File: 166-2-27804

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

MARISSA FONTAINE-ELLIS

Grievor

and

TREASURY BOARD
(Health Canada)

Employer

Before: Joseph W. Potter, Board Member

For the Grievor: David Landry, Public Service Alliance of Canada

For the Employer: Ronald Snyder, Counsel

Heard at Winnipeg, Manitoba,
July 22 to 25, 1997 and December 1 to 3, 1997.

The grievor, Ms. Marissa Fontaine-Ellis, was employed as a programme officer (PM-03) in the Medical Services Branch of Health Canada, in Winnipeg, Manitoba. She has filed a grievance dated January 26, 1996 dealing with the termination of her employment effective January 5, 1996 as a result of a letter she had written on June 6, 1995. The grievance was referred to adjudication on April 14, 1997.

A request for the exclusion of witnesses was made and granted.

Background

Ms. Fontaine-Ellis commenced working for Health Canada in 1984 as a stenographer. She progressed to a programme officer level 3 position effective November 1991. Her job title was Regional CHR (Community Health Representative) Consultant (Exhibit G-1). Among other duties, she provided direction and recommendations to First Nations communities on matters relating to CHR training; as well she advised on family violence programs again to First Nations communities in the region. In total, there were 61 Bands in the region. She testified she is a member of the Sagkeeng First Nation. As a PM-03, she reported to Mr. Patrick Nottingham, Director of Community Based Health Services. Mr. Nottingham testified that he is a metis, and he has responsibility for four programs: the National Native Alcohol and Drug Abuse Program (NADAP); the Indian and Inuit Health Program; the Community Health Consultation Program; and the Transfer of Control Program. He testified he spends about 80% of his time travelling to the various Bands in the region and interacting with the Council Chiefs. His supervisory/subordinate relationship with the grievor commenced about October 1989 and continued except for various periods of time from January 1993 onward when Mr. Nottingham was on educational leave pursuing a Masters of Public Administration degree.

In June 1993, Ms. Fontaine-Ellis filed a personal harassment grievance and in July 1994, she filed a sexual harassment grievance. Both of these were filed against her supervisor, Mr. Nottingham. The Harassment Investigation Report (Exhibit E-35) is dated March 1994 and covers some 15 allegations over a period of time. None of the allegations were substantiated by the investigation team; however, needless to say the working relationship was strained, to say the least.

A sexual harassment complaint was also investigated (Exhibit E-36). The complaint followed an incident which took place on May 17, 1994. It is not necessary to detail the events other than to note that the investigation report was unable to draw any final conclusion with respect to the incident as only Mr. Nottingham made himself available to be interviewed. The complainant, Ms. Fontaine-Ellis, did not come forward to be interviewed.

On or about June 13, 1994, Ms. Fontaine-Ellis received a copy of a memorandum dated June 1, 1994 from Mr. Nottingham to Financial Services asking that $98,400 be transferred from the CHR budget to the NADAP budget (see attachment to Exhibit E-3). Mr. Nottingham testified this was an administrative action only but that it was the first time such action had been taken. This money represented 100% of the CHR program for which the grievor was responsible and she testified she immediately wrote to Mr. Nottingham expressing her displeasure and concern with this action (see further attachment to Exhibit E-3). The letter reads, in part (as written):

> *This is one of several issues where as a supervisor your thinking and objectivity are clouded by your malicious intent towards me, such character and actions are unbecoming of any supervisor/manager in the Public Service.*

On June 22, 1994, the grievor received a memorandum (Exhibit G-6) from the Regional Director, Mr. Pascall Bighetty, returning a training form and two travel authorization forms which she had submitted. All three forms had initially been approved by Mr. Bighetty but upon reviewing them Mr. Nottingham testified he felt the training could be obtained elsewhere on a more cost effective basis and he stated as much to Mr. Bighetty. Ms. Fontaine-Ellis was instructed to discuss the forms with her supervisor.

On June 27, 1994, the grievor commenced taking sick leave and in fact has not been back to work since. Her sick leave credits expired towards the end of July 1994 and she testified she then applied for sick leave benefits through UIC, which she received for some 14-15 weeks. Following this, she went on welfare.

Ms. Fontaine-Ellis testified that in June 1995 she received two final level grievance replies to the sexual harassment allegation and to another allegation of harassment and abuse of authority. Both grievances were against Mr. Nottingham and both were denied. The grievor testified that she felt this was a continuing pattern of denial and that management was not listening to what she was saying. She testified she was pushed to the limits and was under a great deal of stress, and under medical care at the time as well.

The grievor testified that following receipt of the above referenced grievance replies, she composed a letter dated June 6, 1995 and addressed it to the Assembly of Manitoba Chiefs, to the attention of Grand Chief Philip Fontaine, with a copy to the Sagkeeng First Nation (Exhibit E-3). As the letter was the basis for the termination of Ms. Fontaine-Ellis' employment, it is useful to reproduce it here exactly as written:

> *Assembly of Manitoba Chiefs*
> *500 - 286 Smith Street*
> *Winnipeg, Manitoba*
>
> ***ATTENTION: Grand Chief Philip Fontaine***
>
> ***Bear in mind, the Supreme Court of Canada has unequivocally stated that governments should not be acting in an adversary manner towards First Nation peoples.***
>
> *I have worked as a federal employee with the Department of Health Canada, Medical Services Branch, within the Community Based Health Services (C.B.H.S.) unit for over 10 years.*
>
> *My designation and responsibility as a Program Manager (Regional C.H.R. Consultant) within government policy was to liaise and represent the interests and concerns of the various First Nations communities within Manitoba Region through the reporting lines. In approaching my job, I portrayed a competent, honest, forthright, and above-board attitude in dealing with the programs I was responsible for and the First Nations communities I served. My appraisals from all supervisors were excellent, prior to Patrick Nottingham joining the unit and becoming the supervisor/Director of C.B.H.S.*

> *However, as Patrick Nottingham became the supervisor and Director of the C.B.H.S. unit, he eventually became discontented with my honesty and above-board attitude, I displayed working with the communities and First Nation peoples. As a result, Patrick Nottingham tried desperately to get me out of the unit by harassing and abusing me and undermining the programs I was responsible for (C.H.R. Program and Family Violence Initiative).*
>
> *Officially, for approximately 2 years the harassment, abuse of authority, and sexual harassment inflicted upon me by Patrick Nottingham is perpetuated, as the department continues to distort, cover-up, and deny the conduct of Patrick Nottingham in the face of factual evidence and their own policy.*
>
> *The conduct of Patrick Nottingham has caused me to be attended to by a Physician, Psychiatrist, and Therapist, who all stated that what I was experiencing from my supervisor at work was detrimental to my health, safety, and well-being. They further recommended that I remain off work until the matter is fully and properly resolved.*
>
> ***Presently, Patrick Nottingham and the department has forced me to be at home, off work without pay, living on welfare.***
>
> *Those who are not fully aware of Patrick Nottingham, be assured that he is nothing more than an Aboriginal of convenience, who conforms to the status quo and wears his Aboriginalness on his sleeve when appropriate for his own advancement. There is no doubt that he is now positioning himself for the Regional Directorship, as it is transparent that the department/government would like him in that position to fulfil their own agenda.*
>
> *Given no choice, while I seek political action and assistance from the Assembly of Manitoba Chiefs, not only because of my situation but for all First Nation peoples concerned, I also anticipate taking the matter to the courts and the media.*
>
> *A prompt response would be very much appreciated.*

Mr. Nottingham testified that towards the end of June 1995 he received a number of calls from various Tribal Council representatives asking what was going on in his area as they had received a package of information (Exhibit E-3). The package contained the June 6 letter signed by the grievor as well as a one-page document signed by the grievor's husband, Mr. Hubert Ellis, together with the June 1, 1994

memorandum (cited earlier) transferring $98,400 from the CHR budget to the NADAP budget together with the June 13, 1994 reply memorandum from Ms. Fontaine-Ellis (also cited earlier). The one-page document signed by Mr. Ellis contained disparaging remarks against Mr. Nottingham; consequently, Mr. Nottingham testified he filed a suit for libel against both the grievor and her husband. In October 1995, an order was given by The Honourable Mr. Justice Schwartz for an Interlocutory Injunction restraining both Marissa Fontaine-Ellis and her husband from publishing defamatory statements concerning Mr. Nottingham (see Exhibit E-5).

Mr. Nottingham testified that after Exhibit E-3 was sent out, many First Nations people stopped calling him and meetings that had been previously set up were cancelled. As it affected his work, the Associate Regional Director, Mr. Keith Cale, was informed of the events and shown the package of information. In order to attempt to diffuse the situation, Mr. Cale sent out a letter on July 7, 1995 (Exhibit E-10) to Grand Chief Phil Fontaine and numerous Tribal Council representatives informing them that an investigation had been conducted into the alleged harassment. The letter stated there were no grounds to support the allegation. In addition, the letter stated the Department did not support the views of Ms. Fontaine-Ellis or her husband.

Mr. Cale then wrote to Ms. Fontaine-Ellis on July 14, 1995 (Exhibit E-11) asking to meet with her on July 20 to discuss the contents of the letter. Ms. Fontaine-Ellis replied on July 19 (Exhibit E-12) asking that the meeting be postponed to enable her to retain the services of a lawyer. Mr. Cale responded on July 20 (Exhibit E-13) agreeing to the postponement to either August 10 or 17. A copy of this correspondence was forwarded to the representative of the bargaining agent, Mr. Ray Strike.

Mr. Cale testified that based on the information he had he felt the damage had been done by writing the June 6 letter and he believed Ms. Fontaine-Ellis could not return to the workplace. Nevertheless, he wanted the meeting to occur in order to hear the grievor's side of the story and to inquire into what caused her to write the letter.

The meeting took place on August 17 as scheduled. Present were the grievor, her husband, their lawyer (Mr. Hoffman), Ms. Nancy Masarsky (Human Resources Advisor) and Mr. Cale. In his testimony Mr. Cale stated he asked the grievor why she

wrote the letter and she told him she had tried everything else and simply felt she had no where else to turn except the First Nations Chiefs. In her own testimony, the grievor also stated she believed she was writing the letter as a private citizen and she stated this to Mr. Cale as well. Mr. Cale testified he asked her if she would write such a letter again and the reply he received was that she would not if she was working but would if not working. In direct testimony, when asked if she would do the same thing again, the grievor ultimately replied that she would not and stated it was the only letter she wrote, even after receiving the letter of discharge from her employment.

Mr. Cale testified that there was considerable discussion about the other contents of Exhibit E-3, but the meeting ended with Mr. Cale thanking them for the information and stating he hoped to get back to them in a couple of weeks.

On September 18, 1995, the grievor sent Mr. Cale a letter (Exhibit E-20) stating she was still awaiting a response to the August 17 meeting. Included in the letter was the following paragraph:

> *Furthermore, the way you greeted me prior to the meeting, in a Nazi manner, clicking your heels and saluting me, was uncalled for and I was offended by it.*

Mr. Cale testified he was dumfounded by the letter. He received another letter dated September 20, 1995 from Mr. Ellis (Exhibit E-21) alleging, among other things, the same action.

It is important here to note that Mr. Cale testified that, while he has limited vision, he is considered legally blind. He stated, however, it would not be in his nature to greet someone in this fashion.

It is safe to say that Mr. Cale felt offended by the allegations of both the grievor and her husband. He testified he may have raised his hand to wave to them as they came into the meeting but nothing more. In any event, he called Mr. Hoffman to set up another meeting and they agreed to meet on October 2. Mr. Cale testified that at the meeting he told Mr. Hoffman the grievor could not return to her position but an offer was advanced by Mr. Cale to avoid termination. It essentially involved the grievor getting a medical assessment and the Department actively trying to market her to other federal departments. If this failed, Mr. Cale testified he stated they would

have to terminate her employment. The meeting ended with Mr. Hoffman indicating he would relay the information to Ms. Fontaine-Ellis and get back to him.

On October 4, 1995, Mr. Cale sent the grievor a letter (Exhibit E-22) saying the matter had not yet been decided and was still under consideration. A copy of the letter was sent to the grievor's lawyer. On October 10, the grievor replied (Exhibit E-23) stating that Mr. Hoffman no longer represented her and in fact had been removed from her case on September 8. Therefore, the letter stated, the meeting of October 2 "... amounts to a violation ...". Mr. Hoffman wrote to Mr. Cale on October 12 (Exhibit E-24) confirming the fact he no longer was acting for Ms. Fontaine-Ellis. Mr. Cale testified that when he then became aware Mr. Richard Beamish was the newly appointed lawyer for the grievor, he wrote to Ms. Fontaine-Ellis on October 31 asking for confirmation of this (Exhibit E-25). That same day, Mr. Beamish wrote to Mr. Cale advising that he was representing the grievor and inquiring as to what alternative employment positions were available for Ms. Fontaine-Ellis in order to resolve the situation (Exhibit E-26). On November 16, 1995, Mr. Cale met with Mr. Beamish to discuss a possible resolution. The substance of the discussion was confirmed in a letter of November 17, 1995 from Mr. Cale to Mr. Beamish (Exhibit E-30). The letter states, in part:

> *Health Canada would like to try to reintegrate Marissa in some other Federal Public Service Department other than Health Canada. In order to attempt this, we would require the following:*
>
> *1) Marissa would have to undergo a complete "Back to Work" assessment to determine her fitness for work, including the identification of any possible limitations;*
>
> *2) Marissa would have to demonstrate a positive attitude toward a redeployment including such things as cooperating with Human Resources to update her resume and preparing herself for any interviews.*
>
> *Should Marissa agree to these stipulations and work with us to try to redeploy her, we will make every effort, without guarantees, to find her alternative employment commensurate with her skills and abilities elsewhere in the Public Service.*

Under cross-examination, Mr. Cale agreed it was not stated in the letter that a failure to resolve the matter along the proposed lines would result in termination. However, Mr. Cale did testify that this was stated to the grievor's lawyer.

By December 20, Mr. Cale had still not heard from Mr. Beamish about the proposed resolution; therefore, he wrote him another letter a copy of which was sent to the grievor (Exhibit E-31). The letter stated that Mr. Cale had reached a conclusion as to the appropriate action he must take for the June 6 letter and this conclusion would be implemented on January 2, 1996 if a formal reply to the offer was not received. Again under cross-examination, Mr. Cale agreed he did not state that the conclusion he had arrived at was termination.

As nothing further was received either from the grievor or her counsel, a termination letter was drafted on January 2, 1996 (Exhibit E-32). It states:

> *We met on August 17, 1995 to discuss the matter of your formal communication of June 6, 1995 with the Grand Chief, Philip Fontaine regarding a "cover up by the Department" of alleged harassing conduct perpetrated upon you by your supervisor. In your letter to the Grand Chief, you claimed that the "Department and its management team", in the person of Mr. Nottingham, have forced you to be at home, off work, without pay, living on welfare. You further contended that the "... Department/Government would like him [Mr. Nottingham] in the position [Regional Director] to fulfil [its] own agenda".*
>
> *With respect to your original allegation of harassment and abuse of authority in the work place complaint, this matter has as you are aware been duly investigated and based on the evidence, a determination was made that your complaint was unfounded.*
>
> *Your subsequent decision to refer your perceived unresolved matter to the Assembly of Manitoba Chiefs for the purpose of gaining its support and intervention was in my opinion totally improper. I quote*
>
> > *"... political action and assistance...not only because of my situation but for all First Nations peoples concerned".*
>
> *I was very much concerned regarding your decision to air your criticism and perceived mistreatment publicly and of your stated intention to pursue the matter with the media.*

> *You certainly were aware that you had other internal avenues of redress available and deliberately chose not to pursue them.*
>
> *My continued investigation into this incident revealed that you did not deny sending this letter to Grand Chief Fontaine, that you refused to recognize that your conduct was totally inappropriate and that you demonstrated no remorse in terms of your involvement. In fact, at your disciplinary hearing, you stated that you felt it was your right, as a private citizen, to communicate with whomever you wished because you were on leave without pay from your position. I do not share your opinion. Employees who are on leave continue to be bound by the policies of the employer and should not impair their future ability to re-engage in the department/client relationship nor bring disrepute on the Employer.*
>
> *Based on my assessment of the incident, I have determined that your behaviour constitutes gross misconduct. In reaching this conclusion I have taken into consideration: your failure to recognise that your action was totally inappropriate; your lack of contrition and my determination that you have compromised your ability to render services as a Program Manager in Aboriginal Communities. As a consequence, I am of the opinion that you are no longer fit for further employment with Medical Services Branch.*
>
> *By virtue of the authority contained under section 11(2) of the Financial Administration Act, you are hereby terminated for cause from the Public Service effective at the close of business on January 5, 1996.*
>
> *You have the right to grieve this decision.*

Mr. Cale testified that because he was still hopeful a response would be received from the grievor he did not send the letter out on January 2. The following day the grievor sent Mr. Cale a letter (Exhibit E-33) informing him Mr. Beamish was no longer representing her interests. Mr. Cale wrote to the grievor on January 5 (Exhibit E-34) and extended the deadline for a reply to his November 17 letter to January 8. At that time, Mr. Cale stated he intended to finalize the matter. He heard nothing by January 8 and consequently he sent out the letter of termination.

In cross-examination, Mr. Cale reaffirmed the fact that the grievor was terminated solely for the June 6 letter she wrote, and not because of any of the documents written and distributed by her husband.

In cross-examination, Mr. Cale was asked about a series of letters written by the grievor's husband to both the Deputy Minister and Minister of Health together with replies (Exhibit E-8). Mr. Cale's attention was drawn to a letter dated October 28, 1994 from Michèle S. Jean, Deputy Minster, Health and Welfare Canada, which stated, in part:

> *With respect to the efforts taken by management in seeking out a mediator to help the parties reach some sort of an understanding, I find this to be a very positive step, and have asked my officials to work towards that end. This mechanism can be a viable and valuable vehicle for bringing individuals together. To this extent, I would encourage your wife to show her support for this process by fully participating.*

Mr. Cale testified he was not aware of any mediation efforts made to resolve the issues.

Also in cross-examination, Mr. Cale testified he was aware the grievor's appraisals reflected a fully satisfactory (or superior in one case) rating from 1986 to 1993 (Exhibit G-10). He also testified these were the only appraisals ever done on the grievor. With respect to a disciplinary record, Mr. Cale testified, again in cross-examination, that the grievor had not received any discipline whatsoever in her 10-year employment history. Mr. Cale stated that it was as a result of these factors that a resolution was being sought rather than immediate termination. Furthermore, Mr. Cale testified that, because Ms. Fontaine-Ellis had been doing a good job, he felt there was a good chance she could do a good job elsewhere. That, Mr. Cale testified, is why he sought to market her elsewhere rather than simply let her go.

Ultimately, however, Mr. Cale stated the grievor did not respond positively to the offer of resolution and the Department was left with no choice but to terminate Ms. Fontaine-Ellis' employment.

I also heard testimony from Ms. Marilyn MacKenzie whose curriculum vitae was submitted for the purposes of establishing her as an expert witness (Exhibit G-17). I indicated I would reserve my determination on this matter. She is a consultant specializing in harassment and discrimination in the workplace. Mr. Snyder objected to the admissibility of the evidence of Ms. MacKenzie as he said it was not relevant

and could be prejudicial to the employer. I indicated I would permit her to testify and determine what weight, if any, would be accorded to her testimony.

Ms. MacKenzie testified that the grievor had been referred to her for counselling starting in May 1996 and she has seen her some 33 times. During the initial visits, Ms. MacKenzie testified that the grievor was very upset, depressed; she cried and suffered emotional pain. However, progressively she has improved through, in part, the formulation of short-term goals.

Under cross-examination, Ms. MacKenzie stated she had no notes of the 33 sessions other than an initial session and these were introduced as Exhibit E-43. When I asked Ms. MacKenzie what the likely effect would be of putting the grievor back in her position, if that was the ultimate decision, she replied that the grievor would be committed and ready to work. However, she stated she did not believe it would be fair to either the grievor or her supervisor to have the same reporting relationship in the future. Previously, Mr. Nottingham had been asked a similar question by counsel for the employer to which he replied he felt it would affect greatly his ability to carry out his functions. When the grievor was asked this question in cross-examination, she stated it would be uncomfortable for her and she did not see herself reporting to Mr. Nottingham.

In order to avoid the necessity of having to call upon the grievor's medical doctors to testify, the parties submitted to me, by agreement, Exhibit G-18 which represented personal notes taken by Dr. R. Mahay with respect to some seven visits by the grievor commencing June 28, 1994 and ending on June 15, 1995. Also contained in the exhibit was a letter from Dr. K. Ford who saw the grievor on August 24, 1994 and a letter from Dr. M. Mysore who saw the grievor on March 1, 1996. The exhibit then goes on to state:

> *The evidence tendered in respect of this Exhibit is for the purposes of demonstrating what Dr. R. Mahay would stipulate as to his observations and treatment in respect of the Grievor.*
>
> *This evidence, however, is not tendered for the purposes of establishing or suggesting that the Grievor's letter of 6 June, 1995 (Exhibit E-3) was as a result of medical, physical or psychological impairment.*

Argument for the Employer

The employer's counsel stated that the grievor circulated a libellous letter against her supervisor and the Department. For this action, counsel stated, the employment relationship can not continue. The recipients of the letter were large portions of the Department's clientele, including various Tribal Councils, Council Chiefs and the Sagkeeng First Nation. Counsel argued the letter was in reality a campaign of defamation on the part of the grievor to discredit her supervisor and the Department.

Counsel urged me also to have regard for the various handbills signed by Mr. Ellis which contained other disparaging remarks about Mr. Nottingham. Counsel stated these other documents went to the issue of mitigation and the evidence suggested the grievor was complicit in their creation. He stated that the grievor had to have known these other documents were being distributed and would have a further negative effect on the mandate of the Department in working with the Tribal Councils.

Furthermore, he argued, given the strained relationship that existed between the Federal Government and the Natives, and given the very important role the Department played in delivering health programs and trying to negotiate the devolution of these programs to the Natives, the grievor placed the Department in a precarious position.

Counsel argued that notwithstanding the letter Mr. Cale wrote in attempting to limit the damage (Exhibit E-10), Mr. Nottingham observed he was being avoided by the clientele of the Department. Counsel stated this was a case of nothing more than a disgruntled employee who could not accept that her allegations of sexual and personal harassment were being dismissed by the Department.

The employer's counsel also argued the grievor's credibility was in question as evidenced by her evasiveness in responding to questions on the witness stand. He suggested her testimony was given on the basis of having her look for the "best answer, not the right answer."

Counsel also argued that there was no medical evidence to suggest that some condition led the grievor to write the letter. In fact, counsel stated, Exhibit G-18, which was a document drafted by consent of each party, contained a stipulation on the first page that no medical condition caused the letter to be written. Her judgement, in other words, was not impaired.

Counsel argued that the Department had been prepared to try to reintegrate her into some other area in the Public Service if she co-operated (see Exhibit E-30). It was the lack of a positive response which ultimately forced the employer to terminate her employment.

In the first alternative, counsel stated that if I believe the grievor should not have been terminated, pay in lieu of reinstatement should be considered. In this vein, I was referred to the decision in *Lutes* (Board file 166-2-26706).

The second alternative is a request that if the grievor was to be reinstated it should only follow an evaluation by Health Canada to ensure she is medically fit to return to work. Counsel stated if she is not deemed fit, I should consider her dismissed for reasons of incapacity.

I was also referred to the following decisions: *Neil Fraser v. Public Service Staff Relations Board* [1985] 2 S.C.R. 455; *Re Office & Professional Employees International Union, Local 263, and Lord & Burnham Co. Ltd.* (1972), 24 LAC 218.

Argument for the Grievor

The grievor's representative pointed out there was no direct evidence anyone from any of the Tribal Councils stated they did not want to work with Mr. Nottingham or with Health Canada in the various programs. As a consequence, the representative questioned the negative effect the letter really had on the clientele.

The representative argued the discharge letter was based on the composition of the June 6 letter itself; therefore it was not open to the employer to argue that the handbills composed by Mr. Ellis should affect the decision.

The representative noted that the grievor's actions were predicated on the actions of her supervisor. I was reminded of the May 17 incident which led to allegations of sexual harassment. Following this was the June incident of transferring 100% of the funds from the grievor's CHR training program followed closely by the denial of her travel requests.

With respect to the issue of the grievor's demeanour on the witness stand, the representative stated that any hesitation or pausing before she replied did not mean she was not credible, and he urged me to so find.

The representative stated the situation here is not deserving of either discharge or pay in lieu of reinstatement. The representative pointed out that in *Lutes* (supra) the grievor had stolen property. That is not the situation in the instant case and there was no evidence introduced that suggested Ms. Fontaine-Ellis did not get along with her colleagues.

The representative stated that the grievor had gone on sick leave on June 27, 1994 and when her credits expired about a month later, she went on leave without pay which continued until her termination. The evidence showed she was seeing a doctor and was under financial and marital strain (Exhibit G-18). It was after being off work for about a year, with all the accompanying pressures, that she wrote the letter and this was the only letter she wrote. She felt she had a right to do so as she believed she was a private citizen. She did not write another following her termination as she realised it was wrong to have done so in the first place. However, she had written to the First Nations in the belief she had nowhere else to turn for help.

I was asked to consider her good disciplinary record of 10 years. Also, her performance appraisals indicated she was a good employee. It was only when the interpersonal relationship with her supervisor broke down that problems arose. The representative also stated that the grievor had lost respect for Mr. Nottingham.

With the build up of activity, such as the May 17 incident, the transfer of CHR budget dollars and the denial of travel requests, Ms. Fontaine-Ellis wrote a letter to Mr. Nottingham (June 13, 1994 as attached to Exhibit E-3) which was very critical of him. She should have been warned at that stage that such a letter was unacceptable if

in fact the Department felt so. Nothing was done. Yet, a year later, when she wrote another letter, termination was the result. This, the representative argued, was too severe.

Finally, the representative argued that the November 17, 1995 letter (Exhibit E-30) by Mr. Cale put forward a proposal for resolution but never mentioned termination. The employer acted from November 17, 1995 to January 2, 1996 as if the June 6 letter was not so serious that she could not be reintegrated somewhere in the workforce.

The representative urged me to rescind the discharge and put her back on leave without pay effective January 5, 1996. As she is currently attending University, the representative requested any order to reinstate should not be made effective before the end of April 1998.

I was referred to the following cases: *Laboucane* (Board files 166-2-16086 to 88); *Thomas* (Board files 166-2-25493; 25494 and 149-2-140); *Marineau* (Board file 166-2-26226); *Chedore* (Board file 166-2-9320); *Poley* (Board file 166-2-12046); *Puxley* (Board file 166-2-22284); *Horn* (Board file 166-2-21068); *Crowchild* (Board file 166-3-8119) and *Noël* (Board files 166-2-26820; 26913; 26929; 27458 to 62).

Reasons for Decision

It is well established in the relevant jurisprudence that the letter of termination must set out the reasons for discharge (see *Johnson v. Canada* (1993), 70 F.T.R. 217). In this case the January 2, 1996 termination letter (Exhibit E-32) was issued because the grievor's "... behaviour constitutes gross misconduct." It is based on the fact she wrote a letter dated June 6, 1995 (Exhibit E-3). The letter of termination makes no mention of the grievor's involvement in letters written or actions taken by her husband. As a result, I agree with the grievor's representative that the issue is whether or not the one letter written by the grievor warrants discharge. The peripheral issues relating to the writing and circulation of the handbills (to use the employer's term) by the grievor's husband have not been considered by me in determining the propriety of the penalty.

In the same vein, the employer argued that the personal and sexual harassment issues were not before me and I had no jurisdiction to deal with them. I agree with this and this award will not make any finding of fact with respect to those issues.

With respect to the introduction of Ms. MacKenzie as an expert witness, her curriculum vitae (Exhibit G-17) states she is currently engaged in private practice as a Harassment and Discrimination in the Workplace Consultant. Her area of expertise relates to harassment and discrimination issues.

As stated previously, the issue of harassment is not before me in this grievance. Therefore, as the area of expertise possessed by Ms. MacKenzie is not related to the issue in front of me, I have not relied on her testimony for the purposes of my determination.

The evidence reveals that there was, to state the obvious, a very strained relationship between Ms. Fontaine-Ellis and her supervisor Mr. Nottingham. The performance appraisals indicate that the grievor's work was well appreciated and indeed this was reflected in Mr. Cale's testimony. However, I have no doubt that the extremely difficult working environment involving the grievor and her supervisor affected the work done in that unit.

In the grievor's opinion, an incident which she termed sexual harassment took place on May 17, 1994. That incident has been investigated (see Exhibit E-36) with no definite conclusion, although I note the addendum states:

> *Upon considering the limited information presented to us, it would appear unlikely that Patrick was attempting to intimidate or harass Marissa.*

Be that as it may, this incident was followed by the movement of budget dollars from a program the grievor was in charge of, without any advance information being given to the grievor. No one disputes the authority of Mr. Nottingham to move the budget dollars around, but one would have to think when 100% of the program funding is to be moved it would be prudent to discuss this ahead of time with the individual responsible for that program. However, it would appear that the relationship had at that time deteriorated to such an extent that the only communication between the two was in the form of letter writing.

These events, coupled with the denial of the grievor's travel requests, were followed by the grievor commencing sick leave. Then, about one year later, while on leave without pay, the grievor wrote what has been called a vitriolic letter containing very strong sentiments of dislike for her supervisor and sent this to the Assembly of Manitoba Chiefs.

Was this worthy of termination? If not, counsel for the employer stated, my jurisdiction would be limited to reinstatement in the position from which she was discharged (or pay in lieu of reinstatement, as he also argued). If reinstatement is in order, is it appropriate to reinstate her into what is obviously a hostile working relationship? That is the question I must determine.

There was no denying the fact that the grievor wrote the June 6 letter. The letter which was critical of her supervisor was sent to people with whom her supervisor was required to deal on a regular basis. I am satisfied that the grievor's behaviour in writing this letter was reprehensible and deserving of a severe disciplinary penalty.

The evidence indicates that when the grievor met with Mr. Cale to discuss the reasons for writing the letter, she stated to him that she felt she could do so as she was a private citizen. However, Mr. Cale's own testimony was that he asked her if she would do such a thing again and she replied she wouldn't if she was working, but would if she was not working.

Mr. Cale's reaction to the appropriate course of action that should be taken in this case can be found in the contents of his November 17, 1995 letter to the grievor's lawyer, Mr. Beamish (Exhibit E-30). He stated that the Department wanted to try to reintegrate the grievor in the Public Service but needed her assistance including obtaining a "back to work" assessment from Health Canada and an updated résumé from the grievor. If she did these, Mr. Cale stated that attempts at securing alternate employment would be made.

I found Mr. Cale to be a very credible witness. I believe he was sincere in stating that he wanted to resolve this issue by finding alternate employment for the grievor. He expressed no malice towards the grievor in spite of being hurt by accusations of making a Nazi-like salute (which incidentally I would attribute to

nothing more than a misunderstanding of an initial wave in greeting Ms. Fontaine-Ellis and her lawyer).

However, as the grievor's representative pointed out, the letter did not state what the consequences would be for Ms. Fontaine-Ellis if she did not agree to this proposal. It is a supposition at this point to state she would have provided the information had she known the potential consequences of not doing so. Mr. Cale testified he did state to Mr. Beamish that the alternative was termination, but Mr. Cale also agreed this was not stated in the proposal for resolution of November 17. It was only when a reply had not been received by December 20 that a deadline was imposed of January 2, 1996 (see Exhibit E-31). Certainly at that point Ms. Fontaine-Ellis knew, or ought to have known, that some action on her part had to occur. For reasons known only to herself, she chose to do nothing until January 3, the day after the stated deadline, when she informed Mr. Cale that her lawyer, Mr. Beamish, no longer represented her (Exhibit E-33). Still trying to resolve the issue, rather than terminate the grievor's employment, Mr. Cale extended the deadline for a reply to January 8 (Exhibit E-34). Only when this deadline passed without an indication from the grievor that she accepted the proposed resolution did Mr. Cale feel he needed to issue the letter of termination.

In other words, management's response to the June 6 letter was to attempt to move the grievor elsewhere. Termination was not their immediate reaction and, as Mr. Cale testified, the reasons (at least in part) were attributable to the grievor's very positive performance appraisals and clean disciplinary record.

Was management's request of the grievor a reasonable one under these circumstances? The grievor had been off work for over a year and a half at the time the resolution was broached. Initially sick leave was used, followed by leave without pay. There is no question the grievor was under medical care while off work; therefore I find it was reasonable to ask for her to establish her medical fitness before reintegration could commence.

An updated résumé was important too if for no other reason than to reflect the higher education level the grievor now had. Evidence indicated the grievor was pursuing a University degree and this could have proven beneficial in looking for

alternate employment. Consequently, I find nothing wrong in asking for this piece of information either.

I agree with the Department's initial reaction that a proper resolution to this issue can be found in something other than termination. As the grievor's representative pointed out, the grievor had no disciplinary record whatsoever prior to the termination and the performance appraisals are fully satisfactory or better. Also, as stated by the grievor's representative, the employer acted between November 17, 1995 and January 8, 1996 as if the June 6 letter was not so serious a matter that she could not be reintegrated into the Public Service.

This was a single incident by an individual whose work history was devoid of any discipline whatsoever and whose performance appraisals all indicated she conducted herself in a fully satisfactory (or better) fashion. Her work was valued by the Department to the extent that they wanted to place her elsewhere, although no actual efforts were made.

There is no question that the supervisor/subordinate relationship has been severely marred by the letter and this decision should not be interpreted as condoning this type of action. However, in consideration of all the above facts, I am of the view that discharge is not appropriate in these circumstances.

Having arrived at the conclusion that in these particular circumstances termination was not a proper course of action to follow, I will turn to the first alternative proposed by counsel for the employer, namely, pay in lieu of reinstating the grievor. While at first blush that might seem like an attractive option given the testimony by both the supervisor and grievor concerning the potential negative effects of reinstatement to the grievor's position, I have rejected that option for several reasons.

Firstly, the positive performance appraisals indicate the grievor is a valued employee. Secondly, there is no history of disciplinary problems with the grievor. I was not made aware of any problems the Department had with the grievor outside those of the supervisor/subordinate relationship. Thirdly, and in my view most importantly, the Department's reaction to the June 6 letter was, for a lengthy period of

time, not focused on termination. They felt it advisable to market the grievor elsewhere in the Public Service.

Therefore, it is not appropriate to simply award the grievor a sum of money and dispense with the matter. I believe a more appropriate response in these circumstances can be crafted.

In *Tourigny* (Board file 166-2-16434) adjudicator Jean Galipeault was faced with a termination grievance. He concluded that, although the grievor was guilty of misconduct, discharge was too severe a penalty under the circumstances. He substituted a long term suspension without pay and ordered Mr. Tourigny's reinstatement in the PM-03 position which he occupied at the Cap-de-la-Madeleine Employment Centre prior to his discharge. However, the adjudicator recognized there were a number of reasons why the grievor should be placed elsewhere and at page 73 of his decision he wrote:

> *It is, however, my opinion, for all the reasons mentioned previously in my decision, that it would be better for Mr. Tourigny to work in an Employment Centre other than the one in Cap-de-la-Madeleine, more specifically, in another Employment Centre in Mauricie.*
>
> *If the employer cannot find a PM-3 position for Mr. Tourigny in one of the Employment Centres in Mauricie, other than in Cap-de-la-Madeleine, by September 14, 1987 at the latest, he should be rehired as a PM-3 at the Cap-de-la-Madeleine Employment Centre.*

The employer then placed the grievor in another position and the bargaining agent complained to the Board saying the jurisdiction of the adjudicator was limited to ordering reinstatement in the previous position only. This complaint was ruled on by Board Member Thomas W. Brown (Board file 161-2-462) who ordered reinstatement to the PM-03 position at Cap-de-la-Madeleine.

The employer appealed this last decision to the Federal Court of Appeal (*Canada (Procureur général) v. Tourigny* (1989), 97 N.R. 147). In allowing the appeal, the Federal Court of Appeal said, at page 149:

> *[6} The adjudicator's decision is contained in the paragraphs I quoted and should be interpreted by taking into account each of these paragraphs. That being the case, it is clear that the absolute terms of the order contained in the first of these paragraphs are qualified, or modified, by those in the second paragraph which clearly grant the employer the option of transferring the respondent to an employment centre other than the one in Cap-de-la-Madeleine, provided that this option is exercised before September 14, 1987. If the Board ruled otherwise and thought that no executory value could be attached to the second paragraph, it is because it thought the directives it contained were outside the jurisdiction of the adjudicator, whose role, it is alleged, is limited in a case such as this to setting aside the wrongful dismissal and restoring the employee to the position he previously occupied. This opinion is unfounded. The adjudicator has the authority, in deciding a grievance, to give directives to the employer. That is what the adjudicator Galipeault did in this case. Contrary to what the Board thought, the adjudicator, in the second-last paragraph of his decision, did not make any appointment; he simply added an option for the employer to his order, as he was entitled to do.*

Therefore, my award is as follows:

The discharge is to be replaced with a lengthy suspension without pay up to May 31, 1998. As Ms. Fontaine-Ellis was on leave without pay at the time of her discharge, she will be reinstated to her Regional CHR Consultant position on leave without pay status effective May 31, 1998. In ordering reinstatement effective May 31, 1998, I am mindful of the request of the grievor's representative for reinstatement effective April 30, 1998 due to the grievor's ongoing University studies. I have balanced this with the comments below suggesting alternate employment be sought. This extended period will permit a more thorough search to be made for a possible alternate position and it is also in keeping, I believe, with the serious repercussions of writing such a letter.

In light of the *Tourigny* decision (supra) and the very unique circumstances of this case, I have decided to offer the employer the following option.

The employer may look elsewhere in the federal Public Service in Winnipeg for an indeterminate position for Ms. Fontaine-Ellis at the same group and level she occupied at the time of discharge. This search, if conducted, should include positions within the Department as well. If the employer is successful in locating such a

position, it may place the grievor therein. If the employer is unsuccessful in placing the grievor in such a position prior to May 31, 1998, she is to be reinstated effective that date to her Regional CHR Consultant position on leave without pay status.

I would urge Ms. Fontaine-Ellis to provide the Department with an updated curriculum vitae to assist in the search for employment elsewhere which, in my opinion, is as much in her interests as in the employer's. This may be all the more critical now in light of the grievor's recently upgraded level of education.

With respect to the requirement that the grievor receive an evaluation by Health Canada to ensure she is medically fit to return to work, I see nothing wrong with this request. However, with respect to the request of counsel for the employer that I should consider her dismissed for reasons of incapacity if she is not deemed fit, I have no authority to do so as this is another issue entirely. The grievor was dismissed for disciplinary reasons and not for incapacity. In any case, there may well be other related issues here, such as disability insurance.

On a final note, it may be appropriate for the parties to secure the assistance of a mediator; something that was suggested early on in the process but never followed up on.

To the extent noted above, the grievance is sustained.

Joseph W. Potter,
Board Member

OTTAWA, January 14, 1998.