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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

LAWRENCE NAIDU

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

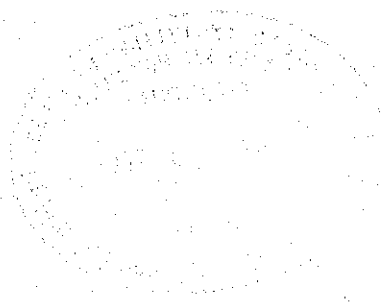
Employer

Before: Francine Chad Smith, Q.C.

For the Grievor: Paul Reniers, Employment Relations Officer with the Professional Institute of the Public Service of Canada

For the Employer: Renée Roy, Counsel

Heard at Vancouver, British Columbia,
September 11-13, 2001



Introduction:

[1] Mr. Lawrence Naidu, the grievor, is an auditor with the Canada Customs and Revenue Agency. He grieved his 20 day suspension by his employer. The suspension was delivered on June 25, 1998 by Mr. Blair Sixsmith, the then Assistant Director, Verification and Enforcement, of the Vancouver Tax Services Office. The letter of suspension reads as follows:

> *The Internal Affairs Division recently conducted an investigation as a result of receiving a complaint from a taxpayer. The results of the investigation revealed that on several occasions you made numerous accesses to confidential tax information other than in the course of your duties. It was also found that you did not demonstrate any contrition for your actions, nor were you forthright during your interviews with the Investigator.*
>
> *This action on your part represents a willful disregard and violation of the Departmental Standards of Conduct and constitutes major misconduct. By your actions, you have demonstrated a lack of the honesty and integrity necessary to function as an employee in a position of responsibility, thereby damaging the relationship of trust essential to your involvement in the operations of the Department.*
>
> *In order to impress upon you the seriousness of your misconduct, and in the interest of correcting your behavior, I hereby suspend you without pay for a period of twenty (20) days. This suspension is to be served from Friday June 26, 1998 to the close of business Friday July 24, 1998. Any recurrence of a similar nature will result in more severe disciplinary action up to and including termination of employment for cause.*
>
> *You have a right to grieve this decision in accordance with the terms and conditions of employment set out in the relevant collective agreement.*

[2] The representative of the grievor made a preliminary application to set aside the discipline because the grievor was denied the right to representation at the first investigatory meeting regarding the matters that gave rise to the discipline. The application included a request to present evidence pertinent to the issue. The grievor's representative requested the issue of the preliminary application be determined prior to the hearing itself, appreciating that this request may result in an adjournment. He advised that the adjournment would serve a further purpose of allowing him to obtain medical evidence he intended to present as part of his case, it only having become

apparent to him shortly before the hearing that medical evidence should be presented with respect to the issue of mitigation.

[3] After discussion, the adjudicator concluded there was no need to adduce evidence with respect to the preliminary application. It was accepted that the grievor was requested to meet with the investigator one day in advance. The grievor attended the meeting and requested it be postponed to allow him an opportunity to have representation. The investigator advised the grievor he had no right to representation but that he was entitled to have an observer present. The grievor decided to proceed without an observer being present. According to the representative for the grievor, the grievor made inculpatory statements at that meeting to his detriment.

[4] The representative of the grievor relied upon the Public Service Staff Relations Act, section 8(1) and Article 33.03 of the collective bargaining agreement as the foundation for a grievor's right to representation. He argued the right to representation is a substantive right and accordingly denial of that right is fatal, thus rendering the discipline imposed null and void. He further argued no distinction should be made between an investigatory meeting and a disciplinary meeting. Such distinction is artificial and fails to take into account the purpose of the right to representation. This is particularly so when the person conducting the investigation does not expect the employee to be able to provide justification for the conduct in issue and/or it appears probable that discipline will follow. To support his argument, the representative for the grievor relied upon the following cases: *Evans and Treasury Board (Employment and Immigration Canada)* (1994), PSSRB File No. 166-2-25641, [1994] C.P.S.S.R.B. No. 129, (1994) 26 PSSRB Summaries 28 (Digest); *Glengarry Memorial Hospital and Canadian Union of Public Employees* (1990), 11 L.A.C. (4th) 325 (Roach); *Riverdale Hospital and C.U.P.E., Loc. 79* (Reyes) (2000), 93 L.A.C. (4th) 195 (Surdykowski); *Canada Safeway Ltd. and R.W.D.S.U.* (MacNeill) (1999), 82 L.A.C. (4th) 1 (Ish); and *Hickeson-Langs Supply Co. and Teamsters Union, Loc. 419* (1985), 19 L.A.C. (3d) 379 (Burkett).

[5] Counsel for the employer opposed the application for the adjournment and argued the grievor did not have a right to representation at the investigatory meetings. She maintained that neither section 8(1) of the *Public Service Staff Relations Act* nor Article 33.03 of the collective bargaining agreement gave the grievor the right to representation at an investigatory meeting. Counsel relied upon the following cases: *Ward and Treasury Board (Revenue Canada-Taxation)*, PSSRB File Nos. 166-2-16121

and 16122, [1986] C.P.S.S.R.B. No. 335, (1986) 10 PSSRB Summaries 45 (Digest); *Evans and Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-2-25641, [1994] C.P.S.S.R.B. No. 129, (1994) 26 PSSRB Summaries 28 (Digest); *Arctander and Treasury Board (Canada Post)*, PSSRB File No. 166-2-10565, [1982] C.P.S.S.R.B. No. 44, (1982) 1 PSSRB Summaries 20 (Digest); *Tipple v. Canada (Treasury Board)(F.C.A.)* [1985] F.C.J. No. 818.

[6] In addition, counsel distinguished the cases relied upon by the representative of the grievor and in particular, relied upon the *Arctander* and *Tipple* cases, together with the *Public Service Staff Relations Act*, and argued the parties should be bound by the contract they negotiated.

[7] The representative for the grievor was given a brief opportunity to respond, during the course of which the adjudicator ruled there would be no adjournment, the issue would be considered and ruled upon at the conclusion of all the evidence and the representative for the grievor could pursue his argument on the preliminary issue, specifically responding to the *Tipple* case which he was not familiar with.

[8] The representative of the grievor objected to the foregoing ruling on the basis that he should have been entitled to an adjournment to review the *Tipple* case so as to be able to respond to it before the ruling was made.

Facts:

[9] Mr. Blair Sixsmith, the Acting Director of the Vancouver Tax Services Office, gave evidence with respect to his involvement in the investigation and discipline. During the relevant periods of time, he was the Assistant Director, Verification and Enforcement, with the Vancouver Tax Services Office. As a result of information coming to his attention regarding a taxpayer's complaint, Mr. Sixsmith directed a member of his staff to determine whether Mr. Naidu had delivered a conflict of interest declaration to allow him to submit returns on behalf of taxpayers. The inquiries revealed he had not done so. As a result of this failure to comply with policy, the matter of the taxpayer's complaint was referred to the Pacific Rim Security Department for an investigation. A regular component of an investigation of this type is a review of the mainframe computer access records. According to Mr. Sixsmith, the review of the mainframe access records indicated a significant number of accesses by Mr. Naidu to the data on the mainframe computer. As a result, two specific issues were flagged

for investigation. The first issue related to the preparation of tax returns for the complaining taxpayer and the second issue was with respect to inappropriate access to the employer's database.

[10] Mr. Norm Rodrigue, a senior investigator with Internal Affairs, Security Directorate, in Ottawa conducted the investigations into the two issues. Mr. Rodrigue testified with respect to the steps he took in investigating the two matters and his conclusions. He conducted two interviews with Mr. Naidu on March 4, 1998 and March 26, 1998. Then he prepared a report dated May 27, 1998, that was filed as Exhibit A9. As a result of Mr. Rodrigue's inquiries, he concluded the first complaint relating to the preparation of returns for the complaining taxpayer was unfounded. The employer accepted Mr. Rodrigue conclusion and did not include the matter in its grounds for disciplining the grievor. Accordingly, that matter will not be addressed further in this decision.

[11] Mr. Rodrigue testified his first interview with Mr. Naidu was on March 4, 1998. Mr. Rodrigue initially contacted Mr. Naidu by telephone, at least one day in advance and explained who he was, what Internal Affairs does, and that he wanted to meet with him to discuss a complaint received regarding Mr. Naidu filing tax returns for a fee and Mr. Naidu's activities on the computer mainframe system referred to as the RAPI system.

[12] Mr. Rodrigue then explained how he conducted the March 4, 1998 interview with Mr. Naidu. Mr. Rodrigue was accompanied by Mr. Larry Kozak, who was there to take notes of the meeting. Mr. Rodrigue has a routine that he follows which includes an interview note sheet upon which he checks off the items as they are addressed. Those items include the purpose of the investigation, confirmation that Mr. Naidu could have an observer present – a bargaining agent representative or a co-worker, that the investigation was an administrative one not a criminal investigation, that he had management's authority to conduct the investigation, that Mr. Naidu was required to cooperate according to the employer's Code of Conduct, and that pursuant to the *Privacy Act*, information gathered pursuant to the investigation would be on a file which others would have access to.

[13] Mr. Rodrigue acknowledged Mr. Naidu probably mentioned something about a bargaining agent representative not being available for the meeting, to which

Mr. Rodrigue suggested, let's get started and if you feel uncomfortable we'll stop for you to get someone in. A discussion then ensued with respect to both issues.

[14] The initial question Mr. Rodrigue asked the grievor with respect to his access to computer data was whether he had had access to the RAPI system that was not related to his audit work. The grievor responded no. Mr. Rodrigue asked if the grievor had had access to the RAPI system that was with respect to any friends, family or co-workers that was not related to his audit work and the grievor responded no. Mr. Rodrigue then advised the grievor that he had information regarding a number of non-work related accesses to the RAPI system and asked him to respond with respect to a number of them. The first access related to a taxpayer named R. The grievor identified R as a friend living at a specific address in Vancouver; however, the grievor could not recall her given name. The grievor said he had received written authorization from R and after requesting access to her account from her collection officer, he accessed her account. However, the grievor could not recall the name of R's collection officer, nor could he produce the written authorization from taxpayer R.

[15] The grievor was next asked about a taxpayer named N. The grievor identified N as a friend; however, he could not recall his given name or where N was living. The grievor said he accessed N's tax account on the RAPI system under the same circumstances as the R account. However, the grievor was no longer in possession of N's written authorization, nor could he recall the name of N's collection officer.

[16] Mr. Rodrigue next asked the grievor if he could justify the access to 1,724 taxpayers under the name Naidu from July 25, 1996 to November 18, 1997. The grievor was unable to justify those accesses and commented to the effect, "It was for no good reason, just to snoop around, I guess."

[17] At this point, the grievor said he wanted to stop the interview and have a chance to review his workload before continuing. Mr. Rodrigue then gave the grievor six specific surnames to research in order to support his accesses to those accounts. The interview ended at that point. The grievor was asked to sign notes taken by Mr. Rodrigue to ensure he had understood the answers correctly. The request was in keeping with Mr. Rodrigue's routine practice; however, the grievor declined to sign the notes.

[18] At the second investigatory meeting on March 26, 1998, Mr. Eddy Gillis, a Labour Relations Officer with the bargaining agent, was present. The grievor requested an opportunity to correct some information given during the first interview with respect to the first issue of the preparation of tax returns, and then with respect to the accesses to the accounts for taxpayers named N. The grievor said his access to those accounts was for training purposes only and he specifically said he did not access either his own account or that of his spouse.

[19] The interview then addressed the six surnames that Mr. Rodrigue had given the grievor to consider at the first interview. With respect to the name D, the grievor said the access could have been for a GST account and he then said that he would check that out and advise Mr. Rodrigue. With respect to the name S1, the grievor had not looked into this name; however, later on in the investigatory process the access to this name was justified. Similarly, the grievor's access to the name K was justified. With respect to the name S2, the grievor's explanation was that it was for training purposes. With respect to the name J, the grievor could not recall the reason for the accesses to options N1, N4 and N5 on June 26, 1997; however, he said he would check his workload and report further to Mr. Rodrigue. With respect to the name H, it was determined that the access by the grievor was justified.

[20] According to Mr. Rodrigue, out of a total of nine names, being the three names put to the grievor at the first meeting and the six names discussed at the March 26, 1998 interview, only the access to three names was justified. The access to the remaining six names was not justified. With respect to those six names, the access to the name J occurred on June 26, 1997 and included four accesses under Option N1, N4 and N5. The remaining accesses were all under Option T over the following periods of time: Surname D, three accesses on August 12, 1996; Surname S1, 33 accesses on June 11, 1997; Surname Naidu, 1,724 accesses from July 25, 1996 to November 18, 1997; Surname N, 32 accesses on July 22, 1997; Surname R, 79 accesses – 44 on July 25, 1995 and 35 on July 22, 1997.

[21] The records also showed the grievor accessed his own account four times in 1996 and 1997 and his spouse's account twice in 1997.

[22] Upon completing his investigation, Mr. Rodrigue filed his report dated May 27, 1998 (Exhibit A9).

[23] As mentioned previously, with respect to the first issue, Mr. Rodrigue concluded there was no direct indication that the grievor actually prepared or filed departmental documents on behalf of GST registrants involved in business ventures as alleged by the complaining taxpayer. With respect to the second issue, Mr. Rodrigue made the following conclusion:

> *From the information gathered, it can be demonstrated that Lawrence Naidu accessed taxpayer information on the RAPI system for purposes not related to his duties and responsibilities as a departmental employee.*
>
> *There is no information to suggest that Lawrence Naidu disclosed taxpayer information to a third party. [Exhibit A9, page 10.]*

[24] The foregoing conclusion by Mr. Rodrigue was based upon his analysis, which summarized the pertinent facts with respect to the second issue, in the following manner:

> *Naidu advised that 'it was for no good reason, just to snoop around, I guess' when he was confronted with the accesses made to 1724 taxpayer accounts by the surname of Naidu. In addition, he explained that he accessed the N and S tax accounts for 'training purposes'. He repeatedly accessed these two account names using Option 'T', during the period July 25, 1996 to November 18, 1998.*
>
> *Contrary to Naidu' statement, the AUDIT TRAIL REPORT report related to his accesses on the RAPI system revealed that he accessed his and his spouse's account.*
>
> *Naidu' statement regarding the written authorization he obtained from R and N to access their respective tax account; the authorizations he subsequently obtained from the unidentified Collections Officers to whom the accounts in question were assigned at the time; his accesses to these tax accounts on the RAPI system to view the outstanding balance regarding the amount of money both R and N owed to the Department cannot be substantiated given that the evidence clearly demonstrates that he accessed these tax accounts under Option 'T' only. Option 'T' on the RAPI system reveals no information regarding taxpayer account financial status.*

[25] Upon submitting his report, Mr. Rodrigue's activities with respect to the investigation, and any subsequent matters arising therefrom, ceased.

[26] During the cross-examination of Mr. Rodrigue, a number of facts relating to the preliminary issue of lack of representation were elicited. Mr. Rodrigue's background and experience comes from his work with the military police in the Air Force, followed

by his work in the Special Investigatory Unit in the military, which included basic police training and an extensive investigation course. Mr. Rodrigue acknowledged that when he began the March 4 interview with the grievor he may have said something to the effect that I have done my homework and that I strongly suggest you be truthful to result in minimal damage because lying or being unhelpful usually make matters worse. Mr. Rodrigue also acknowledged that based on the information he had from the Audit Trail Report prior to his first interview with the grievor, he concluded the evidence demonstrated a serious concern and that he highly suspected the grievor's access to the taxpayer information was unauthorized.

[27] With respect to the interview on March 26, 1998 after explaining to Mr. Gillis, the bargaining agent representative, that his role was only that of an observer, Mr. Gillis indicated that he did not agree that his role was so limited. Mr. Rodrigue then suggested that they start the process and see how it goes. He did acknowledge that on a couple of occasions Mr. Gillis did attempt to intervene and that he responded quite firmly by moving close to him and advising him once again that his role was limited to that of an observer. Mr. Rodrigue explained he stood up and moved close to Mr. Gillis in order to make his point more strongly.

[28] With respect to the copy of the Audit Trail Report records, Mr. Rodrigue acknowledged he could not specifically recall giving the records to the grievor; however, he said in his normal process he would show a person he was asking questions from a portion of those records. He then recalled that at the March 4, 1998 meeting, having no intention at the time to ask him about the six other surnames that had been accessed, he would have then opened the Audit Trail Report and picked those names out from it in order to ask the grievor to research his records with respect to those names in preparation for their next meeting. Mr. Rodrigue did say he gave the grievor a copy of the notes taken at the end of the interviews and did say that he would not usually release the Audit Trail Report because of the confidential information it contained. Lastly, Mr. Rodrigue acknowledged in cross-examination that he did not try to understand why the grievor would access his account or his wife's account through option T in the RAPI system. Mr. Rodrigue did acknowledge that the Audit Trail Report demonstrates that the grievor, in accessing surnames, appeared to be sitting at a desk for a period of time scrolling through a number of the surnames quite quickly. For example, in one minute he could have scrolled through a large number of accounts.

[29] In re-examination, Mr. Rodrigue testified that not only did he not have any authority to discipline the grievor, but that it is not his role, nor did he make any recommendations or comments with respect to discipline.

[30] Mr. Sixsmith received Mr. Rodrigue's report in late May, 1998. He sent a copy to Ms. Lorna Gray, to whom the grievor's direct supervisor reported.

[31] Ms. Lorna Gray gave evidence that she had received some preliminary results of the investigation conducted by Mr. Rodrigue sometime in March 1998. At that time she had no direct involvement with the grievor. Upon receiving a copy of the final report from Mr. Sixsmith, she was asked to review it and determine whether any disciplinary action should be taken. Ms. Gray reviewed Mr. Rodrigue's report and prepared a report (Exhibit E24) dated June 19, 1998 that she submitted to Mr. Sixsmith. Ms. Gray concluded that the grievor had made a number of accesses to confidential information that were not for work-related purposes. His explanations for accessing the information were not plausible and she noted there was apparently no recognition of wrongdoing by the grievor. Accordingly, she recommended a 20 day suspension be imposed. She testified she arrived at the penalty of a 20 day suspension after reviewing Mr. Rodrigue's report and consulting with the Human Resources Branch. In light of all the facts, she accepted Human Resources' recommendation of a 20 day suspension. She did note that she did not have authority to impose discipline of that nature.

[32] Ms. Gray explained why she did not regard the grievor's explanations for accessing the taxpayer information as plausible. Firstly, with respect to efforts to obtain information on outstanding balances for the surnames R and N, the Audit Trail Report showed access to option T information only, which does not provide outstanding balances. She also reviewed the grievor's training schedule over the periods when he accessed information relating to the surnames Naidu and S2 and determined the grievor was not training during those times. Further, with respect to the training issue, Ms. Gray said one only needs to be shown how to access option T on the RAPI system once; it is a simple search option. Ms. Gray went on to indicate that the RAPI system is not hard to operate and no training is given with respect to it. The learning process is through an instruction booklet and occasionally asking assistance from a colleague. In any event, even if one were training, the employer's policy is that

its employees are only to train on their own working files that they are authorized to access.

[33] Ms. Gray gave further explanations of the RAPI system, including what information option T would reveal to a searcher. The information would be a taxpayer's name, address, date of birth, date of death, and significant relationship information such as spouse and the spouse's social insurance number, date of birth, date of death and account number. Option T also shows the taxpayer's social insurance number. Option N contains financial transactions relating to the taxpayer's account including assessments, re-assessments, payments, interest and penalties charged. The Audit Trail Report, marked as Exhibit A4, does not contain all the information that a search on option T would reveal.

[34] Regarding the grievor's access to his own account and his wife's account, Ms. Gray indicated there was a significant number of these accesses over a 17 month period for which she could ascertain no work-related reason. Such access by an employee to his own account and to that of a spouse is contrary to the employer's Standards of Conduct (Exhibit A1, page 8).

[35] Ms. Gray had worked as an auditor with the employer before becoming a team leader for auditors and eventually being appointed a manager or section head with responsibilities for overseeing audit functions.

[36] In cross-examination, Ms. Gray acknowledged that her experience as an auditor was on the income tax side and that her familiarity with the day-to-day work of GST auditors was limited. More specifically, she does not personally get involved with compliance issues; those issues are addressed in manuals, and addressed by technical advisers and team leaders. Ms. Gray acknowledged that at the time of preparing her report she did not review the Audit Trail Report, and that she was not made aware of any additional information, including extenuating circumstances, unless such matters were noted in her report. More specifically, she testified she did not speak to the grievor during the period of her involvement in the matter.

[37] Mr. Sixsmith testified that upon receiving the report from Ms. Gray recommending a 20 day suspension, he then contacted Human Resources and spoke with a member of that department to receive advice regarding issues of fairness and consistency in light of the fact pattern. Mr. Sixsmith indicated that it was his personal

view that termination was the appropriate penalty in light of the facts. He testified that the Human Resources told him that if one was accessing records for snooping purposes generally a three day suspension was issued and that termination was delivered in cases where the information was utilized for personal gain or information was delivered to a third party. Human Resources thought a 20 day suspension was reasonable under the circumstances and Mr. Sixsmith concluded that it was probably a sufficient penalty to correct the behaviour. He did take into account the fact that the grievor did not demonstrate any remorse, that he did not accept responsibility, and that he was not forthright when questioned about the issue.

[38] Mr. Sixsmith then testified about preparing for the June 25, 1998 disciplinary meeting and what occurred at that meeting. The meeting was attended by himself; Ms. Paulette Hikeda, from Human Resources; the grievor; Mr. Rob Fredericks of the Professional Institute of Public Service Employees; and by Mr. Bob Coan, the grievor's direct supervisor. Mr. Sixsmith testified it is his usual practice after delivering a letter of discipline to ask for any comments from the grievor or on the grievor's behalf; however, in this particular case, he cannot specifically recall if he did that. Mr. Sixsmith recalled a response from the grievor to the general effect that he did not do anything wrong. He subsequently received a letter from the grievor dated July 6, 1998 (Exhibit A12) stating the following:

> *I refer to your letter of disciplinary action dated June 25, 1998.*
>
> *I would like to once again apologize for any discomfort or inconvenience caused as a result of my actions and the investigation conducted by the Internal Affairs Division. It has never been my intention to bring disrepute to the Department. I have always tried to discharge my responsibilities in a mature and professional manner within the prescribed rules, policies and guidelines of the Department. I have aimed for a high standard of conduct and have promoted trust, goodwill and integrity in my dealings with all parties, so that Departmental values are not compromised.*
>
> *It is apparent that the disciplinary action taken against me was based, in part, on my credibility. I am personally hurt by this allegation and am confident that when full disclosure occurs and proper explanations are given, this conclusion as to my credibility and trustworthiness will be very different.*
>
> *I wish to stress that, upon resumption of my official duties, I will remain faithful and loyal to the Department in respecting its values and work ethics. I realize that, given this unfortunate disciplinary*

> *action, I should bring even greater care and diligence in the performance of my duties to avoid any activity that may have a bearing upon my character as not being honest and trustworthy. I am confident that the degree of trust essential to my employment relationship will be fully restored.*
>
> *In closing, I wish to note that I view the filing of a grievance as a process which will provide the opportunity for me to provide full explanations for my actions and demonstrate that both the Department's disciplinary decision and negative view of my credibility are not warranted. I sincerely look forward to that result.*

[39] Mr. Sixsmith did recall the grievor asking him how he was going to explain a 20 day suspension to his wife. He also recalled a discussion about how the 20 day suspension would affect the grievor's pay and that a determination was made to spread the loss of pay arising from the suspension over a three month period in consideration of the grievor's financial position.

[40] In cross-examination, Mr. Sixsmith acknowledged that the only information he considered in making his disciplinary decision was Ms. Gray's report and his discussions with Ms. Paulette Hikeda. He recalled that he looked at the Rodrigue report and while he said the Audit Trail Report may have crossed his desk he would not have gone through it line by line. Mr. Sixsmith also acknowledged in cross-examination that the letter of suspension dated June 25, 1998 had been prepared prior to the disciplinary meeting. Lastly, when asked in cross-examination whether the grievor had apologized at the meeting, Mr. Sixsmith's reply was that his stronger recollection was that the grievor said he was going to take the issue up the ladder to prove that the discipline was inappropriate. He did note that the grievor may have provided an expression of regret but the manner in which it was offered did not appear to him to be an acceptance of wrongdoing or an apology for any wrongdoing.

[41] Both Ms. Gray and Mr. Sixsmith testified about the critical role confidentiality plays in the workplace. This evidence was substantiated by supporting documents that were filed as exhibits.

[42] The grievor, Mr. Lawrence Naidu, testified on his own behalf. He testified with respect to the changes in the workplace since he began in 1990, his health over the relevant period of time and other factors in his life contributing to a high degree of stress, the investigation, and he provided an explanation for the conduct in issue.

[43] With respect to the investigation, the grievor testified he was contacted by Mr. Rodrigue one day prior to the first investigatory meeting taking place and was advised that Mr. Rodrigue wanted to discuss two issues: a complaint from a named taxpayer and the matter of unauthorized searches on the RAPI system. The grievor spoke with a shop steward who was unable to attend the meeting the next day and accordingly, the grievor attended the meeting on his own. Upon arriving at the meeting he requested bargaining agent representation and Mr. Rodrigue responded by suggesting that they should get started and if the grievor felt uncomfortable, or felt he needed representation, they could then address the issue. He confirmed Mr. Rodrigue advised that he was only entitled to have a representative there as an observer. The grievor testified that during the course of first investigatory meeting he was prepared to cooperate but he did not know the extent of the investigation and felt intimidated by Mr. Rodrigue and Mr. Kozak.

[44] The grievor went on to state that in his opinion Mr. Rodrigue made comments that were very unreasonable and made him uncomfortable. He felt Mr. Rodrigue was guarded in providing him with any information and proceeded by asking questions to put him on the spot. The grievor said that Mr. Rodrigue had a number of pre-set questions that he asked. Mr. Rodrigue did not show him any documentation regarding accesses. The grievor's first recollection of seeing Exhibit A4, the Audit Trail Report, was not until his bargaining agent representative obtained a copy of it through a request to Access to Information after his grievance was filed.

[45] The grievor testified that he was aware of the confidential culture of the employer and particularly with respect to access to the RAPI system. He thought that he was within the policy scope in accessing the RAPI system as he did and stated that perhaps his actions reflected poor judgment on his part because of his state of mind at the time. He noted it was not his intention to take any information and use it for any inappropriate purpose and in this regard, he relied upon the fact that he functions as an auditor and the information that is obtained through option T is of a very limited nature. He noted that he had observed it was very common for auditors to use option T or any other profile in relation to their work. These observations were made approximately two years ago and at the relevant time when there were very few terminals available and employees would often line up in order to have access to the computer terminals. He also advised he had discussions with trainers and other auditors where he was advised that it was okay for him to have the type of access that

was now in issue. He acknowledged that he now appreciated the employer's reasoning and agrees with those reasons and appreciates now that his actions were not appropriate.

[46] Regarding the grievor's health, he testified he suffered from a considerable amount of stress over the relevant period of time from 1995 through to 1997. In addition to a number of changes being made at the workplace, his own health was compromised because he was suffering from a lingering back injury as a result of a motor vehicle accident, he was undergoing difficulties in his marriage, and his son from a previous marriage was not well. The grievor was required to attend meetings at the school and with medical personnel with a view to obtaining a diagnosis of his son's condition and appropriate treatment for him.

[47] With respect to the grievor's own health, three documents were filed: a letter dated March 1, 1998 from Dr. Neville Smith to Dr. Best, who was then the grievor's doctor; a letter dated February 13, 1996 to Dr. Reznek from Dr. Eibschutz; and a note on a prescription pad from Dr. Mudaliar. The grievor testified that in early 1996 he was not doing very well. He was referred to a rheumatologist and suffered from depression. He was not able to perform his activities at his usual level, nor could he sleep. These factors resulted in excessive fatigue and more stress at work. He testified that the factors that worsened his condition were excessive activity and stress.

[48] Regarding stresses in the workplace, the grievor relied upon the number of times his work location was moved and changes made in his supervisors resulting in different expectations of him. In addition, there was the consolidation of the income tax and the GST functions that also contributed to stress. The work itself in dealing with taxpayers can be difficult at times and included travel. Additional stress was created by his poor job performance and advice from his supervisor, Mr. Bob Coan, that he was not meeting expected standards. According to the grievor, Mr. Coan showed understanding and consideration to him because of his problems at home and with his health. The grievor testified that some days his stress was so high that he could not deal with job issues.

[49] He acknowledged making the accesses to the RAPI system that the employer was relying on and said he made those accesses to practice utilizing the system and to

become familiar with the type of information available on it. He accessed the RAPI system in this fashion on several occasions when he had free time or wanted to fill his time. He said that when he accessed the RAPI system there could have been other things for him to do but this is what he chose to do with a view to relieving his stress. He felt a break from the more stressful work would allow him to get back to his other functions.

[50] More specifically, with respect to his access to the Naidu surname he said it was chosen because it was easy and it came to mind. With respect to the R surname, for him it was a very common name. The D surname was related to his GST workload and he said he had to do investigation about this client. With respect to access to his own record and that of his spouse, he said he had not intended to look at those records specifically but they came up in one of his searches.

[51] During cross-examination, counsel for the employer asked why the grievor did not speak of the health and personal problems he was undergoing at the time. The grievor responded that he didn't talk about his personal problems because he felt they might exacerbate the situation. He stated that he did speak with Mr. Coan about some of the details of his problems because it was affecting his performance. In response to a question in cross-examination regarding his access to the N and R surnames, the grievor stated he accessed those simply because they were easy names for him. However, affidavits filed by one N and one R (Exhibits A-14 and A-15) suggested the grievor had been making inquiries into their accounts for them.

[52] In cross-examination it was elicited from the grievor that although Mr. Coan was present at the disciplinary meeting he did not make any attempt to assist by making any reference to the problems the grievor was undergoing. Then in re-examination when this question was pursued by his own counsel, the grievor said that he did attempt to say something at the disciplinary meeting but Mr. Sixsmith said, "Sorry I can't discuss that, all the decisions have been made". I do not accept the fact that the grievor was denied an opportunity to offer an explanation at the disciplinary meeting. I have serious concerns about the credibility of the grievor with respect to his evidence in this regard. Mr. Sixsmith was not cross-examined on this point and it was of significant import that had the representative of the grievor intended to rely upon it, Mr. Sixsmith should have been questioned about it; it should then have been presented during the grievor's examination-in-chief and supported by either acceptance by

Mr. Sixsmith or through the evidence of the grievor's bargaining agent's labour representative, Mr. Gilles, who was present at the beginning of the first day of the hearing. Even when the grievor wrote the letter of July 6 to Mr. Sixsmith (Exhibit A-12, *supra*) stating that his conduct would ultimately be found justifiable, the grievor did not mention his problems, or the fact he was prevented from discussing them at the disciplinary meeting.

Argument:

The Argument on Behalf of the Employer:

[53] Counsel for the employer argued it had demonstrated the grievor was disciplined for just cause. She relied upon the fundamental importance of maintaining the confidentiality and integrity of our tax system. In this regard she relied upon the *Ward* decision. In the case at hand, counsel for the employer noted the grievor, Mr. Naidu, showed a complete lack of honesty and consistency throughout the investigatory process, and that lack of honesty and consistency continued at the hearing. She maintained it was unreasonable for the grievor to claim he was making the accesses to option T for training purposes when the access continued over a number of years. This was particularly so because option T, which was the primary access option utilized by the grievor, had limited information. In addition, the limitations of the grievor's access profile prevented him from obtaining information regarding individual's balances as he stated he was doing with respect to three of the surnames in the investigatory meetings and which position he continued to rely upon for some time as demonstrated by filing affidavits sworn by the three individuals. Counsel for the employer also relied upon the fact that in many instances the grievor was unable to give names of the people who he alleged told him the type of access he participated in was acceptable. He had shown no remorse throughout the investigation and disciplinary process except perhaps at the hearing, when it appeared to come out of the blue on re-examination that the grievor testified that while he attempted to offer some explanation at the disciplinary meeting, Mr. Sixsmith refused to allow him to do so.

[54] Counsel for the employer maintained the employer went to great lengths to ensure consistency in the application of discipline and in this regard, relied upon the

case of *Griffin-Waricke and Treasury Board (Revenue Canada-Taxation)* (1988), PSSRB File No.166-2-16115; [1988] C.P.S.S.R.B. No. 66.

[55] Regarding the issue of mitigating factors, counsel relied upon the decisions of *Funnell and Treasury Board (Department of Justice)*(1994), PSSRB File No. 166-2-25762, [1995] C.P.S.S.R.B. No. 83 and *Thomas and Treasury Board (Revenue Canada-Customs, Excise and Taxation)* (1999), PSSRB File Nos. 166-2-27608, 28503, 28504 and 149-2-172, [1999] C.P.S.S.R.B. No. 124 where medical evidence that could have been made available at the time of discipline wasn't shared with the employer. As a result, the adjudicators in both cases felt it was not proper to adjust the discipline.

[56] With respect to the medical evidence, counsel for the employer argued it did not show that the grievor could not understand right from wrong or the consequences of his actions. At the March 4, 1998 meeting he felt access was okay because he did not disclose the information to anyone else. Perhaps this conclusion would be different if it involved only one incident of access or a momentary lapse; however, she submitted it was difficult to explain the numerous accesses over the periods of time as "momentary lapses". Other cases relied upon were *McIntyre and Treasury Board (Revenue Canada-Customs and Excise and the Public Service Staff Relations Board)* (1996), T-1928-95 (Federal Court, Reed J.) and (1994) PSSRB File No. 166-2-25417; *Ward (supra)*, and *Boisvert and Treasury Board (Solicitor General-Corrections Canada)* (1996), PSSRB File Nos. 166-2-25435 and 26200.

[57] With respect to the issue of lack of representation at the investigation stage, in light of the evidence provided, counsel took the position that it was questionable whether any incriminating or prejudicial remarks were in fact made on March 4, 1998 that could justify the approach taken by counsel for the grievor that he was prejudiced by lack of representation. People incriminate themselves all the time and that's why investigations work. Furthermore, most of the inconsistencies in the grievor's stories surfaced only after the investigation was completed when the grievor had the full benefit of representation. Here, during the adjudication process, the grievor had a trial *de novo* and any inconsistencies during the hearing reflect upon credibility. The adjudicator is empowered to weigh the evidence and determine issues of credibility. In conclusion, there was no prejudice suffered as a result of the grievor being denied a right to representation at the investigation stage and the discipline should be maintained.

[58] Lastly, the adjudicator was reminded not to make any change in the discipline simply on the basis that the adjudicator may have arrived at a different conclusion with respect to the discipline imposed.

Argument on Behalf of the Grievor:

[59] With respect to the issue of lack of representation, the representative of the grievor urged once again a purposeful view of the right to bargaining agent representation be taken because that right goes to the heart of the labour regime and the respective roles between the bargaining unit and employer with respect to resolution of matters in the workplace.

[60] In the *Canada Safeway* case the employer's mind appeared to have been determined at the outset of the investigation. In this regard, the case at hand was very similar as Mr. Rodrigue testified he had little doubt of the grievor being able to explain his extraordinary accesses to the RAPI system, particularly with respect to the access to the grievor's own information and that of his spouse. It was clear from the evidence of Ms. Gray and Mr. Sixsmith that they relied exclusively on Mr. Rodrigue's report in determining whether discipline should result and more specifically, what the nature of that discipline would be.

[61] The representative of the grievor distinguished *Tipple* from the case at hand. *Tipple* addressed an individual's right to be heard and to be aware of the potential consequences of what might flow as a result. In cases involving the right to be heard, the affected individual can be returned to his or her previous condition through a trial *de novo*. However, a right to representation at a critical point in time cannot be cured because a statement has already been given. Put in other words, the harm has been done or "you can't unring a bell". In the case at hand, the employer's decision to impose discipline has been built upon the grievor's own comments during the investigation process when he was not allowed the right to representation. At both investigation meetings, Mr. Rodrigue testified that he had already formed the impression that the grievor was not being candid with him.

[62] The representative of the grievor invited the adjudicator to speculate about how representation could have changed the way in which the investigation developed. For example, had the representative been allowed an opportunity to view the evidence in the Audit Trail Report, much of the confusion regarding what occurred could have

been avoided, thus eliminating or resolving the inconsistencies which developed. Credibility is always an issue with adjudicators and a trial *de novo* even with adequate representation, does not and will not cure the harm done by lack of representation. In this regard he referred to the following passage from then Deputy Chair Tarte's decision in *Evans and Treasury Board*:

> *Arbitrator Burkett in Re Hickson-Langs Supply Co. and Teamsters Union, Local 419 (1985), 19 L.A.C. (3d) 379 properly described union representational rights as "contractual due process". He states at page 392:*
>
> > *These safeguards are in the nature of a contractual due process. While it may seem unfair to the employer to have its actions found to have been null and void, the due process provisions are central to the representation provided under the collective agreement and, in our view, there is no other way to give real meaning to them.*
>
> *Marvin Chertkow in his article entitled Mandatory Union Representation at Discipline: An Arbitrator's Perspective (Labour Arbitration Yearbook 1993, supra, at page 139) describes the principle as follows:*
>
> > *The concept of contractual due process has its roots in the due process principle that underlies our justice system. Thus, an accused person has the right to a full and proper defence, including the right to counsel, when facing criminal or quasi-criminal proceedings. The principle is also established in the area of administrative law. In the case of Pett v. Greyhound Racing Assn. Ltd., where a trainer was faced with loss of his licence resulting from an allegation of doping a dog, Lord Denning stated:*
> >
> > > *It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to make a speech.*

> *If justice is to be done, he ought to have the help of someone to speak for him.*
>
> *Contractual due process includes (where the contract language so provides) the right to know in advance the nature of the charges, the opportunity to consult with a union official prior to the "interview" or "hearing", and the right to have the union representative speak for and on behalf of the accused employee. The importation of the concept of due process into the workplace is one that has been described as penetrating "to the heart of the relationship of the employer and employee".*
>
> *The right to representation in such circumstances is a substantive one whose breach cannot be cured at some later date by a hearing de novo. Unlike Tipple (Federal Court of Appeal A-66-85), this case is involved with more than simple procedural fairness.*

[63] When an employer is easily able to anticipate discipline will arise, an employee should have the right to representation. The reasons for extending the right to representation at the front end of the discipline process are to avoid embarrassment and anguish. This right of representation has been accepted in the private sector and there is no justification for divergence between rights of employees of the federal public service and those employees in other jurisdictions or collective bargaining regimes.

[64] In the alternative, in the event the adjudicator does not conclude the grievor's right to representation was breached, the representative of the grievor submitted that very little weight, if any, should be given to the grievor's comments made during the March 4, 1998 meeting. In this regard, the representative relied upon the *Johnson and Treasury Board (Royal Canadian Mounted Police)* (1995), PSSRB File No. 166-2-26107, [1995] C.P.S.S.R.B. No. 39 (then Deputy Chair Tarte) and *Evans* and submits the information arising from the first meeting should not be considered in the context of the adjudicatory hearing.

[65] Should the adjudicator find discipline was warranted in the case at hand, the grievor's representative places in issue the appropriateness of the discipline relying upon *Ward*, *Griffin-Waricke*, and *McIntyre* cases, *supra* and upon *Buset and Treasury Board (Canada Customs and Revenue Agency)* (2000), PSSRB File Nos. 166-2-29742 to

29744 and *Hunt and Treasury Board (Transport Canada)* (1988), PSSRB File Nos. 166-2-17113 and 17114, [1988] C.P.S.S.B. No. 169.

[66] The representative of the grievor invited the adjudicator to find the only plausible explanation for the conduct of the grievor was that he was depressed and unwell. The grievor cruised through the RAPI system, trying to understand what he was able to do with it and not really getting anywhere with it. Neither Ms. Gray, Mr. Sixsmith, nor Mr. Rodrigue, made any attempt to understand the grievor's situation, specifically what his training needs might have been. In any event, no actual damage or harm resulted from the grievor's unauthorized access.

[67] With respect to the issue of mitigation, the representative of the grievor invited the adjudicator to consider the high level of stress the grievor was suffering from. His preoccupation with his problems and insecurity in the job made it difficult for him to disclose the fact that he was suffering from health and personal problems or to disclose the details of such matters.

Issues:

[68] 1. Does an employee have a right to representation during the investigation of wrongdoing by the employer.

[69] 2. If so, what consequences flow from the employer's failure to allow representation.

[70] 3. Subject to the determination of the first and second issues, given the facts of this case,

i) did the employer have cause for discipline;

ii) was the discipline imposed within the acceptable range; and

iii) if the discipline was within the acceptable range, were there mitigating circumstances to justify a reduction of the penalty imposed.

Reasons for decision:

1. **Does an employee have a right to representation during the investigation of wrongdoing by the employer:**

[71] The right to representation generally is a matter of entitlement that has its foundation in principles of equity and in administrative law. While clear rights to representation exist in criminal law pursuant to legislation, there is no authority, or acceptable justification, for transporting those rights into other fields of law, including labour law, without a legal basis for doing so.

[72] Courts have accepted the right to representation in labour arbitrations. *Re Men's Clothing Mfgs. Assn. of Ontario and Arthurs* (1979), 26 O.R. (2d) 20, 104 D.L.R. (3d) 441 (H.C.J., Div. Ct.)

[73] The right is based upon the *audi alternam partem*, or the right to a fair hearing, principle established in equity and then incorporated into principles of administrative law.

[74] That right and other rights that have been traditionally accepted to exist during arbitration hearings stem from the nature of the arbitration hearing itself. An arbitration hearing, or in this case an adjudication hearing pursuant to *The Public Service Staff Relations Act*, is a judicial function to determine issues with respect to rights contained in a collective bargaining agreement and, where applicable, rights contained in legislation. Because an arbitrator, arbitration board, or adjudicator is empowered to make a decision that ultimately confers or detracts from the respective parties' rights and the decision is final and binding, the traditional rights of fairness inculcated in principles of administrative law apply.

[75] In this case we are dealing with parties to a collective agreement, whose rights and obligations are also contained in legislation - *The Public Service Staff Relations Act* and *The Financial Administration Act.* The adjudication process, as a final determination of the issues in question, is provided for in *The Public Service Staff Relations Act.* Accordingly, the hearing is a judicial process, sometimes referred to as a *quasi* judicial process, requiring adherence to the traditional rules of fairness. Accordingly, there is no doubt the grievor was entitled to representation at the hearing. However, his representative at the hearing would have the principles extended not merely to the steps of the grievance process itself, but to the employer's initial investigation of potential or alleged wrongdoing. In other words, the bargaining agent would have an employee be entitled to the specific right of representation before the employer had determined there was wrongdoing. This is the argument, even

though it is only after the employer concludes there was wrongdoing that it then considers what discipline, if any, should be imposed upon the employee. The decision of what discipline to impose is, at least in theory, not the final determination of the matter. Collective bargaining agreements and legislation usually provide for a multi-step review process that an employee may pursue if unsatisfied with the employer's disciplinary decision. Upon the completion of that process, if the employee remains dissatisfied with the disposition, the employee may then proceed to an arbitration hearing, or in this case, an adjudication hearing, for a final and binding resolution of the issue. Legally, in the absence of specific language in the collective agreement or applicable legislation to the contrary, it is only the hearing mechanism, for a final and binding resolution of the issue, that brings into play the administrative law principle of the right to a fair hearing. However, many collective bargaining agreements do provide for representation at earlier phases of the process.

[76] The representative of the grievor has argued that section 8(1) of the *Public Service Staff Relations Act*, and Article 33.03 of the collective bargaining agreement provide the right to representation to employees at the investigation phase of the process. Section 8(1) of the *Public Service Staff Relations Act* provides:

> *8. (1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*

[77] Article 33.03 of the collective bargaining agreement provides:

> *33.03 When an employee is required to attend a meeting, the purpose of which is to render a disciplinary decision concerning him, the employee is entitled to have, at his request, a representative of the Institute attend the meeting. Where practicable, the employee shall receive a minimum of one day's notice of such a meeting.*

[78] The language in section 8(1) of the *Public Service Staff Relations Act* addresses the general right of an organization to represent the employees without interference and does not create any specific rights of representation as between the employer and individual employees. That being so, it certainly does not provide for the extended and very precise right of representation the representative of the grievor argues that it does. The language of article 33.03 in the collective agreement, on the other hand,

does provide for a specific right of representation where an employee is required to attend a meeting called to render or deliver a disciplinary decision and only then if the employee requests representation. The language of section 33.03 is not broad enough to allow for the interpretation the representative of the grievor maintains that it does.

[79] Investigatory meetings, and meetings requesting explanations for the conduct of employees are common occurrences in the work place. Had the parties intended the language of the collective agreement to include the right to representation at these meetings or at all meetings between the employer and its employees, collectively or individually, it would have been a simple matter to include that right in the agreement. In arriving at the conclusion not to accept the interpretation the grievor's representative would have me uphold, I have had regard to the general scheme of grievance resolution contained in the collective bargaining agreement and the legislation, and to general principles of interpretation. I have also had reference to and taken into account the traditional prerogatives of employers and determined that neither the language of the collective bargaining agreement or the applicable legislation alters those prerogatives in this case. Lastly, I have considered the cases relied upon by the grievor's representative.

[80] The cases of *Canada Safeway* and *Evans and Treasury Board* are not directly on point and accordingly, while containing discussions of some useful principles, do not support the argument. Although both cases warrant comment, without addressing the legal conclusions the respected arbitrator and adjudicator arrived at, they are distinguishable on the facts. The majority of the arbitration board in the *Canada Safeway* case concluded that although the investigatory meeting was adjourned to call in a representative before the suspension was delivered, there was only one meeting and the grievor was entitled to representation throughout. Another material fact was the notice of dismissal was delivered by mail, and that delivery also breached the employee's right to representation. In the *Evans* case, although the parties were operating under an identical provision as section 33.03 in the case at hand, then Deputy Chair Tarte found the meeting the grievor was called to and advised she had the option of resigning or being fired was in fact a disciplinary meeting and the grievor's request for representation was discouraged by the employer. It was on the basis of those facts, which are different from the facts at hand, that the discipline was found to be null and void because the grievor was denied her substantive right of representation pursuant to the operative collective agreement.

[81] Of further significance is the fact the decision of Arbitrator Ish in the *Canada Safeway* case, although upheld at the Court of Queen's Bench, was set aside by the Saskatchewan Court of Appeal and remitted back to the adjudication board to consider whether the employer had just cause to dismiss the grievor without taking into consideration the grievor's confession made while she did not have representation. The majority decision of the Court of Appeal was written by Cameron J., who stated, in the paragraphs numbered below:

> *¶37 While we do not regard the failure to observe the requirements of Article 23.05 as merely procedural (having observed the right of representation to which it gives rise is substantive), we do agree with much of this analysis. We are not to be taken, however, as suggesting that a board of arbitration is precluded from setting aside a suspension or discharge and reinstating an employee in consequence of a breach of the Article. In some instances this might be an appropriate remedy within the power of the board to grant, though in our respectful opinion reinstatement is not to be treated as a presumptive remedy.*
>
> *¶38 Article 24.11 of the collective agreement affords the board a range of remedial choice, express and implied. As envisioned by the Article, the task in applying it is to select an appropriate remedy, one that is suitable to the occasion and as complete as possible, bearing in mind the goal is to effectively but not excessively remedy the harm of the breach.*
>
> *¶39 In this instance the harm of the breaches, so far as it extended to Ms. MacNeill, was to partially deprive of her the benefit of the right to have a union representative present when she was suspended, and to wholly deprive her of the benefit of that right when she was discharged. The benefit, to harken back to the object of the right, was the better protection of her interests, including her interest in knowing the basis for suspension and discharge, in answering effectively to the company's position, and in avoiding damaging her own position.*
>
> *¶40 Of these, it was principally the last of them that was compromised by the breaches. Had she been represented at the time of the suspension she might not have confessed to the alleged theft. Indeed, it is to be assumed for the purpose at hand that she would not have done so. Theoretically, had she not done so the company would either have refrained from suspending and later discharging her, or to have done so in reliance alone upon the evidence it had collected against her beforehand. As a practical matter, given the findings of fact of the majority, the company would have*

suspended her in any event, convinced as it was, before the meeting at which she was suspended, that she was guilty of theft, and committed as it was to the work-place policy visiting theft with dismissal.

¶41 Aside from the harm of the confession little if any other concrete harm befell Ms. MacNeill by reason of the breaches. Represented or not, and realistically speaking, she knew the basis upon which the company was about to act, was not going to dissuade it from suspending or discharging her, and was not deprived of the opportunity to challenge its position, for she had a right to grieve, a right she effectively exercised within the allotted time. Indeed, the grievance, during which she was represented by counsel, constituted the strongest possible means of informed and effective challenge.

¶42 Having regard for the real harm of the breaches, and to the extent they affected only her interests, the appropriate remedy, if possible, was to exclude the confession, determine if the company had had just cause to suspend and discharge her in the absence thereof, and then to either set aside the suspension and discharge and reinstate her, if the company did not have just cause, or to dismiss the grievance if it did. Otherwise, the remedy was destined to be excessive and inappropriate, especially in the circumstances.

¶43 We might add that to the extent the breaches potentially affected others, namely other employees whose interests were similarly protected, and might therefore have merited a broader remedy-one having an exemplary or deterrent or prospective element to it-it should be noted that these breaches can hardly be taken to have had that quality. This is largely self explanatory, and therefore suffice it to say that the company cannot be said to have blatantly disregarded the requirements of the Article or to have exhibited a general tendency to ride rough-shod over the right secured by the Article. Nor can the breaches be seen realistically as affecting the interests of others in any significant sense.

¶44 In our judgment, then, the majority should not have set aside the suspension and discharge and ordered reinstatement by reason alone of the breaches, for unless it had no other realistic choice this constituted not only an erroneous application of Article 24.11 but an unsustainable one, having regard for the standard of review.

¶45 Which brings us to the issue of whether, as the majority held, it was too late in the day to entertain the idea of rendering Ms. MacNeill's confession inadmissible in consequence of the breaches, and then determining whether,

> *in the absence thereof, the company had had just cause for dismissing her.*
>
> *¶46 Ms. MacNeill, acting through counsel at the time, did not of course seek such remedy, preferring instead to seek reinstatement on the alternate ground the suspension and discharge amounted to excessive disciplinary action or was void by reason of the breaches. Hence, she chose to reach beyond the exclusion of her confession and admit the alleged theft. This was a tactical choice open to her to take, and having taken it, she placed the board in an awkward position. Not only would it have to ignore her confession, which as a practical matter it might readily have done in line with common judicial and quasi-judicial practice, it would have to ignore her testimony admitting to the theft. In the main, it was this that prompted the majority to rule as it did once it acknowledged there may be cases in which breach could be remedied by means of excluding inculpatory statements associated therewith.*
>
> *¶47 Obviously, this is not as it should have been. And to cut to the heart of the matter, there seems no good reason why the board could not have ignored her confession, as well as her admission (should it have been inclined to ignore her admission notwithstanding her tactical choice), and then to have determined whether the company had had just cause to dismiss her. In short, this was a realistic alternative to setting aside the dismissal and reinstating her without determining the underlying matter. It was especially so, given the fact the board had concluded on the first branch of the case that reinstatement was inappropriate.*

[82] In the case at hand, the investigator, Mr. Rodrigue conducted the investigation and provided a report regarding his findings and conclusions. He had no mandate or authority to determine what discipline if any should flow as a result of his investigation, nor did he make any recommendations in that regard. Although his investigation was material to the discipline imposed upon the grievor, Mr. Rodrigue did not make a decision affecting the grievor's rights. Even if Mr. Rodrigue had made a recommendation regarding the grievor's rights it could not be concluded that his right to representation had been breached for three reasons. Under the employer's hierarchical scheme Mr. Rodrigue had no authority to make a determination regarding the issue of discipline. The collective bargaining agreement and the applicable legislation establish the adjudication process as the final and binding level of determination. There was no specific language in either the collective bargaining agreement or the applicable legislation granting employees the right to representation

when the employer calls an employee to a meeting to answer questions regarding that employees' conduct in the course of his employment.

[83] This conclusion is consistent with the duty an employee owes to an employer. Unless otherwise stipulated, the employer has the right to direct its workforce. That right must necessarily include the right to review the performance and behaviour of its employees. If such a review disclosed improper or unacceptable behaviour, the collective bargaining process and the legislation envisage a process of correcting behaviour, which includes discipline.

[84] The principle that an employee is not required to provide an explanation to his employer or acknowledge any wrongdoing is not one that is enshrined in the collective bargaining regime. That principle is one that is enshrined in our criminal law. The collective bargaining regime has developed from employment law, which historically has upheld, and continues to uphold, the employer's right of entitlement to good faith from its employees. Accordingly, the approach is very different. Whether an employee has been candid with the employer, acknowledged the inappropriateness of the conduct in question, apologized and demonstrated remorse and a willingness to correct the behaviour or refrain from it in the future, are primary considerations in addressing the issue of mitigation of the discipline imposed.

[85] With respect to the alternative argument made on behalf of the grievor that if it be found no right to representation existed at the investigatory meetings, nevertheless, the information provided by the grievor at those meetings should not be considered. I agree with the comments made by then Deputy Chair Tarte in the *Johnson* case regarding consideration of statements made during an investigatory meeting. In his reasons for decision, Mr. Tarte stated:

> *. . . This does not mean, however, that evidence obtained under duress during an investigation process cannot be attacked at a hearing. Questions of fairness, reliability and natural justice can always be raised when warranted. As a matter of course, employees should be advised when their conduct is being investigated and should, whenever possible, be given the opportunity of being represented when they are questioned about their possible misconduct. Very few persons have the ability to think clearly and defend themselves properly when they are being interrogated. The trust which must exist in any employer-employee relationship must be nurtured by both sides. Even though clause M-33.03 does not*

> *apply in this case, I find it regrettable that the grievor was not given more advance notice and advised of the possibility of representation when she was examined by a trained police officer.*

[86] However, although the evidence is clear that Mr. Rodrigue is a well trained and experienced investigator, and that is training included police interrogation training, no facts have been established in the evidence that persuade me, on a balance of probability, to question the fairness, reliability or any other aspects of natural justice with respect to the circumstances of the two investigatory interviews conducted by Mr. Rodrigue. Accordingly, I have concluded there is no impediment or injustice in taking into consideration the statements made by the grievor during the two meetings.

2. If the grievor's right to representation is denied, what consequences flow from the employer's failure to allow representation:

[87] Because of the conclusion that neither the applicable legislation or the collective agreement contain a right to representation at investigation meeting(s), there is no need to address this issue.

3. Should the discipline imposed stand:

i) Did the employer have cause for discipline:

[88] The employer has established it had grounds for discipline. Those grounds being the repeated accesses to unauthorized information relating to taxpayers, including the accesses to information relating to his personal account and that of his spouse.

ii) Was the discipline imposed within the acceptable range:

[89] According to the evidence of Mr. Sixsmith, the employer's discipline policy for unauthorized access to taxpayer information was a three day suspension for snooping and dismissal where the information was used for the employee's benefit or given to a third party. In light of the evidence of the employer's discipline policy regarding unauthorized access, it appears that although the 20 day suspension is within an acceptable range for such conduct, the number of days of the suspension may have been high.

iii) In the event the discipline was within the acceptable range, were there mitigating circumstances to justify a reduction of the penalty imposed:

[90] The grievor testified of the difficulties he was going through during the relevant period of time at work and at home, including his personal health problems and difficulties of his son. Some medical reports substantiating his personal health problems were filed and support his evidence in this regard. I accept the fact the grievor had been suffering from stress as a result difficulties at home, his personal health problems, and the problems with his son. I also accept that stress can be a negative factor in the workplace.

[91] Nevertheless, there remain some difficulties with the grievor's reliance upon these matters as mitigating circumstances to persuade the adjudicator to reduce the discipline imposed by the employer. When the grievor was asked at the discipline meeting on June 25, attended by both his bargaining agent representative and his direct supervisor, no mention of his difficulties was raised. Then when he wrote a letter to the then Assistant Director, Mr. Sixsmith on July 6 regarding the discipline, while he stated that his conduct would ultimately be found to have been justifiable, he made no reference to his difficulties. As counsel for the employer pointed out, even if some of the grievor's conduct could be accounted for as instances of poor judgment as a result of stress and poor health, that explanation does not ring true in light of the extended period of time over which the various unauthorized accesses occurred. Then of course there were the inconsistent explanations the grievor provided to Mr. Rodrigue and at the hearing.

[92] In my consideration of this issue, I have also been mindful of the grievor's testimony regarding his reluctance to advise his employer of his personal problems. However, when an issue of numerous breaches of the employer's confidentiality policy arises, it becomes important to share this information with the employer. The grievor testified that his personal and health problems were affecting his work performance and that he spoke with his supervisor, Mr. Coan, regarding them. There was nothing submitted in evidence to substantiate this fact. The grievor also relied upon his understanding that his actions did not breach the employer's confidentiality policy because of advice received from other auditors, from trainers, or as a result of practice he observed other staff members engaging in. Again, there was no evidence to support these allegations and there was a lack of specificity in them. I have reluctantly had to

come to the conclusion that the grievor, having failed to be candid with the employer in the first instance, has now felt obliged to embellish his position by grasping at straws to justify his conduct; or alternatively, the grievor has engaged in a concerted effort to mislead his employer and this adjudicator regarding the circumstances of his unauthorized accesses to taxpayer information. Either way, his conduct has not contributed in a positive way to the process. While an employee's failure to offer an explanation early on in the investigation process and disciplinary meetings is not detrimental in itself, the grievor's failure to do so in this case, when combined with the variations of his explanations, has been a factor that I have considered.

[93] Other factors considered on the mitigation tally sheet were that no disclosure of confidential information was made to a third party; that the confidentiality policy is of utmost importance to the employer and the integrity of our tax filing system; and the potential for serious harm that could arise in the event the confidential information accessed by the grievor was given to third parties and the general difficulty the employer would have in establishing this to be the case. Although the grievor apologized for his conduct, I have not considered the apology as a mitigating circumstance because the elements of remorse and acceptance of misconduct appeared lacking.

[94] In light of the foregoing considerations, the grievance is dismissed. It was indeed tempting to reduce the number of days of the suspension in light of the grievor's personal and health problems; however, the issue of those problems contributing to the confidentiality breaches was not satisfactorily demonstrated and I was concerned about the grievor's colouration of the material facts, and concluded that if in fact the length of the suspension was at the high end of the acceptable range, the mitigating circumstances in the grievor's favour were not sufficient to justify the exercise of my discretion to reduce the number of days.

[95] Now that his unhappy incident has been determined, I am hopeful the grievor will put it behind him and be able to move forward, in a frank and positive manner with his employer, and in good health in his life.

Francine Chad Smith, Q.C.
Board Member

REGINA, December 10, 2001