



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

GENEVIEVE BATIOT

Grievor

and

**TREASURY BOARD
(Justice Canada)**

Employer

Before: Donald MacLean, Adjudicator and Board Member

For the Grievor: Bernadette Maxwell and Nancy Elliot, counsel

For the Employer: Michael Ciavaglia and Ingrid Stack, counsel

Heard at Halifax, Nova Scotia,
November 2 - 4, 1998

DECISION

Genevieve Batiot is the grievor in this case. She says that the employer suspended her for an indefinite period in April 1997. Later, in February 1998, it discharged her. She claims that the employer's decisions to discipline her were without just cause.

The bases of her claim are threefold: (1) the employer failed to follow the rules of natural justice in dismissing her, because it did not give her an opportunity to answer the allegations; (2) the employer knew, or ought to have known, that she was suffering from a disability, yet it failed to refer her to its own Employee Assistance Program; and, (3) it failed in its duty to accommodate her in her disability. She says that evidence of her disability arises from the fact that she had both a gambling and a drug addiction.

The employer says that it had reasonable cause to discharge Ms. Batiot. It maintains that she misappropriated public funds of the department through her misuse of the office petty cash fund and her use of a departmental credit card. According to the employer, she converted public funds to her own personal use. It says that her actions breached the fundamental trust that it had confided in her.

The employer considered that the misappropriation of the office's petty cash fund and the use of the credit card for her personal use were serious acts of misconduct. Her actions breached the trust that they had given to her in her position. The employer rejected the claim by Ms. Batiot that there was inadequate managerial support for her to access the EAP.

Until her discharge on February 3, 1998, Ms. Batiot was the Administrative Officer (and Manager of Finance and Administration, at the AS-02 level) at the Halifax regional office of the Department of Justice. She was part of the management team in the regional office. The employer had suspended her indefinitely on April 9, 1997, pending the outcome of its investigation into her activities.

The decision to terminate Ms. Batiot was based on a series of events that took place in the period prior to her suspension. Those events led to a preliminary investigation in January

1997 into Ms. Batiot's use of the office petty cash fund and the office's credit card. A subsequent investigation and audit in April 1997 revealed that Ms. Batiot misappropriated funds out of the office's petty cash and utilized the department's credit card for personal purchases.

Ms. Batiot had the responsibility for the \$ 500.00 in the petty cash fund. It was part of her job to verify that all expenses out of the fund were legitimately made. She was the one who checked out requests for money; she reconciled the amounts, and she requisitioned the cheques to cover the payouts out of the fund.

In 1996 the department had also provided her with a credit card to make purchases for office supplies. As with the petty cash fund, she was the person who was responsible to ensure that all purchases on the card were for legitimate departmental purposes. Each month she would verify the amounts on the monthly statement against her vouchers for the purchases, and then she would requisition a cheque to pay off the statement.

The evidence of the employer reveals that Ms. Batiot used the petty cash and the credit card to purchase such things as 6/49 lotto tickets, Atlantic lotto scratch and win tickets, food and cigarettes. An audit verification of the product codes (primarily from Lawton's Drugs) revealed the actual nature of her personal purchases. Ms. Batiot had submitted false information to support those purchases.

During the period covered by the internal investigation, she had made personal petty cash purchases in the amount of \$ 181.03 and credit card purchases totalling \$ 870.10. As of April 1997 the petty cash fund was short by another \$ 210.43. The total short-fall in all was \$ 1,261.56

In July 1997, all relevant information was turned over to the Halifax Regional Municipal Police. At that time Ms. Batiot was charged with fraud, theft and breach of trust in regard to the misappropriation of public funds. At first she pled not guilty to the charges. A year later, in July 1998, she changed her plea to guilty to the criminal charges. During a sentencing hearing in September 1998, the court granted Ms. Batiot a conditional discharge. As part of her sentence the court also ordered her to make restitution to the department within 12 months

in an amount between \$ 750.00 and \$ 1,200.00. Ms. Batiot was also ordered to complete 50 hours of community service.

During the adjudication hearing, Ms. Batiot admitted that she had misappropriated the office petty cash fund and used the office credit card for her personal purposes. She further conceded that she made up false vouchers in an attempt to cover up her actions. She said that she first fell into that trap in the latter part of 1995. However, the evidence of the employer is that she was dipping into the petty cash fund in the early part of 1994.

For the first time since the investigation began, Ms. Batiot also admitted that she was the person who had stolen approximately \$ 500.00 from her co-workers in mid-March 1997. At the time she had covered her tracks by suggesting that she too was a victim of the thief. She had said that someone had taken \$ 22.00 from her purse. She further acknowledged that she had borrowed as much as \$ 500.00 from fellow workers at the office. (At the time of the hearing, Ms. Batiot had not repaid any of the borrowed money, nor had she attempted to replace the money that she had stolen from her co-workers.)

Ms. Batiot has been an employee in the Public Service for 17 years. She started at the CR-01 level in National Defence in Halifax. Over the years she moved up in the Public Service into positions with progressively more responsibility in External Affairs, and Energy Mines and Resources, until her appointment in 1988 as the administrative officer (and manager) in the Halifax regional office for the Department of Justice. She has held an indeterminate position in the department at the AS-02 level since that time.

The department began hearing rumours of irregularities in the petty cash fund during the spring of 1996. Some of the staff indicated that funds were not readily available from the petty cash box when requests for an advance or reimbursement were made, unless Ms. Batiot was available with her purse. Sometimes the key was not available. Mr. Tax, the director of the regional office, requested that Ms. Batiot prepare a reconciliation of the petty cash funds. He felt that it was just a matter of reconciling the paid outs and replenishing the fund with a cheque.

In the summer of 1996 the Financial Services Division of the department also had questions concerning the office credit card. When more questions arose in December 1996,

they ordered an audit for mid-January 1997. That audit turned up a couple of irregularities, but they were not major. It was later learned that Ms. Batiot had borrowed over \$ 300.00 from a neighbour to replenish the fund before the department conducted their audit.

On March 21, 1997, a number of staff members in the office reported money missing from their purses, wallets, and desks in their offices. The estimate is that someone had taken \$ 500.00. On March 27, 1997, the department brought in the Halifax Municipal Police to investigate the thefts at work. During the police investigation, a neighbour of Ms. Batiot indicated to the police that Ms. Batiot had confided to her that she had taken \$ 500.00 cash from work.

On April 3, 1997, Ms. Batiot was off work. The police had called her in for questioning about the theft of jewellery from a neighbour's house. At first she protested her innocence, but later in the interrogation she confessed that she had taken the jewellery and pawned it.

Back at the office the petty cash boxes were examined. One was empty, and the second contained only 18¢. On the following day, Friday, April 4, Ms. Batiot returned to work. During the morning she contacted her family doctor, Dr. Conter. She told him that she was having a very bad day. He scheduled her to come to his office that afternoon. In turn, he left a voice mail message for Mr. Tax to inform him that Ms. Batiot should return home for the afternoon. Ms. Batiot left work around 11:00 a.m. that morning.

After she left, the employer examined the petty cash boxes again. One box remained empty. However, the second now contained a total of \$ 399.28 in cash, plus vouchers and receipts that totalled \$ 168.39. Ms. Batiot had managed to come up with the funds. The employer decided to conduct an in-depth audit of the petty cash fund and the credit card purchases.

Ms Batiot did not report to work after April 4, 1997. Her doctor issued her a sick leave certificate. She tried to get approval for the sick leave. However, on Wednesday, April 9, 1997, the employer had placed her on indefinite suspension pending their investigation. Besides, she did not have any more sick leave left to her credit. Mr. Tax had previously advanced her sick leave credits from the 1997-1998 fiscal year.

Charles Saunders conducted the internal investigation into the petty cash and the credit card irregularities. He had done the original audit of the petty cash in January 1997. He had not found any significant problem at that time. During his audit investigation in April, Mr. Saunders verified the reported purchases against the store receipts. He checked the coding on the receipts against the list of codes provided by Lawton's Drugs, and the credit card company. As a result he concluded that Ms. Batiot had used the petty cash fund and the credit card for her personal purposes. She had used the petty cash fund for irregular purchases as early as 1991, when Ottawa refused to accept purchases of Christmas cards and a kettle for the office. At the time she had used cash receipts of personal purchases by herself and others to make up for those office purchases. The audit showed that in April 1994 she began using the petty cash fund for personal purchases. The vouchers would show purchases of office supplies, while the store sales' slips that went with the vouchers were for personal items. The loss to the government over the years amounted to \$ 1,261.56.

Once he received the results of the internal investigations, Mr. Tax recommended that Ms. Batiot's employment be terminated and that she be required to return any funds that she had misappropriated from the Crown. That was recovered from other monies that were owed to her by the employer.

The evidence of Ms. Batiot was that she and her family were living above and beyond their means for the past number of years. In 1988, at about the same time period that Ms. Batiot became the administrative officer for the department, her husband purchased a fishing supply business. When the fishery downturned in the early 1990's the business experienced significant financial difficulties that are still evident to this day. Ms. Batiot and her husband had to re-mortgage their home to inject capital into the business. She would borrow money from her sister and repay her on payday.

To calm her nerves, caused in part by her financial problems and the pressures at work, her doctor in 1992 gave her a prescription for Ativan, a benzodiatapine. By the fall of 1994 she was mildly abusing the Ativan prescription. By the latter part of 1995, she says that became dependent on and addicted to the drug. Ms. Batiot acknowledged that, during the winter and early spring of 1996-1997, she was consuming Ativan at three times her prescription rate. She would secure her quantities from friends and acquaintances. In the four

months prior to her suspension, Ms. Batiot's weight dropped by approximately 30 pounds. Because of stress from her financial problems and her Ativan addiction she was not eating properly.

In August 1995 Ms. Batiot began frequenting the newly-opened Sheraton Casino in Halifax. Her first couple of visits were moderately successful. On each occasion she left with more than double the \$ 40.00 stake that she had taken to the casino. For her it was to become the nirvana to their financial woes. Subsequent visits to the Sheraton turned out to be the downfall for Ms. Batiot. She started gambling and losing money on a regular basis.

She was hooked on both gambling and the Ativan. She was blinded by the prospect that her gambling would get the family out of their financial hole. The Ativan allowed her to get through the day.

She says that the Ativan clouded her sensibilities. She would borrow from family, friends, and co-workers on any pretext. She would "borrow" funds from the petty cash and credit card at \$ 20.00, \$ 40.00 \$ 60.00, and more, at a time to feed her gambling appetite. She would even spend the whole night at the casino. She managed to hide her addictions from her family, her doctor, and her co-workers. Her family only learned of her gambling predilection in January 1997 when she told her husband. She did not tell any of her co-workers, or her supervisors, about her drug and gambling problems. When co-workers questioned her about changes in her personality and other symptoms of her stress, she would refer to family problems. Her fallback was to refer especially to the problems associated with caring for her mother. In 1988 her mother had moved into an apartment in Ms. Batiot's home. As the years passed, her mother's Alzheimer's disease, resulted in her becoming increasingly dependent on Ms. Batiot.

Ms. Batiot testified that she had approached Mr. Tax in December 1996 to go to an EAP counsellor to discuss her family problems. She says that he was not receptive to her request. She could get time off if she were to schedule her appointments for the later part of the afternoon. She tried it a couple of times, but her family obligations to her mother, and her relief of her mother's nurse, made that arrangement unworkable. She did not go back to Mr. Tax to tell him of her difficulty.

Since her suspension in April 1997, Ms. Batiot has taken many steps to change her situation. She has attended therapy sessions. The business has closed. They are liquidating its inventory. She and her husband had to sell their home and sailboat and pay off her husband's business debts with the equity. After selling their house, the family moved into a smaller home for which they have a lease-purchase agreement from her father-in-law. In short, Ms. Batiot and her family have adopted a more modest and affordable life style. Ms. Batiot's family and in-laws have been very supportive.

Ms. Batiot has not gambled since April 1997. She has voluntarily agreed to be barred from the casino. She has also abstained from Ativan since mid-April 1997. She has attended the Core addiction program and the Matrix program under the auspices of the Metro (Halifax) Drug Dependency Council. Matrix is a women-centred service for women who are or have been harmfully involved with drugs, alcohol, and or gambling. Ms. Batiot has re-started volunteering in her community in her efforts to rebuild her self-esteem.

In the adjudication hearing, the grievor presented a medical report from her family physician, Dr. Conter, and reports and testimony from her psychiatrist, Dr. Allan Gosse. Dr. Conter has been her family doctor since 1986. It was only on April 4 that she confided to him about her addictions. On previous visits to his office, she would refrain from taking Ativan. During the appointment on April 4 he formed the opinion that Ms. Batiot was unable to return to work as of that date. Dr. Conter arranged for Ms. Batiot to enter a psychiatric treatment program at the Nova Scotia Hospital.

Dr. Gosse initially saw her in September 1997. At that time, Dr. Gosse described Ms. Batiot as being stressed and under pressure. He considered that she was suffering from mixed anxiety and depression, with an associated panic disorder. She was not able to work at that time. His diagnosis helped the grievor establish a long-term disability claim. She was on LTD until May 30, 1998.

Dr. Gosse described Ms. Batiot as an educated woman who has achieved some considerable career goals since she began working in the Public Service. He testified that she was experiencing some serious stressors in her life that could have contributed to the thefts at work.

Dr. Gosse has seen Ms. Batiot regularly since September 1997. He describes her as shattered, ashamed, remorseful, and embarrassed as a result of her actions. He believes that she has made great progress since her initial visits. He now considers Ms. Batiot to be at a low risk of falling back into a pattern of misuse of medications or gambling.

Dr. Gosse testified that abuse of Ativan would explain why Ms. Batiot passed out at work one day. He likened Ativan to alcohol. It disinhibits and clouds a person's judgement. A person under the influence of Ativan could do things that he or she would not normally do.

Dr. Gosse also testified that the gambling problems arose from her financial situation and her family situation. Although theft can be associated with a gambling or drug addiction, it is not symptom of drug or gambling addictions.

The evidence is that Ms. Batiot did not tell anyone at work about her addiction problems, nor did she ask for specific assistance for those problems. The employer only learned of those issues in her grievance letter in February 1998.

Mr. Tax was aware that Ms. Batiot was under some stress and that she was not quite herself before her indefinite suspension in April 1997. He testified that both Ms. Batiot and Dr Conter attributed her ongoing stress to her family problems, and in particular, to the health of her mother. It was taking a toll on Ms. Batiot. Mr. Tax had noticed her weight loss. Yet, according to Mr. Tax, she told him that she had wanted to lose some weight.

When Ms. Batiot did not report to work after April 4, 1997, Mr. Tax informed Ms. Batiot and her lawyer at that time that she was no longer eligible for sick leave with pay. As of April 3, 1997 Ms. Batiot had a deficit in her sick leave accumulation. During the 1996-1997 fiscal year, she had used up her sick leave credits. During that time, Mr. Tax had also allowed her to use some anticipated sick leave from the next fiscal year, 1997-1998.

Douglas Richard, a staff lawyer with the department, testified that in January 1997 he had noticed changes in Ms. Batiot's attitude and body weight. She had asked him for money on a couple of occasions. She explained to him that her weight loss was a result of her not having any money for food. Mr. Richard suspected that Ms. Batiot was also borrowing money

from other employees. He confirmed his beliefs and confronted Ms. Batiot. She acknowledged that she had borrowed upwards of \$ 500.00 from as many as 10 co-workers.

Mr. Richard spoke to Mr. Tax in regard to Ms. Batiot's situation. They discussed the possibility of referring her to the EAP program. At the time, Mr. Tax encouraged Mr. Richard that if he wanted to help Ms. Batiot he should do something about it. Mr. Richard did mention the EAP program to Ms. Batiot, but she claimed that the EAP would be of no help to her. She stated that she had previously attended the EAP. It had done nothing to help her.

Mr. Richard and Karen Thomson another fellow employee both commented that it would affect morale in the office if Ms. Batiot were reinstated. Because she was involved in theft from the employer, it would take a long time to build the morale back up and a long time for her to regain the trust of the other employees.

Summary of the representations on behalf of the Parties

Argument for the Employer

Counsel for the employer submitted that this is an unfortunate situation for both Ms. Batiot and for the department. Based on the documents submitted at the hearing, one could have some sympathy for some of Ms. Batiot's problems. Yet, she continues to blame others for her problems. She points to her husband, her family, Lawton's Drugs, and her director, Mr. Tax for making mistakes. They are the ones who failed to do something. It was not she.

Ms. Batiot does not show any remorse for what she has done. She has not taken any steps to repay the money that she borrowed from her co-workers. Nor does she apologize for stealing money from her co-workers.

She appears to be willing to pay back the money if she gets her job back, but she does not care about repaying the money if she does not get her job back. Her demeanour tells all in this situation. That is a very telling point.

Ms. Batiot tries to pass the blame onto her husband. She claims that her family had financial difficulties around the time that her husband was starting his new business. She

claims that this has triggered her gambling. Yet, the financial problems were those of the family unit. They had made their decisions together.

Ms. Batiot's financial problems could cause some stress, but this stress was of her own making. The real problem here is that Ms. Batiot did not try to deal directly with her problems. The family could have sold their boat or scaled down their house earlier on, but Ms. Batiot chose to take the quick fix in the Ativan. Ms. Batiot abused the drug and she allowed it to muddle her judgement. She also looked for a quick fix through gambling.

It would be utterly inconceivable to pay someone for stealing. During the period of their financial difficulties, they were spending family funds. Meanwhile, Ms. Batiot was stealing from her employer and her co-workers.

It is true that Ms. Batiot has undertaken the Core and Matrix programs. However, the important thing to remember in this instance is that Ms. Batiot does not accept personal blame for her actions. There is no evidence that she accepts blame for any of her actions.

Ms. Batiot was quite familiar with the idea of creative accounting. Early on Ms. Batiot came up with some creative accounting to cover up withdrawals from petty cash for such things as office Christmas cards and a kettle, because Ottawa did not permit such purchases

These kinds of acts were not impulsive. She had planned her actions from the outset. They were not triggered or motivated by her addictions. These types of behaviour patterns are evident as early as 1991. The investigation of the petty cash shows misappropriations by her as early as April of 1994. That was before Ms. Batiot had her addiction to Ativan. It is clear that she dipped into the petty cash for her own personal reasons.

The documentation speaks for itself. Yet, Ms. Batiot's answer is that the Lawton's code for lottery tickets is wrong. In order to cover for this type of error, Ms. Batiot tries to push back her addiction to 1994.

In January 1997, Ms. Batiot knew that there was an audit coming. At that time, she borrowed money from a friend to fix things with petty cash. The money that she "borrowed" was around \$ 500.00, and not \$ 300.00 as she has testified. This suggests that she still does not understand the reality of her actions.

Ms. Batiot's manipulations of the cash slips are also part of the problem here. She was not so muddled that she wrote slips for such things as scotch tape on the back of the receipts when the purchases in reality were for food, cigarettes, or lotto tickets. She was trying to cover up her actions.

Ms. Batiot was able to hide her addiction for more than two years. This does not indicate that her thoughts were muddled. In short, Ativan had nothing to do with Ms. Batiot's behaviour between 1991 and 1997.

Ms. Batiot claims that Mr. Tax was not supportive of her going to the EAP. Nevertheless, Mr. Richard recalls that Ms. Batiot had earlier found the EAP program to be useless and a waste of time. She would like to allocate the blame to Mr. Tax for not following-up on the EAP program.

Yet, Ms. Batiot did not tell the Department that she had been in contact with the EAP in the past. Ms. Batiot seemed to have forgotten that she earlier approached EAP. Furthermore, Ms. Batiot did not tell her employer about her addictions. She kept the employer in the dark.

There is no denial of natural justice in this case. The argument of natural justice is defeated because her criminal lawyer advised her not to speak to the office. She never has apologized for her actions. Although her lawyer told her not to speak to the office, the employer could not stop her from contacting the office.

The evidence demonstrates that Mr. Tax bent over backwards to help Ms. Batiot. Yet, the present situation is an issue of trust. Three people testified before they knew that Ms. Batiot had stolen money from their wallets and purses. Stealing breaks the bond of trust completely.

Her fellow employees do not feel that they could trust Ms. Batiot in the future. It would take a very long time for them to regain any trust for Ms. Batiot.

She does not show remorse. There is no trust left between her, the employer, and her fellow workers. Therefore, she should not be reinstated.

There is no need to consider the evidence of Dr. Gosse regarding Ms. Batiot's behaviour after her discharge. Dr. Gosse reports that she has recovered from her drug addiction and that there is a very low chance of relapse. Yet, this does not throw any light on her current situation. That evidence can be heard and reviewed, but it does not have to be relied on.

Dr. Gosse suggests that Ms. Batiot had a gambling addiction. He says that it was a symptom of a greater problem. However, Dr. Gosse did not diagnose Ms. Batiot as having a gambling addiction before her suspension. His report is based entirely on what Ms. Batiot told him. Dr. Gosse testified that Ms. Batiot's gambling was serious in the fall of 1996. Yet, there is evidence of Ms. Batiot dipping into the till as early as 1994.

Counsel argues that this is not a case where the penalty should be changed. There are no mitigating circumstances. Ms. Batiot did not have any real disorder. Instead, her thefts at work have been her normal way of operating. She and her family had been living beyond their means. Now she continues to deny her own personal responsibility for her actions.

If Ms. Batiot had some kind of compulsive disorder that was beyond her control, we might consider giving her a second chance. Ms. Batiot's actions leading to termination are quite serious, but they do not result from impulsive or compulsive behaviour.

Ms. Batiot has only shown remorse at the hearing for her thefts from her employer and her co-workers. Therefore, there are no mitigating circumstances in this situation. She lost her job because of her own actions and she is now making a plea to get it back. There is no evidence that her co-workers are sympathetic or forgiving of Ms. Batiot for stealing from them.

Ms. Batiot tries to say that the receipts from Lawton's and the credit card company are hearsay. However, under the Canada Evidence Act, business records are valid as evidence.

Ms. Batiot had prepared vouchers to claim reimbursement for her purchases. She did not act impulsively in this respect. It was a regular occurrence for her.

Ms. Batiot should not have a second chance. There is no remorse. Ms. Batiot's co-workers have been affected. The post-discharge evidence should not be considered unless the employer knew of it before the termination. This is not the case here. Ms. Batiot did not

inform her employer about her gambling problems, or her drug addiction, until after her termination.

It is true that the employer has an obligation to provide help under the EAP program. Nevertheless, the employer must have knowledge of the problem and the employee must be willing to do her part towards recovery. In this instance, Ms. Batiot did not inform her employer of her problems. Instead, she tried to cover her tracks by replenishing the petty cash.

The employer can only go so far to try to help an employee. Ms. Batiot rebuffed any investigative attempt to find out what was going on. Furthermore, she did not consider that the EAP program would help her.

Counsel for the employer cited the following authorities and cases:

- (1) **Canada Post Corp. and CUPW (Parada)** (1993), 34 L.A.C. (4th) 257, (Jolliffe), at pages 266, 267, 268, 270, 271, 288, 290, 291 and 292.
- (2) **NewTel Communications and C.E.P.C., local 410 (Stockley)** (1998), 71 L.A.C. (4th) 73, (Oakley), at pages 94, 95 and 96.
- (3) **Compagnie Minière Québec Cartier v. Quebec** [1995] 2 S.C.R. 1095.
- (4) **Funnell and Treasury Board (Department of Justice)** (1995), Board File 166-2-25762, (Tarte), at pages 26 and 27.
- (5) **Clare v. Attorney General of Canada** (1993), 93 CLLC 12,143 (F.C.A., Robertson J.).
- (6) **Renouf and Treasury Board (Revenue Canada, Taxation)** (1998), Board Files 166-2-27766, and 166-2-27865 (Simpson).
- (7) **Canada Safeway and UFCW, local 1518 (Kanouse)**, [1997] B.C.C.A.A.A. No. 754 Award no. A-409/97, (Devine).
- (8) **Gunderson and Treasury Board (Revenue Canada, Customs and Excise)** (1995), Board File 166-2-26327 and 166-2-26328, (Chodos).

- (9) **Canadian National Railway and C.A.W. - Canada** (1994), 43 L.A.C. (4th) 129, (Picher).
- (10) **Canada Post Corp. and CUPW** (1995), 50 L.A.C. (4th) 52 (Jolliffe), at pages 60 and 61.
- (11) **University of Manitoba and A.E.S.E.S.** (1994), 44 L.A.C. (4th) 104 (Bowman), at pages 111 and 112.
- (12) **Canada Safeway**, [1996] M.G.A.D. No. 1, (Kaminski).
- (13) **McMorrow and Treasury Board (Veterans Affairs Canada)** (1994), Board File: 166-2-23967 (Chodos).
- (14) **Lutes and Treasury Board (Citizenship and Immigration Canada)**, (1995) Board File: 166-2-26706 (Turner).

Mr. Ciavaglia asks that the grievance be denied.

Argument for Ms. Batiot

Counsel for the grievor argues that Ms. Batiot has been a dedicated and trustworthy Public Service employee for some 17 years. Her performance reviews before 1996 were excellent.

The thefts and misappropriation of funds at work were out of character and were the product of external factors. These factors included her financial stress, a drug addiction to Ativan, and her gambling.

Furthermore, Ms. Batiot has taken the necessary steps to remove those external factors. She did not have a systematic scheme to defraud her employer. Counsel adds that Ms. Batiot approached the employer for help, but that help was not forthcoming.

The employer's evidence in regard to the EAP referral does not wash. They claim that they do not want to harass an employee to follow the program. However, they have not been particularly pro-active in pursuing the EAP program for employees.

In mid-January 1997 Mr. Richard saw that Ms. Batiot was suffering. She was anxious, nervous and had a drug addiction. His opinion was that she was not remorseful. Yet, he is not an expert in such matters.

Dr. Gosse is the only expert in this case. He is a psychiatric expert. Besides, he has some knowledge in the field of addictions. His impression of Ms. Batiot is that she suffered from a mental illness. She had both a gambling and a drug addiction. These problems were symptomatic of her underlying condition in regard to her anxiety and her depression. In his opinion there was a very low likelihood of her problems resurfacing. He believes that she would be okay if she returned to work.

Ms. Batiot is ashamed and shattered and is very remorseful for her past behaviour. Her drug abuse led her to do things that she would not normally do. There was testimony from character witnesses that Ms. Batiot has shown remorse. She testified with honesty, humility, grace, and intelligence. She demonstrates that she is extremely remorseful. She could have easily denied that she had stolen from her co-workers. On the contrary, she admitted to this even though there was no proof that she had taken money from her co-workers. Ms. Batiot made the admission to redeem some of her own self-esteem.

During the criminal trial, Ms. Batiot's first plea was not guilty. This is a standard plea to buy some time. Her lawyer at the time advised her not to own up to anything and not to have any contact with her office concerning these matters. A person cannot be faulted for following the advice of her lawyer.

Ms. Batiot is someone who has gone through a personal nightmare. Somehow, she has found the strength to rise above it and to ask for a second chance. Asking for a second chance does not mean that she shows no remorse.

The adjudicator should consider the post-dismissal evidence in this instance. It is unlikely that the situation will repeat itself. This is not a case where Ms. Batiot could not overcome her problems. It is not too great a risk for her to be employed in the future. She is a homemaker and mother of two children. Her life situation evokes a certain degree of sympathy. She is not a fast buck artist. She was not self-seeking or hedonistic.

In the instant case, the employer has not discharged its duty to investigate the problems of Ms. Batiot. If the employer had reason to believe that she was dipping into the petty cash, the employer should have been more diligent to determine what was wrong with her that would cause her to do it.

Ms. Batiot admits that she was wrong. She accepts the responsibility for the grief she has caused to the others in this case. This is not a case where Ms. Batiot totally denies any guilt. In any event, her behaviour was aberrant because of her mental illness. This illness manifested itself in drug and gambling addictions.

The employer has an onus to investigate when things have changed in an employee's behaviour. If there are changes in an employee's behaviour or it can be observed that the employee's mood has been affected, the employer should ask what is wrong. The employer was not pro-active in this case. When the problem of dipping into petty cash surfaced, the employer should have asked more questions.

If an employee is going to EAP, she should not be reminded about any loss of time or scheduling problems that may occur to accommodate her.

To say that her problems were self-inflicted, or that she was the author of her own misfortune misses the point and betrays a misunderstanding of mental illness and the nature of addictions.

Ms. Batiot has not paid back her fellow employees because she is doing everything that she can to feed her family. She will pay them back when she returns to the work force.

Counsel for Ms. Batiot argues that if the principles of natural justice had been adhered to in the instant case, there would have been an in-depth investigation before Ms. Batiot had been suspended and discharged.

Counsel adds that the use of the Lawton Drug and credit card receipts by the employer are classic cases of hearsay. No one from those companies provided evidence as to the definition of their categories. We do not know what they mean.

Counsel for the grievor cited the following authorities and cases:

- (1) **Herrit and Treasury Board (National Defence)** (1996), Board File: 166-2-27188, (Simpson).
- (2) **Duggan and Staff of the Non-Public Funds, Canadian Forces** (1987), Board File: 166-18-16810, (Nisbet), at page 27.
- (3) **McNamara and Treasury Board (National Defence)** (1989), Board File: 166-2-18291, (Young), at pages 9-10.
- (4) **Cluney and Treasury Board (Revenue Canada - Customs and Excise)** (1994), Board File: 166-2-25534, (Tarte).
- (5) **Sample and Treasury Board (Revenue Canada)** (1997), Board File: 166-2-27610, (Simpson).
- (6) **Graham v. Bison Diversified**, October 11, 1991, (Steel), at page 16.
- (7) **Sauchuk v. Royal bank of Canada** (unreported), June 25, 1987 (Abramovitz), Ref. No. 783 - Quebec.

Ms. Maxwell requested that I allow the grievance.

Conclusion and reasons for the decision

Ms. Batiot admitted that she had misappropriated funds from the employer. Because of that concession by her, the main issue in this case turns on whether Ms. Batiot's actions warranted any discipline, and if discipline is warranted was discharge the most appropriate action. Put another way, does she deserve a second chance in light the mitigating factors? Can she be reinstated with or without conditions?

The employer says that the thefts from the petty cash and the credit card account were neither impulsive nor compulsive. Instead, counsel contends that they were planned and deliberate. Furthermore, Ms. Batiot took elaborate steps to cover up what she had taken.

Counsel for Ms. Batiot maintains that her actions resulted from her addictions. She says that I should consider evidence of her post-termination rehabilitation. She contends moreover that the employer should have realized that Ms. Batiot was having problems at work. Therefore, it should have been more pro-active in helping Ms. Batiot before it made the decision to terminate her employment.

Dismissal cases are never easy to decide. This case is not an exception to that premise. However, after examining all the testimony of the witnesses, the numerous exhibits, and the argument from counsel for both parties, I conclude that the grievance should be denied. It would not be correct or reasonable to reinstate Ms. Batiot in the department. The following are the reasons why I have come to this decision

In outlining my decision I will review the jurisprudence that is relevant in this instance. I will then review how it affects the factors in regard to Ms. Batiot's circumstances and the conclusion that I have reached.

In the *Québec Cartier* case, *supra*, the Supreme Court of Canada outlines the role of an arbitrator in reviewing an employer's decision to discharge an employee, at page 1101:

As a general rule, an arbitrator reviewing a decision by the Company to dismiss an employee should uphold the dismissal where he is satisfied that the Company had just and sufficient cause for dismissing the employee at the time that it did so. On the other hand, the arbitrator should annul the dismissal where he finds that the Company did not have just and sufficient cause for dismissing the employee at the time that it did so.

In his decision in *Funnell*, *supra*, Mr. Tarte accepts the principles outlined in *Québec Cartier* when he says (at page 24):

That question must generally be resolved by looking at the facts as they existed at the time of termination. Post-termination evidence should normally not be looked at to make that assessment. The reasonableness of the employer's decision is determined at the time of termination on the basis of what it knew or should have known at that time. The employer is not required to possess the wisdom that often only comes with hindsight.

Mr. Tarte adds (at page 26) that:

Post-termination evidence may in certain circumstances enable an adjudicator to properly determine whether the employer's assessment of the grievor's situation at the time of termination was correct.

This general rule can be contrasted with the effect of post-discharge evidence. The board in *NewTel*, *supra*, stated that (at page 94):

The effect of post-discharge evidence of rehabilitation needs to be considered in relation to the seriousness of the disciplinary offence. There are relatively few arbitration awards dealing with gambling addictions compared to the number of arbitration awards dealing with alcoholism, however some guidelines may be obtained from the alcoholism related cases. Having regard to prior awards, it is apparent that a greater weight should be given to post-discharge evidence of rehabilitation where the disciplinary offence is more closely related to the fact of the alcohol or gambling addiction rather than to some other serious disciplinary offence.

In dealing with gambling addictions, the board in *NewTel*, *supra*, (at pages 94 and 95) added that:

...the seriousness of the misconduct needs to be considered. There may be various disciplinary offences that result from a compulsive gambling problem. For example, a grievor could have an absenteeism problem caused by a compulsive gambling problem. In other words, not every compulsive gambling problem that is related to a disciplinary offence would necessarily be related to the offence of theft or falsification of expense claims. There are also varying degrees of seriousness of theft or fraudulent activity. The extent and seriousness of any theft or fraudulent activity will need to be considered when determining what weight to give post-discharge evidence of rehabilitation.

In *NewTel* (at pages 95 and 96) the board considered a list of factors that arbitrators have weighed in assessing the seriousness of the misconduct as contrasted with the mitigating elements. Among the mitigating factors that they considered were: the previous good record of the grievor; the long service of the grievor; whether it was an isolated incident in the grievor's employment history; did the incident happen on the spur of the moment or was it premeditated; did the penalty create special economic hardship for the grievor; were the rules of conduct uniformly enforced; circumstances negating intent; the seriousness of the offence in terms of the employer's policy and obligations; the grievor's inability to appreciate the wrongfulness of the incident; the grievor's acknowledgement of the misconduct; and, the grievor's future prospects for likely good behaviour.

I recognize that Ms. Batiot has accomplished a lot since the date of her original suspension and subsequent termination. She has made an honest attempt to change her overextended lifestyle to a more moderate and controllable one. Nevertheless, this is a case where the grievor had to hit rock bottom and lose her job before she could realize that she could effectively change her circumstances for the better.

There was evidence that Ms. Batiot was suffering from a drug addiction (to Ativan), and that she had a serious problem with gambling. It has been argued that Ms. Batiot was not acting as herself and that her true character had been temporarily altered. It was also argued that her behaviour was aberrant and impulsive. As an explanation she says that it was the result of her addictions.

Counsel for Ms. Batiot seek support in cases such as *Duggan, supra*, and *Herritt, supra*. In *Duggan* the grievor was a cafeteria supervisor at CFB Halifax who had suffered from alcoholism for some time. The grievor in that instance had stolen money from the cafeteria cash float for which she was responsible. She used the money to buy liquor. In line with the instant situation, the grievor's job performance had been satisfactory until the money was discovered missing. However, *Duggan* is distinguishable in that it was evident to the grievor's fellow employees that she had become bloated and had a sickly appearance. Furthermore, Ms. Duggan was going to work with the smell of alcohol on her breath. It was evident to all that something was wrong with her.

One could argue that Ms. Batiot's weight loss and stress could be telltale sign of some form of addiction when combined with the concerns about the petty cash and the credit card usage. However, when Ms. Batiot was questioned on such changes, her answers varied from wanting to lose weight, to not having any money for food. In addition, she attributed her stress to her mother's sickness and rebuffed her fellow employee, Mr. Richard, in his suggestion to refer her to the EAP.

In *Herritt, supra*, a stores-person at CFB Halifax was reinstated with conditions. In that instance the grievor had admitted to stealing case lots of food supplies. The purpose of the theft was to enable him to finance his cocaine addiction.

In that case, the grievor had made his employer aware of his addiction prior to his discharge. (*Herritt, supra*, at page 13). Furthermore, Mr. *Herritt* had been previously referred by his employer to the EAP program, for some financial and alcohol problems. There was no real follow up to the program by the employer.

In the instant situation, the employer did not have any prior knowledge of Ms. Batiot's addictions. She did not take any steps to inform the employer that her stress was related to

things other than her family situation. When she was asked, Ms. Batiot stated that the EAP would be of no assistance to her. Moreover, she tried to cover up her thefts to prevent the employer from finding out about her dipping into the petty cash monies. These are not the actions of an employee who is looking for help in her situation.

I cannot agree with the notion that Ms. Batiot's thefts from the employer were a result of impulsive or compulsive behaviour. As was the case in *Herriott* and *Duggan*, some employees steal to finance their addictions.

In this instance Ms. Batiot had made a pattern of using the petty cash funds and the office credit card to buy everything from lotto tickets to cigarettes and food.

In short, these are not the purchases of an addicted person. Ms. Batiot had become accustomed to "borrowing" from and replenishing the petty cash fund long before anyone could argue that she was addicted to either Ativan or gambling. It appears to me that Ms. Batiot's gambling and drug addiction only made it harder for her to balance the petty cash funds on a regular basis before someone eventually detected that the funds were not always available. It was only a matter of time before Ms. Batiot's actions were going to catch up with her.

Counsel for Ms. Batiot questioned the employer's use of the product codes from Lawton' and the credit card company. She said that there was no one from the companies to substantiate what they mean.

However, I agree with counsel for the employer that the slips and the product codes are business records that are receivable as evidence under the Canada Evidence Act. In point of fact, I accept the evidence of the auditor in its totality. In my view none of the evidence of Ms. Batiot, nor the submissions of her counsel, seriously questioned the accuracy of the audit undertaken by Mr. Saunders. The audit demonstrates that she began using the petty cash fund for her own use in 1994. That was before she began abusing the Ativan. It was at least two years before the time when, in the fall of 1996, she says that she had become muddled by the drug.

I have considered the post-discharge evidence of Dr. Gosse. He considers that Ms. Batiot is well on the road to recovery. He suggests that she is a low risk of having any recurring problems. This medical opinion gives me cause to pause in making my decision. It seems harsh to deny Ms. Batiot a second chance even though she has travelled a considerable distance on the road to recuperation.

However, I am not prepared to give the post-discharge evidence as much weight as counsel for Ms. Batiot would like. (See *NewTel, supra*, at page 94). Ms. Batiot's thefts were both persistent and extensive over a long period of time. Therefore, I am of the opinion that the post-discharge evidence of rehabilitation should be given less weight. Furthermore, there are not sufficient mitigating factors to allow me to alter Ms. Batiot's termination of employment.

Although Ms. Batiot has been an employee of long service and good record with the Public Service, her acts of theft were not isolated incidents that were committed on the spur of the moment. Indeed, Ms. Batiot had taken the time to manipulate the credit card and petty cash receipts to cover her actions. Furthermore, she borrowed money from a neighbour to replace the funds in the petty cash when she knew that Mr. Saunders was to audit the petty cash fund in January 1997. This is not indicative of an inability to appreciate the wrongfulness of her actions.

On April 4 Ms. Batiot said that she was having a bad day. Of course she was. The jig was up. The police were on to her for the jewellery theft. Yet, even with all her stresses and concerns, she still managed to scrape up cash to replenish most of the petty cash box. To round out what was supposed to be in the petty cash she found or created a few vouchers. Only this time it did not work as easily as it had in January. When they noted the new contents of the box, the employer decided to investigate their suspicions.

Ms. Batiot only admitted responsibility for the thefts when she was confronted with the proof that she had misappropriated the funds. That occurred a long time after her indefinite suspension. She did not own up to her actions until later.

The only other question that remains is whether the trust relationship could be restored between Ms. Batiot and her employer. This question is complicated by the fact that Ms. Batiot

not only stole from her employer; she also stole from her co-workers. However, the thefts from her co-workers were not part of the reasons for her discharge.

In the final analysis, I consider that Ms. Batiot's thefts from her employer were acts of dishonesty rather than acts that were being impulsively guided by her necessity to fuel her drug or gambling addiction. I do not feel that the trust relationship can be restored in the current situation. Her fellow workers testified that the morale in the work place would be negatively affected by a decision to reinstate Ms. Batiot. While I tend to discount such expressions of opinion by fellow workers, I am, nevertheless, persuaded that her reinstatement would also send the wrong message to Ms. Batiot and her fellow workers that an employee can steal from an employer and then create whatever cover-up subterfuge that serves her best; it would not matter if you are caught, an adjudicator will reinstate you. That is not a message that I intend to foster.

I am not convinced that I should overturn the employer's decision to terminate Ms. Batiot's employment. I believe that the employer discharged her for just cause. There is not sufficient reason to reduce the penalty just because Ms. Batiot has decided to rehabilitate herself after the shock of her suspension: (*Québec Cartier*, *supra*, at page 1102). Accepting such post-termination evidence to overturn just dismissals would send the wrong signal to Ms. Batiot, and lead to the false belief that a dismissal for just cause can be overturned by proving an addiction and undergoing rehabilitation after the fact.

Does the employer's reaction to her going to EAP nullify the decision to discharge her? Although the employer has an obligation to provide assistance for its employees in times of need (see the *Clare* decision, *supra*), the employee also has the obligation to inform the employer that he or she is in need (see also the *Funnell* decision, at page 27). Employees must realize that the EAP is there to assist employees in maintaining their jobs in co-operation with their employer. It is not a tool for re-integration into the work force after an employee's employment has been terminated for cause.

In this instance, Ms. Batiot had knowledge of the EAP and should have sought out the help that she claims she needed at the time. She says that Mr. Tax was not receptive to allowing her to use the EAP. That is not a conclusion I would make in this case. In its worst

scenario he had asked her to co-ordinate her visits to the EAP towards the latter part of her workday. She says that she had difficulty in making that accommodation. Yet, she did not raise that issue with Mr. Tax. The evidence is that he certainly accommodated her in the past with her sick leaves. There is no evidence that he would not have allowed her to alter her routine on visits to the EAP.

On a final note, the grievor claims that she has been denied natural justice to respond to the employer's allegations against her. The answer to such an allegation is that she had an opportunity to present her evidence before me. The adjudication hearing cures any procedural unfairness in a disciplinary process (see the decision in *Tipple*, Court file A-66-85, (F.C.A.)). In my opinion Ms. Batiot has not provided me with cogent evidence that the employer's decision was wrong.

Indeed, on the contrary, it is my conclusion that the employer had just and reasonable cause to discharge Ms. Batiot.

For all these reasons, the grievance of Genevieve Batiot is denied.

Donald MacLean,

Board Member.

Moncton, May 27, 1999.