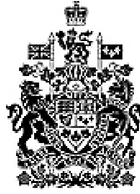
**Date:** 20150723

**Files:** 561-34-440 and 566-34-3750 and 7716 to 7718

**Citation: 2015 PSLREB 67**

*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 and adjudicator

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BETWEEN

**MARY ALICE LLOYD**

Complainant and Grievor

and

**CANADA REVENUE AGENCY**

Respondent and Employer

Indexed as
*Lloyd v. Canada Revenue Agency*

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act* and in the matter of individual grievances referred to adjudication

**Before:** Joseph W. Potter, a panel of the Public Service Labour Relations and Employment Board and adjudicator

**For the Complainant and Grievor:** Steve Eadie, Professional Institute of the Public Service of Canada

**For the Respondent and Employer:** Allison Sephton and Christine Langill, counsel

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Heard at Toronto, Ontario,
October 23 to 26, 2012; June 17 to 21, 2013;
and May 5 to 9 and September 15 to 16, 2014.
Written submissions filed December 18, 2014 and March 31 and April 27, 2015.

[1] 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" or PSLREB) to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal (PSST). In other words, the new Board is now performing the functions that were exercised separately by the former Board and the PSST. 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* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*. Further, pursuant to section 395 of the *Economic Action Plan 2013 Act, No. 2*, a member of the former Board seized of this matter before November 1, 2014, exercises the same powers, and performs the same duties and functions, as a panel of the new Board. In addition, 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 *PSLRA* as that Act read immediately before that day.

## I. Complaint before the Board and individual grievances referred to adjudication

[2] Mary Alice Lloyd was, at all material times, a senior investigator in the Enforcement/Investigation Branch of the Canada Revenue Agency (CRA or "the employer"). She worked in the Toronto Centre Tax Services Office (TSO) in Toronto, Ontario.

[3] In November 2009, Ms. Lloyd filed a grievance in which she wrote that it concerned her "unpaid suspension from work" and "that the suspension is harassment." She also grieved the preliminary results of an internal affairs investigation report. This grievance was assigned PSLREB File No. 566-34-3750.

[4] On January 19, 2010, the Professional Institute of the Public Service of Canada ("the Institute") filed a complaint under section 190 of the *PSLRA* claiming that the employer had suspended Ms. Lloyd without pay in retaliation for an adjudication at which she had been successful. The Institute claimed that this action contravened

subparagraphs 186(2)(*a*)(ii), (iii) and (iv) of the *PSLRA*. It also claimed that the employer would not set a date for Ms. Lloyd's return to work in spite of the fact that her health would permit such a return. This complaint was assigned PSLREB File No. 561-34-440.

[5] Initially, these two matters were set down for a hearing in Toronto from October 23 to 26, 2012.

[6] On June 16, 2010, the employer wrote to the former Board, stating that it did not have jurisdiction to hear the grievance in PSLREB File No. 566-34-3750, as it concerned an indefinite suspension. Therefore, it did not meet the requirements of paragraph 209(1)(*b*) of the *PSLRA*.

[7] The Institute replied on June 28, 2010, stating that the suspension had resulted in significant financial hardship for Ms. Lloyd, and therefore, it did meet the provisions of paragraph 209(1)(*b*) of the *PSLRA*, and the former Board had jurisdiction to determine the issue.

[8] The former Board replied to both parties on June 29, 2010, stating that the issue might be dealt with in advance of a hearing but that if it were not, it should be raised at the outset of the proceedings.

[9] The parties engaged in a series of settlement discussions that resulted in postponements to a hearing date. Unfortunately, the discussions were not successful, and the former Board held the hearing as originally scheduled in October 2012.

[10] Ms. Lloyd also filed two other grievances. In the first, filed on April 11, 2011, she grieved a disciplinary notice that she received, which she claimed was too severe. She also claimed the notice contravened clause 43.01 of her collective agreement (between the Institute and the employer for the Auditing Group; expiry date December 21, 2009; "the collective agreement"), as well as the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*). This grievance was assigned PSLREB File No. 566-34-7716.

[11] For administrative reasons, the former Board created a second file for the April 11, 2011, grievance, PSLREB File No. 566-34-7717.

[12] In February 2012, Ms. Lloyd filed her second grievance, stating that she was being removed from her position without her consent, in contravention of article 34 of

the collective agreement. Additionally, she claimed that she was being discriminated against on the basis of disability, contrary to the *CHRA*. This grievance was assigned PSLREB File No. 566-34-7718.

[13] The Institute filed a completed Form 24 with the Canadian Human Rights Commission ("the Commission"), which informed the Commission of the references to adjudication under PSLREB File Nos. 566-34-7716 to 7718.

[14] As stated earlier in this decision, a hearing had been set for October 2012 in Toronto to hear the complaint and grievance in PSLREB File Nos. 561-34-440 and 566-34-3750. Shortly before it began, the Institute asked that the grievances in PSLREB File Nos. 566-34-7716 to 7718 also be heard, at the same time.

[15] On October 23, 2012, at the outset of the hearing, the parties informed me that they were continuing with settlement discussions and that I would be advised of the outcome.

[16] On October 26, 2012, at the end of the time the former Board had allocated for the hearing, the parties informed me that an initial settlement had not been reached but that discussions would continue later that month and that the former Board would be informed of the outcome.

[17] The Institute informed the former Board via email dated November 14, 2012, that a settlement had not been reached and requested that the matter again be set for a hearing.

[18] On November 21, 2012, the Commission informed the former Board that it did not intend to make submissions with respect to these matters.

[19] Additionally on November 21, 2012, the employer wrote to the former Board, claiming that it did not have jurisdiction to hear the grievance in PSLREB File No. 566-34-7718, as it concerned a staffing matter, for which there was another recourse. The employer did state that if the former Board decided to take jurisdiction, then it did not object to having all the files heard together.

[20] On November 28, 2012, the former Board wrote to the parties and stated that the complaint and grievances in PSLREB File Nos. 561-34-440 and 566-34-3750 and

7716 to 7718 would be heard in Toronto from June 17 to 21, 2013. The hearing commenced as scheduled on June 17, 2013.

[21] At the outset of the June 17, 2013, hearing, the employer raised a preliminary objection, stating that Ms. Lloyd had hired a court reporter to record the proceedings. The employer objected to the reporter's presence as it was not the former Board's practice to record proceedings. The Institute replied that Ms. Lloyd had hired the court reporter for her own purposes, and she stated that she had found it difficult to take notes at a previous adjudication hearing. Furthermore, she said that she could not take notes and testify at the same time.

[22] I ruled that it was not the former Board's normal practice to record these types of proceedings and, therefore, a court reporter would not be allowed. However, I stated that I would afford Ms. Lloyd whatever time she needed to take notes and that during her testimony, she could have a colleague take notes, and the colleague would be afforded the same courtesy. The hearing then began without the court reporter.

[23] The Institute stated that four issues were grieved, as follows:

1. In November 2009, an indefinite suspension was levied against Ms. Lloyd while an investigation into her conduct took place. It took over a year to complete, and Ms. Lloyd objected to how it was conducted and how much time it took to complete it. It was effectively a disciplinary action as well as a violation of article 34 of the collective agreement.

2. An unfair labour practice occurred. Ms. Lloyd presented information at a 2008 adjudication hearing for which she received an indefinite suspension on November 6, 2009, which continued until June 2011.

3. In March 2011, Ms. Lloyd received a disciplinary letter suspending her for 40 days.

4. Ms. Lloyd was forced to take a permanent lateral move (PLM) without her consent. This was a violation of article 34 of the collective agreement as well as the *CHRA*.

[24] On behalf of Ms. Lloyd, her representative stated that the issue of remedy would be argued at a later date, depending on the decision rendered.

[25] The employer stated that the former Board was without jurisdiction to decide the 40-day suspension issue because that time was subsumed by a period during which Ms. Lloyd was on long-term disability, so there was no penalty. During the hearing, the employer withdrew its objection.

[26] The employer also stated that the former Board was without jurisdiction to decide on the issue of the forced PLM, as Ms. Lloyd had pursued the action via the staffing appeal route. She was successful, so she never worked in the unit to which she was to be moved.

**II. <u>Summary of the evidence</u>**

[27] In this section, I will provide a somewhat brief overview of the evidence. In the "Reasons" section, I will expand on the evidence as it applies to the complaint and each particular grievance or complaint file.

[28] Ms. Lloyd began her employment with the CRA in September 1997, and in December 2000, she successfully obtained a position in the Special Enforcement Program (SEP). In the spring of 2001, she went to the Criminal Investigation Program (CIP).

[29] In February 2006, Ms. Lloyd filed a grievance claiming that the employer had failed to accommodate her. A hearing was held in 2008, and a decision was rendered (Exhibit U-2; 2009 PSLRB 15).

[30] Before the 2008 adjudication hearing, Ms. Lloyd's representative informed her that the employer was contesting the fact that she had sent an email about her ergonomic needs and that she would need to produce a copy of it.

[31] In February 2006, Ms. Lloyd spoke to her team manager, Al Horbatiuk, and told him that she needed some personal information from her computer.

[32] Mr. Horbatiuk told Ms. Lloyd to contact the Information Technology (IT) Section, and on February 3, 2006, she spoke to Ian Balgobin, an IT analyst.

[33] Mr. Balgobin testified that Ms. Lloyd gave him two blank CDs and asked him to burn a copy of her "H" drive ("home drive") as well as her emails (Exhibit E-8). He explained that it was not uncommon for employees to request copies of their H drives

if they were to be absent for extended periods. Ms. Lloyd was actually on long-term disability when she went in to the office and made her request. She met Mr. Balgobin to discuss the request, and he said that he would need more than two CDs, in his words "after viewing the size of her H drive."

[34] In March 2006, Mr. Balgobin finished copying all the files to the CDs; he had had to augment the supply of CDs that Ms. Lloyd had given him. There were about 16 CDs in total. He called Ms. Lloyd to inform her that the work was done. He met with her on March 9, 2006, in the building and handed over a spindle containing all the CDs.

[35] Ms. Lloyd testified that when she got home, she viewed the CDs to determine where her personal information was and which specific folder on the CDs contained the information that she needed for her adjudication hearing. She then secured the CDs in a locked cabinet.

[36] Ms. Lloyd's boyfriend at the time offered his laptop to view the CDs and to make the necessary copies. She loaded the CDs into the laptop, found the email in dispute, copied it to the desktop and made copies of it (Exhibit U-3). She then awaited the adjudication hearing.

[37] As anticipated, the issue about sending the email arose at the 2008 adjudication hearing. Ms. Lloyd had all the CDs with her and produced the one containing the email in question. Counsel for the employer asked her where she got the disc, and Ms. Lloyd told her. Counsel then gave the disc to an articling student to load into her laptop, at which point Ms. Lloyd advised that it also contained taxpayer information.

[38] An employer representative in the hearing room, Tracey O'Brien, asked Ms. Lloyd to hand over all the CDs; Ms. Lloyd complied. Ms. O'Brien said the articling student's laptop would have to be brought into the CRA and wiped clean. Ms. Lloyd asked if the same thing should be done to her laptop and was told that it should, if she had done the same thing the articling student had just done. Ms. Lloyd did not think the CD had been loaded; it had just been copied. She heard nothing more about the incident until she received a letter in the mail in January 2009.

[39] Ms. O'Brien attended the 2008 adjudication hearing as an employer representative and was in the hearing room when she witnessed Ms. Lloyd take the stack of CDs out of a large purse and saw one loaded into the articling student's

laptop. When she heard Ms. Lloyd say that the CD contained taxpayer information, Ms. O'Brien said that she became very nervous. She called the Director of the Internal Affairs Fraud Prevention Division (IAFPD). It was agreed that the CDs should be returned to the CRA, and the next day, Ms. O'Brien delivered them to the Toronto Centre TSO.

[40] Ms. O'Brien also called Joanne Todesco who, at the time, was Director of the Toronto Centre TSO, and told her that Ms. Lloyd had a number of CDs containing taxpayer information.

[41] After receiving the CDs, Ms. Todesco had them sent to the Internal Affairs Division (IAD) in Ottawa, Ontario, for review. In October 2008, the IAD told Ms. Todesco that the CDs contained unencrypted taxpayer information. The 2008 adjudication hearing was still in progress, and Ms. Todesco received legal advice to wait until the adjudication hearing was done before doing anything. She complied with this advice.

[42] Ms. Todesco testified as to the importance the employer places on protecting taxpayer information. Aside from policies such as "Protection of Classified and Protected Information and Assets Outside the Workplace Policy" (Exhibit E-1, Tab 56), "Procedures for Protecting Classified and Protected Information and Assets Outside the Workplace" (Exhibit E-1, Tab 57), and "Code of Ethics and Conduct" (Exhibit E-1, Tab 58), all of which CRA employees receive, intrinsic in the workplace is safeguarding taxpayer information. The employer wants the public to comply with the *Income Tax Act* (R.S.C. 1985, c. 1 (5th Supp.)), and in return, the employer ensures that taxpayer information will be safeguarded.

[43] The 2008 adjudication hearing ended in December 2008, and on January 20, 2009, Ms. Todesco wrote to Ms. Lloyd, stating that she was to bring in the following (Exhibit E-1, Tab 1):

> *. . . the privately owned laptop computer onto which you downloaded documents owned by the Canada Revenue Agency without authorization. . . .* [and arrangements would be made] *for Information Technology (IT) personnel to be available to remove from its drives all of the documents owned by the Canada Revenue Agency. . . .*

[44] Ms. Lloyd was on sick leave without pay at the time the letter was written, so it was sent to her home.

[45] Ms. Lloyd testified that the laptop in question belonged to a former boyfriend and that she had no access to it when she received the January 20, 2009, letter. Assisted by her bargaining agent representative, Ms. Lloyd drafted a reply, dated January 30, 2009, in which she stated in part as follows (Exhibit E-1, Tab 2):

> . . .
>
> . . . *please be advised that I am not at liberty to provide you with anyone else's laptop.*
>
> *I trust you will take me at my word when I say that I have no documents owned by the Canada Revenue Agency.*
>
> *I will be having surgery in early February and while I expect a lengthy recovery my goal is to return to full health and take up my position in Enforcement at the earliest opportunity.*
>
> . . .

[46] On or about February 1, 2009, Ms. Todesco left the director position to commence an interchange program. She did not return to her position until January 2010.

[47] While Ms. Todesco was away, Roma Delonghi took over the director position. Ms. Delonghi was made aware that an internal investigation was underway about unprotected CDs being removed from the workplace and subsequently being downloaded to a non-CRA device. After receiving the preliminary results in April 2009, Ms. Delonghi consulted with the IAD and Legal Services to see how best to proceed. It was determined that she should draft a letter as a follow-up to the one Ms. Lloyd had sent on January 30, 2009.

[48] On June 4, 2009, Ms. Delonghi sent a letter to Ms. Lloyd asking for the contact information of the laptop's owner so that the CRA could contact him directly (Exhibit E-1, Tab 4). Ms. Lloyd was on sick leave without pay at the time the letter was sent.

[49] In addition to the laptop issue, Ms. Lloyd had been on sick leave without pay since August 2007; consequently, Ms. Delonghi had sent her a letter dated

April 28, 2008 (Exhibit E-1, Tab 3), in which she had asked Ms. Lloyd for an updated medical certificate, in order to initiate a plan of accommodation.

[50] No replies were received to the April 28, 2008, and the June 4, 2009, letters. Ms. Delonghi left the director position in June 2009, and Jamie Walker then took over as the interim director.

[51] On September 10, 2009, Ms. Walker sent a letter to Ms. Lloyd, stating that she was to ". . . provide access to the laptop in question, and/or the name and contact number of the person who has the laptop" (Exhibit U-7). The letter spoke about the seriousness of the situation and asked for a reply by September 17, 2009. It then stated the following: "Failure to hear from you by this time will require us to seek legal avenues including referring the matter to the RCMP to investigate whether or not charges should be laid against you pursuant to subsection 239(2.2) of the *Income Tax Act*.."

[52] The letter also stated that an internal investigation into Ms. Lloyd's actions concluded in a report dated August 14, 2009, that she ". . . downloaded sensitive taxpayer information on a non-agency computer" and that a fact-finding meeting would be convened shortly.

[53] Ms. Lloyd testified that she was unaware that an internal investigation had been undertaken, but she immediately consulted with her bargaining agent representative, and they agreed to a meeting, which was held on September 18, 2009.

[54] The employer asked Ms. Lloyd to bring in her personal computer as well as her friend's laptop to ensure they did not contain taxpayer information. Ms. Lloyd was concerned about protecting her personal information on her computer and safeguarding it, while at the same time trying to assure the employer there was no taxpayer information on it. The employer said it would develop guidelines to ensure Ms. Lloyd's privacy was protected, and six months later, procedures were developed to everyone's satisfaction. A search of Ms. Lloyd's personal computer revealed that no taxpayer information was on it. As far as her friend's laptop was concerned, Ms. Lloyd said that he would submit a letter about the information on it.

[55] As stated earlier, Ms. Lloyd was on sick leave without pay, which continued into November 2009. On November 3, 2009, she emailed the acting director, Ms. Walker,

advising her that she was planning to return to work on November 30, 2009, on reduced hours.

[56] On November 6, 2009, Ms. Walker wrote to Ms. Lloyd, stating in part as follows (Exhibit U-12):

> . . .
>
> *I am writing to you at this time with respect to the preliminary results of the Internal Affairs and Fraud Prevention Directorate (IAFPD) report as well as the foregoing medical note recently submitted by you.*
>
> *I have reviewed the medical note you provided to me pertaining to your fitness to return to work. I am pleased to hear that your health has improved sufficiently to allow you to contemplate a return to work. I am cognizant, however, that additional information is required to clarify any restriction and/or accommodation needs that may be required to facilitate and implement a graduated return to work.*
>
> *However, I am not able to implement a return to work plan with you at this particular point in time as the preliminary results of the IAFPD report have concluded that the CDs you removed from the workplace contained e-mails with protected taxpayer B information. An integral part of your duties as an employee of the Canada Revenue Agency is respecting and safeguarding the integrity of the confidential information entrusted to you while performing your official duties on behalf of the Agency.*
>
> *These preliminary findings have given Management sufficient grounds to conclude that you have compromised the security of Agency property and confidential client information. As indicated to you in my previous correspondence dated, September 10, 2009, I may be required to seek legal avenues. I would like to advise you that I have engaged the RCMP to retrieve the information and investigate whether or not charges should be laid against you pursuant to subsection 239(2.2) of the* Income Tax Act *for violation of the confidentiality provisions of section 241 of the same* Act. *Based on this, I am also notifying you that I am suspending you indefinitely without pay pending the completion of a more comprehensive review into these matters. This suspension will take effect Friday, November 6, 2009 at the close of business. Please be advised that management of the Toronto Centre Tax Service [sic] Office will work closely with IAD to ensure that the balance of the investigation be conducted as expeditiously as possible.*

> *While you are on suspension without pay, you are not to perform any work on behalf of the CRA. You are not to enter CRA premises for any reasons unless you have prior approval from the undersigned.*
>
> *While a return to work is not possible at this time, I assure you that Management is amendable to working with you and your physician to put in place an Individual Accommodation Plan in accordance with the Agency's Illness and Injury Policy, as deemed appropriate after our review into your conduct has been concluded. Should you wish to initiate a further exchange of information between Management and your physician to facilitate the preparation of the Individual Accommodation Plan at this time, I would be prepared to do so. Alternatively, if you choose to defer this step until such time as our investigation is concluded, I would also agree to your request. Please notify me with respect to which option you wish to pursue in this regard.*

. . .

[57] Ms. Lloyd then filed her grievance, which has been identified earlier in this decision as PSLREB File No. 566-34-3750.

[58] In addition, in response to the employer's letter of November 6, 2009 (Exhibit U-12), Ms. Lloyd asked her occupational therapist, Lori Curgenven, to fax a letter to the employer concerning her return to work. The letter, dated December 7, 2009, (Exhibit U-14) states in part as follows:

. . .

> *As you know, from previous correspondence and documentation, Ms. Lloyd completed therapy in the Acquired Brain Injury Outpatient Program at Toronto Rehab, Ramsay Centre on November 25, 2009. Also noted on previous documentation, based on our assessment and observations, we feel that Ms. Lloyd has rehabilitated from her brain injury, such that she is now ready to resume work, albeit gradually and with certain reasonable, accommodations in place.*
>
> *To facilitate Ms. Lloyd's return to work we have attached a preliminary list of accommodations that will maximize her performance at work. Usually a job site assessment and meeting with the employee and manager precedes this list of accommodations, however, since CRA has not accepted our offer for these services, a list of preliminary accommodations is attached, based on our findings and resources.*

. . .

[59] At the end of December 2009, Ms. Todesco completed her interchange assignment and returned to her position as Director of the Toronto Centre TSO. Upon her return, she took carriage of Ms. Lloyd's case, and was told that the initial results from the IAD review of the CDs she had handed over contained some 42 000 pieces of taxpayer information. Ms. Todesco was also made aware of the exchange of letters concerning Ms. Lloyd's accommodation needs.

[60] On January 14, 2010, Ms. Todesco sent an email to Ms. Lloyd and her bargaining agent representative, stating in part as follows (Exhibit E-1, Tab 20):

. . .

> *I am writing to you today to let you know that I have completed my interchange assignment and have resumed my role as the Director of the Toronto Centre TSO. I am taking carriage of this case and have thoroughly reviewed the file. Based on the information to date, I have chosen not to pursue the involvement of the RCMP. You will be contacted shortly by the investigator assigned by IAD with respect to the formal investigation that will be conducted. I strongly recommend that you cooperate and participate in the process.*
>
> *With regards to the Individual Accommodation Plan, which may be implemented in the future, I am aware that some information provided (documents and telephone message from Toronto Rehab) were sent or referred directly to Mr. Hans Neilson which has caused some unnecessary delays. I request that any future communication be sent directly to me.*

. . .

[61] The contents of the letter were discussed in a teleconference, following which the employer prepared an accommodation plan for Ms. Lloyd's return to work (Exhibit U-15). This was a graduated return to work, and Ms. Lloyd was to ". . . assume the duties of a CIP Investigator." Ms. Lloyd and the employer signed the accommodation plan.

[62] Ms. Todesco testified that the initial accommodation plan had Ms. Lloyd beginning her return to work in the SEP and then gradually moving to the CIP. The employer felt that this transition would be less stressful for her (Exhibit E-1, Tab 37). However, Ms. Lloyd rejected this option, and it was agreed that she would return to her CIP position, which she had held when she last worked for the employer.

[63] Ms. Todesco testified that even though Ms. Lloyd was on an administrative suspension, there was a need to work on an accommodation plan to be ready when the IAD report was done.

[64] While this process was going on, the Institute filed a complaint (PSLREB File No. 561-34-440) under section 190 of the *PSLRA* (Exhibit U-16), which was about both the suspension without pay and the return-to-work issues. It states in part as follows:

. . .

> *1)Suspension of November 6,2009:*
> *Ms. Lloyd is being blocked from returning to work after a lengthy leave. She has been suspended without pay for an indefinite period while the CRA carries out an investigation into her use of what is being called inappropriate use of confidential information. No time frames have been given as to the completion of the investigation. The information in question was released to her by CRA, and used for the sole purpose of supporting her claim at adjudication. Her claim was that she had not been properly accommodated. She was successful in the adjudication.*
>
> *Its Ms. Lloyd's view that the employer, under the guise of "due diligence", is punishing her for exercising her rights ,going through with the adjudication, and supporting her claims at adjudication by using information she was given access to by CRA. Its her position that the suspension without pay, given all of the circumstances , is punitive and excessive and that the employer is retaliating for her adjudication. This constitutes a contravention of PSLRA 186 (2) (a )ii, iii, iv.*
>
> *2)Continuing delays:*
> *It is Ms. Lloyd's position that the employer has resisted( in the face of full and legitimate medical information) accepting that Ms. Lloyd's health will now allow her to return to work and setting a date for that to happen.*
>
> *The two issues are connected. It was only after Ms. Lloyd had supplied medical information and proposed a return to work date of November 30,2009 that she received the suspension of November 6,2009.*

. . .

> [*Sic* throughout]

[65] As mentioned earlier, the IAD had launched a formal investigation. The senior investigator was Julie Rodriguez. She began working as an investigator in 2003 and has

investigated hundreds of cases, most of which, she stated, involved computer issues. She has an IT background.

[66] Ms. Rodriguez was assigned the investigation in December 2009 and interviewed Ms. Lloyd, Mr. Balgobin, Ms. O'Brien and the individual who owned the laptop that Ms. Lloyd had used.

[67] After conducting the interviews, Ms. Rodriguez concluded that Ms. Lloyd had copied the CDs in her possession to a non-CRA device and that the CDs contained taxpayer information. She reached that conclusion because she had the original CDs in her possession for the investigation, and they were all labelled. Ms. Lloyd told Ms. Rodriguez that she had labelled the CDs after viewing them on her friend's laptop. Ms. Rodriguez knew from her IT background that in order for Ms. Lloyd to look at the content of a CD, that CD had to be copied to the device and opened using a program called *Outlook*. Therefore, the CDs had to have been copied to a computer that Ms. Lloyd admitted was not a CRA computer. Independent testing conducted by Ms. Rodriguez during the investigation confirmed that the CDs had to be downloaded before they could be read. It was not possible to load a CD onto a device and read its contents without downloading it to the device.

[68] In her report, Ms. Rodriguez concluded as follows (Exhibit E-1, Tab 21, page 27):

. . .

> *The information gathered during this investigation determined that Mary Lloyd, Investigator, Enforcement Division, Toronto Centre Tax Services Office, contravened CRA policy regarding the security and protection of confidential information and failed to uphold the confidentiality provisions of section 241 of the* Income Tax Act *by removing unencrypted CDs containing taxpayer information belonging to CRA from the workplace and by copying confidential information onto a non-CRA device. This resulted in an unauthorized disclosure of taxpayer information.*

. . .

[69] The investigation report provided by Ms. Rodriguez is dated December 22, 2010 (Exhibit E-1, Tab 21). That was more than a full year after she was assigned the file. The reason for the delay was that in April 2010, Ms. Rodriguez began acting as the IAD manager; she continued to until December 2010, when she became the IAD acting

director. At that time, getting the investigation report approved was given top priority, and it was released.

[70] While the internal investigation was progressing, Ms. Lloyd was attempting to return to work based upon an individual accommodation plan, which had been developed and agreed to on March 3, 2010 (Exhibit U-15). It was agreed that she would return to work on a graduated basis to ". . . the duties of a CIP Investigator" (Exhibit U-15).

[71] Ms. Todesco was awaiting the results of the IAD report before proceeding to implement the return-to-work program for Ms. Lloyd. On June 20, 2010, Ms. Lloyd sent Ms. Todesco an email asking about the status of the investigation (Exhibit U-17). Ms. Todesco replied, stating in part as follows (Exhibit U-17):

. . .

> *Your lack of cooperation in regards to making your home computer and friend's laptop accessible to the Agency was a factor that was taken into consideration when making the decision to place you on the indefinite suspension. . . . However, in light of your recent cooperation and the fact that the investigation process has been lengthy, I am prepared to review the situation. . . .*

. . .

[72] Ms. Todesco did review the situation and wrote to Ms. Lloyd on July 8, 2010, stating in part as follows (Exhibit U-19):

. . .

> *… I have reviewed the issue of your indefinite suspension and I will not be reinstating you at this time. I note that … you continue to be in receipt of disability benefits from Sun Life Financial. It is anticipated that the IAD Report will be finalized before the end of the summer, at which time I will advise you of the next steps.*

. . .

[73] Ms. Todesco made that decision because Ms. Lloyd was still receiving disability insurance and therefore had some income. Ms. Lloyd had been away two years so there would be little, if any further significant erosion of knowledge. Additionally, the IAD report was expected shortly. Finally, Ms. Todesco testified that protecting taxpayer

information is extremely serious for the CRA, and upon Ms. Lloyd's return, she would have had access to taxpayer information, so the administrative suspension was continued to protect this information.

[74] As stated earlier in this decision, the IAD report was not released until December 2010, and Ms. Lloyd's indefinite suspension continued.

[75] Shortly after the IAD report was released, Ms. Todesco left the workplace, and Ms. Delonghi took over as Acting Director, Toronto Centre TSO.

[76] Ms. Delonghi met with Ms. Lloyd and her bargaining agent representative on January 25, 2011, to discuss Ms. Lloyd's return to work. Discipline was also being contemplated at that time, and Ms. Delonghi concluded that a 40-day suspension was appropriate for Ms. Lloyd's actions with respect to the CDs. Ms. Delonghi concluded that discipline was necessary because Ms. Lloyd had removed unprotected CDs containing taxpayer information from the workplace and had downloaded their contents to a non-CRA device. The fact that Ms. Lloyd had not attempted to limit the amount of information she removed from the workplace was relevant to Ms. Delonghi; so was the inordinate amount of taxpayer information removed from the workplace. The fact that Ms. Lloyd was a criminal investigator at the AU-03 level was also considered, as was her lack of remorse.

[77] Countering those facts was the fact that Ms. Lloyd had been employed with the CRA since 1997, with a clean record, as was the length of time it took for the IAD report to be released. That all led Ms. Delonghi to issue a "Disciplinary Action Report - March 17, 2011" suspending Ms. Lloyd for 40 days. The dates were to be determined once she was medically fit to return to work (Exhibit E-1, Tab 22). Ms. Delonghi said that she approved the report, but Ms. Lloyd's manager, Roy Prince, signed it. It states in part as follows:

. . .

> *On February 3, 2006, while on leave you contacted the Regional Helpdesk and requested a copy of your entire H drive. On March 9, 2006 the request was completed and you removed 16 unprotected CD's [sic] from the workplace which contained thousands of emails with personal and confidential taxpayer information. There was no work-related reason for you to do so.*

> *A detailed review of the CDs was completed by the Electronic Network Monitoring System (ENMS) and [sic] concluded that they contained 37488 emails and 776 documents with taxpayer information. The emails spanned from December 2000 to January 3, 2006. The 776 documents contained over 42000 instances of taxpayer information, including names, social insurance numbers, addresses, and financial data.*
>
> *The subsequent Internal Affairs and Fraud Prevention Division (IAFPD) investigation determined that you downloaded the contents of all the CDs onto your friend's laptop, and that you made copies, or had copies made, of at least one of the CDs. You have also acknowledged downloading the CDs onto your personal computer.*
>
> *The IAFPD report concluded that you '…*contravened the CRA policy regarding the security and protection of confidential information and failed to uphold the confidentiality provisions of section 241 of the Income Tax Act by removing unencrypted CDs containing taxpayer information belonging to the CRA from the workplace and by copying confidential information onto a non-CRA device. This resulted in an unauthorized disclosure of taxpayer information'.
>
> *Numerous attempts were made by management to retrieve your friend's laptop, and later your personal computer, in order to cleanse any remaining taxpayer information on the hard drive. However your cooperation was not forthcoming until IAFPD involvement in March 2010. Your lack of cooperation frustrated management's attempts to minimize the security threat, and resulted in the continued and ongoing risk of release and disclosure of high volumes of sensitive taxpayer information.*
>
> *The review of the contents of the CDs also revealed an enormous quantity of personal email, making it apparent that you had utilized a multitude of working hours sending and receiving personal emails. The quantity greatly exceeds the limited personal use as defined in the* Code of Ethics and Conduct *under section G:* Electronic network access and use.
>
> *There is no prior disciplinary record.*

. . .

[78] Ms. Lloyd stated that she did not request a copy of her entire H drive. The items in her personal folders contained potential evidence for her adjudication hearing, and as it was work-related, she believed that she was entitled to it.

[79] With respect to the amount of taxpayer information on the CDs, Ms. Lloyd stated that much of it was duplicated.

[80] Ms. Lloyd never acknowledged downloading the CDs onto her personal computer.

[81] Ms. Lloyd believed she had cooperated to the extent possible with respect to both her computer and her friend's laptop.

[82] With respect to the paragraph in the Disciplinary Action Report about personal emails, this was the first time Ms. Lloyd had been made aware of that issue.

[83] When Ms. Lloyd received the 40-day suspension, she filed a grievance (PSLREB File No. 566-34-7716).

[84] Darrell Mahoney, Assistant Commissioner, Ontario Region, CRA, was the delegated representative required to reply to Ms. Lloyd's grievance at the third level of the grievance process concerning her 40-day suspension. He did so on April 16, 2012, stating in part as follows:

. . .

> *Your indefinite suspension was an administrative action taken by management. You continued to receive disability benefits during the time while on indefinite suspension. In addition, management took further steps to address the ensuing investigation delays by reverting a portion of this time, from September 1, 2010 to June 12, 2011, to Sick Leave Without Pay, in recognition that you still had to pay health care premiums and noting that the time while on indefinite suspension was not pensionable. Furthermore, as soon as management had ascertained that your security clearance was in order and upon having received current medical clearance to confirm that you were fit to return to duties, management made arrangements to return you to the workplace. The argument posed that the 'floating suspension' was an attempt to add additional penalty and that you had been blocked in your efforts to return to work cannot be supported. Management performed their due diligence in ensuring that appropriate medical clearance had been attained and that all required accommodations were in place, prior to your return and subsequently, you were returned to duties on June 13, 2011. I have determined that the 40-day suspension was not immediately imposed by management, in efforts to enhance the success of your gradual return to work program.*

> *Finally, you alleged that management's actions constituted retaliation and had contravened CRA policies, legislation, and the collective agreement, however; in my review of the circumstances involved, I have found no evidence to support these allegations.*
>
> *I am in agreement that the quantum of discipline was warranted to impress upon you the seriousness of your actions; therefore, I find no reason to amend this decision, in that, the 40-day suspension within your disciplinary notice will stand, albeit; this time will be considered as a retroactive suspension. The 40-days will be determined as 'time served' while on indefinite suspension.*

. . .

[85] After the notice of suspension was issued, Ms. Lloyd was made aware that two issues were preventing her from returning to work (Exhibit U-24). On May 11, 2011, Mr. Prince wrote to Ms. Lloyd, stating in part as follows:

. . .

> *Please be advised that we have received documents from Sun Life concerning Mary's Gradual Return to Work. I will be reviewing the plan in consultation with Human Resources and will be in touch with you on it shortly, however can advise that I do not see any medical issue preventing Mary's return to work.*
>
> *At this point, the only delay in returning to work is Mary's security clearance which remains outstanding. The Security Directorate is currently awaiting the results of a criminal records search being performed by the RCMP. The RCMP requested Mary's fingerprints, which were provided on April 4, 2011. I have been told that it may take up to 180 days for the RCMP to provide the Agency with the required information. I am attempting to have the clearance expedited, however have been advised that the RCMP does not prioritize for the Agency. I will keep you informed of any progress or developments.*
>
> *In the meantime, the return to work plan indicates that an ergonomic assessment will be required to ensure that the Mary's workstation has been set up correctly. I suggest we go ahead and schedule that while we await the security clearance. The assessment will be coordinated through Sun Life, so Julie Johnson will be in touch to schedule the assessment. I will have someone meet Mary and the ergonomist in the lobby and escort them upstairs.*

. . .

[*Sic* throughout]

[86] On May 31, 2011, Ms. Lloyd's bargaining agent representative wrote to Mr. Prince, stating in part as follows (Exhibit U-25):

. . .

*Our position is that Mary Lloyd . . . is entitled to work while her security clearance is renewed. She should therefore begin work immediately on her return to work plan which has been approved by all parties. Anything less would constitute discrimination under the* CHRA *on the grounds of failure to accommodate. . . .*

. . .

[87] Also in May 2011, Ms. Lloyd was made aware of another issue that the employer said might impact her return to the CIP position. On May 20, 2011, Mr. Prince wrote to Ms. Lloyd, stating in part as follows (Exhibit U-25):

. . .

*However, at this time we would like to make you aware of a potential issue concerning Mary's return to CIP. As you know, the Supreme Court of Canada McNeil decision imposed a legal duty on the Crown to disclose to the accused, acts of serious misconduct or criminal records of potential crown witnesses that either are relevant to the investigation or could reasonably impact on the case against the accused. At this time it remains unclear exactly how this may impact the Agency, and specifically, how it may impact the viability of referrals to PPSC wherein employees with serious misconduct on their record must act as crown witnesses. The PPSC may determine that due to work-related misconduct a CRA employee has credibility issues which affect their ability to act as a witness in criminal proceedings, and as a result may choose not to pursue prosecution.*

*Recent dealings with the local PPSC office have indicated that they may be taking a very broad interpretation of McNeil, and have also demonstrated that they are applying a very high standard when evaluating a potential witness's credibility. Consequently, management has identified potential risks of assigning work in CIP to employees with serious misconduct on their record. Management is currently awaiting further guidance from Corporate Labour Relations on these issues.*

*Due to the real and significant risks resulting from the McNeil decision, management must take steps necessary to*

> *ensure the integrity of the Program and of our investigations. Therefore, should your security clearance be obtained before further direction from Corporate Labour Relations is received, you will not be assigned work from active CIP files, but instead will be assigned work from SEP on an interim basis. Any duties assigned will conform to the restrictions and limitations outlined in the return to work plan prepared by Sun Life, as noted above.*

. . .

[88] Ms. Lloyd returned to work in June 2011, after agreeing to take up a position in the SEP. All the necessary elements in the accommodation plan were put in place, including the gradual return to work. The acceptance of a return to a position in the SEP was made ". . . without prejudice to our position that Mary [Ms. Lloyd] should have been re-integrated [*sic*] into CIP not SEP" (Exhibit E-1, Tab 35).

[89] Ms. Delonghi testified that it was her decision to return Ms. Lloyd to a SEP position rather than to the CIP position the employer had agreed to in 2010. She based her decision on an undated return-to-work plan signed by Ms. Lloyd's physician on April 21, 2011 (Exhibit E-1, Tab 29), which does not refer to any specific position but rather outlines Ms. Lloyd's accommodation needs. Ms. Delonghi felt that the SEP position met all the stated conditions.

[90] The gradual return to work was to continue until September 2011, and then it was to be reviewed. However, it was never reviewed, and in December 2011, Ms. Lloyd was told that she was to be transferred to a civil audit position, which would require her to take about 17 courses.

[91] The proposed move was being made due to the employer's concerns about the impact a Supreme Court of Canada decision called "*McNeil*" would have on Ms. Lloyd's ability to perform her functions. Her group and level would remain AU-03.

[92] The proposed move was discussed with Ms. Lloyd and her bargaining agent representative at a meeting held on December 17, 2011. At the meeting, Ms. Lloyd asked to remain in her SEP position, and Ms. Delonghi stated that she would consider it, but she also asked Ms. Lloyd to consider going to the civil audit position or other like jobs. The parties agreed to meet again in January 2012 to discuss the move further.

[93] The issue of keeping Ms. Lloyd in the SEP position was brought to Mr. Mahoney's attention in early January 2012. A recommendation was made to him that he authorize a PLM without Ms. Lloyd's consent to a position in Audit at the AU-03 level. On January 11, 2012, Mr. Mahoney sent Ms. Lloyd a letter, stating that she was to be moved to an AU-03 tax auditor position effective January 23, 2012 (Exhibit E-1, Tab 38).

[94] Ms. Delonghi followed up this letter from Mr. Mahoney with one she signed on January 17, 2012, stating in part as follows (Exhibit E-1, Tab 39):

. . .

> *As a result of* McNeil *disclosure requirements, management has determined that your disciplinary record precludes you from participating in any criminal investigations or criminal proceedings on behalf of the Agency. These are essential functions of your substantive position as a Senior Investigator in the* Criminal Investigations Program. *Therefore management has deemed it necessary to place you in an alternative position which does not normally require involvement in any criminal proceedings.*
>
> *This Permanent Lateral Move (PLM) is an administrative action that is taken in accordance with the* Directive on Lateral Moves. *It is acknowledged that this Permanent Lateral Move is being made without your consent. As outlined in the* Directive on Recourse for Assessment and Staffing, *you are entitled to receive recourse for this Permanent Lateral Move without consent in the form of* Individual Feedback, *followed by* Decision Review. *Copies of the* Directive on Lateral Moves *and the* Directive on Recourse for Assessment and Staffing *and* [*sic*] *have been enclosed for your reference.*
>
> *Effective January 23, 2012, you will be working in the Small and Medium Enterprises (SME) division of Audit. As per your request, Mr. Thomas Haddrath will be your new Team Leader. Enclosed is a copy of the draft Learning Plan for your new job and [sic] which was previously given to you on December 21, 2011. It has been updated to reflect the correct Team Leader. I would like to assure you that management is committed to providing you with the necessary support to ensure a successful transition into your new position.*

. . .

[95] After receiving the January 11, 2012, letter, Ms. Lloyd met with the employer and again asked that she be allowed to remain in the SEP position. She was told that

she would be subjected to a PLM without her consent. At that point, she raised her health concerns and said that she wanted to show the job description to her doctor to get his opinion. The employer agreed.

[96] On January 24, 2012, Ms. Delonghi sent Ms. Lloyd an email outlining what the employer believed were the accommodations needed for her to reintegrate into the workforce, along with some questions for her physician to comment on (Exhibit E-1, Tabs 41 and 42).

[97] Employees can use an internal process to contest PLMs, and Ms. Lloyd availed herself of it (Exhibit E-1, Tab 40). She claimed that she had been arbitrarily treated. Ultimately, the CRA's commissioner agreed with her and ordered that corrective measures be taken (Exhibit E-1, Tab 51).

[98] On February 8, 2012, Ms. Lloyd filed a grievance concerning the forced move in which she stated as follows: "I grieve that the employer has discriminated against me under the Canadian Human Rights Act on the grounds of mental and physical disability" (Exhibit U-27). Her corrective action included a request that she ". . . be compensated for general damages and pain and suffering in order to compensate for this treatment and the contravention of the Canadian Human Rights Act" (PSLREB File No. 566-34-7718). Ms. Lloyd testified that all corrective measures had been completed, except for her request for compensation.

## III. Summary of the arguments

### A. For the respondent and employer

[99] On December 18, 2014, the respondent and employer submitted its written argument with respect to these matters. It is on file with the new Board.

[100] The written submission is broken down into sections, each dealing with the several grievances and the complaint, as per my request at the hearing. I will summarize the respondent and employer's argument for each grievance and the complaint.

**1. <u>Indefinite suspension without pay (PSLREB File No. 566-34-3750)</u>**

[101] The employer submitted that the new Board is without jurisdiction to review or alter the suspension. It was an administrative decision, and therefore, it does not fall within the adjudicable matters under section 209 of the *PSLRA*.

[102] It is generally accepted that a suspension without pay pending an investigation is not deemed a disciplinary action. Ms. Lloyd had to establish that the suspension was disguised discipline. (See *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63, at paras 135, 137 and 140).

[103] In *Ramirez v. Canada Customs and Revenue Agency*, 2004 PSSRB 158, a Canada Customs and Revenue Agency (CCRA) employee was suspended indefinitely without pay pending the results of an investigation concerning allegations that the employee had engaged in fraudulent activities with respect to the payment of customs duties. A criminal investigation had been launched. The adjudicator found (at paras 30 and 31) that the CCRA had had just cause to indefinitely suspend the employee pending the outcome of the investigation, due to the risk to the CCRA's reputation, and that allowing the employee to continue to work would have been too great a burden for the CCRA to assume.

[104] Given Ms. Lloyd's duties as a criminal investigator, her position of trust within the organization and the seriousness of the alleged misconduct, the CRA was well within its rights to protect the public and its workplace in light of the sensitive information it held by suspending her pending the results of the investigation. The employer requested that this grievance be dismissed.

[105] In the alternative, even if the suspension is found disciplinary instead of administrative and jurisdiction is taken, the employer submitted that its decision to suspend Ms. Lloyd was reasonable and that it should not be disturbed lightly since it was reasonable.

**2. <u>40-day suspension (PSLREB File Nos. 566-34-7716 and 7717)</u>**

[106] Given the seriousness of Ms. Lloyd's misconduct, which resulted in an unauthorized disclosure of nearly 42 000 instances of taxpayer information and a massive threat to the CRA's reputation, the employer submitted that a 40-day

disciplinary suspension was more than justified. Frankly, her employment could have been terminated.

[107] In *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124, at paras 93 and 94, the Public Service Staff Relations Board acknowledged that the confidentially of taxpayer information was of utmost importance to the CCRA and to the integrity of its tax filing system. Further, a potential for serious harm could have arisen had the grievor in that case given the confidential information that he had accessed to third parties. As a result, the adjudicator concluded that even though the suspension was at the high end of the acceptable range (in that case, 20 days for unauthorized access to two taxpayers' information — the grievor's and his spouse's), the mitigating circumstances were not enough to warrant shortening it. In addition, even though the grievor had apologized for the unauthorized access, the elements of remorse and accepting the misconduct were found lacking.

[108] Further to the CRA's policies, the importance of guarding taxpayer information and acting in the public's interest is set out in subsection 241(1) of the *Income Tax Act*, which provides the following (see *Buset v. Canada Customs and Revenue Agency*, 2001 PSSRB 26, at para 79, and the *Income Tax Act*, ss. 2, 3, 9, 239, 241 and 246):

> ***241.*** *(1) Except as authorized by this section, no official or other representative of a government entity shall*
>
> *(*a*) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;*
>
> *(*b*) knowingly allow any person to have access to any taxpayer information; or,*
>
> *(*c*) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the* Canada Pension Plan, *the* Unemployment Insurance Act *or the* Employment Insurance Act *or for the purpose for which it was provided under this section.*

[109] Ms. Lloyd's work description outlines that her role as an AU-03 investigator and auditor is to investigate individuals and corporations suspected of having committed offences with respect to the *Income Tax Act*. As an investigator working with taxpayer information, and under the legal obligations set out in the *Income Tax Act*, Ms. Lloyd was held to a high standard of trust. She was entrusted with access to taxpayer information. In doing so, she was expected to safeguard that sensitive information and

to act at all times in the public interest, not in her own interest to the detriment of taxpayers.

[110] Instead, Ms. Lloyd copied the information of thousands of taxpayers onto at least one non-CRA device, provided her then-boyfriend with access to the CDs containing that taxpayer information and made two further copies of the CDs, which resulted in the unauthorized disclosure of taxpayer information, in contravention of section 241 of the *Income Tax Act*.

[111] Ms. Lloyd argued that there was no evidence that the unauthorized disclosure resulted in harm to taxpayers. However, as held by the Federal Court of Appeal, misconduct that puts an employer at a substantial risk of serious harm may suffice to justify discipline, including dismissal, even if the harm does not materialize. A substantial risk of serious harm is enough. (See *Canadian Imperial Bank of Commerce v. Boisvert*, [1986] 2 F.C. 431 (C.A.), and *Payne v. Bank of Montreal*, 2013 FCA 33, at paras 58 and 59.)

**3. <u>PLM without consent and discrimination (PSLREB File No. 566-34-7718)</u>**

[112] The employer submitted that as per subsection 208(2) of the *PSLRA*, the decision to subject Ms. Lloyd to a PLM without her consent is beyond the new Board's jurisdiction as she had already availed herself of another administrative mechanism for redress. She used the CRA's recourse mechanism under its *Staffing Program* and received the decision she was seeking — the PLM was overturned, and she was able to return to her CIP duties. This aspect of her grievance is now moot (see *Dhudwal et al. v. Canada Customs and Revenue Agency*, 2003 PSSRB 116).

[113] The only aspect of the grievance that the new Board may consider is Ms. Lloyd's discrimination and failure-to-accommodate complaint. To establish that the CRA discriminated against and failed to accommodate her, she had to establish the following (see *Ahmad v. Canada Revenue Agency*, 2013 PSLRB 60, at para 119):

(a) she had a disability that prevented her from performing one or more of the essential duties of her position;

(b) she made the employer aware of the disability; and

(c) the employer failed to implement the necessary accommodation.

[114] Ms. Lloyd has not established that she has a disability and therefore has not established a *prima facie* case of discrimination.

[115] The employer submitted that Ms. Lloyd also failed the second part of the test in that she did not make the employer aware of her disability before it decided to move her. In fact, before making the PLM decision, management reviewed the medical information in its possession and determined that it could easily meet the needs of Ms. Lloyd's gradual return to the workplace in another position. There was no medical information on file to indicate that she could not be moved to a new position; nor did any information state that she had any cognitive issues. Surely, the employer could not have breached its duty to accommodate a disability of which it was not even aware.

[116] Finally, Ms. Lloyd did not establish that the employer failed its duty to accommodate her once it was aware of her cognitive issues (whatever those might have been). As soon as she raised these issues after the PLM decision was made, management immediately halted her movement to audit duties and asked for further medical information from her doctor (which took a while to obtain and required several clarifications).

[117] Management then proceeded to work with Ms. Lloyd, using its understanding of her physician's advice to find an appropriate job in Audit where her accommodation needs would be met. Management maintained that for operational reasons flowing from the *McNeil* decision, it simply could not have kept her in the CIP position. In any event, as the PLM decision was eventually overturned, Ms. Lloyd never did have to assume audit duties.

[118] The employer met its obligation to accommodate Ms. Lloyd based on the information it had and as information continued to become available. It made good faith efforts to understand the nature of her limitations and to accommodate her. It was Ms. Lloyd who was not cooperative during the accommodation process. She remained insistent on her ideal form of accommodation (which was to stay in the CIP) and was extremely reluctant to assist in the search for similar new jobs. An employer representative described the process of trying to help her choose a new job as "an impossible task."

**4. Unfair labour practice complaint (PSLREB File No. 561-34-440)**

[119] Ms. Lloyd alleged that the respondent's decision of November 6, 2009, to suspend her without pay was motivated by ". . . [her] exercising [her] rights, going though [*sic*] with the adjudication and supporting [her] claims at adjudication by using information [she] was given access to by CRA." She cited a contravention by the employer of subparagraphs 186(2)(*a*)(ii), (iii) and (iv) of the *PSLRA*.

[120] The respondent submitted that there was not a single shred of evidence to support a claim that its decision to administratively suspend Ms. Lloyd was made in retaliation for her pursuing her grievance against Mr. Prince. The decision was a direct result of Ms. Lloyd's unauthorized disclosure of taxpayer information and the security risk that her return posed to the CRA before the investigation completed.

[121] The only link between the 2008 adjudication hearing and Ms. Lloyd's 2009 suspension is that during that hearing, the CRA discovered that she had 18 unencrypted CDs in her possession that contained a significant amount of taxpayer information and that she might have copied the information onto her then-boyfriend's laptop. There was no reason for her to have obtained and disclosed over 37 000 instances of taxpayer information in preparation for her adjudication hearing (or, by the way, for her to have brought the entirety of that information to the hearing if all she needed was the June 30, 2005, email relating to her accommodation request).

[122] As such, the respondent submitted that it had met its burden of proving that its actions were not motivated by the fact that Ms. Lloyd had earlier either filed or pursued a grievance. The respondent requested that this complaint be dismissed.

[123] The respondent provided a book of authorities containing 23 tabs of case law. I will not cite them, but I will note that the book of authorities is on file with the new Board.

**B. For the complainant and grievor**

[124] The Institute provided a written argument and rebuttal on March 31, 2015, which are on file with the new Board.

[125] The Institute's written submissions are also divided into arguments on each grievance and the complaint, as I had requested. I have summarized the argument and

rebuttal and have organized them so that they correspond with the order in which the CRA made its submissions, for ease of reference.

**1. <u>Indefinite suspension without pay (PSLREB File No. 566-34-3750)</u>**

[126] Ms. Lloyd contended that the "administrative" suspension was indeed disciplinary in nature and therefore that it is adjudicable under the *PSLRA*. She stated that (a) the length of time the investigation took, (b) the lack of due diligence and objectivity in the investigation, and (c) the flawed findings resulting from the investigative methods made the suspension disciplinary.

[127] The seriousness of the incidents in question was belied by the approach that the employer took to the problem. If this matter was so serious, why did it wait more than a full year to suspend Ms. Lloyd? The first specific contact about the laptop came in January 2009, from Ms. Todesco. Ms. Lloyd responded that same month, giving her reasons that she was unable to do what was asked of her. The next correspondence came in June 2009 (five months later) from another director, Ms. Delonghi. Then Ms. Walker, another director, wrote in September 2009. Ms. Lloyd had a reasonable expectation given the time lapse that the matter had been concluded; however, in November 2009, she was suspended.

[128] Ms. Lloyd waited from November 6, 2009 (the date she received the letter of administrative suspension), until January 14, 2011, to receive the investigation results, or approximately 425 days. Then she waited from January 14 to March 17, 2011, for discipline to be administered, or about 60 days. Then she was allowed to return to work on June 11, 2011, after about another 90 days. The total number of days she was off work after she had alerted the employer that she was ready to return to work was about 580.

[129] A total of 281 days, from September 2010 to June 11, 2011, which had originally been part of the administrative suspension, were converted in March 2011 back to "SLWOP," the leave code under which Ms. Lloyd had been off work before November 2009. Why was this or another action not taken sooner to alleviate the burden of her long absence?

[130] The CRA is fully responsible for the length of time the investigation took to complete. Ms. Rodriguez, the senior investigator and author of the investigation report,

was assigned to the investigation only in December 2009. Four months later, in April 2010, she became the IAD acting manager because the last manager left with little or no notice; she could not carry out a peer review of her investigative report as that would be a conflict of interest.

[131] Ms. Lloyd's investigative report was in a queue because there was an inventory of investigations and an approval process based on prioritization. Although it was high priority, it took a long time, and because of a "standstill, none of the reports went out."

[132] Case law supplied by the Institute showed that a lengthy investigation was unreasonable and that it resulted in grievances being partially or fully allowed.

[133] The investigation lacked due diligence and objectivity. Even though Ms. Lloyd raised the issue of her superiors taking work home and putting information on non-CRA devices (just as she was being accused of doing) in her interview with Ms. Rodriguez, and even though the issue was clearly relevant to establishing that the CRA's leadership inconsistently applied standards, Ms. Rodriguez chose to ignore it.

[134] Ms. Rodriguez must have been aware of the condonation argument that would have followed had Ms. Lloyd's point been confirmed. Ms. Lloyd has been prejudiced.

[135] Ms. Lloyd's issues were not fully and fairly examined after she raised them, which was a contravention of natural justice and procedural fairness.

[136] There is no evidence that Ms. Lloyd downloaded any information. Stating that she downloaded some is a matter of opinion, not fact. Any proof that established downloading as opposed to copying, as Ms. Lloyd testified she had done, was accomplished internally; none of the tests were released as evidence, and none of the tests were carried out on her friend's laptop to corroborate the claim that traces of the taxpayer information would be found on its hard drive. The clearest evidence that there was no download was when Ms. Lloyd's home-computer hard drive was examined and nothing was found. On a balance of probabilities, if nothing were found on her computer, then nothing would have been found on her friend's laptop.

[137] The approach to the problem of the CDs and the risk to the CRA was not reasonable or objective. The predetermined outcome and the length of and the misinformed conclusion of the administrative suspension amount to what was, in

essence, discipline, and constitute discipline under the *PSLRA*, no matter what it might have been called.

[138] In rebutting the employer's submission, the Institute differentiated the case law that the employer relied on from the facts of this case. In addition, it stated that a reasonable punishment would not have stretched from November 2009 to March 2011, which is how long Ms. Lloyd was kept off work due to the investigation. Even if one were to accept that a retroactive change of status to sick leave without pay changed something, then the employer seemed to suggest that 10 months would be a reasonable penalty.

[139] On August 7, 2007, Ms. Lloyd went on sick leave without pay. On November 6, 2009, her leave was changed to a suspension without pay. Ultimately, she was back on sick leave without pay effective September 2010. So, from November 2009 to September 2010, she was suspended without pay.

**2. 40-day disciplinary suspension (PSLREB File Nos. 566-34-7716 and 7717)**

[140] One of the factors Ms. Delonghi identified in her decision about quantum of discipline was the *Income Tax Act* and its contravention. Ms. Lloyd was imposed a larger quantum of discipline than she should have been due to the allegation that the *Income Tax Act* was breached, which was not proved.

[141] Ms. Rodriguez read Legal Services' conclusion that Ms. Lloyd had breached the *Income Tax Act* but did not ask her about it during the investigation. Ms. Rodriguez assumed that it was a fact. The investigation provided no analysis or *viva voce* evidence as to why she, as the investigator, believed Ms. Lloyd's actions contravened the *Income Tax Act*. Nor, aside from very general comments, did any of the other witnesses provide any such evidence. That was not natural justice because Ms. Lloyd could not fairly examine and respond to who or what made that allegation.

[142] Examining the relevant sections of the *Income Tax Act* quoted in the employer's submission, the word "knowingly" is prominently placed as the first word in each paragraph. Ms. Lloyd's position was that if she did any of the things described in the relevant paragraphs (which she disputes), she did not "knowingly" do any of them.

[143] Ms. Lloyd's position was that the provisions referred to in the *Income Tax Act* are for the purposes of dealing with individuals who deliberately attempt to defraud

the government or break the law, neither of which the employer's witnesses accused her of.

[144] The disciplinary report contains inaccuracies and suggests that Ms. Lloyd has admitted to things that she has not, such as downloading the CDs onto her personal computer.

[145] The employer established the parameters of the incident in 2009 (Exhibit U-28), yet Ms. Lloyd received a disciplinary notice in March 2011 that stated that she was guilty of more serious offences, such as her failure to uphold the *Income Tax Act* and her unauthorized disclosure of taxpayer information.

[146] A number of mitigating factors should be considered, including:

(a) the 11 years of good service and unblemished record of Ms. Lloyd;

(b) the delay caused by the employer failing to act within a reasonable time;

(c) the employer's inconsistent application of weak policies;

(d) the nature of the incident at issue; and

(e) the fact that Ms. Lloyd did not have bad or fraudulent intentions.

[147] Clause 43.01 of the collective agreement (the no discrimination clause) has been violated. Mr. Prince effectively blocked Ms. Lloyd from returning to being a contributing employee for six months. He claimed that her medical information was not up to date, even though in the end the accommodation plan created in 2010 was used. The employer used the *McNeil* decision to prevent Ms. Lloyd from returning to the CIP. The security clearance issue was used to block her return. Ms. Lloyd should have been allowed to return to work while these issues were cleared up. The collective agreement has been contravened because Mr. Prince's actions were discriminatory under the grounds of disability found in that clause.

[148] By way of rebutting the employer's submission concerning the 40-day suspension, the Institute differentiated the case law the employer relied on from the facts of this case.

[149] With respect to allegations of violating the *Income Tax Act*, the important part quoted of that *Act* is the word "knowingly." Ms. Lloyd's contention, which never wavered, was that she did not contravene any section of the *Income Tax Act*. While it may be appropriate to suggest that she should have known better than to use a non-CRA device to make copies of the CDs, she has never been shown guilty of unauthorized disclosure. Even if potentially traces could have been left on her friend's hard drive, she did not "knowingly" leave them there.

[150] In reference to her actions, Ms. Lloyd posed the following question: "So what was the real risk here [emphasis in the original]?" She stated that two employer witnesses mentioned adverse publicity and how damaging it could be. Another risk could have been confidential information existing on an external-to-CRA laptop. If that risk were truly substantive, would the CRA not have used its full scope of resources to access her friend's laptop in 2008? It never did. The simple fact is that when the employer met with and interviewed her friend in December 2009, it believed him; it did not pursue his laptop. It believed his explanation as to what had happened and saw no benefit in pursuing that laptop further. It never took possession of the laptop and never analyzed it in the interest of safeguarding taxpayer information. Ms. Rodriguez was clear when she referred as follows to any information that might remain on Ms. Lloyd's friend's laptop: "Somebody would have to know it is there and then have tools to get it." Ms. Rodriguez suggested that if anything were on the laptop, the chances of somebody retrieving it would be remote.

[151] Further evidence of minimal risk is shown in a letter from the CRA to the Office of the Privacy Commissioner dated December 15, 2010. The letter states that there was little risk to taxpayers as a result of this incident (referencing Ms. Lloyd's case but not her name).

[152] The fact that the CDs were unencrypted was not Ms. Lloyd's fault, and she did not burn them. The evidence shows that it was not possible to encrypt the CDs at the relevant time, and even if it had been, IT would have done it, not her.

**3. PLM without consent and discrimination (PSLREB File No. 566-34-7718)**

[153] In this case, discrimination occurred due to a failure to accommodate Ms. Lloyd under the grounds of mental or physical disability. The employer had to show that there was a legitimate business need to force Ms. Lloyd from her accommodated

position. The burden would have then been hers to establish that the move was discriminatory.

[154] In the employer's submission, there appears to be some confusion. Ms. Lloyd was not working in the CIP when it was decided to subject her to a PLM. And Ms. Delonghi testified that *McNeil* issues were not at play in the SEP, which is where Ms. Lloyd had returned to work. If Ms. Lloyd was not working in the CIP, then *McNeil* could not have been a legitimate reason to move her. The employer's submission seems to indicate that Ms. Lloyd was moving to a new SEP position, which was not true. She was moving from an investigative role to Audit, with a different function and role and on a different floor of the building.

[155] Although the employer felt confident that Ms. Lloyd could easily transition to Audit, where she had not worked in many years, she and her doctor did not think it would be so easy.

[156] Ms. Lloyd had come back to work in the SEP in June 2011 (although her preference had been the CIP), and six months later she found herself unilaterally moved into Audit, an area that she had last worked in 12 years before in a PM-02 position.

[157] While the words "cognitive impairment" might not have been used in this case, it was patently untrue to suggest the employer was not aware that Ms. Lloyd had suffered a brain injury. Her accommodation and restrictions were based on that injury and recovery. On December 7, 2009, Ms. Curgenven, from Toronto Rehab, Ramsay Centre, wrote to Ms. Lloyd's supervisor, Hans Neilson, stating in part as follows (Exhibit U-14):

. . .

> *As you know, from previous correspondence and documentation, Ms. Lloyd completed therapy in the Acquired Brain Injury Outpatient Program at Toronto Rehab, Ramsay Centre on November 25, 2009. Also noted on previous documentation, based on our assessment and observations, we feel that Ms. Lloyd has rehabilitated from her brain injury, such that she is now ready to resume work, albeit gradually and with certain reasonable, accommodations in place.*

. . .

[158] Mr. Neilson signed off on the plan, resulting in Ms. Lloyd's accommodation plan of March 3, 2010. Exhibit U-29 is the plan that was put into place for Ms. Lloyd's return in June 2011. Then, at a meeting in January 2012, Ms. Lloyd was told she was to be subjected to a PLM.

[159] Plans to move Ms. Lloyd to the Audit Division were well underway without her knowledge. This move was underway before the formal meeting was held on December 20, 2011, which indicates that the decision had been made and that any discussion, including of accommodations, would have been merely perfunctory.

[160] The local Toronto TSO for a second time failed to take Ms. Lloyd's accommodation needs into account and acted unilaterally, this time by attempting to force her to move without multi-party accommodation discussions. The evidence showed that Ms. Lloyd has been discriminated against on the grounds of "mental or physical disability," and she requested a remedy as per the *CHRA*.

[161] In rebutting the employer's submission, the Institute distinguished the case law cited by the employer from the facts of Ms. Lloyd's case.

[162] In addition, the Institute wrote that Ms. Lloyd had come back from her injuries to a new job — the SEP position. The medical clearance was for Ms. Lloyd to return to her old CIP position, but she agreed with the employer to return to the SEP. She worked and did well for six months; then the employer unilaterally declared that she could no longer be there. She did not seek to initiate further or different accommodations. And she did want to stay in the SEP, as opposed to moving to Audit, because she was still in the process of being accommodated there and was doing well.

[163] The employer addressed the issue of the "Decision Review" Ms. Lloyd filed regarding her PLM without consent. It never should have happened, according to CRA policy. Even though she eventually won that case by appealing it, she was still physically moved and initially told to do audit work and then SEP work in her new location. The outstanding issues are whether proper attempts were made to accommodate Ms. Lloyd before forcing her to move and whether she was discriminated against in the course of the employer's actions.

[164] The fundamental point is that Ms. Lloyd did not precipitate the accommodation discussions or demand a move from her SEP position. The grievance was not a

response to an inadequate accommodation in a new position but was a response to a plan to move her from an agreed-upon accommodation position without consultation. The employer determined that she had to move without considering what that might mean to her health.

**4. <u>Unfair labour practice complaint (PSLREB File No. 561-34-440)</u>**

[165] Ms. Lloyd filed this complaint with the former Board after being barred from returning to work on November 6, 2009, by the letter of suspension. The suspension has been grieved separately, but Ms. Lloyd's position was that her suspension was retaliatory under section 190 of the *PSLRA*.

[166] The CRA retaliated against Ms. Lloyd by disallowing her to return to work. She made that determination because of the timing of the suspension.

[167] The administrative suspension happened only when Ms. Lloyd announced that she was ready to return to work. It did not happen on the discovery that she had the CDs and that she might have done something improper with them. The intent of the suspension can be seen only as an effort to keep her out of the workplace. The respondent did not want her to work; that was retaliation.

[168] *Ontario Jockey Club v. Service Employees International Union, Local 528* (1977), 17 L.A.C. (2d) 176 at para 6, sets out the general principles for deciding whether an employee who may be guilty of misconduct should stay on the job or be relieved of his or her duties while an investigation is conducted. Using these principles, should Ms. Lloyd have been able to work during the investigation into her conduct? The answer is, "Yes."

[169] Another reason the suspension was retaliatory is that some of the people involved in the 2008 adjudication hearing were also involved in the 2009 suspension. A further reason is that the employer had a legal opinion that determined Ms. Lloyd's guilt.

[170] As corrective action, Ms. Lloyd sought that each of her three grievances be upheld and that the corrective action in each be awarded. She sought either an elimination of the disciplinary action and 40-day suspension or a reduction of the suspension's severity.

[171] In keeping with labour relations principles, Ms. Lloyd asked that she be made whole in every way for all her issues, which would include, but would not necessarily be limited to, the following:

> 1. *The difference between Sun Life payments and her regular full AU-03 pay. This equals approximately 30 percent pay from November 6, 2009, to June 11, 2011 (approximately 580 days).*
>
> 2. *Pension premiums paid for the same period as above. Pension years of service adjusted as necessary.*
>
> 3. *Health care premiums that she paid out of pocket.*
>
> 4. *Dental receipts that were paid out of pocket because dental coverage ceased when she was suspended and could not afford to pay the premiums herself.*
>
> 5. *The equivalent of CHRA awards for both general damages for pain and suffering and reckless discriminatory practice under paragraph 53(2)(e) and subsection 53(3). As in Filiter (Exhibit U-2), adjudicators have the authority under paragraphs 226(1)(g) and (h) to interpret, apply and order relief pursuant to the CHRA.*
>
> 6. *There be an order for the release of Ms. Lloyd's personal information, which was on the original CDs, all of which is still in the possession of the CRA.*

[172] Finally, should a remedy be found in Ms. Lloyd's favour, she asked that the adjudicator be seized of the files in the event of implementation difficulties.

[173] The Institute provided a book of authorities containing 13 cases. Again, I will not cite them, but I note that the book of authorities is on file with the new Board.

**C. <u>Employer and respondent's rebuttal</u>**

[174] The CRA provided a written rebuttal on April 27, 2015, with respect to the Institute's submission, which is on file with the new Board.

**1. <u>Indefinite suspension without pay (PSLREB File No. 566-34-3750)</u>**

[175] The administrative suspension started in November 2009. It ended in March 2011, when a disciplinary decision of a 40-day suspension was rendered. Later, in June 2011, Ms. Lloyd was able to return to work once other matters (which are not the subject of this grievance) were completed.

[176] As for the length of the November 2009 suspension, the period from September 2010 to March 2011 was reverted to sick leave without pay. Thus, the administrative suspension was approximately 10 months. It was not the alleged 600 days claimed in the Institute's submission.

[177] During the administrative suspension, an investigation was underway. A preliminary review was done, followed by a full investigation. The Institute has attempted to attack the investigation process via a variety of allegations. However, the Federal Court of Appeal has unanimously held that such allegations are cured by a *de novo* hearing, such as this one (*Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.) (QL)).

[178] During the suspension, the employer reviewed the need to continue it at least three times. The reviews found that need. In addition, there was local newspaper coverage of the story, and serious concerns arose about the CRA's reputation that met the requirements detailed in *Ontario Jockey Club*.

[179] The administrative suspension began in November 2009, because that was when Ms. Lloyd received medical clearance to return to work. Before that, she was on sick leave and was not in the office.

[180] The employer began the suspension when it looked like Ms. Lloyd would return to work because until all the facts were known, it was a risk to the CRA to return her to the workplace, where she would have had access to taxpayer information. All CRA positions have some form of access to taxpayer information. Since the CRA takes protecting taxpayer information and its public reputation very seriously, it was not an option for Ms. Lloyd to work in any position at the CRA at that time.

**2. <u>40-day disciplinary suspension (PSLREB File Nos. 566-34-7716 and 7717)</u>**

[181] The mitigating factors that Ms. Lloyd cited have already been considered, which is why her employment was not terminated.

[182] Ms. Lloyd did not have a work-related reason to access, remove or copy the taxpayer information. In addition, she did not have management's express authorization to remove that information from CRA premises in the first place.

[183] A CRA employee is guided by the *Income Tax Act*. Ms. Lloyd attempted to minimize her actions with semantics by arguing whether she “knowingly” did something under that *Act*. The fact remains that that *Act* is another example of a clear message to employees that protecting taxpayer information is of paramount importance. In addition, evidence was heard about Ms. Lloyd knowingly viewing the taxpayer information on a non-CRA computer; at times, she even admitted to doing so.

[184] Ms. Lloyd blamed the IT Section for giving her the information. Nevertheless, the taxpayer information on her hard drive was her responsibility. She stated that she needed only one document. Yet, she acknowledged that instead she received many more documents. Instead of flagging that as a concern, she walked out of the CRA premises with the information and then viewed it on a non-CRA computer and laptop, where it was copied to their hard drives. The files were hers, on her H drive, and she knew of their contents. She was responsible for limiting her request to only what was necessary and to ensure that taxpayer information was protected. She failed.

**3. PLM without consent and discrimination (PSLREB File No. 566-34-7718)**

[185] The employer’s decision to return Ms. Lloyd to the SEP was based on operational considerations, including the *McNeil* concerns, not on her disability.

[186] With respect to the PLM, that decision was based on the information available at the time as to where Ms. Lloyd worked. The employer could not have been expected to consider accommodation needs that it was not aware of.

**4. Unfair labour practice complaint (PSLREB File No. 561-34-440)**

[187] This complaint, filed in January 2010, was sparked by the November 2009 suspension. It was not an unfair labour practice; nor was it some form of retaliation as Ms. Lloyd appeared to argue. The November 2009 decision was based on the fact that until she was scheduled to physically return to the workplace and thus resume working with taxpayer information (which was the issue at the heart of the matter), there was no direct risk to the CRA that would have required suspending her from the workplace. She was not in the workplace before that.

[188] An administrative decision had to be made in November 2009, based on the potential risk to the CRA and the public. It was a risk assessment issue, not an unfair labour practice.

[189] The respondent referred to four decisions in support of its rebuttal. I will not cite them, but once again, I note that the referenced cases are on file with the new Board.

## IV. Reasons

[190] This decision concerns one complaint (PSLREB File No. 561-34-440) and three grievances (PSLREB File Nos. 566-34-3750 and 7716 to 7718). It is noted that PSLREB File No. 566-34-7717 contains the same grievance as in PSLREB File No. 566-34-7716. (It was assigned two different file numbers just for administrative purposes.) For ease of reference, I will deal with each issue by assigned file number.

### A. Unfair labour practice complaint (PSLREB File No. 561-34-440)

[191] On February 2, 2010, the Institute filed a complaint under section 190 of the *PSLRA* on behalf of one of its members, Ms. Lloyd. The complaint was dated January 19, 2010.

[192] Section 190 of the *PSLRA* reads in part as follows:

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> . . .
>
> *(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*

[193] Section 185 of the *PSLRA* reads as follows:

> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*

[194] The complaint filed on behalf of Ms. Lloyd deals with two issues and states as follows:

> . . .
>
> *1)Suspension of November 6,2009:*
> *Ms. Lloyd is being blocked from returning to work after a lengthy leave. She has been suspended without pay for an indefinite period while the CRA carries out an investigation*

*into her use of what is being called inappropriate use of confidential information. No time frames have been given as to the completion of the investigation. The information in question was released to her by CRA, and used for the sole purpose of supporting her claim at adjudication. Her claim was that she had not been properly accommodated. She was successful in the adjudication.*

*Its Ms. Lloyd's view that the employer, under guise of "due diligence", is punishing her for exercising her rights ,going through with the adjudication, and supporting her claims at adjudication by using information she was given access to by CRA. Its her position that the suspension without pay, given all of the circumstances , is punitive and excessive and that the employer is retaliating for her adjudication. This constitutes a contravention of PSLRA 186 (2) (a)ii, iii, iv.*

*2) Continuing delays:*
*It is Ms. Lloyd's position that the employer has resisted( in the face of full and legitimate medical information) accepting that Ms. Lloyd's health will now allow her to return to work and setting a date for that to happen.*

*The two issues are connected. It was only after Ms. Lloyd had supplied medical information and proposed a return to work date of November 30,2009 that she received the suspension of November 6,2009.*

. . .

[*Sic* throughout]

[195] The complaint alleged that subparagraphs 186(2)(*a*)(ii), (iii) and (iv) of the *PSLRA* had been violated. If proven, this would be a prohibited ground under section 185 of the *PSLRA*. Subsection 186(2) states in part as follows:

***186.*** *(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*

*(*a*) refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*

*(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or*

> *participates in the promotion, formation or administration of an employee organization,*
>
> *(ii) has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2,*
>
> *(iii) has made an application or filed a complaint under this Part or presented a grievance under Part 2, or*
>
> *(iv) has exercised any right under this Part or Part 2 . . . .*

[196] There are two parts to the complaint. The first is about a suspension that the respondent imposed on Ms. Lloyd by way of a letter dated November 6, 2009, which states in part as follows (Exhibit E-1, Tab 13):

. . .

> *I am writing to you at this time with respect to the preliminary results of the Internal Affairs and Fraud Prevention Directorate (IAFPD) report as well as the foregoing medical note recently submitted by you.*
>
> *I have reviewed the medical note you provided to me pertaining to your fitness to return to work. I am pleased to hear that your health has improved sufficiently to allow you to contemplate a return to work. I am cognizant, however, that additional information is required to clarify any restriction and/or accommodation needs that may be required to facilitate and implement a graduated return to work.*
>
> *However, I am not able to implement a return to work plan with you at this particular point in time as the preliminary results of the IAFPD report have concluded that the CDs you removed from the workplace contained e-mails with protected taxpayer B information. An integral part of your duties as an employee of the Canada Revenue Agency is respecting and safeguarding the integrity of the confidential information entrusted to you while performing your official duties on behalf of the Agency.*
>
> *These preliminary findings have given Management sufficient grounds to conclude that you have compromised the security of Agency property and confidential client information. As indicated to you in my previous correspondence dated, September 10, 2009, I may be required to seek legal avenues. I would like to advise you that I have engaged the RCMP to retrieve the information and*

> *investigate whether or not charges should be laid against you pursuant to subsection 239(2.2) of the* Income Tax Act *for violation of the confidentiality provisions of section 241 of the same* Act. *Based on this, I am also notifying you that I am suspending you indefinitely without pay pending the completion of a more comprehensive review into these matters. This suspension will take effect Friday, November 6, 2009 at the close of business. Please be advised that management of the Toronto Centre Tax Service [sic] Office will work closely with IAD to ensure that the balance of the investigation be conducted as expeditiously as possible. . . .*

. . .

[197] The second part of the complaint, which Ms. Lloyd stated is related to the first part, states that the respondent resisted accepting the fact that her health permitted her to return to work on November 30, 2009.

[198] The respondent's response to this complaint was the following:

> *. . . there was not a single shred of evidence to support a claim that the Employer's decision to administratively suspend Ms. Lloyd was in retaliation for her having pursued her grievance against Mr. Prince. The decision was a direct result of Ms. Lloyd's unauthorized disclosure of taxpayer information and the security risk which the return posed to the Agency. . . .*

[199] Ms. Lloyd alleged that the indefinite suspension of November 2009 was in fact retaliation for her 2008 adjudication (see *Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15) (*Lloyd #1*). This retaliation, she alleged, was not allowing her to return to work. She further alleged that the intent of the suspension can be seen only as an effort to keep her out of the workplace.

[200] Ms. Lloyd buttressed her case by stating that some of the people involved in the 2008 adjudication were also involved in the decision to issue the 2009 suspension. Finally, she stated that the 2009 suspension was based on a legal opinion, which determined her guilt.

[201] As a brief background, in 2008, Ms. Lloyd attended an adjudication hearing for a grievance she had filed dealing with a duty-to-accommodate issue. While preparing for that hearing, her view was that she would need to prove the existence of an email that she had sent to her supervisor, Mr. Prince.

[202] At the time of the 2008 adjudication, Ms. Lloyd had been off work for a period of 10 months in 2006 due to chronic fatigue and fibromyalgia (see paragraphs 15 to 19 of 2009 PSLRB 15). Following a short period of reintegration, Ms. Lloyd had a very serious biking accident in August 2007, which required an extensive period of recovery. She was still recovering from the bike accident and was off work when the 2008 adjudication hearing took place.

[203] While off work, Ms. Lloyd contacted her supervisor, Mr. Horbatiuk, and told him that she needed some personal information from her computer at work. He instructed her to contact the IT Section. Ms. Lloyd followed his instruction and told Mr. Balgobin that she needed a copy of her personal folders. She was given about 16 CDs containing the work that was in her personal files found in the H drive. Ms. Lloyd took the CDs home and labelled them. She then copied them using her friend's laptop. They contained not only her personal emails but also taxpayer information.

[204] Ms. Lloyd brought all 16 CDs to the 2008 adjudication hearing. At the appropriate time, she produced the one that contained the email in question, thus proving its existence. When she handed the CD to the employer's counsel, she stated that it also contained taxpayer information, as did all her other CDs.

[205] That was a very condensed version of what took place in 2008. I will expand on it later in this decision as other issues relate specifically to what happened.

[206] After the 2008 adjudication hearing, Ms. Lloyd remained off work due to her biking accident. On November 3, 2009, she sent an email to Ms. Walker, advising the following: "I am planning to return to work [M]onday, [N]ovember 30 beginning 3hr shifts as per my doctor's medical recommendations" (Exhibit U-11).

[207] After receiving the email, the respondent sent Ms. Lloyd the letter of November 6, 2009, suspending her indefinitely. The complaint to the former Board then followed.

[208] Ms. Lloyd alleged that the respondent's letter of November 6, 2009, contravened subparagraphs 186(2)(*a*)(ii), (iii) and (iv) of the *PSLRA*.

[209] To be successful with this complaint, Ms. Lloyd had to show that the respondent refused to continue to employ her and that it suspended or discriminated against her

because she testified at a proceeding of the former Board, filed a complaint with the former Board or exercised any right under applicable provisions of the *PSLRA*.

[210] It is quite clear to me that the respondent issued the November 6, 2009, letter as a direct result of receiving Ms. Lloyd's November 3, 2009, email. Until November 3, 2009, Ms. Lloyd had remained absent from work due to her biking accident. Any concerns the CRA had with respect to her being at work and being able to access taxpayer information were negated by the obvious fact that she was not at work.

[211] When Ms. Lloyd informed the CRA that she had seen her doctor and that she was planning to return to work at the end of the month, the CRA immediately reacted with the letter of suspension. I find that those actions were not specifically prohibited by subparagraphs 186(2)(*a*), (ii), (iii) or (iv) of the *PSLRA*. The respondent did not suspend Ms. Lloyd because she had testified at the 2008 adjudication hearing.

[212] The respondent's decision to suspend Ms. Lloyd was stated in the November 9, 2009, letter, which states in part as follows:

. . .

> . . . *I am not able to implement a return to work plan with you at this particular point in time as the preliminary results of the IAFPD report have concluded that the CDs you removed from the workplace contained e-mails with protected taxpayer B information*. . . .

. . .

[213] The respondent's decision to suspend Ms. Lloyd was necessitated by the fact that she stated that she was going to return to work at the end of November 2009.

[214] The Institute also stated in its written submission that ". . . the employer has resisted . . . accepting that Ms. Lloyd's health will now allow her to return to work and setting a date for that to happen."

[215] With respect to the first part, which was that the employer resisted accepting that Ms. Lloyd's health allowed her to return to work, I find that the opposite is true. The evidence shows that the November 6, 2009, letter was issued following the receipt of the November 3, 2009, email from Ms. Lloyd, stating that she would be returning to work. The CRA appears to have accepted the fact that Ms. Lloyd's health permitted her

to contemplate a partial return to work, which appears to be why it sent the letter of suspension.

[216] Again, I find that that action by the respondent was not prohibited by subsection 186(2) of the *PSLRA*. The suspension was not related to the 2008 adjudication hearing.

[217] For these reasons, I find that the complaint in PSLREB File No. 561-34-440 is dismissed.

**B. Indefinite suspension without pay (PSLREB File No. 566-34-3750)**

[218] On November 30, 2009, Ms. Lloyd filed a grievance against her indefinite suspension, as detailed in the employer's letter of November 6, 2009.

[219] In her grievance, Ms. Lloyd claimed that the unpaid suspension was unwarranted and without cause, was harassment, was issued in retaliation for her accommodation claims, was untimely and was being used to block her return to work. She grieved the preliminary results of the IAFPD report and that she was not interviewed or given access to it, that no time frame was established in which to complete it, that the employer displayed a wilful disregard for her circumstances and for her desire to return to work, that the people responsible for the decision acted in bad faith, and that they violated specific provisions of the collective agreement as well as CRA policies and the *CHRA.*

[220] As corrective action, Ms. Lloyd stated that she wanted the grievance heard at the third level of the grievance procedure within 10 days, the letter of suspension rescinded, to be returned to work immediately, to be made whole with respect to lost wages and benefits, to receive a written apology, and to receive compensation equivalent to Commission awards for pain and suffering, as well as punitive damages.

[221] The new Board's records indicate that the Commission was never notified with respect to this filing. There is no record of the Institute ever filing the required Form 24 with the Commission.

[222] The employer's position was that the new Board is without jurisdiction to review or alter the suspension. It was an administrative decision, and it is not adjudicable under section 209 of the *PSLRA*.

[223] The employer's alternative position is that if the suspension is found to have been disciplinary, changing it should not be considered lightly since it was reasonable.

[224] Ms. Lloyd stated that the indefinite suspension was disciplinary because of how long the investigation took to complete, the lack of due diligence and objectivity in the investigation, and the flawed findings resulting from the investigative methods.

**1. <u>Background</u>**

[225] At an adjudication hearing in October 2008, the employer learned that Ms. Lloyd possessed a number of CDs containing taxpayer information. The employer also learned that they might have been copied to a non-CRA device.

[226] When Ms. Lloyd was on the witness stand, counsel for the employer asked her about an electronic copy of an email exchange between her and her supervisor, Mr. Prince. She had a stack of CDs in a plastic case; she gave one to the employer's counsel and said that the email was on it. An articling student, who was assisting the employer's counsel, loaded the CD into her laptop.

[227] Ms. Lloyd was asked what the CDs were. She responded that they were a complete backup of her H drive. Counsel for the employer asked if the CDs contained taxpayer information, and Ms. Lloyd replied that they did.

[228] At a break in the adjudication proceedings, Ms. O'Brien, the CRA's senior labour relations advisor, contacted the director of the IAFPD and reported what had just happened. It was agreed that Ms. O'Brien would retrieve the CDs and the articling student's laptop. Ms. Lloyd handed over all the CDs and then said she had copied a CD to her friend's laptop and asked if the employer wanted that laptop as well. She was told that it did; had she done the same thing as the articling student, she needed to bring the laptop in. Ms. Lloyd agreed to bring the laptop in the next day. In both direct and cross-examination, Ms. O'Brien was unwavering on the point that Ms. Lloyd agreed to bring her friend's laptop in the next day. Unfortunately for everyone, Ms. Lloyd did not. I mention this because this case might have ended there had the laptop been produced.

[229] Ms. O'Brien did not pursue Ms. Lloyd's failure to produce the laptop the following day because, she said, it was outside her role, and security would have done

it as it was not a CRA laptop. Ms. O'Brien also informed Ms. Todesco, Director of the Toronto Centre TSO, about Ms. Lloyd possessing the CDs.

[230] In Ms. Lloyd's testimony, she said the laptop's owner told her the CD had not been loaded on the laptop but had just been copied. Based on the fact that the same procedure did not take place as had occurred with the articling student, Ms. Lloyd felt that she did not need to bring the laptop in, and no one mentioned it to her again until much later.

[231] Ms. Todesco arranged for the IAD in Ottawa to view the CDs. It did so, and in October 2008, she was informed that the CDs contained unencrypted taxpayer information. Ms. Todesco contacted the Department of Justice and was told to wait until the adjudication proceedings ended before doing anything further.

[232] The adjudication proceedings ended in December. On January 20, 2009, Ms. Todesco wrote to Ms. Lloyd, asking that Ms. Lloyd's friend's laptop be brought in (Exhibit E-1, Tab 1). Ms. Lloyd responded on January 30, 2009, stating that she was not at liberty to provide the laptop (Exhibit E-1, Tab 2). She explained in her testimony that she had broken up with her boyfriend and that she did not have access to his laptop.

[233] Ms. Todesco left her position in January 2009 for a one-year assignment, and Ms. Delonghi took over from February to June 2009, at which time Ms. Walker became the acting director of the Toronto Centre TSO. She remained in that capacity until Ms. Todesco returned in January 2010.

[234] On February 2, 2009, the IAFPD, using its Electronic Networks Monitoring System, began a formal review of all the CD contents (Exhibit E-1, Tab 21, page 4). It was completed on August 14, 2009, and concluded that the CDs contained taxpayer information (Exhibit E-1, Tab 8).

[235] On September 10, 2009, Ms. Walker, Interim Director of the Toronto Centre TSO, sent Ms. Lloyd a letter, asking once again that the laptop be produced and that she reveal the name and contact number of the person who had it. Also included in the letter was the following (Exhibit U-7):

*…*

> *…An internal investigation has now concluded in a report dated August 14, 2009, that you downloaded sensitive taxpayer information on a non-Agency computer.*
>
> *I will be contacting you shortly to ask you to attend a fact finding meeting to review the IAD report in its entirety and to provide you with an opportunity to present your rationale.*

[236] Ms. Lloyd's representative responded to the September 10, 2009, letter and asked for a meeting as soon as possible (Exhibit U-8).

[237] A meeting was agreed to for September 18, 2009 (Exhibit E-32).

[238] Ms. Walker attended the meeting, and three employees from the IAD at headquarters participated via teleconference. Ms. Lloyd was informed about what was found on the CDs, and it was stressed to her how important it was to get the laptop. During that meeting, it was revealed that Ms. Lloyd had viewed the CDs on her personal computer, so she agreed to bring that in plus a letter from the owner (her former boyfriend) of the laptop. She expressed concerns about protecting her privacy and about how the IT Section would remove any copies of the CD contents, if they existed. Ms. Walker replied on September 28, 2009, with the procedures that IT was to follow (Exhibit E-1, Tab 11).

[239] The following day, September 29, 2009, Ms. Lloyd's representative responded to Ms. Walker, stating he would supply a letter from Ms. Lloyd's friend responding to the CRA's concerns about his laptop. However, she would not turn over her personal computer because the employer could not protect her privacy of personal information on its hard drive (Exhibit E-1, Tab 65).

[240] Also on September 29, 2009, Ms. Walker received a letter signed by the owner of the laptop in question. The letter stated in part as follows (Exhibit E-1, Tab 60):

. . .

> *Ms. Lloyd did use a laptop in my possession at that time. At no time did I observe her download taxpayer information. I did not view any information other than a particular email which was subsequently printed by Ms. Lloyd from her own computer and presented into evidence at the hearing. I did not download any information myself as Ms. Lloyd did not give me access to the disks in her possession. I wiped the laptop after her usage so that her email was removed.*

> *Unfortunately, I no longer have access to the laptop she borrowed, so I am unable to provide it to you.*
>
> *I am prepared to swear an affidavit to the events indicated above, if you request.*

. . .

[241] Just to close the loop on this point, Ms. Walker wrote to the owner of the laptop on December 22, 2009, and asked him to come in and sign an affidavit indicating that he did not view or share the taxpayer information that Ms. Lloyd had put on his laptop. He did so on December 30, 2009, and in response to a question from Ms. Walker about the letter he signed on September 29, 2009, Ms. Walker stated that he told her Ms. Lloyd had written the letter and that he had just signed it. Note that he never testified in front of me.

[242] While these events were taking place, it is important to remember that Ms. Lloyd was not at work. As mentioned earlier, she suffered a very serious bike accident on August 7, 2007, and had been unable to return to her job since. She had a number of care providers, including Dr. Jan Carstoniu of the Headache and Pain Management Centre in Toronto.

[243] On September 29, 2009, Dr. Carstoniu wrote to Ms. Lloyd and stated that he agreed with her suggestion that she attempt to return to work. He suggested she start with no more than three or four hours daily, three days per week, and then gradually increase her workload (Exhibit U-10).

[244] Ms. Lloyd then wrote to Ms. Walker on November 3, 2009, stating that she would return to work on a limited basis starting on November 30, 2009 (Exhibit U-11).

[245] Ms. Walker responded by writing the letter of November 6, 2009, suspending Ms. Lloyd ". . . indefinitely without pay pending the completion of a more comprehensive review into these matters" (Exhibit U-12).

[246] Ms. Walker testified that she suspended Ms. Lloyd because she was not comfortable giving Ms. Lloyd more access to taxpayer information and that the IAD had told her that an investigation could be concluded within four months.

[247] Following the suspension letter of November 6, 2009, Ms. Lloyd filed her grievance against it on November 30, 2009.

[248] The employer's first argument is that I was without jurisdiction to determine this grievance because its action had been administrative and therefore was not adjudicable under section 209 of the *PSLRA*.

[249] Section 209 of the *PSLRA* states as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> *(*c*) in the case of an employee in the core public administration,*
>
> *(i) demotion or termination under paragraph 12(1)(*d*) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*
>
> *(ii) deployment under the* Public Service Employment Act *without the employee's consent when consent is required; or*
>
> *(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*
>
> *(2) Before referring an individual grievance related to matters referred to in paragraph (1)(*a*), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*
>
> *(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(*d*).*

[250] *Braun v. Deputy Head (Royal Canadian Mounted Police*), 2010 PSLRB 63, at para 126, states as follows:

> *To be adjudicable, a grievance must deal with the application or interpretation of a collective agreement or an*

> *arbitral award, a major disciplinary action, a demotion, a termination, or a deployment. An employee filing a grievance about a ". . . matter affecting his or her terms and conditions of employment" that does not fall within the parameters of section 209 of the* Act *is not left without recourse, but the adjudication process is not the appropriate forum. The grievor can always seek judicial review before the Federal Court of the employer's decision at the final level of the grievance process.*

[251] In my view, this was an indefinite suspension of a significant period and would constitute a major disciplinary action. It happens in many cases that an indefinite suspension either is cancelled if the investigation finds no wrongdoing or is subsumed by a suspension if wrongdoing is found. In this case, the indefinite suspension was only partially subsumed by another suspension, so I find the remainder was a major disciplinary action over which I have jurisdiction.

[252] The grievance lists a number of issues with respect to its details. I will deal with each one.

[253] Ms. Lloyd stated that she grieved the letter of November 6, 2009.

[254] The letter of November 6, 2009, imposes an unpaid suspension from work, so the first two items in Ms. Lloyd's grievance can be combined. She claimed the unpaid suspension was unwarranted and without cause. I cannot agree.

[255] Protecting taxpayer information has to be one of if not the most important tenets for the CRA. Every taxpayer is entitled to be confident that his or her information will be held in the strictest of confidence. Were it not so, taxpayers could be extremely reluctant to release personal information to the CRA.

[256] The evidence indicates that Ms. Walker was concerned about Ms. Lloyd returning to work given the allegations that she had accessed and removed confidential taxpayer information from the CRA. Until the investigation into those allegations completed, Ms. Walker determined it was appropriate to issue the letter suspending Ms. Lloyd. Once the investigation was completed, a final decision would be made on what, if anything, would be done. The investigation could have exonerated Ms. Lloyd completely, partially or not at all. However, until the investigation ended, the allegations Ms. Lloyd faced were, in my view, simply too serious to allow her to return to the workplace.

[257] The grievance states that the suspension was harassment and that it was imposed in retaliation for the accommodation claim. Ms. Lloyd grieved that the suspension was untimely and that it was used to block her return to work.

[258] Again, in my view, the suspension was not issued in retribution for the accommodation claim. As stated earlier, the suspension was issued because of Ms. Walker's concerns with having Ms. Lloyd in the workplace given the allegations she had removed confidential taxpayer information from the CRA. It was not issued as retribution for the accommodation claim. I can find no evidence to support the claim that the suspension was harassment.

[259] Ms. Lloyd grieved the preliminary results of the IAFPD report. I find that I have no jurisdiction to review this report, as it is not, I believe, within the parameters of section 209 of the *PSLRA*.

[260] I take a similar view with the portion of the grievance that states that Ms. Lloyd was not interviewed as part of the IAFPD process. I have no jurisdiction to decide who should or should not have been interviewed as part of that process.

[261] Ms. Lloyd grieved that no deadline was established for the report to be completed. As stated earlier, I believe I have no jurisdiction over this portion of the grievance, as it falls outside the parameters of section 209 of the *PSLRA*.

[262] Ms. Lloyd grieved that the CRA displayed a willful disregard for her circumstances and that the people responsible for the decision to suspend her acted in bad faith.

[263] The Institute's written argument with respect to this point is, as I understand it, that ". . . there was not a full and fair examination of issues when they were raised by Ms. Lloyd. This is a contravention of natural justice and procedural fairness."

[264] It is important to remember that this particular grievance deals with the November 6, 2009, decision, which predates the final IAFPD report (issued in December 2010; Exhibit E-1, Tab 21). Therefore, at the time this grievance was filed, the issues had not been examined fully; nor could they have been because the investigative process had not yet completed. Therefore, at the time this grievance was filed, it would have been premature to say that there was a wilful disregard for

Ms. Lloyd's circumstances and that those involved acted in bad faith. Such a finding could have been made, I believe, only after the report had been completed.

[265] If I am wrong, after looking at all the reports after the fact, I do not believe that the CRA acted in a manner that displayed a wilful disregard for Ms. Lloyd's circumstances; nor did it act in bad faith. The employer was fully aware that Ms. Lloyd was planning to return to work, which is precisely why it issued the letter of suspension, as it sought to protect taxpayer information. The employer argued that ". . . [the CRA] was motivated by the need to ensure that no further security breaches took place concerning such sensitive information." I agree with that part of the employer's argument and as such can find no evidence of bad faith or wilful disregard for Ms. Lloyd's circumstances.

[266] The grievance alleges violations of the collective agreement, CRA policies and the *CHRA*.

[267] With respect to the *CHRA*, I note that the Institute did not file the required Form 24 with the Commission; nor did it argue as much in its written submission. This is not surprising as the Institute covered it when it dealt with the remaining grievances, and I will address the issue there.

[268] With respect to the alleged violations of CRA policies, I find I am without jurisdiction to decide that issue as that allegation falls, in my view, outside the provisions of section 209 of the *PSLRA*.

[269] The grievance alleges violations of "Article 1.01, 1.02, 37.04, 37.06, 43."

[270] Article 1 of the collective agreement is entitled "Purpose of Agreement," and I could not find evidence to support an allegation that either clause 1.01 or clause 1.02 was violated. (See Exhibit U-1 for copy of the collective agreement.)

[271] Article 37 of the collective agreement is entitled "Standards of Discipline," and clauses 37.04 and 37.06 state as follows:

> ***37.04*** *When an employee is suspended from duty or terminated, the Employer undertakes to notify the employee in writing of the reason for such suspension or termination. The Employer shall endeavour to give such notification at the time of suspension or termination.*

. . .

> ***37.06*** *The Employer agrees not to introduce as evidence in a hearing relating to disciplinary action any document concerning the conduct or performance of an employee the existence of which the employee was not aware at the time of filing or within a reasonable time thereafter.*

[272] The letter of November 6, 2009, was addressed to Ms. Lloyd, and it explained why she was being suspended without pay. It stated in part that preliminary findings indicated that she had compromised the security of CRA property and confidential client information. The letter also stated that the preliminary results of the investigation indicated that she had removed CDs from the workplace containing confidential taxpayer information.

[273] I believe that those statements, together with the remainder of the letter, satisfy the provisions of clause 37.04 of the collective agreement. The suspension was effective November 6, 2009. Therefore, I find that Ms. Lloyd was provided with the reason for the suspension when it was imposed and that no violation of clause 37.04 took place.

[274] Ms. Lloyd alleged that a violation of clause 37.06 of the collective agreement occurred. I am not aware of any document relied upon at the adjudication hearing that Ms. Lloyd was not aware of at the time of filing or within a reasonable time after that. I find no violation of this clause.

[275] Article 43 of the collective agreement is entitled “No Discrimination,” and as stated earlier, no Form 24 was submitted for this grievance. However, this allegation was covered in the other grievances Ms. Lloyd filed and is dealt with later in this decision.

[276] Just to be clear, I cannot find any evidence that the employer discriminated against Ms. Lloyd by issuing the November 6, 2009, letter. In my view, the letter was clearly issued out of the CRA’s concern that its confidential taxpayer information needed to be protected by not allowing Ms. Lloyd to work, which was not discriminatory. It was based on a preliminary finding from an internal investigation, one that needed further review. The decision was based on the CRA’s operational needs and was not based on any of the factors cited in clause 43.01 of the collective agreement.

[277] Based on all the above, the grievance dealing with the indefinite suspension and bearing PSLREB File No. 566-34-3750 is dismissed.

**C. 40-day disciplinary suspension (PSLREB File Nos. 566-34-7716 and 7717)**

[278] On March 17, 2011, the CRA sent Ms. Lloyd a document entitled, “Disciplinary Action Report – March 17, 2011,” which suspended her for 40 days (Exhibit U-23). The suspension was to begin once Ms. Lloyd was medically fit to return to the workplace.

[279] The report states the misconduct and lists any mitigating or aggravating factors, as follows:

> ***Misconduct***
>
> *On February 3, 2006, while on leave you contacted the Regional Helpdesk and requested a copy of your entire H drive. On March 9, 2006 the request was completed and you removed 16 unprotected CD’s [sic] from the workplace which contained thousands of emails with personal and confidential taxpayer information. There was no work-related reason for you to do so.*
>
> *A detailed review of the CDs was completed by the Electronic Network Monitoring System (ENMS) and [sic] concluded that they contained 37488 emails and 776 documents with taxpayer information. The emails spanned from December 2000 to January 3, 2006. The 776 documents contained over 42000 instances of taxpayer information, including names, social insurance numbers, addresses, and financial data.*
>
> *The subsequent Internal Affairs and Fraud Prevention Division (IAFPD) investigation determined that you downloaded the contents of all the CDs onto your friend's laptop, and that you made copies, or had copies made, of at least one of the CDs. You have also acknowledged downloading the CDs onto your personal computer.*
>
> *The IAFPD report concluded that you ‘…*contravened the CRA policy regarding the security and protection of confidential information and failed to uphold the confidentiality provisions of section 241 of the Income Tax Act by removing unencrypted CDs containing taxpayer information belonging to the CRA from the workplace and by copying confidential information onto a non-CRA device. This resulted in an unauthorized disclosure of taxpayer information’.

*Numerous attempts were made by management to retrieve your friend's laptop, and later your personal computer, in order to cleanse any remaining taxpayer information on the hard drive. However your cooperation was not forthcoming until IAFPD involvement in March 2010. Your lack of cooperation frustrated management's attempts to minimize the security threat, and resulted in the continued and ongoing risk of release and disclosure of high volumes of sensitive taxpayer information.*

*The review of the contents of the CDs also revealed an enormous quantity of personal email, making it apparent that you had utilized a multitude of working hours sending and receiving personal emails. The quantity greatly exceeds the limited personal use as defined in the* Code of Ethics and Conduct *under section G:* Electronic network access and use.

*There is no prior disciplinary record.*

***Any mitigating or aggravating factors, and the disciplinary measure***

*Mitigating factors which have been considered are the length of the investigation, the fact that your intent was not to disclose or disseminate taxpayer information, and your clean disciplinary record.*

*Aggravating factors considered include the lack of cooperation and candour you demonstrated in dealing with management on this issue, as well as the seriousness and nature of the misconduct.*

*The confidentiality of client information is paramount to the integrity of our tax system. The CRA takes very seriously its obligation to protect taxpayer information. Our* Code of Ethics and Conduct *speaks to the importance of each employee's contribution to ensuring that our tradition of integrity and professionalism is carried out and enhanced, to reinforce the CRA's commitment to serve the public responsibly, while supporting a work environment in which people are respected. As such your conduct cannot be condoned.*

*Therefore, in accordance with the authority delegated to me under section 51(1) (f) of the* Canada Revenue Agency Act, *you are hereby given a 40-day (300 hour) suspension. The suspension will be served once you are medically fit to return to the workplace. The details and dates of the suspension will be determined at that time. For the duration of the suspension, you will be required to return your Agency identification and access cards, and entry into the employer's*

> *premises will be prohibited without the permission of the Assistant Director of Enforcement.*
>
> . . .
>
> [Emphasis in the original]

[280] On April 11, 2011, Ms. Lloyd filed a grievance concerning the discipline imposed. (I note that the Institute's written submission states that the grievance was filed on March 17, 2011. This was the date on which the Disciplinary Action Report was issued, and the grievance on file with the new Board is dated April 11, 2011).

[281] In addition to grieving the suspension, Ms. Lloyd alleged that the employer retaliated against her and that it contravened several of its policies, the *CHRA* and clause 42.01 of the collective agreement.

[282] I note that the Institute did file a Form 24 with the Commission concerning PSLREB File Nos. 566-34-7716 and 7717 and that the Commission chose not to make submissions but that it wished to receive a copy of the decision once it was rendered.

[283] Ms. Lloyd requested that the suspension be rescinded or at least reduced, that she be made whole, including all salaries and benefits and pension lost, and that she receive general and aggravated damages.

**1. <u>Background</u>**

[284] In October 2008, Ms. Lloyd attended an adjudication hearing concerning an accommodation issue about her employment with the CRA. During that hearing, she was made aware that the employer was disputing the existence of an email she allegedly wrote to her supervisor, Mr. Prince. Her representative advised her to have a copy of the email available for production at the hearing. Obtaining that email ultimately resulted in the 40-day suspension.

[285] Ms. Lloyd began her employment with the CRA in September 1997, and in December 2000, she assumed a position in the SEP. Shortly after that, she moved to a position in the CIP, which involved working on files that contained potential tax frauds.

[286] In 2007, Ms. Lloyd had a very serious biking accident, and she was off work for an extended period. She testified that she was cleared to return to work on

September 29, 2009. I mention this to clearly show that due to her accident, she was not at work at the time of the 2008 accommodation adjudication hearing.

[287] Ms. Lloyd was also off work from June to October 2006 on long-term disability. During this period, she and her representative prepared for the accommodation hearing. Ms. Lloyd stated that one of the central issues in that hearing was whether she had sent an email to Mr. Prince about her accommodation needs.

[288] It appears that on June 30, 2005, Ms. Lloyd sent Mr. Prince an email detailing her fibromyalgia illness and its treatment (Exhibit U-3). In preparing for the 2008 adjudication hearing, Ms. Lloyd's representative learned that the employer would dispute the fact that that email was ever sent, so the representative informed Ms. Lloyd that they would need to prove its existence.

[289] As Ms. Lloyd was not at work while she prepared for her 2008 adjudication hearing due to her illness, she telephoned her supervisor, Mr. Horbatiuk, and told him she needed some personal information from her computer. She was told to call the IT Section and to get a "ticket number," which she did.

[290] Ms. Lloyd said she met with Mr. Balgobin and told him that she wanted only copies of her personal folders from her computer. He told Ms. Lloyd to bring in her own disc, as it was her personal information. Ms. Lloyd brought in two CDs and gave them to him.

[291] Ms. Lloyd testified in front of me that Mr. Balgobin instructed her to upload all her information from her desktop to a network drive so he could access it to do the work. She was told it would take all day to transfer the files; as she was supposed to be on sick leave, she could not remain there all day. She testified she told Mr. Horbatiuk that someone from the IT Section would be there all day and would need all her information but that she could not remain at work. She left with the understanding that someone from the IT Section would call her when the work was done.

[292] Mr. Balgobin testified as to what Ms. Lloyd asked of him. He stated that he was asked to burn a copy of her H drive to CD, which is her personal drive on her work computer. He also testified that if her request had been for something small and specific, it would have been noted on the work ticket, and that he would have done that work. The work ticket (Exhibit E-8) reads in part as follows: "User provided 2 CDs

to burn H Drive. However, her H Drive is 9 GB in size. Called and left user a VM, stating that further organization is needed, as well as more CDs." Mr. Balgobin testified that he took those actions.

[293] On March 9, 2006, Mr. Balgobin handed over a number of CDs to Ms. Lloyd at the work site. She said there were 16 CDs in total, and she left with them.

[294] Ms. Lloyd testified that she had some concerns about receiving all that information but since she had spoken to her manager and IT about it, she felt that it must have been okay for her to have the information.

[295] Ms. Lloyd testified she took the CDs home and placed them in a special locked cabinet that the CRA had provided and approved.

[296] As the 2008 adjudication hearing date was approaching, Ms. Lloyd's representative asked her to be prepared to prove the existence of the June 30, 2005 email. When this request was made of her, Ms. Lloyd testified that her personal computer at her home was not working, so her then-boyfriend offered his laptop to burn a copy of the CD. Ms. Lloyd said she then viewed the emails, found the one in dispute, copied it to the desktop of the computer she was using, took the CD out and told her friend that she needed two copies of it.

[297] When the 2008 adjudication hearing took place, the issue of whether the June 30, 2005, email was actually sent did in fact arise. Ms. Lloyd was prepared for this and produced a printout showing the existence of the email. The employer's counsel objected to the printout, and Ms. Lloyd then provided the original disc that contained the email. The disc was given to an articling student who was assisting counsel, and the articling student loaded it into her laptop. At that juncture, Ms. Lloyd testified to me that she stated she was advising "everyone the CD contained taxpayer information on it, as it was now leaving [her] control."

[298] Following a discussion at the 2008 adjudication hearing, Ms. Lloyd handed over the remaining CDs to the CRA representative.

[299] The CRA representative informed the articling student that her laptop would have to be taken back to the CRA to have its hard drive wiped. Ms. Lloyd then asked the representative if the same process would have to be done to her friend's laptop.

Ms. Lloyd was told that if she had done the same thing as the articling student had just done, then the laptop would have to be brought in, and on the next day.

[300] Ms. Lloyd spoke to her friend. He told her the CD had not been copied onto his laptop and that just a copy of it had been made. Based on this, Ms. Lloyd felt no need to bring the laptop in, and she heard nothing further on this subject until she received a letter from the CRA dated January 20, 2009 (Exhibit U-4). The letter references an earlier email, but Ms. Lloyd testified that the January 20, 2009, letter was the first time she heard about the laptop issue following the 2008 adjudication hearing.

[301] The letter asked Ms. Lloyd to arrange to bring the laptop into the office within seven days of the letter's date. It was signed by the then-director of the Toronto Centre TSO, Ms. Todesco.

[302] Ms. Lloyd testified that the laptop belonged to her ex-boyfriend, who had attended the 2008 adjudication hearing. When she received the January 20, 2009, letter, she was no longer in a relationship with him. He had told her the laptop belonged to his employer and that he did not want to retrieve it.

[303] Ms. Lloyd responded to the letter on January 30, 2009, stating in part as follows: "[P]lease be advised that I am not at liberty to provide you with anyone else's laptop" (Exhibit U-5).

[304] Ms. Lloyd received no further correspondence about the laptop until June 4, 2009, when she received a letter from Ms. Delonghi, Interim Director, Toronto Centre TSO (Exhibit U-6). The letter requested the name and contact information of the laptop's owner so that the CRA could contact him directly, but Ms. Lloyd did not reply.

[305] On September 10, 2009, Ms. Walker, who was Interim Director, Toronto Centre TSO, wrote to Ms. Lloyd about two issues (Exhibit U-7). The letter states in part as follows:

. . .

> *I am writing to you today to advise you of the seriousness of this situation and the necessity to obtain access to the laptop to ensure that no electronic imprint remains on the hard drive or elsewhere in the computer unit. As you are aware, it is the Agency's legal responsibility to secure and protect personal and confidential taxpayer information under*

> *section 241 of the* Income Tax Act*. CRA employees are also bound by the confidentiality provisions of section 241 of the* Income Tax Act*. Subsection 239(2.2) of the* Income Tax Act *provides that every person who contravenes subsection 241(1) is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months, or both.*
>
> *I am directing you to choose one of two options. Specifically that you are to provide access to the laptop in question, and/or the name and contact number of the person who has the laptop. A CRA Information Technology specialist must review the information stored on the laptop and ensure that no classified and/or protected information remains on the unprotected hard drive.*
>
> *My expectation is that you will contact me either by phone at . . . or via my e-mail address at . . . no later than September 17, 2009, so I can make the necessary arrangements. Failure to hear from you by this time will require us to seek legal avenues including referring the matter to the RCMP to investigate whether or not charges should be laid against you pursuant to subsection 239(2.2) of the* Income Tax Act *for violation of the confidentiality provisions of* section 241 *of the same* Act*.*
>
> *The second issue relates to your failure to abide by the confidentiality provisions of the* Code of Ethics and Conduct *as well as the provisions of Chapter 9 –* Procedures for Protecting Classified and Protected Information and Assets Outside the Workplace*, Security Volume, Finance and Administration Manual. An interim investigation has now concluded in a report dated August 14, 2009, that you downloaded sensitive taxpayer information on a non-agency computer.*
>
> *I will be contacting you shortly to ask you to attend a fact finding meeting to review the IAD report in its entirety and to provide you with an opportunity to present your rationale. I would strongly recommend that you bring your union representative to support you at this meeting.*

. . .

[306] Ms. Lloyd testified that it was news to her that the IAD was involved, as she had not been made aware of that before receiving the letter of September 10, 2009.

[307] Ms. Lloyd and her representative requested a meeting with the employer (Exhibit U-8), and one was held on September 18, 2009. At the meeting, Ms. Lloyd was told the CRA wanted her personal computer from her home so that it could verify if

taxpayer information was on it. The CRA also wanted her friend's laptop. She replied that she would deliver a signed letter about the laptop but that she had privacy concerns about releasing her personal computer. She assured the CRA that no taxpayer information was on it. She was told that procedures would be developed to ensure her privacy was protected. They were provided to her on September 28, 2009, and the following day, Ms. Lloyd's representative wrote that a letter from the laptop owner would be provided. (It was, on September 29, 2009; Exhibit E-1, Tab 60.) The representative also wrote that Ms. Lloyd would not turn over her personal computer because the CRA ". . . cannot protect the privacy of personal information contained on the hard drives" (Exhibit E-1, Tab 65).

[308] Ms. Lloyd testified that six months later, an IAD investigator put procedures in place that she found would satisfactorily ensure that her privacy would be protected. She then handed over her personal computer, and a search of it was carried out. No taxpayer information was found on it.

[309] As stated earlier, Ms. Lloyd attempted to return to work part-time in November 2009, and was then suspended "… indefinitely without pay pending the completion of a more comprehensive review into these matters" (letter from Ms. Walker to Ms. Lloyd, Exhibit U-12).

[310] This "more comprehensive review" was, in fact, an IAFPD investigation, conducted by Ms. Rodriguez. She was given the assignment ". . . [t]o determine the circumstances surrounding what appeared to be unauthorized disclosure of taxpayer information by Mary Lloyd, Investigator, Enforcement Division, Toronto Centre Tax Services Office" as well as ". . . [t]o determine whether the Information Technology Regional Services followed the established protocol when copying the content of the [*sic*] Mary Lloyd's personal drive to compact discks" (Exhibit E-1, Tab 21, page 6).

[311] Ms. Rodriguez testified she received the assignment in December 2009 and that she issued the report in December 2010 (Exhibit E-1, Tab 21).

[312] Ms. Rodriguez has an IT background. She holds several certificates in computer and investigative techniques. She has had training with the RCMP and the Ottawa Police on forensic issues with respect to hard drives, and IT is her area of expertise. She has conducted hundreds of investigations, most involving IT issues.

[313] Ms. Rodriguez was aware of the preliminary investigation dated August 14, 2009 (Exhibit E-1, Tab 8) and was aware no one had been interviewed, so she prepared a list of people to interview and the questions she would ask them.

[314] Ms. Rodriguez interviewed four people (Ms. Lloyd, her former boyfriend, Mr. Balgobin and Ms. O'Brien), and she then wrote her report (Exhibit E-1, Tab 21).

[315] The process to issue the report took just over one year. It has a release date of December 22, 2010.

[316] During the interview process, Ms. Rodriguez learned that the 16 CDs were all labelled according to the time frames of the information they contained. Ms. Lloyd labelled them, which was never disputed.

[317] Ms. Rodriguez testified that in order to view what is on a CD, it must be copied to the hard drive of the computer being used in order for the applicable software program to display its contents. There was much discussion at the adjudication hearing as to whether or not the CDs were actually copied to the laptop or simply read on the laptop. Ms. Rodriguez was adamant, in both examination-in-chief and cross-examination, that the only way to read a CD is to first copy it to the hard drive in order that its contents could be displayed. In the end, I do not find anything significant turns on this point, and I will elaborate further in my decision.

[318] Ms. Rodriguez explained the delay issuing the report was caused by a series of personnel changes in the IAD. Each report needs a peer review before it can be released, and no one was available to peer review it.

[319] When the report was released in December 2010, it contained the following conclusion about Ms. Lloyd (Exhibit E-1, Tab 21, page 27):

. . .

> *The information gathered during this investigation determined that Mary Lloyd, Investigator, Enforcement Division, Toronto Centre Tax Services Office, contravened CRA policy regarding the security and protection of confidential information and failed to uphold the confidentiality provisions of section 241 of the* Income Tax Act *by removing unencrypted CDs containing taxpayer information belonging to CRA from the workplace and by copying confidential information onto a non-CRA device.*

> *This resulted in an unauthorized disclosure of taxpayer information.*

. . .

[320] In January 2010, when Ms. Rodriguez' investigation was just getting underway, Ms. Todesco returned to her position as the director, Toronto Centre TSO. She remained in that position until January 2011, which was just after the investigation report was released.

[321] At several times in 2010, Ms. Lloyd or her representative asked Ms. Todesco about the status of the investigation. Ms. Lloyd made one such inquiry on June 10, 2010, via email (Exhibit U-17), and Ms. Todesco replied, stating in part as follows: "I realize that the IAD results are taking a lengthy period of time, however investigations of this kind can be quite onerous and complex" (Exhibit U-17).

[322] Ms. Lloyd's representative replied to this email on June 28, 2010, expressing disappointment and asking that Ms. Lloyd be reinstated (Exhibit U-18). Ms. Todesco replied on July 8, 2010, declining to reinstate her and stating as follows: "It is anticipated that the IAD Report will be finalized before the end of the summer" (Exhibit U-19).

[323] Another email, sent by Ms. Todesco on December 1, 2010, stated as follows: "In my email to you of November 9th I advised that I anticipated that the IAD Report would be finalized before the end of November. That has not occurred and I regret that I am unable to confirm an exact timeframe [*sic*] for receipt of the report at this time" (Exhibit U-20).

[324] Ms. Todesco testified that the reason she chose not to reinstate Ms. Lloyd included the fact that the IAD initially told her the report would be out by the end of the summer, then said it would be out by the end of November. She was continually under the impression that the report would be released very shortly. (See Exhibit E-23 for some of the reasons.)

[325] In addition, Ms. Todesco was aware that Ms. Lloyd continued to receive disability benefits, which, Ms. Todesco stated, were 70 to 80 percent of her salary, so the burden of the suspension was mitigated, in Ms. Todesco's view.

[326] The other reason she did not reinstate Ms. Lloyd was that she would have had access to taxpayer information in the workplace, and protecting this information was vital to Ms. Todesco.

[327] In December 2010, the IAD report was released. Ms. Todesco had moved to another position, and Ms. Delonghi had become Director of the Toronto Centre TSO. The decision to suspend Ms. Lloyd for 40 days was made by Ms. Delonghi, although the Disciplinary Action Report (Exhibit E-1, Tab 22) was signed by Mr. Prince. Ms. Delonghi explained that Mr. Prince was Ms. Lloyd's manager and that it was a common CRA practice to have the manager sign and deliver a disciplinary notice.

[328] Ms. Delonghi considered a number of factors when deciding on a 40-day suspension. One was the significant amount of taxpayer information found on the CDs. The IAD report indicated that the CDs in Ms. Lloyd's possession had 776 documents on them, containing the following (Exhibit E-1, Tab 21, page 25):

> *. . . over 42000 instances of taxpayer information, including names, social insurance numbers, addresses and financial data*
>
> *… a detailed review was conducted on the CD containing the June 30, 2005, email, which revealed at least 2660 instances of unique taxpayer names and social insurance numbers….*

[329] In cross-examination, Ms. Delonghi was asked if she was aware that much of the information on the CDs was in fact in duplicate and that the number of unique cases was not as great as it was made out to be. She responded that the reference to 2660 instances in the CD containing the June 30, 2005, email concerned all unique instances. There were no duplications in those numbers, and they are solid numbers, containing names, addresses and social insurance numbers. The reference to 42 000 instances contains some duplication.

[330] Another factor Ms. Delonghi considered was the fact that Ms. Lloyd had made copies of the taxpayer information.

[331] Ms. Delonghi also considered the fact that Ms. Lloyd had removed unprotected CDs from the workplace containing taxpayer information, directed someone to copy the CDs and downloaded them to a non-CRA device.

[332] In cross-examination, Ms. Delonghi was asked if encryption was possible in 2006, when Ms. Lloyd received the CDs from IT. Ms. Delonghi thought it was, but was not sure. With respect to the issue of downloading the CDs, her understanding was that to make copies of a CD, you first have to download the information to the hard drive.

[333] Another consideration in imposing the discipline was the fact that Ms. Lloyd did not attempt to limit the amount of information that she removed from the workplace. In Ms. Delonghi's opinion, an inordinate amount of taxpayer information was removed.

[334] Ms. Delonghi was asked if she was aware there was a difference of opinion as to what Ms. Lloyd had actually requested be copied. She said she was aware that the IAD report stated that Ms. Lloyd's position was that "she pointed out to IT the items she wanted copied" (Exhibit E-1, Tab 21, page 13), but Ms. Delonghi's position was that the ticket showed the request was to "burn H: Drive" (Exhibit E-1, Tab 21, page 8). Furthermore, the report stated the following: "[T]here was no way he would have spent an entire week sorting mail and burning all those CDs if all Mary Lloyd wanted was a few folders from her mailbox. It would have been extra work for no reason" (Exhibit E-1, Tab 21, page 17). Ms. Delonghi said that based on her experience with IT, IT would not have made copies if it did not need to, so she preferred Mr. Balgobin's version of what was requested over that of Ms. Lloyd.

[335] Another consideration that led Ms. Delonghi to issue the 40-day suspension was the fact Ms. Lloyd was a criminal investigator and that she had investigated such issues before. In addition, she displayed a lack of candour and cooperation in returning the laptop.

[336] With respect to the lack of candour, Ms. Delonghi was asked if she was aware that Ms. Lloyd volunteered that the CDs contained taxpayer information, but Ms. Delonghi did not recall it.

[337] With respect to the laptop, Ms. Delonghi was aware that Ms. Lloyd did not actually possess her friend's laptop, and she was aware that Ms. Lloyd did not turn her personal computer over due to privacy concerns.

[338] Another consideration for Ms. Delonghi was the lack of remorse shown by Ms. Lloyd. While Ms. Lloyd's representative apologized on her behalf, she never did.

[339] Ms. Delonghi considered the fact that Ms. Lloyd had been employed since 1997 with a clean record. She also considered how long it took to complete the IAD report. Also considered were the mitigating factors brought up by Ms. Lloyd's representative. The range of discipline went from a 30-day suspension to terminating Ms. Lloyd's employment, and Ms. Delonghi felt that a 40-day suspension was appropriate, given all the facts.

[340] Ms. Delonghi was asked to comment on a section in the Disciplinary Action Report that reads as follows (Exhibit E-1, Tab 22):

. . .

> *The confidentiality of client information is paramount to the integrity of our tax system. The CRA takes very seriously its obligation to protect taxpayer information. Our* Code of Ethics and Conduct *speaks to the importance of each employee's contribution to ensuring that our tradition of integrity and professionalism is carried out and enhanced, to reinforce the CRA's commitment to serve the public responsibly, while supporting a work environment in which people are respected. As such your conduct cannot be condoned.*

. . .

[341] Ms. Delonghi testified that the public's trust is of paramount importance to the CRA. The expectation is that taxpayer information will be treated the same way as the CRA would treat its own information. Taxpayer information is treated with great care, and employees are spoken to continually about this issue. In addition, employees must make an annual affirmation stating that they have read the CRA's policies.

[342] With respect to the section in the Disciplinary Action Report that states as follows (Exhibit E-1, Tab 22):

. . .

> *Therefore, in accordance with the authority delegated to me under section 51(1) (f) of the* Canada Revenue Agency Act, *you are hereby given a 40-day (300 hour) suspension. The suspension will be served once you are medically fit to return to the workplace. The details and dates of the suspension will be determined at that time. For the duration of the suspension, you will be required to return your Agency identification and access cards, and entry into the employer's*

> *premises will be prohibited without the permission of the Assistant Director of Enforcement.*

. . .

Ms. Delonghi explained that although Ms. Lloyd was on disability at the time the Disciplinary Action Report was issued, a gradual return to work was being developed. She felt it was not equitable for Ms. Lloyd to serve the suspension without the benefit of collecting disability insurance. Additionally, it was felt that if Ms. Lloyd served the suspension immediately after she returned to work, it would negatively impact the success of that return.

[343] In addition, Ms. Delonghi shortened Ms. Lloyd's suspension without pay to September 2010. She had the remaining time converted to sick leave without pay in order for Ms. Lloyd to receive a refund of health premiums and buy back pensionable service. It was shortened to September 2010 because that was the time the IAD report was first expected.

[344] The discipline was imposed because, as stated in the Discipline Notice, Ms. Lloyd removed ". . . unencrypted CDs containing taxpayer information belonging to the CRA from the workplace and by copying confidential information onto a non-CRA device" (Exhibit E-1, Tab 22). This action, as the IAFPD report concluded, ". . . contravened the CRA policy regarding the security and protection of confidential information and failed to uphold the confidentiality provisions of section 241 of the *Income Tax Act*" (Exhibit E-1, Tab 22).

[345] There can be no dispute that Ms. Lloyd removed confidential taxpayer information from her workplace. In fact, she revealed that the CDs she possessed at the 2008 adjudication hearing contained protected taxpayer information. She stated she had the CDs because she needed a copy of an email that was on her H drive, and she asked Mr. Balgobin to make her that copy. Mr. Balgobin said he was asked to copy the H drive, which contained not only the email in question but also thousands of taxpayer information records.

[346] When Ms. Lloyd requested a copy of the information, she gave Mr. Balgobin two CDs. The email in question was to be copied to one CD, and presumably, the other CD was to be a second copy. When Mr. Balgobin informed Ms. Lloyd via a voice message that he needed more CDs to make the copies, it should have raised alarm bells with

her. All she needed was a copy of one email, which would easily have fit on one CD. So why did Mr. Balgobin require more CDs when Ms. Lloyd had already provided him with two? There is no evidence that Ms. Lloyd called him back to ask why more CDs were needed. The first stop sign that Ms. Lloyd faced was missed!

[347] Ms. Lloyd then met with Mr. Balgobin and received a large number of CDs. (The evidence was that it was anywhere from 16 to 20 CDs). This was another opportunity for Ms. Lloyd to question why she was receiving all that information when all she required was one copy of one email. She failed to stop and ask this question. This was the second stop sign that she missed!

[348] An argument was submitted that Ms. Lloyd had asked only for a copy of the email but that she was told the entire H drive had to be copied. Mr. Balgobin said he would not have done all that work had he not been asked to. I was asked to prefer his testimony to Ms. Lloyd's, but in the end, I do not think this point is relevant.

[349] Ms. Lloyd brought in two CDs to obtain the information and was then given 16 to 20 CDs. She knew she needed only one email, so receiving all those CDs should have stopped her in her tracks. In addition, the H drive was hers, and she obviously knew what was on it. The moment she walked away from the workplace was the moment she should have known she had protected taxpayer information with her, and she should have stopped in her tracks. Another stop sign missed!

[350] It was not argued that Ms. Lloyd was unaware that confidential taxpayer information could not be removed from the workplace. Indeed, she identified the fact that the CD she introduced at the 2008 adjudication hearing contained not just the email in question but also confidential taxpayer information.

[351] The CDs in Ms. Lloyd's possession were labelled, and she stated that it was in her handwriting. She said she had to view the CDs to determine which one contained the email in question and then had to label it for ease of reference at the 2008 adjudication hearing.

[352] Ms. Lloyd admitted to loading the CDs onto her then-boyfriend's laptop so copies could be made. Much testimony was heard on whether or not the CDs could be read without downloading them to the computer first. Ms. Rodriguez testified the only way to read a CD was first to download it, and Ms. Lloyd said the CD was only copied,

not downloaded. In the end I find nothing turns on the answer. Whether or not they were downloaded, thus leaving a copy on the computer is, I believe, a technical matter that does not impact my decision. The fact of the matter is that Ms. Lloyd knowingly had the CDs inserted into a non-CRA device and had copies made.

[353] In some ways, viewing and copying the CDs on and to a non-CRA device without knowing whether traces of their information would be left behind is worse than knowing that trace evidence would be left. At least if one is aware that trace evidence exists, then security steps can be taken to remove it all. If one does not know or realize that trace evidence could exist, then one would not know to take the necessary steps to ensure it is completely erased.

[354] To Ms. Lloyd's credit, she stated that she kept the CDs in a locked CRA-approved cabinet, and no evidence exists to suggest otherwise. She obviously knew the CDs contained confidential taxpayer information, which was considerably more information than she needed for her 2008 adjudication hearing. Why did she not call the CRA and inform it that she had more information than required, including confidential taxpayer information? She chose to remain silent, thus going through another stop sign.

[355] The Institute submitted the *McGoldrick v. Treasury Board (Revenue Canada - Customs and Excise*), PSSRB File No. 166-02-25796 (19941003), decision as support for reducing the penalty, given the several mitigating factors.

[356] I note that in *McGoldrick*, the grievor in that case had his employment terminated because he had revealed confidential information to unauthorized persons. The adjudicator reduced the penalty to a more than 10-month suspension.

[357] There was no evidence that Ms. Lloyd revealed the confidential taxpayer information to anyone. However, I believe there is a very large difference between a 10-month and a 40-day suspension. The mitigating factors cited in *McGoldrick*, such as a satisfactory work record, no previous discipline and the fact that the grievor in that case did not stand to benefit from his actions, were all factors the employer considered with respect to Ms. Lloyd in arriving at a 40-day suspension in Ms. Lloyd's case.

[358] In *Labrie v. Treasury Board (Health Canada)*, PSSRB File No. 166-02-26301 (19950918), a 20-day suspension was reduced to 3 days, but in that case, the grievor had the tacit support of his supervisor for his actions, something not in evidence in this case.

[359] In *Bastie v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-22285 (19930909), a 10-day suspension, imposed because the grievor in that case misrepresented himself, was reduced to 5 days. Ms. Lloyd never misrepresented herself, and the mitigating factors in *Bastie* (a clear record and no personal gain) were again considered in her case.

[360] I find that the evidence clearly supports the employer's reasons for imposing discipline and that it considered all mitigating factors. In fact, the evidence supports the claim that, but for these mitigating factors, Ms. Lloyd's employment would have been terminated.

[361] Thomas Jefferson, the third president of the United States, said the following: "Whenever you are to do a thing, though it can never be known but to yourself, ask yourself how you would act were all the world looking at you and act accordingly." (Taken from Peggy Anderson, *Great Quotes from Great Leaders*, 1990.)

[362] Ms. Lloyd might have thought that no one would know, but she had to know that what she was doing was wrong. She also had many stop signs placed in her path that, in my opinion, she ignored.

[363] As I said earlier in this decision, the protection of taxpayer information by CRA employees, no matter what level of employee they may be, must be of paramount importance, and applies to the entire organization. Removing taxpayer information from the work site without a specific need and without <u>very</u> explicit approval is, I believe, an action not to be condoned.

[364] In light of all of this, in my view, the discipline imposed was appropriate, and I see no need to modify the 40-day suspension., and PSLREB File Nos. 566-34-7716 and 7717 are dismissed.

**D. PLM without consent and discrimination (PSLREB File No. 566-34-7718)**

[365] On February 8, 2012, Ms. Lloyd filed a grievance claiming that both the collective agreement and the *CHRA* were violated. The grievance reads as follows (Exhibit U-27):

> *Grievance*
> *I grieve that I was not allowed to return to my former position in CIP (Investigations).*
> *I grieve that I am now being removed without consent from the SEP position I was told I had to return to.*
> *I grieve that I have been forced to move, without proper forethought, to audit, an area I last worked in twelve years ago as a PM.*
> *I grieve that my forced move has made me a public spectacle in the workplace.*
> *I grieve that my restrictions (physical and cognitive) have not been properly considered, before I was told that I had to move to the audit area.*
> *I grieve that there is an extra burden being placed on me to have 2 supervisors and do SEP work in an audit area.*
> *I grieve that making me move to 2 different new jobs in the span of 6 months, after returning to work from an injury, is disciplinary.*
> *I grieve that the employer has contravened Article 43 of the Collective Agreement and any other related articles.*
> *I grieve that the employer has discriminated against me under the Canadian Human Rights Act on the grounds of mental and physical disability.*
>
> *Corrective Action:*
> *I be returned immediately to the Investigations floor and the job of SEP, while awaiting the outcome of the grievance and PSLRB hearing on the question as to whether I be returned to CIP.*
> *I be returned immediately to CIP.*
> *I be compensated for general damages and pain and suffering in order to compensate for this treatment and the contravention of the Canadian Human Rights Act.*

[366] The Commission was notified about the reference to adjudication but chose not to make submissions. Instead, it requested a copy of the new Board's decision once it was rendered.

**1. <u>Background</u>**

[367] In August 2007, Ms. Lloyd had a very serious biking accident that necessitated an extensive recovery period. One of the individuals providing her care was Dr. Jan Carstoniu, who co-founded a clinic in 1995 treating people with chronic pain.

[368] Dr. Carstoniu testified that he met Ms. Lloyd in September 2009 and that she expressed an interest in returning to work. He agreed with a gradual return-to-work program, which he confirmed to Ms. Lloyd on September 29, 2009, stating in part as follows (Exhibit U-10):

. . .

> *Since your involvement in a motor vehicle accident on August 7, 2007 you have been unable to return to your job as a result of the injuries sustained affecting the head, jaw, neck and back that led to intolerable chronic pain, cognitive dysfunction, a sleep disorder, depression and anxiety.*
>
> *You have engaged in multidisciplinary treatment involving pharmacological, physical, psychological and surgical therapies for about the past two years. During this time you have consistently stated your determination to return to work.*
>
> *During our meeting on September 17, 2009 you told me that you felt ready for a return to your former occupation and asked for my opinion. I agreed. In fact, at this stage I feel that it would be a positive move from a therapeutic standpoint for you to once again engage in a job that you find meaningful and personally rewarding.*
>
> *However, your symptoms have not resolved completely and unfortunately it is unlikely that you will ever become completely pain free. It is likely that a return to work will cause some aggravation of some symptoms but you have demonstrated your awareness of this possibility and we have agreed that the potential benefits of returning to work far outweigh the potential risks. You have already demonstrated good coping skills and are in fact used to having pain that fluctuates in severity.*
>
> *The duration of your absence from work and the seriousness of your injuries are strong indications for a graduated return to work. I suggest that you start with no more than 3-4 hours daily for three days a week and increase your work load gradually after that. Although it is difficult to predict with any accuracy an exact date for return to full-time work, I*

> *believe that a reasonable goal would be for you to be working full hours within three months of returning to your job.*
>
> . . .

[369] Ms. Lloyd testified she submitted this letter to Ms. Walker who, in September 2009, was the director of the Toronto Centre TSO.

[370] Ms. Lloyd asked for a job description and a functional abilities assessment form for Dr. Carstoniu to complete and return to the CRA. Ms. Lloyd heard nothing further from the CRA, so on November 3, 2009, she sent Ms. Walker an email, advising her that she would return to work part-time starting on November 30, 2009 (Exhibit U-11).

[371] After Ms. Walker received the email, Ms. Lloyd was suspended indefinitely (Exhibit U-12).

[372] The letter of suspension also referenced Ms. Lloyd's return-to-work plan, stating in part as follows (Exhibit U-12):

> . . .
>
> *I have reviewed the medical note you provided to me pertaining to your fitness to return to work. I am pleased to hear that your health has improved sufficiently to allow you to contemplate a return to work. I am cognizant, however, that additional information is required to clarify any restriction and/or accommodation needs that may be required to facilitate and implement a graduated return to work.*
>
> . . .
>
> *While a return to work is not possible at this time, I assure you that Management is amendable to working with you and your physician to put in place an Individual Accommodation Plan in accordance with the Agency's Illness and Injury Policy, as deemed appropriate after our review into your conduct has been concluded. Should you wish to initiate a further exchange of information between Management and your physician to facilitate the preparation of the Individual Accommodation Plan at this time, I would be prepared to do so. Alternatively, if you choose to defer this step until such time as our investigation is concluded, I would also agree to your request. Please notify me with respect to which option you wish to pursue in this regard.*
>
> . . .

[373] Ms. Lloyd testified that the job she was to return to was in the CIP.

[374] On December 7, 2009, Toronto Rehab, Ramsay Centre, with which Ms. Lloyd wasconsulting, sent a letter to the CRA asking for a meeting to discuss her return-to-work accommodation plan (Exhibit U-14). The letter also states in part as follows:

. . .

> *As you know, from previous correspondence and documentation, Ms. Lloyd completed therapy in the Acquired Brain Injury Outpatient Program at Toronto Rehab, Ramsay Centre on November 25, 2009. Also noted on previous documentation, based on our assessment and observations, we feel that Ms. Lloyd has rehabilitated from her brain injury, such that she is now ready to resume work, albeit gradually and with certain reasonable, accommodations in place.*
>
> *To facilitate Ms. Lloyd's return to work we have attached a preliminary list of accommodations that will maximize her performance at work. Usually a job site assessment and meeting with the employee and manager precedes this list of accommodations, however, since CRA has not accepted our offer for these services, a list of preliminary accommodations is attached, based on our findings and resources.*

. . .

[375] Attached to the letter were accommodation recommendations for Ms. Lloyd so that she could perform her job.

[376] On February 19, 2010, Ms. Lloyd signed off on an "Individual Accommodation Plan" encompassing the accommodation recommendations attached to the December 7, 2009, letter (Exhibit U-15). Ms. Lloyd was to ". . . assume the duties of a CIP Investigator . . ." and it was to be a graduated return to work. This was then sent to the CRA for final approval.

[377] This plan was presented to Ms. Lloyd at a meeting held on February 5, 2010, attended by the then-director, Ms. Todesco. In her testimony, Ms. Todesco said she offered two accommodation plans to Ms. Lloyd. The first was for a position in the SEP with a gradual reintegration to the CIP position. Ms. Lloyd and her representative objected to this proposal, as they wanted a return to the CIP position, which was the second plan and both plans were presented to Ms. Lloyd (Exhibit E-1, Tab 37). As stated earlier, Ms. Lloyd signed off on the return to the CIP position.

[378] Ms. Lloyd was still under the administrative suspension (cited earlier) when the accommodation plan was signed. Ms. Todesco decided not to implement the accommodation plan and reinstate Ms. Lloyd because, in part, she was of the view that the IAD report would be out by the end of the summer. In addition, she was aware that Ms. Lloyd was continuing to receive disability benefits, which were 70 to 80 percent of her salary, so the administrative suspension was being mitigated. In addition, protecting taxpayer information was of paramount concern to Ms. Todesco. As was stated earlier, the IAD report was not released until December 2010.

[379] Ms. Todesco also testified that Ms. Lloyd's security clearance expired in the summer of 2010, so she spoke to Mr. Prince about it and asked that it be renewed. While an employee can be returned to work while awaiting a security clearance if his or her director approves it, Ms. Todesco does not allow it.

[380] Ms. Lloyd completed the security form in March 2011, and Mr. Prince wrote to her and her representative on May 11, 2011, stating in part as follows (Exhibit E-1, Tab 33):

. . .

> *Please be advised that we have received documents from Sun Life concerning Mary's Gradual Return to Work. I will be reviewing the plan in consultation with Human Resources and will be in touch with you on it shortly, however [sic] can advise that I do not see any medical issue preventing Mary's return to work.*
>
> *At this point, the only delay in returning to work is Mary's security clearance which remains outstanding. . . .*

. . .

[381] Mr. Prince then wrote to Ms. Lloyd on May 20, 2011, stating in part as follows: "I have had an opportunity to review the Return to work plan with HR, and do not foresee any difficulty with implementing accommodation needs…" (Exhibit U-25).

[382] However, further on in the letter, Mr. Prince informed Ms. Lloyd that she would not return to a CIP position but instead would be assigned work from SEP on an interim basis.

[383] Ms. Lloyd testified that this was the first time the employer had raised the *McNeil* decision. Ms. Lloyd's representative sent a reply to Mr. Prince's letter on May 21, 2011, stating in part as follows (Exhibit U-25):

. . .

> *Our position is that Mary Lloyd, as with any other CRA employee ,[sic] is entitled to work while her security clearance is renewed. She should therefore begin work immediately on her return to work plan which has been approved by all parties. Anything less would constitute discrimination under the* CHRA *on the grounds of failure to accommodate.*

. . .

[384] Ms. Lloyd agreed to return to work in the SEP position pending the outcome of discussions about the *McNeil* decision. She returned in June 2011, and the gradual return to work was to continue until September 2011, when it was to be reviewed.

[385] Ms. Delonghi was the director of the Toronto Centre TSO in 2011. She testified that it was her decision to have Ms. Lloyd return to work in the SEP position. That position was classified at the AU-02 group and level, but Ms. Lloyd was at the AU-03 group and level, so she was paid at the AU-03 group and level while working in the AU-02 position. All known accommodation requirements were put in place for Ms. Lloyd in her SEP position. When Ms. Lloyd returned in June 2011, Ms. Delonghi was aware of a return-to-work plan that both Ms. Lloyd and Dr. Carstoniu had signed in March 2011 (Exhibit E-1, Tab 29). Ms. Delonghi said that those accommodation needs could be met in the SEP position.

[386] Ms. Delonghi stated she was concerned about having Ms. Lloyd in a SEP position because of the "*McNeil*" decision. This decision was interpreted as requiring the CRA to disclose to the defence at a hearing any misconduct by a criminal investigator, thus potentially jeopardizing the CRA's case against the taxpayer. Ms. Delonghi decided it was best to move Ms. Lloyd out of the SEP, either with or without her consent.

[387] A meeting was held on December 17, 2011, with Ms. Lloyd and her representative. Ms. Lloyd was asked to give her consent to move to an AU-03 position in the Small and Medium Enterprises (SME) Division. Ms. Lloyd asked that she be allowed to remain in her SEP position until the adjudication decision was rendered on the 40-day suspension. Ms. Delonghi agreed to consider her request.

[388] Another meeting was held in January 2012 with Ms. Lloyd and her representative. Ms. Delonghi told Ms. Lloyd that the adjudication decision was 6 to 12 months away, so she would be subjected to a PLM with or without her consent.

[389] On January 17, 2012, Ms. Delonghi wrote to Ms. Lloyd, stating in part as follows (Exhibit E-1, Tab 39):

. . .

> *As a result of* McNeil *disclosure requirements, management has determined that your disciplinary record precludes you from participating in any criminal investigations or criminal proceedings on behalf of the Agency. These are essential functions of your substantive position as a Senior Investigator in the* Criminal Investigations Program. *Therefore management has deemed it necessary to place you in an alternative position which does not normally require involvement in any criminal proceedings.*
>
> *This Permanent Lateral Move (PLM) is an administrative action that is taken in accordance with the* Directive on Lateral Moves*. It is acknowledged that this Permanent Lateral Move is being made without your consent. As outlined in the* Directive on Recourse for Assessment and Staffing*, you are entitled to receive recourse for this Permanent Lateral Move without consent in the form of* Individual Feedback*, followed by* Decision Review*. Copies of the* Directive on Lateral Moves *and the* Directive on Recourse for Assessment and Staffing *and [sic] have been enclosed for your reference.*
>
> *Effective January 23, 2012, you will be working in the Small and Medium Enterprises (SME) division of Audit. As per your request, Mr. Thomas Haddrath will be your new Team Leader. Enclosed is a copy of the draft Learning Plan for your new job and [sic] which was previously given to you on December 20, 2011. It has been updated to reflect the correct Team Leader. I would like to assure you that management is committed to providing you with the necessary support to ensure a successful transition into your new position.*

. . .

[390] On the weekend of January 23, 2012, Ms. Lloyd's workstation was moved to the SME position, which was on a different floor from her SEP position.

[391] On January 24, 2012, Ms. Lloyd filed a "Request for Individual Feedback," asking that she be put back in the SEP immediately. She also stated on the form as follows:

"My accommodation plan and return to work plan in SEP have been contravened without consultation or medical advice as to the effect this transfer will have on me mentally and physically" (Exhibit E-1, Tab 40).

[392] When Ms. Delonghi received it, she immediately stopped the move and told Ms. Lloyd to recommence her SEP work until further information was received from her doctor (Exhibit E-1, Tab 41).

[393] Ms. Lloyd asked that she be returned to her workstation in the SEP, but Ms. Delonghi denied that request, as Ms. Lloyd's desk and ergonomic requirements had been moved to the new location in the SME Division. Ms. Delonghi felt that all physical accommodation needs were being met in the SME work location and stated the following to Ms. Lloyd: "While I recognize that remaining seated in the Audit area is not ideal in terms of convenience, this arrangement will suffice for a short-term duration while we consult with your doctor" (Exhibit E-1, Tab 43).

[394] Ms. Lloyd replied, stating in part as follows (Exhibit E-1, Tab 43):

> *… I'd like to point out that my circumstances are Accommodation and Security and not merely ones of convenience. . .*
>
> *In the meantime, given the current circumstances, I'd like to point out that this whole situation is rather stressful for me and my physical pain has increased as a result. . . .*

[395] On February 4, 2012, Dr. Carstoniu wrote to Ms. Lloyd's representative, stating in part as follows (Exhibit E-1, Tab 45): "I have carefully reviewed Revenue Canada's AU-03 work description of the job Ms. Lloyd has been transferred to. In my opinion, the transfer of Ms. Lloyd to these new working conditions is medically inappropriate for the following reasons . . . ."

[396] Dr. Carstoniu was cross-examined at length about what he understood the job in the SME Division was, and he acknowledged that a lot of his understanding was based on his conversations with Ms. Lloyd. However, he also said that the SEP job was familiar to Ms. Lloyd. The proposed transfer to a position she was not familiar with, such as the SME position, would have caused more stress, and the transfer was not a good idea. He did acknowledge that if the employer had accommodated Ms. Lloyd and had allowed her the time needed to study and learn the new position, she could have been successful.

[397] The CRA's commissioner issued a written decision on August 20, 2012, with respect to the PLM. The decision states in part as follows (Exhibit E-1, Tab 51): "Therefore, after careful consideration of the related material and the information before me, I conclude that the decision to proceed with a permanent lateral move without consent was not based on established policy. As a result, I find the decision arbitrary."

[398] Ms. Lloyd remained in the SEP position until that program was transferred to Audit, at which time she went to her original location at the CIP.

[399] The first part of the grievance deals with the employer's decision to subject Ms. Lloyd to a PLM. The employer stated that I am without jurisdiction to hear this aspect of the grievance due to the provisions of subsection 208(2) of the *PSLRA*, which states in part as follows:

> ***208.*** *(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act*.*

[400] It is quite clear from the evidence that there was an internal process to dispute the PLM. It is also quite clear from the evidence that Ms. Lloyd availed herself of this internal process. In fact, the CRA commissioner's decision, dated August 20, 2012, overturned the PLM, deeming it "arbitrary." As such, there was clearly another "administrative procedure for redress," and the Commissioner upheld this aspect of Ms. Lloyd's grievance. Thus, I agree with the employer's submission that I am without jurisdiction to hear this part of the grievance.

[401] The remaining part of the grievance is Ms. Lloyd's claim that she was discriminated against by her employer on the basis of disability and that the employer failed to accommodate her disability. The grievor has alleged that the employer discriminated against her in relation to her disability in violation of the *CHRA* and Article 43 of the collective agreement.

[402] Article 43.01 of the collective agreement provides that there shall be no discrimination exercised or practised with respect to an employee by reason of mental or physical disability, among other grounds.

[403] According to paragraph 226(2)(*a*) of the *PSLRA*, an adjudicator or the Board may, in relation to any matter referred to adjudication, interpret and apply the *CHRA* (other than its provisions relating to equal pay for work of equal value), whether or not there is a conflict between the *CHRA* and the collective agreement, if any.

[404] Section 7 of the *CHRA* provides that it is a discriminatory practice in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. Disability is a prohibited ground of discrimination (subsection 3(1) of the *CHRA*). Section 25 of the *CHRA* defines disability as "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."

[405] In order to establish that an employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination, which is one that covers the allegations made and that, if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 ("*O'Malley*"), at para 28). The Board cannot take into consideration the employer's answers before determining whether a *prima facie* case of discrimination has been established (see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para 22).

[406] It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the claim of discrimination to be substantiated. The grievor has only to show that discrimination was one of the factors in the employer's decision (see *Holden v. Canadian Railway Company* (1990), 14 C.H.R.R. D/12 (F.C.A.), at para 7). The standard of proof in discrimination cases is the civil standard of the balance of probabilities (see *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 F.C. 789 (C.A.)).

[407] Once a *prima facie* case has been established, the employer can avoid an adverse finding by calling evidence showing that its actions were in fact not discriminatory or by establishing a statutory defence that justifies the otherwise discriminatory practice (*A.B. v. Eazy Express Inc.*, 2014 CHRT 35, at para 13). Where the employer leads evidence to rebut the *prima facie* case, it is up to the grievor to establish that the employer's evidence is false or a pretext, and that the true motivation behind the respondent's actions was, in fact, discriminatory.

**a. <u>Is there a *prima facie* case of discrimination?</u>**

[408] To establish a *prima facie* case of discrimination, Ms. Lloyd must show the following: that she had a disability; that she experienced an adverse impact with respect to her employment; and, that her disability was a factor in that adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61 CanLII at para 33).

[409] Has Ms. Lloyd established that she has a disability? The employer submits that she has not established her disability. I disagree. I would add that it is inconceivable that the employer would attempt to argue otherwise. Not only did I have the benefit of both Ms. Lloyd's testimony and that of Dr. Carstoniu, ample documentary evidence was presented at the hearing to corroborate the fact that she has a disability as defined by s. 25 of the *CHRA*. (See, for example, the following exhibits: U-9, U-10, U-14, U-29, U-35.) Moreover, as early as February 2010, the employer sent her a document entitled, "Individual Accommodation Plan" (Exhibit U-15), which stated in part: "Based on your pre-existing illness, and your bicycle/motor vehicle accident, your job accommodation needs as recommended by Toronto Rehab and supported by Sun Life Financial have been utilized to formulate your graduated return to work plan." This document was issued after it received the letter from the Toronto Rehab, Ramsay Centre, stating that Ms. Lloyd had rehabilitated from her brain injury to the extent that a gradual return to work could commence ". . . with certain reasonable accommodations in place" (Exhibit U-14).

[410] In my view, Ms. Lloyd has clearly established her disability.

[411] Did Ms. Lloyd experience an adverse impact with respect to her employment? The uncontroverted evidence is that Ms. Lloyd sought to return to the same position that she had occupied prior to her medical leave, namely her CIP position. However, she agreed to come back to work in the SEP position. Six months later, she found herself subjected to the PLM without her consent. Ms. Lloyd was transferred to the audit position on a different floor. Her work station and equipment were physically moved to this new location. There is no question that Ms. Lloyd experienced an adverse impact with respect to her employment.

[412] Was Ms. Lloyd's disability a factor in that adverse impact? For her disability to be a factor, there must have been an indication that the employer knew about it. There is no doubt in my mind that Ms. Lloyd made the employer aware of her disability. An

employee seeking accommodation has a duty to cooperate with her employer by providing information as to the nature and extent of her disabilities that will enable the employer to determine necessary accommodations (see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 525). Ms. Lloyd properly fulfilled this duty. Indeed, the accommodation plan that the employer advanced from the outset was based on this information.

[413] Applying the *O'Malley* test, I find that Ms. Lloyd's allegations, if believed, would be complete and sufficient to justify a finding in her favour in the absence of an answer from the employer. Her evidence shows that she was disabled, that she was adversely differentiated in her employment on the basis of her disability, and that her disability was a factor in this adverse impact. Accordingly, I find that Ms. Lloyd has met her onus of establishing a *prima facie* case of discrimination.

[414] Given this finding, I note that it is unnecessary for me to address the argument put forward by Ms. Lloyd's representative that I draw an adverse inference from the employer's refusal to call Mr. Prince to testify.

[415] For the respondent to rebut the *prima facie* case of discrimination established by the grievor, it must lead sufficient and convincing evidence to demonstrate that the explanation being provided is reasonable and non-discriminatory. (See *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 at paras 36-37).

**b. Has the employer met its evidentiary onus of providing a reasonable non-discriminatory explanation?**

[416] According to the employer's submissions (page 30, para. 79), "the PLM was due to business requirements and identified program risks." I cannot accept that the employer's explanation is reasonable for the simple fact that, at the time of the PLM, Ms. Lloyd occupied a SEP position, not a CIP position. The difference in the positions was stated as follows in Ms. Delonghi's January 25, 2012, letter to Dr. Carstoniu (Exhibit E-1, Tab 42): "The primary difference between the SEP and CIP positions is that SEP auditors conduct civil audits for the purpose of determining tax liability; while CIP investigators conduct criminal investigations to determine penal liability. A SEP Auditor's focus is gathering evidence to support civil re-assessments, whereas a CIP

Investigator's focus is on gathering evidence to prove the 'guilty mind' of the taxpayer."

[417] Moreover, as the employer acknowledged in its written submissions (page 25, para. 61): "Ms. Delonghi decided that when Ms. Lloyd returned to work in June 2011, it would be to the Special Enforcement Program ("SEP") division, where the *McNeil* disclosure issues would not be at play." While Ms. Delonghi testified that she was concerned about having Ms. Lloyd in a SEP position given the potential implications of the *McNeil* decision, I cannot accept that Ms. Delonghi's stated concerns were reasonable given the fundamental difference between the CIP and SEP positions that she drew to Dr. Carstoniu's attention in her January 25, 2012, correspondence.

[418] Based on the evidence (both *viva voce* and documentary), I find that the explanation provided by the employer for the PLM was not reasonable. I am not satisfied based on the evidence provided that the respondent has met its onus of proving that at the time that the PLM occurred, there were operational requirements precipitating Ms. Lloyd's move from her accommodated SEP position. Accordingly, I conclude that the respondent has not established a reasonable non-discriminatory explanation for the discriminatory practice.

**c. Did the employer meet its duty to accommodate Ms. Lloyd to the point of undue hardship?**

[419] Subsection 15(2) of the *CHRA* sets out a statutory defence to what would otherwise be a discriminatory practice. The applicable portions of s. 15 of the *CHRA* read as follows:

> *Exceptions*
>
> ***15.*** *(1) It is not a discriminatory practice if*
>
> > *(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a* bona fide occupational requirement*; (…)*
>
> *Accommodation of needs*
>
> ***15.*** *(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a* bona fide occupational requirement*…it must be established that accommodation of the needs of an individual or a class of individuals affected*

> *would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*

[420] The first accommodation plan signed by all parties was to have Ms. Lloyd gradually return to her duties as a CIP investigator (Exhibit U-15). This was in February 2010. This agreement had been made following a meeting at which the employer had hoped Ms. Lloyd would agree to a SEP position. Ms. Lloyd requested the CIP position, and the document was signed.

[421] Due to the investigation and administrative suspension cited in the other grievances, Ms. Lloyd did not return to work in February 2010. In fact, it was not until June 2011 that Ms. Lloyd returned to work in a SEP position, one she ultimately agreed to. By all accounts, everything was going well until she was told in December 2011 that the employer was to subject her to a PLM, with or without her consent.

[422] There was clearly no consultation with Ms. Lloyd's medical advisors before the decision was made to subject her to a PLM. The employer had received medical input on the previous positions she was to occupy and felt it could accommodate her needs in the new position. Ms. Delonghi made an assumption that was not open to her to make in the circumstances. The employer had a duty to seek a medical opinion on the necessary accommodations required for Ms. Lloyd to successfully perform the new duties before unilaterally imposing the PLM on her.

[423] In addition, when Ms. Lloyd was subjected to a PLM without her consent, she was physically moved to a different floor. When she objected to the PLM without consent, Ms. Delonghi, to her credit, put an immediate halt to the move. However, Ms. Lloyd was not physically moved back to the floor where she was located while performing the SEP duties. She was assigned SEP work but was isolated from her colleagues, who could have helped her reintegrate to the workforce. It is true that she could have picked up the phone and called her colleagues or could have gone up one floor for a meeting, but I can find no reason that she could not have been relocated to the SEP floor. Being physically located in the SEP, I believe, is consistent with the accommodation measures recommended and agreed to in the accommodation plan that led to Ms. Lloyd's return to work in a SEP position and would have helped her reintegration. Instead, she was left isolated on a different floor.

[424] I find that the employer failed to meet its duty to accommodate Ms. Lloyd's disability. Accordingly, I conclude that the employer engaged in a discriminatory practice and this aspect of the grievance is allowed.

**d. <u>What, then, is appropriate compensation?</u>**

[425] I have the authority pursuant to paragraph 226(2)(*b*) of the *PSLRA* to award damages to Ms. Lloyd as a result of the employer's discriminatory practice under paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*, which read as follows:

> *Complaint substantiated*
>
> ***53.*** *(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:*
>
> …
>
> *(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.*
>
> *Special Compensation*
>
> *(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.*

[426] Ms. Lloyd asked for compensation for general damages and pain and suffering, which was also canvassed in *Lloyd #1*, which states in part as follows (at pages 17-18):

> . . .
>
> ***That she be compensated for pain and suffering, and undue expense on her part.***
>
> *… In this case, I conclude that there was no evidence that the employer "…engaged in the discriminatory practice wilfully*

> *or recklessly," so I am not prepared to make an order pursuant to subsection 53(3) of the* CHRAA *[sic]. However, it is quite apparent that the grievor was impacted significantly by her employer's failure to provide an adequate plan of accommodation or indeed to even act on her request for an ergonomic assessment in a timely manner. In a recent case, an adjudicator of the Board set forth helpful guidelines when the learned adjudicator stated the following:*
>
>> In determining an appropriate amount of compensation, the CHRA sets out the following guidelines that I consider relevant: the nature of the circumstances, extent and wilfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in.
>
> *(See* Pepper v. Deputy Head (Department of National Defence) *2008 PSLRB 71, at para 30). Although not much turns on it in this case, I may take issue with the suggestion that there need be any element of wilfulness with respect to an award for compensation pursuant to paragraph 53(2)(*e*) of the* CHRA*. I otherwise accept the general guidelines.*
>
> *In this case, I am of the view that despite the fact that the employer had knowledge of the nature of the disability suffered by the grievor, her supervisors did not even speak to her to determine what the type of accommodation she would require might be. Rather, they unilaterally imposed changes to her work requirements without knowledge of the particulars of the "work precautions" set out in her doctor's report. On that basis, I determine that the grievor's pain and suffering was not as great as in the* Pepper *(2008 PSLRB 71) case, but it was significant. Consequently, I order the employer to pay to the grievor an amount of $6000.00.*
>
> . . .
>
> [Emphasis in the original]

[427] I also find in this case that there was no evidence the employer ". . . engaged in the discriminating practice wilfully or recklessly . . . ," and I have determined that it is not appropriate to make an order under the provisions of subsection 53(3) of the *CHRA*.

[428] In my view, the evidence did establish that Ms. Lloyd was impacted by the employer's decision to subject her to a PLM, even though this decision was ultimately reversed. Ms. Lloyd wrote to the employer on January 26, 2012, stating that the

situation was stressful and that her physical pain had increased. This was not challenged. She endured pain and suffering.

[429] Following the 2008 adjudication hearing, the employer was ordered to pay Ms. Lloyd $6000 (*Lloyd #1*). I find the situation in this case was more stressful for Ms. Lloyd than that case, although not as great as in *Pepper v. Deputy Head (Department of National Defence)*, 2008 PSLRB 71. In *Pepper*, the grievor's employment had been terminated due to an inability to attend work for medical reasons. (The application for judicial review was dismissed: *Canada (Attorney General) v. Pepper*, 2010 FC 226. The compensatory award for pain and suffering was not challenged on review.) Accordingly, I set the amount to be paid to Ms. Lloyd pursuant to paragraph 53(2)(*e*) of the *CHRA* at $7000.

[430] I note also that Ms. Lloyd requested the release of her personal information that was on the CDs. If the employer has not already done so, I will order it to release Ms. Lloyd's personal information back to her. I have not been made aware of any reason that this order should not be made. (I note that this was a remedy sought in File No. 561-34-440, but my remedial authority is broad and not restricted by a specific list of enumerated remedies: see *Canada (Attorney General) v. Amos*, 2011 FCA 38 at para 75.)

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

(*The Order appears on the following page*)

**V. Order**

[432] PSLREB File No. 561-34-440, the unfair labour practice complaint, is dismissed.

[433] PSLREB File No. 566-34-3750, the grievance against the indefinite suspension without pay, is dismissed.

[434] PSLREB File Nos. 566-34-7716 and 7717, the grievance against the 40-day disciplinary suspension, is dismissed.

[435] For PSLREB File No. 566-34-7718, the grievance against the PLM without consent and discrimination, I am without jurisdiction to deal with the issue of the PLM without consent. I find that the employer discriminated against Ms. Lloyd, and I award her $7000 for pain and suffering to be paid within 60 days of this decision. No other monetary award is made.

[436] The employer shall release Ms. Lloyd's personal information contained on the CDs back to her within 60 days of this decision.

July 23, 2015.

**Joseph W. Potter,**
**a panel of the Public Service Labour**
**Relations and Employment Board and adjudicator**