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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

MICHELINE BÉTOURNAY

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Bétournay v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

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

For the Grievor: Frédéric Durso, Professional Institute of the Public Service of Canada

For the Employer: Marc Séguin, counsel

Heard at Montreal, Quebec,
June 20 to 23, 2017.
(FPSLREB Translation)

I. Individual grievances referred to adjudication

[1] Micheline Bétournay ("the grievor") was suspended without pay and then terminated from her position as a research and technology advisor with the Canada Revenue Agency ("the Agency") for serious misconduct that allegedly broke the relationship of trust that the Agency must have with its employees.

[2] The grievor referred two grievances to adjudication, one about her suspension without pay, and the other about her termination and the subsequent revocation of her reliability status. For the reasons that follow, I find that the suspension without pay was disciplinary and unjustified. Consequently, the grievor is entitled to her pay and benefits for the length of the suspension. I also find that the termination was substantiated. Finally, I will not decide the reliability status revocation issue since it was rendered moot due to the justified termination.

II. Legislative amendment

[3] 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 name of the Public Service Labour Relations and Employment Board and the titles of 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*").

[4] For the purposes of this decision, "Board" refers to the Public Service Labour Relations and Employment Board and the Federal Public Sector Labour Relations Employment Board. Likewise, "*Act*" refers to both the *Public Service Labour Relations Act* and the *Federal Public Sector Labour Relations Act*.

III. Summary of the evidence

[5] The Agency called the following people to testify: Dana-Lynne Hills, security officer and director general of security and internal affairs at the Agency; Joël Tremblay, internal investigator in the Internal Affairs and Fraud Control Division; Hugo Girard-Beauchamp, who made a complaint against the grievor; Patrick Desrochers, senior manager of the Scientific Research and Experimental Development section at the

Laval office and the grievor's immediate supervisor; and Henri Bettez, the director of the Western Quebec Tax Services Office, who made the decision to suspend the grievor and then terminate her. The grievor testified for herself.

[6] Mr. Bettez testified that in about April 2015, he received a document entitled "[translation] Inventory of Facts" from one of his colleagues in criminal investigations, which discussed a private meeting between the grievor and Mr. Girard-Beauchamp. At the meeting, her behaviour was allegedly completely contrary to the Agency's standards, as set out in its *Code of Ethics and Conduct.* Mr. Bettez quickly forwarded the information to the Internal Investigations Division.

[7] Mr. Girard-Beauchamp testified about what happened at the meeting with the grievor. He is a real estate developer and a partner in a company ("the company") that arranges private loans for those who cannot deal with banks. Towards the end of 2014, the company seized a house for which there had been a payment default and listed it for sale. The house, in Laval, was listed on the Internet for $279 000 without a legal warranty and was designated "foreclosed". A broker, Marc-André Pilon, was handling the sale.

[8] On January 22, 2015, the grievor offered $255 000; the company countered at $260 000, which she accepted. The offer was conditional on a property inspection, which occurred on January 24. After the inspection, she asked the broker to meet with the company's partners to discuss the price of the house. Mr. Girard-Beauchamp testified that there were two other partners in the company, Yvon Lareau and Philippe Lareau. The grievor attempted to contact Philippe Lareau. He spoke with Mr. Girard-Beauchamp, who agreed to meet with the grievor at the house that was for sale.

[9] In addition to Mr. Girard-Beauchamp and the grievor, her spouse and Mr. Pilon were also at the meeting. She began by mentioning that she had the inspection report in hand, which showed a large number of deficiencies. She made a new offer, $220 000, given the amount of work required to fix up the house. Mr. Girard-Beauchamp replied that the company could not accept less than $250 000. The grievor then asked him if she could speak with him in private in the bathroom.

[10] According to Mr. Girard-Beauchamp, as soon as the door was closed, the grievor produced her Agency identification card as well as a pile of papers on the trust

structures underlying the company and documents from the Autorité des marchés financiers of Quebec (AMF) on matters calling into question his partner, Philippe Lareau. She told him that she understood trusts well because she worked at the Agency, that their organization was suspicious, and that she wanted to buy the house for her daughter, this time offering $240 000.

[11] Mr. Girard-Beauchamp was completely stunned and taken aback by the intensity of the negotiations. He responded that he had to discuss the matter with his partner and quickly left, taking leave of Mr. Pilon in a hurry.

[12] Mr. Girard-Beauchamp testified that he had been shocked and surprised. He did not understand why the grievor brought up the structure of his company and his partner's difficulties with the AMF or why she showed him her Agency identification card. He thought that they were negotiating in good faith; in the circumstances, invoking the Agency was particularly intense, and the entire situation made him very uncomfortable.

[13] Mr. Girard-Beauchamp spoke about the matter with Philippe Lareau; they called a lawyer for advice, who advised them to put everything in writing, which led to the inventory of facts that Mr. Bettez received a copy of. As for the house transaction, he let the broker take care of it. The grievor made another offer, but the company was no longer interested, and the offer was finally cancelled.

[14] In Mr. Girard-Beauchamp's cross-examination, the grievor pointed out a contradiction between the narrative that appears in the inventory of facts received by Mr. Bettez and the minutes of the meeting prepared by the Agency's investigator, Mr. Tremblay. Although in his account written on February 6, 2015, Mr. Girard-Beauchamp remembers answering in the affirmative the grievor's question about whether he knew where she worked, on July 7, 2015, he told the investigator that he did not know where she worked until she told him and showed him her identification card to confirm it. Mr. Girard-Beauchamp was unable to explain this contradiction.

[15] Mr. Tremblay testified about his investigation. According to his investigation report, which is dated September 17, 2015, on April 14, 2015, Mr. Bettez notified the Internal Affairs and Fraud Control Division, where Mr. Tremblay works, of a complaint from Mr. Girard-Beauchamp. Mr. Tremblay explained that complaints are not always

founded. Therefore, first, a pre-investigation is carried out, which is followed by an official investigation, if warranted. The pre-investigation mainly involved reviewing the grievor's unauthorized accesses of the Agency's electronic network. The evidence showed that from January 26 to 29, 2015, she accessed 29 accounts of businesses associated with Mr. Girard-Beauchamp and Mr. Lareau. In his report, Mr. Tremblay noted that not only is such access prohibited by the Agency's *Code of Ethics and Conduct* but also that on November 6, 2014, Assistant Commissioner Gabriel Caponi reminded Agency employees that accessing its databases was forbidden, except in relation to files assigned to them.

[16] At the end of May 2015, the Internal Affairs Division informed Mr. Bettez about the grievor's unauthorized accesses of business accounts. An official investigation was launched. Mr. Tremblay conducted interviews in early July with Mr. Girard-Beauchamp, Mr. Pilon, and the grievor. According to Mr. Tremblay's interview notes, initially, the grievor denied using the Agency's resources to research the company. She said that all the information she found was taken from public sources. However, when confronted with the audit trail established by Mr. Tremblay, she admitted to accessing the Agency's databases and stated that she did so only to check the company's corporate structure and the shareholders' involvement in different businesses.

[17] During the interview, Mr. Tremblay asked the grievor if she had read the Agency's *Code of Ethics and Conduct*, to which she reportedly replied: "[Translation] It's absurd all the stuff that's in there." When questioned about her interactions with Mr. Girard-Beauchamp, she provided a different interpretation of her actions. Her testimony at the hearing was consistent with what Mr. Tremblay reported in his notes. I will return to this later.

[18] Mr. Tremblay found Mr. Girard-Beauchamp's allegations essentially founded. The grievor had used her status as an Agency employee to threaten Mr. Girard-Beauchamp, to obtain a better price. In addition, she used the Agency's databases for personal benefit.

[19] Mr. Tremblay met with the grievor on July 8, 2015, and immediately after that with Mr. Desrochers and Mr. Bettez, to inform them of his findings. After this meeting, Mr. Desrochers spoke with the grievor. Her state of mind worried him. She did not seem very affected. She asked him if she should leave the workplace. She had a

meeting with a taxpayer the next day.

[20] At the hearing, Mr. Desrochers explained the nature of the grievor's work. She was a technical advisor in scientific research. When a taxpayer applies for a research and development tax credit, the file is reviewed by a technical advisor (such as the grievor), who determines whether the scientific criteria are met. A financial officer then determines the appropriate amount of the tax credit or refund. When a meeting is held with a taxpayer, the technical advisor and the financial officer both attend.

[21] Mr. Desrochers spoke with Mr. Bettez about the advisability of allowing the grievor to meet with the taxpayer and the financial officer (and another colleague) the next day. They decided to allow her to hold the meeting so that she could finalize the file she was working on.

[22] The next day, July 9, 2015, Mr. Desrochers and Mr. Bettez met with Marc Bellavance, the director of labour relations. His view was that the content of Mr. Tremblay's preliminary report justified an administrative suspension. Mr. Bellavance did not testify at the hearing.

[23] On July 10, 2015, Mr. Bettez sent a letter to the grievor informing her that she had been suspended without pay pending the end of the investigation. The Agency set out the reasons for the suspension and the terms in the letter as follows:

> [Translation]
>
> …
>
> ***SUBJECT: ADMINISTRATIVE SUSPENSION WITHOUT PAY DURING THE INVESTIGATION***
>
> *Madam,*
>
> *The CRA'S Internal Affairs and Fraud Control Division (IAFCD) has initiated an investigation into allegations that you made unauthorized accesses of taxpayer information and that you abused your authority.*
>
> *After receiving new information, we reviewed our decision to continue your employment during the investigation. In light of that information, I have decided to suspend you without pay from your CRA duties, to protect the CRA's interests and integrity. The administrative suspension without pay is*

> *effective immediately and will be in effect until the investigation concludes.*
>
> *During this period, you are barred from accessing the employer's premises without my personal authorization. You are also required to not communicate with your work colleagues about the investigation. And be aware that under no circumstances are you to communicate with the complainants.*
>
> *Rest assured that we will do everything in our power to complete the investigation as soon as possible. We will keep you updated on the investigation's findings, and you will have the chance to send us your comments.*
>
> *You must immediately return all CRA property, including files, laptop, keys, USB keys, corporate credit card, identification card, access card, cellphone, BlackBerry, voicemail passwords, and all other CRA documents and property.*
>
> *If you need to collect any personal property belonging to you, arrangements will be made to have it delivered to your residence.*
>
> …

[24] Mr. Bettez testified that he had considered assigning the grievor to another position, as stipulated in the discipline policy, but that doing so would not have reduced the risk. Specifically, the grievor's misconduct occurred outside the workplace, where the Agency could not control her actions, and the risk of reoffending was unchanged. Ultimately, keeping her away from the workplace was a way for the Agency to maintain its reputation pending a final decision on the penalty to impose. It was first necessary to receive the final investigation report and to allow the grievor to respond to it.

[25] According to the investigation report, the investigation was already finished when the Agency decided to suspend her without pay. The final investigation report is dated September 17, 2015. Mr. Bettez met with her at a disciplinary hearing at the end of September.

[26] On October 27, 2015, Mr. Bettez sent a termination letter to the grievor. The misconduct that gave rise to the penalty was outlined in the following paragraph:

> [Translation]

> *Via your status as an Agency employee, you abused your authority in an attempt to influence the negotiation of a real estate transaction in which you were personally involved. In fact, you used your Agency identification card and made statements that in our view, appeared threatening. In addition, you made several unauthorized accesses of the Agency's systems to further your research into the owners of the desired house.*

[27] The letter mentions mitigating factors, such as the unblemished disciplinary record and the expressed remorse. However, noted as an aggravating factor are her negative comments to the investigator about the Agency's *Code of Ethics and Conduct*. Mr. Bettez testified about the extent to which the comments undermined his trust in her. Finally, the letter discussed the termination in the following terms:

> [Translation]
>
> *As you know, your research and technology advisor position requires a great degree of trust and integrity. That high level of trust is crucial to the proper functioning of Canada's tax system. In light of that, I find that the relationship of trust that must exist between an employee and his or her employer has been irreparably broken. For these reasons, and in accordance with paragraph 51(1)(f) of the Canada Revenue Agency Act, I inform you by this that you have been terminated as a CRA employee, effective retroactively to July 10, 2015.*

[28] Mr. Bettez also explained how the *Procedures for Addressing Employee Misconduct* were used to determine the appropriate penalty for the grievor's misconduct. The document outlines the ranges of penalties to impose due to misconduct, based on seriousness. The most serious misconduct is in "Group 5", in which the penalty ranges from 20 days of suspension to termination. In his testimony, Mr. Bettez brought up that several aspects of the grievor's misconduct appeared in the examples given for Group 5, including, "[translation] Unauthorized access of taxpayer information or of a similar nature", and, "[translation] Abuse of authority, including the inappropriate or excessive use of an employee's authority to obtain a benefit". Based on the table, some misconduct could be included in Groups 2, 3, 4, or 5, depending on its seriousness; for example, "[translation] Conduct that could negatively affect the Agency's reputation or discredit the Agency".

[29] After studying the investigation report, considering the Agency's *Discipline*

Policy, and meeting with the grievor, Mr. Bettez found that the relationship of trust had been broken and that the grievor's misconduct was such that termination was the only suitable penalty.

[30] On November 4, 2015, the grievor was informed that her reliability status had been revoked. The reasons for the revocation were based on the investigation's conclusions, but emphasized were protecting information held by the Agency and safeguarding its reputation. In an interview held on October 8, 2015, when faced with the facts alleged against her, the grievor's attitude did not inspire confidence in the Agency, which it expressed as follows in the revocation letter:

> [Translation]
>
> …
>
> *On October 8, 2015, you participated in a resolution-of-doubt interview as part of the review of the grounds of your reliability status. All relevant information was reviewed, including what you provided at the resolution-of-doubt interview. We have found that you pose a serious and imminent risk to the security of the Agency's information and material goods given that during the interview, you did not seem to recognize the abuse of your status as an Agency Employee and its impact on the Agency. Furthermore, you justify and downplay your actions by blaming them on panic and your suspicions towards your interlocutors to the detriment of the Agency's rules and procedures, of which you were aware.*
>
> …

[31] The letter went on to raise the risk posed to the Agency and ultimately concluded that the reliability status had to be revoked. Ms. Hills testified that she analyzed the risk and found that it was too much for the Agency. The grievor's conduct had been deliberate with respect not only to researching Agency databases but also to using her position to intimidate someone, to obtain a personal benefit. Her lack of judgment throughout the matter undermined the confidence that the Agency could have in her.

[32] In cross-examination, it was brought up that since May 2015, technical advisors, including the grievor, no longer had access to taxpayer databases; the Agency's witnesses confirmed that fact. Ms. Hills replied that that would not change her

analysis. Although it was true that that risk no longer existed, the fact that the grievor used her employee status to obtain a personal benefit was the most serious aspect of her behaviour, and that risk remained. Furthermore, she did not appear to express any remorse for the behaviour she displayed during the negotiations to buy the house.

[33] The grievor testified and gave her version of the events. She started with an overview of her career, particularly at the Agency. She is a mechanical engineer and has been a member of the Ordre des ingénieurs since 1979. After working in the private sector, she started working at the Agency in 2001 as a consultant and obtained a permanent position as a technical advisor. As noted, the position involves evaluating the scientific aspects of a project for which the taxpayer requests a research and development tax credit or refund.

[34] The grievor explained that the work has evolved over the years. She spoke about a project that she worked on to audit aggressive planning by certain companies that used fairly complex corporate structures to hide their connections. It is done so that a company that has no activities can claim a considerable research credit. The grievor explained that she learned to navigate the Agency's databases to untangle the threads of corporate structures. In fact, she spoke about it as "[translation] spinning a web to trace the tax credit". She added that the Agency's system is not always user-friendly and that sometimes it takes ingenuity to obtain a full picture of a corporate structure.

[35] That project, which she led while carrying out other duties in Laval, was transferred to the Montreal office. She continued to serve as a technical advisor. In July 2015, she was summoned to an interview with Mr. Tremblay, the investigator. She was dumbfounded because it was the first time she had heard anything about a complaint about a purchase of a house in Laval.

[36] At the hearing, the grievor recounted how things had progressed.

[37] She was looking for a house near her for her daughter. She saw the listing for the house, and it seemed perfect. It was affordable and close to her home. It would be the fifth building she had purchased, and she was confident that everything would go smoothly, just as in the past.

[38] She visited the house with the broker and noted that it needed a lot of work, but

it did not frighten her because she is handy. She offered $255 000, and the seller countered at $260 000, which she accepted. The promise to purchase was conditional on an inspection. Under an inspection clause, the purchaser may withdraw the offer, with notice, if the inspection reveals deficiencies that are likely to significantly reduce the house's value.

[39] The inspection was performed on January 24, 2015, and it was disastrous. Before he submitted his report, the inspector, whom the grievor knows well and respects, called to inform her that the house had a host of serious problems, that likely there was asbestos in the roof, and that the heating system was not up to code. He added that he hoped her offer to purchase included a clause "[translation] to the full satisfaction of the buyer". The grievor panicked, since she had not put that clause in the offer. Thus, she felt caught off guard.

[40] She explained at the hearing that from that moment, she wanted to know everything about the company selling the house. She researched it at home on the Internet through the Quebec Enterprise Register (QER). She found some information, including the partners' names. She noted that one partner, Philippe Lareau, had several cases before the AMF. More and more concerned, she spun her web like she did when working at the Agency. She looked for all the numbered companies, trusts, and other entities comprising the company. She found a great deal of information on the Internet but was missing some, including about one of Mr. Girard-Beauchamp's businesses that was not registered with the QER.

[41] She summarized her concerns. She was dealing with a corporate entity, and she did not know all its ins and outs. According to the listing, there was no legal warranty. She had just received a disastrous inspection report, and the inspector had asked her if she had included the full-satisfaction clause. She saw that one of the company partners had had charges against him brought before the AMF. And one of Mr. Girard-Beauchamp's businesses was not registered in the QER. She decided to search in the Agency's databases, since: "[Translation] I thought that maybe I would find it at the Agency".

[42] She carried out research in the Agency's databases to understand the company's structure and to find Mr. Girard-Beauchamp's business. That same week, she received the inspector's written report, which she gave to the broker. She did not want to waste

time and attempted to contact Mr. Lareau but was unsuccessful. She explained to the broker that she wanted to deal with the company's partners.

[43] A meeting was then organized at the house for sale on January 30, 2015, with the grievor, her spouse, the broker, and Mr. Girard-Beauchamp. The grievor brought all her documents; in addition to the inspection report, she had the complete web of the company's corporate structure and a copy of an AMF table with a list of its cases against Mr. Lareau.

[44] She began the discussion with Mr. Girard-Beauchamp by saying that the inspection report showed that the house needed a great deal of major repairs to fix it up. She offered him $220 000 for the house, taking into account the work that needed to be done. He said that that was too low and that the company could not accept less than $250 000. However, he was allegedly willing to have some work done, including on the roof and the heating system. She asked him to put that offer in writing. He refused and told her that he was giving her his word. That was when she told him that they would continue the discussion in the bathroom, leaving her spouse and the broker in the living room.

[45] Once they were in the bathroom, she took out all her documents from the web she had spun, which included the company's structure and the list of cases before the AMF. She made it clear to Mr. Girard-Beauchamp that she could not trust his word alone, given the company's extremely complex structure and Mr. Lareau's apparent problems. She testified that Mr. Girard-Beauchamp seemed dumbfounded. He asked her where she had obtained all that information. She responded that she worked for the Agency and that she knew how to do such research. To support her assertions, she took out her Agency employee card, which she had with her because she had just left the office. She offered him $240 000, including the work to be done, with a written commitment. He said that he would have to speak with his partners.

[46] On one point, the testimonies of the grievor and Mr. Girard-Beauchamp are completely consistent: he stormed out, barely greeting the broker as he left.

[47] In cross-examination, when the Agency asked the grievor why she took Mr. Girard-Beauchamp aside to the bathroom, she answered that it was the only enclosed room on the floor and that she did so for the sake of discretion. She did not want to

discuss Mr. Lareau's troubles in front of the broker. She added that if Mr. Girard-Beauchamp had agreed to sign the commitment to complete the work with a price of $250 000, she would not have taken him aside. The Agency asked her why she had the documents from her web and the AMF list since she did not know beforehand how the negotiations would unfold. "[Translation] It was my Plan B", she answered. Negotiations were underway, and she wanted Mr. Girard-Beauchamp to understand that she wanted the house but that she knew whom she was dealing with.

[48] Still in cross-examination, the Agency asked her whether she thought that her behaviour in the bathroom could have been perceived as intimidating. She answered that everyone has a limit for what he or she considers intimidating; for her part, she is fearless, and nothing intimidates her. She provided as an example a colleague who had been frightened by a taxpayer who had apparently threatened her. The grievor stated: "[Translation] I would not have been afraid."

[49] After the January 30, 2015, meeting, the grievor attempted to confirm the offer of $240 000. The broker indicated that the seller was holding to $250 000. The grievor made an offer at that price, with a condition that the roof be repaired, and set a deadline of February 1, 2015, at 4:00 p.m. The vendor did not respond, and she told the broker that she was released from the offer. However, the broker told her that she was not released since she had to release herself under the terms of the promise to purchase, with notice and an inspection report. She served the notice to the seller by bailiff on February 3, 2015, and the transaction did not take place. In her view, the seller was attempting to drag things out so that she would be trapped and forced to buy. According to Mr. Girard-Beauchamp, the seller was no longer interested. The broker did not testify at the hearing.

[50] After she was suspended on July 10, 2015, the grievor filed a grievance against it and asked to see the complaint that gave rise to the investigation. Only long after her termination (which occurred on October 27, 2015), specifically in May 2016, did she receive a copy of the inventory of facts, written by Mr. Girard-Beauchamp. In his testimony, Mr. Bettez confirmed that he had refused to give her a copy of the complaint, to protect the complainant.

[51] I should add that I asked the grievor to explain her comment during the investigation, which was that the Agency's *Code of Ethics and Conduct* is "absurd",

since it seemed to weigh heavily on the Agency. She answered that in fact, the *Code* is absurd, because it contains all sorts of things that have nothing to do with work, such as the requirement to ask permission from a manager before volunteering. She added: "[Translation] Who cares if I want to serve meals to seniors at a retirement home?"

IV. Summary of the arguments

A. For the Agency

[52] According the Agency, the grievor's misconduct was proved, and her termination was justified. The misconduct had two parts: unauthorized accesses of the Agency's networks, and the abuse of her identification card in an attempt to influence a real estate transaction.

[53] The Agency argued that the investigator's research was sufficient to establish an audit trail of the unauthorized access. Agency employees are prohibited from making accesses that have nothing to do with work duties.

[54] With respect to the finding that the grievor abused her employee status, the Board will have to weigh the facts and the witnesses' credibility. The Agency maintains that the grievor's actions established that she used her status to obtain something. If she had doubts or concerns, why did she not simply abandon the promise to purchase after receiving the inspection report? Why did she attend the meeting with the seller with all the documentation on the company?

[55] The Agency's view is that the grievor's actions make sense if they are interpreted as follows. She made an offer to purchase, obtained the inspection report, and prepared a modified offer. She researched on the Internet and then in the Agency's databases to find out as much as possible about the company selling the building. On January 30, 2015, she went to the meeting that she had requested. She did not achieve the desired result in the living room. She then requested a private discussion with the seller, during which she presented the results of her research as well as her Agency employee card.

[56] The Agency's argument is that the grievor sought to use all means (including invoking her Agency employee status) to negotiate what she wanted to buy the house. She said that she simply wanted the offer in writing. If so, then why continue negotiating in the bathroom to get the price down to $240 000?

[57] The grievor's entire approach — the web, the reference to the Agency, and the fact that she showed her card — would amount to intimidation and abuse of her employee status. In the Agency's view, the misconduct was serious, especially since as a technical advisor, she held a position of trust that required a great deal of integrity.

[58] The Agency maintains that the misconduct was so serious that progressive discipline was not applicable. Therefore, the termination was justified, in its opinion. It summarized the facts as follows. The grievor deliberately used its databases, despite a clear prohibition, in her own interests to spin her web and to show it to the seller. She invoked her employee status, regardless of whether it was to obtain a written commitment or to lower the price; in any case, she did so as part of a private real estate transaction. She does not seem to recognize the seriousness of her actions. She admits that she should not have accessed the Agency's databases, but she does not appear aware of the seriousness of her actions involving Mr. Girard-Beauchamp.

[59] According to the Agency, the grievor's behaviour discredited it.

[60] With respect to the grievance against the suspension without pay, the Agency views the suspension as administrative and not disciplinary; as such, the Board does not have jurisdiction. On that issue, the Agency relies on *Narayan v. Canada Revenue Agency*, 2009 PSLRB 40; *Petrovic v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 16; and *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63. To have jurisdiction, I would have to find that the suspension without pay was in fact disciplinary. Mr. Bettez spoke about the risk to the Agency with respect to both accessing its information and its image. Those considerations justified the suspension on July 10, 2015. At that time, the Agency had the investigation results but had not yet decided the final discipline.

[61] With respect to the revocation of reliability status, the Agency concedes that there is no longer any doubt that, following the Federal Court of Appeal's decision in *Canada (Attorney General) v. Heyser*, 2017 FCA 113, the Board has jurisdiction to deal with a termination resulting from a revocation of reliability status. However, in this case, according to the Agency, the Board does not have jurisdiction. Revoking the reliability status was an administrative measure, and nothing in the wording of s. 209 of the *Act* gives the Board jurisdiction over a grievance of this nature. It was not a disciplinary process, and the measure did not result in a penalty or loss of

employment. The Agency maintains that it revoked the reliability status because it could no longer trust the grievor. The analysis was separate from the disciplinary process.

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

[62] The Board is seized with two grievances. One deals with the suspension without pay imposed for the duration of the investigation, and the other deals with the termination and the revocation of reliability status. According to the grievor, there are three disciplinary actions, for which the Agency has the burden of proof of establishing that its decisions were reasonable and well founded.

[63] The grievor had been a technical advisor since 2001 and had a clean disciplinary record. She maintains that she always did her job conscientiously, as evidenced by the special initiative on aggressive planning.

[64] The grievor submitted her interpretation of the facts. After making a purchase offer, she discovered that there were numerous problems with the house, and the inspector spoke to her about a "[translation] to the buyer's complete satisfaction" clause. She then panicked. She tried to find out more about the seller. Searching on the Internet, she discovered the trusts underlying the company that was selling the house as well as one partner's cases before the AMF. So, she became concerned and continued her research. According to her, one of Mr. Girard-Beauchamp's companies did not appear in the QER. Her reflex was to check in the Agency's networks, as she had often done for her research into aggressive planning. She regrets doing that and understands that it was a mistake. She said that she expressed her remorse during the investigation and to Mr. Bettez, in meetings.

[65] After finishing her research, the grievor was even more concerned. She requested a meeting with the seller on January 30, 2015, which was not at all out of the ordinary. After receiving the inspection report, she wanted to renegotiate her offer.

[66] The Agency strongly emphasized the inappropriateness of taking Mr. Girard-Beauchamp aside and interacting with him alone in the bathroom. However, according to the grievor, it was for discretion.

[67] According to the grievor, when she began revealing her research, Mr. Girard-

Beauchamp seemed surprised. She mentioned that she worked for the Agency to let him know that she knew how to conduct this kind of research. She showed her identification card simply to confirm her employment.

[68] In the grievor's view, the Agency's argument that she used her card to obtain a benefit does not hold up. She was negotiating in good faith. The numbers were rational and were based on the house's value and the cost of the work. Thus, there was no unfair advantage.

[69] The grievor emphasized that the inventory of facts that gave rise to the complaint is an undated and unsigned document of which the author is unclear. Mr. Girard-Beauchamp supposedly prepared it, but his secretary allegedly helped draft it. In his testimony, Mr. Girard-Beauchamp contradicted the document, without explanation.

[70] According to the investigation report, during an interview with Mr. Girard-Beauchamp, Mr. Tremblay seemed to obtain exactly what was in the inventory of facts and did not seem to ask any other questions. For example, in the inventory of facts, Mr. Girard-Beauchamp wrote that "[translation] … she took out her Revenue Canada card to back up her threat". In the interview report, Mr. Tremblay wrote the following: "[Translation] … she took out her laminated Agency card to back up her threats …". When questioned at the hearing about the nature of the threats, Mr. Girard-Beauchamp was vague and unable to specify them. He was also unable to remember what the grievor said to him when she showed him her card.

[71] According to the grievor, the Agency banked heavily on her alleged threats, yet they remain vague. Furthermore, the investigator was not interested in the subsequent events of the house purchase. The Agency did not have a complete picture and found that there was misconduct, without any real evidence. Its approach was biased from the outset and was not corrected.

[72] Mr. Bettez allegedly received the inventory of facts in April 2015 and confirmation on May 26 that the grievor had made unauthorized accesses. However, a decision was not made before July, and once again, the decision to suspend her took two days. Was there really a risk?

[73] If the Agency had all the information on July 10, 2015, why did it wait until the end of September to hold the disciplinary hearing? The suspension was supposedly "administrative" because there was supposedly a "risk", but that risk was already there on July 8, 2015, when the grievor was allowed to meet with a taxpayer as part of her duties. In her view, the fact is that there is risk at all times, for all employees.

[74] According to the grievor, it was also wrong to state that the suspension without pay was administrative, since it had financial consequences, the effect of which was punitive.

[75] The grievor emphasizes that the Agency's *Discipline Policy* provides as follows for administrative suspensions during investigations (at page 18):

> [Translation]
>
> …
>
> *Temporarily removing the employee may be necessary if* ***all*** *the following conditions are met:*
>
> - *The employee's presence at work poses a reasonably immediate and serious risk to the CRA.*
> - *The allegations that are potentially dangerous, harmful, or undesirable to the CRA will result in the employee being unable to perform his or her duties suitably or will negatively affect other employees.*
> - *Modifying the employee's duties (or stricter supervision) will not mitigate the risks to the CRA.*
>
> …
>
> [Emphasis in the original]

[76] However, the grievor maintains that her conduct did not give rise to the concerns expressed by the Agency. She had proved herself. She had 15 years of irreproachable service. If there was a failing, the Agency was required to apply progressive discipline. She commented that the Agency's *Code of Ethics and Conduct* is a matter of opinion. It is true that the *Code* is voluminous, but that does not mean that the grievor rejects the values that it extols. On the contrary, by participating in the special project, she demonstrated that she was willing to work hard to uphold the Agency's values. She could have been assigned to other tasks had her position truly

posed a risk. As indicated as follows on page 20 of the *Discipline Policy*:

> [Translation]
>
> …
>
> *The employee shall be suspended indefinitely without pay* ***only after*** *the manager has reviewed the possibility of assigning the employee to other tasks. An indefinite suspension shall be used only in* ***exceptional circumstances*** *and as a last resort.*
>
> …
>
> [Emphasis in the original]

[77] However, in the grievor's view, management did not really consider the possibility of assigning her to other tasks, and yet, the circumstances were not overly exceptional. Technical advisors, including the grievor, no longer had access to Agency databases containing taxpayer information. Furthermore, the Agency made an issue of the fact that she had said that she worked for it. According to her, it was a rather insignificant comment; it is not forbidden to say where one works.

[78] With respect to the termination, the Agency did not analyze the facts. Its mind was made up at the outset, and the entire investigation procedure was tailored to justify its findings. In no way did Mr. Bettez consider progressive discipline, even though it is a basic labour relations principle. The grievor made mistakes, which she acknowledged, but termination was not called for, given that she had 15 years of flawless service and was to retire soon.

[79] With respect to the revocation of reliability status, the Agency argues that it was administrative; however, the grievor maintains that it was disciplinary. Ms. Hills's decision was based entirely on the investigation's findings. The Agency considers that the grievor is no longer reliable because she allegedly uttered threats and acted for her personal enrichment. However, she maintains that no threats were made, and Mr. Girard-Beauchamp was unable to repeat them. A real estate transaction is not a matter of enrichment but rather negotiation, although she still had to pay the price of the house.

[80] The grievor noted that one might wonder why the Agency chose to revoke her

reliability status even though the work contract had ended due to the termination. According to her, the only possible explanation was that it wanted to block her eventual reinstatement in the event her termination grievance was successful. By maintaining that the measure was administrative, the Agency deprived the Board of its jurisdiction to examine the merits of the revocation. As in *Bergey v. Canada (Attorney General)*, 2017 FCA 30 (request for leave to appeal presented before the Supreme Court of Canada), and *Canada (Attorney General) v. Grant*, 2017 FCA 10, the measure constituted disguised discipline such that the Board would have jurisdiction to render a decision on the revocation.

[81] As a corrective measure, the grievor seeks reinstatement in her functions, with the payment of lost wages. If the Board finds that the termination was justified, she still requests that the suspension grievance be allowed rather than accept that the termination be made retroactive to the suspension date, since it was not justified in the circumstances. Finally, she requests that the revocation of her reliability status be assessed as a disciplinary measure.

V. Confidentiality order

[82] At the hearing, the Agency submitted a redacted version of the investigation report and requested that it replace the unredacted version in the Board's file. All the redacted information is public: the name of the company selling the house, the company's shareholders, and the house address. All that information is available on the Internet. The complaint that gave rise to the grievor's termination is being dealt with in this decision, and Mr. Girard-Beauchamp testified before me. Therefore, I do not see the utility of or the need for redacting.

[83] The Agency also requested that the portion of the investigator's report that directly shows his audit trail be sealed. This document is a list of account numbers, sometimes associated with company names and, a few times, with people. The document discloses absolutely nothing that is confidential; it simply shows that research was conducted in the database. Since there is no confidential information, I do not see the need to seal this document.

VI. Reasons

[84] The grievances are about three separate Agency actions: the suspension without pay during the investigation, the termination, and the revocation of reliability status. I will address each one in turn.

A. The suspension without pay during the investigation

[85] The case law under the *Act* has consistently found that a grievance about an administrative suspension cannot be referred to adjudication (see *Narayan*; *Petrovic*; *King v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 45; and *Iammarrone v. Canada Revenue Agency*, 2016 PSLREB 20). Under s. 209 of the *Act*, a suspension may be referred to adjudication only if it is disciplinary in nature.

[86] As the Federal Court of Appeal noted in *Basra v. Canada (Attorney General)*, 2010 FCA 24, it is not enough for an employer to declare that a suspension is administrative. So, in this case, it is up to the Board to establish that the suspension was indeed administrative. The distinction between administrative and disciplinary action may be determined based on the employer's intent or on the action's effect on the employee. (See *Canada (Attorney General) v. Frazee*, 2007 FC 1176, at paras. 22 to 24.)

[87] In *A.A.H.P.O. v. Toronto East General & Orthopaedic Hospital Inc.* (1989), 8 L.A.C. (4th) 391, cited in *Frazee*, the arbitration board was of the view that a decision that deprives an employee of income is itself punitive and therefore disciplinary unless it is reasonable on the employer's part. In that case, a lab technician did not perform a test properly, and the employer determined that he required additional training. For nine months, the employee was deprived of the potential to earn supplemental income by performing callback or standby work because he was deemed unable to work alone outside normal hours. That action, which was initially reasonable, became punitive and thus disciplinary after a certain time, as follows, even if the employer appeared to have no intent to punish:

> ***19*** *Rather than put the grievor through a concentrated refresher programme on reading smears, or rearranging his reorientation programme so that for a time it stressed this particular task, the hospital was content to primarily rely on the general reorientation programme. This resulted in the grievor being removed from callback duty for an unduly long period of time. Indeed, he was kept off call-back work for some nine months, substantially longer than employees new*

> *to the laboratory. We are satisfied that the negative consequences to the grievor of being disqualified from performing call-back work for such an extended period of time were not justified by the hospital's need to protect its interests and those of its patients. In the result, we conclude that while the grievor's disqualification from doing stand-by and call-back work was initially reasonable, after a time it ceased to be so and became punitive. Being punitive it amounted to a form of discipline. As already noted, there is no claim that the grievor's conduct was deserving of discipline.*
>
> [*Sic* throughout]

[88] In other cases, the employer's disciplinary intent is clear, and the decision maker is right to exercise jurisdiction under the *Act* with respect to a suspension. For example, the intent manifests when the purpose of the action is clearly to correct or punish the employee's behaviour. (For example, see *Canada (Attorney General) v. Grover*, 2007 FC 28 (upheld in 2008 FCA 97).)

[89] It is therefore appropriate, to determine whether the suspension was administrative or disciplinary, to examine the punitive effect on the employee, the reasonableness of the employer's decision, and the employer's discernable intent.

[90] There is no question that a suspension that deprives an employee of wages has a punitive effect on the employee. Furthermore, in *Basra*, the Federal Court of Appeal wondered as follows whether such a wage denial is sufficient to establish the disciplinary nature of the suspension, but it did not answer the question:

> …
>
> *[14] It was suggested by this Court during the course of the hearing that the fact that the suspension was without pay may have been sufficient in itself to allow for the conclusion that the measure was disciplinary in nature. That is, the withholding of the pay is* prima facie *punitive since it deprives the employee of the salary to which he or she is otherwise entitled (compare* Cabiakman v. Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195, at paras 68 and 69). It is no answer to say, as the respondent suggests, that had the investigation exonerated the appellant, he would have been entitled to his full pay retroactively (Memorandum of the respondent, para. 65). It remains that while he was suspended the appellant was deprived of his salary.*

[91] The adjudicator in *King* raised a similar concern, as follows:

…

> ***58*** *In my view, suspensions without pay held out as administrative by an employer pose a significant challenge. The removal of an employee from the workplace and the discontinuation of his or her salary and employment benefits normally raise the apprehension that discipline may have occurred. Some observers argue that — not without reason, in my opinion — suspending an employee with pay is a measure that can be more readily characterized as non-disciplinary and administrative in nature.*

…

[92] Denying wages has a punitive effect and therefore might indicate discipline. Labour law jurisprudence in the federal public sector does recognize that an administrative measure may temporarily deny an employee wages. However, that measure must be reasonable. (In particular, see *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9).

[93] The Agency's *Discipline Policy* (Exhibit E-2, Tab 17) clearly outlines how to manage cases of suspected misconduct when an investigation is required. The Agency must decide if the employee's presence at work during the investigation period poses a risk. On that matter, the *Policy* stipulates the following:

> [Translation]
>
> …
>
> *Temporarily removing the employee may be necessary if* ***all*** *the following conditions are met:*
>
> - *The employee's presence at work poses a reasonably immediate and serious risk to the CRA.*
> - *The allegations that are potentially dangerous, harmful, or undesirable to the CRA will result in the employee being unable to perform his or her duties suitably or will negatively affect other employees.*
> - *Modifying the employee's duties (or stricter supervision) will not mitigate the risks to the CRA.*
>
> *The manager must take into account the CRA's values, the employee's duties (particularly when he or she holds a position that requires a high level of trust, including auditors, collections officers, cashiers), and the nature of the*

> *allegations.*
>
> …
>
> [Emphasis in the original]

[94] I did not receive any evidence indicating that the grievor's presence at work constituted an immediate and serious risk to the Agency, which was aware of the allegations in April 2015 and did not seem to consider that there was a risk at that time. It reacted only after it appeared that the allegations had merit, after investigating, in July 2015. After he was informed of the investigation's results, Mr. Bettez decided that the grievor could still meet with the taxpayer on whose file she was conducting a technical evaluation. The striking thing in this case is the total lack of connection between the grievor's duties and her misconduct. Neither the taxpayers she was dealing with nor the files for which she was responsible were in the least threatened by her personal behaviour during a private real estate purchase.

[95] Mr. Bettez testified that he consulted Mr. Bellavance, a labour relations advisor, who told him that it was appropriate to suspend the grievor without pay. However, according to the Agency's *Discipline Policy*, the evaluation is supposed to be carried out before the investigation starts. That policy stipulates the following:

> [Translation]
>
> …
>
> *Managers **must**:*
>
> ☐ *Consult their labour relations advisors before deciding to suspend the employee indefinitely without pay, in accordance with **consultation requirements**.*
>
> …
>
> [Emphasis in the original]

[96] Mr. Bellavance did not testify at the hearing. I draw a negative inference from the lack of testimonial evidence on his reasoning. In my view, the Agency did not justify the suspension it imposed in July 2015.

[97] The Agency did not explain what risk the grievor posed to it. Since May 2015, she no longer had access to the databases following an administrative decision that

affected all technical advisors. In addition, Mr. Bettez did not explain how technical and scientific research duties were incompatible with the alleged misconduct. The grievor never dealt with taxpayers alone; nor was she involved in establishing the amounts in question. In contrast to other situations in which removing the employee was justified (see *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55), under the circumstances, the Agency had no objective reason to fear that the grievor's misconduct would have any effect whatsoever on her work.

[98] Only the grievor, management, and the investigators were aware of her misconduct. This was not a situation in which public notoriety could have negatively affected the Agency. Its databases were not threatened, since the grievor had not had access to them for two months. Throughout Mr. Bettez's testimony, who imposed the suspension, I was able to discern two fears: a tainting of the Agency's reputation, and the fear of a repeat offence.

[99] With respect to the damage to the Agency's reputation, since only a few people outside it knew of the misconduct, it would be difficult to say that its reputation was threatened. As for the fear of reoffending, related to the fact that the grievor did not seem to understand the seriousness of her actions, the risk was the same whether she was at work or at home. As long as she was an Agency employee, she could invoke her employee status in inappropriate situations. Once again, the risk did not have any connection to carrying out her duties and in no way justified denying her work and wages.

[100] Most evident during Mr. Bettez's testimony was that he believed that he could no longer trust the grievor because of her attitude toward the *Code of Ethics and Conduct.* In my view, suspending an employee because he or she denigrates the *Code of Ethics and Conduct* seems more disciplinary than administrative. Employers are entitled to deal with employees who openly criticize their codes of conduct. However, such behaviour does not necessarily pose an immediate risk; the employer must specifically establish the need to temporarily suspend an employee on whom no discipline has been imposed.

[101] In fact, the suspension letter does not specify the risk that the grievor's continued employment would pose. She was suspended "[translation] to protect the CRA's interests and integrity …". It states that after mentioning the two allegations of

misconduct, namely, the unauthorized access of the Agency's databases and the "[translation] abuse of authority". The letter stated not only that the grievor had to surrender all property belonging to the Agency but also that her personal property would be delivered to her residence. That is not far from a termination.

[102] In my view, the suspension was not warranted and can be explained only from a perspective under which the Agency was already punishing the grievor for her misconduct. And, as an additional indication of the disciplinary nature of the suspension, it was later combined with the ultimate discipline — the termination. In fact, by making the termination retroactive to the date of the suspension, the Agency confirmed the disciplinary nature of the suspension. It added to the measure imposed to penalize the misconduct.

[103] Therefore, I find that the suspension without pay was not based on any administrative concerns but rather was disguised discipline. The employer imposed the suspension under false pretences; it was not justified administratively.

B. The termination

1. Justification

[104] The Agency submitted the following three federal-public-sector decisions, in which termination was imposed for consulting government networks to obtain personal information without authorization, as confirmed at adjudication: *Ward v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File Nos. 166-02-16121 and 16122 (19861229); *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43; and *Campbell v. Canada Revenue Agency*, 2016 PSLREB 66. In those three cases, the information obtained through unauthorized access was disclosed to third parties, which aggravated the misconduct. That is not so in this case. The unauthorized access itself, although wrongful, was not necessarily sufficient to warrant termination. The circumstances surrounding the unauthorized access had to be considered.

[105] In *Ward*, Ms. Ward obtained personal and confidential taxpayer information, which she then shared with unauthorized third parties. It included peoples' addresses, telephone numbers, and social insurance numbers. Ms. Ward was going through an extremely difficult period in her personal life, but that, in the adjudicator's view, did

not excuse her behaviour, and the termination was upheld.

[106] In *Shaver*, Mr. Shaver worked in the employment insurance department. He had accessed the personal information of one of his co-owners and had disclosed it to his spouse to help their case in a dispute with that co-owner. The adjudicator decided that the termination was justified.

[107] In *Campbell*, Mr. Campbell had made many unauthorized accesses to help parents and friends. One of the factors that counted for the adjudicator, who upheld the termination, was Mr. Campbell's lack of remorse. He seemed to believe that he had acted properly, even if he had gone against his employer's rules. He regretted his actions, but according to the adjudicator, it was more for the disciplinary consequences than for the misconduct.

[108] An analysis of a termination has three steps (see *Basra*): 1) Was the misconduct proved, and did it justify a disciplinary measure? 2) Was termination excessive, based not only on the misconduct but also on the mitigating and aggravating factors that apply in the case? 3) If the measure was excessive, what is an appropriate one?

[109] The alleged misconduct in this case is twofold. First, accessing taxpayer information in the Agency's databases, and second, the grievor's invocation of her Agency employee status for personal benefit.

[110] In my view, the unauthorized accesses to the networks was well established, and the grievor admitted to it. Of course, there is a difference between carrying out research on people and then publicly disclosing their personal information, and carrying out research on a corporation and keeping the information to oneself. However, in addition to the fact that accessing the networks for personal purposes is strictly forbidden and may warrant discipline, most disturbing in this case is how the information was used. That leads to the second aspect of the misconduct, which is the intimidation and abuse of employee status.

[111] The grievor used her position as an Agency employee to intimidate Mr. Girard-Beauchamp and to obtain a personal benefit, which ultimately was the misconduct that justified the termination. In this case, using her employee status for private ends amounted to abuse.

[112] The abuse began with accessing the Agency's databases. When Mr. Girard-Beauchamp asked the grievor where she obtained all her information, she testified that she replied as follows: "[Translation] I work for the Agency." She might well assert that she did not speak those words to intimidate, but the fact is, they are intimidating, especially in a situation involving a demonstration of complex trusts and cases before the AMF.

[113] Even if I take the grievor's version as entirely true and Mr. Girard-Beauchamp's as embellished, I can find only intimidation and an invocation of Agency employee status to obtain a personal benefit. I do not know if she made threats, such as: "[Translation] Give me my price, or the Agency will investigate all your trusts that seem suspicious." It is not necessary to believe that version to view the entire situation as an intimidation session that could have discredited the Agency.

[114] The grievor looked into the company and researched it using the Agency's databases. The purpose was not, as she claims, to reassure herself as to the house sale. She already knew that the seller was a company, that there was no legal guarantee, and that the house had serious deficiencies. The purchase offer included an escape clause in the event of serious defects. The grievor testified that this would have been the fifth property she bought; she could not claim that she did not know the meaning of a conditional inspection clause.

[115] It is impossible in this context to view the meeting in the bathroom, with the web of trusts and the list of cases before the AMF and with the attempt to lower the price of the house even further, as anything but intimidation, in which the status of being an Agency employee was invoked as part of the negotiation. If not, then why mention it? Why not simply reply that she knew it all because she had searched on the Internet and did not trust a company composed of other companies? Why mention it in private, even though the list of cases before the AMF is published on the Internet? It was not about discretion or reassurance. Instead, she used Agency resources initially for research and then as a weapon to negotiate with Mr. Girard-Beauchamp. At best, no open threats were made, but a threat certainly was made by the simple fact that she mentioned all the research and added that she was an Agency employee, as part of a real estate transaction.

[116] The grievor testified that she would not let herself be intimidated. Her

resistance to intimidation is not a test. Anyone confronted in private by an Agency employee, or by someone who advertises himself or herself as one and shows the extent to which they know the person's business, would be intimidated and would view it as a threat if in addition the Agency employee said: "[Translation] Lower the price of the house you are selling by another $10 000."

[117] The grievor attempted to establish contradictions between Mr. Girard-Beauchamp's testimony, his interview during the investigation, and the inventory of facts that he prepared. The inventory of facts was not written as well as it could have been, and with all due respect for Mr. Tremblay, the report's style is not perfect. That said, the facts are consistent enough for me to find that the grievor used taxpayer information from the Agency's networks for personal purposes and that she abused her Agency employee status when negotiating for private property.

[118] The Agency is not a typical part of the federal public administration. It is responsible for the financial information of all taxpayers. Its powers over each taxpayer are enormous. Consequently, all its employees are required to scrupulously comply with the rules for using property that is entrusted to them to carry out their duties. All employees are also prohibited from using their Agency employee status in private transactions. The type of misconduct committed by the grievor was particularly serious due to the fact of the Agency's responsibilities.

[119] When the grievor was accused of conducting research on the Agency's networks, it was not only for using public property for personal purposes but also for researching confidential information entrusted to the Agency by taxpayers, against legislative assurance that it would be protected.

[120] The grievor was faulted for abusing her employee status in an attempt to negotiate with the seller. She confirmed that she said she worked for the Agency to convey to Mr. Girard-Beauchamp the seriousness of her position in the negotiations. Several actions contribute to the profile of a misconduct. She took Mr. Girard-Beauchamp aside, talked to him about the trusts that compose the company and his partner's cases before the AMF, and mentioned her Agency employee status before then offering a different amount for the house purchase. It is difficult not to find an abuse of her employee status.

[121] I find that the misconduct is proved and that it warranted discipline. It remains to be decided whether the discipline imposed was excessive. The grievor maintains that the Agency should have applied the principle of progressive discipline for an employee with 15 years of service and no disciplinary record. On that note, she relied on other decisions in which the Board determined that the discipline had been too harsh and that a reprimand should have been the employer's first step (see *Grant v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 37; and *Pronovost v. Canada Revenue Agency*, 2017 PSLREB 43). For its part, the Agency maintains that the misconduct was so serious that the termination was justified. I agree.

[122] To reach that conclusion, I rely less on the testimonies of the Agency's witnesses than on the grievor's testimony. In my view, her unawareness of the completely inappropriate nature of her negotiations for the house purchase confirmed the Agency's fears. She did not recognize the seriousness of her misconduct, and I accept that the Agency could no longer trust her; the bond of trust required for any employment relationship had been broken. The absence of a disciplinary record was a mitigating factor. However, in my view, the number of years of service constitutes a rather neutral factor. Admittedly, the grievor had worked well at the Agency for 15 years. However, after so many years, she should have been more aware of the importance for the Agency that its employees show irreproachable behaviour.

[123] A word about the *Code of Ethics.* I agree with the grievor that everyone is entitled to an opinion about documents issued by an employer. She might well have found that the *Code of Ethics and Conduct* was so lengthy (with its appendices) that no one would have had the time to read it. However, she found the time to read its section on volunteering. It would have been beneficial to read the sections on the prohibited use of Agency property for personal purposes and abusing Agency employee status. Agency employees cannot afford to ignore the principles outlined in the *Code of Ethics and Conduct*.

[124] For all these reasons, I find that the termination was justified.

2. <u>The retroactivity of the termination</u>

[125] In *Shaver*, the adjudicator found that in a case involving a suspension without pay and then a termination, the suspension was disciplinary and not administrative.

However, he also found that because the termination was retroactive to the start of the suspension, the question of reimbursing wages lost during the suspension without pay had become moot, relying on *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62.

[126] Since *Brazeau*, a termination retroactive to a suspension date has never been challenged under the *Act*. With all due respect to *Brazeau* and those that followed it, the rationale for retroactive termination in the federal public sector has never been established.

[127] In *Brazeau*, Mr. Brazeau was terminated after an investigation into wrongdoing that he allegedly committed as part of his duties. He was responsible for managing Crown contracts, and the evidence established that he had placed himself in a conflict of interest and that he had violated ethics rules applicable to awarding certain contracts. The adjudicator found that the termination was justified.

[128] When the investigation began, Mr. Brazeau's employer decided that it was prudent to remove him from the workplace, since the alleged wrongdoing was directly related to his duties. For nearly a year, Mr. Brazeau received his wages while suspended. When the employer received the investigation results, it transformed the suspension into one without pay. It relied on the seriousness of the alleged deeds to justify eliminating the pay.

[129] The adjudicator found that the suspension with pay was clearly administrative. As long as the employer had not assessed the merits of the allegations, and given their seriousness, it was indeed prudent to keep Mr. Brazeau away from work. However, according to the adjudicator, when the employer eliminated his wages, it converted the suspension into discipline. The risk had already been addressed via the suspension with pay. The new measure, based on the seriousness of the investigation's results, could be seen only as disciplinary.

[130] Thus, the adjudicator's view was that the suspension without pay was adjudicable under s. 209(1)(b) of the *Act*. However, she ended the analysis with the following sentence:

…

> ***154*** *Despite that conclusion, I agree with the respondent's submission that the grievance regarding the suspension is moot since the termination was imposed retroactively to the original date of the suspension without pay.*
>
> …

No explanation was given to substantiate this finding.

[131] Since *Brazeau*, a suspension without pay has been presumed moot if the termination was justified, and setting the termination as of the date of the suspension without pay had been presumed reasonable. However, other adjudicators had already asked the question and had reached a contrary finding. I retain from the jurisprudence of federal public sector labour law, based on a previous version of the *Act* of which the relevant provisions have stayed the same, *McManus v. Treasury Board (Revenue Canada, Customs & Excise)*, PSSRB File Nos. 166-02-8048 and 8078 (19800310).

[132] Mr. McManus, a Revenue Canada employee in its Customs Section, attempted to cross the Canada - United States border without paying taxes applicable to purchases made in the United States. At the beginning of the investigation into the circumstances, the employer suspended him without pay. It then terminated him two months later. The adjudicator dealing with the suspension and termination grievances found that Mr. McManus merited discipline for his wrongdoing but that a disciplinary suspension was sufficient.

[133] One of the questions that the adjudicator had to decide was whether Mr. McManus was entitled to his wages during the suspension, which was imposed for the duration of the investigation. The adjudicator found that Mr. McManus should receive his wages. I quote the relevant paragraphs of the decision, on pages 21 to 23, which reflect the reasoning that I am applying to the facts of this case:

> …
>
> *With respect to the first grievance, on a review of the evidence and the submissions of the parties, it must succeed. While I am satisfied that an indefinite suspension pending an investigation is disciplinary and within the Employer's statutory power, the power may only be utilized in appropriate situations. As Mr. Jolliffe noted in Gaw, (file 166-2-3292) at page 11, it is highly unusual for an employee to be relieved of his duties before a conclusion with respect to alleged wrongdoing is reached by the appropriate authority.*

> *Such drastic action may be justified where an employee is charged by police with a criminal offense, but, even in those circumstances an employer must justify why the employee cannot continue to work in his job or in some lesser capacity pending the resolution of the criminal charges in the courts. See Guenot (file 166-2-1498); Horsefield (file 166-2-1568); Phillips Cable Ltd. (1974), 5 L.A.C. (2d) 274 (Adams).*
>
> *In the instant case, the Grievor had not been charged by police with any criminal offense. The Employer did suspect that the* Customs Act *had been violated by the Grievor, but there was no suggestion that the possible offense was sufficiently grave to suspend the Grievor while a thorough investigation was made. No evidence was led within the meaning of the above cases that would justify the Grievor's suspension. The decision of Deputy Chairman Kates in Gosse (files 166-2-2967, 3055, 3060, 3285, 3314) is an example of an employee being allowed to continue in his position until a final decision was made with respect to his dismissal and, having regard to the observation in Gaw (supra), this should be the normal practice save for exceptional circumstances. Thus, the Grievor is entitled to compensation from the date of his suspension until the date of his dismissal. In this respect, I cannot concur with the reasoning of the adjudicator in Gascon (files 166-2-2938, 2945) where it was held that a dismissal and indefinite suspension form a single measure, the former taking effect on the date of imposition of the latter. In my view, the employer must justify the reasonableness of any act which has the effect of penalizing an employee. If an employer wishes to suspend an employee while a final decision is made, there must be good and sufficient cause. To hold otherwise, ignores the employee's economic interests pending the making of the final decision.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis in the original]

The adjudicator's analysis of the suspension without pay was separate from his analysis of the termination. He decided that pending the investigation's conclusion, it was unfair to deprive the employee of his wages when there was no justification for removing him from the workplace during the investigation. I fully endorse this reasoning.

[134] Another reason it seems unfair to me to deprive an employee of his or her wages during an investigation, regardless of the outcome, is the wording of the

legislation under which an employer acts. As part of the labour relations scheme in the federal public sector, under s. 12(3) of the *Financial Administration Act* (R.S.C. 1985, c. F-11), any discipline imposed by an employer must be for cause. However, until the employer explains to the employee the justification to support the discipline, it cannot be justified within the meaning of the *Act*. It cannot be retroactively justified, since the rationale provided to support the discipline, the employer's reasons, must actually exist when the discipline is imposed. In the context of imposing discipline, the reason cannot be the misconduct itself but instead the explanation the employer provided to justify the discipline imposed. Otherwise, the wording of s. 12(3) would be meaningless. When the *Financial Administration Act* specifies that the discipline must be for cause, it must be understood that it imposes on the employer the obligation to explain to the employee its rationale behind the discipline at the moment the discipline affects the grievor. That is why in the letter that it gave to the grievor, the Agency explained to her the cause supporting the termination.

[135] Thus, the employer must be able to explain the rationale that it invokes, meaning that it must have a reason at the moment discipline affects an employee. How could the reason apply retroactively? In law, it can exist only from the moment it is explained to the employee. It seems contrary to the notion of justice to recognize a legal effect of a reason before it can even be formulated. From the moment the employer is in a position to explain its rationale to the employee, it can terminate. It is the employer's responsibility at that moment to explain its rationale to the employee. Unless it can explain its reason for the discipline to the employee at the moment it affects the employee, the discipline cannot be justified within the meaning of the s. 12(3) of the *Financial Administration Act.* Logically, the employer cannot impose discipline retroactively.

[136] Therefore, I find that the grievor's termination was not justified until October 27, 2015.

[137] Since I have already found that the grievor's suspension without pay was not administrative but was unjustified disguised discipline, she is entitled to her wages and related benefits for the length of the suspension without pay, from July 10 to October 27, 2015.

C. The revocation of reliability status

[138] The issue of revoking reliability status has been raised in several recent decisions rendered under the *Act* (see *Bergey v. Treasury Board (Royal Canadian Mounted Police) and Deputy Head (Royal Canadian Mounted Police)*, 2013 PSLRB 80; *Heyser v. Deputy Head (Department of Employment and Social Development) and Treasury Board (Department of Employment and Social Development)*, 2015 PSLREB 70; and *Féthière v. Deputy Head (Royal Canadian Mounted Police)*, 2016 PSLREB 16). The Federal Court of Appeal, in the judicial review of these decisions (*Bergey*, 2017 FCA 30; *Heyser*, 2017 FCA 113; and *Canada (Procureur général) c. Féthière*, 2017 CAF 66), clearly ruled on the jurisdiction that the *Act* confers to examine the merits of revoking reliability status when it is the principal reason for a termination.

[139] The situation in this case is different. The revocation of reliability status was not the reason for the termination but occurred after it. However, it was essentially based on the same reasons. The Agency maintains that the Board does not have jurisdiction since it was purely an administrative matter. As for the grievor, she sees it as discipline or as an unlawful impediment to the Board's jurisdiction to set aside the termination.

[140] It is my view that the Board arguably has jurisdiction to examine the revocation if it could impede any reinstatement that the Board may order. It would be absurd if a reinstatement order could not be executed because reliability status had been revoked without sufficient justification.

[141] The question does not arise in this case because I find that the termination was justified. The main reason for it was the Agency's loss of trust in an employee who had accessed its databases and who had abused her employee status in an attempt to obtain a personal benefit. The revocation of reliability status seems to me closely connected to the reasons for the termination.

[142] I must say that I find it rather odd that the Agency revoked the reliability status of someone it no longer employed. Reliability status is an essential condition of employment. Once employment is terminated, it seems to me that the status is as well. This perspective would appear to confirm the grievor's argument that her reliability status was revoked for the sole reason of preventing a potential reinstatement.

[143] In any case, I do not see the need to rule on the justification of the Agency's decision to revoke the grievor's reliability status. Were she to seek another position in the federal public sector, it would be her potential employer's responsibility to determine her reliability. In this case, the Agency decided that she was no longer trustworthy, and it terminated her. I have already found that that was not excessive. The reliability status fell by virtue of the termination. I do not wish to decide anything for the future.

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

(The Order appears on the next page)

VII. Order

[145] The Canada Revenue Agency's request to substitute a redacted version of the investigation report for the full copy placed in the Board's records is denied.

[146] The Canada Revenue Agency's request to seal part of the investigation report placed in the Board's records is denied.

[147] I find that the grievor's suspension without pay was disguised discipline.

[148] I find that the grievor's termination was justified but only as of October 27, 2015.

[149] I order the Canada Revenue Agency to reimburse the grievor her wages and related benefits for the period from July 10, 2015, to October 27, 2015.

[150] I find that with the confirmation of the termination, the issue of the revocation of the grievor's reliability status is moot.

[151] I will remain seized for a period of 60 days for any issue with remitting the amounts owed the grievor under this order.

October 20, 2017.

FPSLREB Translation

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board