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Files: 566-02-10152 and 568-02-325

Citation: 2016 PSLREB 17

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

NICOLE STEVENSON

Grievor and Applicant

and

TREASURY BOARD
(Department of Employment and Social Development Canada)

Employer and Respondent

Indexed as
Stevenson v. Treasury Board (Department of Employment and Social Development Canada)

In the matter of an individual grievance referred to adjudication and an application for an extension of time referred to in paragraph 61(*b*) of the *Public Service Labour Relations Regulations*

Before: Margaret T. A. Shannon, a panel of the Public Service Labour Relations and Employment Board

For the Grievor and Applicant: Jessica Bungay, counsel

For the Employer and Respondent: Allison Sephton, counsel

Heard at Fredericton, New Brunswick,
July 21 to 24, 2015.

I. Individual grievance referred to adjudication

[1] The grievor and applicant, Nicole Stevenson, alleged that the employer and respondent, Department of Employment and Social Development Canada in its role as Service Canada, excessively delayed taking disciplinary action against her as a result of a finding that harassment allegations made against her by the employees she supervised were substantiated. The grievor alleged that as a result of this delay, she was forced to retire, effective June 27, 2014. Finally, she alleged that she was constructively dismissed on September 5, 2014. She sought an extension of time for filing a constructive dismissal grievance as she allegedly did not become aware of the facts giving rise to the constructive dismissal until September 5, 2014.

[2] Relative to PSLREB File No. 568-02-325, throughout this decision, the applicant will be referred to as the grievor, and the respondent will be referred to as the employer.

[3] 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; "the *Act*") before November 1, 2014, is to be taken up and continue under and in conformity with the *Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

II. Summary of the evidence

[4] Until her retirement on June 27, 2014, the grievor was the manager of the Fredericton, New Brunswick, passport office. Originally, Passport Canada operated that office, but in 2013, responsibility for it was transferred to the employer's Service Canada branch. During her time as manager, the employer received several complaints concerning how the grievor managed the Fredericton passport office.

[5] Helen Ettritch, the grievor's manager in November 2012, testified that she received a series of emails in late 2012 from the grievor's subordinates alleging that the work environment in the Fredericton passport office was toxic. On November 23, 2012, the employer convened a special meeting of the Fredericton passport office employees and Ms. Ettritch, accompanied by the regional vice president of the employees' bargaining agent, at which numerous harassment allegations were raised by the employees that the grievor supervised. She was also at the meeting, along with her assistant manager. A series of situations were discussed, describing how the employees did not like the way the grievor spoke to them and questioning some of her managerial decisions. The employees prepared and presented a letter to Ms. Ettritch expressing their concerns, complaints, and issues. It was a very emotional meeting, at which the employees were allowed to express their concerns, and a series of commitments were developed on how the group would work together to make the office a better workplace.

[6] The grievor did not comment on or respond to any of the situations raised in a meaningful way. When she did comment in response to the situations and the group undertakings, she simply stated that that was the way she was and that she would not change. The group merely had to put up with her for another 14 months until she retired. The meeting was not the first time Ms. Ettritch had had to deal with similar complaints from the Fredericton passport office employees. The grievor's response had always been the same as the one she offered at the November meeting: that that was the way she was, she was not going to change, and they had to put up with her only until she retired, which was to come in 14 months.

[7] At the end of the very emotional meeting, Ms. Ettritch suggested to the grievor that she work from home the following Monday (the meeting was held on a Friday). The grievor indicated she would think about it and on Sunday emailed Ms. Ettritch, advising her that she was too stressed to return to the workplace and that she was going to see her doctor about securing sick leave. She went on sick leave that Monday and never returned to the workplace. Each of her requests for sick leave, with and without pay, was certified. Eventually, she applied for long-term disability benefits, which were denied. Nevertheless, she did not return to the Fredericton passport office or any of the employer's other locations (Exhibit 4). She continued to request sick leave throughout the period at issue.

[8] These harassment allegations became the basis of a discrimination grievance filed by the Fredericton passport office employees and the grievor's assistant manager (Exhibit 5). The employer reviewed the grievance and considering the seriousness of the harassment allegations undertook to investigate the allegations. At the request of Steven Risseeuw, Passport Canada's chief operating officer, on December 28, 2012, the grievor's access to the Fredericton passport office and to the employer's IT network was suspended, which was consistent with how others on long-term sick leave were treated.

[9] A bilingual external investigator, Mr. Gagnon, was found in the Fredericton area to conduct the investigation. He started his investigation a month after he was hired because he was not immediately available on hiring. Once the investigation began, he met with 12 employees, the grievor, and 3 members of management. Thirty-seven allegations were investigated. Everyone interviewed was provided a copy of his or her statement for review and amendment, if necessary. Following that, the investigator drafted a preliminary report, which was sent to the grievor for her comments.

[10] The final report was dated January 31, 2014. It was not initially released to the grievor as the employer's access to information coordinator had to review it first. Throughout the process, which was lengthier than anticipated, Ms. Ettritch followed up with her human resources contact, inquiring as to the status of the investigation (see the emails at Exhibits 7 to 9). Ms. Ettritch received her copy of the report in late March 2014. She then had to review it.

[11] The investigator concluded that 19 of the 37 allegations against the grievor were founded. Ms. Ettritch's labour relations advisor recommended that she meet with the grievor and give her an opportunity to add anything she felt was relevant. On April 1, 2014, responsibility for the Fredericton passport office moved to the Atlantic Region from the Quebec Region, where Ms. Ettritch was located. After the transition, the associate deputy minister, Atlantic, had the decision-making authority relative to any disciplinary action. Ms. Ettritch briefed Vincent Nash, area director, Citizen Services (New Brunswick Region), and Jeff Tapley, senior executive director (New Brunswick Region), on the progress to date.

[12] On May 6, 2014, Ms. Ettritch and Mr. Nash met briefly with the grievor to discuss the report. The grievor raised a few points, which Ms. Ettritch noted. The

grievor was advised that the employer hoped to have a decision made within a couple of weeks, but this estimate was very naïve. For the employer to come to a recommendation, the report had to be reviewed and the facts and what had been done previously to rectify the grievor's behaviour had to be considered. Based on all that, disciplinary action recommendations were to be developed, which were then to be sent to the employer's Labour Relations department for approval. After that, they were then to be sent to the assistant deputy minister for consideration.

[13] On June 3, 2014, the recommendation was sent to Donna Cocchito in Labour Relations, which stated that the grievor was to be terminated as she had previously been suspended for the same behaviour, had been met with and coached many times, had expressed no recognition of how her behaviour affected people, had showed no remorse, and had taken no accountability for her actions.

[14] On June 5, 2014, before Labour Relations completed its review and forwarded the recommendation to the assistant deputy minister, the grievor announced her intention to retire. She had previously mentioned to Ms. Ettritch several times her countdown to retirement and her intention to retire. No final decision had been made concerning discipline at that point. Ms. Ettritch was confused about how to respond to the grievor's notice and forwarded it to Labour Relations. Ms. Cocchito advised her that as the grievor was retiring, Labour Relations would close its file, and no further action was to be taken.

[15] Ms. Ettritch was initially involved while she was covering for Guy Genest, who had taken a leave of absence in 2012. When he returned briefly to the workplace, she consulted with him on the file and eventually took it over in March 2014 when a consideration of the appropriate disciplinary action was underway. Ms. Ettritch recognized that the Treasury Board guidelines on disciplinary action (Exhibit 17) recommended that delays were to be avoided when imposing discipline. She also recognized that her timeline estimates were naïve. She did her best to keep the grievor up to date on her progress by communicating with the grievor and her counsel as the case might have been.

[16] Part of the delay reaching a decision was caused by identifying the client after April 1, 2014. Initially, Mr. Risseeuw was the client who contracted with the consultant to investigate the harassment allegations, but it needed to be confirmed whether that

was still the case after April 1, 2014, to determine who had the authority to discipline the grievor.

[17] The grievor's counsel was advised of that stumbling block as a reason for further delaying the discipline (see the email at Exhibit 37). She continued to follow up, seeking a response to her request to be informed of what if any corrective action would be taken. The last such correspondence was on June 5, 2014, at 16:43 (Exhibit 41). At 20:34 that same day, the grievor sent her letter of resignation to Mr. Nash. In it, she states that she is retiring due to the employer's failure to advise her of the outcome of the harassment complaint; she had no choice but to retire, for financial reasons. Her resignation was accepted on June 6, 2014, and her disciplinary file was closed.

[18] Between 2012 and 2013, Mr. Genest was the director of operations for Passport Services, Quebec Region, which included the offices in New Brunswick. From November 2012 to January 2013, he was on sick leave, during which Ms. Ettritch replaced him. He returned to the workplace in January 2013 and took over responsibility for the grievor's harassment investigation. On February 5, 2013, he phoned the grievor to advise her that the grievance filed by the Fredericton passport office employees had been accepted and that an investigation would follow.

[19] He advised the grievor that during the investigation, she was not to talk to her employees or return to the Fredericton passport office. Given the number of allegations being investigated and the number of employees who grieved, it would have been impossible to remove the employees from the workplace. As the grievor was on sick leave at the time, it was easier to advise her not to return. It was clear that she was not to return specifically to the Fredericton passport office, not that she could not return to work were she fit. Were she fit to return, the employer would find her a workplace elsewhere in its organization; however; the question never came up. Mr. Genest's purpose in advising the grievor not to return to the Fredericton passport office was to avoid her speaking to the employees there. It was not to prevent her from communicating with the employer or from returning to work.

[20] The grievor never asked to return to work; nor did she ask to be accommodated. Had she done so, and had she been able to return to work, the employer would have had to examine the location she should be returned to. As it turned out, it was never

necessary as she was on sick leave throughout the investigation process. Eventually, she inquired about her benefits and about the possibility of applying for long-term disability insurance.

[21] The grievor was advised of the investigator's name by letter dated March 12, 2013. Finding an investigator who was bilingual and available at the time took considerable effort. Mr. Risseeuw and Labour Relations were the clients and primary contacts for the investigator throughout the investigation process.

[22] Mr. Genest followed up with the grievor on occasion to bring her up to date on the investigation process. He told her that the investigator would go as fast as possible and might have indicated that it would take four months. Each time, she stated that she was "like that" and that the passport office employees merely had to put up with her for a little while longer. She claimed that she apologized each time there was an issue, so everything should have been alright. This was the same thing she had been saying since December 2011 when she was the subject of a different internal investigation. She had again mentioned her retirement in May 2012 following a one-day suspension for inappropriate behaviours in the workplace.

[23] The investigator began holding interviews on April 8, 2013. The grievor was provided with the allegations three days before her interview (Exhibit 34). On May 14, 2013, she was sent an email confirming the upcoming transition within Passport Canada. On September 26, 2013, she inquired as to her status. She was not happy that the process was taking so long but understood why. Mr. Genest tried to keep the grievor advised of the progress and updated her every month to two months.

[24] There were no discussions about the grievor returning to work; she continued to provide the employer medical certificates on a regular basis. She eventually was put on an unpaid sick leave. Mr. Genest was unaware of the outcome of her application for long-term disability benefits.

[25] In October 2013, Mr. Genest went on sabbatical. Ms. Ettritch assumed his responsibility again of dealing with the file, and she communicated with the grievor. With the transition from Passport Canada to Service Canada, Mr. Nash became the grievor's manager. Ms. Ettritch's name was provided to the grievor's counsel as the employer point of contact. On April 15, 2014, the grievor's counsel inquired by email as to the status of the investigation. Approximately nine days later, Ms. Ettritch called

the grievor's counsel with an update. The reason for the delay was that when the grievor's counsel sent her email, Ms. Ettritch did not have the requested information. She had to get it from the employer's corporate office.

[26] The grievor's counsel again emailed Ms. Ettritch on April 24, 2014 (Exhibit 38), for a further update. Ms. Ettritch replied via phone the next day, and a meeting was scheduled for May 6, 2014, for the grievor, her counsel, and the employer's representatives, Ms. Ettritch and Mr. Nash. It was the last fact-finding meeting before Ms. Ettritch and Mr. Nash prepared their recommendations for Mr. Risseeuw. The decision-making process was explained. They did not discuss the impact of not making a decision. Ms. Ettritch indicated that she and Mr. Nash hoped to have prepared their recommendations within 2 weeks but that it took 3.5 weeks to prepare their first draft of the recommendations. The grievor's counsel contacted Ms. Ettritch again on May 20, 2014, to determine if a decision had been made. Mr. Nash responded to her inquiry by stating that it would be another week or two.

[27] The recommendations were finally ready on June 3, 2014, and were conveyed to Labour Relations. Neither the grievor nor her counsel was advised, and on June 5 at 17:34, her counsel followed up with the employer to determine if any decision had been made. The grievor was not told that a recommendation had been made. Later that day, at 20:34, she submitted her resignation, stating her intention to retire.

[28] Ms. Ettritch could not predict what the employer would have done had the grievor not stated her intention to retire. The harassment file was closed effective June 6, 2014, after the grievor's resignation had been accepted. This was not communicated to the grievor as the employer wanted to wait until all the retirement paperwork had been completed. If she had not followed through with her intention to retire at the end of June 2014, a disciplinary hearing would have been held.

[29] Ms. Ettritch did not have any further contact with the grievor or her counsel. Like Mr. Genest, Ms. Ettritch did not know that the grievor was on unpaid sick leave until the long-term disability insurance carrier contacted her to confirm that medical certificates were in the grievor's leave file. Those involved had assumed that she was already receiving long-term disability insurance benefits.

[30] Mr. Nash assumed responsibility for the Fredericton passport office on April 1, 2014. He assumed responsibility for this grievance file from Ms. Ettritch in

June 2014. He had never met the grievor before the May 6, 2014, meeting. At that meeting, the grievor, in the presence of her counsel, was asked to provide Mr. Nash and Ms. Ettritch with any information she wished to share that had not already been provided and that might influence the employer's decision based on the investigation.

[31] At the May 6 meeting, Mr. Nash and Ms. Ettritch hoped that the grievor would receive a decision within two weeks. Despite their best efforts, they could not come up with recommendations in that time. As they went through the report, it became evident that given the breadth and depth of the information it contained, it would take more time to evaluate it. They were under an obligation to properly consider its contents. A further delay was in everyone's best interests. The draft recommendation to terminate the grievor was reached on June 3, 2014. It was sent to Labour Relations for review before it was sent to Mr. Risseeuw for approval.

[32] Once he received the grievor's resignation on June 6, 2014, Mr. Nash consulted with Labour Relations as to what effect it had on the investigation. He was advised that once the grievor's resignation was accepted, Labour Relations closed its file, and the matter was finished. He confirmed his acceptance of the grievor's resignation on June 13, 2014 (Exhibit 46). Her request to retire was voluntary, and he did not have the right to refuse it. He did not tell her that her case was closed, from the employer's perspective. The employer had no authority to discipline her when she was no longer an employee, and Mr. Nash was not authorized to inform her of the recommendation.

[33] Mr. Nash forwarded the email confirming the acceptance of the resignation to the compensation department, which required a firm retirement date, so Mr. Nash contacted the grievor for the date on which she intended to retire. A few hours later, her counsel contacted Mr. Nash, demanding an update. He did not respond as no decision had been made and the retirement process had started. He spoke to the grievor's counsel on June 19 via telephone. She asked if a decision had been made and was advised that none had been made. She also asked when she would be advised as to the decision and was told that it would be at least another week. Mr. Nash agreed to advise her whether a decision would be made or whether the file would simply be closed.

[34] On June 24, the grievor advised Mr. Nash that she would be retiring on June 27, 2014, at his request, which caused him concern as he had never requested

that she retire. He had merely asked her to confirm on what date she would be retiring. The grievor also advised the employer that she would be on sick leave until July 31, 2014 (Exhibit 49), which would take her to and beyond her intended retirement date. A leave form was prepared and signed to authorize the leave to the date of her retirement. After she confirmed her retirement date, Mr. Nash met with the grievor to exchange property. There was no discussion about the outcome of the investigation.

[35] Despite the grievor's retirement, Mr. Nash continued to receive inquiries from her counsel inquiring as to when a decision would be delivered concerning the harassment investigation against the grievor. On July 23, 2014, Mr. Nash received a voicemail from the grievor's counsel about the status of the investigation. By email (Exhibit 48), he advised counsel who was replacing the grievor's usual counsel that Labour Relations would contact him about an answer to his inquiries. If he did not receive one within 14 days, counsel was invited to follow up with Mr. Nash again. Mr. Nash was not in a position to respond to that counsel's inquiries as the matter had been assigned to corporate counsel.

[36] The employer's counsel replied to the grievor's counsel on September 5, 2014, and confirmed that the file was closed and that no further action was pending. The grievor was no longer an employee, and the employer no longer had the authority to discipline her.

[37] Mr. Nash admitted that in an ideal circumstance, a harassment investigation process would be completed within 12 months as set out in the employer's policy. However, those deadlines are only guidelines. In this case, given the number of allegations and witnesses to be interviewed, it took considerably longer to complete. The employer was optimistic that matters could be resolved sooner; however, it was important to take the time necessary to make the proper decision. The decision-making process was not explained to the grievor or her counsel.

[38] The grievor testified that she became a manager in 1987 while employed by the Atlantic Canada Opportunities Agency and that she assumed responsibility for managing the Fredericton passport office in March 2005. She supervised between 10 and 14 employees there. At the time of her retirement, she had 31 years of service with the federal public service. In the fall of 2012, she reported to Mr. Genest who worked from Passport Canada's Montreal office and visited the Fredericton office once or twice

a year. She had been disciplined twice: once, she received a one-day suspension, and the second time, she was suspended for two days without pay for incidents similar to those raised in the harassment grievance.

[39] The culture in the Fredericton passport office in the fall of 2012 was toxic. The employees communicated their unhappiness to Ms. Ettritch, who had replaced Mr. Genest. Ms. Ettritch and the human resources officer, Ms. Cocchito, prepared a survey, which the Fredericton passport office personnel were required to complete. On November 20, 2012, the grievor received a phone call from Ms. Ettritch, who advised her that the results of the survey were different from the previous year. An all-staff meeting was to be held on November 23, 2012, and the grievor was to meet with Ms. Ettritch on November 22.

[40] The grievor was upset that Ms. Ettritch invited all the employees in the Fredericton passport office to this meeting. She was advised that the office was to remain open and that Ms. Ettritch would bring people from other passport offices to cover for those at the meeting.

[41] At the beginning of the meeting, Angela McLaughlin, the assistant manager of the Fredericton passport office, explained that the purpose was to discuss the survey results and to develop commitments to improve the work environment. The grievor thought that Ms. Ettritch and Ms. Cocchito would support her in the meeting, but they did not. She felt that all the comments were about her. Her employees wanted her to be in her office and to stay there all day. The meeting lasted from 10:30 to 16:45.

[42] When she left the meeting, the grievor was upset. Seeing this, Ms. Ettritch followed her to her office and suggested that the grievor work from home on the following Monday to allow some time between the meeting and resuming her supervisory duties. The grievor declined the offer, at which point Ms. Ettritch suggested she take leave.

[43] The grievor went home and thought about the meeting all weekend. On the Sunday, she decided to take leave. She went into her office and left her keys on the desk. She emailed Ms. Ettritch to advise her that she would be on sick leave and would provide a doctor's note. She also asked her ex-husband to take their son for a few weeks while she dealt with the upset the meeting had caused her to feel. She was also stressed and anxious.

[44] The grievor saw her doctor on November 26 or 27, 2012. According to the grievor, the doctor could tell that she was very upset. The doctor asked her what had happened, to which the grievor responded by describing the meeting and saying that she could not go back into that environment. The doctor put her on sick leave for two months, following which it would be reassessed. A doctor's note was provided, which the grievor delivered to the employer.

[45] On December 20, 2012, the grievor received a phone call from Mr. Genest advising her that all her employees had filed a harassment grievance against her. She was advised that he would provide her with more information shortly but that in the meantime, she was not to speak to anyone, which she interpreted as meaning that she was to speak to no one, not that she was not to speak only to her employees. Mr. Genest clarified it in an email (Exhibit 29).

[46] The next communication she received concerning the grievance was on February 5, 2012, when Mr. Genest advised her that Mr. Risseeuw had allowed the grievance and that a harassment investigation was to be held. She was to cooperate with the investigation and was not to return to the office until it was completed. He anticipated it would take four months. To the grievor, it sounded like she was being suspended. She consulted her counsel, who advised her that it sounded like she had been suspended with pay but told her that he would confirm it with the employer. When he contacted the employer, her counsel was advised that if the grievor wanted to be paid during the investigation period, she would have to use her sick leave.

[47] The grievor expected that the investigation would be dealt with expeditiously, within four months. She had seven months of accumulated sick leave at the time. On March 13, 2013, Mr. Genest advised her that an investigator had been hired and that the interviews would begin in April, which was confirmed by letter (Exhibit 27). The next contact the grievor had with the employer was on April 6, when Mr. Genest called to tell her that she was to meet with the investigator on April 11, 2013. The harassment investigator, Mr. Gagnon, then phoned her on April 8, 2013, to confirm her availability.

[48] Before the meeting, Mr. Gagnon emailed a copy of the allegations to the grievor. She received a detailed letter outlining the allegations (Exhibit 34) on April 11, 2013, after the interview. She addressed each allegation from memory as she had not been in

the office to obtain the necessary documents. In June 2013, at the investigator's request, she was granted access to the office for three hours after normal work hours ended, to retrieve relevant documents. She was allowed to access her email account, from which she selected items to print. Each item was reviewed by an employer representative before she was allowed to leave the workplace with it.

[49] The investigator was to provide the grievor with a summary of her interview for her to review The grievor heard nothing further from Mr. Gagnon until the end of August 2013 when he called to discuss two more allegations that had arisen. After that, she did not meet with Mr. Gagnon again. The grievor received a copy of the draft report for her comments in October 2013. The deadline for her comments was October 17, 2013.

[50] The grievor drafted her observations and comments on the summary for her counsel's review and then submitted them to Mr. Gagnon by the deadline. After that, she heard nothing further, even though she kept asking the employer for news. In February 2014, she received the final report (Exhibit 63) by express mail, which was dated January 31 and was received one month later, at the end of February. The grievor expected that within a month, she would hear about what corrective action would be taken, expecting that it would be mandatory training. She drafted her response to and observations of the report as directed so that they could be forwarded to Mr. Risseeuw for consideration in his decision making.

[51] The grievor kept the employer up to date on her progress and continued to send it doctor's certificates and current contact information. The reason she continued to provide the employer with sick leave certificates was to ensure that she could access her sick leave credits and eventually apply for employment insurance sick-leave benefits and long-term disability benefits. If she were on sick leave, she would be entitled to buy back pension time for the period she was without pay. Eventually, her long-term disability insurance application was denied because she was not disabled from performing managerial duties. Even so, she remained on sick leave without pay. Throughout the entire sick leave, the grievor was under the treatment of her doctor, a psychiatrist, and a psychologist who said that she could not work in the Fredericton passport office environment (see the long-term disability insurance application at Exhibit 32). However, at no time did the grievor ask the employer to place her in a different work location. Nor did she ever ask it for any sort of accommodation.

[52] The grievor sent an email with a notice of a change to her email address to Mr. Genest, but when she received notice that he was out of the office, she forwarded the message to Ms. Ettritch (Exhibit 22). During the period she was off work, the grievor began volunteering approximately 17 hours per week. She advised Ms. Ettritch of it, and when Ms. Ettritch expressed a desire to talk to her, the call was arranged around the grievor's volunteer hours.

[53] The call happened 1 week after the grievor turned 55 years of age in March 2014. Its purpose was to determine if the grievor intended to retire. She became eligible for retirement in 2014. She advised Ms. Ettritch that she did not know when she would retire. She had previously told people in the office that she wanted to stay at work until her son graduated in 2016. At age 55, she could retire without a penalty. The grievor also told Ms. Ettritch that she might have to retire to maintain an income.

[54] Ms. Ettritch also advised the grievor of the pending changeover to Service Canada on April 1, 2014. However, she did not tell the grievor that she could return to work. When the grievor asked Ms. Ettritch how the change to Service Canada would impact her employment situation, she was advised that she would be joining Service Canada on her return.

[55] The next communication the grievor had with the employer was at the May 6, 2014, meeting. She had no clue who Mr. Nash was until, during the meeting, she was advised that he was her new supervisor. Ms. Ettritch and Mr. Nash asked the grievor if there was anything additional they needed to know concerning the report and the situation at the Fredericton passport office. She told Ms. Ettritch and Mr. Nash about complaints against an employee and asked that the letter she had submitted with her comments be brought to Mr. Risseeuw's attention. At the conclusion of the meeting, the grievor was advised that she should have the employer's decision within two weeks. At the end of the two weeks, the employer still had not made a decision. She was advised that the employer expected to make a decision within the next few weeks.

[56] By June 2014, the grievor was in need of money as her savings were running out and her long-term disability application had been denied. She was not going to borrow money from her family to see her through until she returned to work, so she did the logical thing and submitted her retirement notice in June 2014. She testified that she

needed an income and that she just wanted to put an end to the situation she had been living with since December 2012. She was tired and could no longer put up with the stress it had caused her. She wanted to, in her words, "put it behind [her] and move on with [her] life". To her, this was the logical thing to do.

[57] She stated in her notice of intention to retire sent to Mr. Nash that the date might need to be extended, depending on whether she was suspended as a disciplinary action. She did not want the discipline to penalize her from a pension perspective. She could no longer wait for a decision. She had taken all she was going to take from the employer and had had enough with the delays. She was tired of feeling the way she was feeling. Never did she anticipate that the employer would consider terminating her employment.

[58] The grievor did not consider her email to Mr. Nash a letter of resignation. It was merely a statement of her intent. However, when Mr. Nash notified her by return email that he had accepted her resignation (Exhibit 46), she did not clarify that distinction. At no time did she express a desire to retract her retirement.

[59] Throughout the months of July, August, and September, the grievor expected that she would receive a response from the employer concerning a discipline decision. Her counsel continued to follow up with the employer, and yet no response was received until early September 2014, when the employer's counsel advised her counsel that the file and the case were closed.

[60] Matthew Hiltz was contacted by the grievor when he was employed at the law firm of Cox & Palmer. He testified that he had a conversation with a Yolande Viau concerning a paid administrative leave for the grievor if she was not welcome to return to the workplace. He was not sure who Ms. Viau was or whether she was an employer representative or employed by the Department of Justice. He also explored with Ms. Viau the possibility of a retirement package for the grievor. When the responses to both were negative, he advised the grievor to remain on sick leave and to provide the employer with a doctor's note. It was in the grievor's best interests to remain on sick leave if she wanted an income as it was possible that if she were not on sick leave, the employer would suspend her without pay.

III. Summary of the arguments

A. For the employer

[61] The new Board is without jurisdiction to hear this matter as the employer neither suspended the grievor nor took disciplinary action against her, which is required by s. 209(1)(*b*) of the *Act*. The grievor terminated her employment under section 63 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). Nowhere has the grievor alleged disguised discipline, which would be within the new Board's authority to scrutinize. She voluntarily went on sick leave. At no time did she inform the employer that she was fit to return to work. The employer had no reason to question the doctor's notes, which the grievor submitted on a regular basis. Her testimony confirmed that she was unfit to work throughout the investigation period. She was not suspended.

[62] There is no grievance stating that the grievor was suspended; she grieved only the delay rendering a decision. According to *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), she could not rely at the hearing on grounds for her grievance that had not been raised at the different levels of the grievance process. In the alternative, the new Board has no jurisdiction as the suspension was administrative in nature. If one considers the employer's intent, it is clear that excluding the grievor from the workplace was not discipline. The employer had communicated to her that she was not to return to the workplace during the investigation as given the culture of fear that she was alleged to have promulgated in the Fredericton passport office, it was best to separate the parties during the investigation. Sick leave without pay is not generally deemed disciplinary, and the burden of proof was on the grievor to show otherwise (see *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63 at paras. 135, 137, and 140), *Attorney General of Canada v. Frazee*, 2007 FC 1176 at paras. 20 to 22, and *King v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 45 at para. 62).

[63] Furthermore, a delay in an investigative process is not disciplinary (see *Stead and Weda v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 87 at paras. 57 to 59 and 63). Mr. Genest stated that the grievor could not return to the workplace, meaning the Fredericton passport office. He also testified that had the employer been advised that the grievor was fit to return to work, it would have re-evaluated the situation. Another workplace was an option; however, there was no need to move her,

given that her doctor had certified that she was unfit to return to work. Mr. Nash testified that even more options arose for returning the grievor to work after the Service Canada merger on April 1, 2014. However, she never requested a workplace accommodation or provided medical information to the effect that she was fit to return to work. The employer relied on the doctors' notes the grievor provided as an accurate reflection of her ability to work. She was on sick leave before the harassment grievance was even filed. She never returned to work after the November 2012 all-staff meeting.

[64] The length of an investigation may become disciplinary (*Basra v. Canada (Attorney General)*, 2010 FCA 24), depending on the circumstances. To determine whether an investigation is disciplinary, one must look at the employer's intent and at all the relevant facts (see *Braun*, at paras. 135, 137, and 140; *King*, at para. 62; and *Stead*, at paras. 57 to 59 and 63). There was no bad faith or camouflage in the employer's investigation of the harassment allegations. Time was required to find a bilingual investigator available to conduct the investigation. Once one was found, the employer received the investigation report within 11 months. The entire investigation took under a year, which was not unreasonable given the number of allegations, employees who grieved, and people interviewed.

[65] The employer acted in good faith throughout the process and followed up with the investigator on many occasions to find out why it was taking so long. It could not control the third party's timeline, and in the midst of all this, it was transitioning from Passport Canada to Service Canada. The employer wanted to be thorough in its assessment of the report and did not want to rush its decision-making process. Another fact-finding meeting was held on May 5, 2014, and by June 3, 2014, Mr. Nash and Ms. Ettritch had prepared their recommendation, which then needed the employer's Labour Relations experts' sanction and the deputy head's concurrence.

[66] On June 5, 2014, the grievor submitted her retirement notice. Mr. Nash saw no reason not to accept it; it was her choice, and he could not refuse. However, the notice of intention to retire did throw the employer for a loop. It did not know its requirement or authority to see the harassment process through to its conclusion. According to its labour relations representative, the file was closed. Mr. Nash could not understand why the grievor's counsel continued to follow up about the file's status.

The grievor confirmed her retirement date as June 27, 2014, and on that date, she ceased to be a public service employee.

[67] The grievor was entitled to grieve things that happened as an employee, but she could not refer the delay completing the investigation to adjudication. It is not within the new Board's jurisdiction; it is not disciplinary and not part of the relevant collective agreement. Any allegation of constructive dismissal on September 5, 2014, is outside the time during which the grievor was an employee. The delay making a decision was not disciplinary. The employer was not waiting her out and was not hoping she would retire. There is no evidence that the employer encouraged or asked her to retire. She raised retirement as a possibility, not the employer (see *Canada (Treasury Board) v. Lavoie*, [1978] 1 F.C. 778; *Cawley v. Treasury Board (Department of Fisheries and Oceans)*, 2013 PSLRB 135 at para. 44; and *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28 at para. 161).

[68] To determine if a retirement was voluntary, one must look at the employee's intent from both objective and subjective perspectives (Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, at para. 7:7100). Both an objective act and a subjective intent are required; did the employee really mean what was said? Putting in writing one's intention to retire demonstrates an objective intent to retire. There was no duress, no coercion, and no evidence that the grievor was medically incapable of making the decision, which would have negated her stated intention (see *Hassard v. Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 32 at paras. 163 and 164). She had counsel present who was very involved with her throughout the process. The grievor testified that she was sick of the situation and that she wanted to be done with it. How that occurred was her choice. She never withdrew her decision to retire. She testified that it was a logical decision for her and that she does not want her job back. If her resignation is ineffective, the only remedy open to her is reinstatement (see *Motorways Direct v. Teamsters Union, Local 880* (1988), 35 L.A.C. (3d) 11). The grievor had time to reflect on her decision; she made her choice and took steps to implement it.

[69] The employer is not responsible for the grievor's financial situation; it did not cause it. The employer did not cause the situation that gave rise to the harassment grievance; nor did it write the report. The grievor put herself in the situation, which she resolved by retiring (see *Charron v. House of Commons*, 2002 PSSRB 90 at paras. 63

and 64; *McNab v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-14343 (19840224); [1984] C.P.S.S.R.B. No. 24 (QL) at para. 39; and *Arsenault v. Treasury Board (Solicitor General - Correctional Service of Canada)*, PSSRB File No. 166-02-23957 (19930722); [1993] C.P.S.S.R.B. No. 135).

[70] The ongoing contact with the grievor's counsel despite the fact that she had already indicated her intention to retire made Mr. Nash feel that the employer was being set up for legal action against it (see *Rinke v. Canadian Food Inspection Agency*, 2004 PSSRB 143 at para. 146). The employer was receiving mixed messages from the grievor and from her counsel. It was clear to Mr. Nash that the grievor wanted to retire, and the ongoing contact with counsel felt like a set-up for a constructive dismissal case. If the grievor did not want to retire, she could have waited it out and ultimately grieved her termination or retracted her resignation.

[71] Financial pressure is not duress, and deciding to retire as a result is not involuntary (see *Mutart v. Deputy Head (Department of Public Works and Government Services)*, 2013 PSLRB 90 at paras. 87, 91, and 103; *Mutart v. Canada (Attorney General)*, 2014 FC 540; and *Canadian Museum of Civilization v. Public Service Alliance of Canada*, [2000] C.L.A.D. No. 343 (QL) at paras. 21 and 26). The grievor created her lack of pay. She went on sick leave and remained off work even after her long-term disability insurance claim was denied as she was not totally disabled. She never asked for an accommodation or to return to work.

[72] The grievor was not constructively dismissed. She chose the date on which to retire, which predated the date on which she was allegedly constructively dismissed. The concept of constructive dismissal has no place in the public service (*Hassard*, at paras. 176 to 178); it exists at common law, under which employees have no access to a grievance process. Unionized employees have recourse rights through their collective agreement grievance rights. They can file grievances and refer them to adjudication.

[73] Employment in the federal public service is also governed by the *PSEA*, which covers resignations and administrative discharges. It determines when someone becomes a federal public service employee and when that person ceases to be an employee. There is no room in this regime for another form of termination (see *Gaskin v. Canada Revenue Agency*, 2008 PSLRB 96 at para. 69). The employer has not violated the grievor's terms and conditions of employment or taken any action against her. She

chose to retire. Nothing was unreasonable or arbitrary in the employer's treatment of the grievor.

[74] To be successful in an application for an extension of time, a grievor must establish through clear, cogent, and compelling evidence the reasons for the delay. The new Board must consider the length of the delay and the due diligence of the grievor. The new Board must balance the injustice to the grievor against the prejudice to the employer in granting an extension. The final factor to be considered is the grievor's chance of success (see *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1 at para. 75).

[75] The grievor provided no explanations or compelling reason for not filing a grievance alleging constructive dismissal until September 8, 2014, when her last day as an employee was June 27, 2014. In letters sent to the employer after she retired, her counsel threatened legal action as a result of her constructive dismissal. On August 14, 2014, in a letter from her counsel (Exhibit 59), the employer was given until August 22, 2014, to provide the grievor with a decision on the outcome of the harassment investigation. On August 29, 2014, her counsel sent a grievance pursuant to s. 208(1) of the *Act* to Mr. Nash alleging that she had been constructively dismissed on August 22, 2014. The grievor and her counsel arbitrarily chose September 5, 2014, as the deadline for the employer to respond to her grievance.

[76] As to the allegation of a delay in the decision-making process, the grievor could have filed a grievance at any point before her retirement. A grievor cannot sit on his or her rights. Due diligence was not demonstrated. Furthermore, the grievance's chance of success is low, particularly in light of the constructive dismissal allegations. She cannot force the employer to continue an employment relationship after she has retired. Allowing that would be highly prejudicial to the employer. Based on *Featherston v. Deputy Head (Canada School of Public Service)*, 2010 PSLRB 72 at para. 81, *Crête v. Ouellet and Public Service Alliance of Canada*, 2013 PSLRB 96 at paras. 27, 28, and 32, *Callegaro v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 110, and *White v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 88 at para. 67, the request for an extension of time should be denied. Since the new Board has no jurisdiction, this grievance should be dismissed.

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

[77] The employer's failure to determine discipline against the grievor was more damaging than the decision itself. She was stuck in purgatory for an unreasonable amount of time. Mr. Nash knew that when she retired, unresolved issues still remained, which is clear from the ongoing interaction between the employer and the grievor's legal representatives. She relied on the employer's communications that an answer was forthcoming at the time of her retirement. Given the employer's representation, it was reasonable for her to rely on those communications.

[78] According to *Cawley*, at para. 43, in the case of an involuntary resignation, the grievor is still an employee and therefore is entitled to grieve. Only on September 5, 2014, was the grievor advised that no decision would be rendered. There was no undue delay filing the grievance; it was filed five days after that. The application for an extension of time was made with respect to the resignation since it was clearly tied to the outcome of the employer's decision. That qualification was met on September 5, 2014, when the grievor's counsel was advised that no determination was forthcoming and that the file had been closed. If the employer did not know what impact the resignation had on the disciplinary decision, it is unreasonable to expect the grievor to understand it. The employer should have told her clearly on June 27, 2014 that it had closed her file. The fact that it withheld this information should not be used against the grievor. The grievances related to the failure to issue a decision and the delay in advising the grievor of the discipline to be imposed were clearly within the time limits prescribed. It is only fair that the time limits be extended for the constructive dismissal grievance.

[79] In *Richard v. Canada Revenue Agency*, 2005 PSLRB 180, the grievor in that case was indefinitely suspended and then fired. She was granted as extension by the former Board eight months after she was suspended and six months after she was terminated. The former Board held was held that the clear direction of the employer in that case to the grievor not to return to the workplace was a suspension (see paragraphs 62 to 64). The employer in this case claimed that the grievor was absent on certified sick leave throughout the period she was not in the office. The evidence shows that she did not submit another doctor's certificate after March 31, 2014. Thus, she must have been suspended.

[80] There are clear, cogent, and compelling reasons for extending the timelines for the grievor to file a grievance. The employer advised her repeatedly that a decision was forthcoming. Mr. Nash provided a clear communication on June 19, 2014. Again, on July 2, 2014, the employer's counsel advised the grievor's counsel that a response would be received in due course. On July 23, 2014, Mr. Nash was again contacted for a response, and his counsel replied on July 24, 2014. It was clearly easier for the employer to let her retire than to make a decision in a complicated matter. On September 5, 2014, counsel for the employer enclosed a copy of a grievance form in her response. The grievor has demonstrated due diligence in pursuing this matter.

[81] There is no evidence of any prejudice to the employer, while the grievor has demonstrated the significant prejudice she would suffer if she were not allowed to pursue her grievance. She has a reasonable chance of success if allowed to proceed. After over 20 months of delaying the process, it is ironic that the employer sought to preclude the grievor from pursuing her grievance because she missed the 35-day deadline for filing it. Her rights are statutory, while the employer sought to enforce a policy. It should be remembered that the grievor tried to file her grievance on August 29, 2014, which was still beyond the June 27, 2014, deadline.

[82] The employer's cited cases are clearly distinguishable. The grievor in *White* delayed three years and five months. In *Featherstone*, the delay was nine months. In *Callegaro*, the delay was 14 months, and in *Crête*, it was approximately 12 months. Those delays are significantly different from the one-month delay in the grievor's case, during which her counsel and the employer had clear and ongoing communications. It was clear that the decision-making process was ongoing.

[83] The employer's timeliness argument raises an estoppel issue. The grievor relied on representations made by the employer that were intended to be relied on and were in fact relied on. It is in the interests of justice and fairness to find that the employer was estopped from raising an objection to timeliness.

[84] The employer stated that no disciplinary action was taken against the grievor despite the fact that she was told not to return to the Fredericton passport office. She was suspended, for all intents and purposes. The employer argued that that point is moot since she was on paid sick leave. It was up to the employer to prove that the grievor was unfit for work. In *Potter v. New Brunswick Legal Aid Services Commission*,

2015 SCC 10, the Supreme Court of Canada ruled that if an employer directs an employee not to attend the workplace, then the employee is suspended.

[85] The grievances before the new Board are that the employer delayed rendering its decision, that the grievor's resignation was involuntary, and that she was constructively dismissed, which clearly provide the foundation for the new Board's jurisdiction. As to the *Burchill* argument raised by the employer, the grievance provided information sufficient to make the employer aware of the allegations it needed to address. The grievor is not to be held to a standard of perfection for setting out the details of each event. It is consistent with the *Act* that the grievance should be read consistent with the purpose of the legislation, which is to provide employees with access to redress for workplace disputes within an adjudicator's jurisdiction. If there is insufficient information, the new Board may order that the grievor provide a statement of particulars.

[86] The fact situation in *Potter* is strikingly similar to the grievor's case. Mr. Potter was on sick leave when he was advised not to return to work until he received further direction. That was the start of an indefinite administrative suspension (see *Potter*, at paras. 10 and 12). An administrative suspension does not preclude the Board's jurisdiction if the right factors exist (see *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9). In *Larson*, the adjudicator found that the employer's failure to abide by its policies or meet deadlines was equal to an intention not to be bound by the employment contract. A reasonable person would conclude that he or she was no longer bound by the employment contract.

[87] On applying the reasonable person test to the grievor, it was clear that she did not have sufficient information to make an informed decision concerning her choice to retire. She could have been informed of its recommendation, but the employer chose not to inform her. The indefinite suspension created uncertainty for the grievor, and the employer had an obligation to establish that it was reasonable or justified. There is no evidence that the employer ever reconsidered the suspension. It claimed that it was not necessary as the grievor's return to the workplace never came up, given that she was on sick leave. The employer is obligated to establish that she was unfit for work. The fact that other opportunities were available to the grievor was never communicated to her. It is clear that the employer never intended to be bound by the employment contract (see *Larson*, at paras. 161 and 162; *Basra v. Deputy Head*

(Correctional Service of Canada), 2007 PSLRB 70 at para. 102; and *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55 at paras. 60, 62, and 71).

[88] After February 25, 2014, the employer never turned its mind to whether the grievor's suspension was still required, which was compounded by delays and a failure to provide her with information on the investigation's progress. The employer was negligent by failing to honour its timelines. Its harassment policy requires that a complaint be resolved with the least disruption possible to those involved and handled in a timely manner, and the complaint investigation process is to be carried out promptly. A complaint is to be fully investigated within 12 months of being made. Any penalty imposed must be implemented in that time. The employer's disciplinary guidelines incorporate the *Larson* criteria and strongly advise that it not delay disciplinary action.

[89] In *Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70, the handling of a harassment complaint by the employer in that case was examined. The adjudicator in that case concluded that a harassment complaint carries with it a stigma that attaches itself to the respondent. The adjudicator also concluded that the employer failed in its duty of diligence, prudence, and impartiality and that it aimed to provoke the grievor to leave his employment. The grievor in this case was similarly treated. The length of the process became the foundation for the inference that she would get sick of things and retire. Similarly, in *Singaravelu v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 178, the employer in that case erred in imposing discipline more than three years after the alleged misconduct. The principle that an employer must follow policies that may result in disciplinary action was applied. An employer is expected to abide by its policies. Otherwise, when taken as a whole, it becomes evident that the employer in this case no longer intended to be bound by the employment contract.

[90] By its conduct, the employer perpetrated a sham and a camouflage and acted in bad faith, resulting in the grievor choosing to retire. Mr. Hiltz testified about the retirement package. Mr. Genest testified he did not want her back. Ms. Ettritch called her 1 week after her 55th birthday for no stated purpose other than discussing retirement and volunteer work. The underlying inference to be drawn from the significant delay rendering the discipline decision is that the employer was waiting the grievor out.

[91] After June 3, 2014, the employer's communications became misleading; Mr. Nash and Ms. Ettritch knew what their recommendation was, and they knew that their decision would impact the grievor's retirement date. The employer had no intention of meeting its deadlines. The grievor was backed into a corner and had no serious or unqualified intention to retire.

[92] The assertion that the grievor severed the employment relationship on a voluntary basis is not supported by the evidence. Her resignation was precipitated by the employer's failure to render a decision. The grievor had been misled by the employer. Mr. Nash knew that the labour relations file had been closed once he accepted the grievor's resignation, yet he advised her counsel that a decision would be rendered on or about June 26, 2014. According to Brown and Beatty, at para. 7-261, when an employer accepts a retirement notice from an employee, the employer ought not to act in bad faith. Employees are vulnerable and should be protected (see *McKinley v. BCTel, 2001 SCC 38*). The grievor should not be denied the right to grieve because the employer delayed making a decision (see *Cawley*).

C. Employer's reply

[93] The employer did not hide information from the grievor. It could not share information that did not exist. The decision-making process was prolonged, but Mr. Nash never stated that a decision would be forthcoming on or around June 26, 2014. He was in no position to know when it would be made. He did say that a recommendation would be submitted by June 19, 2014. Before the deputy head made a decision, the grievor chose to retire. The employer has no authority to discipline someone who is not an employee. On August 29, 2014, the grievor attempted to submit a grievance but used the wrong form. The official grievance was filed on September 10, 2014, and was anchored on the September 5, 2014, letter from the employer's counsel. The content of the grievances was different.

[94] The *Potter* decision does not apply. The new Board has jurisdiction to deal with a disciplinary suspension, which the affected employee can then grieve. It does not have jurisdiction over an administrative suspension. To determine which type of suspension is at issue in this case, the new Board has to look at the employer's intent. If there was no disciplinary intent and the employer acted in a reasonable fashion and not in bad faith, the suspension is administrative. Paragraph 62 of *Cabiakman* states

that if an administrative suspension is warranted for legitimate business interests, given the whole context, the employer has not constructively dismissed the employee.

[95] *Burchill* stands for the proposition that for the new Board to have jurisdiction over a matter, it had to have been dealt with through the grievance process. The new Board has no authority to amend a grievance and consider additional allegations. The grievor grieved the delay rendering a decision related to the findings of the harassment investigation. The merits of that investigation were not raised in the grievance; nor did the grievor grieve the alleged suspension. It was too late at the hearing to raise those allegations.

[96] The employer's guidelines are not mandatory as they have no legislative root. The new Board has found that policies and guidelines are not enforceable through adjudication and that there is no remedy for a violation of either a policy or its guidelines by the employer. The new Board has used such violations to evaluate employers' behaviour. The evidence shows that the employer acted diligently and in good faith with respect to the harassment investigation, which took less than a year to complete and thus is significantly different from the fact situations in *Robitaille* and *Singaravelu*.

[97] There is no evidence that the employer was trying to wait the grievor out. One cannot infer from Ms. Ettritch's call in March 2014 that she was trying to nudge the grievor to retire. She called because of an email from the grievor stating that she was upset because she found out about Mr. Genest's prolonged absence from the office (Exhibit 22). It was not bad faith for the grievor's manager to inquire about her plans. At the November 2012 meeting, the grievor repeatedly told those present that they would have to put up with her only for 14 months more because she planned to retire.

[98] If the grievor felt that she was suspended on February 5, 2013, she should have grieved it within 35 days. She did not. She continued to provide the employer with proof of her inability to work due to her health and to ask the employer to continue to grant her sick leave. When her sick leave with pay ran out, she claimed employment insurance sick-leave benefits and applied for long-term disability insurance. The employer undertook no steps to formally suspend her. Her leave status throughout the period from November 2012 to June 2014 indicated that she was on certified sick leave with and without pay.

[99] The evidence demonstrates that all the *Larson* requirements have been met. There was no need to re-evaluate the reason she was absent from the workplace. The doctor's notes and leave requests continued to regularly come in. Had she indicated that she was fit to return to work, the employer would have evaluated whether it could have returned her to another work location. If not, the employer would have had to determine if a suspension was required. All the information from the grievor's doctor and her testimony said she was unfit to work. The employer had no obligation to prove that the grievor was unfit to work or to initiate the accommodation process, as her counsel suggested. The grievor had the obligation to initiate that process. She did not request accommodation or that she be returned to work at the Fredericton passport office or at any other office.

[100] It was not demonstrated that the employer intended to sever the employment relationship or refuse to abide by the grievor's terms and conditions of employment. Why would the employer continue with the investigation and make a discipline recommendation if it had no intent to abide by the grievor's terms and conditions of employment? Why would Ms. Ettritch and Mr. Nash continue to follow up with the grievor and her counsel if the employer had no intent to abide by the grievor's terms and conditions of employment? A reasonable person would see that the employer was acting out of due diligence.

[101] The employer acted in a timely fashion, and there is no evidence of bad faith or an intention to unreasonably prolong the process on its part.

[102] As to the grievor's application for an extension of time to file a grievance alleging that constructive dismissal occurred on September 5, 2014, the employer's September 5 letter was included with the grievance form. The evidence shows that the letter was provided to the grievor's counsel in response to a specific request. It could not form the basis from which a grievance could be filed. The employer did not and is not waiving the time limits for filing a discharge grievance.

IV. Reasons

[103] There are four issues to be determined in this case:

> (1) Was the grievor suspended from the workplace from February 2013 to June 2014?

(2) Did the employer excessively delay imposing disciplinary action against the grievor as a result of a finding that harassment allegations made against her by the employees she supervised were substantiated?

(3) Was the grievor forced to retire effective June 27, 2014?

(4) Should the new Board grant the grievor an extension of time for filing a constructive dismissal grievance because she allegedly did not become aware of the facts giving rise to the constructive dismissal until September 5, 2014?

A. Was the grievor suspended from February 2013 to June 2014?

[104] Before the employees of the Fredericton passport office filed their harassment grievance, the grievor was on certified sick leave. She continued to provide the employer with sick-leave certificates and to apply for paid and unpaid sick leave from the employer, which she was granted throughout the period at issue. In addition, on the basis of her medical situation, she applied and received employment insurance sick-leave benefits. When they were exhausted, she applied for long-term disability benefits. Based on her conduct and the medical information she provided to the employer, it was reasonable for the employer to rely on the legitimacy of that information and to believe she was unfit to work.

[105] As the grievor was out of the workplace, the evidence shows that the employer never turned its mind to whether she should be suspended. Mr. Genest directed her not to return to the Fredericton passport office; however, the employer had other locations to which she could have been assigned, according to the employer's uncontradicted evidence, but for the fact that she was too ill to be in the workplace according to her evidence and the medical certificates she provided the employer. It is clear from the email chain in Exhibit 29 that the ban imposed was for the Fredericton passport office only and that the grievor could otherwise communicate with anyone.

[106] In *Cabiakman*, the Supreme Court stated that when determining whether a suspension was reasonable, an adjudicator must focus on the situation that existed when the decision to suspend was made because the issue to be determined is whether the employer's decision to suspend was justified at the time it was made. A suspension requires that the employer take some affirmative step to bar an employee from the

workplace, whether it be pending an investigation or for disciplinary reasons. The employee must be advised that he or she is suspended and must be given a reason.

[107] Mr. Genest's uncontradicted evidence was that he notified the grievor in February 2013 by telephone that the Fredericton passport office employees had filed a harassment grievance against her, that it had been accepted, and that an investigation into the allegations would follow. It was also uncontradicted that he advised the grievor that during the investigation, she was not to talk to her employees or return to the Fredericton passport office. As the grievor was on sick leave at the time, there was no need to suspend her pending the completion of the investigation. It was clear that she was not to return specifically to the Fredericton passport office, not that she was not to return to work were she fit.

[108] Unlike in the cases cited by counsel for the grievor, this was not a situation in which an employer removed an employee from the workplace pending the completion of a disciplinary investigation. In this case, the grievor was absent from the workplace due to medical reasons, for which she provided doctor's certificates. She initiated the absence, not the employer. It was disingenuous of her to argue at the hearing that the information she provided to the employer to secure an income and to access her sick leave benefits should not be relied upon to support her allegation that she was suspended. But for her actions, she might well have been assigned to another workplace.

[109] The uncontradicted evidence of the employer's witnesses was that the employer would have assessed whether the grievor could have been assigned to another of its offices or whether she should have been suspended pending the completion of the investigative process, but that was not required as long as the grievor continued to absent herself from the workplace for medical reasons.

[110] If I am wrong as to the application of *Potter*, and the grievor was suspended, I find it was an administrative suspension, over which I have no jurisdiction. The investigation undertaken by the employer was not disciplinary but was rather a fact finding investigation. It was reasonable given the circumstances of the harassment grievance to separate the parties and as the grievor was out of the workplace on authorized sick leave, I see nothing which would change the nature of the absence to a disciplinary suspension. The ongoing interaction with the grievor, her requests for sick

leave and other sick benefits, and the provision of medical certificates met the necessity under *Larson* to re-evaluate the suspension on a regular basis.

B. Did the employer excessively delay imposing disciplinary action?

[111] The grievor raised no argument that the investigation was vexatious or frivolous. The employer acted promptly and reasonably in response to the harassment grievance filed by the Fredericton passport office employees. As counsel for the employer pointed out, given the number of allegations, the number of grievors, the parties' language requirements, and the need for an external investigator whose schedule was not within its control, completing the investigative process in less than a year was not unreasonable. This was not so in *Basra* and *Larson*, in which investigations languished for lengthy periods. The employer acted responsibly and regularly followed up with the investigator and the grievor. The change from Passport Canada to Service Canada and the reorganization of the regions was incidental to the process.

[112] Determining disciplinary action requires first that the employee be able to respond to the allegations and to provide the employer with reasons that would support mitigating the discipline. The employer extended this opportunity to the grievor in May 2014. A proper consideration of the mitigating factors is a hallmark of the disciplinary process, and it is clear from the evidence that the employer had to consider the grievor's comments at the May 2014 meeting as well as the aggravating factors, such as the history of complaints made against her. It is irrelevant that she and her counsel believed that disciplinary action was coming, in the form of a brief suspension. Throughout the disciplinary process, termination was being considered as an option.

[113] Ms. Ettritch and Mr. Nash did not have the authority under the human resources delegation of authority to terminate an employee (Exhibit 26). That authority belongs to the deputy head. Any recommendation they made concerning discipline to be imposed required vetting by the employer's Labour Relations department to ensure that it was reasonable, justified, and within the realm of other disciplinary action imposed for like offences. Then and only then could the recommendation have been made to the deputy head. This process took approximately eight weeks and was halted

by the grievor's decision to retire. Unlike in *Singaravelu*, the employer did not unreasonably delay its disciplinary decision.

[114] Section 63 of the *PSEA* makes it clear that the consequence of a resignation, including retirement, is that the employee ceases to be an employee on the date that the deputy head, or his or her designate, accepts the resignation in writing. Therefore, the consequences of a retirement accepted by a deputy head are the same as the consequences of any other termination under the *PSEA*, once the individual ceases to be an employee. The authority to discipline an employee for wrongdoing in the workplace is rooted in the employment relationship and is intended to remedy the employee's behaviour in the workplace. As the employee had terminated her own employment, the need to impose disciplinary action became moot in this case.

C. Was the grievor forced to retire, effective June 27, 2014?

[115] The employer argued that I am without jurisdiction to hear this matter based on the fact that retirement is a form of resignation from the public service that falls within section 63 of the *PSEA*. Essentially, the grievor sought to rescind her retirement notice as it was not submitted voluntarily. The grievor argued that she sought to substitute it with a grievance alleging that she was constructively dismissed. Her letter of resignation was not meant to sever the employment relationship but was required to allow her access to her pension funds.

[116] The grievance before me was referred to the former Board under s. 209(1)(*b*) of the *Act* as it alleged disciplinary action resulting in termination, demotion, suspension, or financial penalty. On the face of the grievance, its allegations are related to the grievor's retirement. She argued that the substance of her grievance is related to a forced termination due to the employer's failure to discipline her in a timely fashion and her prolonged suspension pending the outcome of a harassment investigation. The grievor alleged that she had no choice but to retire, to secure an income.

[117] From her grievance form, which initiated these proceedings, it is clear that she sought payment in lieu of notice for her termination and not reinstatement to her position with the employer. She did not seek to rescind her retirement. The pith and substance of the grievance is the termination of her employment, for which she sought damages.

[118] A retirement notice is a de facto voluntary termination of employment. The grievor left her employment with the employer of her own accord to ensure she had an income. It was her decision. She testified that she had taken all she could take of the ongoing disciplinary process, despite being assured that it would soon end. It was a deliberate action she took of her own accord and in her own best interests, according to her testimony. Further evidence of the deliberateness of her action was the application for her pension payments. She had the subjective intent to retire and took all steps necessary to give effect to that intent.

[119] It was not her only option. She could have waited for the employer's decision or alternatively could have advised the employer at any time throughout the investigation and decision-making process that she was fit to return to work, following which the employer would have had to evaluate whether she could be found useful work in a location other than the Fredericton passport office. She did neither. She took matters into her own hands and decided to retire. The employer might very well have inquired about her retirement plans, but based on the evidence, including the grievor's, she was known to discuss her retirement plans openly in the workplace and had informed all assembled in November 2012 that she had only 14 months to go before she intended to retire.

[120] While the grievor might have been flexible as to her effective date of retirement, as she indicated in her retirement notice to Mr. Nash (that the date could be changed as a result of a suspension), there is nothing unequivocal in her emails (Exhibit 3 and 16). She intended to terminate the employment relationship.

[121] The grievor argued that she was forced to retire for financial reasons. This reason was considered by the former Board and the Federal Court in their *Mutart* decisions. Section 211 of the *Act* specifically denies me jurisdiction over any termination of employment under the *PSEA*. The acceptance of the grievor's resignation and application for retirement was a function of the deputy head's authority under section 63 of the *PSEA*, which is not subject to my review.

[122] Counsel for the grievor also argued that Mr. Genest did not want her back, which is contrary to his testimony. Mr. Genest's uncontradicted testimony was that he could not have the grievor return to the Fredericton passport office while the investigation was underway. It was also his testimony that he was not required to

consider the grievor returning to the workplace at the time as she was off on certified medical leave and had she provided him with a certificate indicating she was fit to return to work then the employer would have sought an alternative location for her if one were available. This scenario does not equate with not wanting the grievor back in the workplace. It is consistent with the employer's policy on harassment prevention and envisages a return to work not as the grievor argues a desire to eliminate her from the workplace.

D. Should the new Board grant the grievor an extension of time to file a constructive dismissal grievance?

[123] The rationale for which this application was made is that the grievor did not know until September 5, 2014, of the grounds upon which the claim of constructive dismissal is based. Having determined that she was not terminated, that she voluntarily put an end to the employment relationship, and that she was not suspended without authorization by the employer, *Potter* does not apply. There seems little to be gained by allowing the extension of time. The grievor has little chance of success, and nothing new has come to light that would warrant the extension. Particularly so when the grievor knew all the facts upon which the argument for the extension of time was based before the date on which she retired. She could have filed a constructive dismissal grievance at any point after her resignation was accepted. She chose not to because she first wanted to know what the disciplinary action would be, which is not a sufficient reason for the new Board to exercise its discretion and extend the time limit for filing a grievance.

[124] Grievors bear the burden of proof in applications for extending time limits for filing a grievance. In this case, she has not provided clear, cogent, and compelling reasons why the time limit for filing her grievance should be extended (see *Schenkman*). Likewise, there is no or insufficient evidence that supports her estoppel argument. Providing a copy of a grievance form, which is available online from the new Board's website and that the grievor could have accessed at any time before her resignation or within the 35-day time limit specified in the regulations to the *Act*, does not support the inference that the employer waived the timelines for filing a grievance.

[125] The parties have cited many cases in support of their arguments. While I have read and considered each one, I have chosen to cite only those that are of particular significance to this case.

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

(The Order appears on the next page)

V. Order

[127] The file is closed.

[128] The application for an extension of time is denied.

February 23, 2016.

Margaret T. A. Shannon,
a panel of the Public Service Labour Relations and Employment Board