

Date: 20041019

Files: 166-2-32671 and 32672

Citation: 2004 PSSRB 151



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

JEANIE HILLIS

Grievor

and

TREASURY BOARD
(Department of Human Resources Development)

Employer



Before: Sylvie Matteau, Deputy Chairperson

For the Grievor: Debra Seaboyer, Public Service Alliance of Canada

For the Employer: Rosalie A. Armstrong, Counsel

Heard at Vancouver, B.C.,
July 27 to 29, 2004.

DECISION

[1] These proceedings concern two grievances regarding Jeanie Hillis, the grievor, a former employee of what was then Human Resources Development Canada (HRDC). The first concerns her suspension, from May 17 to 30, 2002, as a disciplinary action for having communicated confidential information to an unauthorized individual, whom I will refer to as Mr. GB, at the request of the parties. The second addresses her termination as a result of the loss of her reliability status on November 15, 2002, following a further investigation.

[2] The two grievances above were heard together. The employer presented two witnesses and stated that the two field investigators involved in the case would not be available. A continuance on the part of the employer's representative prompted by the unavailability of these two witnesses had been requested prior to this hearing. The grievor had opposed the request, considering the nature of the case and the time elapsed since the termination of her employment; the postponement was denied. Another complicating circumstance is the absence of the third party, Mr. GB, now deceased. Consequently, the parties had to allow for a degree of hearsay, as well as documentation originating from third parties. Under the circumstances, I have taken great care to give that evidence the appropriate weight, seeking to acquire a sense of the events as a whole. An exclusion of witnesses was requested and granted. The grievor testified alone on her behalf.

[3] All documents were presented with both parties' consent, some in an edited version to ensure confidentiality of the information about private citizens. I have, however, carefully examined the unedited version of the document allegedly communicated to Mr. GB. In total, the employer filed 30 exhibits and the grievor 14. Some of these documents are typed notes from Jo Ann Hall, the manager who proceeded with the original disciplinary investigation. She testified that she took handwritten notes during the meetings or telephone conversations and that she typed these notes on or about the same day. She referred to them when she testified.

[4] The employer maintained that on the basis of the information gathered, the manager had valid reasons to issue the disciplinary measures and had reasonable cause to remove the grievor's reliability status and terminate her employment. Conversely, the grievor argued first that the disciplinary measures were excessive and second that there was no cause for dismissal. In this regard, she argued both disguised disciplinary sanction and double jeopardy.

The Evidence

[5] Ms. Hillis joined the public service of Canada on August 19, 1999. Her past experiences include work for the Canada Customs and Revenue Agency and Statistics Canada, as well as British Columbia's civil service, in various capacities. She also worked in the private sector, notably with TD Trust as a Tax Associate. She started working with HRDC, in a permanent position, in September 2000. At the time of the termination of her employment, she was an Investigation Clerk, a CR-04 position.

[6] Her work entailed the verification of earnings for persons receiving Employment Insurance (EI). She was called upon to research and contact employers using the Department's database, in order to verify and compare information provided by claimants. She explained that if the information were a match, then she would move on to the next. If not, there would be a follow-up call with the claimant to verify the information or to ask for an explanation. Again, if there was no problem, the case would be closed; if not, she would send it to the next step, adjudication, involving the Investigation and Control Officer.

[7] She also described her other duties as a Service Delivery Representative, in the Call Centre, over a period of approximately eight months. In that capacity, the grievor answered telephone inquiries from claimants regarding jobs and training. She would also receive calls from people reporting possible EI fraud. These were called "Third Party Reports" and the appropriate procedure would be explained to the caller; a form had to be filled out and the matter would then be referred to the Investigation and Control Officer.

[8] Jo Ann Hall, Director of Programs and Services (HRDC) for the region of British Columbia and the Yukon, further explained the grievor's responsibilities and duties. At the time of the events, Ms. Hall was Regional Manager (PM-06) of Shared Services for British Columbia and the Yukon, overseeing the Employment Insurance Payment Section, including the Investigation and Control Central Service Unit where Ms. Hillis worked, as well as the Call Centre. Ms. Hall has been with the Federal public service for 33 years and a manager since 1986.

[9] Referring to the job description for an Investigation Clerk at the CR-04 level (Exhibit E-2), Ms. Hall explained that the grievor's key activities were as follows:

1. *Reviewing and analysing observations generated by various automated detection programs and determining if an investigation should proceed or not.*
2. *Initiating fact-finding and reviewing information received from employers and claimants, determining allocation of earnings and resolving disputed earnings situations.*
3. *Determining whether or not an infraction of the UI Act has occurred and making recommendations to higher level for further investigation, allocation of earnings and/or imposition of administrative penalty.*
4. *Providing of Support Services to CES's in the delivery of Investigation & Control Programs.*
5. *Finalizing investigations by putting cases in order and adjudicating claims by allocating earnings and/or issuing warning letters or imposing administrative penalties in non-contentious cases that meet National Guidelines.*

[10] Ms. Hall also pointed out the fact that this mandate required knowledge of the *Employment Insurance Act* and its regulations, as well as an awareness of the *Privacy Act*, *Access to Information Act* and the *Canadian Human Rights Act* in order to ensure compliance when handling confidential information. It also required the application of office practices and procedures, as described on page 5 of the same document (Exhibit E-2).

The Disciplinary Investigation

[11] Sometime after March 23, 2002, Ms. Hall was forwarded a letter from a private citizen (Exhibit E-3), indicating that the grievor spent time at work on personal business. Furthermore, this letter indicated that the author, Mr. GB, had paid Ms. Hillis for information she provided to him from a government database. According to Ms. Hall, these were two very serious allegations. In her opinion, these allegations needed to be investigated immediately and discreetly, considering the possible nature of the information disclosed. This evaluation was further supported by the possible involvement of a Member of Parliament, whose name Mr. GB referred to in the last paragraph of his letter.

[12] Ms. Hall first contacted Mr. GB on April 5, 2002. At that time, he told her that his letter was misleading and that he never paid for the information. However, he alleged that the grievor had asked for payment. According to Ms. Hall, he explained that he lived in the same building as Ms. Hillis and that he had had discussions with her concerning his attempt to track down individuals who owed him money under Court Orders. The grievor allegedly agreed to help him find addresses for these people. He stated that Ms. Hillis asked him for the names and then provided a list of these names with different addresses for each of the three names he had requested. These latter names will be referred to as Mr. R, Mr. B and a couple by the name of H. This list was of no use to Mr. GB, as there were too many identical names with a different address. When he told the grievor, she answered that she could provide more specific information but that he would have to pay for it.

[13] During that first conversation, Mr. GB confirmed to Ms. Hall that he had printouts with the list of names, including the logo of the government, in his apartment. He agreed to let her see it, either at his house or at the office of his Member of Parliament.

[14] In the same conversation, Mr. GB also alleged that the grievor was using time at work to take care of Strata Council business for the management of their building. She would ask people from the Council to call her at work, would prepare the agenda of meetings and would send the agenda or other documents, using the office fax.

[15] On April 11, 2002, Ms. Hall called Mr. GB back to arrange a meeting to see the documents. He agreed to meet with her on April 16, 2002, and in the meantime, he agreed to fax her the printouts referred to earlier that same day. It was clear to Ms. Hall, upon receiving the faxed documents that they originated from HRDC. Verification through Grant Eastmead, the Service Delivery Manager, Insurance Payment Operations Centre, confirmed that the faxed documents were a printout from a database called "Easy Access" to which Investigation Clerks such as Ms. Hillis have regular access in the course of their duties.

[16] The faxed documents (Exhibit E-6) can be described as a list of names with tables containing 11 columns each. The information contained in the documents referred to two of the three names on Mr. GB's list, namely Mr. R and Ms. H. The information reads as follows: name of the individual, Mr. R, with different addresses in the regions (10 names per page, 6 pages), as well as social insurance numbers, date

of birth and other information collected by HRDC, such as the business registration number of the employer, the record of employment, and the number of weeks the individual might have been a beneficiary of EI. In total, the faxed copy shows the name Mr. R 60 times, with or without different addresses. Also appearing on the faxed document is the designation "Client Summary", as well as the designation "Protected B". In the case regarding Ms. H, her business registration number and business information appear, as well as the designation "Protected A". On another page, containing personal information on Ms. H, the designation "Protected B" also appears.

[17] Ms. Hall met with Mr. GB on April 16, 2002. She stated that her purpose in conducting that meeting was to collect more facts regarding both evidence of Ms. Hillis' request for financial compensation and details about the allegations that Ms. Hillis did personal business at work. At the meeting, Ms. Hall mentioned the fact that the document she received contained information regarding only two of the individuals Mr. GB was looking for. He indicated that he had misplaced the printouts about Mr. B and Mr. H.

[18] Ms. Hall pointed out to Mr. GB that the bottom of the page of the printout document he was showing her had been cut off. According to Ms. Hall, he answered that he had received it like that. It seemed to Ms. Hall that it had been done intentionally to avoid showing the date of the printout and its origin. Mr. GB then confirmed that he had received these printouts the previous June or July 2001.

[19] In her testimony, Ms. Hall then referred to Exhibit E-7, which is a sample of a printout from the Easy Access Database, showing, at the top right corner the origin or the Intranet site at HRDC, as well as the date and time of the printout, which appear at the bottom right corner of the page. Returning to Exhibit E-6, which is a copy of the document in Mr. GB's possession, she noted that it is not possible to identify the access point for the document on the database, the originating database or the date and time at which it was accessed. The two documents were, however, identical in every other way.

[20] According to Ms. Hall, Mr. GB's issue with the grievor was that Ms. Hillis had provided him with a list of names that was useless to him. In response to this, the grievor had suggested that he could make phone calls to trace the persons he was looking for. Mr. GB allegedly responded that he was on limited income and that he could not afford to make these long-distance calls. He alleged that the grievor then

suggested that he pay for her further services to narrow down the list. According to him, no amount was specified during the course of that conversation. The grievor allegedly said to him: "It will cost you and I expect the money in cash." He refused to do it, as it was not right. At that point, Ms. Hall related that he tried to qualify the relationship between the grievor and him, saying first that they were friends and then only acquaintances and also referring to them as "nostalgic neighbours".

[21] Later in the meeting, Mr. GB showed Ms. Hall a copy of the Court Orders mentioned earlier. She was able to scrutinize these documents long enough to verify the correct spelling of the names of the individuals who owed him money. He did not want to give her a copy.

[22] Their continued conversation focused upon Strata Council business and Ms. Hillis' involvement in it. He had faxes in his possession from the grievor, originating from her office and clearly showing that she used government fax equipment. According to Ms. Hall, Mr. GB appeared to have been very concerned that the grievor was not working for the government during working hours, as she should have.

[23] Once she felt she had enough information to convene a meeting with the grievor, Ms. Hall notified Ms. Hillis that a disciplinary meeting would be held on April 29, 2002, and reminded her that she could bring a union representative at that time. During that meeting, Ms. Hall also took notes, which she reproduced later and were tabled as Exhibit E-10. Ms. Hall confirmed that she was present at the meeting, with Jack Swaine, Ms. Hillis's union representative, as well as Mr. Eastmead.

[24] When the grievor was told of the complaint received from a member of the public, her reaction, according to Ms. Hall, was not one of surprise. She is quoted as saying, almost right away: "It is Mr. GB. I should have known." Ms. Hillis then mentioned having had many problems with Mr. GB, such as incidents relating to insurance claims and exchanges of letters between them, adding that other people on the Strata Council or in the building were no longer talking to him.

[25] When showed the printouts, Ms. Hillis first denied that she had printed these documents and allegedly said that she had no reason to do so because she did not know these people. Ms. Hall explained who these people were, that these names came from Court Orders in favour of Mr. GB. Ms. Hillis responded that she was not aware of

such Court Orders, that Mr. GB had reported these people for committing EI fraud and that she was attempting to identify these people in order to send the files to the appropriate investigation officer.

[26] During the conversation, Ms. Hillis also admitted having done her own investigation of someone else from her building, a Mr. X, whose personal information she accessed from work.

[27] Ms. Hall related that when asked how Mr. GB would happen to have been in possession of government printouts, the grievor responded first that she did not know. Ms. Hillis then tried to explain this occurrence, saying she did print them out and took them home. Mr. GB must have subsequently stolen them. This prompted a question from Ms. Hall as to how this information would have been in her home. The grievor responded that she took work home all the time. When asked about the request for compensation for the information provided to Mr. GB, the grievor denied having made any such request for money. As for her comprehension of the confidentiality requirements of her mandate, the grievor mentioned that her understanding was that confidentiality guidelines pertain to cases of famous, known or public persons as claimants. That meant that she should not disclose such facts. Generally speaking, she should not talk about work outside the office.

[28] The April 29, 2002, meeting was adjourned at the suggestion of the grievor's union representative and reconvened the next day. The grievor started that meeting by making a statement. According to Ms. Hall's notes, the grievor indicated that she was sorry that she had become so emotional during the previous meeting, that she had not known what to expect and was surprised by the formality of the process. Ms. Hall also referred to quotes she took down from Ms. Hillis' remarks: "I take pride in my work. This is scary. It's very formal. I'm concerned; it affects my thinking." (The notes relating to this meeting taken by Ms. Hall are found in Exhibit E-20.)

[29] Ms. Hall related that Ms. Hillis also mentioned that she had tried to gather her thoughts the night before but could not remember very much more than what she had said the previous day. The grievor provided the managers with letters written by Mr. GB, in which he tells her that he will report her to her supervisor for the Strata Council work she did from the office. In the grievor's estimation, this was proof that he was intent on making trouble for her.

[30] During this second meeting, the grievor, according to Ms. Hall, admitted that she had made those printouts. Ms. Hillis said she was sorry but that Mr. GB took these documents from her and that it was not her fault. It must have happened at a Strata Council meeting. Mr. GB was aware that she had these documents in her possession, following a conversation they had in the hallway regarding the printouts prior to the Strata Council meeting. At that point, the grievor discussed the information from the documents with Mr. GB in order to identify or find the means to identify which of the individuals in the list of some 50 names were the ones he was actually looking for. She went on to explain that she had lots of material with her and that the group went to visit the building. She must have left the documents behind in the meeting room. Mr. GB stayed behind because of a disability and his inability to move around the building as easily as the others. She speculated that it was on that occasion that he likely took the documents from her.

[31] Ms. Hall further asked if Ms. Hillis could tell her what the designation "Protected B" appearing on the printout meant. Her response was that it meant that the information was protected. As an example, an envelope with the "Protected B" designation on it meant to her that it was to be opened only by the person it was destined to and not by the mailroom staff. She added that she received a plastic or laminated sheet that explained this but she had never looked at it before.

[32] Ms. Hall's comments regarding these meetings were to the effect that the grievor did not understand the requirements for confidentiality. Moreover, she did not understand the risk to the individuals that disclosure of such personal information would entail. In her opinion, the grievor was negligent in her responsibility to the individuals by virtue of having this information with her outside the office.

[33] Furthermore, in Ms. Hall's estimation, this was an incorrect understanding of the grievor's role and responsibilities as an Investigation Clerk. In her view, the grievor maintained all along that she did nothing wrong and that her job was to investigate EI fraud brought to her attention as if she were an Investigating Officer. Ms. Hillis maintained that she was doing her job differently from her co-workers and that she liked to provide as much information or as precise information as possible to the Investigative Officers to whom she referred fraud cases; according to Ms. Hall, this was not the grievor's responsibility.

[34] The disciplinary investigation also gathered information concerning the grievor's response to allegations of her use of employer equipment and time for Strata Council business. Ms. Hall testified that the grievor's response was that she might have used the fax. According to Ms. Hillis, this was common practice amongst office employees. She considered it to be like using the phone. She only worked on the Strata Council agenda, while in the office, on her own time.

[35] After having met with the grievor on April 29 and 30, 2002, Ms. Hall again contacted Mr. GB on May 1, 2002, to verify certain details arising from those meetings. At that point, having noted the unique spelling of the names, she tried to garner information regarding the manner in which the grievor would have come into possession of the list of names that she was to research. Mr. GB did not quite recall the means of transmission of that information. He surmised that the list of names would have been slipped under her door, as was common practice between him and Ms. Hillis.

[36] Another purpose of the May 1, 2002, telephone conversation was to try to elicit some information as to Mr. GB's prior understanding of the grievor's position and responsibilities with the Department, following up on Ms. Hillis' version of the fact that he was informing her of possible EI fraud. When asked, Mr. GB seems to have responded "not exactly" and yet answered that he must deduce from Ms. Hall's questions that Ms. Hillis's job had to do with the investigation of EI fraud. Mr. GB was very vague about his knowledge of what exactly the grievor's responsibilities involved. This concluded Ms. Hall's disciplinary investigation.

[37] During her testimony, Ms. Hall explained that the Department has developed procedures and policies regarding Third-Party Reporting (Exhibit E-11) of possible fraud, which can all be found on the Intranet website of the Department. It was pointed out that the grievor must have been very familiar with this procedure of Third-Party Reporting in her role as a Service Delivery Representative for six to seven months. Also filed as evidence is a printout from the Intranet site describing the procedure dealing with enquiries from families and friends (Exhibit E-12). According to this policy, employees should not deal with a case when the caller is a family member or a friend. As a result, Ms. Hall maintained that the grievor should have referred Mr. GB's allegations of fraud on the part of these individuals to the Call Centre for a Third-Party Report procedure. In other words, she should have asked him to

contact the Call Centre directly. Alternatively, she could have completed the required form (Form 3073) or she could have contacted an Investigation and Control Officer immediately, although the latter would not have been the best route.

[38] In conclusion, regardless of her motivation, Ms. Hall stated that Ms. Hillis should not have consulted these individuals' files herself. If it was a case of reported fraud, it was not her responsibility to look for further information regarding these individuals and it was not her decision to determine what would be wasted time on the part of the Investigation and Control Officer, as Ms. Hillis had argued in her defence.

[39] To complement these procedures and policies specific to EI processes, the employer tabled, through Ms. Hall, the *Conflict of Interest and Post Employment Code for the Public Service* (Exhibit E-14) and the handbook on *Values and Ethics in HRDC* (Exhibit E-17). Ms. Hall was asked to comment on some of the sections relating to the present case. She was also asked to comment on the employee certification document, signed on July 19, 1999, by Ms. Hillis (Exhibit E-15), as well as her affirmation as a public servant upon beginning employment on the same date (Exhibit E-16).

[40] Ms. Hall also testified that there had been training on values and ethics at HRDC. The grievor attended two different sessions; the first one was in January 2001, where the participants looked at different case studies. One of them, Ms. Hall pointed out, was very similar to the situation that the grievor encountered a few months later (Exhibit E-28). Ms. Hall explained that such case studies were submitted to the participants who worked in small groups trying to find a solution or comment on the issues arising. The participants would thereafter regroup with the facilitator who would, at that point, elicit further discussion from the group as a whole. The grievor attended a subsequent training in January 2002, as evidenced by the extra duty and shift work authorization form (Exhibit E-19).

The Report on the Findings of the Disciplinary Investigation and Subsequent Events

[41] The summary of findings (Exhibit E-22) following the disciplinary investigation by Ms. Hall and Mr. Eastmead highlights the three allegations against the grievor and the conclusions of the investigation. These three allegations are as follows:

- (i) inappropriate use of HRDC premises, equipment and system etc. for non-HRDC business;

- (ii) release of confidential client information to unauthorized individuals;
and
- (iii) requesting financial compensation for further accessing and distribution of confidential client information.

[42] With regard to the first and third allegations, it was determined that not enough evidence existed to indicate that they should be considered any further. In the case of the allegation of the inappropriate use of HRDC premises, management could not determine any extensive use of said resources, including time. During her testimony, and as appears from this summary of findings, management had advised the grievor of what would be an inappropriate use of resources and had also sent a reminder to all staff. With regard to the third allegation and its lack of concrete evidence, it was expressly noted that there had also been conflicting statements given between the grievor and Mr. GB, which further confused this issue.

[43] This leaves the second allegation, the release of confidential client information to unauthorized individuals. In this regard, the summary of findings (Exhibit E-22) concludes the following:

Management feels Ms. Hillis is guilty of this, based on the findings of the investigation. Indeed, she admits to accessing confidential, client information and revealing it to a member of the public (Mr. GB). She disputes having handed the information over in paper form to the member of the public, but she does confirm that she verbally went over the information with him. Regardless of the method of communication, it still constitutes in management's opinion, a breach of confidentiality.

[44] The issue of the motivation behind the grievor's action is also addressed in this report:

Management feels the only mitigating circumstances which could exist, would be if Ms. Hillis' motives were with [sic] view to thwarting EI fraud. However, even with that motivation, her actions would still have been wrong. Nevertheless, conflicting statements and credibility come into play and management could not determine Ms. Hillis' exact motives.

[45] The report then goes on to identify several aggravating circumstances that came to light during the investigation. The first one refers to the fact that information on the printout that could have helped identify the source and time of the actual printing

of the document was removed. In management's opinion, the latter demonstrates that whoever produced the printouts also attempted to disguise their source. In this regard, the report chose to give credibility to Mr. GB's version, namely his denial of having altered the document. Management could not find any motive for Mr. GB's action to the contrary.

[46] Secondly, management also chose to believe Mr. GB's version of his motivation to access the information in order to locate his debtors. In support of this conclusion, management pointed out that the conversations with Mr. GB revealed that he was not aware of Ms. Hillis' specific responsibilities regarding EI fraud, as well as the fact that he had been very forthcoming with evidence, including Court Orders, believing that he was entitled to this information.

[47] Thirdly, management was very concerned about the grievor's understanding of policies regarding disclosure and non-disclosure of confidential information. It noted that she was aware of the meaning of the "Protected" provisions on correspondence, yet chose to disclose to a member of the public information contained on a document with such a designation. In management's opinion, its conversation with the grievor revealed that she was not taking seriously either her oath as a public servant not to disclose or make known any matter that might come to her knowledge by reason of her employment, or the need for compliance with the terms and requirements of the *Code of Conduct of the Public Service of Canada*, as well as the *Values and Ethics Policy*. Also taken into consideration was the fact that she had been trained in and had worked with the procedures of Third-Party Reporting in her former role as a Service Delivery Representative. Moreover, in her current assignment in the Investigation and Control Unit, she should have been aware of confidential information policies and procedures.

[48] Fourthly, and finally, management noted the fact that during its meetings with the grievor, she showed no remorse for her actions, and she was found to be non-repentant, except by letter subsequently submitted on May 1, 2002, mentioning her embarrassment regarding all that this situation had created for the Department.

[49] Ms. Hall testified that management was then considering termination as disciplinary action and conclusion to this investigation. In her opinion, the bond of trust between the employer and the employee had been broken. There was no

confidence that something of this nature would not happen again and no assurance that the grievor understood the seriousness of her actions.

[50] Ms. Hall then consulted and reported having had many discussions in order to determine the reasonable disciplinary measures that should be imposed on the grievor. A 10-day suspension was the decision she reached along with her resources at Treasury Board. Being within Mr. Eastmead's authority, he prepared and signed the letter of May 16, 2002, to the grievor. It notified her of the 10-day suspension from May 17 to 30, 2002, inclusively (Exhibit E-23).

[51] Ms. Hillis returned to work on Tuesday, June 4, 2002, where she found that her duties had in fact been restricted to avoid having her access the database during an investigation by the Departmental Security Officer (DSO). The following week, the grievor was notified by Mr. Eastmead that she was required to meet with investigators from National Headquarters Security, on June 13, 2002 (Exhibit E-25). Ms. Hall and Mr. Eastmead also met with these investigators.

[52] Under cross-examination, Ms. Hall recognized the fact that Treasury Board did not agree with her decision for termination but that it would support a 10-day suspension.

[53] She also recognized the fact that Mr. GB's story was not without contradictions. She agreed that there were many discrepancies in his story, including affirmation that he could provide evidence that he had paid the grievor and a subsequent admission that he never paid any money to her, as well as the fact that he first mentioned that the documents he had in his possession had headers or logos identifying the government or the department, and subsequently had to demonstrate that they did not. Ms. Hall maintained that the evidence that gave credence to Mr. GB's version of the events was mostly based on the fact that he did have printouts which obviously came from the Easy Access Database at HRDC in his possession, and that he did have in his possession, and showed to her, the Court Orders with the names of individuals who allegedly owed him money, identical to the ones appearing on the printouts.

[54] Ms. Hall was also asked if the Department had any concerns about Mr. GB's threat to advise a Member of Parliament about these events. Her response was that her goal was to limit the exposure of the individuals involved, as well as the reputation of the Department. She was then asked to comment on her notes of conversations that

she had with Mr. GB by telephone on May 22, 24 and 30, 2002 (Exhibits G-1, G-2 and G-3). She explained that on these three occasions, she contacted Mr. GB by phone, to request that he return to her all copies of the printouts he had in his possession. Mr. GB advised her of recent events between his neighbour, the grievor, and him. He referred to various Court actions that he had against Ms. Hillis and the Strata Council, as well as police investigations. He then went on to explain that he still had all the information in his possession and that he had no intention of giving it to anyone. He would use it only if Ms. Hillis took action against him. He assured Ms. Hillis that he would not send it to the newspapers, but that he might send it to his Member of Parliament. In that event, he would let her know in advance. Of note, the call of May 24, 2004, was initiated by Mr. GB, who had left a message wanting to inform her of recent events at the building involving Ms. Hillis.

The Security Investigation

[55] André Lefebvre, Director of Corporate Security, Investigations and Emergency Response, testified regarding the security investigation that followed the disciplinary investigation by Ms. Hillis' managers. Mr. Lefebvre indicated that at the time, the investigation unit was composed of three former police officers: Messrs. Bellemare, Desrosiers and Jacques.

[56] At the time of the events, Mr. Lefebvre was acting supervisor and later became supervisor of these investigators. He confirmed that Messrs. Desrosiers and Bellemare were in charge of this investigation. He declared that he personally had a general knowledge and was familiar with the workings of this case. It is with this view, considering that he had never met personally either with the grievor nor with Mr. GB nor with the managers, that I will weigh his testimony.

[57] Mr. Lefebvre was asked to comment on the *Government Security Policy* that was in effect at the time. It was agreed by all parties that there was no substantial or pertinent difference in the policy in effect prior to February 1, 2002, and thereafter. Using the policy in effect as of February 1, 2002 (Exhibit E-27), he proceeded to distinguish and define the meaning of reliability status and security clearance (page 17, annex B, glossary). Mr. Lefebvre explained that, since the end of 2002, there is now only one category of reliability status. The enhanced reliability status no longer exists. He also explained that departments must ensure that prior to the commencement of duties, individuals who required access to government assets

undergo a reliability check and are granted reliability status. A review of this reliability status may be required when adverse information later surfaces.

[58] Section 5 of the *Personnel Security Standard* (Exhibit E-28) describes the procedure regarding the possibility of revocation of reliability status. It reads as follows:

As a result of an update or a review based on new adverse information concerning an individual, his or her enhanced reliability status or security clearance may be revoked...

[...]

If the individual concerned is an employee, consideration must be given to reassignment or appointment to a less sensitive position at an equivalent level. Should no such position be available, appointment to a position at a lower level must be considered. Termination of employment may be considered only in exceptional circumstances and only when all other options have been exhausted.

[...]

[59] According to Mr. Lefebvre, the security investigators "do not take this lightly". The fact that the grievor's position required reliability status is something that would have been taken into account in his recommendation. He described four elements of the decision-making process as to whether to remove reliability status with the possible consequence of terminating the employment of an employee:

- (i) evaluation of how the new information affects the security clearance;
- (ii) evaluation of how this would affect the work;
- (iii) forwarding of the case to the attention of the Deputy Minister; and
- (iv) consideration of alternative position or status for the employee.

[60] Section 6 of the *Personnel Security Standard* lays out the review and redress procedure. Section 6.2 specifies the employee's right to challenge a negative decision based on the results of a reliability check through the current grievance procedures in accordance with Sections 91 and 92 of the *Public Service Staff Relations Act (PSSRA)*. This grievance must proceed directly to the final level of the grievance procedure.

[61] Appendix B of the same document above provides guidance on the use of information for reliability checks. More specifically, paragraph 3 presents the guiding principle:

In checking reliability, the question to be answered is whether the individual can be relied upon not to abuse the trust that might be accorded. In other words, is there reasonable cause to believe that the individual may steal valuables, exploit assets and information for personal gain, failed to safeguard information and assets entrusted to him or her, or exhibit behaviour that would reflect negatively on their reliability. Such decisions are to involve an assessment of any risks attached to making the appointment or the assignment, and, based on the level of reliability required and the nature of the duties to be performed, a judgment of whether such risks are acceptable or not.

[62] Mr. Lefebvre became aware of the situation in Ms. Hall's department early in June 2002. He recalled the key issue as being the fact that an employee in British Columbia had revealed privileged information to an unauthorized third party. He was informed that the Regional Manager had conducted a disciplinary investigation regarding disclosure of personal information on four individuals, which had resulted in a 10-day suspension of the employee.

[63] The investigators were sent the first week of June 2002. His recollection is that the reason why his unit was informed and asked to assist the Regional Manager was that Mr. GB, the third party, was making threats of going to the media.

[64] As far as Mr. Lefebvre knows from his supervisory position of the two investigators, they met with Mr. GB and received a copy of the printouts, the same that had been faxed to Ms. Hall. They also met with management and the grievor. The investigators concluded that there was evidence that information was divulged regarding not four individuals but 52. Mr. GB allegedly told the investigators that he had requested this information because he was trying to find some individuals who owed him money as a result of Court Orders.

[65] When asked to comment on the possible motive of the grievor, Mr. Lefebvre's response was that that motivation was irrelevant. He explained that when an employee begins work with the Government of Canada and signs the oath of office, the employee is bound by the Government's responsibility to the citizens who entrust it with their personal information. It is the Government's duty to safeguard personal information

from Canadians in order for the Government to fulfil its mandate and for citizens to benefit from it. Moreover, he pointed out that Mr. GB was not entitled to this information for any reason. Ms. Hillis should never have provided him with information or allowed him to have access to such information.

[66] The investigators reported to Mr. Lefebvre that the grievor voluntarily met with them and was accompanied by counsel. She had tabled a statement at the time of the disciplinary investigation and was asked if she wanted to add to this statement.

[67] Mr. Lefebvre also explained that he initially notified the managers that upon her return, Ms. Hillis should be reassigned to functions other than her regular ones. This would ensure that there would be no tampering with or further use of the database or manipulation of the information. During the period when the grievor's status was under review, Mr. Lefebvre said that no additional information was discovered. It was, however, realized that the personal information of not four but a total of 52 individuals had been compromised. That would be Ms. H and 51 different Mr. R, there is no evidence regarding Mr. B and Mr. H.

[68] After discussion with managers and the National Director of Security Investigations and Emergency Response (SIER), a letter was issued on November 15, 2002, by the National Director of SIER to the Assistant Deputy Minister, notifying him that the grievor's enhanced reliability status had been revoked. This was done under his delegated authority and under the *Canadian Government Security Policy*.

[69] Ms. Hillis was notified by the Assistant Deputy Minister, by letter also dated November 15, 2002. The letter stated that:

The investigation has determined, you released privileged information to a third party on individuals that included; personal data, their social insurance number, addresses, postal codes, phone numbers, employer information, periods of employment and Canada Customs and Revenue Agency employer's account numbers. Since the position that you occupy requires that you hold a valid enhanced reliability status, I am, effective November 15, 2002, terminating your employment with our department

[70] Mr. Lefebvre was asked if this was a letter of a disciplinary nature. In his opinion, it was not. The letter was about a breach in trust following events that

affected the grievor's reliability status. The authority of the Departmental Security Officer is limited to either maintaining or revoking an employee's reliability status. If the result is termination of employment because the status is a requirement of the job, the *Personnel Security Standard* provides the employee with the means for review and redress.

[71] During cross-examination, Mr. Lefebvre admitted that as far as he knew, the investigators were unsuccessful in retrieving the original printouts from Mr. GB. When he consulted with legal services, they informed him that there was no basis to retrieve the documents provided to an individual by an employee of the government. However, Mr. Lefebvre recognized that there was no evidence that the grievor willingly gave the printouts to Mr. GB.

[72] He was also asked to comment as to Mr. GB's motives and the conclusion of the investigation regarding the definition of "personal gain" as it applies in the present case. Mr. Lefebvre confirmed that the allegations regarding the request for payment had not been proven. However, he pointed out that the definition could also mean gains other than monetary.

[73] Although the matter was referred to the Royal Canadian Mounted Police (RCMP) for further preliminary investigation, the grievor was informed during these proceedings that the RCMP would not be pursuing its investigation in this regard. Mr. Lefebvre also confirmed that the investigators did not seek any other information outside of what transpired from the disciplinary investigation. In his opinion, this would have been inappropriate and excessive.

[74] In redirect, Mr. Lefebvre was asked to comment on Mr. GB's credibility. In his opinion, Mr. GB's credibility is irrelevant. He explained this by suggesting that even if Mr. GB was lying and had stolen the information from the grievor, the fact that this information was taken outside the office by the grievor was, for Mr. Lefebvre, the determining factor. She should not have had this information with her at home or in a public place, in any case.

The Grievor's Testimony

[75] The grievor testified on her own behalf. Although she pointed out the fact that she was seeing her work description (Exhibit E-2) as Clerk Investigator for the first time at these proceedings, she acknowledged that the key activities contained therein were a good representation of her work and responsibilities. She also confirmed having worked on the help line and being familiar with the Intranet and the information available to the employees through that service. She confirmed having had access to different databases, including the Easy Access Database.

[76] The grievor explained that she came to know Mr. GB as a neighbour in her Strata building complex. They were members of the Strata Council in the first year of its creation in 1995. Ms. Hillis was elected president of the Council a number of times, including the year ending in September 2001.

[77] She also explained that there were a lot of problems over time between the council and Mr. GB regarding different issues. It started in 1997 when Mr. GB was apparently thrown off the Council. In December 2001, Mr. GB delivered two letters under her door, one dated December 6, 2001 (Exhibit G-11), and another dated December 9, 2001 (Exhibit G-12). The grievor brought these two letters to the attention of her supervisor, explaining that she was having problems with this person as a Strata building Council member. Her supervisor's reaction was apparently sympathetic in that she also was the member of a Strata Council and understood the difficulties that might arise around the management of such buildings. According to the grievor, her supervisor was aware that she was doing Strata business during her lunch hour and she was not concerned about it.

[78] In support of these allegations of harassment from Mr. GB, the grievor referred to the letter of December 6, 2001, where he advised her that he was writing a letter to the supervisor of her section, requesting clarification as to what authority she had either to conduct private business or to use government facilities/equipment for her personal or Strata Council business. The letter referred to threats that were allegedly made by the grievor's husband, regarding various occurrences such as turning off the power and a matter of a stolen trailer.

[79] The other letter from Mr. GB, dated December 9, 2001, referred to alleged threats made by the grievor and her husband to Mr. GB's mother. He wrote in the third paragraph:

I will prosecute you to the full extent of the law and if necessary, will hound you to the end of time for hurting/killing my mother.

He was also advising her that he was sending a copy of this letter to a police officer who, I understood from the grievor, was assigned especially to this building in view of the many complaints that had been filed over a short period of time.

[80] The grievor also produced a letter she wrote to Mr. GB, dated March 20, 2002 (Exhibit G-13), concerning the Strata Corporation bylaws and rules regarding dog ownership in the building. The grievor pointed out that in this letter she maintained a businesslike manner.

[81] As far as this matter was concerned, the grievor had the following recollection of the sequence of events. While Mr. GB and she were at a Strata meeting together, he mentioned that some former business partners of his might have attempted to defraud the EI system. She said she told him of the EI Third-Party call line and that this was his best recourse.

[82] Despite that suggestion, at a June meeting of the Strata Council, Mr. GB gave her a list of three people. She finally accepted the list due to his persistence and her unwillingness to engage in a conflict with him. Her plan was to send the list of names to the Investigation and Control Officer. However, her doubts as to the legitimacy of Mr. GB's claim led her to ignore his request at first. Later, she decided to check the names briefly in the databases. When she inputted one name, some 50 addresses came out. Ms. Hillis pointed out that in the exercise of her work, she mechanically does such searches to acquire addresses and is rarely conscious of the other information appearing on the screen. She commented that this was the case when she searched the database for Mr. GB's list.

[83] She went on to explain that she took the printout home to have a further look at it. Pressed for time to attend a Council meeting, she must have run down to the meeting room, taking Council documents and the printouts with her. She said that at one point, she met with Mr. GB in the hallway very briefly and tried to get further

information from him in order to identify which of the approximately 50 individuals he had been referring to. She maintained that she read from the list and did not show it to him. In any case, she pointed out that Mr. GB had poor eyesight and would not have been able to read the documents she was holding in her hands.

[84] She then explained that Mr. GB did not seem interested anymore. The issue of the list did not come up again between them. She forgot about it. She mentioned that she had no reason to give this individual such documents, as he was her "nemesis".

[85] It was her contention that it was during that meeting, while the group walked about the building with a new contractor, that Mr. GB had the opportunity to retrieve the printouts from the documents she had left behind, as he was unable to follow the group due to his disability.

[86] The grievor admitted taking the printouts out of the office but does not recall what she did with the documents after her meeting with Mr. GB. In referring to her May 1, 2002, statement (Exhibit E-21), she emphasized the last paragraph of that letter, which reads:

I would like to close by saying that my use of HRDC systems was entirely innocent. I believed that I was doing my job. At no time were there any bad intentions or deceptions meant on my part. I admit I was naïve and overzealous, and not properly aware of my responsibilities regarding confidentiality. I now know that I should not have taken this list from our office, and should have dealt with the situation differently. It is the one and only time I ever have and I assure you that I am much more aware now of the policies regarding information. I cannot stop reproaching myself for being the source of all this, and the embarrassment that I have obviously caused to myself and the department. I realize that carelessness in this matter did compromise confidentiality, this was not my intention. I take my position very seriously and apologize very sincerely for the problems I have caused.

[87] She insisted that the statement she made to management was sincere. A discussion with her union representative, Mr. Swaine, after the first day of meeting, helped her understand the nature of management's concerns better.

[88] During cross-examination, the grievor was asked how she could explain her confidence in Mr. GB's wish to report an EI fraud, in light of her past experience with him. Why did she not refer him to the Third-Party Report Procedure, insisting on it

and staying clear of the issue? In response, she agreed that it is what she should have done. She maintained that as an employee, she was not instructed on the importance or the specific guidelines concerning the confidentiality of the information that she was handling. She insisted that these were very unusual circumstances where she was trying to narrow and vet what information to relay to the Investigation and Control Officer.

[89] When asked whether she acknowledged knowing that it was inappropriate for her to look into Mr. X's file, she replied that she did not think it inappropriate at the time since other "people around [her] were doing it." She also denied having ever asked Mr. GB for compensation.

[90] A judgment by the Honourable Madam Justice Baker of the Supreme Court of British Columbia, dated August 9, 2001, was tabled by the grievor. It was marked as Exhibit G-14 and allowed as a document of public record, with the weight it should be given considering its nature. Ms. Hillis declared having come by this document by searching the Internet. In her opinion, Justice Baker's comments regarding the credibility of the plaintiff in that case, Mr. GB, was a representation of his general lack of credibility which, according to her, is of concern in the present adjudication.

Arguments of the Employer

[91] The employer's counsel presented her case in five parts, addressing the following questions:

- (i) Did the grievor do what is alleged of her?
- (ii) Did her action warrant a 10-day disciplinary suspension?
- (iii) Was the DSO acting within his authority when he revoked her reliability status?
- (iv) Did the revocation of the reliability status warrant termination of employment for non-disciplinary reasons:
 - a) What is the legal test to review a revocation?
 - b) How do the facts in this case affect the general test?
 - c) Is there double jeopardy in this case?
- (v) What is the appropriate remedy?

[92] Referring to *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (QL), the employer reviewed the first question and was convinced that the evidence presented by the grievor was "entirely inconsistent with the preponderance of the probabilities that rationally emerge out of all the evidence in the case" (page 4).

[93] Ms. Armstrong points out that the grievor has admitted to printing the document and removing it from the offices of HRDC. In the employer's opinion, Ms. Hillis wanted us to believe that she was blameless because the document was stolen from her. She presented herself as Mr. GB's victim and as the employer's victim because she was not told about the sensitivity of the information that she was handling. It was submitted that she cannot hide behind the allegation that it was Mr. GB who did something wrong. Counsel for the employer suggested that I should not accept the grievor's arguments, as they would cloud the facts, and that I should rather consider the following points:

- (i) a third unauthorised party obtained the printouts;
- (ii) Ms. Hillis was able to confirm physical evidence held by Mr. GB, the printouts and the Court Orders, and was able to secure a fax copy of the former;
- (iii) the investigative officers were able to confirm the physical existence of this evidence in their meeting with Mr. GB;
- (iv) no matter what the motivation - revenge, relationship or other vendetta - nothing changes the fact that Mr. GB had the documents which Ms. Hillis admitted printing.

[94] Counsel for the employer submitted that the grievor not only breached policy, the law and the *Code of Conduct*, but also broke the code of common sense. If indeed Mr. GB's actions were based on revenge, then she set herself up by trusting someone she described as her "nemesis" and a troublemaker to have access to these documents. Furthermore, as somebody who has held various positions in the federal government, including one at the Canada Customs and Revenue Agency, as well as one within the British Columbia Civil Service and TD Bank Taxation Services, she cannot be believed when she is saying she was unaware that it was prohibited to remove personal information from the workplace.

[95] Considering Ms. Hillis' knowledge of the Third-Party Reporting Procedure, the employer doubted her motives that she was investigating a possible fraud. Inconsistencies in her story were highlighted. On the one hand, she admitted to having

looked for Mr. X's file, but she said that that was acceptable because everybody else was doing it. How would it be different for the names provided by Mr. GB? On the other hand, she did not tell anyone in the office that she was autonomously pursuing the request prompted by Mr. GB. She tried to elucidate this by explaining that in her eyes it was part of her job. Then again, although she allegedly told Mr. GB to file a Third-Party Report, he would not leave it alone and because she had to work with him in the building, she went ahead with the investigation despite the fact that she had doubts about the legitimacy of his story. The employer is concerned that Ms. Hillis apparently folded under Mr. GB's pressure. The employer questioned whether Ms. Hillis was generally subject to pressures of diverse individuals and how this might affect her position. Finally, if she was doing this within her job description, the employer questioned the fact that she did not put in any overtime claim that evening, as she usually did when she worked overtime.

[96] In conclusion, and according to the *Faryna (supra)* case, the grievor's version of events makes no sense. The most plausible explanation is that she knew that Mr. GB was pursuing people who owed him money. She used her position as an Investigative Clerk, to help Mr. GB; in so doing, she was gaining favour, if not peace. Mr. GB was in possession of the documents and no investigation could establish that this was other than through Ms. Hillis. Even if Mr. GB had lied to her and lured her home with the information, reasonably speaking, how would he have known when to steal it from her? On the balance of probability, the employer was of the opinion that wrongdoing has been established.

[97] Question number two: in the employer's opinion, such a disciplinary action was warranted. In no way did management act negligently; it met with Mr. GB and then with the grievor, it consulted with its Labour Relations Department and contacted HRDC Headquarters and Treasury Board. Furthermore, the past record of the grievor was considered and a 10-day suspension was supported rather than termination of employment. This would be a fair and reasonable measure.

[98] In support of the case, the employer submitted *Brecht v. Treasury Board (Human Resources Development Canada)*, 2003 PSSRB 36. In that case, the grievor, who supplied information to a friend, provided a legitimate work-related reason for his action (paragraph 57). This outsider was a police officer and the grievor was able to demonstrate and prove that he acted thinking he was assisting the Crown in its outside

investigation (paragraph 64). In the employer's opinion, there was not one iota of evidence to show the same legitimacy in the present case. In the *Brecht (supra)* decision, Vice-Chairperson Potter expressed his opinion that this kind of breach was a serious offence (paragraph 74) and that his decision in that case should not be interpreted as creating a precedent for leniency in these matters:

This decision should not be regarded as one which sets out the proposition that releasing information, which the employer has gathered from the public, to a third party is not reason for termination. In other circumstances, termination for this type of action may indeed be an appropriate response. This is a serious offence and the grievor has incurred what can only be regarded as a lengthy suspension [approximately 2 months]. However, I am convinced that the bond of trust has not been so irreparably broken here that it cannot be fixed. ...

[99] The third issue concerns the authority of the Departmental Security Officer (DSO) to revoke the grievor's reliability status. The employer declared that the DSO was justified in relying on the conclusions of the investigation by his personnel on the basis of the delegated authority and in accordance with the *Government Security Policy* (Exhibit E-27) and the *Personnel Security Standard* (Exhibit E-28) so entrusted to him. He exercised the prerogative recognised by the Federal Court in *Kampman v. Canada (Treasury Board)*, [1996] 2 F.C. 798 (C.A.) (QL), as well as by this Board in *Gunderson v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File Nos. 166-2-26327 and 26328 (1995) (QL). Furthermore, as transpired from Mr. Lefebvre's testimony, this decision was made looking at the case solely through the lens of security, not that of discipline.

[100] Fourth, did the revocation of the reliability status warrant the termination of employment for non-disciplinary reasons? This question was subdivided into three elements. The first concerns the legal test for review of the revocation; the second is an examination of how the facts of this case affect the test; and, finally, there is the question of the alleged double jeopardy. The employer submitted the decision in *Gunderson (supra)* and all four decisions in *Kampman (supra)* in this regard. Ms. Armstrong concluded that procedural fairness is the issue under review at the level of this Board and that the present hearing is an integral part of this process.

[101] The test is really one of good faith on the part of the employer. Did the employer act in a fair and reasonable manner in coming to its decision? The employer tried to gather as much information as possible. The investigators met with Mr. GB, and looked at the documents in his possession; they met with Ms. Hillis and offered her the opportunity to add to or change her statement; they remained, throughout the investigation, open to any other possibility. Furthermore, in considering the revocation, the employer looked at the whole picture, Ms. Hillis' situation and its duty to protect the information gathered from the public. Nothing in this case was done to be unkind or mean to the grievor, but rather for the protection of government assets.

[102] The employer maintained that the facts of this case, viewed through the good faith test, supported the DSO's decision, which was based on credible evidence and a fair and reasonable process. In any case, any deficiency would now be cured with the present hearing. The Federal Court of Appeal in *Tipple v. Her Majesty the Queen (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.) (QL), has declared that unfairness in such a process could always be cured by the hearing *de novo* in front of the adjudicator. In conclusion, the employer's decision should stand.

[103] Finally, according to the employer, the argument of the grievor as to the issue of double jeopardy has no merit. It was raised in *Kampman (supra)* with no ruling on this issue, considering the legislation regime at the time. More recent decisions were submitted in support of the employer's position: *Copp v. Canada Customs and Revenue Agency*, 2003 PSSRB 8 and *O'Connell v. Treasury Board (Solicitor General of Canada - Correctional Services)*, PSSRB File Nos. 166-2-27507, 27508 and 27519 (1997) (QL).

[104] The employer maintained that the grievor was not disciplined twice. The decision to revoke her reliability status is not one that was disciplinary in nature. The DSO has no disciplinary authority over the grievor. The analysis of the situation involved in each investigation was different; their basis was different. Both recourses, under sections 11(2)(f) and (g) of the *Financial Administration Act*, were available to the employer and there was no obligation to choose between the two.

[105] As for the remedy to be considered in this case, the employer maintained that reinstatement is not a possibility. The breach of trust cannot be restored; it has been irrevocably broken. The reliability status cannot be restored, as it is outside my ability. The *Gunderson (supra)* decision would be the only basis for the requested remedy in

this case. The counsel for the employer concluded by asking this process to dismiss both grievances, as Ms. Hillis deserved the 10-day suspension and deserved to lose her reliability status following a fair and reasonable process, done in good faith by the employer. Alternatively, because of the circumstances, only a monetary compensation should be considered in the event that I come to a different conclusion.

Arguments of the Grievor

[106] The grievor's representative acknowledged that the employer has the burden of proof and that the *Faryna (supra)* decision was the "test" vehicle. Her presentation addressed similar questions to those addressed by the employer. In her opinion, the evidence supported neither the conclusions of the investigations nor management's decisions. Ms. Seaboyer pointed out that Mr. GB changed his story many times and that he could not be trusted. Furthermore, he refused to turn over the documents in his possession to Ms. Hall or to the investigators. She felt that Mr. GB was successful in applying intense pressure by threatening to bring the matter to his Member of Parliament and that the grievor ended up being his victim.

[107] The grievor had been a forthright employee up to that point and had cooperated in the investigations. She believed that management had pre-judged the situation from the outset. Furthermore, the evidence presented is very much based on hearsay. Before I determine whether the grievor did what the employer alleged, Exhibits E-22 and E-23 have to be examined, as they presented the allegations and rationale of the case for the employer. The disciplinary letter of May 16, 2002 (Exhibit E-23), clearly explained that the disciplinary decision was "a result of [the grievor's] unauthorized disclosure of confidential information". The summary of findings (Exhibit E-22) referred to three allegations, of which only the second was supported by enough evidence. In fact, in her statement of May 1, 2002 (Exhibit E-21), the grievor admitted printing the document and removing it from the employer's premises. However, she denied categorically having given the document to Mr. GB. She also denied having shown it to him and having asked for compensation.

[108] The employer preferred Mr. GB's version of the matter, despite the fact that his story kept changing and although he refused to turn over the documents in his possession. This was a reflection on his character. If he did not have ulterior motives, he should have been glad to return these documents. Since Mr. GB could not testify

and no one else could testify directly to his intentions, why should his version be given more credence than that of the grievor?

[109] According to the *Faryna (supra)* test, his version made no sense. Given the state of their relationship, it made no sense that Ms. Hillis would have given him the information, putting her job in his hands as a result. In his letter of December 6, 2002, Mr. GB clearly stated that he did not care if the grievor lost her job. This is hardly a risk any reasonable person would take. Ms. Seaboyer then submitted that the grievor's actions were a mistake and were in no way done intentionally or maliciously.

[110] "Credibility" was paramount with respect to Mr. GB, in the grievor's opinion, especially because the employer's actions and decisions were based upon its misplaced belief in it. In the grievor's view, the balance of probability test requires that we look at the motivation of the parties in order to ensure due process; in this regard, Ms. Hillis's version of the facts would be the one that made the most sense. When Mr. GB informed Ms. Hillis that he knew of some people who had committed EI fraud, that information was vague. Ms. Hillis wanted to clarify this. When she saw all the names that came out on her initial search, she did not want these individuals to be investigated without cause, therefore she tried to narrow it down; she was used to screening and assessing such cases. In her eyes, she was carrying out her normal duties; this was her regular activity. She admitted taking the list home; she knew that she was going to see Mr. GB that same evening at the Council meeting. She had a very short conversation with him in order to narrow down the list. She discovered that Mr. GB had lost interest and she was disappointed. She closed the file and forgot about it. She recognized that that had been the wrong way to go about it, but her intentions were to do a good job and not waste the time of the Investigation Officer.

[111] Ms. Seaboyer pointed out that discipline is intended to change the behaviour of the employee. It is not intended to be punitive. In the present case, the grievor went from a 10-day suspension to a revocation of her reliability status. This was a decision that could not be reversed. The grievor was not provided with a second chance. Admittedly, she made a serious mistake and said she would never do this again. If allowed to go back to work, she would be a dedicated employee, pledging never to get into this situation again. She is very aware of what it has cost her. Noteworthy, in Ms. Seaboyer's opinion, is the fact that the employer did accept Ms. Hillis' return to work, although with restrictions. During the six months that she went back to work,

there was no indication that she repeated such actions. This would be a sufficient amount of time to have determined if she was prone to this kind of behaviour and if she could no longer be trusted. On the contrary, she had a better understanding of the confidentiality aspects of her work. Although the grievor is reconciled to the fact that a disciplinary measure was warranted in her case, she submitted that, given her past record, the measure was too severe.

[112] As for the revocation of the reliability status, this, in the grievor's opinion, is where things went seriously wrong. Due process is a real concern in this aspect of the case. As appeared from the Report (Exhibit G-10), the facts were the same as the ones considered under the disciplinary investigation. Nothing new surfaced from this second investigation: no new list of names, no other breach of confidentiality. Furthermore, the suspension letter did not mention that there would be a further investigation and that the grievor's reliability status was under scrutiny and at risk. It did not mention the fact that she could, as a consequence, lose her employment.

[113] Referring to the Report, the grievor's representative pointed out that the findings were erroneous and that the conclusions were also erroneous. Although the allegation of having received personal gain was not supported in the first investigation, it appears to have been a factor in the security investigation, despite the fact that it was still not supported by any new evidence. On the balance of probability, the decision cannot be reasonable.

[114] Alternatively, this termination of employment was a disguised disciplinary measure. Ms. Hall admitted that she was seeking to terminate Ms. Hillis' employment and that her decision was not supported at higher echelons. They were of the opinion that it could not survive an adjudication procedure. It is possible to draw the conclusion that the revocation was a means to effect the termination. In that case, it is double jeopardy and an indication of bad faith on the part of the employer. Although the evidence was slim in this regard, there had been meetings between management and the investigators. The consequence of the revocation of the reliability status was a serious one. A person cannot work in the federal government without it. The representative pointed out that we should be concerned that the revocation process not be used to terminate the employment of employees without just cause or due process.

[115] In conclusion, the representative brought to my attention a Supreme Court of British Columbia's decision (Exhibit G-14). Considering that I could not form an opinion of Mr. GB's credibility because he did not testify and was not cross-examined before me, the opinion of Justice Baker and that of Justice Braidwood could throw some light in support of the grievor's allegation that Mr. GB could not be trusted. The Justices were involved in two different cases and both had the opportunity to hear and see Mr. GB testify in front of them. In each case, Mr. GB's lack of credibility as a witness was a determining factor. The grievor would like me to draw from this an opinion as to Mr. GB's character. Alternatively, in her opinion, there were enough facts in the present case for me to determine his lack of credibility.

[116] Finally, as for the remedy sought, the grievor is of the opinion that as an adjudicator I have the authority to reinstate her reliability status and reinstate her in her job. In this, she relied on *Dekoning v. Treasury Board (Employment and Immigration Canada)*, PSSRB File Nos. 166-2-22971 and 149-2-129 (1993) (QL). I should, therefore, reinstate the grievor, reduce the disciplinary suspension and clear her record. I am also asked to remain seized of the case with respect to implementation of the award in that eventuality.

Rebuttal

[117] In rebuttal, Counsel for the employer maintained that this was not a matter of an attack on the character of the grievor, but that it was a question of her credibility. The credibility of Mr. GB is not an issue. The employer acted in good faith throughout the case. The termination of employment was not a case of disguised discipline. These were two separate investigations, both done in good faith.

[118] On the issue of personal gain, the employer maintained that it was not about money but about favour, if not about getting peace from Mr. GB's harassing behaviour. All in all, the employer has lost confidence in this employee. When she returned to work, she was assigned alternative duties and no longer had access to the database; this cannot be interpreted as regained trust. The grievor did not display at the time, an understanding of the seriousness of her actions.

[119] The Security Section was alerted because protocol required it, and not as a means of terminating the grievor's employment. Considering the burden of proof and the balance of probability, the employer has demonstrated that its actions were warranted.

[120] Finally, a distinction was made regarding the *Dekoning (supra)* case. Since 1993, the power of an adjudicator has been different and the circumstances are different; the case does not apply.

Reasons for Decision

[121] Under the circumstances presented in this hearing regarding hearsay evidence, as mentioned earlier, I have taken great care to consider all aspects of the case presented before me in order to acquire a sense of the events as a whole. There are, however, unequivocal admissions and denials on the part of the grievor. There are also important contradictions between her story and the version told by Mr. GB through Ms. Hall.

[122] The grievor has admitted to having printed the document that ultimately found itself in Mr. GB's possession. Denying any action of showing or giving the document to Mr. GB, Ms. Hillis admitted having communicated orally the information otherwise clearly marked as "Protected" to him. She also admitted having abandoned this document in a public place and surmised that this gave Mr. GB the opportunity to appropriate it clandestinely. Furthermore, when asked what had happened to the document after the council meeting, she was unable to provide an explanation as to how she did not realize at the time that the document was missing. This demonstrates her lack of concern for security and confidentiality. Finally, she denied having asked for payment in compensation for the information provided. Both investigations failed to find evidence of such monetary payment and Mr GB himself admitted that he never paid any money to Ms. Hillis despite the claim in his letter of March 23, 2002.

[123] Important contradictions between the two versions of the story appear as Ms. Hillis attempted to explain her motive as a mitigating factor in her defence. The credibility of the grievor, as well as that of Mr. GB, then comes into play. The employer chose to believe the version of events as related by Mr. GB. In this regard, the employer relied on the facts that each investigation confirmed, namely:

- i) that Mr. GB had documents originating from the Easy Access Database in his possession; and
- ii) that he had in his possession Court Orders concerning individuals whose names matched those that were on the printout;

[124] The employer further submitted that to believe that the grievor was conducting an investigation into EI fraud at Mr. GB's instigation meant that he would have deceived her as to his intentions. There was no evidence of such deception other than the grievor's word. Furthermore, the balance of probability test, according to the *Faryna (supra)* case, did not support this possibility, either. Despite the fact that Mr. GB was characterized as being a troublemaker for the Strata Council at the grievor's building, there was no evidence of this kind of deception on his part.

[125] Conversely, the employer points out that the grievor admitted that she had accessed the database to look up information regarding Mr. X, another neighbour, and that there was also evidence that Ms. Hillis admittedly understood neither the nature of the requirements for confidentiality of information which came to her knowledge by reason of her employment, nor her responsibility with regard to personal information entrusted to her by the public. I see no reason to conclude otherwise.

[126] In this last regard, I am unable to conclude that it was acceptable for the grievor to look up the information and take it out of the office because to her it was "only" a list of names and addresses. I find the grievor's explanation of her behaviour very disturbing. She maintained that she did nothing wrong because she was so used to looking at names and phone numbers on these lists in her everyday activities that she no longer saw the other information appearing on the page, such as birth dates and social insurance numbers, to name only a few. Her defence was that, as an employee handling such information on a daily basis, one simply becomes desensitized to its importance and confidentiality; this is unacceptable. I must agree that she showed no understanding at the time of the importance and the nature of her responsibilities regarding the information she was entrusted to handle.

[127] Even if Ms. Hillis truly believed that she was pursuing a possible EI fraud and, as she said, she was trying to narrow down the list of names, she went about it in an inappropriate manner. She admitted this herself. She should never have left the office with the list, much less taken it to a public place and left it unprotected.

Furthermore, she was aware of the procedures for Third-Party Reporting and the policy regarding dealings with friends, family members and acquaintances; she should have followed them. I find that the mitigating factors presented, whether or not I believe the grievor's version of events, are offset by other serious breaches.

[128] I will briefly address the issue of compensation that would have been part of the motivation for the grievor's actions. Although the July 29, 2002, report by the security officers concluded that no evidence was uncovered as to any payments of moneys made to Ms. Hillis, it suggested that she "corruptly attempted to gain personal advantage" of the situation. I have seen no evidence of the sort; both investigations confirmed this. The evidence rather points to the probability that the grievor was trying to gain "relief" from Mr. GB's demands or trying to gain his cooperation in the Strata building affairs. In any case, her actions can only be qualified as a mistake. They demonstrate a definite lack of judgment on her part.

[129] As such, her actions in having communicated confidential information to an unauthorized individual were proven and this warranted a 10-day disciplinary suspension. I find no unreasonableness in this measure, considering both the grievor's past clean record and the seriousness of her wrongdoing. This was, by far, an acceptable if not a mild measure under the circumstances. I see no reason to intervene in this regard.

[130] Furthermore, I find no evidence of bad faith in the disciplinary investigation. Ms. Hall contacted Mr. GB to gather as much information as possible. She met with him and confirmed his possession of the documents, the printouts and the Court Orders. She met at length with the grievor and her union representative. She consulted with the appropriate resources in order to determine a measured disciplinary action.

[131] I will now turn to the other element of the case, the termination of employment. In this regard, I am to look into the fairness and reasonableness of the process by which this decision was made, including the authority under which it was made, and examine the possibility that this action was, in fact, a disguised disciplinary measure accomplished in bad faith by the employer. Finally, there is the issue of double jeopardy that needs to be addressed.

[132] The Federal Court of Appeal in *Kampman (supra)* has confirmed the decisional authority and prerogative in this matter on the part of the DSO. It has established standards of review for examination by the adjudicator. As such, in order to succeed in having this decision reviewed, the grievor had to demonstrate that the employer failed to comply with the rules of procedural fairness and reasonableness.

[133] As long as the Departmental Security Officer's actions are in keeping with the authority delegated to him by the *Government Security Policy* and *Personnel Security Standard*, he has the authority to rescind the grievor's reliability status. Given the information uncovered through the disciplinary investigation and subsequent events, a new determination had to be made as to whether the employee was still a reliable person to whom government assets could continue to be entrusted, including the very sensitive personal information provided by citizens. This determination was at the discretion of the DSO and the test to be met is the one found in those policies.

[134] The employer did establish that the security investigators proceeded in a fair manner. They met with Mr. GB, the managers and Ms. Hillis, accompanied by her counsel. Moreover, the grievor was offered the opportunity to supplement her original written statement. According to Mr. Lefebvre, they also took time to deliberate the issue and referred the question of employment in alternative functions to management.

[135] However, this process was not without its flaws. I see two problems. The first concerns the lack of notification to the grievor regarding the potential consequences of this process, namely her termination, which could be considered contrary to the employer's duty to follow a fair administrative process. The second relates to the issue of the DSO's authority. Both problems were, however, ultimately remedied.

[136] In the first instance, there was no evidence that the grievor was notified of the possible consequences of the investigation on her reliability status; there was no mention of this possibility in the suspension letter of November 15, 2002, and no mention of this in the letter inviting her to meet with the security investigators. Finally, there was no evidence that she was verbally notified of this possibility at the June 13, 2002, meeting, either. However, according to the *Kampman (supra)* decision, this breach in duties could be subsequently cured by the availability of an adequate alternative remedy. Furthermore, the Court declared in the *Tipple (supra)* case that:

Assuming that there was procedural unfairness in obtaining the statements taken from the Applicant by his superiors ... that unfairness was wholly cured by the hearing de novo before the Adjudicator at which the Applicant had full notice of the allegations against him and full opportunity to respond to them.

[137] The grievor has now had this opportunity during a three-day hearing process before this Board, where she was fully aware of all allegations against her and had the opportunity to call any witness and state her case fully.

[138] The issue of the DSO's authority was also of concern to the grievor and requires closer examination. The evidence showed that events continued to unfold during the time that Ms. Hillis was suspended; Ms. Hall was in regular contact with Mr. GB (Exhibits G-1, G-2 and G-3), trying to retrieve the documents in his possession. On each one of these occasions, according to Ms. Hall's notes, he allegedly mentioned new events at the building involving Ms. Hillis and the possibility of using the printouts in other proceedings if things went further. He apparently also mentioned the possibility of contacting his Member of Parliament.

[139] The investigation report from Mr. Lefebvre dated July 29, 2002 (Exhibit G-10), specified the fact that:

On May 30, 2002, the matter was brought to the attention of Special Investigation because of [Mr. GB's] continuing suggestion of raising the matter with [his Member of Parliament].

[140] According to that same report, the investigation proceeded by the week of June 7, 2002, with a meeting with Mr. GB, who continued to refuse to turn over the documents in his possession, indicating to the investigators "that he would use this information in Court, if required in order to secure judgments against four individuals" (Exhibit G-10). Although these further declarations might have been the trigger to the security investigation, they were subsequently confirmed by the investigators. Mr GB's refusal to turn over the confidential documents, further threatening to use these for his own purpose, indicated his attitude towards this information. The employer began to realize the gravity of the situation. The events were confirmed to be serious enough to justify a review of the grievor's reliability status under the authority of the DSO as provided for in the policy.

[141] This is not evidence of bad faith or unreasonableness on the part of the employer. Rather, the circumstances tend to suggest some eagerness on management's part, in view of the subsequent communications with Mr. GB, to ensure that all had been done according to required security protocols, especially so with the potential of the case becoming a public concern.

[142] The report also contains an opinion that "In light of our investigation's findings, the 10-day suspension without pay previously imposed to Jeanie Hillis will not address the breach of trust that she exhibited in this matter" and recommends that: "In light of this blatant breach of trust, it is recommended that Jeanie Hillis be immediately suspended without pay and that steps be undertaken to initiate her termination of employment with the Government of Canada." This is rather surprising considering that neither Mr. Lefebvre, nor Mr. Lajoie, then National Director of SIER, had the authority to terminate an employee, but only to revoke her reliability status. It is easy to understand the grievor's concern when she later received a copy of this report. However, in the end, the Deputy Minister had the authority to terminate the grievor's employment. He is the one who made that decision and signed the letter to her on November 15, 2002. As such it cannot be said that the DSO overstepped his authority, despite the rather poor wording of his report. Furthermore, Mr. Lajoie's letter of November 15, 2002, to the Deputy Minister, did recommend revocation of the status and not termination.

[143] Finally, the grievor argues that she is subject to double jeopardy as a result of both measures imposed on her, based on the same events. According to *Brown and Beatty* (7:4240), it is generally accepted that the employer cannot impose more than one penalty for the same offence. That is to say no more than one disciplinary penalty for the same offence. The revocation of a reliability status and the subsequent termination come under the employer's discretionary powers in paragraph 11(2)(g) of the *Financial Administration Act* and is not of a disciplinary nature, but rather of an administrative one. The basis for this action and the analysis it requires are different. By nature, the one necessarily looks to the employee's past actions and seeks to change and improve behaviour; the other evaluates, or in this case re-evaluates, the future relationship between the employer and the employee in terms of confidence, trust and reliability and the character of the employee. The result of the security investigation is the removal of the reliability status, not the discharge, which is instead the inevitable consequence of the removal of the status.

[144] Similarly, in the case of *Turgeon v. Treasury Board*, PSSRB File No. 166-2-6925 (1979), the grievor was discharged for his participation in Employment Insurance fraud and found guilty criminally on the basis of the same events. Adjudicator Emile Moalli held that the two processes were two distinct legal recourses resulting in penalties of a different nature, although based on the same events. This is also the case here.

[145] As such, it cannot be said that the situation in the present case constitutes double jeopardy unless the grievor can establish, on the balance of probability, a disciplinary intent on the part of the employer for the review of the reliability status. Mr. Beatty acknowledged that intention is relevant to the issue of double jeopardy in *Re Ontario Produce Co. v. Teamsters Union, Local 419*, (1992), 25 L.A.C. (4th) 195. The grievor did not meet this burden of proof.

[146] The rules and policies for the review process of the reliability status clearly establish it as being ongoing. Section 5 of the *Personnel Security Standard* states that: "As a result of an update or a review based on new adverse information concerning an individual, his or her reliability status or security clearance may be revoked". Any employee can, therefore, be subject to ongoing review when new adverse information concerning that individual comes to management's attention. It was the case here. Appendix "B" of the same Standard provides guidelines for the evaluation of this information for reliability check or, in this case, review. Section 3 states:

In checking reliability, the question to be answered is whether the individual can be relied upon not to abuse the trust that might be accorded. In other words, is there reasonable cause to believe that the individual may steal valuables, exploit assets entrusted to him or her, or exhibit behaviour that would reflect negatively on their reliability.

[147] This process was entered into, in Ms. Hillis' case, after the disciplinary process was closed and partly as a consequence of the further communications with Mr. GB. The fact that there was no mention of this process in the disciplinary letter of May 16, 2002, would confirm that the process initiated on May 30, 2002, namely the request for the security enquiry, was not of disciplinary nature. The wording of the July 29, 2002, report in stating that "In light of our investigation's findings, the 10-day suspension without pay previously imposed to Jeanie Hillis will not address the breach of trust that she exhibited in this matter" also supports this interpretation. It confirms that it was not the employer's intention to seek further disciplinary penalty.

[148] The duty to protect confidential information concerning citizens is a key responsibility in many positions in the federal government. That the employer chose to approach this case at first as a disciplinary matter should not prevent it from re-evaluating the situation from a security point of view, something it could have done in the first place.

[149] I have found no bad faith on the part of the employer leading me to conclude that the termination was a disguised disciplinary measure or that it was intended as such. I have also concluded that the process by which the employer reached this decision was fair despite its flaws, which have been appropriately remedied by this adjudication process. I would have no authority, or reason in any case, to reinstate the grievor's reliability status.

[150] Once the decision is made to revoke the reliability status, the next step is to examine its consequence on the employment of the grievor. Section 5 of the *Personnel Security Policy* states that termination may be considered only in exceptional circumstances. However, section 10.9 of the *Government Security Policy* (Exhibit E-27) requires that:

The Government of Canada must ensure that individuals with access to government information and assets are reliable and trustworthy...

The Departments must ensure that, prior to the commencement of duties, individuals who require: a) access to government assets (except for Governor in Council appointees) undergo a reliability check and are granted a reliability status.

[...]

[151] Mr Lefebvre has explained in his testimony that as of the end of 2002, the minimum or basic requirement for any position in the federal government is the granting of the reliability status. The enhanced reliability status, granted to the grievor at the commencement of her employment in 1999, no longer exists. Since the reliability status is a prerequisite for employment, the termination of the grievor was unavoidable, given the fact that this minimum status had been withdrawn.

[152] The employer, in this case, had no obligation "to search diligently for alternate positions" in its Department as required by the Federal Court in *Singh v. Canada (Public Works and Government Services)*, [2001] F.C.J. No 891. In that case, the security

clearance of the grievor was revoked, leaving Ms. Singh with the possibility of employment at a lower level of security. In the case of Ms Hillis, there is no such possibility. Therefore, I do not have to request that the Department provide evidence of serious effort in this regard

[153] In conclusion, the employer's decision, with respect to the withdrawal of her reliability status, appears to have been based on its duty to assure the Canadian public that it can trust government employees to take their responsibility seriously in the handling of personal information. The employer's decision was also based on the loss of confidence on the part of the employer regarding the grievor's attitude and ability to carry out this responsibility in the future, rather than in the past.

[154] Whether the grievor volunteered the information with a view to thwarting EI fraud or to be of assistance to a member of the public seeking debtors, she put her own employment at risk and can only blame herself for this mistake.

[155] I understand the concern of the Union that this reliability status review process, an administrative measure, could be used to terminate an employee without possibility of recourse to this Board. However, the obligation of the employer to use this process in good faith and with true intent, as discussed in this decision, as well as with administrative fairness, should provide enough protection to the employee; this Board has confirmation of its power to review of these elements. At the same time, this provides the employer with the ability to apply the Government Security Policy in appropriate cases.

[156] Consequently, both grievances are denied.

**Sylvie Matteau,
Deputy Chairperson**

OTTAWA, October 19, 2004.