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Citation: 2001 PSSRB 120

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

SHARON GAIL MILLAR

Grievor

and

TREASURY BOARD
(Human Resources Development Canada)

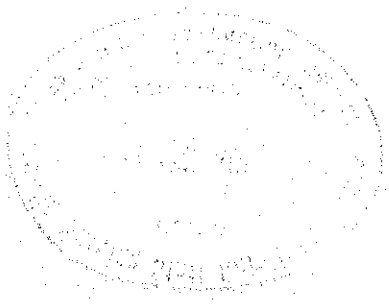
Employer

Before: Francine Chad Smith, Q.C.

For the Grievor: Chris Dann, Grievance and Adjudication Officer, Public Service Alliance of Canada

For the Employer: Harvey A. Newman, Counsel

Heard at Edmonton, Alberta,
October 17 and 18, 2001



INTRODUCTION AND FACTS

[1] Ms. Millar grieved the termination of her employment seeking reinstatement and compensation for lost wages and benefits. At the time, the grievor was employed as a PM 2 - Appeals Agent with Human Resources Development Canada. She had been employed by the employer for 29 years.

[2] On August 22, 2000, the grievor received a letter from Mr. D.C. Rymes, the Regional Director General for the Alberta/NWT/Nunavut Region, which read as follows:

> *I have carefully reviewed the evidence and findings of the administrative investigation into the circumstances associated with your receiving and retaining substantial funds in the form of salary compensation between December 8, 1999 and June 7, 2000.*
>
> *I have concluded based on the evidence presented to me, that you were aware that you were receiving funds to which you were not entitled. Your failure to notify any relevant authority in the Department in relation to these overpayments constitutes gross negligence and fraud on your part by disposing of the funds, knowing that you were not entitled to the additional compensation. Throughout the process of investigation, you have shown no recognition of wrongdoing or remorse.*
>
> *In view of your actions, I have concluded that the bond of trust essential to the continuance of your employment with the Public Service of Canada has been irreparably damaged. Accordingly, under the authority delegated to me by the Deputy Head, I have decided to terminate your employment for cause, in accordance with Section 11(2)(f) of the Financial Administration Act. This decision is effective at the close of business on August 22, 2000.*
>
> *In accordance with Section 91 of the Public Service Staff Relations Act, you may present a grievance against my decision within twenty-five (25) days of receipt of this letter.*

[3] The basic facts of this case are not in dispute. The only factual issue pertains to the extent of the grievor's knowledge with respect to the overpayment and her state of mind, or intentions, in relation to the overpayment. Accordingly, I have chosen to present the facts initially from the employer's perspective and then from the grievor's perspective. The presentation of the facts in this respect also reflects the arguments presented on behalf of the respective parties and the respective rationales for the parties conducting themselves as they did.

The Employer's Case:

[4] In June, 2000, the employer discovered the grievor had received overpayments in her salary from December, 1999 through to and including May, 2000. The gross total of the overpayment was $22,511.72, with the net salary overpayment being $13,791.73.

[5] The overpayment was identified by the employer in its usual payroll review for the period June 8, 2000 to June 21, 2000. As a result, the direct deposit salary payment for the grievor was halted. Later in June the employer paid the grievor of $1,000 to tide her over pending resolution of the overpayment.

[6] The employer established the grievor's regular salary entitlement, the salary payments in issue, and the notifications received by the grievor in relation to all payments, which shall now be set out. The grievor's gross bi-weekly salary entitlement was $1,607.98. However, for the 13 or so pay periods between December, 1999 and early June, 2000, the grievor received a gross bi-weekly salary of $3,215.96. The grievor received pay stubs through the mail approximately one week following the deposit of her salary into her bank account. Her pay stubs for the pay she was entitled to set out the period to which the pay related, her total basic pay of $41,949, that $1,607.98 was paid, and that the total gross payment for that period was $1,607.98. The pay stubs for the payments in issue contained the same information relating to her entitled pay as just set out, then displayed the same payment period for a second time, leave payment in lieu thereof for a total rate of $41,949, that $1,607.98 was paid, and that the gross payable for the period was $3,215.96. The pay stubs for her entitled pay and for the payments in issue also showed the deductions required by law and any further deductions authorized by the grievor.

[7] Other relevant pay information presented by the employer included a pay out of annual leave dated November 12, 1999 in the amount of $803.99 gross, subject to an income tax deduction of $312.37; a pay out of annual leave on March 7, 2000 in the amount of $892.96 gross with no information regarding any deductions; and an overtime and meals payment in the amount of $607.80 gross, with standard Canada Pension Plan and Employment Insurance deductions, and an income tax deduction of $246.00. (Examples of all the pay stubs are contained in Exhibits E2: Payroll Registers, E6: Administrative Review Report, and E8: Disciplinary Report).

[8] The overpayment was spotted by Ms. Dianne Reimer, who was at the time a newly appointed Benefits and Compensation Adviser with the employer. She reported the matter to her team leader, Mr. Carson Ferguson, and they testified with respect to a series of meetings with the grievor and other staff members on June 20, 21, 22 and 27, 2000. The focus of those meetings was to advise the grievor of the fact they had discovered the overpayment in a gross amount of $22,511.72, which they had estimated to represent an approximate net overpayment of $16,000, to discuss recovery options with the grievor, and to eventually explain to her how they calculated the precise net figure of $13,791.73.

[9] Ms. Reimer made notes over the period of time from her discovery of the overpayment through to June 27. The notes were in point form setting out the people in attendance and topics discussed; however, no details of the discussions were recorded. Ms. Reimer testified that, when she was advised of the overpayment, the grievor seemed "quite surprised and had not realized there was an overpayment". She also testified that the grievor did not say she would not pay back the money owing; however, the grievor did say she could not pay it back in a lump sum. Ms. Reimer did not recall the grievor telling her she could not pay the money back; nor did she recall the grievor requesting to make payments over a five year period.

[10] Mr. Ferguson did not take any notes of the meetings he attended. Upon being notified by Ms. Reimer of the overpayment, he concluded action was required and arranged to meet with the grievor in order to discuss options for repayment and to get a sense of the grievor's perspective regarding the overpayments. He recalled asking her if she was aware of the overpayments and that she responded by stating she felt her salary was higher than normal but thought she was eligible for pay equity. He also recalled her stating that she did not think the department would make a mistake and accepted the payments as being correct. He recalled that she said she did not have funds available to make the repayment, that she could not repay it at the rate of 10% of the gross per pay cheque, and that he advised her that she might be able to make a hardship case to make reduced payments and asked her to think about what she could handle and get back to him in seven days. He could not specifically recall the grievor making a proposal for repayment over a five year period but did recall that at one point she volunteered to make payments of $300 per month or per pay period. He felt the discussions regarding repayment were exploratory at that point. He testified the grievor recognized she owed money and was serious about how she could repay it.

Her emotion upon the overpayment being disclosed was one of concern, although he did not think she seemed to be taken completely by surprise. He noted that she may have been coming to the meeting understanding what it was about.

[11] Mr. Ferguson wrote a letter to the grievor dated June 22, 2000 regarding the June 21 meeting, reiterating his specific request that the grievor provide him with a financial statement and other records regarding her financial position. He testified that the exact amount of the net overpayment was arrived at on June 28, 2000 and an e-mail setting forward the amount was sent to the grievor on that date. According to his evidence, he met with the grievor on June 30 expecting to discuss the grievor's financial situation with a view to developing a payment plan; however, at that meeting the grievor advised him that she had declared bankruptcy and that all future discussions regarding this matter must be conducted with her trustee-in-bankruptcy, whose business card she left with him.

[12] Both the grievor's direct supervisor and Mr. Ferguson's superior were away during the relevant period of time. Mr. Ferguson's superior, Mr. Rod Bird, Regional Director for Human Resources Management Services, returned to work on July 17, 2000 and was advised of the overpayment issue by Mr. Ferguson as part of his general operational report.

[13] Mr. Bird made arrangements for an administrative investigation to be conducted into the issue of the overpayment, specifically to inquire into how it was that the grievor could be in receipt of such a significant amount of money to which she was not entitled and not have come forward to bring the matter to the employer's attention. He arranged for an investigation committee and wrote a letter dated July 18, 2000 (Exhibit E7) to the grievor informing her of the administrative investigation committee he had struck, its mandate, and that she was to meet with the committee on a specific date to answer their questions. The letter also contained advice that she was entitled to have an observer present at the meeting.

[14] Ms. Olivia Sadownik, an Operations Analyst with the employer, having considerable experience with the employer and in the Public Service, and Mr. Craig Sinnott were the persons asked to act as the investigation committee. They met with Mr. Bird to receive a briefing, and after doing some preliminary work, interviewed the grievor on July 19, 2000. Mr. Ed Solleveld, a former union executive member, accompanied the grievor to the interview. The report of Ms. Sadownik and Mr. Sinnott

was presented to Mr. Bird on July 25, 2000 (Exhibit E6). The salient portion of their report is set out below:

> ***Analysis***
>
> *The facts of this matter are clearly established by the supporting documentation. The question before us is -did the Principal knowingly receive and retain public money to which she was not entitled, and consciously conceal the fact or otherwise fail to disclose?*
>
> *At several points in the interview the Principal gave clear indications that she was aware her paycheque was larger. Did she know immediately -in the first instance? - perhaps not. It is not unheard of for employees using Direct Deposit of pay to sometimes delay or omit close review of all pay stubs. When, exactly, she became aware is moot, clearly at some time between December 1999 and June 2000 she was aware of her substantially increased pay (an 87% increase in net pay) and did not make inquiries as to the reason(s). It is also clear that the Principal expended the extra pay. If we accept the Principal's contentions that there were no unusual expenditures or major lifestyle changes during the period in question, then it is reasonable to expect that the over-paid money would be in her account. The fact that she is claiming zero cash on hand in her bankruptcy declaration is evidence that she spent or otherwise disposed of the overpayment.*
>
> *When asked what she thought contributed to the increased pay, the Principal mentioned leave payout, overtime and pay equity as possible contributors. The Principal is a long-term employee who routinely received overtime cheques and has, to our knowledge, requested and received 3 annual leave payout cheques. For her to assert overtime and leave payout as potential contributors is not credible. She knows that overtime and leave payout amounts are both received as a separate supplemental cheque. As for pay equity, the Principal had access to the same information available to all other Public Employees; she should have known that she would not have any entitlements under the pay equity settlement. A great amount of pay equity information was disseminated by Treasury Board, the Department and the Union concerning entitlements and time frames. There was also extensive coverage of the pay equity settlement in the media. Moreover, each of the fourteen pay-stubs clearly labels the incremental amount as payment in lieu of leave (LEAVE-PMT IN LIEU --see Appendix II).*

Conclusion

The Committee carefully considered the various issues contained in the allegation, the information provided during the interview and the supporting documents obtained. Based on the testimony and documentation presented, the Committee concludes that, on the balance of probabilities, it is more likely than not that the Principal was, as *[sic]* some point between December 1999 and June 2000, clearly aware that she was in receipt of money to which she was not entitled. The Committee further concludes that the Principal did not behave in such manner as would be expected of a reasonable person in similar circumstances - when she became aware of the extra pay, she should have made inquiries.

The outcome of the investigation is as follows:

The allegation that the Principal knowingly received and retained money to which she was not entitled is valid.

We asked a number of questions in the formal interview specifically intended to give the Principal an opportunity to introduce information of a mitigating nature or anything that would exculpate her in this matter. No such information was introduced. It was clear that the Principal was upset, but she did not display any genuine remorse (at other than being the subject of this review) nor did she acknowledge any personal culpability.

Additional Concerns

- if the anomaly had not been caught, the overpayment would have continued to increase
- the timing of the bankruptcy declaration seems to have coincided, conveniently, with the discovery of the overpayment (thus preventing full recovery of the overpayment)

[15] Mr. Bird considered the administrative investigation report, consulted with Staff Relations in Ottawa and spoke with Ms. Sadownik and Mr. Sinnott. He had a conversation with the Regional Director General, Mr. Rymes, and requested his staff prepare a disciplinary report (Exhibit E8). The disciplinary report outlined the employment history of the grievor, the nature of the infraction, provided an analysis and details of the case, addressed mitigating and aggravating circumstances and lastly, recommended the grievor's employment be terminated because the bond of trust had been broken. Emphasis was placed upon the department's requirement that all employees demonstrate a high degree of honesty, trust and integrity and that the

grievor's actions irreparably shattered that trust. Mr. Bird accepted the conclusions of the disciplinary report. He then wrote a letter dated August 14, 2000 (Exhibit E9) to the grievor requesting she attend at a meeting on August 18 for a discussion of the matter which might involve discipline, and in the letter advised of her right to be represented by a member of the bargaining agent.

[16] A disciplinary meeting was conducted on August 18, 2000 attended by Mr. Rymes, Mr. Bird, the grievor and her union representative, Mr. Ed Solleveld. Two documents were tendered to the employer on behalf of the grievor at that meeting; a letter dated August 18, 2000 from the grievor (Exhibit E10) and a brief submission dated August 18, 2000 regarding mitigating circumstances from Mr. Solleveld (Exhibit E11). The meeting was adjourned so that Mr. Rymes and Mr. Bird could consider the information provided on the grievor's behalf and arrangements were made to meet again on August 22, 2000.

[17] The letter from the grievor read as follows:

> *Dear Mr. Rymes,*
>
> *I am writing to you about the investigation into my receipt and retention of significant overpayments in my pay cheques.*
>
> *At the meeting with Olivia Sadowick and Greg Sinnott, I was asked if there was something I could tell them to help explain the situation regarding the overpayment. I mentioned that I sometimes play bingo and that I have never been out of debt for the past 15 years.*
>
> *I did not say anything more but there is more that I need to say.*
>
> *It is difficult for me to make this admission but I do have a significant problem with gambling.*
>
> *This has made my financial affairs very difficult and is at the root of the issues of the overpayment.*
>
> *I recognize that I must seek treatment for my gambling problem and I am committed to doing so.*
>
> *I take pride in my work and believe that I have made a solid contribution to the department over the last 29 years.*
>
> *I want very much to continue with my work at HRDC and to repair the stress in my relationship with the department.*

I regret the entire issue of the overpayments and I will work hard to see that nothing of a similar nature occurs in the future.

Sincerely yours,
Sharon Millar

[18] The submission from Mr. Solleveld read as follows:

New Facts

During my discussions with Ms. Millar over the past several days she has admitted to having a compulsion/addiction to gambling. This was a difficult admission for her to make and considering the nature of this addiction, I believe her inability or unwillingness to share it with the board is understandable. She has written a statement which includes a commitment to seek help. When making your decision, please consider this as mitigating evidence.

Other Factors

When preparing myself for this meeting, I have considered the worst case scenario, which is Ms. Millar may well be dismissed from her employment. I would therefore offer the following arguments against such a decision:

- *She did not do this alone. We agree that she received and spent money she was not entitled to, however this was made possible due to negligence on the part of HR staff. She alone should not pay the ultimate penalty.*
- *Her decision to declare bankruptcy was made in panic. This panic is attributed to a large degree to the manner in which HR staff treated her during their attempts at recovery. At this time she sincerely regrets having declared bankruptcy as it irrevocably closed the door to any other options that might have been available.*
- *Ms. Millar is 48 years of age and has an unblemished record of 29 years of service. She is a fully qualified Insurance Officer, has previously served as Insurance Services Advisor at Edmonton West and is currently a senior Appeals Writer. A dismissal would be catastrophic for her, her creditors as well as the department. The cost of hiring and training a replacement to her level of expertise would be considerable.*

[19] The same people were in attendance on August 22, 2000. Mr. Rymes, who had the authority to terminate the grievor's employment, delivered the letter of termination to the grievor.

[20] The reasons outlined in the letter of termination were commented upon by Mr. Rymes at the hearing. Firstly, he noted there is a very high standard of trust and integrity expected from members of the Public Service. With respect to someone in the

position of the grievor, being an Agent 2, this is even more so. Her work involves the placement of public funds, ensuring legislation and individual's rights are upheld and being fair and impartial in adjudicating issues of benefit entitlements. Secondly, he noted that although the overpayments were as a result of an error made in the benefits and compensation area, the grievor was in receipt of double her regular salary for approximately 13 pay periods or 26 weeks, the error only being picked up on a routine review by staff. He understood the series of meetings conducted in June, 2000 regarding repayment and why the grievor failed to bring the overpayments to the employer's attention in a timely fashion were not altogether easy discussions. Then there was the fact the grievor declared personal bankruptcy preventing collection of the overpayments. Mr. Rymes was cognizant of those facts, and the facts contained in the administrative investigation report and the disciplinary report at the time he set up the disciplinary meeting with the grievor and her representative on August 18, 2000. The purpose of that meeting was to discuss the findings contained in the administrative investigation report and to receive any additional explanations or information regarding mitigating circumstances that were not addressed in that report. He did not accept that the grievor truly had a gambling addiction. He felt this explanation, together with her last minute proposal to make restitution and seek help amounted to "too little, too late". He felt the grievor had had sufficient opportunities to bring this type of information forward in the meetings in June, 2000 and during her meeting with the administrative investigation committee. Nevertheless, in light of the grievor's long service, the fact she had no previous discipline and that the problem was initiated in the first instance by the benefits and compensation area, he decided to adjourn the meeting until the following week, thereby allowing him an opportunity to reflect upon the new information.

[21] Ultimately, he concluded that the serious nature of the conduct and the aggravating circumstances were such that termination was called for. With respect to the aggravating circumstances, he relied upon the grievor's refusal from the outset and throughout to acknowledge the seriousness of the matter; that the grievor engaged in denial, obstruction, and blaming others for a long period of time; that the grievor was not credible with respect to not being aware of the overpayments; that she did not take responsibility for her actions; and it was only at the last minute that she admitted to mitigating circumstances, but even then, she had not sought treatment and only indicated her willingness to seek treatment. As a result, Mr. Rymes concluded there

was an irreparable breach of trust and the employment relationship was no longer sustainable. He considered whether there were any other positions that would be suitable for the grievor in light of these circumstances and concluded that all positions required the same level of trust. Lastly, he felt that it would be sending the wrong signals to other employees to allow the grievor to continue in her employment in light of her conduct.

[22] In cross-examination Mr. Rymes acknowledged other reasons for his decision included the grievor's refusal to acknowledge the seriousness of the matter, that he did not believe her explanations or the fact that she had a gambling problem, that he concluded her declaration of bankruptcy was a deliberate strategic attempt to prevent the department from recovering the overpayments, that she failed to accept responsibility, and her failure to cooperate throughout.

The Grievor's Case:

[23] At the time of her termination, the grievor was employed with the employer as an Agent 2 and PM 2. She was teleworking from home with the Appeals Unit of the Employment Insurance Commission, preparing submissions on behalf of the insurer to the Board of Referees under the *Employment Insurance Act* with respect to appeals thereunder. Her function in the work she did was to prepare a case supporting the Commission's initial decision. In that regard, she would review the decision to ensure it had been made correctly; select relevant documentation; and prepare a submission for the review by the Appeal Board. In performing that work she did not handle money, nor did she have opportunities to access money.

[24] Her evidence of the chronology of events beginning in June 2000 when she was first contacted about the overpayment through to the time when the letter of termination of her employment was delivered to her in August 2000, was consistent with the employer's case. In addition, her evidence regarding the purpose and general discussions at those meetings also coincided in most respects with the case for the employer.

[25] I will now comment on those specific meetings where material differences in the respective cases existed.

[26] At the June 21, 2000 meeting the net overpayment was estimated to be approximately $16,000. The grievor was asked whether she had that sum to repay and

she responded no. She was then advised the normal procedure is to recoup 100% of the overpayment from an individual's salary until it is paid unless other measures or arrangements are made. It was pointed out to the grievor that the normal minimum payment arrangement was to pay 10% of the gross each month and the grievor indicated that she thought the discussion was based on 10% of the gross overpayment which would amount to approximately $2,000 per month, which was an amount she could not afford to pay, and she stated she could not afford to make that kind of payment. She was then asked how much she thought she could pay and indicated she thought she could pay $300 each month plus any overtime that became payable. She also asked if she could pay out the amount over a five or six year period and was told that was far too long and totally unacceptable. The meeting concluded by Mr. Ferguson asking her to prepare a financial statement and a proposal in writing for June 30, 2000.

[27] On June 27, 2000 when she was advised the exact net amount of the overpayment was $13,791.73, she concluded that she would not be able to get a bank loan because she was already in debt and had no assets except her car.

[28] Upon reviewing her finances, the grievor concluded that without being able to take five to six years to repay the overpayment, she had no options available to her. A financial statement prepared at the end of June (Exhibit U-13) showed her indebtedness, including the salary overpayment, was $ 36,001.71. In her evidence she noted her only asset was a vehicle. Her monthly expenditures totalled $ 1,853.95. This amount included basic necessities and approximately $ 775.00 in loan payments. It did not include any amount for repaying the salary overpayment or food. Her net monthly income was approximately $ 2, 100.00, which left her with an after debt monthly balance of $ 246.05.

[29] As a result of her financial situation, and upon receiving advice from a friend and a shop steward, she decided to declare bankruptcy. She did so and accordingly, at the meeting of June 30, 2000 she advised those present that they had forced her into bankruptcy and because of this, she had no repayment proposal to give them. She left the business card of her trustee in bankruptcy with the employer and advised that they should be in touch directly with her trustee to address the matter in the future.

[30] With respect to the administrative investigation review, specifically the committee's interview on July 19, 2000, the grievor took issue with the statement contained at page 5, paragraph 3, which stated:

> *It was clear that the Principal [the grievor] was upset, but she did not display any genuine remorse (at other than being a subject of this review) nor did she acknowledge any personal culpability.*

[31] The grievor said she was very upset and that she was very sorry for being stupid. She stated that she offered to pay $300 per month and that she was not asked any specific questions about personal culpability or remorse. While acknowledging the truth of many of the statements contained in the report of the interview, the grievor stated that some of the answers were really condensed answers and that she disagreed with the suggestion at question 29 that the employer at the June meetings had cut her considerable "slack" with respect to repayment discussions. In this regard, the grievor testified she did not consider repaying 10% of the gross, being approximately $2,000 per month, or having 100% of her income deducted until payment in full was made, and not being allowed five years to repay the debt as being "slack".

[32] Mr. Ed Solleveld, who was then employed as an Investigation and Control Officer at the Meadowlark office of the employer, attended the administrative investigation meeting as the grievor's representative. His evidence is relevant to that meeting and to the submissions that he and the grievor made to Mr. Bird and Mr. Rymes on August 18, 2000.

[33] Mr. Solleveld first met with the grievor to discuss the issue approximately one hour before the investigative meeting. Without attaching any blame or criticism to the members of the investigation committee, Mr. Solleveld stated the interview was really horrible. The grievor was extremely distraught throughout; she was not coherent and was in tears most of the time. As a result, the interview was very hard on everyone. It lasted one hour. The investigation committee was not receiving the answers they expected and they did not believe what they were hearing. After a time out in order for the grievor to compose herself, clarification of answers already given were being sought by rephrasing the initial questions. Notwithstanding the time out, the tenor of the meeting remained "horrible". Finally, Mr. Solleveld called an end to the meeting as he felt the grievor's answers were not changing and the questions were repetitious.

[34] Mr. Solleveld testified that following the interview with the investigation committee, he was as confused as the committee members were. As a result, he spoke with Mr. Vera Bannister, the chief shop steward, and they decided to go to the grievor's home to discuss the matter. Mr. Solleveld was very concerned about the situation and felt there was more to it than he had heard. He stated in his evidence that the reason they went to her home was to "work her over". It appeared that what they really wanted to do was get to the bottom of what had been going on. It was as a result of this confrontation that she confessed to them she had a gambling addiction. Mr. Solleveld stated it explained a lot in his mind. It was following this meeting that both the grievor and Mr. Solleveld prepared their submissions for the August 18, 2000 meeting with Mr. Bird and Mr. Rymes.

[35] Mr. Solleveld testified that he wasn't sure what to expect at the August 18 meeting with the employer; however, he was anxious to have this new information presented. Mr. Solleveld testified that he was floored when he was asked what sanctions he and Ms. Millar were prepared to offer in lieu of dismissal. He responded by saying that they had not considered any specific sanctions although they understood the employer would have a number of options, but regrettably he and Ms. Millar were not prepared to discuss this point. After an adjournment for a 20 minute deliberation by Mr. Bird and Mr. Rymes, the meeting resumed with Mr. Bird advising that they would like to consult with their legal advisers and meet again the following Tuesday.

[36] At the next meeting, which was August 22, 2000, Mr. Rymes gave the grievor the option of being dismissed or submitting her resignation. She was allowed an opportunity to obtain some further advice and after such advice, chose dismissal. At that point, the letter of dismissal was delivered to her.

<u>The Grievor's Knowledge</u>:

[37] The grievor acknowledged in her testimony that she knew her pay cheques were higher than normal. With respect to the December, 1999 cheque, she said she really didn't think much about it because it was usual to have a higher pay cheque in December because of year end adjustments in Canada Pension Plan and Employment Insurance. In January, 2000, she realized it was high but thought, well this must be okay for some reason. Although the cheques continued to be high, it wasn't until May that she thought, whatever the reason was for the additional amounts of her cheques,

it should have stopped by then. She said that at the end of May or early June, 2000, she phoned a co-worker to ask about whether her cheques seemed high. It was shortly after that call that she was contacted by Payroll. According to her evidence, she never pieced it all together until about that time. She testified she thought the additional monies might have been as a result of pay equity payouts and/or retroactive pay that she was entitled to pursuant to recent collective bargaining negotiations. In addition, there might have been an increase because of a universal reclassification. In any event, it was clear the grievor did not take steps to ascertain why her cheque was higher than it usually was.

[38] She did take issue with the employer's assertion that her cheque was double the usual amount, or represented an 87% increase of her usual pay or an increase of approximately $900 per month. In this regard, the grievor thought her additional pay amounted to a figure around $700 per month. The grievor acknowledged looking at the net figure in her pay stubs and searching "just a little bit" for an explanation. She said she didn't try to figure it out.

[39] Although evidence submitted on behalf of the employer was that the grievor was not eligible for pay equity, the grievor testified that she was not aware of whether or not she was eligible and that, although a considerable amount of information had been disseminated to employees by e-mail and on the electronic bulletin board, she did not read those notices. In cross-examination, in response to a series of questions about what she knew about eligibility for pay equity or other entitlements, the grievor responded that "[not asking questions] had been my guilt all along. I should have asked but I didn't". At one point in her cross-examination, she stated "I didn't say I couldn't phone Payroll [to ask questions or report the overpayment], I said I didn't. In a nutshell, they just beat me to the punch".

Mitigating Circumstances:

[40] At the time of her termination of employment, the grievor was 48 years old, divorced, and living in an apartment with her 23 year old, unemployed, son. Her length of service was 29 years and her job performance was noted by the employer to be fully satisfactory. A review of Exhibit U16, being a collection of performance appraisals during the 1980's and 1990's, demonstrate she has been a competent and valued employee over the years. This is the first instance of discipline of any kind with the employer. For a number of years prior to the overpayment issue, her finances were

a mess and continued to be so, culminating in her declaration of bankruptcy in June, 2000. At this time her only significant asset appears to be a vehicle, of which we have neither a description or valuation. Her declaration of bankruptcy will detract from her potential to obtain a credit rating and she regards it as a negative stigma. She has incurred unspecified debts with relatives and friends to meet her living needs. Despite sending out approximately 50 résumés since her employment was terminated, the grievor has not been successful in obtaining employment. She has sought and obtained assistance with her gambling addiction. She has acknowledged that she should have received better advice when the issue of overpayment arose and that she should have been more proactive in addressing the matter. She maintained that she was always prepared to make restitution notwithstanding her declaration of bankruptcy. This fact was confirmed in her letter to Mr. Rymes dated August 18, 2000.

Argument on Behalf of the Employer:

[41] The employer's case was that over a six month period, or for approximately 13 pay periods, the grievor received almost double her net salary. She knew she was receiving considerably more money than she was entitled to receive and she failed to disclose this fact to her employer, notwithstanding the numerous individual overpayments, the continuous nature of the overpayments, and the significant opportunity she had to report it.

[42] The grievor's failure to report the overpayment was then compounded by her continuous failure to be candid with the employer, her failure to accept responsibility and demonstrate remorse, and her unwillingness to co-operate in repaying the funds, which culminated in her declaration of bankruptcy thus preventing the employer from seeking restitution.

[43] Counsel for the employer, described the grievor's conduct as an offence of opportunity: the grievor realized she was receiving more money than she was entitled to and was devious in accepting it and then in looking for ways to avoid the financial consequences of her actions. He relied upon *Batiot*, Board file: 166-22-28540 (Donald MacLean).

[44] Counsel submitted the grievor was not credible at the hearing or throughout the numerous meetings with the employer, and he relied upon the general authorities in that regard.

[45] Given the nature of the grievor's work, the high expectation of trust and integrity the employer has of persons in those positions and in the department generally, he submitted the employer had no option but to terminate the grievor's employment.

Argument on Behalf of the Grievor:

[46] The representative of the grievor submitted Mr. Bird and Mr. Rymes, who ultimately made the decision to dismiss the grievor, did so without fully appreciating exactly what occurred during the June meetings, what the grievor's financial picture at the time was, and without believing she had, or may have had, a gambling problem.

[47] He noted that during the meetings in June, the issues pertained to the fact of overpayment, establishing the net overpayment, and arranging for repayment. The issue of discipline did not arise until the matter was reported to Mr. Bird, the Regional Director for Human Resources Services, upon his return from annual leave on July 17. Accordingly, questions about the grievor's knowledge, or culpability, did not arise until the administrative investigation committee was struck and conducted its interview of the grievor on July 19. The decision to dismiss the grievor was made by Mr. Bird and Mr. Rymes, in consultation with their advisors, based solely upon the administrative investigation committee's report and the discipline report received from Mr. Bird's staff. Both Mr. Bird and Mr. Rymes concluded the grievor knew she was receiving money she was not entitled to in December, that she continued to accept the overpayments over the six month period, then she denied all responsibility and declared bankruptcy to avoid repaying the funds. When she met with them on August 18, they did not believe she had a gambling problem and regarded this excuse as a further demonstration of her dishonesty.

[48] The grievor's representative submitted she knew she was receiving more money than her regular salary and never denied that fact. Her explanation was consistent throughout and did not change notwithstanding vigorous cross-examination. She thought there was some good reason why she was being paid more money and she started making inquiries of her friends in May.

[49] Given all the facts, the grievor's representative submitted the ultimate issue was the reasonableness of the penalty. He submitted the period of some 15 months since

the grievor's termination was too long to serve without compensation in this case, as even reinstatement with time served is too severe in light of the facts of this case.

[50] Cases and authority relied upon were: *Canadian Labour Arbitration*, 3d, Brown and Beatty, at paras.7:4300, 7:4400; *Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162* (1976), [1977] Canadian L.R.B.R. 1 (P.C.Weiler); *Re: Zehrs Markets and United Food & Chemical Workers, Local 1977* (1996), 60 L.A.C. (4th) 163 (G. Brent); *Re: Castlegar & District Hospital Society and British Columbia Nurses' Union* (1997), 64 L.A.C. (4th) 107 (D.L. Larson); *Beaulne*, Board file: 166-2-27737 (Jean Charles Cloutier); *Vasilas*, Board file:166-2-28149 (P. Chodos, Vice Chairperson); and *Herritt*, Board file:166-2-27188.

ISSUES:

A. Did grounds for discipline exist;

B. If so, was the penalty within the acceptable range;

C. If the penalty was within the acceptable range, did sufficient mitigating circumstances exist to justify a lesser penalty being substituted for that imposed by the employer.

DECISION:

A. Did grounds for discipline exist:

[51] The employer's incredulity of the grievor's explanation regarding the overpayment was understandable, particularly because the decision makers were either unaware of, or did not accept, a number of key facts. The totality of the evidence submitted during the hearing persuaded me, on the balance of probabilities of the following facts.

[52] The grievor's personal financial situation was a mess. Over the course of many years she exercised poor judgment in relation to her finances. The financial statement she prepared in June of 2000 demonstrated she did not have financial resources to meet the employer's repayment demands as her circumstances then stood.

[53] The grievor had a gambling problem. I have been persuaded of this fact based upon the grievor's evidence, the dreadful financial affairs of a twenty-nine year public servant (notwithstanding a divorce and the need to support two children), the evidence

of Mr. Solleveld that it was only after he and Ms. Bannister confronted her that she admitted to having a gambling problem (although I appreciate the self-serving nature of the statement made after the overpayment had been discovered), and the fact the grievor sought counselling for gambling, albeit after the fact. (See Exhibit U-15: Letters from Alberta Alcohol and Drug Abuse Commission re: gambling.)

[54] Based upon those findings, the grievor's explanation that she thought there was a legitimate reason for the extra money she was receiving and that initially she accepted it without looking into it, was understandable. This was particularly so because it was apparent that she didn't pay much attention to her finances - she paid the bills and spent whatever was left over and then some. As she stated, she regarded the extra money as "pennies from heaven". While most people would have appreciated the significant amount of the overpayment, given the grievor's financial history, I have not been persuaded, by a balance of probabilities, that she appreciated the significant extent of the overpayment. She registered surprise and concern at the early meetings according to Ms. Reimer and Mr. Ferguson.

[55] Nevertheless, there can be no doubt, based upon the grievor's testimony, that in May she was concerned about the continuing extra money. At that time, she clearly failed in her responsibility to her employer to bring the matter to its attention. The exact time frame between when she testified she had a concern and when Ms. Reimer discovered the overpayment was not established. However, I am satisfied based upon the presentation of the case on behalf of the grievor, that she had ample time to bring the matter to the attention of the employer before it was discovered. Based upon all of the evidence, I am also satisfied the grievor engaged in some self-deception. There was no doubt the extra money was welcome and the grievor continued her previous spending habit of going through all available cash and then some. She really didn't want to believe she was not entitled to the extra money and probably for that reason didn't look into the matter. While this type of self-deception or neglect, is not as dishonest as her failure to bring the matter to the employer's attention in May once she acknowledged to herself there was a problem, it was nevertheless below the standard her employer of twenty-nine years should have been able to expect from someone in a position such as the grievor held. Accordingly, a basis for discipline has been established.

B. Was the penalty within the acceptable range:

[56] The conduct the employer relied upon to dismiss the grievor was gross negligence and fraud arising from her knowledge that she was not entitled to the funds she received, that she nevertheless disposed of the funds, that she failed to notify the employer of the overpayment, and that she had not demonstrated any appreciation of wrongdoing or remorse. The employer failed to establish that conduct in its entirety.

[57] The conduct that I have found to provide the basis for discipline is twofold. Once the grievor appreciated there may have been a problem with her salary payments, she failed to address the issue by reviewing her pay stubs and then, if questions still remained (which of course they would have), by failing to consult with her supervisor or someone else in a position of authority about the matter. Then in May, when she knew she was receiving more money than she was entitled to, she failed to notify her employer.

[58] That conduct is not as sinister, or as fraudulent, as the conduct the employer acted upon. Nevertheless, I accept that dismissal for the egregious conduct such as I have found it to be is within the range of acceptable penalties.

C. If the penalty was within the acceptable range, did sufficient mitigating circumstances exist to justify a lesser penalty being substituted for that imposed by the employer:

[59] A consideration of the mitigating circumstances also includes consideration of those circumstances which may justify the penalty imposed, or which the employer in this case has referred to as aggravating circumstances. In a recent arbitration decision of mine, *Saskatchewan Telecommunications and Communications, Energy and Paperworkers Union of Canada (Re: Grant Hall)*, May 18, 2001, unreported, I addressed the issue of mitigating circumstances in the following manner:

> *What comprises a mitigating circumstance has been discussed frequently in arbitration cases, the leading ones cited being Steel Equipment Co. Ltd. (1964), 14 L.A.C. 3656 (Reville), and William Scott and Co. Ltd., [1977] 1 Can. L.R.B.R. 1 (Weiler) (B.C.L.R.B.), and in textbooks, such as Brown and Beatty. While lists of mitigating circumstances have been compiled, it is clear that the lists are never presented as being exhaustive. Nevertheless, there are two fundamental steps involved in determining what mitigating circumstances are. The first step is to consider all those facts*

> *and circumstances that pertain to the grievor, including his personal qualities and/or personal circumstances. These considerations may explain or neutralize the egregious conduct, or invite sympathy for the grievor. Of particular significance is whether the grievor has accepted responsibility for the conduct and whether the conduct in issue will not likely be repeated. There may also be some facts that are not in the grievor's favour such as a previous discipline record. The second step is to consider all those facts and considerations from the employer's perspective, including the nature of its business and its operations, which cast more light on the effect of the conduct, including the grievor's role in the operations. Usually these factors counterbalance those that operate to the benefit of a grievor; however, there may be some circumstances that operate in a grievor's favour, such as ease of placement in an area that will eliminate the potential for further problems, the fact that no actual damage occurred, and inconsistent treatment of other employees. Once the mitigating circumstances have been identified the arbitrator or arbitration board must weigh and measure the factors and determine whether it is just and reasonable to substitute a lesser penalty. This process is not a precise one.*
>
> *It is the weighing and measuring of all the mitigating factors that is the most difficult task for an arbitrator or an arbitration board when a grievor's employment has been terminated. There is a natural tendency to want to return a discharged employee back to work, particularly where the employee has a good record and considerable seniority, as is the case here. In addition there are many other circumstances, such as hardship, trauma or suffering of a grievor or the grievor's family, that invite arbitrators and arbitration boards to search for alternative solutions.*
>
> *The suggestion by counsel for the grievor and the union that the employer has an obligation to take into account all mitigating factors before deciding on the discipline to impose is not correct. Neither the employer nor the employee necessarily know or appreciate all the mitigating circumstances at the relevant time. The consideration of mitigating circumstances and the exercise of granting relief is a function of the arbitrator or the arbitration board. However, a prudent employer may, and often does, address mitigation or some aspects of it, in its decision regarding penalty in order to be fair and with a view to having its decision upheld if it is challenged through the grievance process.*

[60] Unfortunately, the grievor in that case was not reinstated. The circumstances of that case were complex and the discussion of mitigation was extensive. Although the facts were significantly different from those at hand, there were enough similarities to

render a number of excerpts from the mitigation discussion useful in considering whether or not the penalty of dismissal should be upheld or modified in this case. Those excerpts are as follow:

> *The grievor has been employed with the company for 19 years, having progressed from his entry position in the repair shop at the warehouse to his current position of technical assistant in the Customer Service Centre. There is no doubt the grievor was a good and valued employee, often willing to 'go that extra distance'. This was evident from his performance appraisals (Exhibit E-16 and U-16A), from the evidence of his supervisor, Ms. Lockhart, and from the grievor's own testimony of how he often assisted colleagues from other departments.*
>
> *The grievor is 39 years old. He is industrious and hard working, having a particular technical flair with computer equipment and he has considerable experience in the music recording industry. As of the date of the hearing he remained actively involved in his music recording business, which is operated from his home.*
>
> ...
>
> *A significant factor in this mitigation equation is the grievor's health. In February 2000 he was diagnosed with acute depression and pursuant to directions from his doctor took an extended leave from work between February 16 and March 22, 2000. There is no doubt from the evidence that the grievor was not well in February. In addition, I have no doubt that the grievor's health was deteriorating prior to February 2000 as Mr. Petroski testified. However, I do question the reliability of Dr. Chapple's comment in his report that the grievor has been suffering from depression since 1998. This statement is particularly important because the inappropriate conduct engaged in by the griever spanned the years 1998 and 1999, as well as in 2000. Dr. Chapple did not provide any facts he relied upon to formulate this conclusion; however, it is reasonable to infer he could only have arrived at this conclusion from subjective information provided to him by the grievor.*
>
> ...
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> *At the end of his evidence-in-chief, the grievor stated he could not return to work in good conscience until he changed his life and divested himself of his business. He acknowledged the inappropriateness of his conduct and acknowledged he now appreciated that he could not mix his personal and work lives as he had done previously; that he must become more disciplined in both his personal life and his work life, and*

that he now knows he has to follow rules and not take short cuts, even though the shortcuts may be for justifiable purposes. This evidence cuts both ways. The grievor's appreciation of frailties and how he must address them is very positive. However, his opinion that "in good conscience" he must divest himself of his business has a negative impact because nine months after his termination, he has not done so, nor did he disclose any specific plans or steps taken to do so.

The grievor had been in a position of trust with the employer. His supervisor, respecting his technical ability and having formed the conclusion that he was reliable, placed her trust in him and allowed him considerable freedom in his day-to-day operations. She was shocked with the evidence uncovered about his activities and stated in her evidence that she could no longer trust him. She, together with the employees she supervised, had spent five years building up a cohesive, capable, independent and respected team. Trust and compliance with technical procedures were key factors in her team's developed operational context. Accordingly, she did not want the grievor back as a member of the team, nor did she believe he could be relied upon to function as a member of the team.

The technical skill of the grievor, while on one hand being a mitigating factor in his favour, also operated to his detriment. The degree of technical skill allowed him to operate very independently and made it more unlikely that other colleagues or his supervisor would be accessing his files to review or check on his performance. Accordingly, his proficiency and skill lulled his supervisor into a false sense of confidence. Had this high degree of confidence not existed, some of the inappropriate conduct may have been spotted sooner and may have been corrected. Unfortunately, the higher the degree of independence that an employee operates under, the higher is the expectation for appropriate conduct that is placed upon him.

...

Then of course there was the extended period of time the grievor was engaged in the egregious conduct, the conduct itself, the grievor's explanation that many of the incidents were just accidents, his evidence that he did not know of the employer's policies, and his evidence that he did not understand or think about the potential ramifications of his conduct.

...

Should the grievor be allowed a reasonable period of time to get back on track and then be allowed to return to work with

the employer in a different position? A demotion, together with a lengthy suspension, would certainly send a significant message of deterrence. Should the grievor be allowed to return to work now, with conditions being attached? Is it appropriate to include in those conditions that the grievor be precluded from operating his current business or any other business? Do I have the jurisdiction to make that a condition of reinstatement? Should employers have, or be given, that kind of control over their employees? Is the grievor really interested in divesting himself of this recording studio business, or for that matter working exclusively for the employer?

Ultimately, while I wanted to assist the grievor, I concluded the efforts required to do this with an appropriate degree of fairness and protection to the employer were too involved and would amount to an unreasonable interference with the employer's human resource operations, which is contrary to a fundamental principle of arbitral jurisprudence. It has long been respected as a sacrosanct principle that arbitrators and arbitration boards do not have jurisdiction to manage an employer's business. That function belongs exclusively to the employer. The employer conducted a fair and reasonable investigation; it presented the facts it had gathered to the grievor and heard his explanations – which were consistent with those he gave at the hearing. The only information the employer did not have when it decised to terminate the grievor's employment was the specific medical evidence introduced at the hearing.

Its management representative mentioned in her evidence that the incidents complained of occurred prior to the grievor's medical leave and had occurred over a three year period. My conclusions regarding the egregious conduct of the grievor were similar to those of management. Having made findings from the evidence and having particular regard to all the medical evidence, I agree with the employer's ultimate conclusion as expressed by Ms. Lockhart in her evidence, that the grievor's medical condition was by and large not related to his egregious conduct, or the cause of it.

I find the circumstances of the grievor have not changed significantly enough to justify returning him to another position with the employer without addressing a number of issues, including restriction or conditions for the grievor, that would involve a marked intrusion into the employer's human resource operations. The issues I have in mind include what position would be an appropriate demotion; does a suitable vacancy exist, if not, what would be a workable back-up plan; what monitoring of the grievor, if any, should be specified; what requirements for medical treatment, if any, should be specified; should restrictions on the grievor's

> *outside work activities be addressed; what would be reasonable future expectations for the grievor's performance; and what tolerances for compliance with restrictions, requirements and expectations should be specified.*
>
> *Lastly, while the depression and anxiety may have been contributing factors for the grievor's reduced ability to function rationally during periods in, or by, January or February 2000, I have noted the grievor's failure to provide sufficient self care for himself as testified to by Mr. Petroski. This relates to an employee's duty to the employer. It is not sufficient for an employee to merely show up for work; an employee must be in a suitable condition, and state of health, to address the day to day duties and responsiblities. As Mr. Petroski testified:*
>
> > *I don't believe seratonin [a deficiency of which causes depression] is the only explanation. Lifestyle is important. If a person's lifestyle is ultimately destructive, problems arise. The grievor broke 90% of the rules for self care.*
>
> *This has been a factor in my decision to uphold the dismissal of the grievor. Other factors were the period of time over which the egregious conduct occurred, the time and attention the employer devoted to the formulation of its related policies and ensuring employees were aware of them, the grievor's disingenuous attempts to deny knowledge of these expectations, and the potential for very serious harm to the employer arising from the type of conduct engaged in by the grievor.*

[61] There are several significant differences between the grievor in the *Saskatchewan Telecommunications* case and this grievor. This grievor has not attempted to delude us with respect to how or why she failed to report the overpayment; her work does not involve direct handling or direct distribution of money, or in other words, there was no direct relationship between the egregious conduct and the nature of her work; she has completed treatment for her gambling problem and appears to have it under control at this time; her conduct did not subject the employer to substantial or irreparable harm; the potential of another incident of overpayment can be readily monitored by the employer; and some additional conditions can readily be imposed upon the grievor with a view to successfully reintegrating her back into the workplace with an adequate degree of fairness and protection to the employer from the type of egregious conduct she engaged in. For those reasons, and bearing in mind all the other positive mitigating circumstances and

negative ones, I believe it is just to reinstate the grievor in her employment on the following terms:

1. The grievor is to be reinstated within seven days from the date of this decision.

2. The employer has the option to assign the grievor to work out of the Meadowlark office or to telework from her home.

3. As compensation for the period of time she has been off work, the grievor is entitled to immediate payment equivalent to her salary for one month, including all benefits that would accrue in relation to the salary payment, with all the usual deductions required by employment law, to be made from the payment. The net salary arising from this compensation is to be paid directly to the grievor or her trustee in bankruptcy, as the law requires.

4. The grievor is to instruct her trustee in bankruptcy to obtain her discharge on terms that are acceptable to the Court and with the specific provision that an indebtedness to her employer, the Treasury Board of Canada (Human Resources Development Canada) in the amount of $9,291.13, without interest, is to continue to be a debt outstanding and due after her discharge. The grievor is to further instruct her trustee to file with the application for discharge:

   i) a consent signed by her with respect to the indebtedness in the amount of $9,291.13, without interest, to her employer the Treasury Board of Canada (Human Resources Development Canada), and

   ii) a copy of this decision.

5. The grievor is to pay all outstanding fees to her trustee in bankruptcy forthwith and deliver proof of payment in full of bankruptcy fees to the employer.

6. Upon receiving her Discharge from Bankruptcy subject to the aforesaid debt to her employer, the Treasury Board of Canada (Human Resources Development Canada), the grievor is to deliver a copy of her Discharge to

the employer. In the event the grievor does not secure her discharge in bankruptcy with the provision that she shall remain indebted to the Treasury Board of Canada (Human Resources Development Canada) in the amount of $9,291.13, either party may apply to me for relief.

7. The grievor is to access the Employee Assistance Program in order to consult a financial counsellor to develop an overall financial plan, including a proposal for repayment of her indebtedness to the employer. That proposal, together with the overall financial plan, shall be submitted to the employer, within 30 days of her return to work. If the proposal is not acceptable to the employer, the employer shall schedule a meeting with the grievor, a union representative, and the financial advisor to resolve the matter. Failing a resolution, the bargaining agent and the employer shall select an independent third party to resolve the issue. As an absolute last resort, the parties may apply to the Public Service Staff Relation Board's Mediation program.

8. The grievor is to schedule a meeting once a year with the financial advisor to review her overall financial plan and her payments to the employer, and thereafter the proposal process outlined in number 7 above is to be repeated until her indebtedness to the employer has been retired.

9. The grievor is not to play bingo or gamble, until her indebtedness to her employer is paid in full.

10. The record of the grievor's dismissal and reinstatement pursuant to this decision shall remain on the grievor's personnel record until her indebtedness to the employer has been paid in full.

[62] I shall retain jurisdiction to address any issues that may arise in relation to the grievor's status as a bankrupt, her application for discharge, any order the Court may make in relation thereto, and in the event the parties require further direction regarding term number 7 relating to access to the Employee Assistance Program and the resolution of the payment of the indebtedness for the first year.

REGINA, November 27, 2001

Francine Chad Smith, Q.C.
Board Member