommends to Mr. Williams that the grievor be given a 10-day suspension for this behaviour. She confirmed that this was her recommendation at the time; however, she conceded that the decision on discipline was not hers.

III. Summary of the arguments

A. For the respondent

[71] In cases of termination, the first question that must be determined is whether or not the employee engaged in the misconduct, and if the answer to that question is in the affirmative, the second question that must be answered is whether or not the discipline, being the termination of employment, was warranted.

[72] The respondent relied on two grounds for terminating the grievor's employment, his absence from his post at the SMU without authorization, and his submission of false activity reports for the dates of his absences.

[73] The grievor conceded in his evidence that he had abandoned his post on August 19 and 26, 2010, and on November 2, 5 and 7, 2010. The grievor also conceded that he had left work on those days at the times set out in the report (Exhibit E-1, Tab 1).

[74] The grievor also conceded in his evidence that he had submitted the five false activity records (Exhibit E-1, Tab 1L). In these activity records, the grievor claimed entitlement to full salary as well as premiums as if he had worked the entire duration of the work shift as scheduled for the days in question.

[75] The respondent stated that an aggravating factor when considering the discipline was the grievor's conduct during the course of the investigation. The minutes of the meetings held with the grievor demonstrated a pattern of behaviour, which the grievor himself described as evasive, defensive and lying. When the grievor met with the two investigators, on November 26, 2010, December 2, 2010, and January 7, 2011, he maintained that on November 7, 2010, he left work at or around 11:00 pm. It was only at the fourth meeting with investigators, on January 21, 2011, when the grievor was confronted with the video evidence that he admitted that on November 7, 2010, he had left the office much earlier and claimed to be outside in the parking lot listening to music and smoking.

[76] When questioned by investigators, the grievor denied ever leaving work early on other occasions. This denial was maintained at the first and second meetings, and at the third meeting, he conceded that he may have on other occasions left 10 to 15 minutes early. At the fifth meeting with investigators, when he is shown the chart with the other early departures from work, the grievor stated he had no recollection of leaving work early.

[77] The grievor stated that he told investigators that he did what he did without thinking. His answers were defensive and guarded. He did not want to "rat out" his colleagues.

[78] According to Mr. Vragovic, the grievor's unauthorized absences had the potential to jeopardize the mandate of the SMU. The SMU's work is highly sensitive and very much in the public eye. There was and is a high degree of trust, responsibility and autonomy inherent in the IEO positions. The grievor's actions not only were in violation of the Code but irrevocably broke the bond of trust between the respondent and the grievor, and the respondent does not trust the grievor.

[79] The respondent referred me to *Thomson v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-27846 (19980402), in which the facts are similar to those of the grievor. In *Thomson*, the grievor, a customs officer and

peace officer, was absent without authorized leave on one occasion and attempted to mislead the employer during the subsequent investigation. Counsel referred me to paragraphs 207 and 208, wherein the Public Service Staff Relations Board (PSSRB) held that the employer had proper cause to dismiss the grievor and that its decision to do so was not excessive.

[80] The respondent also relied on *Ayangma v. Treasury Board (Department of Health)*, 2006 PSLRB 64, which involved fraudulent travel claims. Paragraph 256 refers to the actions of Mr. Ayangma as amounting to something other than an honest mistake or even the case of claiming inflated amounts (which would have been serious misconduct); rather, the grievor claimed for expenses for travel that never took place. This is exactly the conduct that the grievor has exhibited.

[81] *Juneau v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File No. 166-02-13118 (19820922), and *Pinto v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File No. 166-02-16802 (19880411), are both decisions dealing with fraudulent travel claims made by customs inspectors. At pages 8 and 9 of *Juneau*, the PSSRB held that by submitting false travel claims, the grievor was attempting to defraud the public treasury, which is an extremely serious matter, and discharge is not unjust or unreasonable. At page 17 of *Pinto*, the PSSRB makes a similar finding.

[82] *King v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-25956 (19950125), is another decision dealing with fraudulent travel claims. At page 18 of the decision, the PSSRB found that Mr. King committed fraud by falsifying his travel expense claims and by claiming meal allowances that he was told he was not entitled to claim. At page 19, the PSSRB held that “. . . the arbitral jurisprudence recognizes discharge as an acceptable penalty in cases where an employee defrauds his/her employer . . . the grievor was employed in a position of trust that required a high level of honesty and integrity.”

[83] With respect to the grievor’s rehabilitative potential, it was only at this hearing that the grievor admitted for the first time to the findings in the report; yet, he claims he can now be trusted as he is not the same person he was, and he is now taking responsibility for his actions. This is a case of too little, too late. The grievor’s act of contrition is for the sake of convenience at the hearing. The time for him to have

stepped up was during the investigation process, where the grievor himself admitted he was defensive and lied.

[84] Counsel also referred me to *Newman v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 88, wherein the grievor was discharged from his position as a border services officer for untruthfulness during an internal affairs investigation. At paragraph 842, the PSLRB stated that:

I note that dishonesty during an investigation is a serious employment offence. The dishonesty in this case relates to a fundamental part of the employment relationship. The Agency has to place substantial trust in its border services officers to facilitate the flow of people and goods into Canada. Border services officers are left to work alone. Complaints can arise about their conduct, and the Agency expects a full and truthful account of its border services officers' enforcement actions. There is no room for dishonesty in investigative processes, and border services officers and similar officers are held to a higher standard because of the position of trust they occupy

[85] The respondent also referred me to *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62, at para 190, where the PSRLB holds that the lack of forthrightness during the investigation constitutes a determinant factor with regard to the rehabilitation of the grievor and the necessary bond of trust.

[86] The respondent was entitled to a full and truthful account from the grievor during the investigation process, which the grievor now admits he failed to do. The bond of trust expected of him was broken by his actions, which led up to his termination, and the manner in which he conducted himself during the course of the investigation demonstrates that the bond of trust cannot be restored.

B. For the grievor

[87] This case is about quantum. The grievor requests that I review the evidence with an eye on mitigating considerations. What he did was unacceptable and merits a severe disciplinary response.

[88] The grievor admitted that at the time of the misconduct, he was an immature and different person from who he is today. The grievor has exhibited remorse that is both sincere and credible. He has taken responsibility for his wrongdoing, which proves his rehabilitative potential.

[89] At the time of the investigation, the grievor was frightened and did not help himself; his wife and he were expecting their first child, and they had just bought a new home.

[90] With respect to the time sheet that was filled out by the grievor for the November 7, 2010 workday, the time sheet was signed off by management and it was paid, notwithstanding the fact that by the time it was signed off, his supervisor knew that he had left work early. While the respondent states that it cannot put its trust in the grievor, it did so by keeping him in his position and signing off on his time sheet. While today the respondent takes one position with respect to the grievor's actions, that position was different back in November 2010.

[91] The grievor was given an opportunity to explain what happened on November 7, 2010, and he stated that he left early; in later meetings in the course of the investigation, he admitted where he was, and he shed light on where his head was at the time of the investigation meetings.

[92] An issue also came to light during the course of the hearing that employees were being allowed to go home early before the end of their shifts, which was not compliant with the respondent's policy. Ms. Kiameh testified that there were two schools of thought with respect to this practice of allowing employees to leave work early. What is clear is that the respondent was not holding the other employees to the same standard that they were holding the grievor. Since the events that have led to the grievor's termination, things have changed, and it has been a learning experience for the respondent.

[93] The grievor referred to *Dickins v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2000 PSSRB 67. In *Dickins*, the grievor conducted herself inappropriately and was discharged from her position; however, the adjudicator looked at the case in its totality. It is this manner in which the grievor submits his case should be viewed: the practices that were being permitted at the SMU.

C. Respondent's reply

[94] *Dickins* is based on a unique set of circumstances that has no bearing in this case. At paragraphs 146 and 147, it states as follows:

[146] *I believe the circumstances of the situation before me are so unique and unusual as to warrant an alteration to the penalty imposed.*

[147] *The environment was, to state the obvious, abnormal. A strike is not an every day [sic] occurrence, and the tension and exhaustion were felt by everyone.*

[95] With respect to the suggestion by the grievor that the respondent condoned his behaviour because his time sheet, which encompassed the November 7, 2010 workday, was approved and paid, it should be disregarded as that time sheet was signed off on November 16, 2010, shortly after the November 7, 2010 workday and just after the grievor provided his initial report about what had happened. The respondent had very little information at this time about what the grievor had really been doing.

[96] With respect to the submission regarding employees being permitted to leave work early before the end of their shifts, there is a difference between being authorized to leave work and being absent without leave.

[97] The submission that the grievor's behaviour was due to the fact that he and his wife were expecting a baby and they had just purchased a new house does not demonstrate his rehabilitative potential. These events are everyday occurrences and go against the suggestion of rehabilitative potential.

IV. Reasons

[98] Adjudication hearings with respect to discipline under paragraph 209(1)(b) of the *PSLRA* are hearings *de novo*, and the burden of proof is on the respondent.

[99] The usual basis for adjudicating issues of discipline is by considering the following three questions (see *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 CLRBR 1): Was there misconduct by the grievor? If there was misconduct, was the discipline imposed by the employer an appropriate penalty in the circumstances? If the discipline imposed was not appropriate, what alternate penalty is just and equitable in the circumstances?

[100] The grievor was terminated from his position as an IEO on June 27, 2011. The reason for the termination was that he had been grossly negligent in the performance of his duties as he had been absent from the workplace without authorization on five separate occasions and that with respect to those absences had completed his time

sheets as if he had been at work for the full duration of his scheduled hours of work, claiming both regular salary and premiums. In addition, during the course of the investigation into his absences, the grievor had on multiple occasions misled and deliberately withheld information from the investigators.

[101] As stated at the outset of this decision, the facts of this matter are straightforward and not in dispute. The grievor admitted that on the five occasions, he left work early, albeit with respect to the November 7, 2010 incident, he states that while he left the SMU at 6:26 p.m., he remained in the parking lot, in his car, from the time he left the office until just before 11:00 p.m., when he left for home. The grievor also admitted that with respect to the five occasions, he filled out his time sheets in a fraudulent manner, claiming for work he did not do both at a regular time rate and at an evening premium rate, and, in the case of the November 7, 2010, at the weekend premium rate. The grievor also admitted that with respect to the investigation, he misled his superiors as to the true facts, denying that he had left the workplace before around 11:00 p.m. on November 7, 2010, and denying he had ever left the workplace early on other occasions. Given these facts, there is no doubt that the misconduct is established.

[102] The only question for me is whether the discipline in this matter, termination of employment, was appropriate, or should a lesser penalty be substituted. It is my determination it should not.

[103] As set out at page 18 of *Pinto*:

...

I concur with the reasoning of my colleague, Mr. J.M. Cantin, Vice-Chairman, in Bristow (supra), when he states:

Fraud, as is known, is a very serious act of misconduct. It must be likened to theft which is, according to Brown and Beatty, "one of the gravest if not the gravest, charges of misconduct in an employment relationship" (see Canadian Labour Arbitration, ed 1, no 7:3310, page 387). As such, fraud usually leads to discharge, unless there are extenuating or mitigating circumstances. (p. 34)

...

[Emphasis in the original]

[104] The reasoning in *Pinto* is reiterated, in one way or another, in *Juneau, Ayangma* and *King*. The actions of the grievor strike at the very core of any employment relationship, which is the exchange of labour for remuneration.

[105] On November 7, 2010, the grievor was caught when a tamper alert was signalled, and he was compelled to fess up to his supervisor that he was not actually at work but somewhere else. This event resulted in the investigation, which culminated in the disclosure that the grievor's action on November 7, 2010 was not an isolated incident and that he had left early on four other occasions.

[106] What is equally distressing is not only did the grievor leave work early and claim his salary and premiums, but he lied repeatedly about his behaviour. The grievor's deception started almost immediately when he was found out. The tamper alert was recorded at 11:10 p.m. According to the grievor's testimony, he had left early and was "almost home." His reason for leaving early was that he had worked through his lunch (meal) break. The grievor's meal break is half an hour. If he legitimately had worked through his meal break and that was his reason for leaving, he would have been leaving at 11:30 p.m., not before 11:00 p.m.

[107] The grievor's deception did not end there. He maintained over the course of three fact-finding meetings that on November 7, 2010, he left work at around 11:00 p.m. In fact, at the third fact-finding meeting (the minutes of which are found at Exhibit E-1, Tab 1E), after again confirming that he had left around 11:00 p.m., Ms. Scoburgh asks the grievor: "Did you work in the SMU for the whole time of your shift?" The grievor responded: "Yes." It was only when confronted, during the course of the fourth fact-finding meeting, with evidence of his 6:29 p.m. departure, that the grievor admitted he had actually left much earlier. It was only when he was found out that his story changed, and he stated that he was out in the parking lot, smoking and listening to music.

[108] The grievor also lied repeatedly about whether or not he had ever departed work early on other occasions and whether or not any of his co-workers had ever participated in that type of activity.

[109] In the course of his testimony, the grievor was asked by his representative to explain to me why he did what he did. In his response, the grievor stated that he had erred in judgment and what he did was wrong. What he did not do was answer the

question. While I can only speculate as to why he did what he did, I expect it was because he felt he could get away with not working and still get paid.

[110] In the course of his testimony, the grievor was asked by his representative to explain to me why he lied during the investigation, to which he answered that he was defensive and guarded. Again, he did not answer this question. While I can only speculate as to why he lied, I expect it was because he did not expect to be found out.

[111] These non-responses by the grievor speak directly to his character and credibility. He was not able to answer his employer honestly when he was found out some four years ago, and yet, when the grievor comes to this tribunal seeking reinstatement, he does not explain his behaviour, when asked, even after having in excess of four years to think about it.

[112] The action of the grievor in leaving work without authorization was a pattern of behaviour that was intentional and amounted to fraud. When found out, instead of coming clean, which would have demonstrated his rehabilitative potential, he chose to mislead his superiors on repeated occasions as to the true state of affairs.

[113] I agree with the reasoning found in *Brazeau* that the time to come clean was when he was caught in November 2010 and when he was asked if there were any other instances of misconduct similar on his behalf. It is too little and too late to admit your errors as the grievor did, only after misleading and obfuscating during the fact-finding process.

[114] I do not agree with the grievor's submissions that the fact that he and his wife were expecting their first child and that they had purchased a new home were mitigating factors that justified his misleading behaviour during the course of the investigation. If anything, those facts should have propelled the grievor to come clean and admit what he had done at the outset, rather than continue down the path of misrepresentation.

[115] The grievor relied on *Dickins*, submitting that I should view this case in its entirety. In *Dickins*, the misconduct that led to the termination of employment was much different than in the grievor's case. I do not believe that the grievor's circumstances present a situation that is so unique and unusual as to warrant an alteration to the penalty imposed.

[116] The misconduct of the grievor justified the penalty imposed, and I see no reason to interfere with the respondent's decision.

[117] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[118] The grievance is dismissed.

March 2, 2015.

**John G. Jaworski,
a panel of the Public Service Labour
Relations and Employment Board**