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File: 166-2-31288

Citation: 2004 PSSRB 162



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

SHARON-ROSE TAYLOR

Grievor

and



TREASURY BOARD

(Department of Indian Affairs and Northern Development)

Employer

Before: Léo-Paul Guindon, Board Member

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

For the Employer: Robert Lindey, Counsel

Heard at Winnipeg, Manitoba,
June 6, 2003, and March 23 and 24, 2004.



DECISION

[1] The grievor, Sharon-Rose Taylor, a Communications and Executive Services Information Officer working at the Manitoba Regional Office of the Department of Indian Affairs and Northern Development, filed a grievance on October 2, 2001, against a 10-day suspension without pay imposed on her that same day. The grievance was referred to the Board for adjudication on May 17, 2002.

[2] The Regional Director General of the Manitoba Region, Marilyn Kapitany, stated in her letter of October 2, 2001, that the reasons supporting the decision to impose discipline were as follows (Exhibit E-15):

In a letter dated September 18, 2001, you were offered a final opportunity to come forward to support the allegations made by you against ["A.B."]. At that time, you were also advised that failure on your part to cooperate in this investigation could lead to disciplinary action.

On September 21, 2001, you failed to attend the above-noted meeting. During a telephone conversation with you that same day, you indicated to me that you were not prepared to answer any questions with respect to the allegations made by you against ["A.B."].

Your allegations against ["A.B."] were of a very serious nature which necessitated that the Department hire an outside organization to conduct an internal investigation. Without your direct testimony, several of the more serious allegations made by you could not be validated. Your refusal to cooperate with the investigation leaves me with no alternative but to conclude that your complaint was of a frivolous and vexatious nature.

Therefore, by virtue of Section 50 of the Public Service Terms and Conditions of Employment Regulations, and by the authority delegated to me by the Deputy Minister, I have decided to impose upon you a ten-day suspension without pay to be served from Wednesday, October 3, 2001 to Tuesday, October 16, 2001 inclusive....[sic]

(N.B. The initials "A.B." have replaced the name of the person against whom the allegations were made in order to protect that person's identity.)

[3] At the beginning of October 2000, the grievor spoke with Lloyd Fucile, a national representative for the Public Service Alliance of Canada (PSAC), regarding her overtime claims and taxi reimbursement requests. On October 24, 2002, Mr. Fucile wrote to Mary Blais, Associate Regional Director General, indicating that he agreed that she could meet with the grievor to discuss allegations and/or information related to

those issues (Exhibit E-1). The letter also specified that Mr. Fucile and Ms. Blais had previously spoken about those concerns.

[4] In her testimony, Ms. Blais stated that the allegations reported to her by Mr. Fucile were very serious and concerned allegations of fraud.

[5] Ms. Blais requested that Jim Welsh, A/Director, Corporate Services, and Wendy Suarez, Director, Human Resources, meet with the grievor to receive her declaration. On October 25, 2000, the grievor was on her first day of a three-day suspension, for an unrelated matter, imposed on her on October 24, 2000. Mr. Welsh and Ms. Suarez proceeded to interview the grievor at her home on October 25, 2000, in the presence of her husband (Exhibits E-3 and E-5).

[6] At the meeting, the grievor gave Mr. Welsh and Ms. Suarez a copy of the statement (Exhibit E-2) that she had previously written out for Mr. Fucile. Ms. Blais testified that Mr. Fucile had given her a copy of the written statement unofficially when they discussed the issue at the beginning of October 2000. Ms. Blais received an official copy of the statement from Mr. Welsh after his meeting with the grievor.

[7] The participants at the October 25, 2000, meeting read the written statement and the grievor provided them with the following information. She stated that "A.B." had borrowed small amounts of money from her early on during her employment with Communications Services. On May 26, 1999, during a business trip to Russell, Manitoba, she lent "A.B." \$100 and in mid-June, \$150; the money was returned in early July. Less than two weeks later, she lent him \$500. The grievor testified that she showed her bank withdrawal receipt, dated July 22, 1999, to the interviewers. She also advised them that "A.B." had given her blank taxi chits and had asked her to sign them. The grievor testified that he had also asked other co-workers to sign taxi chits for him.

[8] The grievor requested that "A.B." reimburse her the money he owed her. On July 30, 1999, "A.B." asked the grievor to come into his office and to bring along her overtime form for the month of July. At this meeting, "A.B." proceeded to make changes to her overtime form, increasing the number of hours she was claiming. He explained to her that he was doing this in order to reimburse her for the money that he owed her. He completed the form and increased the hours by 21.

[9] The grievor gave Mr. Welsh and Ms. Suarez the notes from her diary in which she had indicated the number of overtime hours she had worked during the month of July (Exhibit E-4).

[10] During her testimony, the grievor stated that she showed a copy of her overtime form for the month of July (Exhibit G-1) to Mr. Welsh and to Ms. Suarez and pointed out the handwritten modifications made by "A.B.". She did not provide them with a copy of the form, as they could obtain the original from the office. Both Mr. Welsh and Ms. Suarez stated that the grievor did not show them a copy of her July overtime form during their meeting on October 25, 2000. Ms. Suarez obtained a copy afterwards from the office.

[11] The grievor advised the interviewers that she had participated in this because "A.B." spoke openly to her about the fact that he got rid of people who did not collaborate with him. He made it clear to her that she owed him "big time" because he had stuck his neck out in order for her to get a position in Communications Services. She participated in the overtime and taxi chit fraud because she was afraid that if she did not, "A.B." would terminate her employment.

[12] There was a balance of \$105 remaining to be compensated after the reimbursement of the increased overtime claim for July. At the beginning of September, "A.B." wanted her to modify her overtime claim for August, increasing it by 10 hours. This, he explained, would cover the amount he owed her plus an additional \$100, which she was to hand over to him. She refused to do so. The grievor stated that after she refused, "A.B."s attitude toward her changed and their relationship deteriorated. For example, in January 2000, he kept a record of her time and the things she was doing. As a result, she filed a harassment complaint against him. Her harassment complaint against "A.B." was rejected.

[13] After their interview with the grievor on October 25, 2000, Mr. Welsh and Ms. Suarez provided Ms. Blais with an oral report. Ms. Blais decided that a formal investigation was warranted in order to review the grievor's allegations. Thomas A. Saunders, Senior Counsel, Department of Justice Canada, was assigned the file and he gave a mandate to KPMG Investigation & Security Inc. (KPMG) to proceed with an investigation concerning the allegations made against "A.B.". Mr. Welsh and Ms. Suarez met with KPMG investigators. Ms. Suarez forwarded them the grievor's written allegation, a copy of the original overtime claim form, as well as the

information she obtained from the grievor in respect of the money she lent "A.B." and the taxi chits.

[14] Ms. Blais sent a formal letter to "A.B." on October 30, 2000, notifying him that an administrative investigation was being conducted (Exhibit G-2):

Administrative Investigation

Further to our discussion of October 24, 2000, this correspondence is to confirm that the following allegations have been made against you by Ms. Sharon-Rose Taylor:

- You have requested loans of money from your subordinates.*
- You have falsified overtime claims and redirected funds to repay loans to your subordinates.*
- You have involved your subordinates in the falsification of taxi receipts.*

Accordingly, an administrative investigation will be conducted. You will be kept apprised throughout the process.

As per the memo of October 24, 2000, your financial signing authorities as ----- have been suspended. This remains in effect until further notice.

You are placed on notice that disciplinary action may be administered as a result of the investigation.

(N.B. The title held by the person against whom the allegations were made was omitted to protect that person's identity.)

[15] The grievor received a copy of this letter from her PSAC representative in May 2001. She was unaware of the contents of the letter before then.

[16] A memorandum was sent to all staff of the Communications and Executive Services Branch by Ms. Blais on December 12, 2000, advising them of the administrative investigation (Exhibit G-3):

This is to advise that an administrative investigation is commencing immediately in relation to allegations concerning abuse of financial authorities.

A representative from KPMG may be contacting you for an interview. Your cooperation during this investigation process is vital in order to ensure the allegations are addressed in a fair and timely manner.

[17] KPMG investigators contacted the grievor in order to schedule an interview with her. On February 28, 2001, she advised them that she would not participate in any interview until she received advice from her union representative. Mr. Saunders was informed of the situation by letter dated March 21, 2001 (Exhibit E-6). Ms. Blais was also advised and she spoke to Mr. Fucile about this.

[18] On April 17, 2001, Mr. Saunders wrote to the grievor to offer her an opportunity to meet with KPMG investigators (Exhibit E-7):

As you may be aware, we represent the Department of Indian Affairs and Northern Development ("DIAND").

Some time ago, we were asked by DIAND to undertake an investigation with respect to certain allegations that were made by a number of employees of DIAND against ["A.B."]. In that regard, we retained KPMG Investigation & Security Inc. ("KPMG") to assist us.

As you will recall, you were one of the employees of DIAND that made allegations against ["A.B."]. Indeed, it was the allegations made by you which initiated the original investigation.

We understand that KPMG has made a number of attempts to meet with you to discuss your allegations. We further understand that, despite these attempts, KPMG has not been able, as of the date of this writing, to either meet with you or to schedule a time at which such a meeting may take place.

This situation is of concern to us. The investigation has been underway now for some considerable time. In fairness to ["A.B."], it needs to be concluded.

To that end, we have made arrangements for Mr. Matt Duncan from KPMG to attend at the DIAND offices, 10th floor boardroom, on Wednesday, April 25th, 2001, at 9:30 AM for the purpose of giving you an opportunity to meet with him.

So that we are clear: your attendance at that time is voluntary on your part; you do not need to attend the meeting if you do not wish to. You should understand, however, that if you do not attend the meeting, the investigation will proceed without reference to your

allegations and we shall assume that you have withdrawn them and do not wish us to consider them further. If you wish to meet with Mr. Duncan at the time indicated here, your manager will permit you the time to do so.

[Emphasis added]

[19] When the grievor received this letter, she became aware that other employees had also made allegations against "A.B.". Because the letter specified that it was voluntary on her part to attend the meeting, and that she did not need to attend if she did not wish to, she chose not to go. Jeffrey Palamar, a lawyer acting on behalf of the grievor, notified Mr. Saunders of her decision by facsimile on April 25, 2001. In his letter, Mr. Palamar stated that he was uncertain as to whether the grievor would have any useful information to provide to KPMG and that she was not in a position to meet with them on the proposed date (Exhibit E-8). The grievor remembered from Mr. Saunders' letter that her allegations would be considered withdrawn, as a result of her decision not to attend the April 25, 2001, meeting with KPMG investigators.

[20] Marilyn Kapitany, Regional Director General since April 9, 2001, notified the grievor that she had instructed KPMG to complete their investigation and submit a report by May 31, 2001, having been informed that the grievor had not attended the April 25th meeting. She ended her letter, dated April 26, 2001 (Exhibit E-9), as follows:

I am very concerned that you have an opportunity to be heard on this issue. If you wish to meet with KPMG, please advise me or Wendy Suarez. You would need to meet with them quite soon so that they have time to incorporate anything you wish to tell them into their report.

[21] By this letter, which was drafted by Ms. Suarez, Ms. Kapitany was requesting that the grievor cooperate with the investigators; the May 31, 2001, date was to ensure that the grievor would have a chance to tell the investigators what she knew. For her part, the grievor understood from this letter ("if you wish to") that she had a choice, as previously stated in Mr. Saunders' letter of April 17, 2001. Furthermore, she assumed that the investigation would be completed by May 31, 2001, based only on allegations submitted by other employees.

[22] A report was submitted to the Department of Justice by KPMG on July 5, 2001 (Exhibit E-12). With respect to the allegations made by the grievor against "A.B.", it stated:

SCOPE LIMITATIONS

We have been unable to speak with Ms. Taylor regarding any of the issues addressed by her which are outlined in the undated and unsigned document which she gave to Mr. Welsh in August of 2000. Had we been able to speak with Ms. Taylor additional information may have come to our attention which could have changed certain of our findings. Similarly, we have not undertaken any enquiries with any of the taxi cab companies in order to determine whether or not any evidence exists that the taxi rides claimed for had not been taken.

Accordingly, should any additional information relevant to our findings come to our attention after the date of this report, we reserve the right to review, and if necessary, to amend our findings presented herein, although we are not obligated to do so. Furthermore, as we are not lawyers, the comments in our letter are not, and should not be interpreted to be, legal advice or opinion.

OUR FINDINGS

[...]

Falsified Overtime Claim of Sharon Rose-Taylor

Ms. Taylor provided an undated, unsigned letter to Mr. Welsh, Acting Director, Corporate Services, INAC, which stated that ["A.B."] had inflated her July 1999 overtime claim form by over twenty hours in order to repay Ms. Taylor a \$500.00 loan she made to him on July 22, 1999. We were unable to interview Ms. Taylor in relation to her allegations.

During the interview with ["A.B."], he denied that he had borrowed \$500.00 from Ms. Taylor on July 22, 1999, and categorically denies having authored or condoned any changes to the July overtime claimed by Ms. Taylor. He was shown the overtime claim form submitted and denied that the handwriting in the documentation was his. ["A.B."] advises that he had a morning meeting with Gail MacDonald, an RCMP officer and a person identified as Mr. Muir ("Muir") on the morning of July 22, 1999 at Lindy's Restaurant ("Lindy's") relating to the possibility of a First Nations demonstration at the Pan American Games. ["A.B."] advises that after that meeting he and Muir returned to the office for a short time and then returned to Lindy's for lunch. ["A.B."] denies having met with Ms. Taylor on that date.

["A.B."] provided us a copy of an e-mail between Ms. Brazil and Ms. Valli Marcoe, of INAC's Human Resources Department, dated August 11, 2000, just prior to his suspension from duties in September 2000. Ms. Brazil

[28] The grievor and her union representative (Ms. Spruse) pointed out the policy statements in the Human Resources Manual relating to administrative investigations and more precisely to the following excerpt (Exhibit G-4):

6.0 Management Policy

6.1 Policy Statements

[...]

- (g) *Employee attendance at an investigative interview is mandatory to the extent that the supervisor can direct a subordinate staff member to attend, however, the disclosure of information is purely voluntary.*

[...]

[29] Ms. Kapitany was not satisfied with the grievor's explanation and sent her a letter on September 18, 2001, offering her one last opportunity to come forward (Exhibit E-13):

Further to our meeting of September 7, 2001, I wish to offer you one last opportunity to come forward with respect to the allegations you made against ["A.B."] in the document you presented to management last October. If you choose not to do so, we will have no alternative but to close our file with respect to the KPMG investigation.

However, I must advise you that your failure to cooperate in this investigation can lead to disciplinary action. You have made allegations of a serious nature against ["A.B."]. As you were the person who caused the investigation to be initiated, the onus upon you to cooperate in full is essential. Your failure to substantiate these allegations may lead to the conclusion that the allegations are of a frivolous and/or vexatious nature.

Should you wish to cooperate prior to the closing of this file, I am prepared to meet with you on Friday, September 21, 2001, from 8:30 a.m. to 10:00 a.m. in my office along with Wendy Suarez, Director of Human Resources. You may wish to be accompanied by your union representative or a person of your choice.

Please come to the meeting fully prepared to discuss the facts of which you are aware surrounding this incident....

[30] Ms. Kapitany explained during her testimony that the Department had a file on the allegations brought forward by the grievor and she needed to decide what to do with it. For her part, the grievor felt very confused because the April 26, 2001, letter from Ms. Kapitany stated that the file with KPMG would be closed as of May 31, 2001 (Exhibit E-9). With Mr. Saunders, Ms. Kapitany wrote that KPMG would proceed without the grievor's allegations if she chose not to attend.

[31] The grievor and Ms. Spruse discussed the situation with Mr. McCarthy (National Component representative) and requested that he call the Department in order to postpone the September 21, 2001, meeting until after the third-level grievance hearing scheduled for September 26, 2001. It was the grievor's understanding, and that of Ms. Spruse, that the September 21, 2001, meeting was postponed based on representations provided by Mr. McCarthy to Ms. Suarez. Ms. Suarez testified to the fact that she did not agree to postpone the September 21, 2001, meeting.

[32] On September 21, 2001, the grievor did not show up at the meeting and Ms. Kapitany telephoned her at work to inquire as to why. The grievor advised her that it was her understanding that the meeting had been postponed based on Mr. McCarthy's representations. Ms. Kapitany did not order her to stop working and to come into her office in order to comply with the September 18, 2001, invitation to meet. At the grievor's request, Ms. Spruse telephoned Ms. Kapitany to inform her that they had both understood from Mr. McCarthy that the September 21, 2001, meeting had been postponed.

[33] On October 1, 2001, the grievor was asked to meet with Ms. Kapitany and Ms. Suarez the next day to be advised of management's decision in respect of the allegations made against "A.B." (Exhibit E-14). She was also advised that she had the right to be accompanied by her union representative.

[34] During her testimony, Ms. Kapitany explained that she decided to discipline the grievor because she had made serious allegations of misconduct against "A.B." but did not provide any evidence following her first declaration on October 25, 2000. After her denunciations against "A.B.", the grievor had to follow through in order to help management take the appropriate action. The allegations she put forward cost the Department \$35,000 and affected the workplace.

[35] In cross-examination, Ms. Kapitany specified that on September 18, 2001, she decided to proceed to another investigation on the allegations made against "A.B." over the KPMG investigation.

Arguments

For the Employer

[36] The grievor made very serious allegations of wrongdoing against "A.B.". She declined on several occasions to meet with KPMG investigators. Their report was not a surprise and everyone accepted that an unsigned, typed declaration, which was not substantiated by the testimony of the declarant and had no supporting documentation, would not meet the level of proof required in a case of fraud. The grievor should have realized that the KPMG investigation would go nowhere if she declined to participate. Her attitude cost the Department \$35,000 of public money for an investigation doomed to failure.

[37] On September 7, 2001, the grievor was asked to explain her refusal to comply with the official investigation. At that meeting, Ms. Taylor explained that, since the rejection of her harassment complaint, she had no intention of discussing the allegations further.

[38] The employer argued that, on September 21, 2001, the grievor had played a game, trying to explain that she did not want to come forward with respect to the allegations because of representations that were going to be made at the third-level hearing of her grievance. Her union representative's arguments on her behalf had failed to convince Ms. Suarez to postpone the meeting.

[39] The grievor was clearly advised in the letter of September 18, 2001, that her failure to cooperate with the investigation could lead to disciplinary action. Notwithstanding that warning, she declined a last opportunity to cooperate. The letter of discipline, dated October 2, 2001, specifies the reasons why she deserved a 10-day suspension without pay. The gravity of her actions justifies a severe penalty. Taking into consideration that she had a previous three-day suspension showing on her personnel file, the 10-day suspension without pay is reasonable.

[40] The decision rendered in *Van der Graaf v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-2-14940 (1985) (QL), is related. In that case, the grievor denied his statement during the course of an administrative inquiry. The employer was aware at the time of the establishment of the board of inquiry that the grievor was not willing to support his statement in front of an investigative body. In that case, the adjudicator came to the conclusion that the employer was justified in taking disciplinary action against the grievor, who had made certain verbal statements to management representatives that another employee was responsible for wrongdoing, which statements were later denied by him before an investigative committee. The facts in *Van der Graaf (supra)* are similar to the present case and I should reach the conclusion that discipline is justified in this case.

For the Grievor

[41] The grievor spoke to Mr. Welsh and to Ms. Suarez about the allegations she made against "A.B.". She substantiated her allegations by showing them the dates and changes made by "A.B." to her overtime claim form for July 1999. She showed them her bank withdrawal slip for the \$500 she loaned him. Management never requested that she clarify some of the allegations after the October 25th meeting

[42] The employer submitted that the grievor could not make allegations and then refuse to testify. This is contradicted by the Department of Justice Canada, which indicated to her that her attendance was voluntary and that if she chose not to attend, the investigation would proceed without reference to her allegations. Ms. Kapitany's letter of April 26, 2001 (Exhibit E-9), indicated that the grievor had a choice whether or not to meet with KPMG investigators before May 31, 2001.

[43] On September 4, 2001, management requested that the grievor explain why she refused to participate in the investigation. The reason put forward by the grievor was that her participation was voluntary, but that did not satisfy management.

[44] Ms. Kapitany's September 18, 2001, letter (Exhibit E-13) was confusing. First, the grievor learned that the KPMG investigation was ongoing, notwithstanding the May 31, 2001, deadline specified earlier. Furthermore, Ms. Kapitany stated that the grievor's failure to cooperate during the investigation could lead to disciplinary action, which contradicted the Department of Justice's statement that her attendance was

"voluntary", as well as Ms. Kapitany's previous letter to the same effect dated April 26, 2001 (Exhibit E-9).

[45] On September 21, 2001, Ms. Kapitany talked to the grievor, who explained her understanding that the meeting had been postponed based on representations made by Mr. McCarthy to Ms. Suarez. Ms. Kapitany did not order the grievor to stop working and come to the meeting.

[46] Management submitted that the disciplinary action was justified by the employer as a result of the grievor's refusal to participate in the administrative investigation. Management stated that the consequences of the grievor's actions were harsh for the employer, who had to assume high fees for the KPMG investigation, and that the investigation needlessly disturbed the operations in the workplace.

[47] The first reason given by the employer goes against the principle of "voluntary participation" of an employee in an administrative investigation. Secondly, it was the employer's choice to give a mandate to KPMG to proceed with an investigation based on allegations made by the grievor and other employees. The fees related to that decision cannot be imputable to the grievor. No evidence was submitted to support the employer's allegation that operations were disturbed by their investigation.

[48] In the present case, the grievor refused to participate in the administrative investigation, mainly because management never ordered her to do so at any stage during the investigation. In *Re GDX Automotive and United Steelworkers of America, Local 455* (2003), 116 L.A.C. (4th) 265, the adjudicator concluded that it was not appropriate to discipline an employee who exercised his right to remain silent. The same conclusion should be reached in this case.

Reasons for Decision

[49] The disciplinary sanction imposed on the grievor on October 2, 2001, is related to her refusal to substantiate the allegations she made against "A.B.". Mr. Fucile brought those allegations to Ms. Blais' attention at the beginning of October 2000. Ms. Blais requested that Mr. Welsh and Ms. Suarez meet with the grievor to receive her declaration.

[50] On October 25, 2000, the grievor gave a copy of her written statement (Exhibit E-2) to Mr. Welsh and to Ms. Suarez and explained that "A.B." had borrowed money from her and increased her overtime claim form for the month of July 1999, in order to reimburse her. At that meeting, the grievor specified to management the date on which the number of overtime hours were increased and showed her withdrawal receipt for the money she lent to "A.B." Ms. Suarez got a copy of the grievor's July overtime form from the office. Following a verbal report from Mr. Welsh and Ms. Suarez, Ms. Blais got the Department of Justice involved in the file because the allegations were very serious and involved allegations of fraud. An administrative investigation was conducted by KPMG Investigation & Security Inc.

[51] On October 30, 2000, Ms. Blais notified "A.B." of the allegations made against him by the grievor and of the fact that an administrative investigation would be conducted (Exhibit G-2). In December 2000, the staff members of the Communications and Executive Services Branch were informed by Ms. Blais that KPMG would be conducting an investigation and she requested their cooperation (Exhibit G-3).

[52] Mr. Saunders was informed on March 21, 2001 (Exhibit E-6), that KPMG would not be able to meet with the grievor until she received advice from her union. Mr. Saunders then offered the grievor an opportunity to meet with a KPMG investigator on April 25, 2001, and advised her that it was voluntary on her part to do so and that she did not need to attend the meeting if she did not wish to (Exhibit E-7). Mr. Palamar, a lawyer acting on behalf of the grievor, advised Mr. Saunders that the grievor would not be attending the meeting (Exhibit E-8).

[53] The grievor was informed by Ms. Kapitany that KPMG was instructed to complete its investigation by May 31, 2001, (Exhibit E-9) and she requested that the grievor advise her or Ms. Suarez if she decided she wanted to meet with KPMG. The grievor maintained her decision not to participate in the administrative investigation and the report submitted by KPMG on July 5, 2001, specified that the investigator had been unable to speak to the grievor and to support her allegations by documentation or her statement (Exhibit E-12).

[54] Ms. Kapitany then requested that the grievor attend a fact-finding meeting on September 7, 2001, to gather details relating to her refusal to comply with an official investigation (Exhibit E-10). The grievor was notified that if the reasons she provided did not satisfy Ms. Kapitany, disciplinary action might be forthcoming. The grievor

submitted to management that her cooperation in the investigation was voluntary, based on information that she had received previously from Ms. Blais, Mr. Saunders and from Ms. Kapitany herself. The grievor and her union representative submitted that the Management Policy of the Human Resources Manual (Exhibit G-4) confirmed this. An employee's attendance is voluntary during an investigation, unless the employee is directed to attend by a supervisor. The grievor specified to management that, once the harassment complaint she had filed against "A.B." was considered unfounded, there was no point in pursuing her allegations further during the KPMG investigation.

[55] Those explanations did not satisfy Ms. Kapitany, who offered the grievor one last opportunity to come forward with respect to the allegations she made against "A.B." at a meeting to be held on September 21, 2001 (Exhibit E-13). The grievor was advised that her failure to cooperate could lead to disciplinary action.

[56] The grievor and her union representative submitted to Ms. Kapitany, on September 7, 2001, that the issue of "A.B."s wrongdoing relating to allegations put forward would be discussed at the third-level grievance hearing to be held on September 26, 2001. They requested that Mr. McCarthy call the Department to postpone the September 21, 2001, meeting, until after the third-level representations.

[57] When Ms. Kapitany asked the grievor why she did not attend the meeting on September 21, 2001, she was informed by the grievor that she understood that the meeting had been postponed, based on Mr. McCarthy's submissions to Ms. Suarez. On this point, the evidence submitted by Ms. Spruse and Ms. Suarez is contradictory. There is, however, no contradiction in the evidence regarding the issue of whether or not the grievor was ordered to attend the meeting when Ms. Kapitany called her at work. All agree that she was not so ordered.

[58] Management decided to impose a 10-day suspension without pay on the grievor and Ms. Kapitany gave her the reasons for doing so in a letter dated October 2, 2001 (Exhibit E-15). Ms. Kapitany supported her decision on three grounds: (1) the grievor failed to attend the September 21, 2001, meeting; (2) the grievor indicated that she was not prepared to answer any questions with respect to the allegations; and (3) the grievor's refusal to cooperate draws the conclusion that the complaint was of a frivolous and vexatious nature.

[59] In a grievance challenging a disciplinary sanction, the adjudicator has the duty to determine, first, whether the grounds for disciplinary action have been proven and, second, whether the sanction is fair and justified. I will proceed to do so on each of the grounds for discipline stated above.

(I) The grievor failed to attend the September 21, 2001, meeting

[60] The evidence shows confusion with respect to the request to postpone the September 21, 2001, meeting. The grievor testified that she requested that her union representatives make representations to the employer to postpone the meeting after she received the notice on September 18, 2001. The grievor and Ms. Spruse testified that they both understood that the representations made by Mr. McCarthy to postpone the meeting were agreed to by Ms. Suarez, but this was denied by Ms. Suarez in her testimony.

[61] The grievor remained convinced of the postponement when she received the telephone call from Ms. Kapitany on September 21, 2001. After that conversation, the grievor requested that Ms. Spruse clarify the situation with management. The evidence submitted by the grievor in relation to the issue of the postponement of the meeting is corroborated by Ms. Spruse's testimony. The fact that the grievor requested that Ms. Spruse clarify the situation with the employer after the September 21, 2001, telephone conversation confirms to me that her conviction was sincere. The employer did not convince me that it was not so as it lead no evidence to support the argument that Ms. Taylor was playing a game on this issue. The fact that Ms. Kapitany did not order the grievor to stop what she was doing and to attend the meeting reinforces the confusion on this issue.

[62] In these circumstances, the grievor's failure to attend the September 21, 2001, meeting was the result of a legitimate and compelling personal excuse to do so based on her conviction that the meeting was postponed. This belief was sincere and came from her union representative's statements to her. Taking into consideration that the grievor communicated to Ms. Kapitany those circumstances in the telephone conversation of September 21, 2001, I conclude that the grievor cannot be held responsible for that misunderstanding. I consider that the grievor did not deserve to be disciplined because she did not attend that meeting. Furthermore, management did not suffer damages from that misunderstanding and another meeting could have been set to take place after the September 26, 2001, third-level hearing.

(II) The grievor indicated that she was not prepared to answer any questions with respect to the allegations

[63] The above statement has to be considered in the circumstances of the misunderstanding regarding the postponement of the September 21, 2001, meeting. The grievor was not prepared to attend the meeting and to answer questions with respect to the allegations because she was convinced, at the time of the telephone conversation with Ms. Kapitany on September 21, 2001, that the meeting had been postponed by agreement with her union representative. Furthermore, in the notes taken by Ms. Suarez at the September 7, 2001, meeting, Ms. Taylor stated that she would have taken part in a meeting with management if it took place after September 26, 2001 (noted as September 27 in the notes) (Exhibit E-11). Management presented no evidence regarding why the meeting could not take place after this date.

[64] Up until the September 18, 2001, letter, the grievor's understanding was that her attendance in the administrative investigation was voluntary. She was confused by the letter that reversed the position held before, in writing, by the Department of Justice and by the Department. She could not understand on what basis her attendance at the September 21, 2001, administrative investigation became mandatory, nor why she was now obliged to come forward with respect to the allegations she had made against "A.B.", and to be fully prepared to discuss the facts.

[65] The employer had been aware, since the October 25, 1999, meeting, that the allegations made against "A.B." by the grievor were of a serious nature. The employer had known since that meeting that the grievor's declarations instigated the KPMG investigation. The employer should have told the grievor, at that point, that the onus was on her to cooperate in full and to substantiate her allegations and that failure to act accordingly might lead to the conclusion that the allegations were of a frivolous and/or vexatious nature.

[66] In other words, in its September 18, 2001, letter, management changed the manner in which it characterized the non-attendance of the grievor at the administrative investigation. The employer cannot punish the grievor, who followed the advice given to her by both management and her union, regarding the voluntary nature of her attendance at an administrative investigation. Furthermore, because the grievor was not ordered to attend the meeting during the September 21, 2001,

telephone conversation, management cannot hold against her that she was not prepared to answer questions.

(III) The frivolous and vexatious nature of the complaint

[67] The employer concluded, from the grievor's refusal to cooperate in the administrative investigation, that her complaints were of a frivolous and vexatious nature. The same reasoning applied previously with respect to the voluntary aspect of the attendance of an employee at an administrative investigation can be applied to this ground of discipline. From the outset, the employer understood the seriousness of the allegations made against "A.B." by the grievor to Mr. Welsh and Ms. Suarez on October 25, 1999. The employer told the grievor, at that time, that her refusal to attend the administrative investigation would have the effect that her allegations would be considered as withdrawn and the investigation would proceed only on allegations put forward by other employees. The employer did not advise the grievor, at that time, that her failure to participate would have as a consequence that her allegations would be considered frivolous and vexatious and could lead to disciplinary action. Instead, it changed its mind on this on September 18, 2001, without giving the grievor an opportunity to make representations on the issue.

[68] The employer, who bears the burden of proof, has not shown that the grievor's allegations are frivolous and vexatious. The mere fact that she now is unwilling to discuss the matter does not prove this. Indeed, the only evidence placed before me on this issue tends to support the grievor's allegations. The employer has led no evidence to cast any doubt at all on her allegations, let alone her intentions.

[69] The fairness of the disciplinary decision is questionable in these circumstances.

[70] For all these reasons, I conclude that disciplinary action cannot be based on the grievor's refusal to come forward during the investigation performed internally by the Department to support the allegations she made against "A.B.".

[71] I, therefore, conclude that the employer did not fulfil its burden of proof with respect to the grounds for imposing disciplinary action on the grievor on October 2, 2001. The evidence clearly shows that the sanction is unfair and unjustified.

[72] Consequently, the grievance is allowed. I order that the employer reimburse the grievor her pay and any benefits she was deprived of during her 10-day suspension, from October 3 to 16, 2001. I further order the employer to withdraw from the grievor's personnel file all notes and letters related to the disciplinary sanction imposed on her by the letter of October 2, 2001.

**Léo-Paul Guindon,
Board Member**

OTTAWA, November 10, 2004.