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Citation: 2015 PSLREB 53

Public Service Labour Relations Act Before an adjudicator

BETWEEN

RUTH MCEWAN

Grievor

and

DEPUTY HEAD
(Immigration and Refugee Board)

Respondent

Indexed as
McEwan v. Deputy Head (Immigration and Refugee Board)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, adjudicator

For the Grievor: John Yach, counsel

For the Respondent: Caroline Engmann, counsel

Heard at Ottawa, Ontario,
June 2 to 5 and August 25 to 27, 2014.

I. Individual grievance referred to adjudication

[1] The grievor, Ruth McEwan, alleged that she was terminated from her executive position as an EX-01 with the Immigration and Refugee Board of Canada (IRB or "the employer") without cause. She seeks reinstatement to her position and an order directing that the terms of a "Career Transition Agreement," which the employer suspended before her termination, be fulfilled.

[2] 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 new Board") to replace the former Public Service Labour Relations Board ("the former Board") 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 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) as that Act read immediately before that day.

II. Summary of the evidence

[3] The grievor was employed as Director of Procurement, Security and Administration, at the IRB, an EX-01 position. She was terminated on April 30, 2013, following a Public Service Commission (PSC) investigation into staffing processes that she had conducted and an internal IRB investigation into her conduct of the same staffing processes. The PSC and the IRB investigations came to the same conclusion. The conclusion of the IRB investigation resulted in her termination for having placed herself in a conflict of interest (COI) position and for having breached the Treasury Board's Values and Ethics Code for the Public Sector ("the Code") and the terms and conditions of her employment by involving herself directly in competitions for positions within her section (Exhibit 3, tab 1).

[4] Before her termination, the grievor was notified that as a result of an internal restructuring of the IRB, her position had been identified for elimination and that her services would no longer be required as of April 1, 2013. She was advised that she was entitled to certain workforce adjustment benefits (Exhibit 22, tab 5), including the option of accepting a career transition agreement. She elected to leave the core public

administration via such an agreement and so advised her employer by signing the form provided and by submitting it to her employer on October 26, 2012.

[5] On January 7, 2013, in a letter, the employer advised the grievor that further negotiations of the career transition agreement were suspended pending the outcome of its staffing actions investigation (Exhibit 22, tab 6). In its letter, the employer states that since the negotiations were suspended, the grievor's option form and resignation were treated as being of no force and effect. In correspondence with the grievor's legal counsel, the employer took the position that by signing the career transition option form, the grievor had stated her intention to negotiate a transition agreement, which had never been concluded (Exhibit 22, tab 8).

[6] Simon Coakeley was IRB Executive Director until his retirement in 2013. Before that, he was responsible for approximately 1000 employees, including the director of corporate security and administration (as the grievor's position was then known). As an EX-01 in this position, the grievor was part of the senior management team of the Corporate Planning and Services Branch, reporting to an EX-03, who was Serge Gascon.

[7] As a director, the grievor had responsibility for budgets and staffing and for supervising subordinate staff. On June 10, 2010, she received a letter confirming that she had been subdelegated appointment authorities (staffing authority) by the IRB's chairperson (Exhibit 3, tab 20), who was the deputy head responsible for staffing under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). In order to qualify for this delegation, the grievor was required to and did attend staffing training in 2010.

[8] In June 2012, Mr. Gascon advised Mr. Coakeley that the grievor had asked him to sign a letter of appointment offering a job within her department to her son. Mr. Gascon was not aware up to that point that the grievor's son was a candidate in the staffing process and refused to sign the letter until he had further information. In addition, the grievor's actions in a staffing process involving a Ms. Cochrane concerned the IRB, due to allegations that the grievor had hired Ms. Cochrane, a woman with whom she had a personal or business relationship, for a CR-04 position. Consequently, the IRB requested that the PSC investigate both staffing processes. The PSC has authority under section 66 of the *PSEA* to investigate external staffing processes (Exhibit 3, tab 18).

[9] On December 12, 2012, after the PSC provided Mr. Coakeley with a copy of its factual report indicating that the grievor had placed herself in a COI, in contravention of the Code, the employer, represented by Mr. Coakeley, undertook a disciplinary investigation of its own into the matter (Exhibit 3, tab 14). The grievor expressed her discontent with the disciplinary investigation and the duality of processes she was facing in a letter dated December 13, 2012 (Exhibit 3, tab 13). In her letter, she stated that she had an agreement with the PSC concerning her opportunity to provide further submissions on the PSC's report. The employer was unaware of this agreement. Regardless, there was nothing in an agreement between the grievor and the PSC that would have precluded the employer from conducting its internal investigation.

[10] The grievor raised further concerns with the employer's investigation in a letter to Mr. Coakeley dated December 14, 2012 (Exhibit 3, tab 12). In this letter, she alleged that the employer, by relying on information from the PSC, breached the *Privacy Act* (R.S.C. 1985, c. P-21), as it was a use of information contrary to the purpose for which it was gathered. She also alleged that the employer's reliance on the PSC report, which was not then completed, was a breach of procedural fairness. The dual processes were causing her undue mental, physical and emotional stress. Furthermore, she should have been advised that she would be subjected to an internal review in addition to the PSC's external review. Mr. Coakeley responded to the grievor's concerns on December 19, 2012 (Exhibit 3, tab 11).

[11] He informed the grievor that the deputy head has authority under the *Financial Administration Act* (R.S.C. 1985, c. F-11; *FAA*) to take disciplinary action for Code violations. There was no breach of the *Privacy Act*. The PSC provided information to Mr. Coakeley that the grievor had provided to it relative to the investigation requested by the employer. The PSC's investigation was into staffing actions undertaken on behalf of the IRB's deputy head. The IRB had every right to the same information as provided to the PSC, provided it was for a consistent use.

[12] The IRB used a written process in its disciplinary investigation. Additional time was provided when requested. The investigator met with the grievor and her counsel in person. Mr. Coakeley reviewed the PSC's factual summary report and enough of the 57 emails in it to form the basis of the disciplinary investigation. He was satisfied that the summaries provided were accurate, based on his review of the emails. The IRB investigation report was provided to the grievor on April 2, 2013 (Exhibit 3, tab 7).

[13] The PSC accepted the investigator's report and issued a record of decision on April 17, 2013 (Exhibit 3, tab 5). It concluded that Ms. McEwan had committed improper conduct and fraud during the appointment process involving her son and during Ms. Cochrane's appointment process. Consequently, the PSC issued the following directive:

> ·for a period of four years, Ms. McEwan was to be prohibited from accepting any position or work within the federal public service without the PSC's written approval;
>
> ·for a period of four years, Ms. McEwan had to advise the PSC if she were to obtain casual employment within the federal public service;
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> ·Ms. McEwan was to be required to complete courses in values and ethics and staffing at the Canada School of Public Service within six months of the PSC's decision;
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> ·Ms. McEwan was not to be allowed to exercise any duties related to staffing for a period of five years; and
>
> ·the IRB's Chairperson was not to subdelegate staffing authorities to Ms. McEwan for a period of five years.

[14] Mr. Coakeley's report (Exhibit 3, tab 7) was based on an evaluation of the PSC's fact finding, sworn statements provided to the PSC by witnesses it interviewed, the emails provided to the PSC and submissions from the grievor. The focus of his investigation was the alleged Code violations, while the PSC focused on alleged *PSEA* violations. The investigations were based on the same facts, but their contexts were different. Mr. Coakeley concluded that the grievor was in a real COI when she acted as the delegated manager in a staffing process in which her son was a candidate. He concluded that she acted as his spokesperson and that she assisted him in the process in various ways, including by intervening when he missed an exam, by deciding that the exam should be rescheduled and by soliciting a reference letter for him. As to the grievor's actions when she deployed Ms. Cochrane to the mailroom, Mr. Coakeley concluded that the grievor did so to vacate a position to allow her son to be considered for an appointment.

[15] As to the grievor's involvement in hiring Ms. Cochrane in the first place, Mr. Coakeley concluded on the basis of emails between Ms. Cochrane and the grievor that the women had a relationship other than as employer-employee before Ms. Cochrane was hired. In fact, Ms. McEwan admitted that Ms. Cochrane helped her around her house and with moving to another residence. Ms. Cochrane admitted that the grievor had employed her to perform landscaping and cleaning services before hiring her at the IRB.

[16] Based on these conclusions and others made in the report, Mr. Coakeley concluded that the grievor had violated the employer's Code by allowing herself to be in a COI between her employer, her friend and her son. The trust relationship between the employer and a member of the executive cadre was eroded completely, and discipline was warranted.

[17] When asked what the grievor should have done in the circumstances of these staffing actions, Mr. Coakeley responded that she should have recused herself completely and that she should have not been involved in any way in any staffing process to which a family member applied. Instead, she was involved in the decision making with respect to the conduct of the process and intervened on her son's behalf, including having another employee moved to a different position to create a vacancy for her son. As to the grievor's actions in the staffing process involving Ms. Cochrane, the evidence was uncontradicted that the relationship between the grievor and Ms. Cochrane was more than a casual acquaintance. The grievor should have recused herself from this staffing process as well.

[18] In coming to his conclusions, Mr. Coakeley took into consideration that the grievor did not evaluate her son's exam or participate in his interview. She did make key decisions in both staffing processes as to qualifications, including changing educational qualifications when Ms. Cochrane could not prove she met the standard set and deciding to use a ranking system to determine the successful candidate. The fact that she made these and other decisions at key points in the staffing processes was unacceptable.

[19] Mr. Coakeley shared his report with the grievor. On April 10, 2013, he met with her and her representative and other employer representatives to obtain her comments on his conclusions. Nothing was said that made him change his mind. At the grievor's request, she was given until April 17, 2013, to provide her comments to the

IRB investigation report, which she did (Exhibit 3, tab 4). Mr. Coakeley considered the grievor's April 17 submissions and a tape recording of her first interview by the PSC investigator as requested by the grievor. He prepared a summary addressing the issues she raised in which he assessed the comments and described how they affected his findings (Exhibit 3, tab 3). The results had no significant impact on his findings.

[20] Mr. Coakeley took his findings to IRB Chairperson Brian Goodman, who was aware in broad terms of Mr. Coakeley's IRB investigation and was fully aware of the PSC investigation. Mr. Coakeley presented Mr. Goodman with his investigation summary and recommendations (Exhibit 3, tab 2). He attached the PSC report received on April 17, 2012 (Exhibit 3, tab 5), and his assessment of aggravating and mitigating factors (Exhibit 3, tab 3), following which he briefed Mr. Goodman in person. Mr. Goodman was concerned that the grievor receive due process and the protections of natural justice. He wanted to ensure that all possible alternatives to termination were evaluated.

[21] The only other possible disciplinary alternative was demotion, which, given that the employer-employee trust relationship was severely damaged, was not an alternative. There were no other executive positions at the IRB that did not involve staffing. Furthermore, if the grievor could not be trusted to staff positions, she could not be trusted to comply with the Code when contracting with suppliers. The IRB had no EX-01 positions in Ottawa that did not involve staffing or contracting responsibilities, other than the senior advisor position to the chairperson or deputy chairperson. The senior advisor has full authority related to decision-making processes of IRB divisions in the management of these divisions. This position requires expertise in the subject matters of the interaction, of divisions which that the grievor did not have. Suspension was considered as an option, but the problem was putting her back in an executive position upon her return, given the need for trust. There was no hope that the trust relationship could be rebuilt, given the grievor's failure to acknowledge the gravity of her actions.

[22] Compliance with the Code was a term and condition of the grievor's employment. She violated the ethical values, the professional values and the merit-in-recruitment value. When faced with an ethical dilemma, she did not take steps to advise her director general, her senior advisor in staffing or the IRB ethics officer. Furthermore, when she realized she was in a COI, she did not fill out the required form

declaring it. The Code requires that when in doubt, an employee should seek the deputy head's direction. There was no doubt in these circumstances that the COI existed, yet she did not take steps to avoid or declare it. Any doubt about whether a COI exists must be resolved in the public interest.

[23] The entire process from the referral to the PSC to the point at which the grievor was terminated took approximately two years. During that time, there were no significant operational challenges with her in the workplace. Her staffing authority had been temporarily revoked pending the outcome of the PSC investigation. For this period, she was not performing the full range of EX duties and could not be assessed for performance purposes against other EXs. She was given an acting assignment as Director, Corporate Planning and Management Practices (Exhibit 5), during this period. When another director went on assignment, the grievor was given signing authority over that director's area.

[24] At the time of her termination, the grievor had approximately 34 years of service in the public service. In February 2013, Mr. Coakeley had discussions with her concerning her intention to retire when her position was eliminated on April 1, 2013. Mr. Coakeley was aware the grievor had opted for retirement under the "Directive on Executive Compensation Workforce Adjustment Plan."

[25] Mr. Gascon was Director General, Corporate Services and Integrated Planning. The grievor reported directly to him. When Mr. Gascon arrived in 2008, the grievor held the position of Director, Procurement, Security and Administration. He gave her the flexibility to ensure that she had the resources available to do the job within her allotted budget, which included staffing. The grievor had responsibility for the accommodation portfolio, procurement, records management and security. She had all EX-01 responsibilities related to the management of her section, including spending and staffing. When exercising this authority, she was required to consult Mr. Gascon and to update him when things were going off the tracks. She had every opportunity to consult him when she felt it required. It was left to her to decide what issues needed to be brought to Mr. Gascon for consultation, discussion and direction.

[26] Mr. Gascon expected his directors to let him know when they undertook staffing processes. He did not need to be involved in staffing positions at the lower levels, but he did expect to be updated on the progress of competitions. Following a PSC audit of IRB staffing actions, it was apparent that the IRB had major issues with recruitment.

Mr. Gascon expected his directors to focus on respecting *PSEA* hiring rules. This message was repeated at staff and directors' meetings. The IRB knew that its staffing actions were being scrutinized by the PSC. As a precautionary step, the Chairperson asked each director general to look over staffing actions.

[27] In 2009, Mr. Gascon's branch was restructured in anticipation of the upcoming strategic operating review of government services. He tasked the grievor and another director with evaluating how the sections could best function as a branch. In 2011, the grievor was advised that she would no longer be responsible for the security function. She was not happy with the news. Rather than declare her position surplus at that point as he had intended, she was kept on to complete projects. Mr. Gascon undertook to provide her work at the director level. As a result of changes to the *Immigration and Refugee Protection Act (*S.C. 2001, c. 27*)*, the IRB undertook a restructuring. To ensure that the IRB was ready for the implementation of the legislative changes, the grievor was given responsibility for another director's area, including signing authority over the area's cost centres and budget, while that director was on assignment to the reform project.

[28] On June 22, 2011, the grievor went to Mr. Gascon with a letter of offer addressed to her son offering him a position within her division. She advised Mr. Gascon that she had removed herself from the process because of the relationship and that it would be best for him to sign the letter of offer. He refused and advised her that they would discuss the matter further. Later that afternoon, he asked her why she was bringing this to his attention so late in the process.

[29] On June 24, 2011, the grievor followed up on the status of the letter of offer. She was advised of Mr. Gascon's concerns and that no further indeterminate appointments would occur in her area until he had been provided with, and authorized, an updated organizational chart for the grievor's area (Exhibit 3, tab 9, page 90).

[30] When dealing with such a sensitive matter as hiring the grievor's son, the Director General should have been involved from the beginning, not once the letter of offer was ready for signature. The grievor could not understand Mr. Gascon's concerns and asked him the following: "As long as you are satisfied that nothing untoward occurred, what is the problem?" (Exhibit 3, tab 9, page 90). She then offered that if there was a problem, she would accept a deployment so that her son would not be

working under her. This was a band-aid, according to Mr. Gascon. She did not recognize that the letter of offer should never have been prepared unless she first informed him of the COI, following which they could have taken all steps necessary to ensure transparency and lack of bias in the staffing process.

[31] There was the possibility that, perceived or real, a candidate had been given an advantage in a staffing action through the grievor's influence. She was perceived as being in authority and was expected to take every step to avoid or mitigate the perception of bias. She had been given the required staffing courses to qualify her to receive staffing delegation. Mr. Gascon also hired a staffing consultant to assist her with staffing in her division, yet he was faced with another concern with her involvement in staffing actions. The first arose in January 2011 involving another candidate, Ms. Cochrane, whom the grievor attempted to and did eventually hire in May 2011.

[32] When Mr. Gascon asked the grievor about the existence of a relationship between her and Ms. Cochrane, she assured him that there was nothing to worry about. Ms. Cochrane had been one of her neighbours and had helped her out on occasion. When questioned about her action of attempting to hire Ms. Cochrane in January 2011, the grievor mentioned to Mr. Gascon that there had been a challenge with obtaining proof of Ms. Cochrane's education and that the grievor had hoped to get an exemption from this qualification for Ms. Cochrane. The grievor became directly involved in helping Ms. Cochrane secure a copy of her diploma from her school overseas. Mr. Gascon found it odd that a director would be so involved with a candidate for a lower-level clerical position.

[33] Mr. Gascon contacted Diane Lacelle in IRB Human Resources and obtained the staffing file for the competitions involving Ms. Cochrane and the grievor's son. He scheduled interviews with the grievor and other people involved in these processes (Exhibit 3, tab 19). From the file review and the interviews, it was not clear how the grievor's son came to be the successful candidate in one of these processes. The consultant hired to assist the grievor did not know. The human resources officer assigned to the files advised Mr. Coakeley of his concerns with the grievor's conduct of the staffing processes. The consensus was that the matter merited further inquiry. On the recommendation of Human Resources, the matter was referred to the PSC for investigation. The grievor was informed that the file had been transferred to the PSC

for investigation, that her staffing delegation was suspended and that her performance pay would be held in abeyance pending the results of the PSC investigation. Following this, she went on sick leave.

[34] Mr. Gascon was interviewed twice by the PSC investigators and was given the opportunity to review and comment on its factual report. He spoke to the lead investigator on another occasion to determine if the final report was ready as the IRB was anxious to receive the results due to the grievor's job being affected. The employer needed the results before it moved to declare her position surplus because serious results in the PSC investigation could have jeopardized her possibility of surplus status. He played no role in the disciplinary investigation.

[35] In October 2012, the grievor was declared surplus when a new structure was announced, which saw the remainder of her division dismantled and then eliminated, and its sections were transferred to other divisions within the directorate. Mr. Gascon's goal was to have the new structure in effect in April 2013. Beginning in September 2012, he and the grievor had discussions about her transition options. She had previously stated that she intended to retire in 2013. At the time of these discussions, she had not been declared surplus (Exhibit 3, tab 17). In response to her request for a career transition package, Mr. Gascon met with Mr. Coakeley, as he did not have the authority to approve one. The grievor was informed on many occasions that only the IRB's chairperson, as the deputy head, had the authority to grant a career transition package. On September 13, 2012, she demanded to be declared surplus, knowing that the PSC investigation was ongoing into the staffing actions involving her son and Ms. Cochrane.

[36] The grievor prepared her list of demands of what was to be included in her career transition package. Mr. Gascon provided them to the Chairperson and to Human Resources. The intention of these demands was to form the basis of negotiation of a career transition package even though at that point the grievor had not been declared surplus. The Acting Chairperson made no decision on the proposal.

[37] Gregory Doucet was the IRB staffing advisor assigned to Mr. Gascon's portfolio. His role is to provide advice to managers on legislation, policies and directives that govern the IRB staffing process and to assist in staffing vacancies. Discussions between Mr. Doucet and a manager begin when the manager identifies a need. After Mr. Doucet receives a staffing request, the decision is made in conjunction with the

hiring manager on how to fill the vacancy. If the hiring manager chooses to proceed by competition, the manager drafts the statement of merit criteria, which includes the required education, experience, knowledge, abilities and personal suitabilities consistent with the work description. Rating guides such as exams, interview questions and type of reference check are drafted and evaluated to ensure that they are consistent with the work description. Rating guides are compared to the statement of merit criteria to ensure that the qualifications it details are adequately addressed. The evaluation criteria are examined to ensure that they create no barriers for candidates.

[38] Once the competition closes, the delegated manager pre-screens the applicants on the basis of their cover letters and resumés. Those who make it through the pre-screening process then write the exam. Candidates successful on the exam are invited to interviews. After the interview, a successful candidate undergoes a reference check, security screening and verification of his or her second-language profile. Exams may be administered by the delegated manager, possibly his or her subordinate, or someone from Human Resources. The delegated manager carries out the reference checks. The delegated manager drafts the reference check form.

[39] Once a candidate has been selected, the delegated manager drafts a "right fit" rationale explaining why the candidate should be hired. Then the candidate's second-language profile is verified and the candidate is asked to undergo security screening. Non-subjective areas of selection are verified, such as education. When being screened on education, a successful candidate must provide proof, usually in the form of a copy of his or her diploma, before being appointed.

[40] The role of the delegated manager involved in staffing a position is, overall, to make sure that key decisions that would affect the process are based on advice provided to him or her. The delegated manager makes any decision that will affect a file. Human Resources representatives provide advice and make recommendations; they do not make staffing decisions. If issues arise in the course of the staffing process, Human Resources will obtain direction from the delegated manager on how to proceed. For example, if a candidate is unavailable for a test or interview, the delegated manager decides whether to reschedule or reject the candidate. If a candidate's education cannot be verified, Human Resources will provide advice on how to obtain the proof. Neither the delegated manager nor Human Resources will contact the educational institution to obtain a diploma. If a candidate cannot provide proof of his

or her qualifications, depending on the level of education, alternatives may be available.

[41] Mr. Doucet was the staffing officer in the staffing process involving Ms. Cochrane, which the PSC reviewed. The process was initiated in April 2010 and was posted for 48 hours in August 2010. Of the candidates screened-in to write the exam in September 2010, three passed. All three had previously been IRB casual employees. Of the three, only one could prove that she met the educational requirement. Ms. Cochrane was one of the two candidates who could not.

[42] The grievor was aware that Ms. Cochrane was unsuccessful in obtaining proof that she met the educational requirements. She asked Mr. Doucet to contact the school to secure a copy of the diploma on Ms. Cochrane's behalf, which he did by sending an email, but nothing came of it. After not receiving the required proof or any confirmation of Ms. Cochrane's efforts to obtain it, Mr. Doucet consulted his manager and the Director of Human Resources. The Director provided alternatives to obtaining a copy of the diploma, including having the PSC test Ms. Cochrane, which did not happen.

[43] Instead, the grievor went to great lengths to help Ms. Cochrane obtain proof of her educational qualifications from overseas. When she was unable to, the grievor sent an email to Mr. Doucet indicating that based on all the efforts to secure the proof, by Ms. Cochrane and others, she was satisfied that Ms. Cochrane met the educational qualifications and asked him to proceed with an offer of indeterminate employment once Ms. Cochrane's security clearance had come through (Exhibit 3, tab 10). Human Resources did not prepare the letter of offer as requested and recommended that the CR-04 position be offered to another candidate.

[44] Ms. McEwan chose to run another CR-04 competition, and this time, it was posted externally. She decided to move forward with an amended statement of merit criteria that lowered the educational requirements to the minimum for a CR-04 under the Treasury Board Qualifications Standards for the CR Group. The results of the first competition were carried over into the second one, and the original applicants were rescreened. The only person who benefitted from the change in qualifications was Ms. Cochrane.

[45] The grievor's son applied to the second competition for the CR-04 position. Mr. Doucet found out at the pre-screening phase that that candidate, Shawn McEwan, was related to the grievor. Suzanne Mahoney, the consultant that the IRB hired to assist the grievor in her staffing processes, came to Mr. Doucet with the resumés that she had screened. She indicated that one of the applicants had the same last name as the grievor and indicated that this applicant was not available during a specific period.

[46] When Mr. Doucet went through Mr. McEwan's application, nothing indicated when he was or was not available. Curious, Mr. Doucet asked Ms. Mahoney as to how she would have known about Mr. McEwan's availability. Mr. Doucet then went to the grievor and asked her if she was aware that her son had applied to the competition; she stated that she was aware. She also told Mr. Doucet that she had advised Ms. Mahoney as to her son's availability. Ms. Mahoney denied that the grievor told her of those availability dates. Finally, the grievor told Mr. Doucet that since her son was a candidate, she wanted to be at arm's length from the competition to avoid a COI. Ms. Mahoney was to do all the assessments.

[47] Mr. Doucet then told everything to Ms. Mahoney, adding that the grievor claimed to have advised Ms. Mahoney that the grievor's son would be a candidate. Ms. Mahoney became upset and responded that she wanted nothing to do with the competition and that he should leave her office. Mr. Doucet reported the situation to his manager, who advised him that since the grievor had stated she would not be involved in the process, there was no concern at that point.

[48] The problem was that the grievor signed off on the statement of merit criteria, the assessment tools and the right-fit criteria. In addition, it was her decision to reschedule her son's exam when he failed to appear when scheduled. The reasons her son provided for missing the exam were not typically sufficient to warrant a rescheduling. He sent no messages about rescheduling. The grievor was the go-between, conveying her son's information to Human Resources.

[49] When it became time to check the second-language evaluations, Mr. McEwan's name was included on the list that Ms. Mahoney provided to Mr. Doucet. The grievor was copied on the list. Mr. Doucet wondered why since the grievor had indicated she wanted to remain at arm's length from this competition, but since it had no impact on a candidate's success, Mr. Doucet said nothing. He was not aware the grievor was communicating directly with her son about the competition.

[50] During the first CR-04 competition, rumours circulated that the grievor and Ms. Cochrane were friends and that Ms. Cochrane had worked as the grievor's maid. When the staffing request and right-fit explanation were forwarded to Human Resources, signed by the grievor, there was no disclosure of any relationship between her and Ms. Cochrane. Mr. Doucet also raised this with Mr. Gascon.

[51] Eventually, Ms. Cochrane was appointed to an indeterminate English-essential CR-04 position. She did not stay in that position long as she deployed to another position in the mailroom, leaving her position vacant and available for the appointment of Ms. McEwan's son. Before that happened, the grievor consulted Mr. Doucet. She wanted to know her options with respect to placing someone into a position occupied by someone else, who would soon retire. She would not tell Mr. Doucet whom she wanted to deploy, but she did indicate that it was urgent.

[52] On May 30, 2011, the grievor submitted the request to deploy Ms. Cochrane to the mailroom, and on May 31, 2011, the paperwork was done. In June 2011, Mr. Doucet received the staffing request form and the right-fit assessment to appoint Mr. McEwan, following which Mr. Doucet sent an email to Mr. Gascon to advise him of the grievor's intention.

[53] Michel-Eric Theriault, Director of Staffing and Labour Relations at the IRB testified as to the delegated manager's responsibilities in a staffing process. The manager is accountable for all decisions made with respect to the file. The Corporate Staffing section of Human Resources reviews a staffing file before issuing a letter of offer to a successful candidate. If the file is non-compliant, the deficiency is noted, and a letter of offer should not then be issued. However, it is still within the delegated manager's authority to direct that a letter of offer be issued. Corporate Staffing does not have oversight over COIs or a manager's behaviour in a staffing process. If there are concerns with a manager's behaviour, the staffing advisor raises them with the delegated manager. If there are no changes, the concerns are then escalated to the next level of management. Corporate Staffing raised its concerns with Mr. Gascon with respect to the staffing actions involving Ms. Cochrane and Mr. McEwan.

[54] Ms. McEwan testified that she received her staffing delegation after completing the required training at the Canada School of Public Service in 2003. Since then, she completed the mandatory refresher twice. She had been the delegated manager in many staffing processes. Due to her tremendous workload in 2010 and 2011, she was

too busy to handle staffing, so a consultant was brought in to carry out staffing in her division. The procurement office selected Ms. Mahoney to carry out the staffing and human resources planning for Ms. McEwan's division based on priorities that Ms. McEwan explained to her. Ms. McEwan advised her that she was too busy with other work in these areas and that she was to work independently. Ms. McEwan was to be consulted for all decision making. In all, Ms. Mahoney assisted with approximately 20 staffing processes, including hiring casuals, acting assignments, retirement special assignment plans (SAP) and regular staffing. Ms. McEwan and Ms. Mahoney communicated primarily via email.

[55] Ms. Mahoney prepared Ms. McEwan's part of the human resources plan and completed all staffing action request forms that required Human Resources and the delegated manager's approval. Human Resources prepared the job descriptions and statements of merit criteria. Normally, delegated managers draft the statements of merit criteria; however, in the staffing actions that were subject to the PSC review, Ms. Mahoney completed the job descriptions in conjunction with the human resources officer assigned to the file, which Ms. McEwan then approved. Ms. McEwan decided that rather than an existing exam, an updated exam should be used.

[56] Applications for the positions were received by Human Resources and sent to Ms. Mahoney, who did the screening. In August 2010, Ms. McEwan's son was looking for full-time employment in both the public and private sectors. At the last minute, he applied for the vacant position in Ms. McEwan's area. Ms. Mahoney proctored and graded the exams. She and two others conducted the interviews. Ms. McEwan did not participate in the interview process. Ms. Mahoney and the human resources representative decided to rank the candidates on total scores rather than to use a best-fit scenario. Ms. McEwan approved the method selected by Ms. Mahoney.

[57] Ms. Cochrane placed first among the candidates. Ms. McEwan and Ms. Cochrane knew each other outside of the IRB, as they had been neighbours 23 years earlier. They lived next door to each other for approximately 10 months, following which they had no contact for more than 10 years. They met again when they were both involved with the Centrepointe Theatre. Once reunited, Ms. Cochrane did odd jobs for Ms. McEwan, such as helping her with moving and landscaping. Ms. McEwan shared this information with Mr. Gascon, Human Resources, and three other managers.

[58] Ms. Cochrane was initially hired at the IRB by one of Ms. McEwan's colleagues, to whom she had provided Ms. Cochrane's resumé. When she was determined to be a successful candidate for a position in Ms. McEwan's area, Ms. Cochrane encountered difficulty confirming her education as she had been educated in England. Ms. McEwan asked Mr. Doucet, the human resources officer running the competition for her, to contact the British Board of Education to attempt to obtain a copy of Ms. Cochrane's diploma. When he was unsuccessful, Ms. McEwan did so herself, which was not unusual for her as she had done it for other employees (see the emails in Exhibit 22, tab 2).

[59] When it became clear that Ms. Cochrane's qualifications could not be confirmed, another staffing process was run. In consultation with Human Resources, Ms. McEwan decided to carry forward the results of the first process into the second process and to lower the educational requirements, meaning two of the candidates from the first competition, Ms. Cochrane being one, now qualified. The statement of merit criteria was changed to reflect the lower educational requirements. Ms. McEwan informed Mr. Gascon of the changes. Ms. McEwan's son applied to the second competition. He advised his mother of this by phone a couple of days after he had applied. Ms. McEwan knew that her son would see the notice of competition as she had set him up with an alert that notified him of all CR-level vacancies in the public service.

[60] Ms. McEwan informed Ms. Mahoney that Shane McEwan was her son. Mr. Doucet asked Ms. McEwan if she knew Shane McEwan. Ms. McEwan confirmed the conversation she had had with Ms. Mahoney. Mr. Doucet informed Ms. McEwan that the employer could not prevent family members from applying to competitions and that he would check with his supervisor on how the matter should be handled. Ms. McEwan testified that she advised Mr. Doucet that she did not want to have anything to do with running that staffing process and that he was to deal directly with Ms. Mahoney. She did not have anything to do with screening candidates and did not sign any of the documents related to the process.

[61] When her son missed his interview, Ms. McEwan decided it could be rescheduled as a matter of due diligence. She should not have responded to the email advising her that her son had missed his interview. It was clearly inappropriate, as she knew she could not be at arm's length in the process if she responded, but she had information about the candidate and his availability. She should have had Ms. Mahoney respond.

Ms. McEwan also assisted her son with securing a reference from a Dr. Foster, yet no one asked her about the details.

[62] After the candidates were screened, nine were placed in a pool of qualified candidates. Ms. McEwan knew that Ms. Cochrane and her son were rated first and second respectively in the English essential competition. Around the same time, Ms. McEwan became aware of another employee's intention to retire from his English-essential position in the mailroom, which meant that she had two available CR positions in her division. She intended to staff both from the existing candidate pool after creating a second poster but could not use the same pool of candidates to staff positions with different statements of merit. Ms. Cochrane was hired as a result of the first competition and was subsequently deployed into the position in the mailroom at her request (Exhibit 3, tab 9, page 88), leaving her CR position vacant.

[63] As a result of Ms. Cochrane's deployment to the mailroom position, Ms. McEwan had a vacant CR position. The original pool of candidates was used to staff it. The next eligible candidate was Shane McEwan. Ms. McEwan knew she could not sign a letter offering her son the position, so she told Mr. Doucet to prepare the letter for Mr. Gascon's signature. Funding was secured for temporary CR positions, which were offered to the remaining candidates in the pool.

[64] Once the letter of offer was drafted, Ms. McEwan took it to Mr. Gascon and spoke to him about what had happened and why his signature was required. She apologized for not telling him sooner. He asked her to leave the letter with him and stated that he would look into it. He would not sign the letter of offer until he was satisfied with the process. Ms. McEwan was embarrassed and upset by not having told him sooner, but she did not expect her son to qualify for the position. She offered to deploy to another position if Mr. Gascon did not think she had dealt with the matter appropriately to ensure that her son secured employment and would not be reporting to her.

[65] After Mr. Gascon had time to assess the situation, he called Ms. McEwan to a meeting with the Director General of Human Resources. Only at this meeting did Ms. McEwan begin to understand the seriousness of the situation. Following the meeting, she contacted her son and asked him to withdraw from the competition, which he did. Minutes of the meeting were provided to Ms. McEwan for comment. She

agreed with most of what was recorded except that she disagreed that she did not inform the interview board that her son was one of the candidates.

[66] Ms. McEwan recognized that it was inappropriate to rely on advice from junior staff. She had specifically asked Mr. Doucet to speak to his superiors. Ms. Sonia Marcotte, Mr. Doucet's manager, was Ms. McEwan's peer and was aware of Ms McEwan's relationship with Ms. Cochrane and Shane McEwan. Ms. McEwan discussed her knowledge of Ms. Cochrane with Mr. Gascon on more than one occasion. She gave him a full and honest explanation of their relationship. Ms. Cochrane was best described as an acquaintance according to Ms. McEwan; they were not friends.

[67] After her staffing delegation was suspended, Ms. McEwan was asked to undertake a series of projects, one of which was the branch review to reduce expenditures pursuant to the federal government's "Strategic and Operating Review" and "Deficit Reduction Action Plan." As part of this review, she examined her own areas, which were strangely placed in comparison to other departments. She determined that if the work was organized differently, her director position could be eliminated.

[68] When the grievor returned from sick leave in October 2011, she was advised that she was an affected employee and was given her career transition papers, a copy of the career transition policy and the terms and conditions of employment for executives. She received her options letter (Exhibit 21) on June 28, 2012. She chose option 1 available to her, the departure and career transition option, following negotiations with Mr. Gascon concerning the package she was to receive. She delivered her confirmation of her choice of options to Mr. Gascon's assistant (Exhibit 9). She was declared surplus on October 25, 2012.

[69] On January 7, 2013, the grievor was notified that as a result of the ongoing PSC and internal investigations, the IRB was suspending all career transition agreement negotiations pending the outcomes of the investigations (see the letter at Exhibit 22, tab 6). As a result, the career transition option selection form, including Ms. McEwan's stated intention to resign, was treated as being of no force and effect.

[70] Ms. McEwan's counsel sent a letter to the IRB grieving the anticipatory breach of the career transition agreement (Exhibit 22, tab 7), to which the IRB responded that it

was premature to file a grievance as no decision had been made and as the negotiations could resume at the conclusion of the investigations (Exhibit 22, tab 8).

[71] In her director role, the grievor participated in the directorate budget process and had spending authority over her divisional budget. She had no restrictions on her budget and procurement roles or her oversight of subordinates when she returned from sick leave in the fall of 2011. When she returned, her staffing delegation had been suspended, and Mr. Gascon had assumed the staffing role for her area. She was also advised that her performance review was being held in abeyance pending the completion of the PSC investigation. This was the only restriction placed on her while the PSC investigation and internal investigation were ongoing. She was still involved in the staffing processes but not as the delegated manager.

[72] Ms. McEwan was involved in 10 to 30 staffing processes at the Office of the Information Commissioner of Canada between 2007 and 2008 as a director general, for which she was accountable. She was also a senior advisor to the information commissioner on the Code during this period. No questions were raised concerning her integrity. From 2008, she had a staffing delegation at the IRB and had been involved in 5 to 10 staffing processes as the delegated manager. Until the incidents arose that became the subject matter of the PSC investigation, the IRB raised no concerns about her integrity. Ms. McEwan was aware of the requirement to report a potential COI. She received COI training in terms of personal assets and post-employment. The training covered what to do when faced with a potential COI.

[73] As a result of her termination, Ms. McEwan estimated that she lost more than $123 000 in performance pay, benefits and management insurance. She received performance pay every year until 2010-2011, when it was held in abeyance pending the outcome of the investigations.

[74] In cross-examination, the nature of relationships between Ms. McEwan and her employees was explored. In particular, the one with a Mr. Patel, who developed designs for Ms. McEwan when she was building a house (Exhibit 25). She did not ask him to draw up plans, but he wanted to do something nice for her and sent them to her in December 2010. The pair had an email exchange concerning the plans (Exhibit 25), and on January 31, 2011, he sent her another version. On February 9, 2011, he committed to further update the plans, which he did on February 11 and again on March 9, 2011. Ms. McEwan did not disclose to her employer that Mr. Patel was working on building

plans for her. According to Ms. McEwan, she advised Mr. Patel on many occasions that he should not work on building plans for her. When he offered to do some painting for her, she did not accept.

[75] Mr. Patel did not get along with his supervisor, so Ms. McEwan had him report directly to her. She assisted him in getting his degree from India recognized in Canada. She provided employment references for him. He appreciated her assistance and sent her a Valentine's Day email. She did not want to hurt his feelings, so she allowed him to continue to draw building plans for her.

[76] Ms. McEwan actively sought employment for her son. She put out feelers to her peers (Exhibit 3, tab 9) seeking employment opportunities for him. The reference letter she allegedly wrote for Dr. Forster to sign concerning her son was for another process and not the one in her area. She was not aware if her son used the Dr. Forster letter in the staffing process in her area. Mr. Doucet confirmed that he had used it in support of his application and that it was in the staffing file for the CR position in the grievor's area.

[77] Ms. McEwan served on the Savoy Society board of directors with Dr. Forster and Ms. Cochrane. She exchanged more than 61 personal emails with Ms. Cochrane during the same period the competitions were underway (Exhibit 3, tab 9, pages 53 to 58). Despite having testified that she had advised Mr. Doucet about the relationship she had with Ms. Cochrane, Ms. McEwan testified that she should have disclosed the emails for the sake of transparency. She also did not disclose that Ms. Cochrane helped her prepare for her move and was in her home. She did not socialize with Ms. Cochrane, who merely helped her do things. They communicated frequently on many subjects, including the emails at Exhibits 31 and 32, which were of a personal nature and not business related. Ms. Cochrane sent her emails, such as Exhibits 33 and 34, while she was a candidate in the second competition. Ms. McEwan asked Ms. Cochrane on occasion to pick up cigarettes and paint for her.

[78] Ms. McEwan's intention all along was to put Ms. Cochrane in the mailroom position even if she had not asked to be deployed to it. The incumbent in that position gave his notice of retirement on May 3, 2011, when Ms. Cochrane was still a casual. It was unlikely she would have asked to be deployed to the mailroom position while she was a casual. Ms. McEwan decided to deploy her to the mailroom before she was hired as she knew the results of the competition at that point. Ms. Cochrane was hired on

May 25, 2011, and was deployed to the mailroom on May 31, 2011. The mailroom vacancy was an opportunity for the grievor to create a vacancy and to appoint her son. The next person in the eligibility pool would have been offered the position regardless of who they were, but it did occur to Ms. McEwan that her son was the next person in line.

[79] Ms. McEwan admitted that she was not forthright about her relationship with Dr. Forster and her involvement with drafting a reference letter for her son. She did advise the PSC that Ms. Cochrane was an acquaintance and not a friend. She admitted her failure to file her COI form, all of which were foolish oversights. At the very minimum, she should have recused herself from the staffing processes involving her son and Ms. Cochrane.

III. Summary of the arguments

A. For the employer

[80] There are two parts to this grievance: the first relates to the career transition agreement, and the second relates to the grievor's termination. The employer raised a preliminary objection related to the Board's authority to reinstate a career transition agreement as it is clearly outside the scope of an adjudicator's authority under section 209 of the *PSLRA*, which clarifies the scope of an adjudicator's jurisdiction over collective agreement matters and discipline resulting in termination, demotion, suspension or financial penalty.

[81] The employer's letter in January 2013 (Exhibit 22, tab 6), clearly states that the employer was suspending the career transition agreement negotiations pending the completion of the investigations into the grievor's staffing actions. The grievor might have indicated to the employer her choice of career option, but she and the IRB never signed an agreement. The decision to suspend the negotiations might have been grievable under section 208 of the *PSLRA*, but it was not referable to adjudication under section 209. The appropriate venue to review the employer's decision was the Federal Court (*Khalid v. Canada (National Research Council)*, 2013 FC 438). Section 209 constrains adjudicators' jurisdiction.

[82] In this letter, the employer refers the grievor to the "Directive on Career Transition for Executives" (Exhibit 3, tab 24). Section 2.5 of Appendix C of that

document outlines the instructions for developing a career transition agreement. As per section 5.1 of the directive, the only person delegated to negotiate and enter into such an agreement with an executive is the deputy head, of which the grievor was clearly aware. There was no misunderstanding that Mr. Gascon had the authority to negotiate and enter into such an agreement.

[83] By the time she was advised that the career transition agreement negotiations were suspended, the grievor was well aware that she was under investigation. No agreement was in place. She was privy to all the facts. The normal rules of contract apply. There was no meeting of the minds between the principal parties to the agreement. Even if an adjudicator has the authority to order a career transition agreement reinstated, an adjudicator cannot order a non-existent agreement reinstated.

[84] In order to support its decision to terminate the grievor, the employer had the onus to prove that the grievor committed some misconduct worthy of discipline, that there were no mitigating factors, that the conduct was not condoned, and that the discipline imposed was reasonable and appropriate in the circumstances. The alleged misconduct in this case was a COI that led to a violation of the Code.

[85] The test for a COI in the public service is set out in *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62. The Federal Court has ruled that the appropriate test is the "reasonable man" test (*Threader v. Canada (Treasury Board)*, [1987] 1 F.C. 41 (C.A.), at page 12). Based on all the evidence, the question to be answered is whether a reasonable person, who is informed, would conclude that the grievor's interests clashed with the public's interest in transparency. The answer to that question is "Yes."

[86] Implicit in the grievor's testimony is an admission of a potential or real COI that was worthy of disciplinary action. The question then is the reasonableness of the penalty. The grievor was familiar with the Code. She worked with it and advised management on its application, which warrants the severest of penalties. Her position within the organization is another factor to consider when determining the appropriate penalty. She was a senior executive and should be held to a higher standard that someone in a less-senior position (*Brazeau*, at paras. 165 to 170).

[87] The facts demonstrate that there are two bases for concluding the grievor was in a real COI. She has acknowledged she was in a COI when she attempted to hire her son. She admitted that she should have recused herself from the competition or at the very least should have signed a COI report. In the beginning, she told Human Resources that she wanted to remain at arm's length from the competition, yet she did not. She made the decision to reschedule her son's missed interview and intervened on other occasions in the process. She advocated on behalf of her son as is evident in her email to Mr. Doucet in support of her son continuing in the process (Exhibit 3, tab 9, page 37). This was not a response to a question posed by Mr. Doucet in the normal course of work. Advocating on behalf of her son in this process was inappropriate.

[88] The grievor's efforts to ensure that her son's resumé was up to date and her communications with Dr. Forster to ensure that her son had a reference letter were also inappropriate. She argued that the reference letter was for a different competition, but the timing of her email with Dr. Forster concerning the reference letter submitted by her son in the competition, April 5, 2011 (Exhibit 28), and the date of the interview, April 7, 2011, was not coincidental.

[89] The employer has established that Ms. McEwan was in a COI with respect to her son's candidacy. She did not tell her manager, Mr. Gascon, about it until she asked him to sign the letter of offer. In her original letter of offer (Exhibit 3, tab 21), the grievor was advised that by accepting it, she acknowledged her receipt of the Code and accepted that it formed part of the terms and conditions of employment. Furthermore, she testified that she was familiar with her obligations under the Code and that she had once been a special advisor on the subject to senior management.

[90] The Code requires members of the public service to act at all times in a way that upholds the public trust. It is not sufficient to simply act within the law. The COI between the grievor's duty and her son and friend must be resolved in favour of the public interest. She knew there was a problem with participating in a competition in which her son was a candidate; she told Human Resources she wanted to remain at arm's length. The Code requires a public servant to consult and seek guidance from his or her manager or the person designated by the deputy head if the public servant is uncertain if circumstances constitute a COI (Exhibit 3, tab 22, at pages 14 and 19 to 21). The grievor did not consult her manager until the hiring of her son was a *fait accompli.*

[91] The grievor was also in a COI *vis-à-vis* Ms. Cochrane, based on the evidence. The grievor has stated that Ms. Cochrane was an acquaintance who did work for her on occasion. It is open to the adjudicator to make a finding that they in fact had a close personal relationship that was not fully disclosed to the employer, even at the hearing. In the grievor's testimony, she described her relationship with Ms. Cochrane as somewhere between an acquaintance and a close friend. This testimony can be discounted in light of the emails presented (Exhibits 31 to 35, inclusive) that demonstrate a close personal relationship.

[92] The grievor testified that she disclosed her relationship with Ms. Cochrane to Mr. Gascon. The extent of the disclosure and her testimony differ completely. The more credible version of the extent of her disclosure is Mr. Gascon's. He testified that when it was brought to his attention that she may have hired her maid, he had a discussion with her in which she assured him that there was nothing to worry about. They had merely been neighbours 22 years earlier for 10 months and had only recently become reacquainted. She never disclosed the true nature of their relationship, that they served on the Savoy Society board of directors or that Ms. Cochrane did a number of things for her, not just odd jobs. The grievor did not admit to the extent of their relationship until the documents were put to her on cross-examination.

[93] Ms. Cochrane described her relationship with the grievor when interviewed by the PSC. The employer was entitled to rely on the PSC report and its internal investigation report, which relied on the PSC report (see *Hassard v. Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 32, at para 201 to 202 and 206 to 211). The grievor could not have been surprised by the contents of these reports as she provided two responses to the PSC report and was provided the opportunity to respond to the IRB report.

[94] Ms. Cochrane's perception of her relationship with the grievor is much different. In her interview with the PSC, Ms. Cochrane described a much closer relationship (Exhibit 3, tab 10, page 23). Her evidence was fairly consistent; their relationship evolved from one of acquaintances to something more personal. The emails between the two suggest a relationship that is much more than the grievor described. There is a relationship of trust as is evidenced by Ms. Cochrane's access to the grievor and her home. The emails between the two (Exhibits 31 to 35) are not what one would normally send to one's director. A director would not send a friendship chain email to a casual

acquaintance or to an employee. Ms. Cochrane was the only employee in the office to whom it was sent.

[95] The fact that the grievor was willing to stick her neck out and accept the risk that Ms. Cochrane met the educational requirements for the competition even though she had no proof is further evidence of the nature of their relationship. If she was only an acquaintance, it would have been irresponsible for the grievor to accept this risk. She was insistent on appointing Ms. Cochrane to the position and advocated on her behalf to achieve this (Exhibit 3, tab 9, pages 2 and 3). This is indicative of a closer relationship than she disclosed to her employer. It is clear that the grievor intended to offer Ms. Cochrane an indeterminate position, that she ensured that Ms. Cochrane had casual employment with the IRB and that she advocated on her behalf. This close personal relationship clashed with her professional obligations.

[96] During the second staffing process, in which Ms. Cochrane was deployed to the mailroom position, she was doing work for the grievor related to her move. It is clear that the grievor's intention in the second competition was to secure employment for both Ms. Cochrane and Shane McEwan. She received the mailroom incumbent's email advising that he would be retiring on May 3, 2011. She directed Ms. Mahoney to get the deployment going on May 16, 2011. On May 25, 2011, she provided Ms. Cochrane with a letter of offer, and on May 31, 2011, she asked Mr. Gascon to sign a letter of offer for Shane McEwan, offering him the position vacated by Ms. Cochrane when she accepted the deployment to the mailroom. The grievor excused her deployment of Ms. Cochrane to the mailroom because she would have done so based on her qualifications. The issue is the use of her subdelegated authority and lack of disclosure to accomplish her goal of finding employment for her friend and her son, which is a COI.

[97] The manner in which she set the scene to achieve her goals made things worse. She used a consultant to disguise her decisions in critical matters. If you scrape the surface, she was the puppet master in control. Looking at the evidence using the reasonable man test, it is clear the grievor was in a real COI, which is a direct violation of the Code.

[98] The employer did not condone the grievor's behaviour. It referred the matter to the PSC for investigation and then undertook its own investigation. She ought to have known better, given her experience. She never sought advice as to how she might remain at arm's length. As a certified general accountant (see her resumé, Exhibit 23),

she was familiar with the concept of "arm's length." Termination was appropriate in the circumstances. The aggravating factors outweighed the mitigating factors.

[99] The letter of termination (Exhibit 3, tab 1) clearly sets out the employer's considerations in arriving at the conclusion that termination was appropriate. The grievor was a long-term employee with a good service record. She received no financial gain as a result of her COI, but her behaviour of manipulating the circumstances to achieve her goal was a real COI and a violation of the Code. She offered some apologies and expressed some remorse at the hearing, but this was not her position through the process of determining an appropriate penalty. It is too late to express remorse on the stand (see *Brazeau*, at paras. 178 to 191).

[100] The employer considered the viability of the employment relationship and the grievor's potential for rehabilitation. The conclusion was that the relationship was not redeemable. There has been no testimony to suggest she would have done anything differently. She has expressed no remorse, which compounds the situation (*Thomson v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-27846 (19980402), at 62 and 63). Like the grievor in *Armstrong v. Treasury Board (Public Works and Government Services Canada)*, 2000 PSSRB 29, Ms. McEwan showed little recognition of the seriousness of her actions.

[101] A discipline-free record is subordinate to the gravity of the misconduct (*Blair-Markland v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-28988 (19991103)). Ms. McEwan had a lengthy period of service occupying senior positions and should have recognized the inappropriateness of her actions. She did not; she tried to shift the blame onto members of Human Resources and Ms. Mahoney. Ms. McEwan was not forthright and honest about her relationship with Ms. Cochrane. She has not accepted responsibility for her actions, which is a critical factor in assessing the appropriateness of disciplinary action (*Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43, at para. 103).

[102] The employer submitted that the penalty imposed should be upheld. If the determination is made that it should be overturned, the employer requested that the parties be reconvened, consistent with *Pagé v. Canada (Attorney General)*, 2009 FC 1299, to make representations on the appropriate penalty.

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

[103] The grievor's conduct has been micromanaged. The employer has dug into the bowels of her emails, selected a few and put a negative spin on them. It is essential to not lose sight of the fact that she was an extremely dedicated employee with 35 years of service. Thirty-five years of service with the same employer speaks to a person's character. The incident that is the subject of this hearing is the only incident on her record. The comments on her annual performance review (Exhibit 10, page 5) rebut the conclusions that she set up a plan to allow her to accomplish goals. The only reason that Ms. Mahoney was hired was that the grievor was too busy to do the staffing herself.

[104] The employer's "Guidelines for Discipline" (Exhibit 22, tab 1, page 4) state that discipline should not be punitive. Terminating the grievor was punitive. The employer created a case against her to warrant that termination. It should have used the corrective approach to determine what disciplinary measure would be appropriate in these circumstances. The grievor made several mistakes, but she had no intent to defraud or mislead. She did apologize and express remorse. Once the PSC investigation began in June 2011, her staffing delegation was removed, yet she continued to be active in staffing until terminated.

[105] As of the date the grievor's employment was terminated for cause, the employer knew that a career transition agreement had been negotiated. Regardless of this fact, she had expressed her desire to retire in February 2014.

[106] The employer has not demonstrated a lack of trust in the grievor. She continued to have spending authority under the *FAA* and had extra financial responsibility added during this time. It does not bear out that the employer did not trust her. It could have demoted her or removed her budget authority pending the investigation, but chose not to. Why would it entrust her with budgetary authority if it thought her untrustworthy?

[107] The grievor did not hide her relationship with Shane McEwan. She told Ms. Mahoney when she found out that he applied to the competition. The grievor asked Mr. Doucet to consult his managers to determine what was required to remain at arm's length. She has admitted she should have at least signed a COI declaration and submitted it to management. She also admitted that she should have recused herself from involvement in the competition (Exhibit 26).

[108] The grievor knew that she needed Mr. Gascon's approval to hire her son. She had the letter of offer drafted for his signature and took it to him to sign. She should have realized that the only way her son could get the job was to follow the process. When she did realize this, she told her son that he had to withdraw from the competition, which he did. She engaged in inappropriate conduct and admitted to it. She exercised what she thought was due diligence when she rescheduled her son's interview. She admitted that her intervention was wrong. Never did she have the expectation that her son could get a job in her area without anyone knowing who he was. She just did not give proper consideration as to how to do it above board.

[109] The grievor conceded that putting Ms. Cochrane in the mailroom position could have been perceived as an attempt to make room to hire her son. No harm was done to the other candidates for the position as all who were placed in the pool of qualified candidates received an appointment, either indeterminate or term.

[110] When Ms. Cochrane was initially hired as a casual employee by another IRB manager, the grievor advised Mr. Gascon that they were acquaintances. She told him that they were former neighbours and that Ms. Cochrane did odd jobs for her on occasion. When she was staffing a position in her area and Ms. Cochrane was a candidate, Human Resources raised with Mr. Gascon its concerns with the relationship. He spoke to and reviewed the issue with her and was satisfied with her explanation. The only information she did not share was that they served together on the board of the Savoy Society.

[111] The employer overstated and overemphasized the extent of the grievor's relationship with Ms. Cochrane. Again, the grievor should have filed a COI declaration, but Mr. Gascon already knew about it, which is different from the situation with her son. The employer has not established a lack of trust.

[112] In her response to the IRB disciplinary investigation (Exhibit 26), the grievor admitted her wrongdoing and explained why it was wrong (paragraph 37). She apologized for her actions and acknowledged that they had caused extra work (paragraph 75). The PSC also investigated the grievor and concluded that her actions in the processes related to hiring Ms. Cochrane and the attempted hiring of her son constituted improper conduct and that she committed fraud by deploying Ms. Cochrane to the mailroom position in order to hire her son. In her response to the investigation, there is overwhelming evidence of contriteness and remorse.

[113] It is patently unfair for the employer to use the PSC factual findings together with the spin on the emails it mined from the grievor's email account. Little or no weight should be given to this evidence. The relevant consideration is that at the time of her termination, she had concluded a career transition agreement, which clearly indicated where the parties were going before the termination of her employment.

[114] The grievor met with Mr. Gascon to discuss her options (Exhibit 22, tab 5, page 3). He led her to believe that he was authorized to negotiate on behalf of the deputy head. They arrived at an understanding. Ms. McEwan was asked to sign the attachment and return it to the designated contact person. She did and returned it to Mr. Gascon's assistant to give to him. He admitted receiving it.

[115] The career transition agreement was negotiated while the grievor was under investigation. The employer should have lived up to its terms, allowed her to retire as proposed and paid her the agreed-to career transition allocations. I should allow the grievance and make a retroactive award based on the terms of the career transition agreement. An appropriate penalty for the grievor's serious wrongdoing, based on her lengthy and successful career and knowing that she intended to retire on February 14, 2014, would have been to allow her to retire and to have withheld performance pay as a financial penalty. Instead, as a result of the employer's actions, the grievor has suffered a loss of 4% of her pension and grievous humiliation. This is punitive, not corrective, and is without any element of rehabilitation.

IV. Reasons

[116] This case essentially concerns the appropriateness of a disciplinary penalty. The grievor sought to have the penalty overturned and a lesser penalty substituted in its place. A side but not unrelated issue is whether, in the event that I conclude that the penalty is too severe in the circumstances, I can order the grievor's reinstatement and direct the employer to comply with the terms of an alleged career transition agreement.

[117] An adjudicator should reduce a disciplinary penalty imposed by management only if it was "clearly unreasonable or wrong" (see *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119). By her own admission, Ms. McEwan was guilty of inappropriate conduct and COIs involving the use of her subdelegated staffing authority in two different hiring processes. There is no need to go further to determine

whether she is guilty of culpable behaviour warranting discipline. What needs to be evaluated is, given the facts, whether the employer's decision to terminate the grievor was appropriate discipline in this case. Counsel for the grievor argued that the grievor has admitted her culpability and has expressed true remorse and that based on her 35 years of dedicated service in the public service and the degree of trust placed in her during this career, both before and after the PSC investigation was initiated, the employer had no grounds to conclude that the trust relationship between them was destroyed and that there was no possibility of rehabilitation.

[118] Counsel for the employer, on the other hand, argued that the grievor's behaviour of advocating for her friend to secure her a position in her division; of assisting her son throughout the process, despite having declared she wanted to remain at arm's length from the staffing process; of drafting a reference letter for her son, which was submitted in the staffing process in question; and of intervening to ensure that Ms. Cochrane was deployed to the mailroom to create a vacancy to ensure that her son would be offered a position, which would otherwise have been filled by Ms. Cochrane, is evidence of a well-thought-out scheme to ensure that two people she knew very well secured employment. The PSC concluded that in so doing, she committed fraud.

[119] Counsel for the grievor attacked the evidence on the basis that for its internal disciplinary investigation, the employer relied on the evidence gathered by the PSC. This is not unlike a situation in which an employer receives a harassment report from an outside investigator and relies on it to pursue a disciplinary investigation. The employer is entitled to make use of investigation reports (*Hassard*, at para. 213).

[120] Furthermore, counsel for the employer argued, the grievor was not open with her employer. She admitted that at the very least, she should have signed a COI declaration and recused herself from any involvement in the competitions. She did not. She only brought to Mr. Gascon's attention that her son was a candidate for the vacant position in her area when she asked him to sign the letter of offer because she knew it was inappropriate for her to do so. As to her relationship with Ms. Cochrane, she went to great lengths to disguise the true nature of her relationship.

[121] A COI is a very serious offence within the public service and a clear violation of the Code. Public servants are expected to act at all times in such a way as to uphold the public trust. Public servants must fulfill their duties and responsibilities by making

decisions in the public interest. They must act at all times in a manner that will withstand the closest public scrutiny. If a conflict arises between a public servant's private interests and his or her duties as a public servant, the conflict must be resolved in favour of the public interest (Exhibit 3, tab 22, page 9). Merely acting within the law is not sufficient to discharge this duty. Public servants must strive to ensure that the value of transparency in government is upheld while respecting their duties of confidentiality under the law (Exhibit 3, tab 22, page 8).

[122] The objective of the Code is to set out the public service values as well as COI and post-employment measures. It is intended to maintain and enhance public confidence in the integrity of the public service. The grievor, in her role as a senior advisor on the application of the Code to the information commissioner, could not claim that she was unaware of the Code and its purpose (see her resumé, Exhibit 23). Furthermore, she acknowledged by signing her letter of offer (Exhibit 3, tab 21) that the Code formed part of the terms and conditions of her employment with the IRB. She received training on the rights and responsibilities of a delegated manager in staffing actions before receiving her staffing delegation. There is no reasonable way a person could conclude that she did not know that she was in a COI, perceived or real, when dealing with applications for employment from her friend and her son.

[123] It is clear from the evidence, including her own testimony, that the grievor conceived of the plan to offer Ms. Cochrane a position and then to deploy her to the mailroom position. She admitted knowing that her son was the next candidate for placement from the competition's candidate pool. She pursued this plan and then asked to have a letter of offer drafted for her son. When a draft was provided, she then requested that the signature block be changed to that of Mr. Gascon. The way she approached Mr. Gascon to have the letter signed did not reflect a true recognition of the inappropriateness of her actions then or throughout the entire process.

[124] The grievor could not hide or diminish her culpability by claiming that she relied on the advice of Human Resources or that it was Ms. Mahoney, rather than her who was in control of the staffing processes. The reality is that neither Mr. Doucet nor Ms. Mahoney was the delegated manager responsible for the staffing processes. The grievor and only the grievor had the authority to make decisions that had the potential to benefit people with whom she had close personal relationships. She used her position to their benefit, which was a clear violation of the Code.

[125] Nor could the grievor avoid responsibility by writing an email to Mr. Gascon stating that if he was worried about having two related people working in the same branch, she would be willing to accept a deployment to another EX-01 position (Exhibit 3, tab 9, page 90). She clearly has not acknowledged her COI or the impact it had on the integrity of the staffing process.

[126] The grievor has not expressed any type of true remorse, which must be expressed at the first opportunity. In her response to the IRB investigation, she acknowledges that she is responsible, although she denies that she hid certain information from Human Resources. She goes to great lengths in her response to identify what she should have done and did not do. She states she regrets not signing a COI declaration and causing extra work for others. Finally, she states that she should have known better (Exhibit 22, tab 9). It rings hollow to acknowledge one's failings at the end of the process rather than at the outset. Such a declaration of remorse raises the timeless question: Was the culprit sorry for his or her misdeeds or for having been caught?

[127] Honesty and integrity are important values expected of all public servants by the people they serve. This is clearly outlined in the Code. Public servants, and in particular managers, are expected to behave in all dealings in a manner that reflects these values (*Armstrong*, at paras. 152 to 169). To manipulate processes for personal benefit and to intervene in processes that one knew or ought to have known would create a COI are most egregious violations of the Code, worthy of the most serious of disciplinary penalties.

[128] According to *Brazeau*, a lengthy discipline-free service has to count for something when determining the penalty to be imposed in COIs. Mr. Coakely testified that the employer took that into account when determining the penalty. As well, Mr. Coakely's memo to the IRB Chairperson included a fulsome analysis of the aggravating and mitigating factors that were considered by the employer in its assessment of the appropriate discipline. Both the grievor's length of service and bleamish-free disciplinary record were considered mitigating factors (Exhibit 3, tab 2, page 3). The grievor has provided no evidence to contradict the employer's evidence in this regard.

[129] Having heard the grievor's testimony, I also consider that her 35 years of service and discipline-free prior record can be mitigating factors to take into account in my

determination of whether the discipline imposed was appropriate. I see no reason to interfere with the employer's decision given all the facts, and I believe it was reasonable and not wrong in the circumstances. A lengthy career, particularly one at an executive level, brings with it a higher level of expectations. While that career is a mitigating factor, it is a double-edged sword, and it can be an aggravating factor (see *Pagé v. Canada (Attorney General),* 2009 FC 1299 at paras. 33-35). In this case, I conclude that it is an aggravating factor, given her lengthy service and knowledge of the Code.

[130] As to whether a viable employment relationship remains, the evidence is that the employer considered its viability and the potential for rehabilitation. The conclusion was that the relationship was not redeemable. In the termination letter to the grievor, after setting out all of the mitigating and aggravating factors that were taken into account in its decision, the IRB Chairperson stated: "I find that the trust relationship that is essential between the employer and the employee has been irreparably breached" (Exhibit 3, tab 1, page 3). Counsel for the employer was correct that no testimony from the grievor suggested she would have done anything differently. The grievor must accept responsibility for her actions and the consequences of them.

[131] Nothing was presented to me that would enable me to find that the trust relationship between employer and employee was capable of being rehabilitated. The grievor has expressed no remorse, which compounds the situation (*Thomson* at 62 and 63). Like the grievor in *Armstrong*, Ms. McEwan showed little recognition or acceptance of the seriousness of her actions. These aggravating factors demand a greater disciplinary penalty. Her lack of forthrightness concerning her relationship with Ms. Cochrane further aggravated the situation and put into question the employer's ability to trust the grievor to be honest and forthright in the future. Based on all of the facts outlined above, I find that the grievor irreparably broke the relationship of trust between herself and her employer. Accordingly, I conclude that the discipline imposed was appropriate in this case.

[132] Counsel for the grievor has also argued that the employer had entered into a valid career transition agreement with the grievor in October 2012. Had this agreement been allowed its full force and effect, she would have retired in February 2013, long before the employer terminated her employment. According to counsel for the grievor,

the employer did not have the authority to suspend the operation of this agreement pending the completion of its investigation. Counsel for the employer argued that I am without jurisdiction to consider this question as it is clearly outside the scope of an adjudicator's authority under section 209 of the *PSLRA*, which clarifies the scope of an adjudicator's jurisdiction over collective agreement matters and discipline resulting in a termination, demotion, suspension or financial penalty.

[133] When the career transition agreement negotiations were underway, all parties were aware of the ongoing investigations into the grievor's conduct and that disciplinary action was possible. All parties were also aware that the Directive on Career Transition for Executives was not to be used in situations in which employment was terminated for cause (Exhibit 3, tab 24, clause 2.5). The employer would have me accept that this justifies its decision to suspend the agreement. Rather, in my opinion, it means that if an executive is to be terminated for disciplinary reasons, the career transition provisions are not an alternative to the disciplinary action. In other words, the career transition provisions are not to be used to avoid taking disciplinary action.

[134] Regardless, the Directive on Career Transition for Executives clearly states at Appendix C on page 9 that "[d]eputy heads negotiate Career Transition Agreements within the limitations prescribed in this directive." Nowhere in the directive does it refer to a director general having the authority to enter into such an agreement. The grievor was aware or should have been aware of this since she was provided with a copy of the directive. Any career transition agreement required the deputy head's approval. None of the exhibits submitted to me, or the evidence provided to me orally, show that the parties to the alleged agreement had come to a meeting of minds. I agree with counsel for the employer that ordinary contract law applies when I assess whether there is an agreement between the parties. Based on the testimony and the exhibits before me, I cannot conclude that the parties entered into a binding agreement.

[135] Even if I am wrong in this conclusion, I have no authority under section 209 of the *PSLRA* to reinstate a career transition agreement. A refusal to follow through with the terms of a career transition agreement is not within the scope of an adjudicator's jurisdiction over a termination, demotion, suspension or financial penalty. In essence, by stating that career transition agreements are not to be used in disciplinary matters,

the provisions of the Directive on Career Transition for Executives reinforce this conclusion.

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

(The Order appears on the next page)

V. Order

[137] The grievance is dismissed.

June 11, 2015.

Margaret T.A. Shannon,
adjudicator