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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

ANDRÉ MICHAUD

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Michaud v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Guido Delgadillo, Public Service Alliance of Canada

For the Employer: Marc Séguin, counsel

Heard at Québec, Quebec,
August 28 to 30, 2018.
(FPSLREB Translation)

REASONS FOR DECISION

I. Individual grievance referred to adjudication

1 André Michaud ("the grievor") was suspended without pay for 30 days, from April 9 to May 20, 2014, for carrying out unauthorized accesses to the confidential information of several taxpayers, for making unauthorized disclosures of confidential information to people unauthorized to receive it, and for giving preferential treatment to former employees and people close to them.

2 The grievor filed a grievance against the discipline. His employer, the Canada Revenue Agency (CRA), dismissed it, and it was referred to adjudication on July 16, 2015. In his grievance, the grievor asked to be reimbursed all lost sums. At the hearing, the grievor's opinion was that a 5-day suspension would have been fair discipline. For the reasons that follow, I allow the grievance in part by substituting a 5-day disciplinary measure for the 30-day disciplinary measure.

3 On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continued under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

4 On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *PSLREBA*, the *PSLRA*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations*.

II. Summary of the evidence

5 At the hearing, the employer adduced into evidence the unredacted file and report from the investigation. It also submitted redacted versions. The redaction was intended to protect the confidentiality of the names and personal information of those taxpayers whose interests are not within the ambit of this decision.

6 Confidential taxpayer information (including any information that would identify taxpayers) is protected by s. 241 of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)). Section 241(4.1) provides the following measures to protect this information in the context of a legal proceeding:

> ***241 (4.1)*** *The person who presides at a legal proceeding relating to the supervision, evaluation or discipline of an authorized person may order such measures as are necessary to ensure that taxpayer information is not used or provided to any person for any purpose not relating to that proceeding, including:*
>
> ***(a)*** *holding a hearing* in camera*;*
>
> ***(b)*** *banning the publication of the information;*
>
> ***(c)*** *concealing the identity of the taxpayer to whom the information relates; and*
>
> ***(d)*** *sealing the records of the proceeding.*

7 I find it necessary to protect the taxpayers' personal information. They will be identified simply by initials to ensure that their information is not used or furnished for purposes unrelated to the proceeding before the Board. For the purposes of the Board's file, the investigation report is redacted, and its unredacted version is sealed. The redacted investigation file is in the file. The original was returned to the employer; there is no confidential information in the investigation file that is of use to the decision.

8 The employer called to testify Anne-Marie Gingras, an investigator in the Internal Affairs and Fraud Control Division; Esther Foster, the assistant director of the Tax Services Office (TSO) for Eastern Quebec; and Guillaume Donati, who at the time was the director of that TSO. The grievor testified on his own behalf. Overall, there were no contradictions in the testimonies, but different perspectives were certainly

evident in the arguments.

9 At one time, a taxpayer could go to his or her regional TSO, speak directly with an information officer, and ask questions about the state of his or her CRA file. The grievor began working at the Québec TSO office for Eastern Quebec in 1994 as a client information officer. At that time, a long counter was in place, where a dozen officers received clients at their wickets. The wait time was managed via numbers issued at the entrance.

10 Today, in 2018, the counter is no more. A taxpayer visiting the Québec TSO would be turned away by the commissionaire at the entrance. Taxpayers may obtain information by calling a 1-800 number or by consulting the CRA's website. If necessary, an appointment may be arranged with a tax specialist. The grievor's position no longer exists. He now works in the Source Deduction Division.

11 The drastic change in the information service offering to Canadian taxpayers was difficult for employees. From the early 2000s, the CRA encouraged taxpayers to use the 1-800 number or to consult the website. The change did not happen overnight. The number of counter employees was reduced, taxpayers were encouraged to use the telephone line, and gradually, the CRA insisted that an appointment was required to speak to a counter officer.

12 Mr. Donati and Ms. Foster confirmed that the transition was difficult for employees who were used to directly responding to taxpayers. The grievor described how he had lived through the transition.

13 When he started in 1994, he was assigned to the counter, where he answered the questions of taxpayers who presented themselves there. After establishing the taxpayer's identity via his or her social insurance number and other data, the officer would access the file and answer the questions. If someone other than the taxpayer presented himself or herself to obtain information on the file, for example, an accountant responsible for the income tax return, the officer had to establish that person's right to the information via power of attorney.

14 With the dawn of the 2000s and the CRA's decision to modify taxpayer services, the work of the counter officers gradually evolved. They were encouraged to direct taxpayers to the 1-800 number. Two telephone lines were installed in the Québec

office. When clients came to the counter, they were first told to try to resolve their problem by using the telephone. If it was too complex for the telephone agent, an appointment was then scheduled with a counter employee.

15 Appointments were first set by the counter employees and then by the call centre, which could be reached only by telephone. The grievor testified about the clients' irritation and about the counter officers' discomfort with no longer having direct communication but instead a relationship complicated by the telephone and the mandatory appointments.

16 The grievor's alleged conduct fell within this dynamic, but in the limited context of providing tax information to other TSO employees.

17 The grievor testified that when he arrived in 1994, employees often asked counter officers to look into their tax files, to verify data or to answer questions. Employees were, and still are, prohibited from looking into their own files. In 1994, nothing prohibited an employee, like any other taxpayer, from asking a counter officer to do it.

18 Over the years, because this type of request could weigh down the counter officers' workloads, they asked management to appoint officers who would be designated to answer employees' questions, especially during income-tax-return season (February to April), when requests became more frequent. For several years, the employer designated some people, including the grievor.

19 The practice, which had been established in 2005 and 2006, gradually changed. In 2007, Mr. Donati sent the following message to the employees of the Eastern Quebec TSO:

> [Translation]
>
> *TO ALL EMPLOYEES*
>
> ***Subject: Filing period - Income tax 2006***
>
> *It's yet another tax return filing period! You all know that over the last few months, changes were made to equip our information counters to promote other service options. Self-service kiosks with Internet and telephone lines connected directly to our call centre were added to lobbies. Service officers helped taxpayers use the self-service options and*

> *informed them of the information and channels available to them. All this restructuring also led us to review how we help our employees meet their tax obligations.*
>
> *Therefore, you are encouraged to respect the normal channels for your requests as taxpayers.…*

20 According to the explanations at the hearing, "normal channels" meant the channels that all taxpayers could access, i.e., the 1-800 number, the My Account page on the CRA's website, and eventually, an appointment with a counter officer. The same message was repeated in 2007, 2009, and 2011.

21 In 2011, the following was indicated, which had been understood but had not been stipulated: "[translation] If necessary, or if your request cannot be discussed by telephone, an appointment may be obtained with an officer at a TSO near you." At the hearing, Ms. Foster confirmed that this meant that the Québec TSO employees would obtain an appointment with a counter officer in their TSO.

22 In addition, the 2011 note states the following:

> [Translation]
>
> …
>
> *It is important to remember that employees must not:*
>
> - *access their personal tax information or that of their family members or acquaintances;*
> - *access information to respond to a request from a relative, friend, or colleague or provide that information to an unauthorized person, for any reason;*
> - *access information that is not part of their official duties or assigned workload.*
>
> …

23 Each year, CRA employees receive a reminder that they must review the CRA's *Code of Ethics and Conduct* and the *Conflict of Interest Policy and Guidelines*. An example of a memo on this subject sent in February 2009 was filed at the hearing. It includes the following:

> [Translation]

…

> ***(1) Unauthorized access to taxpayer information:***
>
> *Access to information gathered by the CRA is permitted only when it is part of your officially assigned workload. You are* ***prohibited****, regardless of the circumstances, from using any such CRA information for personal use or gain or for financial advantage for you, your family members, or anyone else.*
>
> *You must not serve friends, acquaintances, your family members, or colleagues or access their confidential information, even if they expressly ask you to. And you* ***must not*** *access your tax information.*
>
> …
>
> [Emphasis in the original]

24 On October 1, 2013, the CRA definitively closed the service counters, and the TSOs ceased being open to the public.

25 The grievor was also active with his bargaining agent, the Public Service Alliance of Canada (PSAC), as the vice president of one of the PSAC's components, the Union of Taxation Employees. In that role, he often accompanied members of the bargaining unit to discipline or investigation interviews. So, in September 2011, he accompanied a colleague, JM, in the context of an investigation into misconduct that she had allegedly committed. In the interview, JM admitted that she had often consulted her colleagues' tax files. The grievor then intervened, as a union representative, to state that it was common practice at the Québec TSO to carry out searches for colleagues in their tax files. The investigator, who was surprised, put the question to Ms. Foster, who answered that such a practice was prohibited.

26 On November 19, 2012, the Internal Affairs and Fraud Control Division sent a letter to Gabriel Caponi, the CRA's deputy commissioner for Quebec, which mentioned that an investigation into the grievor had been launched following audit trails that had revealed that he "[translation] … had accessed the confidential information of 15 work colleagues and their family members 811 times." The audit trails covered January 1, 2005, to December 31, 2011. At the hearing, Ms. Gingras explained that audit trails generally went back six years. The grievor's accesses were also monitored in 2012.

27 For the purposes of the disciplinary investigation, only 23 accesses were retained, affecting 9 taxpayers, from April 14, 2009, to April 11, 2012. Rachelle Scully led the investigation. She no longer works for the CRA and did not testify. Ms. Gingras worked with Ms. Scully in the investigation and attended the interviews.

28 The investigation found as follows:

> [Translation]
>
> …
>
> *The information obtained in the context of this investigation revealed that André* ***Michaud****, a taxpayer services officer with the Revenue Collections and Client Services Division, violated the Code of Ethics and Conduct when he:*
>
> - *made unauthorized accesses to the confidential information of* [JM], [TM], [SP], [MO], [JB], [ML], [PJ], [CJ], *and* [KO]*;*
> - *made unauthorized disclosures of the confidential information of* [JB] *and* [TM] *to* [JM] *and of* [CJ] *to* [PJ]*;*
> - *gave preferential treatment to* [JM] *in processing* [JM]*'s requests for the files of* [SP] *and* [MO], *which enabled* [JM] *to circumvent the service channels normally available to taxpayers;*
> - *and gave preferential treatment to* [ML], [PJ], *and* [KO] *in processing their requests, enabling them to circumvent the service channels normally available to taxpayers.*
>
> [Emphasis in the original]

29 The investigation report explains the misconduct in the following terms:

> [Translation]
>
> …
>
> *The Code of Ethics and Conduct provides that it is prohibited to serve friends, acquaintances, relatives, colleagues, or former colleagues as clients (taxpayers, entrepreneurs, representatives of organizations, etc.). If the occasion arises, the employee must advise his or her manager, who will ensure that they are served by someone else. If that is not possible, the employee must first obtain the authorization of his or her manager and then respect the usual procedure. Contrary to what he reported, none of the information*

> *gathered indicated that André* ***Michaud*** *had informed management that he continued to respond to the requests of colleagues and former employees. It is clear that André* ***Michaud*** *was aware of the procedures given that he had been called to attend several interviews as a union representative, including that of* [JM]*, who was the subject of an administrative investigation in 2011* [investigation number] *for situations involving unauthorized accesses and preferential treatment. Despite that and the many reminders he received, André* ***Michaud*** *chose to disregard the instructions and deliberately continued to respond to his peers' requests.*
>
> …
>
> [Emphasis in the original]

30 The grievor testified that in October 2012, Ms. Foster took him aside to inform him very clearly that no longer and under no circumstances should he serve his colleagues like other taxpayers. Therefore, he was prohibited from accessing their files. According to the investigation report, the last recorded access was on April 11, 2012. There is no evidence of any access after that date. The report on the audit trail is dated October 10, 2012. The investigation that gave rise to the disputed discipline began in November 2012. The investigation report is dated February 17, 2014; the discipline letter, April 14, 2014. Bear in mind that the CRA's information counters closed definitively on October 1, 2013.

31 The grievor had been a union representative for a long time when the investigator called him to schedule an appointment for an interview. His first reflex was to ask which member he would be accompanying. When he was told, "[translation] No, it's for you", he was floored.

32 He had always been very careful to avoid conflicts, even potential ones, with respect to clients. When he was asked to handle a file of someone even remotely related, like a parent, a friend, an acquaintance, or even someone living on his street whom he did not know, he told his supervisor that he could not work on that file. However, he considered that responding to TSO employees' questions had always been part of his duties.

33 As he told the investigator and repeated at the hearing, he knew very well that all searches carried out in the system were recorded, and he had never hidden helping his colleagues. He had always acted in good faith and, according to him, within

the framework of his duties. What added to the surprise was that when he met with the investigator in March 2013, he had not helped any colleagues with their tax files for about six months, in accordance with Ms. Foster's express order.

34 The investigation report refers to several people who were interviewed, including managers and team leaders who supervised the grievor at that time. The interviews confirm that the transition was difficult and that management had to remind employees of the procedure. I will now detail a few excerpts from the report.

35 From Marilyn Guay, the acting manager, Revenue Collections and Client Services:

> [Translation]
>
> …
>
> - *she has known André **Michaud** since 2006. He was responsible for serving taxpayers at the counter who had appointments. At that time, management assigned specific employees to respond to other employees' requests. Therefore, by extension, the counter employees' services were put at the TSO employees' disposal until the directive that stipulated that they had to use* My Account *or call the call centre came into effect;*
>
> - *the procedures changed a great deal over time, and the counter officers no longer had permission to serve taxpayers who arrived without appointments. Before October 2012, the counter employees could schedule appointments in time slots, but since October 2012, only Nadine **Raymond**, team leader of Revenue Collections, could set appointments;*
>
> - *the officers, especially André **Michaud**, had a hard time redirecting taxpayers to the telephones in the lobbies that would allow them to contact the call centre. Sometimes, the taxpayers were on social assistance, were elderly, or had a disability, and it was difficult for the officers to refuse to help them. The officers at the Québec office were not the only ones who had difficulty accepting the procedural changes at the counter because employees at the Rimouski and Chicoutimi offices were also very reticent;*
>
> …
>
> - *from her arrival in 2011, Esther **Foster** was adamant and would not condone counter employees following up on their colleagues' requests. André **Michaud** was very well known at the Eastern Quebec TSO, and the employees had*

> *become accustomed to seeing him even after the procedures were changed. She did not know that André **Michaud** always responded to the Eastern Quebec TSO's employees but was not surprised because he liked to help people. She remembered discussing unauthorized accesses with certain employees. André **Michaud** was their union representative and was present at the disciplinary hearings that took place in 2011 and 2012; therefore, he should have been more mindful of the rules.*
>
> [Emphasis in the original]

36 From Nicole Goulet, then the team leader of Client Services:

> [Translation]
>
> - *from January 2011 until her retirement in September 2012, she was responsible for the counter officers, for reception, and for the cashier in the Chicoutimi, Québec, and Rimouski offices;*
>
> - *André **Michaud** was responsible for serving taxpayers who had appointments at the counter. Following the procedural change in 2009, employees desiring assistance had to call the CRA call centre and obtain an appointment at the TSO that served them. The counter officers were aware that they were not supposed to respond to TSO employees unless they obtained an appointment through the call centres. Sometimes, exceptions happened, like for humanitarian reasons, i.e., when the person asking was facing financial difficulties or was elderly or had a disability. In those cases, the officer at reception could determine that it was necessary for the taxpayer to meet with a service officer without an appointment;*
>
> - *taxpayers sometimes communicated with the officers directly by telephone, and the directive was to redirect them to the call centres. As a general rule, André **Michaud** followed procedures, but he had considerable difficulty adapting to the change, like some of his other colleagues. She remembers issuing reminders to André **Michaud** in 2011 because without exception, Esther **Foster** would not condone counter officers serving taxpayers without an appointment.*
>
> [Emphasis in the original]

37 In fact, the grievor did mention other team leaders, who did not testify at the hearing and were not interviewed in the context of the investigation. According to him, those team leaders condoned him responding to other employees' questions about their tax files to a certain extent, even without an appointment.

38 Ms. Foster testified that she had been on the third floor, while the counter was on the ground floor. She was not the grievor's direct manager. Between them, hierarchically, were a team leader and a manager. At the investigation interview, she stated that in May 2011, she had told the grievor to stop serving the office's employees and that she met with him again on that subject in fall 2012. At the hearing, she could not remember those conversations, but she thought that she certainly had a specific memory of it in 2013 when the investigation interview took place. She remembered insisting that the meetings with counter officers be done only by appointment obtained through the call centre at the 1-800 number.

39 In cross-examination, she was asked whether there was a contradiction between the *Code of Ethics and Conduct*'s prohibition on serving colleagues and the fact that appointments were made for employees at the TSOs in their regions, where they would certainly have been colleagues of the counter officers. Ms. Foster responded that as long as the employee made an appointment through the call centre, like any other taxpayer, no problem would arise.

40 Mr. Donati testified that he always had a lot of respect for the grievor, who, in his union representative role, had always sought a collaborative approach with the employer and managers. Mr. Donati regretted imposing discipline, but given the investigation results, he felt obliged to. He explained that senior management had been required to impose the discipline set out in the employer's *Discipline Policy* grid, which indicates that among other things, the unauthorized disclosure of taxpayer information, which was the grievor's alleged conduct, is part of group 5 and that the sanction could range from 20 days to termination of employment.

41 Mr. Donati explained that the employer's directives required him to impose a minimum sanction, given the seriousness of the alleged misconduct. He mentioned in particular these two acts of misconduct, which are incorporated into the sanction tables: "[translation] Unauthorized access to taxpayer information or to sensitive or confidential information, including providing preferential treatment", and, "Unauthorized disclosure of taxpayer information or sensitive or confidential information". According to the table, the first act of misconduct falls in group 4, and the second, in group 5.

42 During the disciplinary interview, Mr. Donati attempted to make the

grievor understand that an expression of remorse would allow for lesser discipline, namely, 20 days. However, according to Mr. Donati, the grievor did not show remorse. The grievor submitted that he had always acted properly and within the framework of his duties. Thus, Mr. Donati had no other choice but to impose the discipline of 30 days, to show the employer's disapproval. Termination was never considered.

43 At the hearing, the grievor provided explanations for each of the offences alleged against him in the report. Generally, his view was that the investigation report did not mention his explanations. According to him, the allegations had to first be fit into the broader context of the change in service delivery, as described earlier.

44 The grievor added to this description that the acting director, Pierre Boutin (who replaced Mr. Donati for several months in 2009), had tacitly approved of the grievor responding to his colleagues' requests, even without an appointment. The Québec officers allegedly answered the questions of taxpayers who had not had appointments, while at the Montreal office, the directives were followed. The grievor made inquiries. According to him, the Montreal appointments were recorded because it was the central office that administered appointments; so, it was easy for the officers to track them. In Québec, taxpayers had to go through a centralized line; the officers did not have the opportunity to add unforeseen appointments. Mr. Boutin allegedly told him that he could make appointments. When questioned in the context of the investigation, Mr. Boutin said that he did not remember giving that permission. He did not testify at the hearing. That permission would have been contrary to the CRA's directives, which emphasized the importance of the telephone line and the Internet; appointments were to be made only when necessary.

45 In the investigation report, the grievor was alleged to have accessed JM's file, as well as the relatives' accounts, TM, SP, MO, and JB. JM was registered as an authorized representative of SP and MO. No power of attorney appeared in TM or JB's files, and for that reason, it was alleged that the grievor made unauthorized disclosures.

46 It was alleged that the grievor accessed the accounts of ML, PJ, CJ, and KO without authorization. Finally, it was alleged that he gave them preferential treatment, "[translation] … therefore enabling them to circumvent the service channels normally

available to taxpayers …".

47 The grievor was alleged to have accessed accounts without authorization. It must be understood that in the employer's mind, any access to an account other than by telephone, by Internet, or by appointment made by a central office was no longer authorized, since taxpayers were now supposed to access their files by those methods alone. The grievor accessed accounts at the express request of his colleagues or former colleagues, following a procedure that had become contrary to the employer's directives but that had not been contrary for a good part of his employment. The grievor provided the following explanations for each allegation in the investigation report.

48 In the past, the grievor had often helped JM consult her tax file and those of her relatives, which the accesses in 2005-2008 confirm; he was not faulted for making them. At that time, making them was part of his ordinary workload, when employees typically asked counter officers to access their files to verify the account, change an address, obtain a T4, etc.

49 At the hearing, the grievor explained that JM prepared her relatives' income tax returns, including those of her mother, TM; her son and daughter-in-law, SP and MO; and her ex-spouse, JB. Since she had prepared an income tax return, when she asked for information about a file, whether it was a notice or information on a refund, the grievor did not think he was disclosing anything, since she was aware of the return. In fact, she was the registered representative of her son and her daughter-in-law.

50 Between 2009 and 2011, the grievor continued to respond to JM's information requests. He asked her for a power of attorney for her mother and her ex-spouse. She was slow to obtain the one for her mother and to register it in the file. The grievor testified that he had asked for the power of attorney several times. That said, since JM had completed her mother's income tax return, he did not think he was disclosing anything unauthorized when she asked for information on the state of the account.

51 As for the ex-spouse, JB, the grievor expressed his regrets at the hearing. JB had been out of the country for work and had been hard to reach. JM had requested that the grievor make a change of address. When he told her that he needed a power of attorney, JM responded that her ex-spouse could not be reached. In the context of the

investigation, JB said that he had not spoken to anyone at the counter "[translation] … and that it was more likely that he had asked JM to have his address changed …".

52 PJ had been the grievor's colleague. He called the grievor because his wife, CJ, had just received a letter from the CRA that she did not understand. He wanted the grievor to interpret it, which, once again, would have been part of his duties in the past.

53 First, the grievor told PJ to call the 1-800 number. PJ said that the explanations it provided were incomprehensible and reiterated his request. The grievor then insisted on speaking with PJ's wife, CJ, to be certain that she consented to him accessing her account to try to understand the letter. She gave verbal consent. The grievor opened the account to read the letter and was able to offer an explanation. He is alleged to have made an unauthorized access and to have given preferential treatment to an acquaintance.

54 As for ML, who again was a former colleague, the grievor was certainly not inclined to provide her with preferential treatment because they had had several conflicts when they were colleagues. ML called him for an answer to a question about her file. She expected immediate service, since she would have proceeded that way, properly, when she was an employee.

55 The grievor told her that she had to go through the 1-800 number. She was not satisfied with that service, and she began to harass him by phone for an answer to her question. He testified that he could not be remorseful for finally giving in to ML's request since it was a matter of his psychological health.

56 For KO, once again, the allegations were of unauthorized access and preferential treatment. The grievor had sympathized with her while she was at the TSO because she had been a colleague who was young. She left to pursue other projects. After a few years, her tax file was in serious need of updating and correcting. The problem was that she could not provide the information required to identify her and to access the file through the 1-800 number. Generally, an address and other information are used to establish identity. Because she could not retrace the many houses where she had resided during a somewhat disorganized bohemian life, she had been unable to identify herself to the satisfaction of the agents working the 1-800 number. In desperation, she called the grievor, who had no trouble identifying her. He took the

necessary steps to ensure that her file could be settled, including making the unauthorized access.

57 The grievor explained why he refused to express remorse at the disciplinary meeting. As a long-time union representative, he knew very well what was expected of him, i.e., expressing remorse. However, he could not admit that helping colleagues was a wrongdoing against the employer since it had been a significant part of his duties for a long time. At the hearing, he stated that he regretted that he had not insisted more on obtaining the power of attorney for JM's ex-spouse, and he was prepared to admit that he should have noted oral permission in the system more often, as PJ's wife had provided. He still finds that the discipline imposed was unfair and exaggerated.

III. Summary of the arguments

A. For the employer

58 The employer proved that unauthorized accesses and disclosures occurred. The grievor knew the new rules, since in his testimony, he stated several times that he first referred colleagues and former colleagues to the 1-800 number.

59 There is no evidence of the employer's tacit condonation. The grievor breached the rules that he knew of and never showed remorse, despite the door that Mr. Donati opened at the disciplinary hearing.

60 The employer referred me to *Campbell v. Canada Revenue Agency*, 2016 PSLREB 66. In that decision, the grievor, Mr. Campbell, had been dismissed after 33 years of service for actions that appear quite similar to those of the grievor — unauthorized accesses of files and preferential treatment for parents, friends, and acquaintances, with no economic advantage to Mr. Campbell. I will come back to that case in my analysis.

B. For the grievor

61 The grievor points out that it is important to take mitigating factors into account, notably the circumstances surrounding the misconduct.

62 The employer characterizes as unauthorized access something that was condoned for a long time. In the note to employees in 2011 for the income tax return

season, they were told to use the 1-800 number or the website, but it was also stated that if necessary, "[translation] … an appointment may be obtained with an officer at a TSO near you …". Until 2012, appointments could be obtained at the counter, even if the employer encouraged using the 1-800 number to make them.

63 The grievor referred to the following passage from *Chopra v. Canada (Attorney General)*, 2014 FC 246, to argue that the employer could not punish conduct that had been condoned for a long time:

…

> *[109] … Briefly stated, the principle of condonation requires an employer to decide whether or not to discipline an employee when it becomes aware of undesirable employee conduct. The failure of the employer to do so in a timely manner can constitute condonation of the employee misconduct.*
>
> *[110] That is, a long delay in imposing discipline may entitle an employee to assume that their conduct has been condoned by their employer where no other warning or notice is given. Once behaviour has been condoned, the employer may not then rely on that same conduct to justify discipline. Allowing employees to believe that their behaviour has been tolerated, thereby lulling them into a false sense of security, only to punish them later is unfair to employees:* McIntyre v. Hockin, *[1889] O.J. No. 36 (C.A.), at paras. 13 and 16,* Miller v. Treasury Board (Department of National Defence), *[1983] C.P.S.S.R.B. No. 22, at p. 13.*

…

64 Some of the grievor's colleagues and supervisors who could have confirmed the employer's condonation were not interviewed in the context of the investigation. The employer's witnesses had not been nearby when the grievor carried out his actions. He followed the directive to refer his colleagues and former colleagues to the 1-800 number. The problem was the subsequent appointment. For a long time, the Québec TSO condoned appointments being made at the counter. As the 2011 note confirms, even if a central office made an appointment, it would have been with someone at the counter. All the testimonies agree that the profound changes to how taxpayer requests were answered were not implemented overnight.

65 In the investigation report, Ms. Guay states that until October 2012, the employees planned the appointments in the time slots. However, the grievor did not

access his colleagues' files after that date.

66 The Investigator's report is black and white because she could not have known the details of the counter procedure. Accordingly, she characterizes the grievor's access as unauthorized, which was based only on the presence or absence of an appointment made in accordance with the CRA's rules, i.e., an appointment made by the central office. However, those rules are not entirely implemented, according to Ms. Guay's testimony in the investigation.

67 As for the unauthorized disclosures, it is difficult to follow the employer's reasoning. The grievor did not disclose anything, since those to whom he gave the information already had knowledge of the files — JM, for the people she prepared income tax returns for; PJ, for the letter addressed to his wife, CJ, who expressly authorized the grievor to explain the letter to her husband.

68 The grievor was well aware of the 1-800 number and referred his colleagues to it. The problem was what came next. What happened if the 1-800 agent did not answer the question? The solution was an appointment. Therefore, everything turns on how appointments were made rather than on unauthorized accesses or disclosures. It is clear that the grievor considered his colleagues part of his workload, as in the past, if the 1-800 number was not sufficient. When Ms. Foster clearly stated the expectations, he stopped carrying out searches for his colleagues.

IV. Analysis

69 The jurisprudence has long established that discipline referred to adjudication must be assessed based on these three questions: Did the grievor's behaviour justify the employer imposing discipline? If so, was the discipline excessive? If not, what alternative just and equitable measure should be substituted? (See *Basra v. Canada (Attorney General)*, 2010 FCA 24 at paras. 24 and 25.)

70 All the witnesses agreed that the transition in the services offered to taxpayers was difficult, if not painful, for client service officers. It was painful for them to move from a service in which they responded directly to clients to an impersonal service in which a machine (a telephone or computer) was placed between officers and taxpayers. The employer's witnesses confirmed that it took several years and several reminders, not only at the Québec TSO and not only for the grievor, before the

directives were followed perfectly.

71 In this case, it is surprising that that understanding, which was obvious to the employer's witnesses, was not reflected in how the grievor was treated. The employer certainly has the right to impose discipline to correct conduct, but the grievor had ceased his conduct before the official investigation began. There was nothing to correct. The employer can also impose discipline even if conduct has stopped, to indicate its disapproval. In any event, the situation must be considered as a whole.

72 The first question states: Did the grievor's behaviour justify the employer imposing discipline? The grievor testified that he felt trapped between the new directives and his colleagues' requests. For some time, he continued to offer the service he had always offered, believing that management would condone it to some extent.

73 Having heard Ms. Foster and Mr. Donati, despite the role that they played in the disciplinary process, I do not think that that belief was unfounded. Mr. Donati testified that he had to impose the group 5 sanction once the "unauthorized accesses" and "unauthorized disclosures" were proved. He was visibly uncomfortable with punishing someone who essentially failed to comply quickly enough with the impersonal service directives, as indicated by his hope that the grievor would show the expected remorse, so that he could reduce the sanction.

74 The grievor's testimony on the condonation for impromptu appointments with colleagues seems credible to me. He spoke of a tacit understanding with Mr. Boutin, who did not testify. According to the report, Mr. Boutin said during the investigation that he had not assigned the grievor to respond to his colleagues' tax questions "[translation] … since the directive intended for employees who wanted to obtain information in their income tax files stated that they had to consult My Account or call the call centre like any other taxpayer …". Once again, Mr. Boutin was not examined or cross-examined at the hearing about a tacit understanding. I have only the grievor's testimony on that point. The grievor testified frankly, without hesitation, and the tacit condonation seems more than plausible to me.

75 If there was misconduct, I do not think that it is properly characterized in the investigation report. I accept the grievor's explanations for the "unauthorized

accesses", and I consider that the employer did not prove that the accesses were unauthorized because they were done in good faith, in accordance with rules that had once been valid. As for the "unauthorized disclosures", the grievor admitted that he had not been insistent enough about having TM's and JB's powers of attorney, with respect to the disclosures to JM. However, JM prepared the income tax returns, such that it is difficult to see it as a disclosure, given that the information was already known. The unauthorized disclosure also involved the fact that CJ's letter was discussed with her husband, PJ. I believe the grievor when he states that he obtained CJ's verbal permission; his error is that he failed to indicate it in the electronic file.

76 With respect to the preferential treatment, the distinction is whether an appointment was made. The evidence from the investigation on this point is rather unclear, since according to Ms. Guay (who was interviewed in the context of the investigation), the counter employees could schedule appointments in the time slots, but as of October 2012, only the team leader could make appointments. Apparently, Ms. Foster was adamant from the time of her arrival in January 2011 that the counter employees could not handle their colleagues' files. I accept the grievor's testimony that this message was not clearly conveyed to him until October 2012 and that he then completely stopped doing it.

77 That leaves the preferential treatment given to former employees, which, according to the employer, was a free pass for acquaintances. The grievor testified about the extent to which he was careful not to help his neighbours, acquaintances, or family. Given the context of the help that he provided to former colleagues, I truly think that he indeed perceived them as colleagues whom he had already helped and not as friends or relatives. The so-called preferential treatment was the treatment that he was accustomed to giving to his colleagues and that he believed was still condoned.

78 I leave it to the grievor to delineate his misconduct, because I agree with his assessment of it: he clearly criticized himself for the lack of power of attorney in JB's case, and he was prepared to recognize that JM took too long with her mother's power of attorney. He also stated that he was not thorough enough in noting verbal permissions in the electronic file.

79 I find that discipline was justified for failing to comply with the power-of-attorney procedures. For the other impugned acts, I accept the grievor's evidence that

there was a certain condonation by the employer in the context of a difficult transition. The directives were issued; however, they were somewhat contradictory in that employees had to use "normal channels" but could make an appointment for a colleague at the counter. To me, the slide seems almost inevitable.

80 Still to be determined is whether the imposed measure was excessive. In my opinion, it was. It punished conduct that had stopped. The conduct, i.e., accessing information and disclosing it in the context of helping colleagues, was not wrongful for the duration of the grievor's employment. It gradually became that way. When he clearly understood the employer's expectations, he obeyed. He did not harm the CRA's reputation or the confidential information entrusted to him. The taxpayers at issue were not harmed.

81 The grievor's opinion was that for the wrongdoings that he acknowledged, he deserved a five-day suspension. He did not explain how he arrived at that number, but as a union representative, he has extensive experience with employer sanctions.

82 The CRA's *Discipline Policy - Procedures for Addressing Employee Misconduct* includes a table of suggested discipline. The seriousness of the misconduct is classified into 5 groups, and the sanctions are scaled accordingly. It was shown that "unauthorized disclosure" carries a minimum sanction of 20 days. "Unauthorized access" carries a minimum sanction of 5 days. It is stated that the ranges of suggested sanctions (e.g., group 4, 5 to 30 days; and group 5, 20 days to termination) are not mandatory and may be adjusted according to circumstances. A 5-day suspension is common to the ranges of groups 1 to 4. Although I am not bound by this policy, a 5-day suspension seems fair to me to indicate the employer's disapproval without unduly punishing the grievor.

83 In *Campbell*, cited by the employer, the Board upheld a dismissal for misconduct that could seem similar. However, in *Campbell*, it was clear that Mr. Campbell consulted files that had never been part of his workload for the benefit of parents, friends, and acquaintances, which is strictly prohibited by the CRA's code of conduct. The evidence at the hearing clearly established that Mr. Campbell had breached the code of conduct. The Adjudicator summarized the misconduct as follows at paragraph 28:

> *… Among other things, this code of conduct prohibits staff from accessing their own files. It also prohibits employees from helping family, friends, or acquaintances. If an employee is assigned a file of someone he or she knows or is related to, he or she is supposed to immediately report it to his or her supervisor.*

84 The grievor insisted on the fact that he was a stickler for the files of parents, friends, or acquaintances, which was not contradicted. He went as far as refusing a file if the address placed the taxpayer on his street. The facts alleged against him, which gave rise to the contested discipline, were related to a work method that at one time had been expressly authorized by the employer, i.e., consulting tax files for colleagues. I also believe the grievor's statement that the impugned conduct stopped completely after a clear reminder.

85 Mitigating factors like the number of years of service or the absence of prior discipline are generally referred to when analyzing the adequacy of discipline. In the suspension letter, Mr. Donati states that he took them into account. The employer perceived as absent the other factor often looked for, remorse, but I find that it was certainly expressed at the hearing. (Aggravating factors are not at issue in this case.) Whatever the case, my analysis of the proportional nature of the discipline is concerned more with my assessment of the seriousness of the alleged acts.

86 I considered the proportionality of the sanction imposed on the grievor from the perspective of the work procedure transition. The discipline was excessive. The grievor's proposal seems reasonable to me, considering in particular the following facts: he acknowledged his mistakes, he completely ceased the impugned conduct, and he acted honestly at all times.

87 For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

88 The grievance is allowed in part.

89 A 5-day suspension is substituted for the 30-day suspension. The grievor is entitled to the reimbursement of his salary and to the pension calculated for the 25 days, which will be returned to him.

90 Simple interest calculated yearly at the applicable Canada Savings Bond rate must be added to the salary payable for the period from April 9, 2014, to the date of this decision.

November 6, 2018.

FPSLREB Translation

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board