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Citation: 2017 PSLREB 2

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

MARY GALE CHATFIELD

Grievor

and

DEPUTY HEAD
(CORRECTIONAL SERVICE CANADA)

Respondent

Indexed as
Chatfield v. Deputy Head (Correctional Service Canada)

In the matter of an individual grievance referred to adjudication

Before: Michael F. McNamara, adjudicator

For the Grievor: Jack Haller, counsel

For the Employer: Martin Desmeules, counsel

Heard at Moncton, New Brunswick,
May 28 to 30, 2013.

I. Individual grievance referred to adjudication

[1] Mary Gale Chatfield ("the grievor") was a Correctional Officer (CX-02 classification and level) employed by the Correctional Service of Canada ("the employer") at the Nova Institution in Truro, Nova Scotia. In December 2011, she told the employer that her father had died and was granted her request for bereavement leave. During her absence, the employer received information that cast doubt on her claim. An investigation was initiated, which revealed that her statement about her father's death was false and that she had in fact been vacationing in Mexico. She denied these facts when they were initially presented to her and actively attempted to conceal the truth for several weeks. The employer disciplined the grievor by terminating her employment. On March 22, 2012, she grieved the termination.

[2] The employer denied the grievance and in June 2012, the grievor referred it to the former Public Service Labour Relations Board ("the former Board") for adjudication, as it was about a disciplinary action that resulted in her termination (s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2 ("the *Act*").

[3] The matter was heard prior to November 1, 2014, when the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force, creating the Public Service Labour Relations and Employment Board ("the Board") to replace the former Board. 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. Pursuant to section 396 of the *Economic Action Plan 2013 Act*, No. 2, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Act* as it read immediately before that day.

[4] For the reasons set out below, I find that the employer did not discriminate against the grievor based on disability in terminating her employment and that the discipline imposed was reasonable and not excessive.

II. Summary of the events leading to her dismissal

[5] The employer appointed the grievor on an indeterminate basis in December 2007 as a correctional officer in a primary worker position, through an external advertised appointment process.

[6] She performed her work in a satisfactory manner over the following years, as demonstrated by her annual performance assessments up to the period ending September 2011, in which most of her performance ratings were marked as 3 out of a possible 4, meaning that her objectives were met most of the time. One of the correctional managers, Twila Deschambault, testified that the grievor was a very good worker who had developed good personal relationships with her co-workers.

[7] However, in the 2009-2010 period, the employer began noting on the performance assessments that the objective relating to leave management was not being met. More specifically it was noted that her sick leave balance was many hours in the negative, despite the objective that had been set for her to eliminate it.

[8] The grievor testified that starting in September 2008, her teenage son developed some serious health issues and problems relating to substance abuse. By 2010, another child, her daughter, had also developed some health-related issues. In order to deal with these matters, her physician signed notes directing that she only work on day shifts for several months and be absent from work for one three-week period. The grievor would also miss individual shifts from time to time. The employer accommodated these leave requests but, as a result, she accumulated a negative balance in her sick leave. By the close of the fiscal year ending on March 31, 2009, the grievor had a total negative balance of about 25 days in sick leave.

[9] On September 11, 2009, Ms. Deschambault met with the grievor to review her sick leave usage. The manager determined that there were no extenuating or exceptional circumstances to necessitate a negative sick leave balance. She therefore directed the grievor to have all future sick leave certified by a medical doctor until her leave account returned to a positive balance, in accordance with the employer's National Attendance Management Program. As of March 31, 2011, the sick leave balance was still in the negative by about 21 days.

[10] On August 22, 2011, the grievor witnessed an extremely violent fight between two inmates in the Structured Living Environment (SLE) unit of the institution. As the only correctional officer in the unit where the fight occurred, she could not respond directly and waited three to four minutes before the emergency response team arrived to intervene.

[11] The grievor was emotionally affected by the incident and consulted a psychiatrist, who recommended that she be absent from work for the ensuing four work days due to "unmanaged stress arising from a critical incident in the workplace." The psychiatrist followed up with a second letter dated October 20, 2011, in which she explained that the grievor was absent from Sept 1, 2011, onwards because even though she had no ongoing symptoms of trauma from the incident, she was experiencing "significant stress" regarding the administrative response to the event. The grievor filed a compensation claim with the Workers' Compensation Board of Nova Scotia (WSB) but on November 7, 2011, it concluded that her stress-related claim did not establish that she suffered a personal injury by accident arising out of and in the course of her employment.

[12] On November 10, 2011, the grievor's psychiatrist wrote to the employer that she was ready to return to the workplace and assume full duties.

[13] On December 13, 2011, the grievor informed the employer that she was available to work overtime on her scheduled days off during the period of December 14, 2011, to January 1, 2012. On the same day, she also emailed a request to the employer to take annual leave on Sunday, December 18, 2011, but was denied as the quota for permissible absences had been met. When her shift was scheduled to begin on December 18, the correctional manager on duty that day, Darlene O'Laney, noticed that the grievor had not shown up for work. She managed to contact the grievor by telephone several hours later. The grievor explained that she had spent the night at the hospital because her 14-year old daughter was rushed in requiring emergency surgery. Given her upset state over the circumstances, the grievor neglected to call in and inform the employer that she would not be coming in to work.

[14] December 19 to 21, 2011, were scheduled rest days for the grievor. According to a written statement prepared by a correctional manager, Tina McNeil, who did not testify at the hearing, the grievor called the institution at 11:56 p.m. on December 20, 2011, to advise that her father had passed away and that the funeral was scheduled for December 24, which was the day of her next scheduled shift. She explained that she would be leaving a day or two earlier to go to Oshawa, Ontario, where the funeral would take place. She was advised that she was entitled to five days of bereavement leave and any further absences would be treated as unauthorized leave without pay. The grievor did not indicate when she planned to return to work.

[15] On December 21, 2011, the grievor called and spoke to another manager to advise that she was booked on a flight returning late in the day on December 28. This meant that she would be unable to return to work in time for her next scheduled shift on December 29, for which she would need to take unauthorized leave without pay as well.

[16] The grievor ended up taking leave without pay for her next two scheduled shifts (December 25 and 26), as well as those of December 29 and 30, as more fully explained below. December 27 and 28 were scheduled rest days.

[17] Correctional manager Bruce Asselstine testified as to a sequence of events that occurred during the period of the grievor's absence based on a timeline that he prepared after speaking to a number of persons. On December 29 at 11:30 p.m., the grievor contacted Ms. O'Laney to inform her that she was trying to return from her father's funeral but was stuck in Toronto's airport due to snowy weather. The grievor provided the flight number and Ms. O'Laney later checked it on-line and saw that the flight was delayed and would only be arriving in Halifax at 1:56 a.m. This meant that the grievor would again be unavailable for her next scheduled 16–hour shift on December 30.

[18] Mr. Asselstine also stated that during the period of the grievor's absence, rumours began circulating amongst other correctional officers that she was in fact in Mexico and not attending a funeral, which these other employees found unsettling. At one point, copies of printouts from the grievor's Facebook were slipped anonymously under the office doors of a number of managers, as Adele MacInnis-Meaghen, who was the warden at the time, also confirmed in her testimony.

[19] These Facebook pages contained several messages posted by the grievor including one dated December 16 at 8:24 pm, which states, "And the days off begin!!" Another posting dated December 18 says, "Best night ever with the besties! Love you guys", followed by another message saying, "Gonna be a tequila sunrise." A photo of the grievor on a beach is shown having been posted on December 26 accompanied by the text "Beautiful mommy in Mexico!" A message posted by the grievor dated December 26 at 9:08 pm has an annotation next to it that appears to have been automatically generated by Facebook, which says the grievor was in Puerto Vallarta, Mexico. Towards the end of the series of messages, there is a note under the heading

"Recent Activity" stating that "Mary Gale likes Puerto Vallarta Mexico." Another entry made right after a message dated December 30, 2011, consists of 39 photos posted under an album entitled "Mexico 2011".

[20] The grievor's first scheduled shift in 2012 was on January 3, but she called in sick. She later submitted a medical note dated January 4, 2012, stating that she was required to be absent from work on January 3 and 4 due to circumstances in her family that required her presence at home relating to ongoing issues. The letter explained that prolonged absences from her home while her teenaged children are present were problematic at that time, so it was recommended that she only work day shifts until February 6 in order to provide time to address those concerns. A subsequent letter from another physician, dated January 11, 2012, again prescribed that she have reduced work hours and day shifts only until February 28, 2012, "due to medical reasons." However, that physician later issued another note, on January 18, 2012, stating that she was able to return to work as of that date.

[21] The grievor nonetheless remained on leave without pay until January 23, 2012, when she reported to work for the first time after her extended absence. According to a report completed by Mr. Asselstine later that day, upon showing up at the institution, she was asked to attend a meeting at the correctional managers' offices and was advised to have a union representative with her. Several managers were at the meeting and she was accompanied by a union representative. They offered their condolences for her father's passing but also mentioned that they had received information that she was not in fact at a funeral and had used the bereavement leave to take a vacation. She denied this allegation, maintaining that she had only gone to Oshawa for the funeral and that her delayed return was due to bad weather in Toronto.

[22] The grievor was told that the matter could easily be resolved if she produced a copy of her father's death certificate. She was given the rest of the day off so that she could work on obtaining the document.

[23] Later that day, the grievor called Mr. Asselstine to say that the funeral home would not release the death certificate to her and that copies had only been given to her grandmother who had returned to Florida and would not be back until April.

[24] On January 24, 2012, Ms. MacInnis-Meagher met with the grievor and presented to her a memo stating that information had been received that she may have falsified

leave requests during the month of December 2011. It added that such action, if founded, would constitute a serious breach of the employer's *Standards of Professional Conduct*, *Code of Discipline* and the public service's *Values and Ethics Code*. Ms. MacInnis-Meagher advised the grievor that a fact-finding investigation had therefore been convened. The grievor was further advised that if the allegations were founded, disciplinary action could be taken against her up to and including termination.

[25] The grievor denied the allegations, insisting that she was at the funeral in Oshawa and submitting that the Facebook entries had been forged by someone else, likely her former boyfriend who had adopted an aggressive attitude towards her since their separation several months earlier. After the meeting, the grievor forwarded to the employer several emails from him to demonstrate his anger towards her.

[26] Ms. MacInnis-Meagher appointed Kathleen Legere-Newman, a member of the employer's Investigation Board, to conduct the investigation and prepare a report.

[27] The investigation revealed that several of the grievor's co-workers who were acquainted with the members of her family had realized that she could not be in bereavement. For instance, when one of those co-workers learned that the grievor's father had passed away, she contacted the father's sibling to give her condolences. She was surprised to learn that the father was still alive. She forwarded this information to the employer. The grievor eventually became aware of this disclosure to the employer, and on January 25, 2012, she wrote an email to the co-worker, explaining that the person she had contacted was the sibling of her *adoptive* father. The grievor explained that it was her *biological* father who had died in Oshawa, at a homeless shelter, due to an overdose.

[28] The grievor made the same statement to Ms. Legere-Newman, elaborating that she had only learned a few years earlier, upon seeking information about her family's medical history, that her real father lived in Ontario. She gave his name to the investigator and provided Mr. Asselstine with the name of the funeral home in Oshawa where he was laid to rest. However, despite repeated requests, the grievor never produced a death certificate or other document confirming his death. As a result, Mr. Asselstine took it upon himself to search on-line at the funeral home's website and found the obituary for a man by that name. It was someone who was 41 years old at

his death, which would make him younger than the grievor and therefore obviously not her biological father.

[29] Based on all this information, Ms. Legere-Newman issued her report on February 12, 2012, with several findings, including the following:

- The grievor did not report to work on December 18, 2011, nor did she call a supervisor to say she would be absent. This was in contravention of several provisions of the employer's Standing Order 065, which require employees to ensure that they have sufficient leave credits before taking a leave and to inform supervisors of projected absences at least one hour prior to the start of a shift.

- The evidence showed that the grievor was in fact in Mexico on her scheduled work days of December 24 and 25, 2011, despite her request for bereavement leave over this period and her statements that she would be returning on a scheduled flight from Toronto on December 28, 2011 - she in fact returned on December 30, 2011, resulting in her taking leave without pay for an additional day. These acts were in contravention of section 6(a) of the employer's *Code of Discipline CD060*, for fraudulently recording, or failing to record, her attendance. She was also not in compliance with the employer's *Standards of Professional Conduct* in the responsible discharge of duties, which requires staff to conduct themselves in a manner that reflects positively on the public service of Canada and other professional standards. The grievor was also found not to have complied with section 7.1 of the National Attendance Management Program to which she had been subject since 2009, by failing to report all absences and complying with established reporting procedures.

[30] The report was shared with the grievor on February 22, 2012, and she was convened to attend a disciplinary hearing the following day. On the morning of February 23, 2012, the grievor sent a letter by email Ms. MacInnis-Meagher admitting that she had lied and stating that she was an alcoholic and had been drinking excessively during the period in question. She wrote as follows:

> I am an alcoholic. I was on a major drinking binge during the months of December and January and I lied and concocted the whole story so I could continue my binge drinking. I am so ashamed and embarrassed. I have been lying to my friends, family and my work for months now.
>
> I am also being treated for severe depression.
>
> The drinking started in June after I received some terrible news. Then, when the incident occurred in the SLE in August, I turned to alcohol to self-sooth and the drinking continued to escalate.
>
> I am so sorry for the trouble I have caused and the expenses incurred. The drinking has stopped (when my daughter overdosed) but not before all this damage has been done.
>
> I so readily accepted the PO position so I and my family would have a chance to start over. My son is going to an addiction centre in Calgary and my daughter will have the best of care for her kidneys in Calgary and Edmonton.
>
> My Drs (Pace and Summers/Ellis) are fully aware of what has been going on in my life and I am giving you permission to get my files if you would like. I also have a letter from Dr. Pace stating that she recommends I be accommodated for the PO position as she knows how I struggle at Nova and the stress it incurs since the August incident.
>
> After being escorted out of Nova yesterday, I had a breakdown and realized what I have done. That was my rock bottom.
>
> I am accepting any and all repercussions for my actions and will continue to work on my sobriety.
>
> Thank you
>
> Mary Gale

[31] The grievor also told Ms. MacInnis-Meagher that she had been sick all night and day thinking about that day's meeting and, as a result, would be unable to return to the institution and maintain her composure. The disciplinary hearing was therefore postponed to February 28, 2012.

[32] At that hearing, according to Ms. MacInnis-Meagher, the grievor said that she had been drinking very heavily in the period leading to her absence and when she was offered a free trip to Mexico, she made a decision to go. She called the manager to report that her father had died and provided dates for her absence. The grievor told Ms. MacInnis-Meagher at the disciplinary hearing that she was sorry for her acts and

asked for a second chance. As she mentioned in her letter, she had been offered an opportunity to be appointed to a parole officer position in Alberta, which would enable her to have a new start.

[33] Ms. MacInnis-Meagher testified that she was not certain what the grievor was sorry for; was it for lying or for getting caught lying? She noted that the grievor had kept up the lie even after the date when she claimed to have stopped drinking.

[34] On March 8, 2012, Ms. MacInnis-Meagher issued her decision on the matter. She found that the grievor had committed gross acts of misconduct, in clear violation of the employer's *Standards of Professional Conduct*, the *Code of Discipline* and the *Values and Ethics Code*. The warden concluded that the seriousness of the misconduct and the grievor's persistent deflection of responsibility irreparably damaged the bond of trust with the employer. Accordingly, Ms. MacInnis-Meagher terminated the grievor's employment, effective that day. Her decision reads as follows:

> […]
>
> Dear Ms. Chatfield:
>
> On January 30, 2012, a convening order was struck to investigate allegations that you submitted falsified leave requests in the month of December 2011. A vetted copy of the investigation report was shared with you on February 22, 2012 and a disciplinary hearing was held with you on February 28, 2012 to discuss the findings of the report.
>
> After receiving the investigation report, you admitted to submitting a fraudulent bereavement leave request for December 24 - 26, 2011. Only after being confronted with very strong evidence did you confess to your misconduct. By your own admission, you subsequently mislead management by fabricating an elaborate version of events during the disciplinary investigation process.
>
> I have carefully reviewed the facts and circumstances of this case and based on the investigation and your own admissions, I have concluded that you did submit a fraudulent bereavement leave request for the period of December 24 - 26, 2011. Furthermore, I have concluded that your subsequent actions were a futile attempt to conceal your misconduct and mislead management. In doing so, you have committed a gross acts of misconduct which is in clear contravention of the Correctional Service Canada (CSC) *Standards of Professional Conduct* and *Code of Discipline- Commissioner's Directive (CD) 060.*
>
> Specifically, you have violated the following:

- *Standards of Professional Conduct* and *Code of Discipline: Section 6 (a) fraudulently records, or fails to record, his/her attendance or that of another employee.*
- *Standards of Professional Conduct in the Correctional Service of Canada: Standard 1 (Responsible discharge of duties) Staff shall conduct themselves in a meaner which reflects positively on the public Service of Canada, by working co-operatively to achieve the objectives of the Correctional Service of Canada. Staff shall fulfil their duties in a diligent an competent manner with due regard for the Values and principles contained in the Mission Document, as well as in accordance with policies and procedures laid out in legislation, directives, manuals and other official documents.*

In addition, I find that your actions are a violation of the *Values and Ethics Code of the Public Service* in that you have contravened the Ethical Values section by failing to act at all times in a manner that will bear the closest public scrutiny; an obligation that is not fully discharged by simply acting within the law.

In determining an appropriate disciplinary measure, I have taken into consideration all aggravating and mitigating factors, including your recent declaration that you are an alcoholic.

As such, I have concluded that the seriousness of your misconduct and your persistence in deflecting responsibility for your actions have irreparably damaged the bond of trust which is fundamental to the employment relationship. Therefore, in accordance with the powers conferred to me pursuant to Paragraph 12(1)(c) and Section 12.2 of the *Financial Administration Act,* I am terminating your employment with the Correctional Service Canada, effective the end of business on March 8, 2012.

In accordance with the terms of your collective agreement, you have the right to present an individual grievance on this decision.

Finally, I would like to advise you that the Employee Assistance Program (EAP) is available to assist you during this time. You may contact any of the local referral agents or the regional EAP manager, […] at […].

Respectfully,

Adele MacInnis-Meagher
Warden
NOVA Institution for Women
[…]

[*sic* throughout]

[35] As mentioned earlier, the grievor grieved her termination on March 22, 2012.

[36] In her grievance, she invoked the "No Discrimination" provision found in Clause 37.01 of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN (the "bargaining agent"), which has May 31, 2010, as its expiry date and was still in force at the time. Although she did not specify on what basis she claimed discrimination, her letter of February 23, 2012, referred to her alcoholism and emotional state in relation to the SCL incident and the difficulties with her family. As will be elaborated below, these situations may be ascribed to a prohibited ground of discrimination.

III. REASONS

[37] There are two basic issues that I must address in dealing with this grievance:

- Was the decision to terminate the grievor's employment discriminatory?
- Was there misconduct by the grievor and if so, was the discipline imposed excessive?

A. Was the termination discriminatory?

1. The applicable legal principles

[38] As set out below, Clause 37.01 of the collective agreement provides that there is not to be any discrimination or disciplinary action exercised or practiced with respect to an employee by reason of mental or physical disability:

> 37.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Union, marital status or a conviction for which a pardon has been granted.

[39] Section 226(1)(g) of the version of the *Act* as it read at the time of the grievor's dismissal stated that an adjudicator may, in relation to any matter referred to adjudication, interpret and apply the *Canadian Human Rights Act* (*CHRA*) other than it's equal pay for work of equal value provisions, whether or not there is a conflict

between it and the *Act*. This power exists under the current version of the *Act* as well (s. 226(2)(a)).

[40] Section 7 of the *CHRA* states that refusing to employ or to continue to employ an individual, if it is based on a prohibited ground of discrimination, constitutes a discriminatory practice.

[41] Section 3 of the *CHRA* provides that disability is one of the prohibited grounds of discrimination. According to s. 25, the term disability includes any earlier or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

[42] Where parties make a human rights claim, it falls upon them to show a *prima facie* case of discrimination, that is, they must present evidence that covers the allegations made and which, if the parties are believed, is complete and sufficient to justify a verdict in their favour in the absence of an answer from the employer. (*Ontario Human Rights Commission v. Simpson-Sears*, [1985] 2 SCR 536 at para. 28).

[43] To demonstrate a *prima facie* case of discrimination under section 7 of the *CHRA*, the grievor must establish the following:

(i) the grievor has a characteristic that is protected (i.e., one of the prohibited grounds of discrimination);

(ii) the employer refused to employ or continue to employ or adversely differentiated the grievor in employment; and

(iii) the protected characteristic was a factor in the adverse treatment (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. In other words, the grievor need only establish that there is a connection between that treatment and the prohibited ground of discrimination (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 52).

[44] In response, the respondent can refute the allegation of *prima facie* discrimination or present a defence based on section 15 of the *CHRA*, for which the relevant provision in this case reads as follows:

> 15(1) It is not a discriminatory practice if
>
> (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement … .

[45] Thus, the employer's behaviour will not be considered discriminatory if it can be established that its refusal with respect to any employment is based on a *bona fide* (or good faith) occupational requirement (BFOR).

[46] For a practice to be considered a BFOR, the employer must establish that accommodation of the employee's needs would impose undue hardship on it, considering health, safety, and cost.

2. Has the grievor established a case of discrimination on a *prima facie* basis?

[47] For the reasons described below, I am satisfied that the grievor, if believed, has established on a *prima facie* basis that disability was a factor in the employer's decision to terminate her employment. The evidence as presented by her would be complete and sufficient to justify a verdict in her favour, absent an explanation from the employer. However, as I further explain in the next section of this decision, the employer has successfully refuted the *prima facie* case by demonstrating that the griever did not establish on a balance of probabilities that her disability had any bearing on her efforts to deliberately misrepresent her absence and to mislead the employer.

[48] The grievor states that she was suffering from a number of health-related conditions including alcoholism and depression at the time the events leading to her dismissal occurred. These conditions were outlined in her letter of February 23, 2012, which she submitted to the employer after receiving a copy of Ms. Legere-Newman's report.

[49] She testified, in particular, about how she was affected by her son's substance abuse, her daughter's health issues, the SLE unit assault that she witnessed and the employer's lack of support for her WCB claim thereafter, as well as her ex-boyfriend's stalking and the shock of running into an inmate in a local store in October 2011. She even had to deal with the theft and total loss of her car in early November 2011 for which she lacked sufficient insurance coverage. She claims that by that point, she had

become a "mess" and was taking medication for her depression, which her physician had prescribed for her. But, in addition, she began to self-medicate herself by drinking alcohol to excess.

[50] She maintains that as a result of her depression and her consumption of alcohol, which she referred to as alcoholism, she ceased "thinking straight." She described her acceptance of the offer to go on the Mexican trip as a "drunken decision" as it was out of character for her to leave her kids alone at home, including her daughter who had been treated in hospital just a few days earlier. She submits that she was so affected by being "drunk" at this time that she did not even consider how easily her Facebook posts and her tan would reveal to her employer that she had been vacationing down south and not mourning the loss of a loved one. She contends that she was too mentally sick to have known what she was doing and this affected her conduct, which led to her dismissal.

[51] The grievor maintains, furthermore, that the employer was aware of these mental disabilities when it made its decision to terminate her. She stated that Ms. Deschambault knew about her issues with her children, which the supervisor acknowledged in her evidence as well. The grievor also testified that during a meeting about her annual performance evaluation in September 2011, she told Ms. Deschambault that she was taking depression medication and had been drinking. In cross examination, the supervisor could not recall whether or not the grievor had mentioned these facts during their meeting.

[52] The grievor called Christina Marie Benvie, a co-worker, as a witness at the hearing. She testified that the grievor often confided in her about her problems. Starting in the fall of 2011, Ms. Benvie began noticing behavioural changes in the grievor, although these observations were made outside of the workplace since Ms. Benvie was on leave from work at that time. She noticed that the grievor had become sullen and was often crying. She also saw a lot of empty alcohol bottles at the grievor's house and the younger children were often asking her for lifts by car since their mother was unable to drive because she had consumed alcohol. Ms. Benvie testified that she saw the complainant drinking alcohol in January and even February 2012. She did not seem sober. Ms. Benvie testified, however, that the grievor never told her that she had lied to the employer about her bereavement leave. Ms. Benvie also

acknowledged that she never told anyone at the institution, including management, about what she had observed the grievor doing.

[53] I am satisfied that if these allegations were to be believed, without any answer from the employer, they would establish that the complainant was disabled, within the meaning of s. 25 of the *CHRA*, with mental disabilities that included a dependence on alcohol, and that these disabilities caused her to lie to the employer about her father's supposed death, which in turn resulted in her dismissal. This would be complete and sufficient to justify a verdict in her favour in the absence of an answer from the employer.

3. Has the employer provided a reasonable answer and explanation for its decision to terminate the grievor's employment?

[54] I am satisfied that the employer has provided an adequate response to rebut the grievor's *prima facie* case.

[55] To begin with, I note that although the employer did not challenge whether the grievor has the disabilities that she alleges, the only clear affirmation to that effect from her medical practitioners is a letter dated March 8, 2012, the day of her termination, in which Dr. Ryan Sommers states that he has been treating the grievor since August 22, 2011, for several mental health issues following the SLE incident that she witnessed. He sets out his specific diagnosis as alcoholism, major depression, anxiety disorder and post-traumatic stress disorder without any further detail, aside from noting that the treatment plan is cognitive behavioural therapy and medication, and that the expected return to work date would be in three to six months. There is no evidence that this letter was ever communicated to the employer except in the context of the grievance proceedings.

[56] More importantly, the grievor has not established that her disabilities were a factor in the circumstances that led to her dismissal. No evidence was adduced from anyone, other than the grievor's own bare assertion, that the disabilities were such that they made her create a false story about her father's death in order to deceive the employer and obtain paid leave while she was on vacation in Mexico. Neither Dr. Sommers nor any of her other treating health professionals testified at the hearing. Aside from the grievor's claim that her disabilities made her stop "thinking straight", there is no evidence to support her assertion that her disability caused her to lie to her

employer or even more, to continue to construct false stories even after she claims to have stopped drinking and in the face of clear evidence that she had been caught in her lie. The physician's letters do not in any way indicate that her disabilities had any bearing on her decision to deceive the employer.

[57] As the former Board noted in *Casey v. Treasury Board (Public Works and Government Services Canada)*, 2005 PSLRB 46 at paras. 190-191, it cannot be inferred that a disability like alcohol addiction has any bearing on a serious act of misconduct in the absence of any evidence to that effect. The only conclusion that can be drawn in such circumstances is that the employee "knew the difference between right and wrong" and understood what she was doing, particularly given that the grievor said that she had ceased "binge drinking" by mid-January 2012.

[58] Furthermore, I am satisfied that an adverse inference can be drawn from the grievor's decision not to call any of her health professionals to testify and give evidence on matters within their knowledge about her assertion that she filed a false bereavement leave claim as a result of her disabilities. I infer from their absence at the hearing that their evidence would not have supported her claim (see Brown and Beatty, *Canadian Labour Arbitration*, 4th Ed.at para. 3:5120).

[59] The grievor tried to raise certain arguments claiming that the employer failed to accommodate her disabilities by not granting leave or assisting her in obtaining disability or employment insurance benefits. But these arguments are not related to the issue at hand. The evidence demonstrates that whenever the grievor sought leave on account of illness (and often linked to problems involving her children), she was able to take that leave, though sometimes without pay, given her negative sick leave balance. The issue raised in the present case, however, is not whether she was accommodated on those previous occasions, but rather whether the termination imposed on her as discipline for her fraudulent bereavement leave request was discriminatory.

[60] For these reasons, I find that the employer has successfully rebutted the *prima facie* case. The grievor has therefore not established that the employer engaged in a discriminatory practice in deciding to terminate her employment as a disciplinary measure for having made a false leave request.

B. Was the penalty assessed to the grievor excessive?

1. Was there misconduct by the grievor?

[61] As the Federal Court of Appeal held in *Basra v. Canada (Attorney General),* 2010 FCA 24 at para. 26, the employer bears the onus of proving the underlying facts that are invoked to justify the imposition of discipline. This applies to both the facts justifying its imposition as well as the appropriateness of the discipline. The Court added, at paras. 28-29, that in matters involving the Correctional Service of Canada, disciplinary conduct is the subject of the *Code of Discipline* and the *Standards of Professional Conduct*. The Board's first task in adjudicating such matters is to determine if the employer has proven that they have been breached.

[62] The employer correctly pointed out that the falsification of attendance records in the manner that the grievor engaged in is regarded in labour arbitration as theft (see Brown and Beatty at para. 7:3322). It amounts to "stealing time" from the employer for which it has paid, without receiving the employee's services in return. Theft and related forms of dishonesty, such as fraud, have always been characterized as among the most serious forms of misconduct that an employee can commit (Brown and Beatty at para 7:3310).

[63] Furthermore, the evidence adduced by the employer demonstrates violations of the *Code of Discipline* and the *Standards of Professional Conduct* as well as the public service's *Values and Ethics Code*, as was more fully set out in the termination decision of March 8, 2012. The grievor was in clear breach of section 6(a) of the *Code of Discipline*, which forbids the fraudulent recording of one's work attendance. She certainly did not conduct herself in a manner that reflects positively on the Public Service of Canada, as the *Standards of Professional Conduct* and the *Values and Ethics Code* demand.

[64] The grievor's representative conceded in final arguments that falsifying the basis upon which paid leave is obtained amounts to fraud and the theft of time. But, he argued, the grievor in the present case had no intent to commit the fraud. She was too "drunk" and not of "sound mind" to have had the requisite intent or *mens rea* to commit the fraud.

[65] The grievor's representative referred to a finding in a decision by an employment insurance Board of Referees dated September 25, 2012. After the grievor's termination, the Canada Employment Insurance Commission had determined that she was disqualified from receiving regular benefits because her actions leading to her dismissal constituted misconduct. The Board of Referees granted her appeal of that decision and found that her action of filing a false application for bereavement leave and subsequently misleading management during the investigation was not "wilful, or at least of such a careless nature that the employee wilfully disregarded the affects her actions would have on job performance." The Board of Referees added that the grievor was "not in a mental state which would allow her to contemplate the affects her behaviour would have on her employment."

[66] However, I note first of all that the stated role of the Board of Referees in that decision was "not to determine whether the decision of the employer is justified but rather if the employee's actions constitute misconduct **pursuant to the *Employment Insurance Act*"** [*emphasis added*]. Aside from the fact that administrative tribunals are ordinarily not bound by other tribunals' findings, given the qualification made by the Board of Referees, its findings are certainly not of any assistance to me in the present case. Besides, there is no indication that the employer made any representations before that instance. The Board of Referees seemingly relied solely on the grievor's evidence and the material presented by the Employment Insurance Commission.

[67] In any event, I already explored this issue about what the Board of Referees referred to as her "mental state" in the analysis of the discrimination allegation and determined that the grievor did not establish a link between her disabilities and the misconduct.

[68] Furthermore, on the specific point raised by the grievor as to her intention to defraud, as Brown and Beatty point out at para. 7:3310, even where an intention to steal cannot be proved, an employer may still discipline an employee who acts dishonestly and in ways that put his fidelity and trustworthiness in question.

[69] I am therefore satisfied that the grievor engaged in misconduct that was deserving of discipline.

2. Was the disciplinary measure excessive?

[70] Once the employer establishes reasonable cause for discipline, it must then demonstrate that the disciplinary measure imposed was not excessive (*Basra* at para. 29).

[71] The employer referred me to the former Board's decision in *McKenzie v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 26, which dealt specifically with the conduct expected of correctional officers like the grievor. The decision noted, at para. 80, that trust and honesty are the corner-stones of a viable employer-employee relationship, particularly when the employee occupies a position of trust, adding that correctional officers are held to a higher standard of conduct than other public service employees. Their jobs are inextricably linked to the integrity and safety of the laws of Canada, the correctional institution, the inmates and the staff. Any loss of trust or confidence will impair the system and have an adverse effect on those who rely on it. Correctional officers are thrust into situations where their lives are often at risk. Thus, a correctional officer must be confident that his or her fellow officer has adhered to the standards of conduct and enforces and respects the laws of Canada with a high degree of integrity and trust.

[72] The employer has established that the grievor in the present case clearly broke that bond of trust. She engaged in a calculated effort to deceive the employer by fabricating a lie about her own father's death and then, when confronted about it, compounding on that lie with additional fabrications about her father's identity, who made the Facebook entries, the death certificate, and so on, in order to continue deceiving the employer. This was not a mere error or slip but an organized effort on her part to fool the employer in order to receive paid bereavement leave, which was the one form of leave that was still available to her, having exhausted her sick leave credits and been denied vacation leave due to the quotas being applied during the holidays. As mentioned earlier, this was a flagrant breach of the codes and standards that the employer had set for its employees.

[73] However, even where an employee has engaged in an act of theft, termination of employment is not always justified. Arbitrators apply the balancing approach used in all discipline cases to determine whether an employer has just cause to dismiss the employee. A wide variety of factors are considered to determine ultimately whether the

trust that is the foundation of all employment relationships can be restored (see Brown and Beatty at para. 7:3314).

[74] Does the consideration of these factors in this case warrant reducing the penalty of termination that the employer imposed? Many of the factors that can be taken into account when determining if a disciplinary action should be mitigated or modified were listed in the *McKenzie* decision, at para. 73, as follows:

- the grievor's employment record;
- the grievor's years of service;
- whether the misconduct was an isolated incident;
- whether there was any provocation;
- whether the misconduct was committed on the spur of the moment as a result of a momentary aberration or whether it was pre meditated;
- whether the penalty imposed has created an economic hardship for the grievor;
- evidence that the CSC's policies were not been uniformly enforced, thus constituting a form of discrimination;
- the likelihood that the grievor misunderstood the nature or intent of a requirement of the CSC;
- whether the grievor has apologized for her misconduct;
- whether the penalty imposed was done in a timely matter;
- whether the grievor occupied a position of trust;
- the grievor's rehabilitative potential;
- a lack of clarity of the CSC's policies;
- the grievor's age;
- the medical factors which might bear on the issues;
- whether there was a failure to accommodate the grievor;
- whether the grievor's misconduct rendered her unable to perform her duties satisfactorily;
- whether the grievor's misconduct is a breach of the *Criminal Code,* R.S.C. 1985, c. C-46, and thus injurious to the reputation of the CSC; and
- whether the grievor's misconduct led to a refusal, reluctance or inability by other employees or management to work with her again.

[75] In addressing these factors, I note again that the grievor held a position of trust, where confidence in one another amongst employees is very important.

[76] As for the nature of her misconduct, although she was not convicted of any crime, efforts like hers to obtain leave to which she was not entitled have been held to be a form of theft, as I explained earlier in this decision.

[77] The grievor did not have many years of service with the employer, having only worked there for a little over four years when the fraudulent leave request was made. The evidence shows her employment record as ranging from satisfactory to very good, though by her second year, the employer had to actively manage her attendance. There were no prior disciplinary issues in her record.

[78] One of the considerations mentioned in *McKenzie* is whether the incident was isolated. Although there is no evidence of other fraudulent leave claims having been made by the grievor, this incident of deceit was not singular in nature. It was ongoing and she continued to perpetuate it well into 2012. She only ceased when presented with the detailed findings of the investigation report.

[79] There is no indication that she was provoked into lying to the employer and I am not persuaded by the grievor's claim that that this was a spur-of-the-moment incident. She pointed to the fact that only days before asking for bereavement leave, she requested to work overtime during the holiday period and maintains that it was only because some unidentified person, about whom she gave no other details, allegedly offered her the Mexico trip, that this whole matter arose. While the opportunity may have come up unexpectedly, her response cannot be considered to be a sudden unexpected reaction. She deliberately invented a false story about a family death which she kept up for weeks thereafter in order to enable herself to fraudulently use leave that was not otherwise available to her. This is hardly a spur-of-the-moment response as a result of a momentary aberration.

[80] There is no evidence to suggest that the employer's policies were unclear or enforced unevenly, that the grievor was treated any differently than other employees, or that she misunderstood the nature of the conduct that is expected of federal public servants and correctional officers in particular. The penalty was imposed on her in a timely manner, within a month following the investigation report.

[81] Although the grievor did eventually apologize, it only came after she was confronted with indisputable evidence in the investigation report that she had lied to

obtain bereavement leave. She had ample opportunity for almost two months following her return from Mexico to own up to her mistakes and apologize but did not.

[82] I have already rejected the grievor's submission that her disabilities may have been a factor in her decision to lie about her absence from work.

[83] The grievor testified that the termination had both an emotional and financial impact on her, which I have no reason to doubt. She was in her 40's, trying to raise a family on her own, and dealing with financial hardships such as the theft of her car. She seemingly did not find employment immediately after being dismissed as she made a claim for employment insurance benefits. She maintained that she had rehabilitated herself, having started a treatment program for her addiction. Her son, who had created most of the problems in her household, had moved out. She had also arranged for proper health care for her daughter. She contended that she could now be trusted to return to work.

[84] However, the evidence does bring into question the feasibility of such a return, given the breach of trust between her and her employer, and more importantly, with her fellow correctional officers. It was they who, having learned of her fraudulent leave request, manifested serious objections by bringing it to management's attention. It is hard to imagine that they would be comfortable trusting her to work with them again in the future.

[85] After considering all these criteria and any mitigating factors, I still conclude that the grievor engaged in a form of misconduct that broke the bond of trust that is required between her and the employer. The seriousness of the misconduct is sufficient to justify the termination of her employment. A reinstatement to her position would not be appropriate in the circumstances.

[86] I therefore find that the discipline imposed was reasonable and not excessive.

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

(The Order appears on the next page)

IV. Order

[88] The grievance is dismissed

January 11, 2017.

Michael F. McNamara,
adjudicator