File: 166-2-27992

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ISAAC JALAL

Grievor

and

TREASURY BOARD
(Solicitor General - Correctional Service Canada)

Employer

Before: Guy Giguère, Member

For the grievor: Robert P. Morissette, Public Service Alliance of Canada

For the employer: Michel LeFrançois, Counsel

Heard at Montréal, Quebec,
on September 21 to 24, 1998.

Until the termination of his employment, Isaac Jalal was an employee of the Department of the Solicitor General, Correctional Service Canada, at Leclerc Institution, working as a Correctional Officer, CX-01. On September 11, 1996, he was suspended without pay during an administrative investigation of his actions.

The purpose of the investigation was to shed light on a request to commence criminal proceedings and a summons, dated August 28, 1996, filed by the Montréal Urban Community police department: Mr. Jalal was charged with stealing plumbing items from the Réno-Dépôt store in Pointe-Claire.

Some time later, in a letter dated October 18, 1996 (Exhibit G-6), Michel Deslauriers, Warden of Leclerc Institution, informed Mr. Jalal that his employment had been terminated. The following three paragraph give the reasons for the termination:

> [Translation]
>
> *Based on the investigation by Correctional Service Canada, it has been established that you stole items from a commercial establishment in Pointe-Claire on August 28, 1996.*
>
> *Your actions were premeditated and are completely unacceptable. Further, you failed to advise your supervisor before resuming your duties that criminal charges had been laid against you. These are serious offences under our code of discipline.*
>
> *You changed your version of events at various interviews and you completely denied your actions during the employer's investigation, despite the evidence. Your conduct is incompatible with your role as a peace officer. You have harmed the image of CSC and you have completely lost the employer's trust.*

On October 24, 1996, Mr. Jalal filed the grievance that is considered in this decision. In the grievance, he objects to his suspension without pay and to the termination of his employment and requests the following corrective action:

[Translation]

Annex A

1. *To be represented by a member of my choice (qualified by my union) at all levels of the grievance procedure;*

2. *That I be given a written response at each level of the grievance procedure;*

3. *Declare my dismissal following an administrative investigation unfair;*

4. *Order that I be reimbursed throughout the grievance procedure without loss of rights and privileges. Reinstated in my position as of September 11, 1996;*

5. *Recognize that the administrative investigation, its recommendations and the action taken against me was excessive and contrary to the rights and freedoms in the Quebec Charter, s. 17, Chapter 18.2 (guilty of an offense);*

6. *That I be paid compensation of $10,000.00 for the harm done to my health and my reputation;*

7. *Order that the amounts owing be paid with interest from the time of my dismissal;*

8. *The above does not constitute an exhaustive list of the losses associated with the actions taken against me. I reserve the right to take further action.*

Originally, the hearing of this grievance was set for January 28 and 29, 1998 but the parties agreed on a postponement until after Mr. Jalal's criminal proceedings. The hearing was therefore rescheduled for June 11 and 12, 1998 but could not proceed at that time and was finally held on September 21 to 24, 1998.

At the hearing of the grievance, Mr. Jalal testified in English and the other witnesses in French. To facilitate the reading of the original decision in this instance, which was rendered in French, all of the quotations attributed to Mr. Jalal were translated into French. There are two versions of the facts relating to the allegations of theft of plumbing items. Mr. Jalal denied stealing the articles, while the employer accepted the version of the security guards at the Réno-Dépôt. The burden of proof was on the employer but Mr. Jalal's version is given first in the text that follows because it provides the context for the subsequent comments made by the security guards at the Réno-Dépôt.

Mr. Jalal's version

Mr. Jalal was expecting visitors to his home on August 30, 1996 on the occasion of the marriage of his eldest son. For this occasion, Mr. Jalal had decided to renovate his bathrooms and his powder room because some of the taps were dripping and there were rust stains in the sinks. His house had two bathrooms, one in the basement and one on the main floor, as well as a powder room with twin sinks.

On August 15, 1996, Mr. Jalal purchased a complete "Delta" brand pop-up sink stopper assembly at the Quincaillerie 4-Sous for $18.94. Mr. Jalal testified that he replaced the sink cylinder in the basement without having to change the "pop-up" piece, the connectors, clips and stoppers, which he saved for future use.

On August 27, 1996, Mr. Jalal purchased three sets of taps and two white "Crane" sinks at the Réno-Dépôt store. He then returned home where his brother-in-law helped him to disconnect and to remove the two sinks in the powder room. Mr. Jalal opened the boxes in which the sinks were packed and his brother-in-law noticed that the rubber seal cushion was missing for one of the sinks. Mr. Jalal's brother-in-law indicated that he would go ahead and install the sink anyway using some putty while Mr. Jalal went back to the store to purchase another seal cushion. Mr. Jalal's brother-in-law did not use the seal cushion that he had but gave it to Mr. Jalal telling him to show it to the store clerks and they would give him another one.

The next day, August 28, 1996, Mr. Jalal went to the Réno-Dépôt; in his van he had a bag containing a white seal cushion, a "Delta" pop-up stopper, connectors, clips and a shopping list. He wrote on a yellow piece of paper the items that he needed to buy, attached it with clear tape to the seal cushion and headed into the store. When he entered the store, he showed the seal cushion to the clerk at the entrance and that individual let him enter without marking the package in any way. Mr. Jalal explained that he first went to service counter and showed the seal cushion to a woman, who had to call the clerk from the plumbing aisle. The clerk told Mr. Jalal that Réno-Dépôt did not sell the parts separately and suggested that he return the complete sink assembly. "He told me to go to Plomberium to buy the part separately. I was not pleased". Mr. Jalal told the clerk that he wanted to buy a new sink assembly and to be reimbursed for the one that was missing the seal cushion. Mr. Jalal and the clerk went

to the plumbing aisle where the clerk showed him two sink boxes. One was open and did not have the seal cushion. Mr. Jalal took the second box and put it in his cart. Before getting to the cash, he looked in the box and noticed that it did not have a seal cushion either. He therefore left it there. Under cross-examination, Mr. Jalal testified that he did not remember going to the lighting aisle and denied opening the box in that aisle. He left the store without purchasing anything.

Mr. Jalal headed for his van with the seal cushion he had had when he entered the store and checked his shopping list. He realized that he needed to buy connectors, brass spray paint, drain cleaner and a set of pop-up sink stoppers. He went back into the store, to the plumbing aisle, and asked the clerk if Réno-Dépôt sold "Delta" pop-up sink stoppers and connectors. The clerk told him that Réno-Dépôt did not sell "Delta" products, but that the store had another brand that would work just as well. The clerk then handed Mr. Jalal a "Master Plumber" package containing stems and flanges. Mr. Jalal also picked up two bottles of drain cleaner ("Liquid Plumber") and the spray paint and went to the cash to pay.

When he got to his van, Mr. Jalal opened the passenger door and put his shopping bag on the front seat. He then took his "Delta" part and compared it to the assembly that he had just purchased. He noticed that the parts were not exactly the same and that their heads were different. Mr. Jalal went back into the store, this time to the returns counter and returned the assembly that was not right. The clerk asked him for the bill, took the assembly and tossed it behind her with the other returned items. Mr. Jalal testified that he did not open the package, and returned it as it was. He added that the clerk took it and did not call anyone.

Under cross-examination, Mr. Jalal indicated that the package was not sealed when he returned it.

After he got his refund, Mr. Jalal purchased four flexible tubes and returned to his van. Mr. Jalal testified that he never left the store with parts that did not belong to him.

As he was headed for his van, Mr. Jalal was intercepted by two security guards from the Réno-Dépôt, Mr. Labelle and Mr. Cartin. Mr. Cartin took the shopping bag from his hand and asked him if he had the bill. At the same time, Mr. Labelle was

holding a shopping bag that he had apparently taken from Mr. Jalal's van earlier. During his testimony, Mr. Jalal implied that Mr. Cartin and Mr. Labelle had planted the evidence and stated that the van was unlocked. Mr. Jalal also testified that "the two security guards did not identify themselves and they never read me my rights". They returned to the store carrying the two shopping bags. Mr. Cartin was holding Mr. Jalal and gripped his arm so tightly that he had a bruise that lasted for four weeks. This was why he went to a physician on September 16, 1996. While they were in the parking lot, Mr. Jalal had insisted that they call the police, but the guards responded: "not here".

Upon entering the store, the two guards took Mr. Jalal into a small office and asked him to empty his pockets. He did not have anything special in his pockets, only his wallet, his car keys and some change. The security guards told him to sit down. Mr. Cartin questioned him about the seal cushion, whether it belonged to him and what was written on the paper wrapped around it with clear tape. Mr. Jalal told them it was a shopping list. He added that: "They brought out a sealed package of stems and flanges and accused me of stealing the clip from it". Later, Mr. Cartin and Mr. Labelle returned and threw one of the two shopping bags on the table; the pop-up part that he had brought with him fell out of the bag, but they did not show it to him. At that point Mr. Cartin said to Mr. Jalal: "Let's make a deal ", but he then left the room and never spoke of this deal again. Mr. Jalal testified that "at no time did I admit to stealing".

Mr. Jalal testified that the items he was accused of stealing had a retail value of $34.01, including taxes, and not $166.73, as was reported by the security guards; they used the retail price of the sets of which the items were part, including the sinks. In support of his argument, he filed in evidence two bills (Exhibit E-5): one bill dated August 15, 1996 for the Delta pop-up stopper (Exhibit E-6) purchased at Quincaillerie 4-Sous in the amount of $18.94, plus $2.64 in taxes, and another bill, dated September 23, 1996, for the seal cushion purchased from Plomberium in the amount of $5.65 and a stem, connector and clip in the amount of $5.25. The total amount of the September 23, 1996 bill, taxes included, was $12.43.

Mr. Jalal refused to give his name to the security guards; he told them that he would not speak to anyone except the police. When the police officers arrived, they read him his rights and gave him the telephone number of a lawyer. Mr. Jalal contacted this lawyer, Mr. Bélanger, who set up a meeting with him for the following Monday and

mentioned to him that, at that time, he would file an assault complaint on Mr. Jalal's behalf. When the police officers asked him for a piece of identification, Mr. Jalal showed them his card from Leclerc Institution. "I did not show my Correctional Service card in the hope of obtaining any favours or privileges. Indeed, I tried to hide it but they insisted".

Mr. Jalal stated that he did not mention to the police officers that one of the security guards had used excessive force when they apprehended him. He testified that he filed a complaint on September 12, 1996 against the two guards regarding the procedure they had used in apprehending him and the force that they had used on that occasion. Under cross-examination, Mr. LeFrançois, counsel for the employer, filed Exhibit G-11, the police report on Mr. Jalal's complaint. Officer Luc Dumas concluded his investigation of Mr. Jalal's complaint as follows:

> [Translation]
>
> *This file will be classified as without cause; after investigating this file and the related file [. . .] I conclude that the complainant only wants to harm the employees of the Réno-Dépôt store [. . .] because they have accused him of stealing [. . .]*
>
> [. . .]
>
> *He filed the complaint 14 days after his arrest [. . .]*
>
> *He went to see a physician for these injuries 18 days after the initial incidents [. . .]*

One of the two police officers that arrested him at the Réno-Dépôt store, Michel Bolduc, testified in support of Mr. Jalal's version of the facts. He stated that, on his arrival, he met with the two store security guards to get their version of the facts. He then saw Mr. Jalal, whom he arrested, and read him his rights. Mr. Bolduc asked Mr. Jalal to identify himself. He stated:

> [Translation]
>
> *I told him that he had to positively identify himself, for example, a driver's licence, and he gave me his Correctional Service card, because I had to record his employer. Mr. Jalal did not show his card automatically; it was when I asked him to identify himself, when I asked him his occupation, that he gave me his card. He did not try to obtain any favours in*

> *showing his card. He was very calm, he was arrested, he appeared tired.*

Mr. Bolduc testified that he did not make any judgment as to whether Mr. Jalal had stolen the items: his job was to ensure that the reports were properly filled out and the persons properly identified. He stated that he did not ask for Mr. Jalal's version. When Mr. Jalal tried to give it to him, Mr. Bolduc told him to "tell it to the judge". On the question of the value of the theft, Mr. Bolduc indicated:

> [Translation]
>
> *I must admit that if it were less than $10 I would not have made a report, I would have kept it out of the courts. But the security guards told me that if the parts were purchased separately they would be worth between $20 and $30. They said that it was not possible to sell them separately and that we had to use the total value of the items [. . .] In my opinion, the value of the theft was $20.*

In response to Mr. LeFrançois's question as to whether Mr. Jalal had complained to Mr. Bolduc about being mistreated, Mr. Bolduc stated that: "no, and generally that is the first thing they say. He was very calm and cooperative". Mr. Bolduc also stated that: "there had not been a scuffle, if there had been, it would have been noted in the report". He added that he was not aware that there had been an assault complaint filed by Mr. Jalal against the two store security guards.

The version of the Réno-Dépôt security guards

Mr. Labelle and Mr. Cartin, two floor security guards at the Réno-Dépôt store, were involved in the events of August 28, 1996. They testified and explained that they tended to work as a team when following a suspect customer. It was Mr. Labelle who first noticed Mr. Jalal because he found his behaviour suspicious. Mr. Jalal was looking around as though to see if he was being watched. Based on Mr. Labelle's experience, customers who are stealing have the tendency to look around to see if they are being watched. Mr. Labelle began following Mr. Jalal and saw him hide a box in the lighting aisle. While continuing to follow Mr. Jalal, he used his walkie-talkie to call his colleague, Laurent Cartin, to help him by checking out what was in the hidden box.

Mr. Cartin went to the lighting aisle and found a "Crane" sink box that had been opened. He took it to the clerk in the plumbing aisle, who told him the seal cushion

was missing. The clerk told him that the suspect customer had come in a few days earlier to buy two "Crane" sinks of the same model as that in the open box.

Mr. Labelle then saw Mr. Jalal head for the cash and pay for two bottles of drain cleaner, brass spray paint and a package of "Master Plumber" stems and flanges. Mr. Jalal left the store and the two officers followed him. They saw Mr. Jalal head for his van, open the passenger side door, then open the package of stems and flanges, remove a metal piece that he threw on the front seat and return to the store. Mr. Cartin testified that he saw Mr. Jalal "threw the part in the van" and that after Mr. Jalal went back into the store, he was able to see that it was a metal clip.

Mr. Labelle continued to follow Mr. Jalal who went to the returns counter and obtained a refund for the package of stems and flanges. As is evident from Exhibit G-1, the time of the refund was 2:49 p.m., while the purchase was made at 2:45 p.m.. Mr. Labelle then followed Mr. Jalal into the plumbing aisle.

During this time, Mr. Cartin went to see the returns clerk who told him that Mr. Jalal had requested a refund because there was a piece missing from the package of stems and flanges. Mr. Cartin took the package of returned stems and flanges and went to see the clerk in the plumbing aisle. The clerk told him that Mr. Jalal had come in earlier asking whether the clips were sold separately to which he had been told no.

In the meantime, Mr. Labelle saw Mr. Jalal take a rotating stem and a retaining nut from a display sink and hide them in his right pants pocket. Mr. Labelle then informed his colleague Mr. Cartin of this by radio and Mr. Cartin also began watching the suspect. Mr. Cartin testified that Mr. Jalal asked a clerk whether the "Delta" pop-up sink stoppers were sold separately. Mr. Cartin also saw Mr. Jalal looking around to see if he was being followed and then remove the pop-up stopper from a "Delta" display sink and hide it in his right pants pocket.

Mr. Jalal then selected four flexible pipes and went to the cash where he paid only for the pipes. Security guards Cartin and Labelle followed him to his van and intercepted him there, identifying themselves. Mr. Jalal opened the passenger door for them and they retrieved the clip, along with a shopping bag from the Réno-Dépôt. The guards took Mr. Jalal back into the store. Mr. Cartin clarified under cross-examination that he held the suspect by the elbow to keep him moving, but did not use excessive

force. Mr. Cartin testified that, half way between the van and the store, Mr. Jalal told them: "I did not do anything, they are my parts".

The security guards took Mr. Jalal into a small office in the store and Mr. Jalal followed them willingly. While they were going to the office, Mr. Cartin watched Mr. Jalal, who was playing with his pockets. When they entered the office, the two guards asked Mr. Jalal to empty his pockets. At that point, Mr. Cartin saw Mr. Jalal throw the "Delta" pop-up sink stopper on the floor. They picked it up and again asked Mr. Jalal to empty his pockets. That was when Mr. Jalal took out the personal items, along with the rotating stem and the retaining nut.

Mr. Cartin questioned Mr. Jalal because the latter did not speak French. Mr. Cartin began by reading him his rights in English. During the questioning, Mr. Jalal maintained that he had not done anything. However, after a period of time, he admitted to Mr. Cartin that he had taken the seal cushion. Mr. Jalal said: "yes, I did it" or "yes, I took it", but continued to claim that the other items belonged to him.

During this time, Mr. Labelle took pictures of the stolen items and completed the incident report (Exhibit G-1) in which he recorded the value of the items:

[Translation]

> *[. . .]*
>
> *1 pop-up stopper with stem from a "Delta" sink #120576 (at $88.48)*
>
> *1 "Master Plumber" rotating stem + retaining nut #121810 (at $15.94)*
>
> *1 clip from a "Master Plumber" stopper lifting stem (at $5.84)*
>
> *1 washer from a "Crane" sink (at $50.53)*
>
> *TOTAL: $166.73*

Mr. Labelle testified that the price shown as the value of each item stolen was the retail price of the assembly from which it came because the Réno-Dépôt could not sell the assembly if a part was missing. He gave as an example the cost of a pop-up stopper, which did not have a value of $88.48, but which was the price of the "Delta" sink that could not be sold without the stopper.

While he was filling out his report, Mr. Cartin told Mr. Labelle: "O.k., he confessed to the white rubber". Mr. Jalal did not complain at any time and there was no bargaining to make a deal with him.

Mr. Morissette, Mr. Jalal's representative, asked me to note that Mr. Labelle had to refer to his report (Exhibit G-1) to recall the details of Mr. Jalal's arrest.

Under cross-examination, Mr. Labelle was unable to recall a number of points, such as whether he had to argue with Mr. Jalal to get him to return to the store after being apprehended; the angle from which he saw Mr. Jalal take the clip out when he returned to the van, on the passenger side; and whether the shopping bag in Mr. Jalal's van was taken back to the office or only the stolen item. Overall, Mr. Labelle recalled the main elements surrounding Mr. Jalal's arrest.

Mr. Cartin testified under cross-examination that the parts were not handed over to the police, which is the normal procedure; the police merely kept a photograph with their report. Mr. Cartin was not sure whether he pushed Mr. Jalal, whether there was physical contact. Mr. Cartin was not certain whether, at the time of Mr. Jalal's arrest at the van, it was Mr. Jalal who opened the passenger door. Mr. Cartin testified that the "Crane" seal cushion was wrapped in an elastic with a paper on which Mr. Jalal had probably written, but that that did not mean that the part belonged to him; it is a technique that thieves use to make it look like the item belongs to them.

What happened after the events at the Réno-Dépôt

Mr. Deslauriers, warden of Leclerc Institution, testified that he was informed on August 28 or 29, 1996 of the events at the Réno-Dépôt when he received a fax (Exhibit G-4) from the investigation office of the Montréal Urban Community police department - District 11. The cover page of the fax stated "For your information. Accused is your employee". The fax was addressed to Correctional Service Canada at the fax number for Leclerc Institution. Attached to the cover page was a document entitled, "Request to commence proceedings", which was the police report completed by the police officers following Mr. Jalal's arrest at the Réno-Dépôt on August 28, 1996.

Mr. Deslauriers testified that, as warden, he was aware that three things could happen when government employees are charged with criminal offences. Normally, the

employee informs the employer because this is required under the Code of Discipline (Exhibit G-7) (Rule 2, page 6, paragraph 5, "an employee has committed an infraction if he or she: [. . .] (e) fails to advise his or her supervisor, before resuming his or her duties, of being charged with a criminal or other statutory offence"). On other occasions, the police inform Correctional Services because the employee has shown his employee card to the police. Sometimes, the employee does not inform the employer and the employer is unaware of the existence of charges, but may find out about them later during security checks. Under cross-examination, Mr. Deslauriers explained that two or three employees had kept their jobs despite criminal charges for impaired driving. Mr. Deslauriers explained the distinction he made in these cases:

> [Translation]
>
> *Those individuals came and told us, that is why we kept them on. There was one case in which we were not informed and discovered it through a routine security clearance check seven years later. That was not the only factor, we discovered something else, and that person's employment was terminated.*

Mr. Jalal was on leave from August 28 to September 2, 1996 and he did not advise his employer of the theft charges against him. Mr. Jalal testified that he was unaware of the existence of the Code of Discipline until December 1996: [Translation] "In December 1996, a friend brought me the Code so that I could prepare for the hearing. I was unaware that there was one, I had never received a copy of it. I was aware of certain standards of professional conduct but not of the Code". Under cross-examination, Mr. LeFrançois asked Mr. Jalal why he had asked his lawyer if he needed to inform his employer of the incidents. Mr. Jalal responded: [Translation] "I did not know so I checked with my lawyer". Mr. LeFrançois asked Mr. Jalal if he was aware of why some of his colleagues had been suspended. Mr. Jalal stated: [Translation] "I did not know why some of them had been suspended; the main rules of which we were aware were to wear the uniform, not to sleep on the job and to keep away from the inmates". Questioned on the practice of the employer informing its employees of the reasons for suspensions, Mr. Jalal answered: [Translation] "Yes, it is the practice but I did not ask for the reason and it was not given to me; I was not aware of all of the cases; I was aware of some, but not others".

Around September 6, 1996, Mr. Deslauriers established a committee to investigate the theft charges laid against Mr. Jalal and on September 10, 1996, he informed Mr. Jalal that he was suspending him during the committee's investigation. David Lévesque, unit manager at Leclerc Institution, and Christian Hébert, cellblock coordinator at Leclerc Institution, conducted the investigation and prepared a report. They had three interviews with Mr. Jalal, one of which was by telephone. The representative of the bargaining agent, Mr. Brisson, accompanied Mr. Jalal to all of these meetings and also took part in the telephone interview. Everything took place in French, except for the telephone conversation, during which Mr. Jalal asked if someone could speak English to explain certain things to him, which Mr. Hébert did.

Mr. Lévesque testified that during one of these meetings Mr. Jalal told him that he was aware of the Code of Discipline and some of the standards of professional conduct. Mr. Lévesque asked him why he had asked his lawyer if he had to inform the employer of the theft charges. Mr. Jalal told him: [Translation] "I asked his advice, whether I had to report the incident to my employer or my wife". The lawyer told me, [Translation] "No, it is not necessary, not at this point". At the hearing, Mr. Jalal specified that he did not know that he was required to inform the employer and Mr. Lévesque stated that he did not question Mr. Jalal directly on this point because he thought it was obvious.

Following the investigation, Mr. Lévesque concluded that Mr. Jalal was not credible since his testimony did not correspond to that of the security guards, the store clerk, or Officer Bolduc. Mr. Lévesque gave weight to the testimony of Officer Bolduc who, with 15 years experience, believed Mr. Jalal guilty of theft. The testimony of Mr. Labelle and Mr. Cartin were even more important because they had seen what had happened and they were very credible.

Mr. Lévesque did not believe Mr. Jalal when he claimed to have been roughed up by one of the detectives because Mr. Jalal did not go to his physician until two weeks after the incident. Mr. Lévesque felt that Mr. Jalal had tried to take advantage of his job when he showed his employee card to the police officers and he had thereby damaged the reputation of Correctional Service Canada. Moreover, Mr. Jalal did not confess to stealing, which is contrary to the normal behaviour of peace officers in such

circumstances. In the investigation report, Mr. Lévesque and his colleague Mr. Hébert concluded that Mr. Jalal was guilty.

Following this investigation, Mr. Deslauriers terminated Mr. Jalal's employment by letter dated October 18, 1996 (Exhibit G-6). In his testimony, Mr. Deslauriers explained the reasons for the termination, which are contained in the letter. One reason was the theft of the items and another was the coming and going from the van and the number of parts, which indicated that the theft was premeditated. Mr. Jalal was the subject of criminal charges and failed to advise the employer before resuming his duties. The employee had the opportunity to do so and the obligation remained, despite the fact that his lawyer gave him bad advice. Mr. Jalal is an employee with 10 years experience and the obligation to advise the employer is an essential condition of employment at Correctional Service Canada.

Mr. Deslauriers added that Mr. Jalal's conduct was incompatible with his role as a peace officer. At Leclerc Institution, some 180 inmates have been re-incarcerated for minor offences, such as shoplifting, committed while they were on parole. These inmates were re-incarcerated because they were found guilty of offences similar to those Mr. Jalal was facing.

Mr. Deslauriers testified that there was no media coverage of these events, but that Mr. Jalal's actions had damaged the employer's image because he identified himself as an officer of Correctional Service Canada to the police. The employer was informed of Mr. Jalal's conduct by the police officers of the Montréal Urban Community police department, which damages the employer's reputation and can undermine good relations with police forces.

Lastly, Mr. Jalal had completely lost the employer's trust because he did not admit his mistake. This is a very important element: [Translation] "it was not just the theft, it was the fact that he did not admit to it . . ." The loss of trust is more important than the theft itself.

Mr. Deslauriers explained that he was appointed warden of Leclerc Institution in 1995, following an investigation of a loss of control of the inmates at the Institution. The investigation resulted in 28 recommendations on how to regain control of the inmates and he had followed them. In the past, there had been incidents that

threatened the security of the institution, such as massive quantities of drugs coming into the Institution. Ion detectors were installed to prevent drugs from entering the Institution and the prison's perimeter security was strengthened. The last area of vulnerability was the possible corruption of the guards. Speaking of Mr. Jalal, Mr. Deslauriers said: [Translation] "an accused who will not admit to the offence, he can be made to talk; someone who is willing to risk his job by shoplifting is someone who could be open to blackmail". Mr. Deslauriers added that Mr. Jalal would be even more likely to be blackmailed if he were reinstated with Correctional Services. He could be framed because he had lost the employer's trust; Mr. Deslauriers admitted, however, that this argument was not entirely valid.

With respect to the severity of the penalty compared to the real value of the objects stolen, Mr. Deslauriers stated: [Translation] "what was important was why he did not come to see us, to admit; the way he behaved is more important than the amount stolen". Mr. Deslauriers explained that, because Mr. Jalal worked in a security institution, in this case a prison, the severity of the penalty was based on Mr. Jalal's refusal to admit what he had done. Mr. Deslauriers added:

> [Translation]
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> *I have no reason to believe him if he is innocent. Mr. Jalal did not tell the truth. It is a question of principle, of trust. Why did he not try to rebuild the relationship by confessing. He preferred to preserve his image. This is the first time in 14 years that I have encountered someone denying the fact under similar circumstances. I might have agreed to reduce the penalty. The problem is that the bond of trust is broken and that is fundamental.*

Following his suspension, Mr. Jalal filed a claim for unemployment insurance benefits, which was rejected on November 8, 1996 (Exhibit E-9) by Human Resources Development Canada; he was not entitled to benefits because he had lost his job for misconduct. Mr. Jalal appealed this decision and the arbitration board upheld his appeal, determining that Mr. Jalal was not aware that he was jeopardizing his job by not advising the employer that he had received the summons in question. According to the decision of the arbitration board, the benefit of the doubt must be given to Mr. Jalal. Secondly, Human Resources Development Canada did not provide the members of the arbitration board with specific facts that could have been taken into consideration in a matter of misconduct. Further, the arbitration board ruled that

Mr. Jalal did not know that he was jeopardizing his job by not advising the employer that he had received the summons in question.

Mr. Jalal appeared in February 1998 on the charges of theft laid against him. The judge expressed strong reservations about Mr. Jalal's credibility, as can be seen from the following extract from his decision (Exhibit G-9):

> [Translation]
>
> *And, in the instant case, even though the Court believes that the accused is lying and that he acquired certain items without paying for them, the Court must give him the benefit of the doubt, not because of his testimony, but because of the absence of corroborating evidence from the other witness involved in his arrest, and the absence of the items in question to establish more solidly the proof of the charges.*

Mr. Deslauriers testified that Mr. Jalal's acquittal did not provide any grounds for him to change his decision; on the contrary, the acquittal confirmed its validity. He also indicated that there is no directive covering acquittal, "it is case by case".

Mr. Jalal also testified as to the impact the termination of his employment had on his life. At the time, he had been married 32 years and was the father of four children, three of whom were at home and one who was married on August 30, 1996. He had owned his home since 1982. After his termination of employment, he had to declare bankruptcy, he lost his house and his wife asked for and obtained a separation.

Mr. Jalal was devastated by these events and it was hard for him to find another job after his termination. He almost managed to get a job as a security guard at the Delta Hotel in Montréal and then at the Hôtel de la Montagne, but he was unsuccessful because he did not have good references from Correctional Service.

Mr. Jalal then took a computer course and received a diploma from Dawson College. Just prior to his termination of employment, he had obtained an M.A. in Public Administration, with a major in criminal justice, from Carleton University in Ottawa. He paid for the courses himself; Correctional Service did not help him. It had taken him five years on a part-time basis. He also holds a Masters in Education, which he

earned in 1985 from McGill University, as well as a B.A. in 1974 from Sir George Williams University.

Mr. Jalal finally started work at the Montréal Casino on August 3, 1998. He holds a permanent part-time position and is on call: depending on the schedule, he works two days a week and the rest of the time he must remain on call. He works as a "general helper": when an employee is absent, he helps out. He has access to money and had to be accredited by the Quebec Police Force as someone who is trustworthy in terms of security. Mr. Jalal was also made a commissioner of oaths in August 1998 by the Minister of Justice for Quebec (Exhibit E-22).

The hearing of this grievance scheduled for June 11, 1998 did not take place because Mr. Jalal's representative informed the adjudicator that he would not proceed without simultaneous interpretation services. The parties then agreed to mediation led by the adjudicator assigned to the case at that time. During Mr. Jalal's cross-examination, Mr. LeFrançois submitted in evidence a letter dated June 12, 1998, that is, the day after the mediation session. In the letter addressed to Andy Scott, the then Solicitor General of Canada, Mr. Jalal complained about his termination of employment, which he attributed to racial discrimination on the part of Mr. Deslauriers. Mr. Jalal did not pursue this allegation at the hearing before me. The mediation failed and, subsequently, I was appointed adjudicator of this case.

Arguments

For the employer

To begin, Mr. LeFrançois stated that I had to consider two questions. First, did the employer establish that the charges against Mr. Jalal were with foundation? Second, if so, was the penalty too severe?

To answer these questions, the adjudicator must consider the credibility of the witnesses because this is a very important factor. Mr. Labelle was an objective witness; he was unbiased. Mr. Labelle is an experienced security guard: he has made more than 600 arrests. He noticed Mr. Jalal's suspicious behaviour and that was when he began following him. Mr. Labelle had visual contact with Mr. Jalal at all times. He saw him remove the metal clip from the package of stems and flanges; he saw him take the

pop-up stopper from the "Delta" display sink; and he saw him take a rotating stem and a retaining nut and put them in his pocket.

As Mr. Morissette pointed out, Mr. Labelle did read from his notes, but he did not do so throughout his entire testimony. Mr. Labelle testified, without the help of his notes, concerning the distance from which he watched Mr. Jalal when the latter was at his van. Mr. Labelle is aware of the impact that the termination had on Mr. Jalal's life, but he did not change his version because he was certain of what he was saying.

Mr. Cartin's testimony was objective and unbiased. He watched Mr. Jalal, who was playing in his pockets, and he saw him throw the pop-up sink stopper in the office. In general, Mr. Cartin corroborated, by checking with the clerks, what Mr. Labelle said in his testimony, even though he was not always in visual contact with Mr. Jalal.

The explanations provided by Mr. Jalal during his testimony are not consistent, which undermines his credibility. He stated that on August 28, 1996 he went into the Réno-Dépôt with a shopping list attached to a white seal cushion. But during his first visit to the store, he did not purchase anything because he was unable to get the seal cushion that he was looking for.

Mr. Jalal then went to his van to check what was on another shopping list and went back into the store a second time. Mr. Jalal explained that he went back into the store because he needed a set of pop-up stoppers for a "Delta" sink, but he did not bring with him, for comparison purposes, the part that he had in his van. He then bought a package of stems and flanges, some liquid drain opener and brass spray paint.

After making these purchases, Mr. Jalal explained that he returned to his van and discovered that the package of stems and flanges was not right. He therefore went back into the Réno-Dépôt where he said that he was reimbursed for a sealed package of stems and flanges. However, during cross-examination, he admitted that the package was not sealed. He said that he had several clips in his van. Mr. LeFrançois argued that this version of the facts is inconsistent and that there was only one clip, the one that Mr. Jalal had taken from the package of stems and flanges. Mr. Jalal then

said that he returned to the store to purchase pipes. According to Mr. LeFrançois, this story is not logical and that Mr. Jalal was really seeking opportunities to steal parts.

To respond to the second question of whether the penalty is too harsh, Mr. LeFrançois referred to the testimony of Mr. Deslauriers, who explained that, in making his decision, he relied on the testimony of the two security guards and not on that of Officer Bolduc.

Mr. Jalal's suspension during the investigation was justified and the investigation was conducted quickly. As for the suspension, the circumstances are similar to those found in *Re Kimberley-Clark of Canada Ltd. and Canadian Paperworkers Unions, Local 307 (1981),* 30 L.A.C. (2d) 316, at page 320 in particular, where it is stated:

> *[. . .] The presence of the grievor as an employee would have posed a serious threat to the legitimate interests of the employer and he was therefore rendered ineffective to the company as a result of the laying of the criminal charge. [. . .]*

In *Kimberley-Clark,* the employee was accused of setting a fire in his workplace, a paper mill; the employer therefore had a legitimate interest in taking disciplinary action. In the instant case, Mr. Jalal was a prison guard accused of shoplifting and who worked at Leclerc Institution, where inmates are re-incarcerated for similar acts.

Leclerc Institution is now equipped with an ion detector and a new system to secure its perimeter. Since the security of the institution has been strengthened from a technological standpoint, its vulnerability now lies with its staff.

As Mr. Deslauriers explained, it is crucial that an employer be able to trust its employees. Mr. LeFrançois argued that Mr. Jalal did not tell the truth. He therefore did not show that he was again worthy of trust. In arbitral jurisprudence where employees have been reinstated in their duties, they have admitted their mistakes. As Mr. Deslauriers testified, the theft in the instant case is inconsequential and he would have expected Mr. Jalal to admit to it. However, Mr. Jalal did not admit his actions and, moreover, he accused the security guards at the store of planting the evidence.

On September 12, 1996, Mr. Jalal filed a complaint with the Montréal Urban Community police department. He complained, 15 days after the incident, about the way in which the security guards at the Réno-Dépôt handled his arrest. But Officer Bolduc, called to testify by Mr. Jalal, stated that there was no scuffle. Moreover, 19 days after the incident, Mr. Jalal went to see his physician concerning the injuries that he said he received during his arrest by the security guards. However, he did not provide photographic evidence of his injuries.

In a letter dated June 12, 1998 (Exhibit G-13) to Andy Scott, Solicitor General of Canada, Mr. Jalal accused Mr. Deslauriers and Correctional Service Canada of racial discrimination against him and of having violated the *Canadian Charter of Rights and Freedoms*. First, the attitude displayed in this letter certainly raises questions as to the degree of trust that the employer could have in Mr. Jalal. Second, this attitude undermines Mr. Jalal's credibility because it shows a pattern: when he is attacked, rather than admitting his mistakes Mr. Jalal attacks, as he did by filing a complaint against the security guards at the Réno-Dépôt and against Mr. Deslauriers. In any event, prior to the letter of June 12, 1998 (exhibit G-13), Mr. Jalal had not made allegations of racial discrimination against Mr. Deslauriers.

Mr. LeFrançois argued that Mr. Jalal was acquitted of the criminal charges even though the judge did not believe him (Exhibit G-9). Moreover, according to Mr. LeFrançois, the adjudicator is not bound by Mr. Jalal's acquittal of the charges against him. He cited in support *Re Ministry of Finance & Corporate Relations and British Columbia Government Employees' Union (1987)*, 33 L.A.C. (3d) 284, at pages 287 and 288 in particular:

> *[. . .] In these circumstances, arbitrators have held that the employer and the arbitrator are* not *bound by the results of the criminal process. Rather, the arbitration board has a duty under the* Labour Code *to hear the case on its own merits: [. . .]*

Mr. LeFrançois argued that the employer had the burden of proof but that this proof is not the same as in a criminal case, that is "beyond a reasonable doubt", but rather is the proof found in civil law, namely, "the preponderance of proof". He then cited *Flewwelling* (Board file 166-2-14326) in which adjudicator MacNeil stated that, in his opinion, proof of only one of the "*Millhaven* tests" was sufficient to justify

termination. The *Millhaven* tests set out by arbitrator Anderson in *Millhaven Fibres Ltd., Millhaven Works, and Oil, Chemical and Atomic Workers Int'l. Union, Local 9-670* (1967), 1 (A) Union-Management Arbitration Cases 328 are found at page 16 of *Flewwelling*:

> *There are a number of arbitration cases which deal with disciplinary matters arising out of the conduct of an employee at a time when he is not in the Plant. Generally speaking, it is clear that the right of management to discharge an employee for conduct away from the Plant, depends on the effect of that conduct on Plant operations.*
>
> *In other words, if the discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from the place of work, there is an onus on the Company to show that:-*
>
> *(1) the conduct of the grievor harms the Company's reputation or product*
>
> *(2) the grievor's behaviour renders the employee unable to perform his duties satisfactorily*
>
> *(3) the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him*
>
> *(4) the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees*
>
> *(5) places difficulty in the way of the Company properly carrying out its functions of efficiently managing its works and efficiently directing its working forces.*

Mr. LeFrançois argued that the image of Correctional Service Canada had been harmed by the incident, which corresponds to the first of the *Millhaven* tests. As for the second test, as Mr. Deslauriers showed, for security reasons Mr. Jalal's behaviour rendered him unable to perform his duties satisfactorily. As for the fifth test, the bond of trust was broken and this bond is especially important in a prison environment; this breaking of the bond of trust places difficulty in the way of managing the works and the work force of the institution efficiently. Therefore Mr. Jalal's case meets three of the tests when, according to *Flewwelling* (*supra*), the presence of only one test is sufficient to justify dismissal.

Lastly, Mr. LeFrançois's argument dealt with the security of the prison environment. He cited *Courchesne* (Board file 166-2-12299) and the comments of adjudicator Smith in *Kikilidis* (Board files 166-2-3180 to 3182) at page 5. Mr. LeFrançois argued that the adjudicator may not substitute his judgment for that of the employer, that is, Correctional Service Canada, with respect to security matters.

For the grievor

Mr. Morissette stated that he agreed with Mr. LeFrançois on the two questions before me: first, are the allegations with foundation and, second, can the adjudicator intervene to change the employer's decision, that is, by reducing or rescinding any form of disciplinary action.

First, the charges of theft are not with foundation and the employer did not discharge the burden of proof on it. According to Mr. Morissette, the burden of proof that the employer must discharge falls, in this instance, between the "beyond a reasonable doubt" of criminal law and the "preponderance of proof" of civil law. In support, he cited *Walcott* (Board file 166-2-25590) at page 50:

> *[. . .] In fact such misconduct may also be considered a criminal act, leading to even more serious consequences than a dismissal, and in this instance the grievor was the subject of criminal charges. The preponderance of arbitral jurisprudence holds that in such cases the evidentiary test, while remaining within the ambit of the civil burden of proof, requires evidence which is proportionate to the seriousness of the allegations and consequences that may flow therefrom. A commonly accepted description of this evidentiary test is that the employer must demonstrate "clear and cogent" evidence supporting the allegations. [. . .]*

Mr. Morissette stated that *Melcher* (Board file 166-2-27604 at page 11) is also to this effect:

> *[. . .] while the civil burden of proof is applicable, in view of the nature of the allegations and the fact that the ultimate penalty was imposed there is a requirement that the employer prove its case on the basis of clear and cogent evidence. [. . .]*

Mr. Morissette referred to paragraph 7:2500 ("Standards of Proof: Criminal Misconduct") in *Canadian Labour Arbitration*, Third Edition, Canada Law Books by

Brown and Beatty at page 7-25. He also cited *Chandler* (Board file 166-2-17041) at page 9:

> *[. . .] It remained suspicious. Mere suspicion alone however, is not sufficient upon which to base a finding of guilt. The conclusion, therefore, must be that the charges are not proved. The case against the grievor has not been made out. There was a lack, even, of solid circumstantial evidence.*

Mr. Morissette argued that the employer had not provided clear and cogent proof of theft. Indeed, the evidence submitted was weak and there was no continuity in the evidence because the chain of possession was broken. The employer did not submit in evidence the parts that Mr. Jalal was accused of stealing and therefore was unable to establish a direct link between Mr. Jalal and the parts that the security guards stated they had seen him steal. At best, the employer provided circumstantial, but not direct, evidence of theft.

During his testimony, Mr. Labelle repeated that he did not remember certain facts and he had to read from his notes. The security guards testified that, through the windows of vehicles, they saw Mr. Jalal remove the clip from the package of stems and flanges, but that does not make sense. Mr. LeFrançois is assigning intent to Mr. Jalal without evidence when he states that it was illogical for Mr. Jalal to have returned to the store three times when he was in a hurry. However, as shown by Exhibit E-5 (sequence of bills), the purchase was made at 2:45 p.m. and the reimbursement at 2:49 p.m.; four minutes separated these two events.

Mr. LeFrançois stated that it was not important that Mr. Jalal was acquitted of the charges against him, but he was not consistent when he invoked the judge's comments. According to Mr. Morissette, the employer should provide evidence independent of that presented before the criminal court and the adjudicator must make a decision independent of that of the judge.

Second, should the adjudicator intervene to change the employer's decision, either by reducing or rescinding the disciplinary action? The first step is to read the letter of termination of employment (Exhibit G-6). It sets out the reasons for termination and essentially, there are three things of which Mr. Jalal is accused: (1) the criminal charge; (2) the infraction of the Code of Discipline (Exhibit G-7); and (3) the breaking of the bond of trust.

Mr. Morissette argued that he had shown that Mr. Jalal was not guilty of the theft charge and that he had been acquitted of all criminal charges. Further, Mr. Jalal was unfamiliar with the Code of Discipline and with the provisions in particular that required him to advise the employer of the criminal charges. In support of his argument, he cited a decision of an employment insurance arbitration board (Exhibit E-12), which acknowledged this fact. Mr. Morissette claimed that the adjudicator should reach the same conclusion, even though he is not governed by the same rules of evidence as the arbitration board.

As for the bond of trust, this is a subjective matter and Mr. Morissette asked the adjudicator to reject the employer's arguments. Mr. Jalal's complaint of racial discrimination to the Minister (Exhibit G-13) was made after Mr. Deslauriers decision and should not be considered in the adjudicator's decision.

The corrective action requested by Mr. Jalal in his grievance was exhaustive, but Mr. Morissette indicated that Mr. Jalal had agreed to limit them to the following requests.

Mr. Morissette submitted that all disciplinary action against Mr. Jalal related to the incident should be rescinded and his pay and other benefits reimbursed for the period of the suspension. Should the adjudicator find that disciplinary action is required, a suspension of as short a duration as possible should be substituted for the termination.

Mr. Morissette is of the opinion that a penalty is not appropriate, particularly in light of the amounts at issue and the seriousness of the incident. The security guards set the value of the theft based on the selling price of the assembly from which the missing parts were taken and not on the price of the parts themselves. The real value of the missing parts was $34.01, taxes included, and, based on *McManus* (Board file 166-2-8048 and 8078) at page 25, this amount must be taken into consideration. The question of the fairness of the penalty imposed on Mr. Jalal must also be asked in light of paragraph 7:3314 ("Penalty") of *Canadian Labour Arbitration* (*supra*):

> *[. . .] For example, arbitrators have modified the termination of a person found to have engaged in an act of theft and substituted some period of suspension: where the stolen property was of nominal value; where the grievor had such a long and exemplary record of employment that the*

> *misconduct before the board could be perceived as an isolated incident; [. . .]*

In his decision, the adjudicator must take into consideration the impact that the employer's decision had on Mr. Jalal's life. His loss of employment contributed to the failure of his marriage, bankruptcy and the loss of his house.

Mr. Jalal was acquitted of the charges against him and he has no criminal record (Exhibit E-18). He has continued to learn and to be involved in his community. He is a person worthy of trust and, after a security check, he was hired at the Montréal Casino and appointed a commissioner of oaths by the Minister of Justice for Quebec (Exhibit E-22).

Employer's reply

Mr. LeFrançois stated that he accepts the terms "clear", "cogent" and "coherent" with respect to the burden of proof that the employer must discharge.

Mr. Morissette argued that the parts that Mr. Jalal was accused of stealing should have been submitted in evidence. These parts were identified and Mr. Labelle stated that he photographed them. It cannot be claimed that there was a lack of continuity, that the chain of possession had been broken, because the security guards had these parts in view at all times, although on an alternating basis, because they worked as a team on surveillance. The security guards photographed and identified the parts. Moreover, for the purposes of the hearing, Mr. Jalal purchased the parts individually and submitted them in evidence; therefore there is no doubt as to their nature. Mr. LeFrançois admitted that, at certain times, the security agents did not have total recall, but they recalled the theft, which is the essence of the incident.

As for the complaint of racial discrimination, Mr. LeFrançois stated that it did not constitute a ground for termination but added that it makes reinstatement impossible in the employer's opinion. The complaint was filed after the termination and it is true that this element cannot be added to the reasons for termination but the adjudicator has the necessary discretion to consider elements subsequent to the termination. Mr. Morissette invoked facts that took place after the termination, such as Mr. Jalal's bankruptcy and his separation. In Mr. LeFrançois's opinion, it would be an error in law not to take into consideration the complaint of racial discrimination.

Reasons for decision

The main question to be settled in this instance is whether the employer established that Mr. Jalal stole the parts from Réno-Dépôt. The other questions of fact to be determined are whether the theft was premeditated and whether Mr. Jalal was familiar with the Code of Discipline and his obligation to advise the employer of the criminal charges laid against him. Further, is the fact that Mr. Jalal denied stealing and the fact that he changed his version of the facts grounds for termination? Depending on the answers to these questions, it will remain to be determined whether the suspension during the investigation was justified and whether the disciplinary penalty should be rescinded, maintained or modified.

Mr. LeFrançois admitted that, while it is the burden of proof in civil cases that applies, the evidence relating to the allegations of theft must be "clear, cogent and coherent". Mr. Morissette, on the other hand, acknowledged that I was not bound by the verdict of acquittal and stated that I should make a decision independent of that of the criminal judge. I share these points of view on these two important questions.

Determination of the above questions rests largely on the credibility of Mr. Jalal on the one hand and on that of the employer's witnesses on the other. O'Halloran, J.A. of the British Columbia Court of Appeal set out in *Faryna v. Chorny,* [1952] 2.D.L.R. 354, at pages 356 to 358, the principles that guide us in determining the credibility of witnesses.

When he testified, Mr. Labelle had difficulty remembering certain facts and had to refer to the incident report that he had prepared at the time of Mr. Jalal's arrest. However, he clearly remembered having seen Mr. Jalal steal the parts and his testimony was confirmed by that of Mr. Cartin, who clearly recalled the facts and had also seen Mr. Jalal steal parts.

Mr. Jalal's testimony was spontaneous, although he too had to rely on Exhibit E-4 on several occasions, which was his written version of the facts. Nevertheless, I found that his version of the facts contained too many contradictions and lacked consistency. According to Mr. Jalal, he entered the store the first time with a shopping list taped to the seal cushion but did not purchase anything because he could not get a replacement seal cushion. He returned to his van and checked what was on another shopping list, although he could easily have looked at the list attached

to the seal cushion. He then returned to the store to buy a "Delta" pop-up stopper but he did not take the sample he had in his van with him and which he had taken the trouble to bring from home. A clerk told him that "Delta" pop-up stoppers were not sold at Réno-Dépôt; he therefore purchased a package of "Master Plumber" stems and flanges and returned to his van where he noticed that the head of the stem on this brand was not the same as that on the "Delta" stem. He explained that he then returned the sealed package of stems and flanges to the store. At page 3A of Exhibit E-5, he noted: [Translation] "[. . .] I returned it in the same packaging, without opening it [. . .] the packaging was clear and I could see without opening it." Under cross-examination, he admitted that the package was not sealed.

The security guards saw Mr. Jalal remove a metal part from the stems and flanges package and then throw this metal part on the front seat of his van; after he left, Mr. Cartin noticed that the part was a metal clip. I find this version of the facts much more plausible than Mr. Jalal's explanation, that is, that he had several clips in his van.

Mr. Jalal's testimony was not as credible as that of the security guards and several other factors lead me to prefer the testimony of the latter individuals. If I accept the version of the facts presented by the security guards, then the theft of the items would be explained by the fact that the parts were not sold separately at the Réno-Dépôt and Mr. Jalal apparently preferred to steal them than to go buy them at the Quincaillerie 4-Sous, located much farther from his home.

Further, Mr. Jalal's accusations against the two security guards are not credible; he did not complain to Officer Bolduc that he had been roughed up by the two store security guards. He did not file a complaint until 14 days after his arrest, and he did not consult a physician regarding his bruises until 18 days after his arrest.

The evidence presented by the employer is clear, cogent and coherent and shows, on the preponderance, that Mr. Jalal stole the items from the Réno-Dépôt. Applying the test of O'Halloran, J.A. in *Faryna v. Chorny* (*supra*), I do not believe that Mr. Jalal's version of the facts is in harmony "with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". To reiterate the words of then Deputy Chairperson Chodos in *Walcott* (*supra*), it is my view that the employer met the

test of probative force and that it presented evidence proportionate to the seriousness of the allegations and to the consequences that may flow therefrom. I therefore find that the allegation of theft was proven.

Mr. Cartin testified that Mr. Jalal had asked several clerks if the seal cushion, the clip and the "Delta" pop-up stopper were sold separately and, in my view, this indicates that Mr. Jalal wanted initially to purchase these items. He was told no and, apparently, it was only then that he decided to steal them; his actions were therefore not premeditated. It is also my view that the many comings and goings from the store, in a short period of time, further indicate that Mr. Jalal did not plan in advance to steal the parts, but rather that he was nervous and in a hurry to take the items he had just misappropriated to his van. I therefore find that the theft was not premeditated.

Mr. Lévesque testified that Mr. Jalal told him that he knew of the Code of Discipline and several of the standards of professional conduct. Mr. Jalal admitted during his testimony that it was the employer's practice to inform staff when employees were suspended from their duties and to give the reason for the suspension. He admitted that he knew the reason in certain cases. After 10 years of employment with Correctional Service Canada and in light of this practice of informing employees of suspensions, I do not find reasonable Mr. Jalal's explanation that he was not familiar with the Code of Discipline and was unaware of his obligation to advise the employer of the criminal charges laid against him. The weight of the evidence is that he knew of this obligation and that is why he asked the advice of his lawyer. I believe that he was simply hoping that the employer would not find out about these charges.

In the letter of termination of employment of October 18, 1996, the employer accused Mr. Jalal of having changed his story during the various interviews and of completely denying his actions. The employer's evidence dealt mainly with the second point because the only evidence that Mr. Jalal changed his version of the facts related to Mr. Cartin's interrogation in the office at the Réno-Dépôt. According to Mr. Cartin, Mr. Jalal allegedly admitted taking the seal cushion. Mr. Jalal denies it. It is my opinion that the evidence relating to the changing versions does not justify the imposition of disciplinary action.

The second reason, that of " completely denied your actions", was explained by Mr. Deslauriers in his testimony. Mr. Deslauriers mentioned that the theft itself was

inconsequential and that, by refusing to admit his mistake, the employee committed a dishonest act that he considered more serious than the theft. He explained the reason for termination as follows: [Translation] "what was important was why he did not come to see us, to admit; the way he behaved is more important than the amount stolen". I must therefore determine whether Mr. Jalal's failure to admit to the theft constitutes a second dishonest act to be added to the first infraction.

The following extract from *Re Toronto East General Hospital Inc. and Service Employees International Union* (1975), 9 L.A.C. (2d) 311, at page 324, to which Vice-Chairperson Chodos referred in *Hampton* (Board file 166-2-28445) deals specifically with this question:

> *However, that is not the case of this grievor. Here, if as we have found, the discovery of the six cans of juice in his coat is on the preponderance of evidence, consistent with his having misappropriated them, then his subsequent dishonesty in denying that conclusion must be considered as part and parcel of that initial act of misconduct. It is in a sense simply his having been caught up in his own dishonest act. At the moment he failed to admit to his misconduct he was in effect committed to one course of action. He was caught up in and tied to maintaining his falsification of the actual events.*

Mr. Jalal faced criminal charges; he benefited from the presumption of innocence and the right not to incriminate himself. After deciding to plead not guilty to the criminal charges and to exercise his rights, Mr. Jalal adopted an approach by which it would have been inconsistent to incriminate himself by admitting to misappropriating the parts. To reiterate the words of Vice-President Chodos in *Hampton* (*supra*), "[. . .] he took a leap down the slippery slope [. . .]" which led him to deny the fact to the employer and, subsequently, to do so at the hearing of his grievance. This does not mean that I must not take this factor into account, as was determined in *Re Toronto East General Hospital Inc. and Service Employees International Union* (*supra*) at page 323:

> *It is true, as we noted, that Mr. Hogan's case would have merited a much milder sanction had he in fact admitted to his offence. Further, the falsification of evidence under oath itself can only be viewed in the most seious [sic] terms. If the arbitration process is to have any meaning and utility such conduct simply cannot be tolerated. It is also true however that this second manifestation of untrustworthiness and*

> *dishonesty is inextricably interwoven to the first. This simply is not the case of an employee who, having been disciplined for some act of aggravated dishonesty, subsequently and in apparent disregard of that earlier sanction repeats that or some similar offence. In such a case one might reasonably conclude that the employee is not capable of responding to some lesser form of discipline and is simply incapable or unwilling to reform his conduct. In such a case, repetition of what is universally regarded as most serious misconduct may appropriately be met by the discharge of that employee.*

While Mr. Jalal's failure to admit his mistake cannot be viewed as a new offence, it can instead be considered in assessing the appropriate disciplinary penalty under the circumstances.

Having addressed these questions, I must now determine what the appropriate penalty is. It is true that it would have been preferable for Mr. Jalal to have admitted his mistake. However, I do not consider this sufficient reason to uphold his termination, but rather consider it justification for a longer suspension than would otherwise have been appropriate under the circumstances.

Mr. LeFrançois argued that he had met tests 1, 2 and 5 of *Millhaven* (*supra*) and that based on the decision in *Flewwelling* (*supra*) if I consider that even one of the said tests applies, I must find that the only disciplinary sanction appropriate in the circumstances is Mr. Jalal's termination of employment.

I cannot agree with this argument. Arbitral case law has evolved since the decision of arbitrator Anderson in *Millhaven* (*supra*). Initially, arbitrators upheld termination even if only one of the *Millhaven* tests was met; more recently the tendency is to consider also the context and to impose disciplinary sanctions other than termination. Based on this more recent approach, once the employer has shown that one of the *Millhaven* tests applies, arbitrators consider in particular the nature of the offence, the charges and the impact that they have on the employer's interests in order to assess whether the disciplinary sanction is appropriate.

I prefer this approach, which is in keeping with that found increasingly in cases of theft in the workplace. Authors Palmer and Palmer cover it in their book *Collective Bargaining Arbitration in Canada,* 3rd Edition, Butterworths, 1991 at page 361 and Brown and Beatty in paragraph 7:3422 of *Canadian Labour Arbitration* (*supra*). Authors D'Aoust, Leclerc and Trudeau clearly prefer this latter approach as discussed

in *Les mesures disciplinaires: étude jurisprudentielle et doctrinale, Monographie 13*, University of Montréal, 1982 at pages 339 to 351:

> [Translation]
>
> *The original approach was to uphold the employer's sanction regardless of the value of the item stolen. The tenets in support of this approach viewed theft as an offence of such seriousness that it was not appropriate to apply the doctrine of extenuating circumstances. In all instances of theft, the trust required for the survival of the employment relationship disappeared. [. . .]*
>
> *[. . .]*
>
> *The second approach opposes the premises described earlier, as well as the restrictions they sought to place on arbitrators. While acknowledging that theft is a major offence that could, in the extreme, warrant dismissal, the tenets of this more liberal approach avoid the imposition of an automatic penalty and consider that all of the circumstances specific to the instant case, to the act per se and to the personal characteristics of the employee must be taken into consideration. [. . .]*
>
> *[. . .]*
>
> *[. . .] As with all breaches of discipline, it is appropriate to put such actions into their context and not to leap to conclusions too quickly. It is our view that the liberal approach most closely reflects the role that the parties expect of arbitrators and that the latter should not set aside that role on the pretext that the actions are serious offences subject to criminal proceedings.*

Since this approach applies to employees who steal from the workplace, it is logical to consider all of the circumstances and the full range of disciplinary sanctions available in the case of an employee whose misconduct occurs outside work hours and away from the workplace. Arbitrator McColl commented on the application of the *Millhaven* tests in *Re Emergency Health Services Commission and Ambulance Paramedics of British Columbia, C.U.P.E., Local 873* (1987), 28 L.A.C. (3d) 77. His comments are especially relevant to the case before me. He states at pages 86 and 87:

> *I would add to those two comments that the general consensus amongst arbitrators is that it is not necessary for an employer to show that all criteria exist, but rather that, depending on the degree of impact of the offence, any one of the consequences may warrant discipline or discharge. [. . .]*

> *[. . .]*
>
> *[. . .] To support discharge the offence must be of such a serious nature as to demonstrate that the conduct is wholly incompatible with a continuation of the employment relationship.*
>
> *In this case the facts clearly demonstrate the relationship between the charges and the business interests of the employer are sufficiently close to enable the employer to consider the conduct disciplinable. The real issue is whether or not the conduct is sufficiently reprehensible so as to mandate a discharge. [. . .]*

Moreover, in *Re Government of the Province of Alberta and Alberta Union of Provincial Employees* (1998), 72 L.A.C. (4th) 403, at page 420, the arbitration board reiterated these comments in the following manner:

> *[. . .] The question is whether the Grievor's off-duty conduct is "wholly incompatible with a continuation of the employment relationship". To conclude that it is we would have to find "a causal connection, a nexus or linkage between the Grievor's criminal activity and the duties of her job". In our view the connection is not sufficiently strong to justify termination. [. . .]*

In light of these comments, I reviewed the evidence on the three *Millhaven* tests which, according to Mr. LeFrançois, apply in the instant case. For the reasons I will explain in the following paragraphs, I find that Mr. Jalal's conduct, and the theft charges that resulted, did impact the employer's interests and that this conduct was linked to his employment as a prison guard. But this linkage ("the nexus") is not close enough to justify termination of employment. The seriousness of the offence justifies a suspension, but does not make Mr. Jalal's reinstatement wholly incompatible with the employer's interests.

Thus, based on the first *Millhaven* test, it would be necessary for the reputation of Correctional Service Canada to have been harmed as a result of the theft charges laid against Mr. Jalal. While one can understand that the employer would be afraid for its reputation, in actual fact, there is nothing to indicate that it was harmed. The employer's fear that its reputation would be harmed is not enough in itself. To this effect, see the decision of arbitrator Lainz in *Re City of Port Moody and Canadian Union of Public Employees, Local 825 (1996*), 63 L.A.C. (4th) 203. Mr. Deslauriers testified that there was no media coverage of these events and I have no evidence to

show that the reputation of Correctional Service Canada was affected with its partners, namely, the Montréal Urban Community police department. The police too have to deal with incidents of this nature. One example is *Fraternité des policiers (C.U.M.) v. C.U.M. (D.T.E. 83T-170);* [1985] 2 S.C.R. 74, in which the Supreme Court of Canada upheld the decision of an arbitrator, substituting for termination a 13-month suspension in the case of a police officer found guilty of shoplifting items totaling $60.

According to the second *Millhaven* test, Mr. Jalal's behaviour would have had to render him unable to perform his duties. Mr. Deslauriers explained that, by having charges laid against him, Mr. Jalal became unsuitable for his job because inmates at Leclerc Institution had committed minor crimes similar to that of Mr. Jalal. Given Mr. Jalal's acquittal, the fact that he was charged with theft cannot in itself justify the termination of his employment. However, it does show that, in the circumstances of this case, the interests of the employer were impacted by the charges laid against Mr. Jalal and justified Mr. Jalal's suspension during the investigation and even until the time of his acquittal.

As for the fifth *Millhaven* test, Mr. LeFrançois explained that it applied because the bond of trust had been broken, which placed difficulty in the way of efficiently managing the operations and workforces of the Institution. Mr. Deslauriers testified that [Translation]"I might have agreed to reduce the penalty; the problem is that the bond of trust is broken and that is fundamental; why did he not try to rebuild the relationship by confessing". Therefore, in Mr. Deslauriers's view, the bond of trust is broken and cannot be restored, which means that Mr. Jalal cannot be reinstated.

I believe that the fact that Mr. Jalal was the subject of criminal charges, that he failed to advise his employer and that he did not admit to his mistake affected the trust that the employer had in him. It is reasonable to think that, in a prison, this bond of trust is especially important and that any relatively serious damage to that bond of trust is detrimental to the employer's interests. However, to assess whether the seriousness of Mr. Jalal's offence irreparably damaged the trust that could be placed in him, it is necessary to analyse all of the circumstances of the case. Thus, in *Re City of Moncton and Canadian Union of Pubic Employees, Local 51 (1990*), 10 L.A.C. (4th) 226, the arbitration board wrote at page 230:

> *[. . .] Just as it is not sufficient for an employee to exonerate himself by freely admitting his theft when confronted, it is*

> *also not enough for an employer to simply say that the bond of trust is broken. That statement must be reasonable in the circumstances and the circumstances must be such that it would be reasonable to conclude that an employee could not be trusted in the future. [. . .]*

First of all, in the instant case, I am of the view that it is especially important for the bond of trust that the theft was not committed at the workplace. Indeed, authors D'Aoust, Leclerc and Trudeau state the following in note 925 at page 348 of their work, *Les mesures disciplinaires: étude jurisprudentielle et doctrinale* (*supra*): [Translation] "In terms of the continuation of the employment relationship, it is more serious to steal from the employer [. . .] than from a third party, outside the hours of work and away from the workplace".

During 10 years at his job, Mr. Jalal's performance was satisfactory to the employer and the latter never had any criticism of his conduct. Mr. Jalal had never been accused of stealing before; this is therefore an isolated act. Moreover, as I mentioned earlier, it is my view that the theft was not premeditated because the evidence shows that, initially, he did not go to Réno-Dépôt with the intention of misappropriating the parts. He purchased items that were available separately, such as the flexible pipes, the drain cleaner and the brass spray paint, but stole the items for which he would have had to go to another store, such as the Quincaillerie 4-Sous. Without excusing him, I believe that his actions correspond more to what Professor Palmer characterizes as "pilfering" than theft, or what can be treated as a "momentary aberration" (see *Collective Agreement Arbitration in Canada* (*supra*) at page 361). The decision in *Re Government of the Province of Alberta and Alberta Union of Provincial Employees* (supra) states at page 420 that it is also necessary to evaluate the risk to the employer in the case of a crime that is not characteristic of the employee normal personality or behaviour:

> *[. . .] We have to evaluate the risk associated with employing this Grievor, in this job in light of the evidence we have before us. The evidence before us indicates that her participation in this bizarre crime was completely out of character and that it would be unlikely that she would be involved in similar misconduct again. Her performance reviews over a period of years describe her attitude and conduct towards the clients as compassionate and caring. The Grievor's personal and work history compel us to discount the risks associated with her return to work in her former position. [. . .]*

Criminal law deals differently with theft depending on the amount involved and punishes differently those who commit petty theft than those who commit a major theft. This is referred to as the proportionality of offences and sentences. According to the testimony of Officer Bolduc, the policy of the Montréal Urban Community police department is to keep thefts of $10.00 or less out of the courts. I am also of the view that the fact that the price of the parts, purchased individually, was at most $34.01, taxes included, must be considered an extenuating circumstance. Since his termination of employment, Mr. Jalal has been able to find employment in a field where the degree of trust that his new employer requires of him is just as significant. This is another factor that illustrates that the termination at issue was not reasonable and appropriate at the time that it was ordered (see *Cie minière Québec Cartier v. Québec* [1995] 2 S.C.R. 1095).

Accordingly, I am convinced that Mr. Jalal's act was an isolated one which, while being serious in nature, was the result more of an error in judgment than a lack of integrity that would make it impossible to preserve the bond of trust necessary to the employment relationship. I find that the employer's statement that the bond of trust has been irreparably broken is not reasonable in the circumstances and that the evidence reasonably shows that, in future, Mr. Jalal could be worthy of trust.

I therefore allow, in part, Mr. Jalal's grievance against the employer's decision to terminate his employment, dated October 18, 1996 and I replace the termination with a suspension of 20 months, which reflects the delays attributable to Mr. Jalal. I dismiss, in part, Mr. Jalal's grievance and consider that his suspension during the investigation was justified. I can only reinstate Mr. Jalal in the position he held at the time of his termination of employment but, based on the ruling by the Federal Court of Appeal in *Canada v. Tourigny* (1989), 97 N.R. 147, I am leaving the following option open to the employer, if Mr. Jalal consents to it. I grant the employer the option of appointing Mr. Jalal to an equivalent position in the Public Service elsewhere in the Montréal region, or if Mr. Jalal agrees, elsewhere in Canada. If the employer is unable to find such a position within 60 days following the date of this decision, Mr. Jalal will be reinstated in his CX-1 position at Leclerc Institution at the end of that time.

I order the employer to reinstate Mr. Jalal in his position, or in another position, if the parties agree accordingly, and that he be compensated, given what he may have

earned during this period, for any loss of wages or other benefits since June 18, 1998.

Guy Giguère
Board Member

OTTAWA, April 21, 1999

Certified true translation

Serge Lareau