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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

MARY ALICE LLOYD

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Lloyd v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

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

For the Grievor: Tony Jones, Professional Institute of the Public Service of Canada

For the Employer: Richard Fader, counsel

Heard at Toronto, Ontario,
April 25, 2017.

I. Application before the Board

[1] In the decision *Lloyd v. Canada Revenue Agency*, 2015 PSLREB 67 ("*Lloyd* 2015"), *inter alia*, adjudicator Joseph W. Potter ("the adjudicator") dismissed the grievance of Mary Alice Lloyd ("the grievor") against a 40-day disciplinary suspension imposed by the employer, the Canada Revenue Agency (CRA), for allegedly removing unprotected compact discs (CDs) from the workplace that contained personal and confidential taxpayer information without a work-related reason and subsequently downloading taxpayer information.

[2] The grievor brought an application for judicial review to the Federal Court of Appeal ("the Court") to set aside the adjudicator's decision.

[3] By judgment dated April 13, 2016, in *Lloyd v. Canada (Attorney General)*, 2016 FCA 115 ("*Lloyd* 2016"), the Court allowed the application for judicial review in part and remitted the matter to the adjudicator, or if that adjudicator was not available to another duly appointed adjudicator, for a redetermination of the length of the sanction, in accordance with the Court's reasons.

[4] The Chairperson of the Public Service Labour Relations and Employment Board appointed me to redetermine the length of the sanction in accordance with the Court's reasons.

[5] The Court directed that the appropriateness of the suspension be redetermined in light of the adjudicator's findings that two acts of misconduct had been established; namely, the grievor had breached the employer's policy by removing taxpayer information without express authority from her employer, and she had used devices that were not her employer's to make copies of the CD containing her email, which did not contain taxpayer information.

[6] The Court concluded that other grounds for the 40-day suspension, including that the grievor had breached s. 241 of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp); *ITA*) in that she had knowingly disclosed taxpayer information, which would have required a finding that she had downloaded taxpayer information to her computer or her boyfriend's laptop, had not been established. The Court concluded that there was no continuous and ongoing risk of the release and disclosure of high volumes of sensitive taxpayer information.

[7] The Court further directed that the parties would be at liberty to make submissions in respect of condonation or any other argument that the adjudicator may find relevant to determine the length of the suspension that could be justified by these two findings.

[8] Based on the Court's directions, in an interim decision of the Public Service Labour Relations and Employment Board dated April 12, 2017 (*Lloyd v. Canada Revenue Agency*, 2017 PSLREB 33), I ordered that the hearing scheduled for April 25, 2017, be limited to argument based on the existing record.

[9] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board, the *Public Service Labour Relations and Employment Board Act*, and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

II. Summary of the evidence

[10] The following is a summary of the facts recited in the *Lloyd* 2016 judgment of the Court at paragraphs 3 to 10:

> *[3] In February 2006, the applicant was on long-term disability leave. A grievance relating to her disability leave was pending. One of the disputed issues in the grievance was whether the applicant had sent an email dated June 30, 2005 to her supervisor. At the grievance hearing, the applicant intended to prove that she had in fact sent that email.*
>
> *[4] Because she was on leave, the applicant was required to ask CRA's IT department to copy data from her home drive (H: drive, which CRA employees used to store both personal information and work in progress) where the email resided, and deliver it to her.*
>
> *[5] After advising her team manager of her request and obtaining his permission, the applicant communicated with the CRA's IT department in order to procure a copy of the desired email on her H: drive. The exact nature of these communications was a matter of dispute before the adjudicator - both the communication between the applicant and her manager (at least two conversations) and between*

> *the applicant and the IT manager she initially contacted to obtain a work authorization or "ticket", were contested. Neither this person, nor the applicant's team manager testified. The employee from IT who actually performed the work did testify.*
>
> *[6] The IT department copied the entire H: drive, rather than just the email in question. This copy of the applicant's H: drive was delivered to her by CRA in the form of approximately 16 CDs.*
>
> *[7] The applicant received the CDs in the lobby of her workplace. She took the CDs home, viewed them, and found the email she required. She labelled the CDs and stored them in a locked cabinet provided by CRA until the time they were required for the grievance hearing. In 2008, as her own computer was not working, she used the laptop of her then-boyfriend to make two copies of the relevant CD.*
>
> *[8] In the course of the adjudication of the applicant's disability grievance the applicant produced a paper print-out of the June email. Counsel for CRA objected to its admissibility, and demanded production of the CD in order to prove the existence of the email. The applicant then produced all 16 of the CDs, advising that as they contained taxpayer information their confidentiality should be protected. CRA seized the CDs.*
>
> *[9] The CRA's Internal Audit and Fraud Prevention Directorate (IAFPD) began an investigation. The CRA administratively suspended the applicant indefinitely on November 6, 2009 based on the IAFPD's preliminary findings. Over a year later, on December 22, 2010, the IAFPD released its final report.*
>
> *[10] The CRA imposed a 40-day disciplinary suspension on March 17, 2011. The Notice of Disciplinary Action set out the reasons for imposing the suspension ….*

[11] The Court summarized the reasons as follows:

> …
>
> *1. That the applicant had removed from the workplace unprotected CDs containing taxpayer information and downloaded them onto a non-CRA device.*
>
> *2. That the applicant had not attempted to limit the quantity of information removed.*
>
> *3. That the contents of the CDs had been downloaded to her computer and her then-boyfriend's laptop.*

> *4. That her conduct breached section 241 of the* Income Tax Act *R.S.C., 1985, c. 1 (5th Supp.) (*ITA*), and that her job as a criminal investigator involved investigating such breaches in the criminal context, meaning she was familiar with the seriousness of such breaches.*
>
> *5. That she did not cooperate in immediately turning over her computer and her then-boyfriend's laptop.*
>
> *6. That there was continuous and ongoing risk of release and disclosure of high volumes of sensitive taxpayer information.*
>
> *7. That the applicant did not show remorse.*
>
> …

[12] As noted, the adjudicator dismissed the grievance. The Court determined that his reasons in respect of the 40-day suspension did not meet a standard of reasonableness and that in some respects, his treatment of the evidence was problematic. In particular, the Court observed as follows at paragraph 14 of the *Lloyd* 2016 decision:

> *[14] The adjudicator noted that the applicant's position was that she requested that only the email be copied, and was told that the entire H: drive had to be copied. However the adjudicator concluded that this issue was not "relevant", and declined to make a finding on the matter, although it was central to the allegations of misconduct that justified the 40-day suspension. He did conclude … that she had removed taxpayer information without need and express authorization in contravention of CRA policy.*

[13] The Court was referring to the following paragraphs of the adjudicator's decision.

[14] At paragraph 345 of *Lloyd* 2015, the adjudicator noted as follows: "There can be no dispute that Ms. Lloyd removed confidential taxpayer information from her workplace."

[15] At paragraph 348, he stated as follows:

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

[16] The adjudicator also discussed the contested issue of whether any information was downloaded to the grievor's computer or to her boyfriend's laptop. He noted that this was one of the key factors considered in imposing the 40-day suspension, as it underlaid the ongoing risk of the disclosure of taxpayer information. However, the adjudicator was ultimately of the opinion that nothing significant turned on this point.

[17] The adjudicator stated as follows at paragraph 352:

> *[352] Ms. Lloyd admitted to loading the CDs onto her then-boyfriend's laptop so copies could be made. Much testimony was heard on whether or not the CDs could be read without downloading them to the computer first. Ms. Rodriguez testified the only way to read a CD was first to download it, and Ms. Lloyd said the CD was only copied, not downloaded. In the end I find nothing turns on the answer. Whether or not they were downloaded, thus leaving a copy on the computer is, I believe, a technical matter that does not impact my decision. The fact of the matter is that Ms. Lloyd knowingly had the CDs inserted into a non-CRA device and had copies made.*

[18] The Court concluded as follows on this issue in *Lloyd* 2016, at para. 16:

> *[16] In consequence, there was no factual basis upon which it could be concluded that section 241 of the* ITA *was breached. A breach of section 241 requires that the applicant knowingly disclosed taxpayer information, and thus the applicant would have needed to* know *that by inserting a CD into a computer or laptop in order to view or copy information that the information contained therein would be downloaded to the device's hard drive. The applicant testified that she did not* know *that information would be downloaded from the CDs when she inserted them first into her computer, and then her boyfriend's laptop. Again, the adjudicator never made a finding on this issue.*

[19] The Court noted that the grievor had admitted a breach of the CRA policy and that the adjudicator had found accordingly; namely, that she had loaded a CD onto her ex-boyfriend's laptop for the purpose of viewing its contents and of making a copy of the CD containing the June email (the email itself does not contain taxpayer information). That violated CRA policy, which expressly precludes copying CRA information using computers that do not belong to it.

[20] In conclusion, the Court determined that the adjudicator had been required to consider the appropriateness of the length of the 40-day suspension in light of the two *acts* of misconduct that had been established: the removal of taxpayer information without express authority, and the use of non-CRA devices to copy the CD containing the email.

[21] The Court remitted the matter to the Board for a redetermination of the appropriateness of the suspension, in light of its findings.

III. Summary of the arguments

A. For the employer

1. Facts

[22] The grievor was a senior criminal investigator in the Enforcement/Investigation branch of the CRA, working in its Toronto Centre Tax Services Office. The grievor had approximately 14 years of service when she received her 40-day disciplinary suspension.

[23] On March 17, 2011, the grievor received a "Disciplinary Action Report", which suspended her for 40 days. The aggravating factors, in part, were listed as follows:

- removing 16 unprotected CDs from the workplace that contained thousands of emails with personal and confidential taxpayer information (including names, social insurance numbers, addresses, and financial data); in fact, there were 2660 unique taxpayer names and social insurance numbers;
- making a copy of at least one of the CDs;
- not cooperating during the disciplinary investigation and showing no remorse; and
- the fact that she was a criminal investigator who "had investigated such issues before".

[24] The mitigating factors considered were the following:

- the grievor had no prior disciplinary record;

- the length of the investigation;
- the grievor had no intent to disclose or disseminate taxpayer information; and
- the grievor's length of service.

[25] Ultimately, given the serious breach of employer policy, the grievor was imposed the 40-day disciplinary suspension. Summarizing the testimony of the decision maker, Roma Delonghi, Adjudicator Potter noted as follows at paragraphs 339 to 341 of the *Lloyd* 2015 decision:

> *[339] Ms. Delonghi considered the fact that Mr. Lloyd had been employed since 1997 with a clean record. She also considered how long it took to complete the IAD report. Also considered were the mitigating factors brought up by Ms. Lloyd's representative. The range of discipline went from a 30-day suspension to terminating Ms. Lloyd's employment, and Ms. Delonghi felt that the 40-day suspension was appropriate, given all the facts.*
>
> *[340] Ms. Delonghi was asked to comment on a section in the Disciplinary Action Report that reads as follows …:*
>
> …
>
> > The confidentiality of client information is paramount to the integrity of our tax system. The CRA takes very seriously its obligation to protect taxpayer information. Our *Code of Ethics and Conduct* speaks to the importance of each employee's contribution to ensuring that our tradition of integrity and professionalism is carried out and enhanced, to reinforce the CRA's commitment to serve the public responsibly, while supporting a work environment in which people are respected. As such your conduct cannot be condoned.
>
> *[341] Ms. Delonghi testified that the public's trust is of paramount importance to the CRA. The expectation is that taxpayer information will be treated the same way as the CRA would treat its own information. Taxpayer information is treated with great care, and employees are spoken to continually about this issue. In addition, employees must make an annual affirmation stating that they have read the CRA's policies.*

[26] After 16 days of hearing, Adjudicator Potter upheld the discipline and determined that nothing of significance turned on whether the information on the CDs was downloaded to the grievor's friend's laptop.

[27] Adjudicator Potter specifically noted that Ms. Delonghi had already taken into consideration the mitigating factors and that without them, the grievor would have been terminated.

[28] The 40-day discipline was also shortened in September 2010 with the remaining time converted to sick leave without pay for the grievor to receive a refund of health premiums and to buyback pensionable service. By moving her 40-day disciplinary suspension into the period of the administrative suspension rather than imposing it on her during her return to work, the employer softened the impact of the 40-day suspension.

[29] Adjudicator Potter made the following findings of fact:

- The grievor removed confidential taxpayer information from the workplace. In fact, she was aware that the CDs contained confidential taxpayer information.
- When the grievor was handed 16 to 20 CDs, even though all she needed was one email, receiving that many CDs should have "stopped her in her tracks". In addition to the fact that the "H drive" was hers, she "obviously knew what was on it".
- The grievor chose not to contact the CRA to tell it that she had received confidential taxpayer information; she "chose to remain silent".
- There was no evidence that the grievor had even the tacit support of her supervisor to remove confidential taxpayer information (she had told her supervisor that she "… needed some personal information from her computer.").
- The grievor "… had to know that what she was doing was wrong."

- The protection of taxpayer information is of paramount importance, and "[r]emoving taxpayer information from the work site without a specific need and without very explicit approval is, I believe, an action not to be condoned."

[30] Clearly, Adjudicator Potter based his decision on the fact that the grievor removed a significant amount of confidential taxpayer information from the workplace without a specific need for it and without explicit approval. Ultimately, he indicated that there was no need to modify the 40-day disciplinary suspension.

2. <u>The issue for redetermination</u>

[31] The Court agreed that the adjudicator's decision was based solely on the following two elements in the "Notice of Disciplinary Action": (1) the grievor's removal of taxpayer information without the express authority of her manager, and (2) copying the email using a non-CRA device.

[32] However, the Court took issue with the fact that the adjudicator did not feel it necessary to determine whether the CDs were downloaded onto the grievor's friend's laptop. In *Lloyd* 2016, at paras. 22 and 23, it noted the following:

> *[22] The reasons in support of the 40-day suspension, however, cannot be sustained. The 40-day suspension was predicated on CRA's allegation that there was, in the language of the Notice of Disciplinary Action, "a continued and ongoing risk of disclosure of sensitive taxpayer information" arising from the downloading of the CDs on to the computers of the applicant and her then boyfriend, as well as the allegation that the applicant had breached section 241. The adjudicator dismissed these as either irrelevant or made no finding.*
>
> *[23] The adjudicator was required to consider the appropriateness of the length of the 40-day suspension in light of the two acts of misconduct that had been established – the removal of taxpayer information without express authority and the use of the non-CRA devices to copy the CD containing the email. This he did not do.*

[33] On its face, the Court's finding at paragraph 23 seems to contradict the finding at paragraph 21, at which the Court confirmed that the adjudicator's assessment of the 40-day suspension was based solely on the two established elements in the Notice of Disciplinary Action. However, at paragraph 23, the Court states that the adjudicator

failed to consider the appropriateness of the 40-day suspension in light of the two acts of misconduct that had been established.

[34] In sending the matter back for a redetermination of the appropriateness of the suspension in light of the two elements established, it seems that the Court is primarily concerned with the fact that Adjudicator Potter did not explain the impact of the employer not establishing every element of the Notice of Disciplinary Action.

[35] As a result, the employer will address the jurisprudence that supports the proposition that it is open to an adjudicator to uphold discipline even in cases in which all the elements listed in a letter of discipline have not been established.

[36] In the alternative, the employer will argue that the established elements support the 40-day suspension discipline.

3. <u>Authority to uphold discipline if the elements were not established</u>

[37] The Court struggled with the fact that the adjudicator did not address why he was not making findings on all the elements of the Notice of Disciplinary Action despite upholding the 40-day suspension discipline. At paragraph 22, the Court indicates that the suspension was "predicated" on the language in the notice.

[38] However, it is trite law that the role of an adjudicator is to assess the quantum of a penalty based on the allegations established in evidence. While there may be cases in which an employer's failure to establish all the allegations results in a reduction to a penalty, there is no requirement that a reduction be made in every such case.

[39] The role of an adjudicator is to assess the quantum of discipline based on the acts of misconduct that have been established.

[40] For example, in *Spinks v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-15249 (19860109), [1986] C.P.S.S.R.B. No. 3 (QL), Adjudicator Nisbet dealt with a termination for conflict of interest. At paragraph 150, he held as follows:

> *[150] I have found that three of the five grounds given by the employer for the discharge of the grievor have been established. I must now turn to the question as to whether or not the misconduct of the grievor I have found to have been committed by him justifies the severe penalty of discharge….*

[41] After analyzing the aggravating and mitigating factors, Adjudicator Nisbet upheld the termination and dismissed the grievance.

[42] A similar finding was made in the recent decision of *Philps v. Canada Revenue Agency*, 2016 PSLREB 110.

[43] In *Philps,* the Board made a finding only with respect to two of the three grounds relied upon by the employer to support the 30-day disciplinary suspension in that case. The Board noted this and held at paragraph 95 as follows: "So as to leave no doubt, I have determined based on the evidence presented at this hearing, that a disciplinary penalty of 30-days without pay for the incidents involving … is appropriate and warranted."

[44] Likewise, it was open to Adjudicator Potter to base his decision on the two grounds from the employer's Notice of Disciplinary Hearing. It is submitted that this is precisely what he did. As a result, the 40-day suspension should be upheld on the basis that an adjudicator can dismiss a grievance against a disciplinary sanction despite the fact that not all the grounds in the letter of discipline have been established *de novo* before the tribunal.

4. <u>Alternative established elements support a 40-day suspension discipline penalty</u>

[45] In the alternative, should this Board not be persuaded by the assessment of the penalty by Adjudicator Potter, the evidence on the record supports the 40-day suspension discipline that was imposed.

[46] The decision to impose a 40-day disciplinary suspension was rendered on March 17, 2011. Even though the disciplinary action report was signed by Roy Prince, it was Ms. Delonghi's decision.

[47] In making her decision, Ms. Delonghi considered the results of the "IAFPD Investigation Report", which was completed by Julie Rodriguez. The report, in part, made the following findings:

- The CDs that Ms. Lloyd removed from the office in an unprotected fashion included 37 488 emails and 776 documents containing over 42 000 instances of taxpayer information. A detailed review was conducted on one of the CDs (the one containing the June 30,

2005 email), which revealed at least 2660 unique taxpayer names and social insurance numbers, some of which included addresses and financial data (pages 24 and 25).

- There was no work-related reason for Ms. Lloyd to have taxpayer information. She did not need to disclose taxpayer information in preparation for the hearing of her accommodation grievance (pages 11 and 26).

- Ms. Lloyd either made two copies of the CD containing the June 30, 2005, email herself or directed someone to make two copies (page 26).

- Ms. Lloyd was aware of the need to protect taxpayer information and of the security measures required for protected information (page 26).

[48] The protection of taxpayer information is of fundamental importance to the CRA and is intrinsic to the way in which it conducts all its business. There is a direct correlation between the voluntary compliance of taxpayers and the reputation of the CRA; taxpayers will comply with the income tax system only if they trust the agency administering it and trust that their personal information will be protected. As such, it is critical for the public to know that the CRA is vigilantly protecting taxpayer information (see *Campbell v. Canada Revenue Agency*, 2016 PSLREB 66).

[49] The CRA's "Code of Ethics and Conduct" (effective February 22, 2001; "the Code") highlights its commitment to integrity and asks that employees carry out their duties conscientiously and to think through the possible impacts of their actions on all interested parties, which includes the public and clients. The Code discusses confidentiality and the disclosure of information and highlights the importance of protecting taxpayer information and the CRA's integrity. The Code confirms the following at page 6: "Accessing information that the CCRA collects is strictly prohibited unless specifically required by your work. Under no circumstances may you use official information for personal use."

[50] In terms of using the information to challenge disciplinary action, the Code states as follows at page 6:

> *Your access is strictly limited to those parts of the information that are relevant to the purpose….*
>
> *You are required to safeguard official information. Therefore, you are to only use, process, store, or handle designated or classified information for purposes specified by the CCRA. You may not remove, hide, change, mutilate, copy, destroy or make public any official information, record, or document without express authorization from your manager. If you are uncertain about how to treat specific information, consult your manager….*

[51] The policy requires "express authorization" to remove taxpayer information from the workplace.

[52] The grievor has not established a defence of condonation. As noted in *Baptiste v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 127 at para. 311, the burden of proof on the condonation issue rests with the grievor.

[53] At paragraph 289 of *Lloyd* 2015, the grievor's testimony is summarized as follows: the grievor "… telephoned her supervisor … and told him she needed some personal information from her computer. She was told to call the IT section and get a 'ticket number', which she did."

[54] The grievor was on sick leave at this point and indicated to her supervisor only that she needed "personal information" off her computer. She did not ask for "express authorization" to remove vast quantities of taxpayer information. Adjudicator Potter made a finding that she did not even receive the tacit support of her supervisor to remove this information from the workplace. There is simply no basis for a defence of condonation.

[55] The purpose of the "Protection of Classified and Protected Information and Assets Outside the Workplace Policy" (date modified: April 28, 2009) is to reduce the risk of unauthorized disclosure or compromise of classified and/or protected information, which includes taxpayer information. It applies to and is available to all CRA employees. It is especially important to those working in the audit and enforcement divisions, which is where Ms. Lloyd worked, as it speaks to the requirement to securely transport and safeguard taxpayer information when working off-site. It dictates that information should be copied onto encrypted CRA-approved electronic storage media or stored in multiple locked briefcases. It highlights

that employees are responsible and accountable for taking the necessary preventive measures, for exercising good judgment, and for taking care to keep items under their control at all times.

[56] Ms. Delonghi gave the following reasons, in part, for her decision to administer a 40-day disciplinary suspension:

- the fact that Ms. Lloyd had removed the 16 CDs from the workplace in an unprotected manner and had directed someone to make copies of one of them;
- the quantum of taxpayer information contained on those CDs, and the fact that it came from highly sensitive criminal investigations;
- Ms. Lloyd had not attempted to limit the quantity of information taken from the workplace;
- there was no reason for Ms. Lloyd to have had taxpayer information for her adjudication hearing; the only email relevant to the adjudication was the June 30 email;
- Ms. Lloyd's position in the CRA as an AU-03 criminal investigator (which she had been for many years) meant that she was aware of the need to protect taxpayer information;
- Ms. Lloyd's lack of candour and cooperation during the investigation; the report noted that she changed her view of what transpired a number of times (for example, whether copies of the CDs had been made, and by whom);
- the lack of remorse demonstrated by Ms. Lloyd, and what seemed to Ms. Delonghi to be Ms. Lloyd's inability to accept responsibility for her actions; as Adjudicator Potter noted in *Lloyd* 2015: "While Ms. Lloyd's representative apologized on her behalf, she never did";
- the fact that Ms. Lloyd had breached several CRA policies;
- mitigating factors included the fact that Ms. Lloyd had been

an employee since 1997 and had no prior discipline and the length of the investigation; and

- Ms. Lloyd's actions were also mitigated by her intent as she wanted to use the June 30 email only for her adjudication hearing.

[57] Ms. Delonghi testified that the breaches fell within a grid that allowed for a suspension of between 30 days and 6 months, up to and including termination. She testified that given the nature of the breach of the policies, the Code, and other policies on the security and protection of protected information, and the inordinate amount of emails that the grievor removed, a 40-day suspension was appropriate.

[58] Because of a decision at the final level of the grievance process, Ms. Lloyd's discipline was changed to time served during the administrative suspension. As such, she has never served the 40-day disciplinary suspension.

[59] Given the seriousness of Ms. Lloyd's misconduct, the employer submits that a 40-day disciplinary suspension was more than justified. Frankly, a termination could have been warranted.

[60] An adjudicator should reduce a disciplinary penalty imposed by management only if it is clearly unreasonable or wrong. An adjudicator should not intervene simply because he or she might consider that a slightly less-severe penalty would have been sufficient.

[61] In determining what comprises a reasonable amount of discipline, the Board has found that when the matter concerns tax information and an employee who was entrusted to work with such information, the employee's conduct is held to a high standard. Thus, discipline, and often termination, will be warranted in those cases.

[62] In *Foon v. Canada Customs and Revenue Agency*, 2001 PSSRB 126, Vice-Chairperson Potter (as he then was) cited as follows *Ward v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File Nos. 166-02-16121 and 16122 (19861229) at 12 and 13, [1986] C.P.S.S.R.B. No. 335 (QL), to highlight the gravity of unauthorized access to taxpayer information:

> *… so doing* [could] *… put in jeopardy the tax system in Canada which is a unique and delicate system based on voluntary personal input by taxpayers of matters of an*

> *utmost confidential nature … Such an infringement cannot be tolerated if the tax system is to survive and have any credibility and, in addition, it is a criminal offence to access such information or divulge such information to third parties.*

[63] The Public Service Staff Relations Board (PSSRB), in *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124 at paras. 93 and 94, acknowledged that the confidentiality of taxpayer information is of utmost importance to the CRA and to the integrity of our tax filing system. As a result, the PSSRB concluded that even if the suspension was at the high end of the acceptable range (in that case, 20 days for unauthorized access to the information of two taxpayers, the grievor and his spouse), the mitigating circumstances were not enough to warrant decreasing the number of days of the suspension. In addition, even though the grievor in *Naidu* had apologized for the unauthorized access, the elements of remorse and acceptance of the misconduct were found lacking.

[64] In *Nolan v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File No. 166-02-17111 (19871125), [1987] C.P.S.S.R.B. No. 338 (QL), a Revenue Canada employee was caught accessing taxpayer's computer records without authorization, including the file of a police officer who was carrying out an investigation concerning her. Her termination was substituted with a three-month suspension. However, it is important to highlight that the adjudicator in that case determined that a three-month suspension was an appropriate sanction for unauthorized access to taxpayer information, without disclosure.

[65] Ms. Lloyd's work description outlines that her very role as an AU-03 investigator and auditor was to investigate individuals and corporations suspected of having committed offences with respect to the *ITA*. As an investigator working with taxpayer information under the legal obligations set out in the *ITA*, Ms. Lloyd was held to a high standard of trust. She was entrusted with access to taxpayer information. In doing so, she was expected to safeguard that sensitive information and act at all times in the public interest and not in her own interest, to the detriment of taxpayers.

[66] As noted as follows in *Stewart v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 106 at para. 59: "While long service and remorse may be mitigating factors in this case, I also view them as aggravating factors. The grievor knew full well that his behaviour was unacceptable based on his years of service and experience with

the CBSA …".

[67] In *Naidu*, at para. 84, the PSSRB stated the following:

> *… Whether an employee has been candid with the employer, acknowledged the inappropriateness of the conduct in question, apologized and demonstrated remorse and a willingness to correct the behaviour or refrain from it in the future, are primary considerations in addressing the issue of mitigation of the discipline imposed.*

[68] The mitigating factors of remorse and acceptance of one's misconduct are absent in this case. The jurisprudence establishes that remorse is one of the key mitigating factors when considering the appropriateness of a disciplinary sanction.

[69] One would think that if Ms. Lloyd had been truly concerned about the potential release of taxpayer information, she would have done everything in her power to bring in both her home computer and her friend's laptop as soon as possible. Instead, she took almost an entire year to provide the CRA with her home computer and her friend's contact information.

[70] Given all the evidence, a 40-day disciplinary suspension was warranted in this case.

B. <u>For the bargaining agent</u>

[71] The grievor's 40-day suspension should be considerably reduced in light of the decision of the Court in *Lloyd* 2016.

[72] The grievor's representative referred to the statement of facts as outlined by the Court and incorporated into this decision.

[73] On March 17, 2011, the CRA sent Ms. Lloyd a disciplinary action report that suspended her for 40 days, to begin once she was medically fit to return to the workplace. The report reads in part as follows:

…

> ***Misconduct***
>
> *On February 3, 2006 while on leave you contacted the regional helpdesk and requested a copy of your entire H Drive. On March 9, 2006 the request was completed and*

you removed 16 unprotected CDs from the workplace which contain thousands of emails with personal and confidential taxpayer information. There was no work related reason for you to do so.

A detailed review of the CDs was completed by the Electronic Network Monitoring System (ENMS) and concluded that they contained 37,488 emails and 776 documents with taxpayer information. The email spans from December 2000 to January 3, 2006. The 776 documents contained over 42,000 instances of taxpayer information including the names, social insurance numbers, addresses, and financial data.

The subsequent Internal Affairs and Fraud Prevention Division (IAFPD) investigation determined that you download the contents of all the CDs onto your friend's laptop, and that you made copies or had copies made of at least one of the CDs. You have also acknowledged downloading the CDs onto your personal computer.

The IAFPD report concluded that you "… contravened the CRA policy regarding the security and protection of confidential information and failed to uphold the confidentiality provisions of section 241 of the Income Tax Act by removing unencrypted CDs containing taxpayer information belonging to the CRA from the workplace and by copying confidential information onto a non-CRA device. This resulted in an unauthorized disclosure of taxpayer information."

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

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

There is no prior disciplinary record.

Any mitigating or aggravating factors and the disciplinary measure

> *Mitigating factors which have been considered are the length of the investigation, the fact that your intent was not to disclose or disseminate taxpayer information and your clean disciplinary record*
>
> *Aggravating factors considered include the lack of cooperation and candour you demonstrated in dealing with management on this issue as well as the seriousness and nature of the misconduct.*
>
> *The confidentiality of client information is paramount to the integrity of our tax system. The CRA takes very seriously its obligation to protect taxpayer information. Our* Code of Ethics and Conduct *speaks to the importance of each employee's contribution to ensuring that our tradition of integrity and professionalism is carried on and enhanced to reinforce the CRA's commitment to serve the public responsibility while supporting a work environment in which people are respected. As such your conduct cannot be condoned.*
>
> *Therefore in accordance with the authority delegated to me under section 51(1)(f) of the* Canada Revenue Agency Act *you are hereby given a 40 day (300 hour) suspension. The suspension will be served once you are medically fit to return to the workplace….*
>
> [*Sic* throughout]

[74] The Court identified seven distinct elements that the employer relied upon in its reasons for imposing discipline.

[75] At the initial hearing before Adjudicator Potter in 2015, the CRA adduced evidence in support of all seven elements it relied upon in imposing the discipline.

[76] Adjudicator Potter found that only two elements were proved; namely, the physical removal from the work premises of taxpayer information, and the copying of an email from one of the CDs. He made no findings with respect to whether the grievor had downloaded the CDs onto her or her boyfriend's computer.

[77] More noteworthy is that the most serious allegation, which was that the grievor had breached s. 241 of the *ITA*, was determined by Mr. Justice Rennie to have no factual basis as the adjudicator would have had to conclude that the grievor had knowingly disclosed taxpayer information.

[78] To establish this fact, the grievor would have needed to know that by inserting

a CD into a desktop computer or laptop to view or copy information, the information would be downloaded to the device's hard drive. She testified that she did not know that information would be downloaded from the CDs when she inserted them into her computer and then her boyfriend's laptop. The adjudicator did not make a finding on this issue.

[79] Adjudicator Potter did not make a finding that there was an unauthorized disclosure of taxpayer information. He found no evidence that Ms. Lloyd revealed taxpayer information to anyone. He also did not make findings that there was an ongoing risk of disclosure of taxpayer information, as alleged by the CRA.

[80] The CRA continues to allege that Ms. Lloyd did not show remorse. The adjudicator declined to make findings on that point.

[81] There is no confusion in the Court's decision. When read as a whole, it states that the CRA predicated the discipline on seven elements that constituted serious misconduct, the most serious of which was a violation of the *ITA*.

[82] In *Lloyd* 2016, the Court stated at paragraphs 22 and 23 as follows:

> *[22] The reasons in support of the 40-day suspension, however, cannot be sustained. The 40-day suspension was predicated on CRA's allegation that there was, in the language of the Notice of Disciplinary Action, "a continued an ongoing risk of disclosure of sensitive taxpayer information" arising from the downloading of the CDs on to the computers of the applicant and her then boyfriend, as well as the allegation that the applicant had breached section 241. The adjudicator dismissed these as either irrelevant or made no finding.*
>
> *[23] The adjudicator was required to consider the appropriateness of the length of the 40-day suspension in light of the two acts of misconduct that had been established -- the removal of taxpayer information without express authority and the use of the non-CRA devices to copy the CD containing the email. This he did not do.*

[83] The disciplinary penalty must be reconsidered in light of what remains, which are the removal of taxpayer information without express authority and the copying of the email. In light of these findings, the penalty should have been much less than 40 days' suspension.

[84] When the most serious allegations are removed, especially criminal allegations, the *quantum* of discipline must be reduced.

[85] In *Island Telephone Co. (The) v. C.W.C.,* [1990] P.E.I.L.A.A. No. 1 (QL), the grievor in that case, a telephone operator, tried to reach her mother on the telephone during a break. She was unable to. She was concerned because her mother never used the telephone. She used the technology at her disposal to eavesdrop on the line. She heard her brother-in-law and sister-in-law talking disparagingly about her.

[86] She later told her brother-in-law about what she had overheard. He contacted the grievor's employer, which suspended her without pay for 30 days. It was alleged that she had committed very serious offences, including an indictable offence under s. 184(1) of the *Criminal Code* (R.S.C. 1995, c. C-46) by listening to others' telephone conversations when it was not necessary for the purpose of providing customer service.

[87] However, no criminal charges were ever laid against the grievor. The arbitrator concluded that in determining the seriousness of the offence and the degree of penalty warranted, the company had taken into consideration the fact that the grievor had breached a provision of the *Criminal Code*. In her view, it was inappropriate, and consequently, she reduced the penalty imposed upon the grievor.

[88] Similarly, in this case, no criminal offence has been established, and the penalty should be reduced.

[89] In *Lapostolle v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 134, the grievor, a correctional officer, grieved a three-day suspension for making disrespectful comments about his supervisor and for engaging in a bet with an inmate over an arm-wrestling match. The adjudicator concluded that the employer had not proven that the grievor had made the disrespectful comments. The grievor admitted to taking part in the bet. Given the failure to prove that disrespectful comments were made, the adjudicator reduced the three-day suspension to two days.

[90] In this case, only two of the seven elements have been established. As a consequence, the disciplinary suspension should be reduced.

[91] In determining the appropriate quantum, one source is the CRA's discipline policy, which establishes standards of discipline for its employees, along with prescribed penalties. Appendix C to the policy lists examples of acts of misconduct together with disciplinary measures considered appropriate for those acts that progress from oral reprimands to termination.

[92] The policy outlines the process to determine a disciplinary measure, which includes considering the seriousness of the misconduct. The policy states that its Appendix C indicates the seriousness with which the CRA views certain single acts of misconduct. It acknowledges that it is not all-inclusive and that if a type of misconduct is not listed, the delegated manager should use the table to find a similar type of misconduct as a point of reference.

[93] It was alleged that the grievor disclosed taxpayer information without authorization. In Appendix C, Table 1, category 2, the unauthorized disclosure of taxpayer or other sensitive or confidential information is treated as a serious act of misconduct. It is considered a "group 5" offence, warranting a penalty of a suspension of from 30 days to 6 months or termination after mitigating and aggravating factors are considered.

[94] It was also alleged that the grievor violated legislation enforced by the CRA. That misconduct is listed in Appendix C, Table 1, category 4. It is treated as a serious act of misconduct, a group 5 offence, warranting a penalty of a suspension of from 30 days to 6 months or termination after mitigating and aggravating factors are considered.

[95] It has not been established that the grievor disclosed taxpayer information or violated the *ITA* or other legislation enforced by the CRA.

[96] The grievor might have been careless in her use of CRA property. Improper or careless use or neglect of CRA property, equipment, or cards is listed in Appendix C, category 3. Such misconduct is a group 1 offence, warranting penalties ranging from an oral reprimand to a suspension of 3 to 5 days.

[97] Brown and Beatty, in their text, *Canadian Labour Arbitration*, 4th ed., discuss the purpose of a progressive discipline system, in which disciplinary sanctions are gradually increased in their severity, and state that such a system has come to be seen

as the fairest and most effective way for an employer to convey to employees the seriousness with which it regards their situation and to motivate them to change their behaviour.

[98] In all of the circumstances of this case, a 40-day suspension was not necessary to establish the workplace goal.

1. Mitigating factors

[99] In *United Steelworkers of America, Local 3257 v. Steel Equipment Co.*, [1964] O.L.A.A. No. 5 (QL), the arbitrator set out the different factors that should be taken into consideration in mitigating a disciplinary penalty.

[100] One of the mitigating factors is long service. At the time of the incident, the grievor had 14 years of clear service. There has been nothing subsequent to the incident. It was an isolated incident.

[101] One of the mitigating factors is that there was significant delay in investigating the alleged misconduct. A two-and-a-half-year delay occurred from the date on which the employer learned of the information that was on the CD until the grievor was disciplined. The CRA considered the delay a mitigating factor. However, it did not give sufficient weight to this factor.

[102] The grievor was forthcoming. There was no attempt to conceal. She advised counsel to the CRA at the adjudication hearing that the CD contained taxpayer information.

[103] Neither the adjudicator nor the Court made findings that the grievor was uncooperative.

[104] These mitigating factors address the grievor's rehabilitation potential and support a lesser penalty than 40 days.

2. Condonation

[105] The CRA facilitated the removal of taxpayer information as it provided the information to Ms. Lloyd without encryption, restriction, or oversight.

[106] Ms. Lloyd observed individuals taking home CDs to work at home, including her manager, who routinely took home work on CDs. These persons were not called to rebut this evidence.

[107] Mr. Justice Rennie concluded that Ms. Lloyd advised her manager that she was seeking personal information and that she obtained the permission of the Information Technology department to receive it.

[108] Adjudicator Potter noted that Ms. Lloyd testified that she wanted only copies of her personal folders from her computer. The IT technician understood that he was asked to burn a copy of her H drive.

[109] Adjudicator Potter noted that although she had concerns about receiving the 16 CDs, she felt it was okay because she had asked her manager and IT about it.

[110] Adjudicator Potter declined to make a finding that she requested her entire H drive as opposed to just her personal folders, concluding that it was not relevant.

[111] The CRA provided her with the 16 CDs to take off-site without any warning; nor did it provide a laptop for her to review the material.

[112] The inaction of management contributed to Ms. Lloyd not realizing the gravity of removing the CDs.

[113] The investigator's report concludes that the CRA Information Technology Analyst who provided the 16 CDs of data from the H drive did not contravene any CRA policies. As a consequence, the investigator notes that a separate report would be issued to the Information Technology branch about a need to have national IT guidelines or procedures in relation to providing H drive data to clients.

[114] On December 15, 2011, the CRA confirmed to the Office of the Privacy Commissioner (OPC) that it had developed an action plan to develop new procedures for downloading email onto CDs to be developed, communicated, and integrated into its suite of policy instruments as a result of this incident.

[115] The failure to have proper safeguards in place at the time of the incident is a mitigating factor.

[116] The second major factor relating to condonation is that Ms. Lloyd testified before the adjudicator and advised the investigator that her manager habitually took his computer home, with taxpayer information on it. This evidence was uncontradicted. Observing her manager participate in a similar form of conduct is an important mitigating factor to consider.

[117] In *Rodrigue v. Deputy Head (Department of Veterans Affairs)*, 2016 PSLREB 9, the grievor's employment was terminated for obtaining, disclosing to third parties, and using sensitive information from two clients in an unauthorized manner. The adjudicator took into account the fact that her employer had used a client's unredacted medical file as evidence in another proceeding a few months later that was not subject to a disciplinary penalty. Finding that there was a double standard, she set aside the termination and did not substitute another penalty.

[118] Ms. Lloyd might have missed the stop sign by using a non-CRA device; however, she cannot be held solely accountable for this incident. She did not surreptitiously obtain this information. She asked management for permission to obtain it. When it came to light, management changed its policies.

[119] The incident attracted attention in the media. It is significant how the CRA responded to the OPC's investigator. On December 15, 2011, it stated in part as follows:

…

> *It should be emphasized, therefore, that in investigating this incident, the CRA followed clearly defined security policies, processes and procedures. The CRA's decision not to inform taxpayers and the OPC at the time of this incident was made after careful deliberation and in accordance with existing CRA security guidelines and procedures. A risk assessment completed in 2009 determined that there was little risk of injury to taxpayers as a result of this incident. The individual interviewed as a result of the incident was found to be credible, and the investigation concluded that the only information viewed and accessed from the CD was one email for the purpose of a labour relations trial.*

…

[120] The discipline should reflect the real or potential harm arising from the misconduct.

[121] In *Sidorski v. Treasury Board (Canadian Grain Commission)*, 2007 PSLRB 107, the grievor disclosed the results of a competition in which he had participated to another employee, for which he was suspended for five days. The adjudicator reduced the penalty to a two-day suspension on the basis that the *quantum* of discipline should reflect the real or potential harm caused by the misconduct. The employer was not able to establish that the event had had a broad, tangible impact in the workplace.

[122] The employer in this case in its risk assessment found that there was no deliberate intent and little risk of injury to taxpayers.

[123] For over six years, Ms. Lloyd has been prohibited from working on active files. This is a consequence of the impact of the Supreme Court of Canada's decision in *R. v. McNeil*, 2009 SCC 3, which imposed a legal duty on the Crown to disclose to an accused acts of serious misconduct or criminal records of potential Crown witnesses that either were relevant to the investigation or could reasonably impact the case against an accused.

[124] CRA management identified a potential risk in assigning work to employees with serious misconduct on their records. On account of the fact that the CRA's disciplinary policy describes suspensions of over 30 days as constituting significant discipline, Ms. Lloyd has not been able to continue her career as an investigator. The 40-day suspension has had a disproportionate effect on her career.

[125] The Court has already determined that the 40-day suspension was unreasonable. The grievor asks the Board reduce it to a two- to five-day suspension.

C. Employer's reply

[126] The proposition that only two of seven elements of misconduct have been established is misleading. Item five, as outlined at paragraph 10 of the Court's decision, which states that Ms. Lloyd did not cooperate in immediately turning over her computer and her then boyfriend's laptop, and item seven, which states that Ms. Lloyd did not show remorse, were not addressed by the Court. They are not freestanding grounds for misconduct but rather are aggravating factors.

[127] The Board is not precluded from looking at aggravating factors.

[128] While there is no finding that the grievor contravened s. 240 of the *ITA*, nevertheless, she removed massive amounts of taxpayer information from the workplace without authorization and with no workplace reason for so doing. It remains a very serious matter.

[129] The Court did not state that a 40-day suspension was excessive. It stated that the reasons supporting the 40-day suspension could not be sustained. It could have said that 40 days was excessive.

[130] The decisions in *Island Telephone Co.* and *Lapostolle*, in which penalties were reduced on the basis that a number of grounds of misconduct had not been established and the arbitrator and adjudicator tried to place themselves in the employers' shoes, used the wrong approach. The correct approach is to determine the act of misconduct and then ask whether the penalty imposed was reasonable in the circumstances.

[131] The Board is not bound by the employer's disciplinary grid guidelines for managers. Not every type of misconduct is listed.

[132] If, however, regard is had to the grid, an analogy may be made to category 2, which is entitled, "Misuse of taxpayer or other sensitive/confidential information", and in particular, to the second item in the list, entitled, "Unauthorized access to taxpayer or other sensitive/confidential information". This is a group 4 offence, warranting suspensions of 3 to 5 days, 6 to 10 days, 11 to 30 days, and 30 days to 6 months, considering mitigating and aggravating circumstances.

[133] The mitigating factors had already been considered when the discipline was imposed; namely, there was no attempt to conceal. However, the grievor does not seem to get it, as she did not express remorse or apologize.

[134] There was no condonation by the employer. The grievor told her manager that she needed personal information from her computer. Her problem arose when she was handed 16 CDs and did not do anything about it. The employer was not complicit in any action; it was her responsibility.

[135] The fact that her manager might have been working at home on his computer did not establish that there was no business reason for doing so. There was no reason for the employer to call rebuttal evidence on this issue.

[136] The fact that the CRA looked into its policies and procedures following the incident does not mean the misconduct was condoned. Tightening-up procedures does not mean that walking out of the workplace with 16 CDs containing taxpayer information was condoned.

[137] An IT analyst providing CDs is not the same as a manager turning a blind eye to a course of conduct.

[138] The fact that the CRA characterized the incident as having a low risk to taxpayers does not mean that the grievor's behaviour was on the low end of the spectrum of seriousness. Her conduct was extremely serious. As Adjudicator Gray stated in *Campbell*, the right of Canadians to expect their confidential personal affairs to remain private must be protected. Any reduction in penalty would send a terrible message to other employees.

IV. Reasons

A. The Court's decision

[139] The parties take differing views on the interpretation to be given to the Court's decision.

[140] The employer submits that the Court agreed that the adjudicator's decision in upholding the 40-day suspension was based solely on the two elements in the notice of disciplinary action; namely, the grievor's removal of taxpayer information without the express authority of her manager, and the copying of the email using a non-CRA device.

[141] The employer contends that in sending the matter back for a redetermination of the appropriateness of the penalty, the Court was primarily concerned with the fact that the adjudicator did not explain the impact of the employer not establishing every element of the notice of disciplinary action.

[142] It submits that Adjudicator Potter based his decision upholding the 40-day suspension on the two grounds from the employer's notice of disciplinary hearing and that therefore, the 40-day suspension should be upheld.

[143] The bargaining agent, the Professional Institute of the Public Service of Canada, submits that there is no confusion in the Court's decision. If read as a whole, it states that the CRA predicated the discipline on seven elements that constituted serious misconduct, the most serious of which was a violation of the *ITA* as well as a risk of disclosure of sensitive taxpayer information. The bargaining agent stresses that paragraphs 22 and 23 of *Lloyd* 2016 are critical to understanding the Court's directions. Those paragraphs read as follows:

> *[22] The reasons in support of the 40-day suspension, however, cannot be sustained. The 40-day suspension was predicated on CRA's allegations that there was, in the language of the Notice of Disciplinary Action, "a continued and ongoing risk of disclosure of sensitive taxpayer information" arising from the downloading of the CDs on to the computers of the applicant and her then boyfriend, as well as the allegation that the applicant had breached section 241. The adjudicator dismissed these as either irrelevant or made no finding.*
>
> *[23] The adjudicator was required to consider the appropriateness of the length of the 40-day suspension in light of the two acts of misconduct that had been established - the removal of taxpayer information without express authority and the use of the non-CRA devices to copy the CD containing the email.* ***This he did not do.***
>
> [Emphasis added]

[144] In my view, the direction from the Court to the Board is clear. My mandate is to do what the Court has determined that Adjudicator Potter did not do, which is to consider the appropriateness of the 40-day suspension based solely on the misconduct that had been established; namely, that the grievor removed taxpayer information without express authority and that she used non-CRA devices to copy the CD containing the email.

[145] The Court has also instructed me that in its view, the original 40-day suspension was predicated on there being a continued and ongoing risk of disclosure of sensitive taxpayer information arising from the downloading of the CDs onto the grievor's and her boyfriend's computers and that she contravened section 241 of the *ITA*, neither of which were established.

[146] I agree with the observations of Adjudicator Gray in *Campbell* that the protection of taxpayer information is of fundamental importance to the CRA and is intrinsic to the way in which the CRA conducts all its business. As such, it is critical that the public know that the CRA is vigilantly protecting taxpayer information.

[147] Although I am not bound to apply the employer's disciplinary guidelines for managers, it appears to me reasonable to have regard to them, given the importance of protecting taxpayer information to the CRA.

[148] It is noted that the policy is not all-inclusive and that if the type of misconduct is not listed, the table should be used to find a similar type of misconduct as a point of reference.

[149] The allegations that were not established, which were that there was a continued and ongoing risk of the disclosure of sensitive taxpayer information arising from downloading the CDs and that the grievor violated legislation enforced by the CRA were both categorized under the policy as serious acts of misconduct constituting group 5 offences, the most serious, warranting a suspension of 30 days to 6 months or termination.

[150] The bargaining agent argues that the grievor might have been careless in her use of CRA property. Improper or careless use of CRA property is a group 1 offence, warranting discipline ranging from an oral reprimand to a 3- to 5-day suspension.

[151] The employer states that if regard is had to the grid, then an analogy may be made to category 2, entitled "Misuse of taxpayer or other sensitive/confidential information", and in particular to the second item on the list, entitled "Unauthorized access to taxpayer or other sensitive/confidential information". This is a group 4 offence, warranting suspensions of 3 to 5 days, 6 to 10 days, 11 to 30 days, and 30 days to 6 months, considering mitigating and aggravating circumstances.

[152] In following the CRA's process to determine a disciplinary measure, a manager is required to consider the following:

- respect the principles for determining a disciplinary measure;
- consider the seriousness of the misconduct;

- take into account any mitigating and aggravating factors; and
- consider the suggested range of disciplinary measures for different types of misconduct when determining a disciplinary measure.

[153] Ms. Lloyd removed confidential taxpayer information from her workplace. In determining the seriousness of this conduct, the employer acknowledged that she had no intent to disclose or disseminate taxpayer information. The Court has determined that there is no factual basis to conclude that she knowingly disclosed taxpayer information; nor was there any evidence to conclude that there was an ongoing risk of the disclosure of taxpayer information. The CRA advised the OPC's investigator that a risk assessment had determined that there was little risk of injury to taxpayers as a result of the incident and that the investigation concluded that the only information viewed and accessed from the CD was one email, which did not involve taxpayer information, for the purpose of a labour adjudication.

B. Aggravating factors

[154] The employer points to the grievor removing 16 unprotected CDs from the workplace containing confidential taxpayer information, making a copy of at least one of them, not cooperating during the disciplinary investigation, and showing no remorse and to her being a criminal investigator who had investigated such issues before.

[155] The bargaining agent argues that neither the adjudicator nor the Court made findings that the grievor was uncooperative.

C. Mitigating factors

[156] In terms of mitigating factors, the employer pointed to the fact that the grievor had no prior disciplinary record, the length of the investigation, her lack of intent to disclose or disseminate taxpayer information, and her length of service.

[157] The bargaining agent also points to the same mitigating factors; namely, the grievor had no prior disciplinary record at the time of the incident. She had 14 years of clear service, and nothing has occurred subsequent to the incident at issue. The bargaining agent also points to the significant delay investigating the alleged conduct; namely, two-and-a-half years passed from the date on which the employer learned that the information was on the CD until the grievor was disciplined.

The bargaining agent argues that the CRA did not give sufficient weight to this factor.

[158] The bargaining agent also argues the grievor was forthcoming and made no attempt to conceal, and she advised counsel to the CRA at the adjudication hearing that the CD contained taxpayer information.

[159] The bargaining agent also argues that the employer condoned the misconduct that was established. I am not persuaded that this is the case. As Adjudicator Potter acknowledged, as an experienced investigator, when the grievor was given the 16 CDs, alarm bells should have sounded. It was her responsibility to advise management.

[160] In my view, the fact that her manager might have taken his computer home to work on files is not helpful to her argument, as presumably there was a business reason for him doing so, while no business reason was established for removing the 16 CDs.

[161] The category 2 acts of misconduct, unauthorized access to taxpayer or other sensitive or confidential information, together with the other acts of misconduct listed, such as the unauthorized disclosure of taxpayer or other sensitive or confidential information, appear to me designed to ensure that Canada's tax system is not jeopardized when employees without authorization access files or disclose information to third parties, keeping in mind the importance of the right of taxpayers to expect their privacy to be respected. See *Campbell*, at para. 40.

[162] In this case, Ms. Lloyd removed CDs containing taxpayer information from the workplace without authorization. However, there was no intent to access or to divulge taxpayer information. Category 2 appears to me to pertain to more serious misconduct than that which has been established in this case.

[163] In the result, I do not find reference to this category of misconduct to be analogous or helpful.

[164] The bargaining agent argues that regard may be had to category 3, the misuse of CRA facilities, property, or information, or the improper or careless use or neglect of CRA property, equipment, or cards, which is a group 1 offence with disciplinary measures ranging from an oral reprimand to a five-day suspension.

[165] While this category is arguably analogous, I find it does not reflect the seriousness of the misconduct that has been established and the importance of the CRA's obligation to protect taxpayer information.

[166] In my view, regard may be had by analogy to category 3, the misuse of CRA facilities, property, or information, and in particular to the unauthorized use of CRA vehicles, stores, or equipment, which is a group 3 offence, warranting a suspension of from 1 to 2, 3 to 5, 6 to 10, or 11 to 30 days.

[167] I was asked to give greater weight as a mitigating factor to the fact that the internal investigation took a year and four months to complete, during which the grievor was kept out of the workplace on an administrative suspension pending an investigation without pay.

[168] Although not an exact fit, the grievor did remove CDs containing taxpayer information without authorization and did use non-CRA computers to copy her email. Taking into account the list of aggravating and mitigating factors, recognizing that this is not an exact science, I find the 40-day suspension excessive in all the circumstances. Therefore, based on the two *acts* of misconduct established, I would substitute a six-day suspension.

[169] By way of *obiter*, I must express concern that employees in this sector may be administratively suspended pending an investigation without pay indefinitely and without recourse. So far as I am aware, management is not obligated to conduct its investigations within a reasonable time frame.

[170] On that subject, see *Williams v. Treasury Board (Post Office Department)*, PSSRB File No. 166-02-5869 (19790813), [1979] C.P.S.S.R.B. No. 15 (QL), in which Deputy Chairperson Mitchell determined on the collective agreement provision then before him that an employer may conduct an investigation into an employee's alleged misconduct that depends on the particular circumstances surrounding the incident. However, the employer must do so within a reasonable time; otherwise, it will be precluded from taking disciplinary action.

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

(The Order appears on the next page)

V. Order

[172] Further to the Court's direction in *Lloyd* 2016, the 40-day suspension without pay is reduced to a 6-day suspension.

August 28, 2017.

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