Files: 166-2-25992
166-2-25993

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

RUSSELL DEIGAN

Grievor

and

TREASURY BOARD
(Industry Canada)

Employer

Before: Rosemary Vondette Simpson, Board Member

For the Grievor: Dougald E. Brown, Counsel

For the Employer: Ronald M. Snyder, Counsel

Heard at Ottawa, Ontario,
January 15, 1998.

Mr. Russell Deigan's discharge and indefinite suspension grievances (Board files 166-2-25992 and 25993) were heard at adjudication by me from January 11 to 13, 1995. The grievor, Mr. Deigan, was, at all material times, employed as a Commerce Officer, CO-2, with the Bureau of Competition Policy, Industry Canada, until his suspension and discharge for disseminating certain letters about another public servant. The parties requested that the person who was the subject matter of these letters not be identified by name. She is referred to in the decision as Ms. A.

Mr. Deigan was suspended indefinitely as of the close of business June 29, 1994 and he was discharged on July 29, 1994. The letter of discharge dated July 29, 1994 and signed by James H. Bocking, A/Deputy Director, Mergers Branch, Bureau of Competition Policy, reads as follows (Exhibit E-24):

> *I am writing in regard to the issue of the preparation and anonymous dissemination of a series of letters to senior executives within the Public Service, Ministers of the Crown, and advisors within the Prime Minister's Office. These letters were discussed with you at meetings held June 21, July 6, and July 8, 1994. Pending completion of the investigation of this matter you were suspended indefinitely as of close of business June 29, 1994.*
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> *The letters in question call attention to situations involving Ms. A, the Acting General Counsel, Legal Services, Industry Canada (ex- Consumer and Corporate Affairs Unit). They are clearly intended to question her suitability for promotional opportunities, including a position within the Bureau of Competition Policy for which she was being considered, and to prejudice her chances for promotion in general.*
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> *At the meeting of June 21, I stated that if the investigation ultimately determined that disciplinary action was warranted, factors such as forthrightness and remorse would be important considerations. You categorically denied any involvement in the preparation and dissemination of these letters at this meeting of June 21. This denial was repeated at the meeting of July 6, in the face of evidence demonstrating that one letter and portions of text of other letters were found on your office computer. Your denial included the implication that another person had used your computer and that you were being unfairly blamed.*

At the meeting of July 8 held at your request, you admitted to the writing and sending of all letters, with the exception of that received by the Chairman of the Public Service Commission. You continued to deny authorship of that letter despite the striking similarities in phraseology and content to the other letters, especially that to Mitchell Sharp of April 16, 1994. By way of explanation, you stated that you had feared reprisals if Ms. A were to be put in a position of authority over you, such fear having arisen as a result of previous disputes you had had with Ms. A. It is to be pointed out that, firstly, such letters were written subsequent to a discussion you had with a senior officer in your division, who indicated that your fears were not justified, and secondly, you acknowledged at the July 8 meeting that you were aware of the option for you to move elsewhere within the Bureau in the event that Ms. A became the Deputy Director, Mergers Branch. To this extent, your alleged fear of reprisals as the basis for authoring such letters was not justified. You acknowledged the inappropriateness of your actions, you offered to apologize for your actions, and you stated you would not repeat the behaviour.

I am aware that you have had disagreements with Ms. A in the past and that complaints and grievance actions were commenced. These were ultimately settled by a signed memorandum of agreement, involving you, the Public Service Commission, Investment Canada and other parties. A condition of the agreement was that the parties would not "disclose or make public in any way, the content of this agreement or any fact or circumstances giving rise to this agreement without the consent of the other party". You clearly and inappropriately chose to violate this condition by having so disseminated these letters. Such letters span an approximate six-week timeframe, and thus could not be considered an impulsive gesture on your part.

The Bureau of Competition Policy, to effectively perform its role in the investigation and examination of business transactions which involve highly sensitive commercial information, must rely heavily on the integrity, ethical behaviour, and trustworthiness of its officers. You have irrevocably broken that bond of trust and have breached the standard of conduct expected of you by having written and disseminated these letters, by having misrepresented to Bureau management on June 21 and July 6 your involvement with respect to these letters, by having continually denied your involvement regarding the April 14, 1994 letter to the Chairman of the Public Service Commission, and by having failed to honour the agreement which was meant to resolve your differences with Ms. A and other parties.

> *Having carefully weighed your conduct in this regard, including your performance appraisals, I have concluded that your actions justify your dismissal from the Public Service for cause. Therefore, it is my decision, by virtue of the authority delegated to me by the Deputy Minister, to terminate your employment with the Public Service of Canada, effective close of business, July 29, 1994.*
>
> *You are entitled to grieve this decision.*

On hearing the evidence in the case and the oral submissions of the parties, my conclusions and consideration of mitigating circumstances were set out as follows in my decision of May 19, 1995:

> *Also at the very end of the hearing, Mr. Deigan presented to me a document prepared by him which contained a number of statements and arguments further to those made by his representative. Counsel for the employer objected to the admission of the document because it contained references to a number of matters that were not in evidence. With the knowledge and consent of the employer's counsel, I agreed to accept the document to read before ruling on its admissibility. Upon reading the document presented by Mr. Deigan, I found that it contains many factual assertions that were not in evidence. Therefore, I find that I cannot rely upon this submission.*
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> *I am left with the grievances pertaining to his suspension and discharge.*
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> *I have reviewed carefully the facts and the evidence relating to the grievor's actions that led to his suspension and discharge.*
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> *The evidence establishes that Mr. Deigan, a barrister and solicitor, wrote a series of letters of a most vindictive nature in an attempt to poison the minds of the recipients against a senior public servant. These letters were widely distributed to the Public Service Commission, some people at the Department of Justice, and even to the Prime Minister's Office.*
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> *I found Mr. Deigan to be very intelligent and there is no doubt in my mind that he knew exactly what he was doing and that he fully intended to derail Ms. A's career.*
>
> *Mr. Deigan was not honest with this adjudicator. In his testimony he claimed to be motivated by public interest*

and that he did not intend to smear the reputation of Ms. A. He stated that he was simply inviting the recipients of the letters to check into the facts. On the one hand, he said that he had apologized to his employer but expressed resentment that management had considered his apologies to be insincere; on the other hand, he continued throughout his testimony to justify his actions and at one point admitted that he considered himself to be the real victim.

The letters themselves contained false and misleading information. For example, the letters imply widespread complaints against Ms. A. In his cross-examination, however, Mr. Deigan finally admitted that he was the only one involved in making these complaints and that despite investigations not one complaint had been resolved in his favour.

On behalf of the grievor it was submitted that he had been encouraged through an "Upward Feedback" programme in his Department to evaluate his superiors' performance. His representative compared the grievor's actions in writing these anonymous letters to this "Upward Feedback" programme and implied that these actions were along the same line. I find that there is no comparison between the departmental programme in which the information was discreetly handled and the actions of Mr. Deigan for which he was discharged.

Although evidence was introduced of the "Upward Feedback" programme, Mr. Deigan himself in his evidence did not indicate his reliance on it or indicate how it may have affected him. In any case, the "Upward Feedback" programme of the Department was not designed to have the information go outside the Department. It was an opportunity for employees to evaluate their superior officers in a confidential manner and the evaluation was for the use of the latter to be considered by them. It was up to these officers to decide if they wished to use it to modify their methods of dealing with the employees who were under their sphere of influence. The way Mr. Deigan disseminated his information on Ms. A bears no resemblance to the "Upward Feedback" process.

When his activities were first discovered by his employer, he initially made blanket denials. Then some time later he admitted writing all the letters but one, the letter to Mr. Giroux, Chairperson of the Public Service Commission. Later he admitted writing this letter and explained his denial of it on the fact that several lines had been whited out. Despite the omission of these few lines, the letter is quite

recognizable as being almost identical to the others. His excuse in continuing to deny it is not acceptable as truth.

There is no doubt that he is guilty of writing the letters. He has admitted doing so. In his testimony, although he offered to apologize to anyone the employer might suggest, he showed no remorse and no appreciation for the impropriety of his actions.

Mr. Deigan's allegation in his letters that Ms. A has a "history of harassing staff" is a statement that I find to be false based on his evidence.

His own complaint about her integrity and the falsification of documents which he made to the Barreau du Québec was not upheld. He was aware that his letter had caused an investigation to be made. He had followed up his initial complaint with telephone conversations with the syndic of the Barreau in Montreal. Yet, it was his evidence that he had not been given any indication that his complaint had been found to have any foundation.

This is true also of his complaint to the Honourable Kim Campbell. He knew that that matter had been investigated and the investigation was long over with and his allegations against Ms. A had not been upheld.

I do not accept Mr. Deigan's evidence that the letters about Ms. A were motivated by public interest. He made some false accusations and a number of other accusations that he was unable to support. In some letters he wrote these accusations in a manner designed to mislead the reader into believing that the writer was a disinterested third party simply reporting on the concerns of others. The tone of the letters themselves belie his stated intention "to be fair".

Mr. Deigan stated in evidence that he believed that disclosure of details of previous disputes with Ms. A was not in breach of the memorandum of agreement (Exhibit E-2) because he believed that agreement to be void. I am not in a position to make a finding on the legal status of that agreement. Regardless of the question of breach of that agreement, Mr. Deigan, in writing and disseminating these anonymous letters containing false and misleading information about a fellow public servant, engaged in very serious misconduct. In lying and continuing to lie for some time to his employer about his involvement, he aggravated the seriousness of his misconduct. Although he did not give out names, he suggested to his employer that other employees might be the authors of the letters in question

> *thereby potentially involving them in the investigation. Mr. Deigan showed no remorse at the hearing. Although he admitted in cross-examination some of the misleading aspects of his letters, he continued to justify his right to send them as being in the public interest.*
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> *In mitigation I must consider that Mr. Deigan is a long service employee with an unblemished disciplinary record until the matter of these letters arose. Notwithstanding the seriousness of his acts of misconduct, I believe that discharge is too severe a penalty under the circumstances.*
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> *However, I am of the opinion that it would be inappropriate for me to order the return of Mr. Deigan to his former position, the bond of trust between employer and employee being irretrievably broken by the grievor's actions.*
>
> *Accordingly, I award Mr. Deigan compensation in lieu of reinstatement equal to six months' pay at the rate he was receiving at the time of his discharge. In awarding this amount, I have taken into account the following factors: the seriousness of the grievor's misconduct; his previously unblemished record; the fact that he is a long service employee; his age and the fact that it may be difficult for him to re-establish himself in employment.*
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> *For all these reasons, the grievance against Mr. Deigan's indefinite suspension is dismissed; the grievance against his discharge is allowed to the extent indicated above.*

Mr. Deigan applied for judicial review of this decision (Court file T-1365-95). His application was allowed on November 12, 1997, and the matter was referred back to me under the following directions:

> *Accordingly, I would refer the matter back to the same Adjudicator for her to either consider the relevant portions of the written arguments or to hear full oral arguments.*

I decided to give the parties an opportunity to make full oral arguments. Accordingly, a hearing was held on January 15, 1998 at which I also invited counsel for Mr. Deigan to refer to any relevant portions of the written arguments submitted by Mr. Deigan at the original hearing. Counsel for Mr. Deigan stated that he would not be referring to Mr. Deigan's written arguments; he would make an oral submission only.

The following is a summary of the oral submissions of the parties:

Argument for the Grievor

Counsel for the grievor acknowledged at the outset that the letters should not have been sent. The writing of anonymous letters is a kind of behaviour that tends to produce strong reactions of moral disapproval and condemnation. These kinds of reactions are a given with most people. However, no actual harm resulted from the grievor's actions. The appointment of Ms. A, which he sought to derail by his letters, went ahead. There is also no evidence that any of the recipients of the letters gave any credence to the allegations made in them.

Since the letter-writing spanned a period of six weeks, Mr. Deigan's actions cannot be excused as a momentary flare-up. However, counsel for the grievor invited me to find, in the very length of the time period that Mr. Deigan was involved in the letter-writing, evidence of an unhealthy preoccupation with the possibility of the appointment of Ms. A. There is a reference in a letter from Mr. Darroch, Director of Security Services, to Mr. Howard, the Departmental Security Officer, to the effect that Mr. Deigan was in an agitated state. Counsel argued that Mr. Deigan was "preoccupied to the point of obsession" by Ms. A with whom he had had some earlier disputes. However, counsel noted that no medical evidence had been adduced to this effect.

No evidence has been addressed to show that during the period of time that Mr. Deigan was writing the letters his handling of client information was affected. If he was reinstated, he could continue to capably discharge his duties as he did for many years.

He had one blind spot and that concerned Ms. A. Despite this almost feverish obsession, his handling of client third party information was unaffected. If he was reinstated, he would continue to be capable of carrying out his duties as he did before.

Counsel for the grievor referred to the decision in *Fraser* (Board file 166-2-12721) as an authority for dealing with the question of an employee's impairment in carrying out his duties.

The fact that the grievor did not immediately admit authorship of the letters when first confronted should be considered in light of the fact that three

representatives of the employer were present and he was alone without union representation. It is true that Mr. Deigan was offered union representation which he declined; however, the atmosphere was such that there was no one in whom he could confide. After the second meeting, when he had union representation, Mr. Deigan admitted authorship of most of the letters. Counsel urged that I give significant weight to these admissions.

Counsel commented on the fact that, whereas one of the employer representatives considered Mr. Deigan's apology in the meeting described in Exhibit E-19 to be insincere, there is no reference to that conclusion in the notes of the meeting. There is nothing in the notes of the meeting to support the conclusion that Mr. Deigan was insincere.

The letter of discharge refers to a breach of a non-disclosure clause of a settlement agreement. Even if there were such a breach of a confidentiality clause, there is no evidence that it affected his actual handling of confidential information at the Bureau of Competition Policy.

Considering these factors and the grievor's 13-year clean record, it was urged that a lesser penalty than discharge be imposed. Three cases were referred to: *Re Vancouver Community College and Vancouver Municipal and Regional Employees' Union* (1994), 44 L.A.C. (4th) 418; *Re Saint John Shipbuilding Ltd. and Marine & Shipbuilding Workers, Local 3* (1992), 26 L.A.C. (4th) 361; *Martin v. Regina Community Legal Services Society* (Batten, J), 1981, 13 Sask. R. 50.

Counsel for the grievor urged that, should I find discharge excessive, the presumptive remedy should be reinstatement. The bond of trust is not irretrievably broken. These are often just words used by the employer. Undoubtedly, Mr. Deigan would have to earn back the full trust of his employer, but he should be given the opportunity to do so.

Additionally, the grievor's testimony and deportment at the hearing should not preclude reinstatement. A hearing is adversarial by nature. There are many cases before the Board where adjudicators have been highly critical of grievors and yet have reinstated them.

Mr. Deigan could be reinstated and transferred to a position not directly under Ms. A. Conditions could be imposed on his reinstatement which could include such matters as an apology and acknowledgment of wrongdoing, not just to the employer but to Ms. A also. It could include counselling to help the grievor get a better insight into why his actions were so negatively received by others and also to assist him in his further abilities to get along with his co-workers and work with others. Although Mr. Deigan knows full well that if he is reinstated and there are further problems he could face disciplinary consequences up to discharge, this could be made clear to him in writing.

Counsel for the grievor also referred to the following cases: *Re Corporation of City of Ottawa and Canadian Union of Public Employees, Local 503 (Roy)* (1993), 34 L.A.C. (4th) 177; *Fraser and Public Service Staff Relations Board* (1985), 23 D.L.R. (4th) 122; *Re Treasury Board (Employment & Immigration) and Quigley* (1987), 31 L.A.C. (3d) 156; *Amarteifio* (Board file 166-2-25829); *McGoldrick* (Board file 166-2-25796).

Argument for the Employer

The grievor wrote a number of very vindictive letters for the sole purpose of derailing Ms. A's career. The letters were false and misleading and he was aware of that. He continued to deny that he had written the letters which tended to exacerbate the seriousness of the misconduct. There was a complete absence of any true remorse. Even to the date of the hearing, he felt that he was the victim in this case.

In reality, Mr. Deigan has engaged in very serious misconduct and it would be inappropriate to return him to his position because, as pointed out in the evidence of Mr. Bocking, the level of trust between Mr. Deigan and his employer has been irretrievably broken. Trust is a necessary ingredient of the employer-employee relationship. At the Bureau of Competition Policy, much sensitive commercial information is exchanged and the employer must be able to rely heavily on the integrity, ethical behaviour and trustworthiness of the officers. No facts have changed since January 1995 and no submission or argument will alter the findings of fact in 1995.

The only evidence that Mr. Deigan was acting in a compulsive manner or was in a state of agitation was in a letter from the Director of Security at Justice Canada.

There was no direct evidence of this. Indeed, he had only heard of Mr. Deigan's agitation. At no time did the grievor allege that he was agitated.

Regarding the question of Mr. Deigan's admission of writing the letters after consulting with his union representative, counsel for the employer pointed out the grievor's failure to admit writing to Mr. Giroux for a long time after he admitted to the other letters. He also referred to my findings in my decision that Mr. Deigan showed no remorse or appreciation of the seriousness of his actions.

Mr. Snyder reviewed the cases submitted by the grievor and distinguished them. He referred me to the following case: *Grahn v. Canada* (1987), 91 N.R. 394.

Reasons for Decision

Counsel for the grievor is not disputing that the grievor's behaviour was reprehensible and deserving of some disciplinary sanction. However, he did refer to some additional mitigating factors which he asked that I consider. He also suggested that the grievor could be reinstated on conditions.

I have considered the evidence adduced and the arguments of the parties at the original hearing as well as the additional arguments of the parties and have reached the following conclusions.

Mr. Brown argued that Mr. Deigan's mental state, at the time of the writing of the letters, should be considered as a mitigating factor. However, as Mr. Brown himself acknowledged, there is no medical evidence suggesting this.

I have also considered Mr. Brown's submissions regarding the weight that I should place on the fact that Mr. Deigan admitted to writing the letters. I recognize that it is true that he did admit to the writing of most of the letters after his initial denials. This does not constitute a strong mitigating factor, however. His initial denials were vehement and indignant. In the meeting of June 21, 1994, he rebuked management for investigating him saying to Mr. Bocking: "This is ridiculous Jim. You should be ashamed of yourself." Even at a subsequent meeting of July 6, at which he had union representation, he continued to deny authorship of the letters when he was shown copies of them, despite the fact that there were obvious similarities, including some identical passages. It was only after the meeting that the

union representative called management and indicated that Mr. Deigan had something to say and asked for another meeting.

Mr. Deigan's long service and clean disciplinary record must be considered in mitigation as well as the fact that it may be difficult for him to re-establish himself in employment. In light of these mitigating factors, and notwithstanding the seriousness of his acts of misconduct, I believe that discharge is too severe a penalty under the circumstances. However, I remain of the opinion that it would be inappropriate for me to order the return of Mr. Deigan to his former position as the bond of trust between the grievor and his employer has been irretrievably broken by the grievor's action. I still consider it appropriate to award Mr. Deigan six month's compensation in lieu of reinstatement at the rate he was receiving at the date of his discharge.

Nothing presented in Mr. Brown's arguments has persuaded me that Mr. Deigan should be reinstated, even under conditions. Here again the lack of evidence pertaining to a medical state of agitation or compulsiveness makes the framing of conditions impractical, if not totally inappropriate to the circumstances. Furthermore, even if I had the jurisdiction to order that Mr. Deigan be reinstated in another position, I consider that such an order would not be appropriate in the circumstances of this case.

For all these reasons, the grievance against Mr. Deigan's indefinite suspension is denied and the grievance against his discharge is allowed to the extent indicated above.

Rosemary Vondette Simpson,
Board Member

OTTAWA, March 31, 1998.