Date: 2016-11-04

File: 566-02-11358

Citation: 2016 PSLREB 108

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

LORRAINE LORTIE

Grievor

and

DEPUTY HEAD (Canada Border Services Agency)

Respondent

Indexed as
Lortie v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: David Olsen, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Herself

For the Respondent: Pierre-Marc Champagne, counsel

Heard at Halifax, Nova Scotia,
February 16 to 19, 2016.

I. Individual grievance referred to adjudication

[1] On April 8, 2015, the grievor, Lorraine Lortie, grieved a two-day suspension without pay, which was imposed on her in June 2014, and a five-day suspension without pay, which was imposed on her in February 2015. She alleged that both suspensions were unfounded and were part of management's ongoing harassment and retaliation towards her for seeking fairness and justice in a contaminated work environment led by her supervisor, Kathy Lusk, who is also the director of human resources for the Canada Border Services Agency's (CBSA or "the employer") Atlantic Region.

[2] She stated that both suspensions were part of a harassment and retaliation complaint that she submitted to the Canadian Human Rights Commission and that the grievances were filed based on a recommendation that she exhaust all internal recourses before proceeding with external remedies. She sought the reimbursement of lost wages.

[3] The employer's reply, signed by Ms. Lusk at the first level of the grievance procedure on April 17, 2015, stated that Ms. Lortie was provided with due process and procedural fairness in the two discipline decisions. She also stated that both grievances were untimely.

[4] The second-level reply, dated May 8, 2015, stated that the grievance was presented outside the time limit prescribed in the *Public Service Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"). Despite the timeliness issue, its merits were reviewed. The reply stated that the grievor was given an adequate opportunity to present the rationale corresponding to her actions and to provide additional information pursuant to procedural fairness and natural justice theory. The reply also stated that all pertinent aggravating and mitigating factors were considered before the quantum of discipline was determined. The second-level grievance consultation was also considered. The grievance was denied.

[5] The third-level reply, dated May 29, 2015, stated that the disciplinary letters clearly outlined the prescribed timelines for Ms. Lortie to respond and that she had been given sufficient opportunity to present her concerns. The grievance was denied.

[6] The fourth-level reply stated that the grievance was filed outside the prescribed

time limits and was untimely, and therefore, it was denied. Nevertheless, its merits were considered, and it was determined that Ms. Lortie's actions constituted misconduct and that management's decision to impose discipline was reasonable and was based on the principle of progressive discipline.

[7] The grievances were referred to adjudication on July 7, 2015.

[8] At a prehearing teleconference between the parties on February 9, 2016, counsel for the employer advised the Public Service Labour Relations and Employment Board ("the Board") that it would not rely on the timeliness objection to hearing the grievances as it had not raised the objection within 30 days after having been provided with a copy of the notice of reference to adjudication, in accordance with s. 95(1) of the *Regulations*.

II. Background

[9] The employer called two witnesses, Ms. Lusk and Dominic Mallette, the acting district director of Nova Scotia and Newfoundland for the CBSA. The grievor testified on her own behalf.

1. The organization

[10] Ms. Lusk is one of four directors in the CBSA's Corporate Services that in turn reports to the director of Corporate Services, who in turn reports to the director general of the CBSA's Atlantic Region.

[11] Six employees report to Ms. Lusk. Three are classified at the PE-04 group and level and are managers of compensation, staffing, and labour relations respectively. Two employees also at that classification report to her; one is responsible for the employee assistance program and the other for informal conflict resolution and mediation.

[12] The grievor has reported to Ms. Lusk since December 12, 2014. Before then, she reported to Ms. Titus, the manager of labour relations and compensation.

2. The grievor

[13] The grievor is the disability management and accommodation case coordinator for the CBSA's Atlantic Region and has been since October of 2008. She is responsible

for managing and coordinating disability management, accommodating employees with disabilities, and return-to-work services as well as managing all workers' compensation claims in the region. She also monitors compliance with Part II of the *Canada Labour Code* (R.S.C., 1985, c. L-2), dealing with occupational health and safety (OH&S).

[14] She is responsible for providing guidance and advice to managers. In addition, she provides interpretation advice and support to all levels of the employer's regional management as well as to workplace committees and OH&S representatives on OH&S concerns and complaints under the internal complaint resolution process that deals with work refusal situations, among others.

[15] She manages "category three" medical evaluations for the employer's border services officers. She reports quarterly to its headquarters on accommodation and disability cases and on OH&S matters. She communicates with external service providers, Health Canada, the four workers' compensation boards in the Atlantic Provinces, and Employment and Skills Development Canada. She works with the management team and OH&S Committee members on a regular basis.

III. Background to the incidents giving rise to the grievances

A. Evidence of Ms. Lusk

[16] Ms. Lusk testified that she had disciplined Ms. Lortie in the past. She had verbally reprimanded her in March 2013. She had imposed a written reprimand in August 2013 for acting unprofessionally towards a manager and for disrespectful and unprofessional communications with clients.

[17] The discipline letter imposing the written reprimand reflects that Ms. Lortie denied engaging in any misconduct. Ms. Lusk stated in the letter that when rendering the written reprimand, she had considered all mitigating factors, including Ms. Lortie's clean disciplinary record and years of service.

[18] Ms. Lusk stated that she had been trying to engage in discussions with Ms. Lortie concerning appropriate communication styles. She had offered her training on negotiation and dispute resolution. She had also offered her training on work style, including on self-awareness and on how to deal with other personalities in the workplace. She stated that Ms. Lortie turned down the opportunity for work-style

training and that she decided not to participate in the negotiation course.

B. Evidence of Ms. Lortie

[19] Ms. Lortie testified that she completed the two courses that Ms. Lusk had deemed mandatory for her.

[20] Ms. Lortie had identified that she wished to take the negotiation course, based on her personal learning plan. She was scheduled to attend it; however, for personal reasons, she was unable to. One of her coworkers went in her place.

[21] She attended a course in Gatineau, Quebec, dealing with public service excellence and another, entitled "Toolbox for Communication Skills", at St. Mary's University in Halifax, Nova Scotia.

[22] Ms. Lortie testified that following the verbal and written reprimands in March and August 2013, she started losing weight. She consulted her physician, who advised her that it would be preferable that she work from home and not at her workplace due to the stress in the work environment. As of the date of the hearing, she had been working from home since September 2013.

IV. The two-day suspension

A. Incidents on May 22 and 28, 2014

[23] On May 28, 2014, Ms. Lusk wrote to Ms. Lortie, stating in part as follows: "This is to advise you that I have received some complaints with regards to your service. I would like to invite you to a pre-disciplinary meeting in order to discuss the allegations on Thursday, May 29, 2014 at 2 PM." Ms. Lortie advised Ms. Lusk that she would be available by telephone.

[24] The meeting occurred, presumably by telephone. Ms. Lusk testified that they discussed certain emails that had been provided to Ms. Lortie in advance of the discussion. Ms. Lortie stated that she was frustrated with the clients and that she did not agree that what was stated in any of the emails was inappropriate.

[25] On June 17, 2014, Ms. Lusk suspended the grievor for two days, without pay. The discipline letter read in part as follows:

…

> *This letter follows the initial disciplinary hearing held on May 29, 2014 and June 13, 2014. At that time, we discussed various occurrences of potential misconduct, specifically:*
>
> *1) The CBSA Code of Conduct, Section 11- Dealing With People We Work With*
>
> > *By communicating with others, at all times, in a respectful manner including on social media fora and when using electronic communications; and*
> >
> > *By considering the effect our decisions and actions have on others.*
>
> *In accordance with the principles of natural justice and procedural fairness outlined in the CBSA* Discipline Policy*, you were provided with an opportunity to speak to these allegations and provide a rationale and/or mitigating factors. I have reviewed all of the information provided including the statements made during these hearings.*
>
> *I have concluded that the misconduct on May 22, 2014, May 28, 2014, and June 12, 2014 are founded. Behaviour of this nature is unacceptable and will not be tolerated. I must remind you that you were given a letter of reprimand on August 22, 2013 concerning infractions of a similar nature. You are also advised that further disciplinary action would be taken against you for any further infractions. Since you have failed to correct your behaviour, I have decided to take further action…. Further instances of similar inappropriate behaviour will result in more severe disciplinary measures, up to termination from the Public Service.*

…

[26] Ms. Lusk testified that commencing in May 2014, four incidents occurred that ultimately gave rise to the two-day suspension.

B. Incident on May 22, 2014

1. Evidence of Ms. Lusk

[27] On May 22, 2014, Ms. Lusk stated that she received a complaint about Ms. Lortie's approach on a file concerning an employee's return to work.

[28] Ms. Lusk referred to an email chain between Ms. Lortie and Ms. Jardine, an operations manager, concerning the return-to-work plan of an employee who was a

border services officer and who had been absent from work due to a disability.

[29] Ms. Jardine forwarded the email chain to her district director, who in turn forwarded it to Ms. Lusk's director, who then, in turn, forwarded it to her for review.

[30] It is clear from the correspondence that line management was not following Ms. Lortie's recommendations. She had recommended that the employee begin her return to work as a border services officer, while the employer's Operations area had placed her in a non-operational program position.

[31] Ms. Jardine was new to the file and sought information from Ms. Lortie. She advised Ms. Lortie that she wished to be involved in all meetings about the employee. She was not able to explain to Ms. Lortie why the employee was placed in the district office following medical treatment and proposed that the employee be sent on mandatory training. She asked Ms. Lortie to contact her if she had any concerns with the approach.

[32] Ms. Lortie advised her that it would not be prudent to send the employee on mandatory training. She also advised her that the employee needed be reintegrated in a border-services-operations atmosphere. The email continues as follows:

…

> *The employee fights me on everything. The employee thinks I don't know what I'm talking about. I have 20 years of experience in doing this. You don't put a nurse in a fire station for a return to work and that is essentially what they did with this employee. I didn't understand the reasoning behind it. If she's going back to BSO (border services operations), why isn't this return to work taking place in her substantive work location? I didn't get it and I was quite frustrated. I felt like the team didn't believe that she would eventually return to BSO. I wish they would shut up and listen to me and such situations would not occur. I will keep you posted. What I need to know is, is the airport still her substantive work location and if so, a move needs to take place as soon as possible.*

[33] Ms. Lusk considered that Ms. Lortie's comments breached the CBSA's "Code of Conduct", which is a comprehensive document that attempts to address the ethical issues that CBSA employees may encounter while conducting their business. In particular, Ms. Lusk considered Ms. Lortie's comments to have breached section 11, which is titled, "Contact With the People We Work With", specifically the values recited

in bullets three and six. Section 11 reads as follows:

> *Our CBSA values of **Respect**, **Integrity** and **Professionalism** guide our interactions with the people we work with including colleagues, clients, and stakeholders. As CBSA employees we demonstrate these values in a number of ways, including:*
>
> - *by valuing the unique contributions of others within our diverse workforce;*
> - *by fostering collaboration, professional learning, and innovation by being open and honest;*
> - *by communicating with others, at all times, in a respectful manner including on social media fora and when using electronic communications;*
> - *by never engaging in discriminatory or harassing behaviour;*
> - *by considering the effect our decisions and actions have on others; and*
> - *by never making abusive, derisive, threatening, insulting, offensive or provocative statements or gestures to or about another person. See section 2 of the* Canadian Human Rights Act*.*

[34] Section 2 of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6), although not expressly recited in the Code of Conduct, provides as follows:

> ***2** The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*

[35] During cross-examination, Ms. Lusk acknowledged that she was not aware that the employee in question was being sent for mandatory training while she was in an accommodated position and undergoing treatment.

[36] Ms. Lusk did not understand that the employee was not being introduced back into her occupation and that according to Ms. Lortie, there was a risk that management could send the employee into a situation in which she could reinjure herself.

2. Evidence of Ms. Lortie

[37] Ms. Lortie testified about the incident and explained that her concern was that the employee was about to be sent on mandatory training, which was physically demanding.

[38] At the time, the employee did not have a category three medical evaluation. The employee had had back surgery, and based on Ms. Lortie's experience, she believed that once Health Canada carried out its evaluation, it would want to communicate with a specialist.

[39] Before sending the employee to mandatory training, the plan had been to gradually reintroduce her to her border services officer job.

[40] Ms. Lortie testified that she should not have written the sentence: "I wish they would shut up and listen to me …". However, the case had been ongoing for over six years. "They" in this context referred to the employee and the superintendent. Ms. Jardine was the program manager and was letting Ms. Lortie know what was going on with this officer as she was responsible for the employee.

[41] From Ms. Lortie's perspective, when situations like this occur, the last thing desired is a placement not in keeping with the employee's limitations.

V. Incident from May 26 to 28, 2014

A. Evidence of Ms. Lusk

[42] Ms. Lusk referred to an email chain that reflects discussion among employees concerning the regional placement system (RPS), in which employees from different border services offices who require accommodation are consolidated on one list, to facilitate their placement. Ms. Lortie initiated and developed this program, together with staffing advisors. It requires that human resources and operations personnel contact Ms. Lortie before staffing a position to determine if anyone on the accommodation list meets the selection criteria. If no one does, then Ms. Lortie will

clear the position for staffing.

[43] The email chain at issue starts with an email from Human Resources dated May 26, 2014, requesting staffing actions for two CR-03 positions to be filled from an external advertised process once Ms. Lortie grants clearance. The positions proposed for staffing were located in the employer's Southern New Brunswick and PEI Districts. Debra Thompson is the chief of operations for this district. Ms. Lortie was asked to clear the positions.

[44] On May 28, 2014, she emailed Human Resources and Ms. Thompson, stating as follows:

> *Good morning, It's very difficult for me to clear a position when we have so many requests for accommodation. Debbie, the employee you have doing this job, is she an accommodation case? Surrounding POE's* [points of entry] *are running out or have run out of options for accommodation.*

[45] Ms. Thompson replied as follows:

> *Lorraine, the individual we want to pull from the pool is not currently working. This is a term position not indeterminate. Who are we trying to accommodate? All my staff there are on short-term DTA's are being accommodated and are coming to an end as are Ferry Pts's [the MAT ones) [sic throughout].*

[46] Ms. Lortie replied with: "The Saint John POE [points of entry] may require an accommodation in the next few days and they are in a bit of a panic about it."

[47] Ms. Thompson replied: "That's an hour and a half away."

[48] Ms. Lortie replied: "That's right."

[49] Ms. Thompson then wrote: "Our staffing plan had original [*sic*] called for 7 CR-03 cashier terms for the peak period and we have reduced that already due to the others we have on short-term DTA's? Does that help?"

[50] Ms. Lortie replied:

> *RPS-clearance-468-I'm clearing, but my discussion with Saint John is resonating. Debbie, expect a call from Saint John. I realize it makes very little sense to have a FB-03 from Saint*

> *John, on travel status to work a CR-03 position, but it is a demonstration of effort on the Agency's part, actually quite a demonstration of our effort to assist. We never know when a case will land before an adjudicator. Thank you, Lorraine.*

[51] Although not copied on the email, Ms. Lusk took exception to Ms. Lortie's statement to Ms. Thompson that she should "expect a call from Saint John." Ms. Lusk did not see any reason Ms. Thompson should expect a call from Saint John. She interpreted Ms. Lortie's statement as implying that people were going to be frustrated that Ms. Thompson was not taking on one of the employees who required accommodation. Ms. Lusk was of the view that the language used was almost intimidating and that it was harsher than necessary.

[52] During cross-examination, Ms. Lusk acknowledged that she did not realize that the employee in question who had worked out of the port in Saint John was not working. She was not aware that Ms. Lortie had been working with the employee and the employer's manager, trying to find an accommodation for him.

[53] Ms. Lusk acknowledged that the employer had been having problems accommodating employees for over 10 years and that when an employee requires an accommodation and the port in which he or she was working cannot accommodate the employee, one of the options is to contact the surrounding offices. She also acknowledged that travel costs were not considered an undue hardship.

[54] Ms. Lusk was asked why she had told Ms. Lortie not to call Ms. Thompson to apologize. Ms. Lusk replied that Ms. Lortie engaging the client was not appropriate.

[55] Ms. Lusk then acknowledged that Ms. Thompson had not complained about Ms. Lortie's email; rather, Ms. Lusk had determined that Ms. Lortie's correspondence was not appropriate. Ms. Lusk acknowledged that she had not advised Ms. Lortie at the time of the incident that Ms. Thompson had not filed a complaint.

B. <u>Evidence of Ms. Lortie</u>

[56] Ms. Lortie testified with respect to this incident. When this matter was brought to her attention, she was not advised that the complaint had not come from Ms. Thompson. She was advised of the matter during a telephone discussion with Ms. Lusk and Ms. Titus, the Labour Relations manager.

[57] In response, she advised Ms. Lusk and Ms. Titus that she had not intended to offend Ms. Thompson and that she wanted to call her to apologize. She was advised that it would be inappropriate to call Ms. Thompson.

[58] Ms. Lortie advised the Board that she and Ms. Thompson were exchanging emails with respect to an available position at her port in St. Stephen, New Brunswick. Ms. Lortie was aware that one of the officers who worked at the port in Saint John and who had been absent from work due to a disability was ready to return to work and required an accommodation.

[59] Ms. Lortie testified that when she indicated in the email that Ms. Thompson should expect a call from Saint John, her intent had been to give her a heads-up. She was explaining to Ms. Thompson that when an office does not know where to place an employee requiring accommodation, Ms. Lortie advises them to contact the surrounding ports. She stated that she does so at the request of Sun Life Financial, the disability insurer, or the workers' compensation boards.

VI. Incident on May 28, 2014

A. Evidence of Ms. Lusk

[60] Ms. Lusk stated that on May 28, 2014, Ms. Lortie sent an email to her and to other human resources managers in which she expressed frustration concerning a file in the Halifax area. Management was asking Ms. Lortie for clearance to provide an assignment opportunity to an applicant. The email reads as follows:

> *Good morning, Another occasion when accommodated cases in HRM should be applying and are not. Management for employees,* [AB]*, in particular, must be told that this is unacceptable. This is our opportunity to provide training in alternate occupations to employees who know they require permanent accommodations.*
>
> *AB is under the radar. My file for attempting to accommodate him is solid. He has not demonstrated any effort whatsoever to alleviate his situation. But my point is that management must be playing a role as he is being accommodated somehow?? [*sic*] This issue should be addressed at RSMT. Thank you.*

[61] Ms. Lusk stated that she objected to the use of the language "AB is under the radar", as it suggested that management was doing something inappropriate.

Ms. Lortie should not express her personal frustration in an email.

[62] She stated that Ms. Lortie felt the management team was not making the employee's accommodation happen. In her view, Ms. Lortie should have gone to the senior management team to address her concerns. She acknowledged that the email was sent solely to the human resources team.

[63] Ms. Lusk acknowledged in cross-examination that she did not know that the employee "AB" was listed on the RPS as requiring permanent accommodation and that Ms. Lortie had a résumé for him.

[64] Ms. Lusk did acknowledge that when a job opportunity becomes available, Ms. Lortie sends a note to all employees requiring permanent accommodation. Ms. Lusk was not aware that the employee concerned had never responded as being interested in a permanent accommodation.

[65] Ms. Lusk acknowledged that managers have a responsibility to discuss job opportunities with employees who require permanent accommodation. However, she did not agree that Ms. Lortie's email should be understood in that light.

[66] In answer to the question of why she concluded that Ms. Lortie had done something wrong, she answered that Ms. Lortie was suggesting that management was not accommodating the employee to the extent she would have liked him to be accommodated.

B. <u>Evidence of Ms. Lortie</u>

[67] Ms. Lortie stated that the email was not directed to any clients but to Ms. Lusk, Ms. Elms, and Ms. Titus, the manager of labour relations and compensation. Ms. Lortie stated that the purpose of the email was to ask her team for help addressing the situation of an employee who required permanent accommodation.

[68] She referred to the Regional Placement Program (RPS), which is a tool that helps her manage accommodations in the employer's Atlantic Region and in particular helps her accommodate employees who need permanent accommodation. It was designed with border services officers in mind. Once an accommodation request has been vetted and the medical information has been provided, Ms. Lortie communicates with the employee and requests a copy of his or her résumé.

[69] The employee who was the subject of this email required permanent accommodation. Ms. Lortie experiences difficulties accommodating border services officers due to the officer environment if it means accommodating them in clerical positions.

[70] The regional manager had sent her a notification that a position was available in which to temporarily place an employee requiring accommodation. She was attempting to place him in this position to increase his skill set.

[71] Ms. Lortie stated that she was not receiving assistance from the employee's manager. Although the employee required accommodation, he continued to work in his substantive officer position. When he was notified of the accommodated position, he did not express any interest in applying for it. She had offered other positions to him that had not been accepted. Ms. Lortie was of the view that his manager was not assisting her.

[72] The purpose of sending the email was to give her team a heads-up that she was encountering difficulties with the situation. The manager was not sent the email and was not identified in it.

VII. Incident on June 12, 2014

[73] In June 2014, Ms. Lusk prepared a business plan for Human Resources for the next fiscal year. On June 6, 2014, she requested her direct reports to review it and to obtain feedback from their employees.

[74] On June 11, 2014, Ms. Titus requested comments from her team, including from Ms. Lortie, by June 12, 2014.

[75] On June 12, 2014, Ms. Lortie replied to her manager and other members of her team as follows: "Good morning, the only comments I have to express are: stop wasting time; stop wasting taxpayer dollars; stop being pseudo-experts."

[76] Ms. Lusk testified that Ms. Lortie's response was disrespectful to the process and that she should not have communicated in that manner. She asked Ms. Titus to launch a fact-finding investigation to determine why Ms. Lortie had replied in that way.

[77] Ms. Titus and Ms. Lortie had a meeting on June 13, 2014. Ms. Lortie was asked

to provide context to the email she had sent to the team in response to comments related to the draft Human Resources business plan.

[78] The notes of the meeting prepared by Ms. Titus reflect that Ms. Lortie stated that she was being facetious; i.e., funny. It was a light email to her team. She knew these people; it was a joke. She was surprised that Ms. Titus did not think it was funny. She was even more surprised to receive a discipline meeting invitation for such an email.

[79] Ms. Titus noted that she explained to Ms. Lortie that the email was not funny and that considering that it was about the regional Human Resources business plan, it could have seemed like it was directed to the team or management. She explained that there is a fine line when joking about this kind of work.

[80] Ms. Titus acknowledged that the team had shared concerns and frustrations about working for the federal government and that most of the team have made comments about some work-related initiatives and documents. However, there is a fine line, and she considered that this type of response crossed it.

[81] Ms. Lortie responded that she disagreed that this email had crossed the line. She repeated that it was funny and light, that others had found it funny, and that because she sent it, she was being treated differently.

A. Evidence of Ms. Lortie

[82] Ms. Lortie testified that all the individuals who were sent this email were part of her team. They knew her, and she knew them. The team members joke a lot, which is all she was doing in this email. She had explained to Ms. Titus that she had been being facetious and that she had had no ill intent.

B. Evidence of Ms. Lusk

[83] Having conducted the fact-finding investigation with respect to the emails of May 22 and 28, 2014, and having reviewed the report that Ms. Titus prepared of the meeting with respect to the email of June 12, 2014, Ms. Lusk concluded that Ms. Lortie's alleged misconduct was founded.

[84] On June 17, 2014, she wrote to Ms. Lortie, advising her of her conclusions that

the misconduct on May 22 and 28 and on June 12, 2014, were founded and that behaviour of that nature was unacceptable and would not be tolerated. The grievor was reminded that she had been given a letter of reprimand on August 22, 2013, concerning infractions of a similar nature and that since she had failed to correct her behaviour, Ms. Lusk had decided to take further action by way of a two-day suspension without pay.

VIII. The five-day suspension

A. Evidence of Ms. Lusk

[85] Ms. Lusk testified that an OH&S advisor from the employer's national headquarters visits the region annually for one week, during which a series of meetings take place.

[86] There is a purely functional relationship between the OH&S advisor and Ms. Lortie's position as the regional OH&S advisor responsible for the duty to accommodate. There is no reporting relationship.

[87] On November 5, 2014, a meeting occurred at the Halifax airport that involved the OH&S advisor, Ms. Lortie, and management staff. Ms. Lusk was not present. The OH&S advisor went to see Ms. Lusk and expressed concern about how Ms. Lortie had treated her during a meeting with the client management team. The advisor informed Ms. Lusk that she did not want to file a complaint.

[88] After returning to the employer's national headquarters, the OH&S advisor purportedly spoke with her superior, the director general of labour relations, who in turn phoned the Regional Director, who asked Ms. Lusk to look into the matter.

[89] Ms. Lusk carried out a fact-finding investigation. She met with Ms. Lortie on December 12, 2014. If Ms. Lusk provided Ms. Lortie with a written notice setting out the timing and the subject matter of the meeting, it was not entered into evidence.

[90] Ms. Lusk met with two witnesses later in December 2014 and with two more in January 2015.

[91] On January 22, 2015, she emailed Ms. Lortie, advising her that as they had discussed during their December meeting, some concerns had been raised about her

service; that she had noted Ms. Lortie's thoughts on each issue; and that she had advised the grievor that she would complete a fact-finding investigation.

[92] She stated that she completed her fact-finding investigation and that she invited Ms. Lortie to a pre-disciplinary meeting to discuss the allegations on Tuesday, January 27, 2015, at 12:00 p.m. She attached a vetted fact-finding report for the grievor's information.

[93] Ms. Lusk made notes of what the different witnesses had stated to her. However, their names were blacked out, and thus the comments cannot be attributed to any particular witness. The fact-finding report was introduced into evidence. It was acknowledged that unless the witnesses testified *viva voce*, the evidence was hearsay. Nevertheless, the report was admitted into evidence with the Board to ultimately determine the weight to be given to it.

[94] Ms. Lusk received a response by email from Ms. Lortie, contesting the allegations.

[95] On February 5, 2015, Ms. Lusk wrote to Ms. Lortie, stating in part as follows:

> *This letter follows the pre-disciplinary hearing held on January 27, 2015 to discuss allegations of misconduct made against you, specifically the allegations of behaviour described as aggressive, confrontational, and demeaning in tone towards OHS program colleague, in front of clients.*
>
> …
>
> *In accordance with the principles of natural justice and procedural fairness outlined in the CBSA* Discipline Policy, *you were provided with an opportunity to speak to these allegations and provide a rationale and/or mitigating factors. I have reviewed all of the information provided including the statements made during these hearings and I conclude that the allegations of misconduct are founded and that your behaviour on November 5, 2014 is contrary to the CBSA* Code of Conduct, *section 11. In determining the appropriate disciplinary measure, I have considered the following.*
>
> - *You did not acknowledge your behaviour was inappropriate nor did you express remorse for your behaviour;*
> - *The incident took place in public view, in the presence*

> *of clients, and during the provision of service;*
>
> - *Your failure to address matters beforehand and out of view of clients, despite admitted opportunities to do so; and,*
>
> - *Your current disciplinary record on file, which includes a letter of reprimand dated August 22, 2013 and a 2 (two) day suspension administered to you on June 18 and 19 2014.*
>
> …

[96] Ms. Lusk determined that disciplinary action was warranted, and she suspended Ms. Lortie for five days, without pay.

[97] Ms. Lusk acknowledged in cross-examination that she did not record on the fact-finding report that the OH&S advisor had not wanted to file a complaint against Ms. Lortie. She acknowledged that no written complaint was made. However, her superior asked her to look into the situation.

[98] Ms. Lusk acknowledged that she did not send Ms. Lortie's written response to the allegations directly to Mr. Thibodeau, the director of labour relations, but that it was sent as part of the final package.

B. <u>Evidence of Mr. Mallette</u>

[99] At the time of the hearing, Mr. Mallette was the CBSA's acting district director for Nova Scotia and Newfoundland, a position he has held since May 2015. Ms. Lortie is his advisor for OH&S and duty-to-accommodate issues.

[100] He recalled attending a meeting on November 5, 2015, in relation to an OH&S complaint filed about the Halifax airport that had started as a work refusal. The purpose of the meeting was to discuss a way forward and to develop an appropriate process to follow in handling files of this nature. Along with him, also at the meeting were Ms. Lortie, an OH&S advisor from the employer's national headquarters, and three of his supervisors. He led the meeting with the support of Ms. Lortie and the OH&S advisor.

[101] He was asked how the meeting went and what he observed concerning Ms. Lortie. He stated that she was late for the meeting. Apparently, she had not received a notice of the change in start time. He stated that it was no one's fault;

however, Ms. Lortie had insinuated that someone had not advised her of that change.

[102] Mr. Mallette stated that during the discussion, a conflict arose between Ms. Lortie and the OH&S advisor and that tension was in the air. Ms. Lortie challenged the OH&S advisor at times; the advisor was not as familiar as Ms. Lortie was with the cases in the region. He observed Ms. Lortie rolling her eyes when the advisor made suggestions.

[103] Mr. Mallette stated that they achieved what they had wanted to do during the meeting, although it could have gone smoother.

[104] During cross-examination, Mr. Mallette was asked whether he recalled the topic of hazardous occurrences reports being discussed. He could not recall.

[105] He was asked whether the topic of emergency evacuations and fire drills at the Halifax airport were discussed. He replied that that topic had been discussed in the past but that he was not sure it was discussed at that meeting.

[106] It was suggested to Mr. Mallette that the OH&S advisor was present at the meeting for two purposes: one with respect to the OH&S complaint at the Halifax airport, and the second with respect to emergency evacuation drills.

[107] It was suggested to him that the OH&S advisor advised those present that the drills had to take place every three months. At that point, Ms. Lortie asked the OH&S advisor to check the *Canada Labour Code*, as it requires emergency evacuation drills to take place only once a year.

[108] Mr. Mallette remembered that Ms. Lortie challenged the OH&S advisor but could not recall what the issue related to. He was asked whether she had challenged the advisor more than once. He could not confirm that it was or was not done only once.

[109] He was asked whether he was aware that Ms. Lortie and the OH&S advisor had attended a management meeting at a different location the day before with a different management team. Mr. Mallette stated that he had no direct knowledge of such a meeting; however, he was not surprised to learn that there probably had been a previous meeting at another site.

C. Evidence of Ms. Lortie

[110] Ms. Lortie testified that shortly before the incident at the Halifax airport that gave rise to the five-day suspension, Ms. Titus contacted her. During the discussion, Ms. Titus acknowledged that there was considerable tension in the workplace and advised her that she understood why Ms. Lortie was stressed by the work environment and was working at home. She supported her working at home.

[111] The Manager of Labour Relations advised the grievor that she was a target. She also advised her that Ms. Lusk was trying to get her back into the office.

[112] Two days before the meeting at the Halifax airport, the OH&S advisor and Ms. Lortie met at the employer's Human Resources offices in Halifax and then met with a team of managers. The OH&S advisor gave an information session, after which she took questions. While explaining a scenario dealing with the duty to accommodate to the management team, the advisor used a vulgarity that in Ms. Lortie's view was embarrassing. Ms. Lortie asked her why she had done so.

[113] The day before the airport meeting, the OH&S advisor and Ms. Lortie met at Marine Operations with the management team and the OH&S committee members at that location.

[114] The OH&S advisor gave an information session, after which the two of them took questions. A question was asked concerning the circumstances in which hazardous occurrences reports are required to be completed.

[115] The question related to a hypothetical situation in which an employee in a federal workplace slips and falls in a puddle but is able to get up and continue walking. The OH&S advisor told the group that so long as the employee is not injured, completing the form is not necessary.

[116] Ms. Lortie was of the view that Part II of the *Canada Labour Code* requires that a form be completed in these circumstances and that she had been advising the management team of this requirement for over five years. She testified that she did not say anything at the time. That evening, she emailed a senior OH&S advisor in Ottawa, Ontario, who confirmed Ms. Lortie's interpretation of the *Canada Labour Code*.

1. The meeting at the airport

[117] Ms. Lortie explained that she did not arrive late for the meeting as it had been scheduled for 9:00 a.m. She learned that Mr. Mallette had rescheduled the meeting to 8:30 a.m. as he had wanted to accommodate one of the superintendents.

[118] Ms. Lusk had stated that the grievor had used foul language and that tension was in the room that day concerning the grievor. Ms. Lortie denied using foul language.

[119] Ms. Lortie stated that she was worried about possible misinformation that the OH&S advisor could give to the regional management team. In her view, the OH&S advisor did provide incorrect information to the team with respect to the hazardous occurrences reports. Ms. Lortie asked the OH&S advisor to confirm what she was saying. The OH&S advisor had a copy of the *Canada Labour Code* in front of her, but Ms. Lortie did not ask her to read it as she knew that the information the OH&S advisor was providing was incorrect. Ms. Lortie wanted to make sure that the managers were not misguided.

[120] From Ms. Lortie's perspective, the OH&S advisor was mistaken as well with respect to the frequency of evacuation drills.

[121] Ms. Lortie said she was sorry that the OH&S advisor had felt that her back was up against the wall.

[122] Ms. Lortie stated that in her interview, she advised Ms. Lusk about what had happened. She expressed concern that her response to the allegations was not sent to Mr. Thibodeau.

[123] Ms. Lortie was not cross-examined on any of her evidence.

IX. Summary of the arguments

A. For the employer

[124] The burden was on the employer to establish that misconduct occurred that warranted discipline and to demonstrate that the quantum or penalty was reasonable. It is not a perfect science. There is no magic recipe. When it comes time for an adjudicator to review the quantum of discipline it is not a matter for the adjudicator to be convinced that the employer has used the right response, however, if the

adjudicator is satisfied that the quantum of discipline is reasonable in the circumstances, the adjudicator should avoid modifying the quantum.

[125] Section 11 of the Code of Conduct recites that the CBSA values of respect, integrity and professionalism are to guide the interactions of employees with the people they work with including colleagues, clients, and stakeholders. Employees are to demonstrate these values in a number of ways, including the following:

> …
>
> *by communicating with others, at all times, in a respectful manner… when using electronic communication;*
>
> …
>
> *by never making abusive, derisive, threatening, insulting, offensive or provocative statements or gestures to or about another person. See section 2 of the* Canadian Human Rights Act*.*
>
> …

[126] The circumstances of each case may always be examined subjectively. It is a matter of context and nuance. That is why the evidence has to be looked at as a whole, to determine the overall impact, as at first impression, the incidents may not appear to be of great significance.

[127] To put the matter in context, when Ms. Lusk was appointed to her position, the previous manager informed her that Ms. Lortie had communication issues.

[128] Ms. Lusk tried to work with the grievor. She referred to coaching and training that was offered to the grievor. She did not intend to discipline her. She tried to help her. At a certain point, there was nothing left to do but to start the discipline process. Between each and every disciplinary action, she still attempted to work with the grievor, to try and improve her communication skills.

[129] The grievor received a verbal reprimand in March 2013 and a written reprimand in August 2013.

[130] From August 2013 until May and June 2014, Ms. Lortie made some attempts to keep her communications respectful and to not offend management.

1. The two-day suspension

[131] In reviewing the text of Ms. Lortie's emails, although they can sometimes be read subjectively, it cannot be seen how telling it to "shut up" demonstrates respect for management. Similarly, the tone in the correspondence from the grievor to Ms. Thompson, the manager, is unacceptable. She was certainly not trying to work in a cooperative way.

[132] It may be argued that it is all a matter of context. People could say they did not hear an acknowledgement that those words are not appropriate. They could have heard a justification; namely, frustration. However, at some point, the grievor did recognize that perhaps her choice of words was not the best. But by referring to an employee being under the radar, she implied that management was not doing its job.

[133] The misconduct reaches its extreme when in response to a request for feedback on the business plan, she replies to her manager with "stop wasting time", etc. It is difficult to see how that response can be considered respectful. Her explanation to Ms. Titus and to the adjudicator was that it was a joke. If so, it was certainly not an appropriate joke.

[134] With respect to the quantum of the two-day suspension, mitigating factors would normally be considered. However, in this case, there is a lack of remorse; the grievor does not realize that there is anything wrong in her communications, even though she has received coaching and training.

2. The five-day suspension

[135] Ms. Lusk testified that the employer's OH&S advisor from its headquarters reported to her how she was not respected in the meeting of November 5, 2014. See the fact-finding report prepared by Ms. Lusk.

[136] It would be preferable to have the best possible evidence. Although some of the evidence in the report may constitute hearsay, hearsay evidence is still admissible, although the Board may decide only that a certain weight should be given to it.

[137] Most of the time, not all those who participate in an investigation testify at a hearing.

[138] In this case, the decision maker met and discussed the observations of these individuals, to support the discipline.

[139] Mr. Mallette was clear in his testimony about a certain amount of tension being in the room, but he did not share Ms. Lortie's view concerning the level of it.

[140] Ms. Lortie's level of frustration could explain why things happened. Nevertheless, despite the progressive discipline imposed on her, she continues to communicate in the wrong way. Despite coaching and training, she is still challenging management's way of doing things, and not in a constructive manner.

[141] The misconduct is established. The communication problem has reached the point of defiant behaviour. The grievor sees her relationship with the client as being challenged. Even though she may have the best interests of her client at heart, she has to communicate in a respectful way.

3. <u>Quantum of discipline</u>

[142] As noted, there is never an exact recipe to establish the appropriate quantum of discipline. A complete review of the evidence supports the view that the two- and five-day suspensions were not unreasonable. In *Varzeliotis v. Treasury Board (Environment Canada)*, PSSRB File Nos. 166-02-9721 to 9723, 10273, and 10879 (19831011), [1983] C.P.S.S.R.B. No. 108 (QL), the Public Service Staff Relations Board (PSSRB) stated the following at paragraph 165:

…

> *In arbitral jurisprudence, insubordination is perceived as a subjective evaluation of the attitude of an employee. Forms of misconduct that may be categorized as insubordination include "failure to follow the instructions of the supervisor", and "defiant and disrespectful behaviour toward a supervisor". The grievor was discharged on the allegation that he was insubordinate for having engaged in these types of misconduct. The employer bears the onus of establishing that the facts and circumstances adduced in evidence support the decision made, both as to its determination that the conduct of the grievor was deserving of discipline and as to the penalty selected. The test I propose to apply is as follows:*
>
> *(a) Has the employer established just and reasonable cause for some form of punitive discipline?*

> *(b) Has the employer established that the penalty selected was just and reasonable or was the response excessive?*
>
> *(c) If the response was excessive, what penalty, if any, should be substituted.*
>
> …

[143] The adjudicator then discussed as follows the relevance of the consequences applicable to an incident not subject to formal discipline, such as an oral or written reprimand at paragraph 168:

> …
>
> *… Normally, incidents that are not the subject of formal discipline that would invite the exercise of the right to grieve should not be given weight in considering whether the employer had just cause for discipline. However, such evidence may properly be received for the purpose of establishing that the grievor was made aware of the attitude of his employer to a particular course of conduct and knew that its repetition would undoubtedly attract disciplinary action….*
>
> …

[144] In *Lâm v. Treasury Board (Department of Health)*, 2007 PSLRB 69, which involves a series of disciplinary suspensions and an allegation by the grievor of discrimination and harassment by the employer, the adjudicator observed at paragraph 176 that "[a]ssessing a disciplinary issue is always a delicate matter when, at the same time, an employee has undertaken procedures relative to harassment."

[145] Nevertheless, in that case, the adjudicator found that the employer was justified in considering the use of the word "aggressor" as disrespectful in successive emails that the grievor sent to management. At paragraph 216, the adjudicator found that while it might have been acceptable for the grievor to want to debate with her supervisor, the tone that she used and her sarcastic expression of gratitude were completely inappropriate. The adjudicator concluded that those factors should be considered as justifying the disciplinary measure.

[146] In *MacLean v. Treasury Board (Revenue Canada - Customs, Excise and Taxation)*, PSSRB File No. 166-02-27968 (19990107), [1999] C.P.S.S.R.B. No. 1 (QL), which involves a grievance against a 15-day suspension for the grievor's written comments on managers that offended respect for authority and workplace conduct, the adjudicator

commented at paragraph 83 as follows:

> *In my opinion the only person who acted in an unprofessional manner in this case was Mr. McLean… If Mr. McLean thinks that his sarcastic comments and vulgarities are indicative of a professional individual, he is drastically mistaken. They are not. He is the one who has to change his ways and start acting as a professional.*

[147] The adjudicator also stated as follows at paragraph 86: "While a certain amount of jocularity is acceptable in the workplace, the instant case exhibits the problem of an employee who does not know when to stop. To paraphrase Mr. MacLean, things just started rolling and kind of snowballed."

[148] In this case, the two- and five-day suspensions were reasonable and necessary to drive home to Ms. Lortie that she should change her attitude. The Board should not review the quantum of those suspensions.

[149] In *Mercer v. Deputy Head (Department of Human Resources and Skills Development)*, 2016 PSLREB 11, the grievor, a client services agent at Service Canada, grieved a two-day suspension for personally accessing his family members' employment insurance information and for providing a service to them that was not available to other Canadian citizens.

[150] At paragraph 55, the adjudicator stated that an adjudicator should reduce a disciplinary penalty only if it is clearly unreasonable or wrong. In the circumstances of that case, the grievor demonstrated no remorse for his actions and repeatedly tried to deflect responsibility for them by blaming the employer. The adjudicator determined that the grievor had not met his onus to convince her that it was just and reasonable to substitute a lesser penalty.

[151] In *Albert v. Canada Customs and Revenue Agency*, 2005 PSSRB 7, the grievor, who was a supervisor, was given a five-day suspension for sexual harassment. At adjudication, it was argued on his behalf that a number of mitigating factors should have been taken into account and that the penalty should have been reduced. The adjudicator stated as follows at paragraphs 21 and 22:

> *[21] Mr. Hill argued, on behalf of the grievor, that a number of mitigating factors are present here which should be taken into account. I agree with this, and so does the employer. Ms. St. George stated that she looked at case law which suggests*

> *a penalty greater than five days would be appropriate, but these same mitigating factors that Mr. Hill cited were considered by Ms. St. George. She ultimately felt five days was appropriate when all factors were taken into consideration.*
>
> *[22] While mitigating factors are issues that should be considered, once it has been shown to me that the employer did consider them, it would not be appropriate for me to consider them again and further reduce what I feel is an appropriate penalty in these circumstances.*

[152] Ms. Lusk did consider mitigating factors when imposing the discipline.

[153] The misconduct does not relate to the quality of the grievor's work. The employer is not saying that Ms. Lortie is not a good employee.

[154] Mr. Mallette expressed that he is comfortable with her as an advisor. She has a lot of valuable knowledge. The concern is her approach. That is what the employer is attempting to address. It does not dispute that she is doing her job. The problem is with how she expresses herself.

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

[155] The workplace environment, which involves working with managers who come from a background as border services officers, may be described as one in which disrespectful communications are not only permitted; they are the norm. The grievor stated as follows:

> Contrary to counsel for the employer's argument I did apologize for using the words "shut up" in my email. I was not challenging management's authority I was reaching for support from my manager.
>
> With respect to the comments concerning the business plan I was being facetious with my team.
>
> I have received much positive recognition for the way in which I discharge my job responsibilities.
>
> Ms. Lusk admitted that she was not aware of all of the surrounding facts concerning the emails to Deborah Thompson and Ms. Jardine.
>
> With respect to the incident at the airport at no time did I say the meeting went smoothly. Mr. Mallette was not aware of what had happened the previous day. At the meeting I

> only asked the occupational health and safety representative from the National to corroborate her information.
>
> It has been suggested that the tone in my email was accusatory. My email was not accusatory I was reaching out to management for assistance.
>
> I request that the Board review the discipline imposed and determine whether it was appropriate.
>
> I believe the discipline imposed was unfair and that I have not been managed objectively. I believe the quality of my work should play a role in this determination.
>
> Take a close look at my job description. The job description represents a tension between my role as the regional disability management and accommodation case coordinator responsible for coordinating the placement of disabled employees under the duty to accommodate and managers at the various ports who are noncompliant with the duty to accommodate. It depends on the manager. I am stuck in the middle in these situations without the support of my supervisor Ms. Lusk.

C. The employer's reply submissions

[156] Ms. Lortie made submissions with respect to the use of inappropriate language in the workplace. She did not introduce evidence on this issue. She acknowledged that she should not have used the words "shut up" in her email, which she did not acknowledge during the fact-finding investigation. She might have the best of intentions when performing her job, but that is not what is being examined, which is the language she uses in her communications.

X. Reasons for decision

[157] Ms. Lortie grieves her two- and five-day disciplinary suspensions. She alleges that both were unfounded, and she seeks the reimbursement of lost wages.

[158] The employer contends in its replies that Ms. Lortie was provided with due process and procedural fairness. On the merits of the grievance, the employer states that Ms. Lortie's actions constituted misconduct and that the decision to impose discipline on her was reasonable and was based on the principle of progressive discipline.

[159] Ms. Lortie is an excluded employee and is not represented by a bargaining agent; nor are her terms and conditions of employment subject to a collective agreement.

[160] Subsections 12(1) and (2) of the *Financial Administration Act* (R.S.C. 1985, c. F-11) empower deputy heads to establish standards of discipline and to set penalties including termination of employment, suspension, demotion to a position at a lower maximum rate of pay, and financial penalties. Section 12(3) of that Act provides that discipline against or the termination of employment of or the demotion of any person may only be for cause.

[161] The CBSA has a discipline policy that applies to all represented, excluded, and unrepresented employees (the Discipline Policy). The statement of policy in the Discipline Policy reads in part as follows:

> *… It is the policy of the CBSA that all allegations or evidence of employee misconduct be investigated according to the principles of natural justice to ensure that the professional reputation of staff and the integrity of CBSA operations are protected and that appropriate measures are taken.*

[162] Natural justice is defined in the Discipline Policy as follows:

> *…the requirement for management to be fair and reasonable in its application of discipline. It includes the following principles: the right to be informed of any allegations/accusations made and to be given sufficient information to understand the allegations; the right to be heard and the opportunity to present one's case so that an adequate defence can be put forward; and the right to have the decision based on relevant and reliable evidence, obtained through a proper investigation that was disclosed to both parties.*

[163] The CBSA commits in its Discipline Policy to inform employees of any allegations or accusations and to give them sufficient information to understand them.

[164] Brown and Beatty, in *Canadian Labour Arbitration*, 4th ed., at chapter 7, paragraph 7:2110, entitled "Notice", state the following:

> *Of all the conditions that collective agreements require employers to satisfy in exercising their disciplinary powers none is more basic than giving the employee and/or some union official notice of what action it proposes to take. As a general rule, arbitrators insist that employees be given enough information that they know what allegations are*

> *being made against them so that they can respond appropriately… As well, an employer may be precluded from justifying its actions on reasons and events that were not conveyed to the employee. Where the giving of notice is regarded as mandatory and fundamental, communications that are late and/or not sufficiently precise may even render the discipline void.*

[165] Having established that disciplinary action against an unrepresented employee must be for cause and that all allegations or evidence of employee misconduct must be investigated according to the principles of natural justice, the earlier extract from *Varzeliotis* seems apt.

[166] The employer bears the onus of establishing that the facts and circumstances adduced in evidence support its decisions, both as to its determination that the grievor's conduct deserved discipline and as to the penalty selected. The following two questions must be answered:

A. Has the employer established just and reasonable cause for some form of punitive discipline?

B. Has the employer established that the penalty was just and reasonable, or was the response excessive?

A. <u>Overview of the law with respect to respectful communications</u>

[167] Brown and Beatty state the following under the section entitled "Insolent and Defiant Behaviour" at paragraph 7:3660:

> *Conduct that is threatening, insolent or contemptuous of management may be found to be insubordinate, even if there is no explicit refusal to comply with a directive, where such behaviour involves a resistance to or defiance of the employer's authority. If, however, an obscene or abusive outburst is the result of a momentary flare-up of temper, and does not challenge the employer's authority, the imposition of disciplinary sanctions would not be justified. Similarly, it seems generally accepted that, by itself, profanity in the workplace is not grounds for discipline. In determining whether the quality of the grievor's remarks can be characterized as insolent and defiant, regard may be had to the nature of the business, and the common language and mode of expression utilized and tolerated in the plant. Assuming that the behaviour or language at issue is not particularly disruptive, insulting or contemptuous of*

> *management, only minor disciplinary sanctions would be warranted. On the other hand, if the language is accompanied by a refusal to obey instructions, threats or an assault on a supervisor, more severe disciplinary sanctions, including discharge, may be justified.*

[168] Chapter 11 of Palmer and Snyder's text, *Collective Agreement Arbitration in Canada*, 5th ed., deals with insubordination. The chapter is entitled "Insubordination - Showing Disrespect for the Employer", and its author is Beth Bilson, QC. Under the subheading "Verbal Abuse, Profanity and Insolent Behaviour", the author states as follows at paragraph 11.50:

> *11.50 The use of offensive language to superiors is often characterized as "insolent behaviour". This term is broad enough to equally include non-verbal signals of contempt or disrespect for management authority, such as refusing to attend a meeting, failing to acknowledge an order, exhibiting disrespect and defiance and failing to carry out an order that was not explicitly expressed. One arbitrator captured the concept in these terms:*
>
> > *"Insubordination is not restricted to coarse or threatening remarks made to a supervisor. Conduct that displays a contemptuous attitude and/or defiance of authority also falls under that category."*
>
> *Expressions of contempt and ridicule of supervisors via Facebook postings have also been found to constitute wrongful conduct.*
>
> *11.51 There are difficult issues arising where discipline is imposed for verbal statements or other non-verbal "insolence". On the one hand, arbitrators have recognized that not all workplaces are characterized by high levels of decorum or refinement. As one arbitrator put it, "A factory floor is not a Sunday school," and, in some circumstances "vulgar language" or "pithy epithets" must be expected. Where it is part of the custom of the workplace, "speaking frankly" may be seen as normal rather than disrespectful.*

[169] In *Dominion Glass Co. v. United Glass & Ceramic Workers, Local 203* (1975), 11 L.A.C. (2d) 84, the arbitrator summarized the arbitral jurisprudence in this way:

> …
>
> *What is apparent from a perusal of these cases is that the use of profanity in the work place is not, in itself, grounds for discipline. A factory floor is not a Sunday school. The reality of the work place [sic] is that vulgar language and pithy*

> *epithets are often an ordinary part of everyday conversation. It is not the words themselves but the tone and intention of the user which determine whether profanity should be considered abusive or offensive. Moreover, there is a difference between a mere insult, a momentary outburst, and a course of conduct which represents a serious challenge to the authority of the employer and is incompatible with the continuance of a viable employment relationship. The gravity of the situation can vary substantially and so should the disciplinary response. Finally, an assessment of the surrounding circumstances may serve to mitigate, if not fully exculpate, the grievor's offence. One must consider such matters as: the relationship of the individuals concerned (i.e., superior/subordinate or two rank-and-file employees); whether there was provocation; the presence or absence of a previous good disciplinary record; whether the incident appears to be part of a pattern of intemperate behaviour; the grievor's seniority; whether there was an apology; etc.*
>
> …

[170] Ms. Bilson continued her summary of the jurisprudence as follows at paragraph 11.53:

> *11.53 As pointed out earlier, in the development of this area of arbitral jurisprudence, the issue is not the language itself, but rather whether its use is consistent with the employment relationship. Although the use of obscene or abusive language is often seen as fairly strong evidence of insubordination meriting discipline in most circumstances, it is not the language as such but the disrespect for the employer's authority which is the fundamental issue. Thus, language which is not overtly obscene or threatening may nonetheless be held to challenge the employer's authority in an unacceptable way. At the same time, heavily ironic statements, or muted opposition combined with compliance with an instruction may not amount to insubordination. Arbitrators have also assessed the language used in light of the character or situation of the employee involved.*

[171] Ms. Bilson also states under the subheading "Lack of Intent to be Insubordinate," as follows in her summary at paragraph 11.69:

> *11.69 One of the bases for imposing a penalty for insubordination is that it undermines managerial authority and compromises the ability of the employer to direct the enterprise effectively. In the well-known case of* Stancor Central Ltd. (Peppler Division)*, the arbitrator suggested that absence of a guilty intention on the part of the employee might invalidate discipline for insubordination altogether.*

> *Although this was controversial, there have been a number of instances where arbitrators have included this element in the assessment of the penalty. Lack of intention to offend or to undermine managerial authority, an honest belief that the employer's direction is wrong, a factual mistake, and the* bona fide *conviction on the part of union officials that they are protecting their members have all been considered by arbitrators to justify imposing a lesser penalty. Arbitrators have approached this determination from an objective point of view, rather than merely accepting the grievors protestations or denials.*

[172] In sum, it is not the words themselves but the user's tone and intention, whether from a momentary flare up or an honest belief that the employer's direction is wrong, as well as whether a serious challenge to the employer's authority exists, which would warrant a conclusion of insubordination.

[173] I have carefully considered the authorities submitted by the employer.

[174] In *Varzeliotis*, the grievor worked on the Fraser River on a flood-control program with specific responsibility for riverbank protection. He refused to cooperate with provincial officers on matters related to joint bank protection. On another occasion, he was directed to proceed with emergency bank protection using contractors. He refused responsibility, claiming that he did not have sufficient staff, even though the project did not require the use of his staff. He refused to carry out a site inspection on emergency bank protection because he was not of a mind to do it. He repeatedly failed to comply with proper instructions issued to him by his supervisors but also engaged in insolent, defiant, and disrespectful conduct towards them. The adjudicator stated as follows at paragraph 170:

> *There is no doubt that standards of acceptable conduct vary from one work location to another and that words and deeds capable of being interpreted as insubordinate cannot be taken out of context in order to sustain that inference. In this case the work location was the office of a professional employee who knew, or ought to have known, the standard of acceptable conduct for him. Generally, insubordination is conduct contrary to good order and discipline. It is an extremely -serious offense [sic]. It is not limited to a refusal to obey an order or a challenge of authority in the direct sense. Jesting and the use of jocular terms with supervisors is commonplace in the working world, but I expressly reject that the repeated use of critical expressions by the grievor contained in his various memoranda directed to his supervisors was simply an example of "shop talk". In my*

> *view there is no inference to be drawn other than the fact that the grievor had no respect for his supervisors, had no perception that he could not challenge them and that he was insolent, defiant, and disrespectful. The conduct of the grievor went directly to the credibility of supervision itself and indicated an attitude on his part that he could behave as he pleased. He both implied and expressed the view that the quality of supervision in his Branch was unacceptable and he was both angered and alienated when no steps were taken to resolve the situation to his liking. The presence of such an attitude expressed by so forceful a personality constituted a fundamental challenge to the discipline of the work place and the right of management to supervise that activity.*

[175] In *MacLean*, the misconduct involved the grievor sending memos to his fellow employees and his superiors. In one, he refers to a fellow employee as a "chicken" and states that if this employee becomes involved with a file, it will become "screwed up for sure." He sends a sarcastic letter to a senior auditor that is tongue-in-cheek and that is about audit delay practices in cases of pregnancy. In other correspondence, he refers to the head of human resources as "braindead". In others, he does so again and suggests they do what hospitals do to the "braindead", which is "unhook their life-support systems."

[176] In other correspondence, he refers to his superior as being a "f---up" and states that he is no longer prepared to report to him. He states that if his reporting relationship with his superior is not changed, then his superior will need to go on long-term disability. He also sent cartoons to his office that depicted current and former employees in an unflattering and threatening manner.

[177] I will endeavor to apply the principles from the foregoing discussion to the incidents that the employer alleges constitute misconduct.

A. <u>The May 22, 2014 email</u>

[178] Ms. Lortie sent this email to Ms. Jardine, a manager new to the file. Ms. Lortie had recommended that the employee concerned, a border services officer, begin her return to work, while the employer's Operations area had placed her in a non-operational program position following a back operation. Ms. Lortie explained that her concern was that the employee was about to be sent on mandatory training, which was physically demanding, and that she was concerned that the placement was not in keeping with the employee's limitations for medical reasons.

[179] In the email, she refers to her frustration from managing the file over a six-year period. She acknowledges that she should not have written the sentence, "I wish they would shut up and listen to me …". "They" in this context were the employee and the superintendent. The email was not directed to either of them. However, it was sent to a manager in operations who was seeking information. No formal complaint was made.

[180] It is not the words themselves but the user's tone and intention that are pertinent to determining whether insubordination occurred. Also relevant is whether it was a momentary flare-up or an honest belief that the employer's direction was wrong. Critical to this analysis is whether a challenge exists to the employer's authority.

[181] On the evidence, the email, and the evidence of Ms. Lortie that was not challenged in cross-examination, I conclude that the primary purpose of this email was to alert Operations of her concern that the employee was about to be sent on mandatory training, which risked the employee being reinjured. She also expressed her frustration with the process. The words she chose were unfortunate, as she has acknowledged. However, on balance, I am not satisfied that the employer has demonstrated on a balance of probabilities that the email was directed at challenging its authority such that it constituted insubordination.

B. <u>Incident from May 26 to 28, 2014</u>

[182] This email chain begins with a request from Human Resources for Ms. Lortie to clear proposed staffing actions on the basis that no one on the accommodation list met the selection criteria for the positions. The chain reflects that Ms. Lortie advised Ms. Thompson, the chief of operations for the district seeking the clearance, that the Saint John point of entry could require an accommodation in the next few days and that the office was in a bit of a panic about it.

[183] After a discussion carried out through email, Ms. Lortie agreed to clear the position for staffing and stated that Ms. Thompson should "expect a call from Saint John." She then acknowledged that it made little sense to have an FB-03 from Saint John on travel status work a CR-03 position but noted that it was a "… demonstration of effort on the agency's part … to assist."

[184] Although not copied on the email, Ms. Lusk did not see any reason Ms. Thompson should expect a call from Saint John. Her opinion was that the language

used was almost intimidating and harsher than what was necessary.

[185] Ms. Thompson did not file a complaint. Ms. Lusk acknowledged that she did not realize at the time that the employee in question who had worked out of the port of Saint John was not working and that Ms. Lortie had been working with the employee and the employer's manager, trying to find an accommodation for him.

[186] On May 28, 2014, Ms. Lusk advised Ms. Lortie that she had received complaints with respect to her service. During the ensuing investigation, Ms. Lortie was left with the impression that Ms. Thompson had complained about the email. She stated that she had not intended to offend her and that she had wanted to call her to apologize. Ms. Lusk had advised her that it was inappropriate for her to call Ms. Thompson.

[187] Ms. Lortie testified that when she advised Ms. Thompson that she should expect a call from Saint John, her intent was to give Ms. Thompson a heads-up, as one of the officers who worked at the port in Saint John and who had been absent from work due to disability was ready to return to work and required accommodation.

[188] I accept Ms. Lortie's evidence that her intent in writing in the email that Ms. Thompson should expect a call from Saint John was to give Ms. Thompson a heads-up. I have carefully reviewed the text and the evidence and am not satisfied on a balance of probabilities that the words used were to, or that Ms. Lortie's intent was to, challenge management's authority. Accordingly, the comments made in the May 22, 2014 email do not constitute misconduct.

[189] Moreover, in the May 28, 2014, letter, Ms. Lusk expressly advises Ms. Lortie that she had received complaints with respect to the grievor's service, which is one of the grounds for discipline. Clearly, with respect to this incident, no complaint was made about her services, and Ms. Lortie was misled as to this fact. In my view, it was a failure to comply with the CBSA's discipline policy that it would follow the rules of natural justice in investigating alleged misconduct.

C. Incident on May 28, 2014

[190] On May 28, 2014, Ms. Lortie emailed Ms. Lusk and other human resources managers concerning a file in the Halifax area to give her team a heads-up that she was encountering difficulties. The email concerned an employee who was listed in the RPS as requiring permanent accommodation. The employee was apparently not making any

effort to apply for an accommodated position, yet in Ms. Lortie's view, management must have been accommodating him somehow, presumably in his substantive position.

[191] Ms. Lusk considered the words "AB is under the radar" objectionable as they suggested that management was doing something inappropriate. She stated that Ms. Lortie should not express her personal frustration in an email.

[192] Ms. Lusk acknowledged that she did not know that the employee was listed on the RPS system as requiring permanent accommodation. She acknowledged that when a job opportunity becomes available, Ms. Lortie sends a note to all employees requiring permanent accommodation. She was not aware that the employee concerned had never responded. She also acknowledged that managers have a responsibility to discuss job opportunities with employees who require permanent accommodation.

[193] Ms. Lortie stated that the email was not directed to any clients; it was directed to Ms. Lusk and the human resources team to ask for help addressing the situation of the employee who required permanent accommodation. Ms. Lortie stated that she was not receiving assistance from the employee's manager, who was not sent the email or identified in it.

[194] I accept Ms. Lortie's evidence that the intent of this email was to give her team a heads-up concerning the difficulties that the file was presenting. The email did not identify and was not addressed to the manager who was not assisting with the accommodation. Ms. Lortie is in an unenviable position, as reflected in her job description, which reflects a tension between her role as the coordinator responsible for placing disabled employees under the duty to accommodate and managers at the different ports who resist compliance. On a balance of probabilities, I conclude that she was seeking the assistance of her team and that the words in the email do not reflect a challenge to managerial authority and the words do not constitute actionable misconduct.

[195] Once again, Ms. Lusk's May 28, 2014, letter advised Ms. Lortie that she had received complaints about the grievor's service. With respect to this incident, there was no evidence adduced that a complaint was filed with respect to Ms. Lortie's service.

D. Incident on June 12, 2014

[196] Ms. Lusk had prepared a business plan for Human Resources for the next fiscal year. She requested her managers to review it and to obtain feedback from their employees. Ms. Titus requested comments from her team, including Ms. Lortie, who responded that the only comments she had to express were "… stop wasting time; stop wasting taxpayer dollars; stop being pseudo-experts."

[197] Ms. Lortie explained to Ms. Titus during the investigation that she was being facetious and funny, that it was a light email to her team; she knew the people, and it was a joke.

[198] Ms. Titus advised her that the email was not funny considering that since it was about the regional Human Resources business plan, it could seem like it was directed to the team or management. Ms. Lusk concluded that the email constituted misconduct.

[199] In her testimony, Ms. Lortie gave the same explanation that she had given to Ms. Titus during the investigation.

[200] It was a serious request by Ms. Lusk to obtain feedback from her managers and employees for the Human Resources business plan. She was entitled to a thoughtful business-like response. I agree with Ms. Titus's comments that this email crosses the line and on a balance of probabilities conclude that that the employer has demonstrated that Ms. Lortie engaged in misconduct.

[201] The June 17, 2014, letter suspending the grievor for two days relied upon four separate and distinct incidents of alleged misconduct: the May 22, 2014, incident; the May 26 to 28, 2014, incident; the May 28, 2014, incident; and the June 12, 2014, incident. I have concluded that the employer has not met its onus of establishing that the first three incidents constituted misconduct. The only incident that in my view constitutes misconduct was that of the June 12, 2014, email. In the circumstances, I conclude that the two-day suspension is unwarranted and excessive and substitute a letter of reprimand relating to the June 12, 2014, incident on the grievor's file.

E. The five-day suspension

[202] On February 5, 2015, the grievor was suspended for allegations of misconduct made against her in which her behaviour was described as "… aggressive, confrontational, and demeaning in tone towards an OH&S program colleague, in front of clients." The letter concluded that the allegations of misconduct were founded and recited that she did not acknowledge that her behaviour was inappropriate; nor did she express remorse. The quantum of penalty was also based on her then-current disciplinary record, which included the letter of reprimand dated August 22, 2013, and the two-day suspension of June 18 and 19, 2014.

[203] As recited in the summary of the evidence, on November 5, 2014, a meeting occurred at the Halifax airport, which involved the OH&S representative from the employer's national headquarters, management, and the grievor. There was no reporting relationship between the representative and Ms. Lortie.

[204] The OH&S representative expressed concern to Ms. Lusk, who was not present at the meeting, about how Ms. Lortie had treated her. She also advised her that she did not wish to file a complaint.

[205] Nevertheless, Ms. Lusk was requested to look into the matter and carried out a fact-finding investigation, interviewing four persons and the grievor. She completed a report in which she made notes of what the different persons present at the meeting had stated to her. The names of the persons who were interviewed are blacked out, and thus, the comments cannot be attributed to anyone. I allowed the report to be introduced into evidence, recognizing that it was hearsay, with its weight, if any, to be determined, unless the witnesses were called to testify.

[206] The employer called one witness, Mr. Mallette, who at the time of the hearing was the CBSA's acting district director for Nova Scotia and Newfoundland. He testified that the November 5, 2014, meeting was held in relation to an OH&S complaint at the Halifax airport that started as a work refusal. The purpose of the meeting was to develop a process for handling these types of files in the future.

[207] As recited in the summary of facts, Mr. Mallette stated that during the discussion, there was a conflict between Ms. Lortie and the OH&S advisor and that there was tension. He advised that Ms. Lortie challenged the OH&S advisor at times,

who was not as familiar as Ms. Lortie was with the region's cases. He could not recall what the issue or issues related to and was not able to say whether or not the grievor challenged her on only one occasion. It was suggested to him that the issues raised were about when hazardous occurrences reports were to be prepared and about the frequency of emergency evacuation drills. He could not recall. He observed Ms. Lortie rolling her eyes when the OH&S advisor made suggestions.

[208] He stated that they achieved what they wanted to in the meeting although it could have gone smoother.

[209] Ms. Lortie testified as to the circumstances leading up to the November 5, 2014, meeting recited in the facts.

[210] She stated that Ms. Lusk had stated that the grievor had used foul language during the meeting. She denied doing so.

[211] She stated that in her view, the OH&S advisor provided incorrect information to the team with respect to the hazardous occurrences reports, and she asked her to confirm the information that she provided.

[212] In Ms. Lortie's opinion, the OH&S advisor was mistaken as well with respect to the frequency of evacuation drills, and she was worried about the possible misinformation that was being given to the regional management team.

[213] No complaint was filed. The OH&S advisor did not testify. Ms. Lortie was not cross-examined with respect to her recollection of the facts.

[214] There is no real contradiction in the facts as related by Mr. Mallette and Ms. Lortie. Both agree that she raised one or two issues with the OH&S advisor. Mr. Mallette could not recall what they were. In the absence of any evidence to the contrary, I am left with no reason to doubt Ms. Lortie's evidence that she was worried about possible misinformation being given to the regional management team.

[215] It is clear from Mr. Mallette's evidence that the meeting was tense. Ms. Lortie acknowledged that the meeting did not go smoothly at all times.

[216] No *viva voce* evidence was adduced of the actual words the grievor used, the tone of those words, or her demeanour or that she used foul language.

[217] The only direct evidence that could possibly lead to a conclusion that the grievor demonstrated disrespect to the national OH&S advisor was that Mr. Mallette observed her rolling her eyes when the advisor made suggestions.

[218] The fact-finding report is clearly hearsay, even though it was admitted into evidence. The interviewee's names are blacked out, and clearly, the information recited is not attributable to any person. Four persons were interviewed, as well as the grievor.

[219] The report describes aspects of the grievor's behaviour at the meeting in a much more serious manner than was described in the *viva voce* evidence. The behaviour in the report attributed to Ms. Lortie and directed to the national OH&S advisor is described using the following terms: aggressive, confrontational, sarcastic, profane at times, combative, and abusive and accompanied by finger pointing.

[220] The employer had the onus of demonstrating on a balance of probabilities that the grievor engaged in misconduct and in particular that she engaged in behaviour that was aggressive, confrontational, and demeaning in tone to the OH&S advisor. No evidence was led or representation made to suggest that the OH&S advisor and the persons Ms. Lusk interviewed were not available to testify in these proceedings.

[221] Brown and Beatty, at chapter 3, p. 3-78, state the following with respect to using hearsay evidence:

> *The rule against the admissibility of hearsay evidence has been stated as follows:*
>
> > *Written or oral statements or communicative conduct made by persons who are not testifying are inadmissible if such statements or conduct are rendered either as proof of their truth or as proof of assertions implicit therein.*
>
> *But by virtue of section 48 (12)(f) of Ontario's* Labour Relations Act*, 1995, for example, arbitrators are not compelled to exclude hearsay evidence. Rather, they retain a discretion to admit such evidence, and if admitted, to ascribe to it whatever weight they believe proper, subject to the caveat that it cannot be the sole basis for a finding of fact.*
>
> …
>
> *Although admissible, in light of the general acceptance by arbitrators of the purposes of the hearsay rule, typically they refuse to base a finding of critical facts on hearsay evidence,*

> *particularly when those facts could have been established either by calling an employee or obtained by an admission of the grievor. Indeed, even when hearsay evidence is admitted, arbitrators have generally been reluctant to give hearsay evidence much weight, given the inherent unfairness of not being able to test it by cross-examination and the tendency of arbitrators to act in accordance with the "best evidence rule".*

[222] Similar to the provision in the Ontario *Labour Relations Act*, s. 20 of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) empowers the Board to accept any evidence, whether admissible in a court of law or not.

[223] In the circumstances, I have determined that I cannot give any weight to the hearsay evidence as it relates to the proof of critical facts that have not otherwise been established.

[224] Moreover, as stated in Sopinka and Lederman, *The Law of Evidence in Canada*, 3rd ed., at paragraph 6.449, an adverse inference can be drawn in civil cases:

> *… in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.*

[225] The only evidence before me potentially constituting misconduct is that the grievor rolled her eyes when the OH&S advisor made comments.

[226] While eye rolling may constitute some evidence of disrespect in the absence of direct evidence that the remarks Ms. Lortie allegedly made were aggressive, confrontational, and demeaning in tone, I am not satisfied that on a balance of probabilities, the employer met its onus of demonstrating that the grievor engaged in misconduct with respect to the events surrounding the November 5, 2014, meeting.

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

(The Order appears on the next page)

XI. Order

[228] The grievance with respect to the two-day suspension is allowed in part. The suspension is rescinded, and a written reprimand is substituted for it. The grievor is to be reimbursed for the pay that was lost as a consequence of the two-day suspension, together with any applicable benefits.

[229] The grievance with respect to the five-day suspension is allowed. The grievor is to be reimbursed for the pay that was lost as a consequence of the five-day suspension, together with any applicable benefits.

[230] The payments and benefits are to be reimbursed to Ms. Lortie within 30 days of receipt of the decision.

[231] I will remain seized for a period of 60 days from the date of the decision to deal with any issues relating to the implementation of this award.

November 4, 2016.

David Olsen,
a panel of the Public Service Labour Relations and Employment Board