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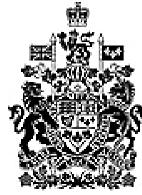
*Public Service Labour Relations and Employment Board Act* and *Public Service Labour Relations Act*



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

BETWEEN

**PATRICIA RODRIGUE**

Grievor

and

**DEPUTY HEAD**
**(Department of Veterans Affairs)**

Respondent

Indexed as
*Rodrigue v. Deputy Head (Department of Veterans Affairs)*

In the matter of an individual grievance referred to adjudication

**Before:** Marie-Claire Perrault, a panel of the Public Service Labour Relations and Employment Board

**For the Grievor:** Goretti Fukamusenge, Public Service Alliance of Canada

**For the Respondent:** Geneviève Ruel, counsel, Treasury Board Secretariat

Heard at Montreal, Quebec,
December 1 to 4, 2015.
(PSLREB Translation)

[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") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 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*.

## I. <u>Individual grievance referred to adjudication</u>

[2] The grievor, Patricia Rodrigue, was employed by the Department of Veterans Affairs ("the employer" or "the department"). On March 17, 2014, she was terminated for "[translation] … obtaining, disclosing to third parties, and using sensitive information from two clients in an unauthorized manner, for reasons other than professional …" (extract from the termination letter). She filed a grievance against that termination the same day, which was referred to adjudication on June 6, 2014.

[3] In addition, on March 27, 2015, the bargaining agent, the Public Service Alliance of Canada, which represents the grievor's bargaining unit, filed a notice with the Canadian Human Rights Commission (CHRC) under section 210 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2); that section reads as follows:

> ***210 (1)*** *When an individual grievance has been referred to adjudication and a party to the grievance raises an issue involving the interpretation or application of the* Canadian Human Rights Act*, that party must, in accordance with the regulations, give notice of the issue to the Canadian Human Rights Commission….*

[4] On March 27, 2015, the Canadian Human Rights Commission indicated that it would not make representations in this file.

[5] A week before the hearing, the employer objected to the grievor raising the discrimination issue as it "[translation] was never raised at any time during the grievance process" (extract from the employer's November 23, 2015, letter). The Board

noted the objection and took it under reserve.

[6] In the following reasons, I dismiss the employer's objection about the Board's jurisdiction to hear a discrimination-related issue under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). Nevertheless, I do not have enough evidence to conclude discrimination occurred. In addition, I allow the grievance against the termination as it was a disproportionate and unreasonable penalty for the alleged misconduct.

[7] During the hearing, I rendered a provisional decision on the admissibility of some of the evidence that the grievor wanted to adduce. After hearing the parties' arguments, I decided to exclude the evidence obtained through an access-to-information request that cited exchanges on the employer side about the penalty to impose on the grievor. That provisional decision will be revisited in the reasons for this decision.

## II. Summary of the evidence

[8] The employer called five witnesses: Robert Cormier, district director at the Montreal Regional Office; Matthew Allaby, who, in January 2014, was an information and privacy officer for the department; Charlotte Bastien, national director of field operations; Michel Doiron, assistant deputy minister, Service Delivery Branch; and Nathalie Pham, the grievor's manager.

[9] The grievor called two witnesses: Wesney Duclervil, PSAC union advisor; and Jean-Sébastien Schetagne, PSAC union advisor. The grievor also testified. To the extent that the facts are not disputed, they are submitted without attribution.

[10] As district director for the Montreal Regional Office, Mr. Cormier is responsible for operations for delivering direct services to the department's clients, i.e., discharged servicepeople. The department has approximately 14 000 clients, including approximately 700 case management files, i.e., complex and difficult cases that require in-depth follow-up. Direct services include, among other things, pension services, home support, follow-ups and assessments, and a referral service for the different professionals who provide treatment (occupational therapists, doctors, psychologists, etc.).

[11] The grievor was a case manager; therefore, she was responsible for several

complex files of veterans. Her manager was Nathalie Pham, team manager, who reported to Mr. Cormier.

[12] A case manager works closely with discharged servicepeople and supports them in their healing process. The case manager must have access to a great deal of information about the client to have a complete picture of that client's physical, psychological, and family situation. The information is input into an electronic system. Several documents are created for the same client, including an intervention plan and individual decision sheets. In addition, the decisions that the case manager makes (for example, referring a client to an occupational therapist) are noted in a decision registry, which the team manager monitors.

[13] On December 4, 2013, Mr. Cormier received a faxed request from Mr. Duclervil asking him for the grievor's monthly decision sheets and decision registers; no date was specified.

[14] Mr. Cormier testified that the request seemed a little too large and a little too vague; in addition, it was about clients' personal information. In short, he needed more detail from Mr. Duclervil. He tried to reach him around mid-December, but Mr. Duclervil was on vacation until January 6, 2014.

[15] Mr. Duclervil testified on that point. He said that in October and November 2013, he tried several times to contact Mr. Cormier and Ms. Pham by telephone to obtain a copy of the grievor's working documents. According to him, it was a common request from the bargaining agent to the employer. He generally had no problem obtaining documents. That time, communication was very difficult to the point that he even faxed a message, which he did very rarely.

[16] At this point, it is important to understand the meaning of that document request.

[17] For the last few years, the grievor's files were monitored quite closely. Her manager, Ms. Pham, testified that the grievor had trouble adjusting to the new systems for developing intervention plans and following up on client files, hence the need for Ms. Pham to closely monitor the grievor's interventions, decisions, and documentation.

[18] Ms. Pham was sometimes late with some files, which was a source of stress for the grievor because it delayed the services that she was to provide to clients. The

related tension increased. In October 2012, a veteran awaiting services ended up in emergency. That incident upset the grievor so much that she had to take a year of sick leave. She returned to work in December 2013. Her doctor prescribed the terms and conditions of a gradual return.

[19] The grievor submitted an application to the Commission de la santé et de la sécurité du travail du Québec (CSST) to receive disability benefits during her sick leave. According to the CSST, the October 2012 incident could not be considered a work accident that caused an employment injury. The grievor appealed that decision before the Commission des lésions professionnelles (CLP). To demonstrate what she considered an employment injury, she thought that she needed the working documents that allegedly showed Ms. Pham's tardiness who, according to the grievor, contributed to her employment injury. Therefore, she requested the sheets and decision registers that Ms. Pham had verified.

[20] The hearing before the CLP was scheduled for January 16, 2014. On January 3, 2014, the grievor asked Mr. Cormier why the documents that Mr. Duclervil had requested had not yet been provided. Mr. Cormier replied that he had not been given any details. He added that the request was supposed to be made through the department's access-to-information section and that only that section can provide third parties with access to those types of documents, after they are redacted. The grievor offered to redact the documents herself, but Mr. Cormier replied that that was unacceptable and that the specialists would take care of it.

[21] It was too late in early January to submit the request to the department's access-to-information section for the January 16 hearing before the CLP. Mr. Allaby, who was then an information and privacy officer for the department, testified that that type of request would easily take 30 days, if not longer. He testified that on January 3, 2014, he did not receive a request from the grievor compliant with the department's rules.

[22] The grievor testified that she found in her boxes (her documents were stored in boxes during her absence of more than a year) copies of two intervention plans emailed to Ms. Pham that showed the time elapsed between the plan's submission and Ms. Pham's response. She decided to adduce that evidence to the CLP.

[23] On the morning of the hearing, the grievor was accompanied by Mr. Duclervil

and a friend, Robert Tremblay. She gave the employer the evidence that she intended to submit to the CLP, including the two intervention plans. The employer strongly objected to submitting that unredacted evidence. According to Mr. Duclervil's testimony, the parties took a certain amount of time to agree on a compromise, which was finally proposed by the official presiding over the hearing: the employer's acknowledgement of the dates on which the emails and responses containing the intervention plans were sent.

[24] Following those events, the employer conducted an investigation and called the grievor in for an interview. Mr. Cormier, the grievor, and Mr. Duclervil testified about that interview. I accept Mr. Duclervil's testimony as being the most objective because he was disinterested. As a union representative, of course, he defends the grievor's interests. However, he seemed very frank about the disagreements that he might have had with her. He did not minimize her aggressiveness shown at the meeting. Therefore, I believed him when he said that the meeting had the atmosphere of a set trap.

[25] At that meeting, the grievor first had to submit the documents that she had intended to use at the CLP hearing. She threw them at Mr. Cormier. Her representatives immediately requested a break. Subsequently, the employer's representatives, including Mr. Cormier, asked her several times where the documents came from, how she had obtained them, and whether she had others. The union members had to intervene several times to state that a question had already been asked and that the grievor had already answered it.

[26] Finally, the employer asked the grievor whether she would do it again if the opportunity were to present itself again. On that point, testified Mr. Duclervil, the grievor "[translation] exploded". The pent-up anger poured out in a torrent, and she replied that yes, she would do the same thing again.

[27] That sealed her fate. The termination letter cites using personal information and a complete lack of remorse and awareness. The employer's witnesses who followed Mr. Cormier, Ms. Bastien, and Mr. Doiron, and who played a role in the decision to terminate the grievor, emphasized the lack of remorse and awareness as one of the main reasons for the termination.

[28] The damage was done, regardless of the fact that after her angry explosion and another break requested by her union representatives, the grievor returned to the

meeting and said that she regretted her action and that she was ready to take courses to update her on the new access-to-information requirements. The grievor testified that she acted in good faith by offering unredacted documents to the CLP and that she thought she was supposed to proceed that way. It was not a general distribution but a confidential disclosure to her union representative, who was bound by his duty of confidentiality, and to the CLP, which also has the duty to protect personal information.

[29] Mr. Cormier testified about the department's policy, which requires that clients be notified when their personal information has been disclosed without their knowledge. That policy seems to have been instituted following revelations in 2010 that the media covered heavily about the use of veterans' personal information for purposes other than those set out in the *Privacy Act* (R.S.C., 1985, c. P-21). Mr. Cormier, Ms. Bastien, and Mr. Doiron all strongly insisted that the 2010 revelations played an important role in raising awareness at the department and led to a strong tightening of the rules on protecting personal information.

[30] Following the investigation into the January 16, 2014, incident, Mr. Cormier contacted the two affected clients to apologize to them.

[31] In her testimony, the grievor reacted strongly to that employer response. According to her, it was unnecessarily traumatizing, especially for one of the clients.

[32] She said that in one case, the client had completely recovered, and it is likely that he would have given his consent. In the other case, the client was very vulnerable, and it was strongly advised not to disturb him with that fear of disclosure since, in concrete terms, no disclosure had occurred.

[33] The grievor testified about her years at the department. She began working there in 1980 after a few years in the federal public service. She worked at there until 1986, first as a receptionist, then as an administrative assistant. She left the public service to study law, which she subsequently practised for about 10 years.

[34] Private practice's demanding schedules brought her back to the public service in 1999, again to the department. She worked as a lawyer for 14 months, after which she held several client service positions before finally ending up as a case manager in Montreal beginning in 2009 under Ms. Pham's supervision and Mr. Cormier's direction.

[35] She testified about her deep commitment to clients and submitted some testimonies and awards as evidence. She feels that she is particularly sensitive to veterans, especially because she can understand their health problems because she has experienced some herself.

[36] The grievor testified about her health. She had to take leave in 2006 and again in 2012 to take care of herself. She was ready to return to work in May 2013. Her doctor recommended a gradual return at a frequency of one day of work per week initially. Mr. Cormier refused, citing operational needs. Upon her return in December 2013, initially at a frequency of two days a week, she was being trained on the computer and on the telephone.

[37] She thinks that the employer discriminated against her; according to her, it wants to get rid of her. She also testified about a rather conflicting relationship with Mr. Cormier who, in the past, allegedly refused to grant her a reimbursement to which she was entitled. Ms. Bastien allowed the grievor's grievance on that subject.

[38] Ms. Pham testified about the supervision imposed on the grievor to improve her performance. Performance requirements were imposed on her beginning in 2010. During her gradual return to work, in December 2013, training and updating were emphasized. No performance requirement was in place then.

[39] Ms. Pham talked about shortcomings to be corrected in the grievor's performance, particularly a difficulty with synthesis. In addition, in the performance assessments adduced as evidence and in her testimony, Ms. Pham pointed out the grievor's occupational strengths, which are her excellent listening skills, her deep commitment to the department's clientele, and her ability to go beyond normal work requirements to meet with potential clients. In that respect, she mentioned an initiative in which the grievor is participating to meet with homeless veterans.

[40] Mr. Doiron testified about the decision-making process that led to the termination. According to him, it is crucial to protect the personal information of the department's particularly vulnerable clientele. The grievor's lack of remorse and accountability played a large role in the decision to terminate her. In addition to the fact that he, as assistant deputy minister, signed the termination letter, he represented the employer at the final, and only, level of the grievance process. Questioned about the factors that he considered with respect to dismissing the termination grievance,

Mr. Doiron said that the grievor talked about her health and her gradual return to work at the time of the January 16, 2014, incident. He added that he had considered it but that it did not decrease her responsibility with respect to her misconduct. The gradual return to work was established according to a gradual number of workdays; no other limitation had been in place.

[41] Mr. Schetagne testified about an event that occurred before the CLP on April 10, 2014, within the framework of another case involving a departmental employee. In that case, the department objected to the application to recognize an employment injury. To prove its case, the department adduced in evidence the unredacted medical file of a client, who was a veteran. Unredacted copies were passed around, including to Mr. Schetagne, the complainant's union advisor in this case. Redacted versions were also produced. At the end of the hearing, no one asked him to return his unredacted copy. He put it in his briefcase. His testimony was uncontradicted.

## III. Summary of the arguments

### A. For the employer

[42] The employer maintains that the grievor's misconduct deserved the penalty imposed on her, i.e., the termination.

[43] The employer addresses the discrimination issue. According to the employer, it was never an issue of discrimination, either in the grievance or during the grievance process. It refers to *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), according to which a new issue cannot be raised at adjudication. Yet, the grievor raises new issues, i.e., about harassment and discrimination. In addition, she requests corrective measures not requested in the grievance.

[44] The notice given to the Human Rights Commission does not suffice to render the discrimination issue adjudicable. In that respect, the employer relies on *Chamberlain v. Canada (Attorney General)*, 2015 FC 50.

[45] In addition, if the Board rules that it can deal with the discrimination issue, *prima facie* discrimination is not established.

[46] The termination is not based on a discriminatory act but on the grievor's

misconduct, which broke the bond of trust that is essential in an employment relationship. The employer complied with the conditions of the doctor's prescribed return to work. In addition, the grievor's act cannot be attributed to her state of health. According to the information provided to the employer about her state of health, the only constraint is the limited number of days she can work, with a gradual increase. No other limitation exists.

[47] There is no evidence of harassment. At most, the evidence reveals a misunderstanding of the employer's intentions. It is insufficient to allege harassment in the absence of all evidence.

[48] The misconduct was determined according to the evidence. The grievor disclosed two clients' personal information to two unauthorized individuals, i.e., Mr. Duclervil and Mr. Tremblay, for her own purposes. The employer can no longer trust her. She went against Mr. Cormier's instructions and did not respect the rules governing access to information.

[49] The lack of remorse and the fact that she said that she would do the same thing again in the same circumstances contributed to the employer's loss of trust.

[50] Mr. Schetagne's testimony about another case that took place in 2014 has no probative value because he does not know whether the client gave consent or whether on that occasion the employer's representative was penalized for using that evidence.

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

[51] The grievor has more than 20 years of service with the federal public service. Before her termination, no disciplinary action had ever been imposed on her. Throughout her diversified career with the department, she has always had excellent performance assessments and has always been greatly appreciated by her colleagues.

[52] In 2006, she had to take leave for approximately three months for health reasons. She subsequently returned to work, continuing her therapy.

[53] Beginning in 2008, Mr. Cormier was the director of her section and Ms. Pham was her immediate manager. The grievor's problems at work began then, and her assessments began to indicate performance problems. She was reproached in particular for including too many details in her reports and in her intervention plans.

However, the grievor testified that the professionals and workers who had to work with the same clients appreciated those details.

[54] The supervision requirements that management imposed caused the grievor a great deal of stress, to the point when an incident related to that supervision was the last straw and caused an employment injury in October 2012, as the CLP's decision confirms (following the January 16, 2014, hearing).

[55] The reason for the dismissal seems rather tenuous considering the grievor's history and the alleged act. No personal information was disclosed to third parties. Mr. Duclervil testified that he had not seen the files, only the emails that cited the dates of remittance and of verification by Ms. Pham. Mr. Tremblay and Mr. Duclervil are governed by ethical rules about respecting the confidentiality of personal information.

[56] The *Privacy Act* is, of course, a very important Act, and the grievor does not question the importance of protecting the personal information of her clients, which she has always done. However, in the context of a quasi-judicial body such as the CLP, one can understand that it is sometimes necessary to submit certain work tools to support one's case, which the employer did in another case, according to Mr. Schetagne's uncontradicted testimony. Why the "double standard" rule?

[57] The disproportionate nature of the penalty suggests that the employer's intention was in fact discriminatory. The grievor was dismissed because her relationships with her superiors had become difficult due to her long-known health problems.

[58] The grievor had a disability of which the employer was aware. According to the CLP's decision, the grievor's supervision aggravated her already precarious state of health. Therefore, the employer cannot deny that it was aware of the grievor's health problems.

[59] The penalty was disproportionate because other individuals in the department who accessed personal information without authorization received much less severe penalties.

[60] The employer made no effort to understand. However, it was an isolated incident, which was exaggerated. The termination letter mentions sharing information with third parties. Ms. Bastien, who played a role in the decision to terminate the

grievor, testified that she did not know who those third parties were. However, their identities were important. There was no public distribution or self-interest, only an email sent to a union representative. The employer aggravated the situation by needlessly alarming vulnerable clients.

[61] The employer cannot simply cite the broken bond of trust. It must justify it. It is clear that the termination constitutes an attack against the grievor. As disciplinary action, termination was excessive. The employer did not consider the mitigating factors, which were the grievor's impeccable disciplinary file and her gradual return to work along with the fact that she experienced a moment of panic proving her case and that she used documents she already possessed. She suggested redacting the documents; the employer for its part did not help her.

[62] It is incorrect to state that the grievor does not feel any remorse. She clearly stated that the measures to protect personal information changed at the department and that she was willing to receive training on that subject.

[63] In terms of additional mitigating factors, her excellent client service and her entire contribution to the department should be noted. It should also be mentioned that at her age, it will be difficult for her to find another job. Termination is certainly not thanks for her dedication over the years.

[64] Finally, the grievor maintains that *Burchill* does not apply. The grievance already spoke of wrongful dismissal because it was contrary to the legislation and to the collective agreement. The grievance was heard at only one level, and at that stage, she and her union representatives certainly raised her health problems and her gradual return to work.

[65] As remedy, the grievor seeks full reinstatement, including benefits. In addition, under the *CHRA*, she seeks $20 000 in moral damages and $20 000 as a special allowance for the suffering that the employer caused. The stress, negative health impact, and the insomnia caused by the termination constitute unrecoverable damages.

## IV. Reasons

### A. The employer's objection to adducing evidence about its internal exchanges on the penalty

[66] I will begin with the reasons for the provisional decision rendered during the hearing.

[67] The grievor tried to adduce as evidence exchanges between management and human resources advisors about the penalty to impose for her misconduct. The employer objected to adducing that evidence. It maintained that it had labour relations privilege, analogous to solicitor-client privilege.

[68] According to the current jurisprudence, labour relations privilege, while not a standard like solicitor-client privilege, nevertheless exists (see *Telus Communications Co. v. Telecommunications Workers Union* (2011), 203 L.A.C. (4th) 154).

[69] In the former Board's jurisprudence, *Zhang v. Treasury Board (Privy Council Office)*, 2010 PSLRB 46, is undoubtedly the most useful decision on that point. In that case, the adjudicator had to decide whether the employer had to adduce as evidence exchanges between management and human resources about a job search for Ms. Zhang; that search had been ordered by an earlier decision. The employer claimed labour relations privilege. The adjudicator in that case summarized the relevant state of the law as follows:

…

> ***36*** *To my knowledge, labour relations communications within management have never been recognized as a class privilege, and I consider that the Supreme Court's comments about the religious communications should apply equally to labour relations communications….*
>
> ***37*** *In* Slavutych*, the Supreme Court of Canada recognized that, apart from class privileges, the courts could recognize case-by-case privileges and that, to determine whether a communication should be privileged, the principles set out by the American professor Wigmore should serve as guidance. The four conditions of the Wigmore criteria are set as follows in vol. 8 of* Wigmore on Evidence*, 3rd ed., (McNaughton Revision, 1961), at paragraph 2285:*

…

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

…

> ***39*** *Discussing the balance that the decision maker must exercise in applying the fourth criterion, the Supreme Court expressed the following in* A.M. v. Ryan*, [1997] 1 S.C.R. 157:*

…

> **29** The fourth requirement is that the interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation …

…

> **31** These criteria, applied to the case at bar, demonstrate a compelling interest in protecting the communications at issue from disclosure. More, however, is required to establish privilege. For privilege to exist, it must be shown that the benefit that inures from privilege, however great it may seem, in fact outweighs the interest in the correct disposal of the litigation.

…

> **39** In order to determine whether privilege should be accorded to a particular document or class of documents and, if so, what conditions should attach, the judge must consider the circumstances of the privilege alleged, the documents, and the case…

…

[70] The adjudicator sided with Ms. Zhang for the production of most of the requested documents because the benefit of disclosure outweighed the prejudice caused, in accordance with the fourth element of the *Wigmore* criteria.

[71] The grievor adduced two decisions supporting her argument that I should accept as evidence the exchanges held on the employer side about the penalty to impose: *Centre for Addiction and Mental Health v. O.P.S.E.U.*, [2004] O.L.A.A. No. 957 (QL), 133 L.A.C. (4th) 178; and *Peel District School Board v. Ontario Secondary School Teacher's Federation, District 19-Peel Region*, [2012] O.L.A.A. No. 94 (QL), 216 L.A.C. (4th) 352.

[72] In *Centre for Addiction and Mental Health*, the arbitrator refused to force the union to produce emails it exchanged with the complainant about the complainant's grievances. The arbitrator recognized both litigation privilege and labour relations privilege. In the relationship between a union member and his or her union, an expectation is in place that their exchanges about the employee's rights and obligations will be treated as confidential.

[73] In *Peel District School Board*, the employee requested the disclosure of correspondence from a disciplinary investigation into his misconduct. In that case, an automobile shop instructor was suspended (and subsequently dismissed) for falsifying invoices and for appropriating school property. Between his suspension and his dismissal, the employer carried out an investigation that led to findings justifying the dismissal. At the hearing, the employer tried to exclude emails traced through the investigation, but the arbitrator ordered their production because they contained facts that supported the employer's position and, to defend his case, the dismissed employee had the right to see that evidence.

[74] In this case, it seems to me that the documents in question are rather like the type found in *Centre for Addiction and Mental Health*, even if they are the employer's documents. Just like a union member and the union are entitled to a privileged space to discuss the union member's rights, the employer and its advisors are entitled to a privileged space to consider available discipline options. In addition, I do not see how those exchanges could support the grievor's case. The employer's actions speak for themselves. It is also entitled to a certain freedom to consider different solutions without having that held against it. It seems important to me to preserve on both sides (employers and bargaining agents) privileged areas where interested individuals can exchange freely, without fear of consequences from their words. When all is said and done, the decisions made are important for an adjudicator.

[75] It is important to note that as illustrated in *Peel District School Board* and *Zhang*, essentially factual data is not very likely to be protected by labour relations privilege. In this case, I retain the advice aspect to allow the employer's objection and to refuse adducing the evidence in question. In my view, the importance of protecting the confidentiality of the employer's exchanges with respect to a labour relations situation outweighs developing the grievor's case because the documents are not factual and will not contribute to my analysis of the situation.

[76] In a similar situation, in *Horne v. Parks Canada Agency*, 2014 PSLRB 30, an adjudicator at the former Board ruled in the same direction, and I cite the following passage that perfectly summarizes my point of view:

…

> ***61*** *A labour relations privilege extends to advice given by a labour relations specialist to a manager as it meets the "Wigmore conditions." These have been expressed in Brown and Beatty,* Canadian Labour Arbitration*, 4th ed., at para 3:4340. (1) The communications must originate in a confidence that they will not be disclosed. (2) The element of confidentiality must be essential to the full and satisfactory relationship of the parties. (3) The relationship must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.*
>
> ***62*** *I noted at the hearing that this case turned on the facts proven and on an assessment of the applicable law, irrespective of any advice Ms. Davies received from Ms. Hansen. I note that managers ought to be able to seek out advice of labour relations advisors and be assured that the advice is confidential, in order to ensure that employees are fairly treated for example during investigations or in decisions arising from investigations. Likewise an employee ought to be able to seek the advice of his bargaining agent without fear of the risk that such advice will be compellable at a hearing. In my view the injury that would be caused by the disclosure of the information far exceeds the benefit of disclosure of advice which is not particularly relevant to the assessment of facts proven and law.*

…

**B. <u>The employer's objection to the Board's jurisdiction over the discrimination issue</u>**

[77] According to the employer, the discrimination issue was never raised during the grievance process. Therefore, the Board cannot be seized of it at adjudication.

[78] The employer cited *Boudreau v. Canada (Attorney General)*, 2011 FC 868, in support of its claim that the grievance cannot be amended at adjudication. In that case, the employee filed a grievance alleging that the employer did not comply with its harassment policy with respect to him. At the referral to adjudication, the bargaining agent cited the collective agreement clause on the employer's obligation to ensure health and safety in the workplace. The employer pointed out that that issue was never raised during the grievance process. The adjudicator sided with it, and the Federal Court upheld the adjudicator's decision.

[79] In this case, other considerations apply. First, the employer had been aware of the grievor's health problems since 2006. When terminated, she was on a gradual return from sick leave. In her grievance's wording, without mentioning the word discrimination, she cites the collective agreement and the legislation against wrongful and unjust dismissal.

[80] Then, Mr. Doiron testified that at the final (and only) level of the grievance process, the grievor cited her state of health as a factor that the employer had to consider in its decision to terminate her.

[81] Finally, in my view, the *PSLRA* provisions about adjudicators' jurisdiction over human rights confirm the Board's jurisdiction in this case.

[82] In that respect, the employer challenges *Chamberlain*, which states that the Board shall apply the provisions of the *CHRA* only if it is properly seized of a grievance. That is precisely so in this case — the dismissal grievance was properly referred to adjudication. The applicable *PSLRA* provisions (sections 226 and 210) read as follows:

> ***226 (1)*** *An adjudicator may, in relation to any matter referred to adjudication, exercise any of the powers set out in paragraph 16(d) of this Act and sections 20 to 23 of the* Public Service Labour Relations and Employment Board Act.
>
> ***(2)*** *An adjudicator or the Board may, in relation to any matter referred to adjudication,*

> ***(a)*** *interpret and apply the* Canadian Human Rights Act *and any other Act of Parliament relating to employment matters, other than the provisions of the* Canadian Human Rights Act *that are related to the right to equal pay for work of equal value, whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any;*
>
> ***(b)*** *give relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the* Canadian Human Rights Act *….*

…

> ***210 (1)*** *When an individual grievance has been referred to adjudication and a party to the grievance raises an issue involving the interpretation or application of the* Canadian Human Rights Act*, that party must, in accordance with the regulations, give notice of the issue to the Canadian Human Rights Commission.*

[83] That text states "[w]hen an individual grievance has been referred to adjudication". The sense of the jurisprudence in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, is to apply the provisions of the human rights legislation, which constitutes a broader legislative framework that collective agreements cannot contradict.

[84] I agree with the employer that the notice to the CHRC is insufficient on its own to provide jurisdiction. However, the adjudicator (in this case, the Board) properly seized of a grievance is empowered to decide the *CHRA*'s application in the matter at issue. Therefore, I am seized of the discrimination grievance within the meaning of the *CHRA*.

[85] However, I do not have enough factors to conclude that discrimination took place or to conclude that the grievor's termination is attributable, in whole or in part, to her state of health. As examples of discrimination, she raised the fact that the employer refused to allow her to return to work one day a week, its obstruction to providing the necessary information for her CLP hearing, and the false pretext used to terminate her.

[86] Those could be indicative, but I am not convinced that the employer acted that way because the grievor had health problems. It allowed her a gradual return to work, beginning with two days a week. It was reasonable for it to state that only one day a week would pose an operational problem. It had concerns about the use of client

information within the framework of a proceeding that concerned the grievor, not the clients. Those concerns were justified. It is true that Mr. Duclervil testified to the lack of cooperation to obtain the documents, but he did not demonstrate that that lack of cooperation was due to discrimination rather than to a lack of communication. Finally, for the termination, I feel that it can be attributed to an exaggeration of the seriousness of the disclosure, but I do not see how the grievor's state of health could be considered a factor in the decision.

[87] In her allegations, the grievor relied on the CLP's decision, which sided with her by affirming that her manager's actions aggravated her state of health. Ms. Pham did not testify before the CLP, and the official drew a negative conclusion. In contrast, Ms. Pham testified before me. I can understand that the supervision to which the grievor was subjected caused her stress. I do not question the CLP's decision. Nevertheless, in my opinion that decision did not confirm discrimination by the employer when the grievor was terminated. According to the evidence presented to me, the employer permitted the gradual return to work, the performance requirements no longer applied during that period, and the termination came entirely from the grievor using the department's clients' personal files. In my view, *prima facie* evidence is not established. To prove *prima facie* discrimination, three elements must be established: an intrinsic condition that is one of the prohibited grounds of discrimination according to the Act, adverse treatment, and a link between those two facts (Quebec *(Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39). The grievor's state of health is a prohibited ground of discrimination; she suffered the adversity of termination, but the link between the two was not substantiated.

[88] I conclude that the grievor's state of health was not a factor in the termination. However, the employer should have considered it a mitigating factor when penalizing her misconduct.

[89] For the harassment allegations, nothing indicates to me that that issue was raised within the framework of the grievance. Therefore, I assess that I am not seized of it.

**C. <u>The termination grievance</u>**

[90] I cannot find a discrimination motive by the employer, but my opinion is that

termination was a clearly disproportionate penalty. The employer referred me to *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43, and *Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151, to justify its decision to terminate the grievor.

[91] In *Shaver*, the grievor worked at the department responsible for employment insurance. He tried to obtain information about members of his housing co-op. He shared that information with his wife, who sat on the co-op's board of directors, and with another member of the board of directors. He filed a grievance to challenge his termination. The adjudicator in that case concluded the following:

…

> ***103*** *The grievor decided to look up names of individuals using confidential information from work, he decided to look further in the respondent's systems and see confidential information about one person and he decided to share that information with a third party, his wife. All of these events were conscious choices made by the grievor and he had complete control at each stage. This was not inadvertence on his part or the operation of an otherwise unforeseeable result or the result of necessity; it was a deliberate and planned act or series of acts with foreseeable consequences. Further, I find that the grievor would have accessed other confidential information for the other names he searched except they did not have files in the respondent's system (because they did not have claims for employment insurance benefits).*

…

[92] The grievor in that case also admitted that he consulted his friends' files, who had filed employment insurance benefits claims, to check the statuses of their claims and to give them advice, which was completely contrary to the code of ethics of the federal public service.

[93] In *Hillis*, the grievor accessed the personal information of people who also lived in a condominium. It seems that she was negligent with that information, which another co-owner received (the circumstances are somewhat mysterious). In any case, personal information was disclosed to third parties without authorization. In that case, the penalty imposed was a 10-day suspension. However, in parallel, the employer conducted a security investigation that led to revoking the grievor's reliability status, which led to her termination.

[94] The adjudicators did not allow the grievances in *Shaver* and *Hillis* against the terminations. The circumstances are quite different from those of the grievor in this case.

[95] In this case, no act was repeated, as in *Shaver*. The personal information was not going to be used, only the files' processing time data. Although the employer affirms that the bond of trust is broken, it seems to me that in this case, the same irresponsibility as in *Hillis* does not exist. The grievor was careful with the documents in question. Her intention was to present them only to the CLP official and only for a very specific reason, i.e., to establish sending and reception dates. Unlike in *Shaver*, the personal information was not used. In addition, unlike in *Hillis*, there was no negligence. It is also noteworthy that in *Hillis*, the penalty was a 10-day suspension.

[96] The grievor referred to an email from a departmental human resources employee that indicates a much less strict penalty for the unauthorized access of data, especially for the first time. That employee did not testify, and the email was submitted in a set of documents, without context and without a witness who could be cross-examined. Therefore, I do not assign any weight to that email. However, the jurisprudence clearly shows that for more serious offences, penalties have often been less severe.

[97] Finally, what is the misconduct in this case?

[98] The grievor acted improperly by using two clients' unredacted intervention plans as evidence for the CLP when the emails probably would have sufficed for her purposes. That said, that use must be put in perspective. The union representative said that he did not see the intervention plan's contents, and the other individual who accompanied the grievor is a practicing lawyer bound by the Bar's ethics rules. Ultimately, the evidence was not filed before the CLP.

[99] Contrast that with the uncontradicted incident in which the employer used a client's unredacted medical file as evidence before the CLP a few months later. In that case, the document was distributed to several people and contained the client's name and registration number as well as the personal data relevant to the case before the CLP. The employer did not present any evidence to me demonstrating that that act was the subject of a penalty or that the client consented. Therefore, I conclude that there was neither a penalty nor consent. Therefore, the grievor has reason to speak of a

"double standard".

[100] Mr. Schetagne's testimony is sufficient for me to rule on this case. It is clear that the employer reacted disproportionately. Indeed, it must impose clear and strict standards for using personal information, and the grievor is required to comply with them. However, those rules must apply to everyone, including the employer's representatives.

[101] In addition, when determining the penalty, the employer did not consider the grievor's many years of exemplary service, the lack of any previous disciplinary action, her age, and her state of health. The employer seems to have reacted strongly to a breach that ultimately did not have many consequences.

[102] I would like to emphasize that I do not take lightly departments' obligations to protect personal information. I also believe that the employer has the right and obligation to implement protocols to ensure compliance with the provisions of the *Privacy Act*. That said, I think that termination was an overly severe penalty, considering the grievor's file and the department's inconsistency in its own use of personal data as evidence before the CLP in another case.

[103] Thus, my opinion is that the termination must be overturned because it was unjustified. I believe that the grievor committed misconduct, but given the evidence according to which the department proceeded in the same manner in another case before the CLP, I am not prepared to substitute another penalty for the termination.

[104] Therefore, I order the grievor reinstated in her position as of March 17, 2014, with salary and benefits.

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

*(The Order appears on the next page)*

## V. Order

[106] The dismissal grievance is allowed. I order Ms. Rodrigue reinstated in her position as of March 17, 2014, with salary and benefits.

[107] I will remain seized for a period of 60 days from the date of this decision to resolve any issues arising from administering this decision.

February 2, 2016.

PSLREB Translation

**Marie-Claire Perrault,**
**a panel of the Public Service Labour**
**Relations and Employment Board**