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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

SUKHBIR JASSAR

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Jassar v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: James Baugh, counsel

For the Employer: Caroline Engmann, counsel

Heard at Vancouver, British Columbia,
October 24 to 27, and November 28 to December 1, 2017,
and April 4 to 6 and July 30 and 31, 2018.
Rebuttal argument heard by teleconference on August 13, 2018.
Supplemental written submissions filed on February 22 and March 4, 2019.

I. Introduction

[1] The grievor, Sukhbir Jassar, was an information technology (IT) infrastructure support analyst (classified CS-01). He worked at the Surrey Tax Centre, in the IT Branch, Pacific Region, of the Canada Revenue Agency (CRA, "the Agency", or "the employer") until he was terminated on September 27, 2013.

[2] On May 16, 2013, the grievor grieved a 10-day suspension that had been imposed on him on April 29, 2013, to be served from May 1 to 14, 2013. The suspension letter reads as follows:

…

> *I have determined that on January 11, 2013* [*sic*] *you installed, connected and fully powered up a wireless router to the CRA network. This internet router remained connected for approximately 30 minutes. In doing so your jeopardized the integrity of the network by allowing the opportunity for external connections to be made, a violation of the Security for the Computing Environment Policy. In accordance with the CRA Discipline Policy I have determined that this represents an "*Unacceptable activity related to the CRA's electronic networks jeopardising [*sic*] its security*".*
>
> …
>
> *As such, in order to impress upon you the seriousness of your actions, you are hereby suspended without pay for a period of ten (10) days….*

…

[3] On September 6, 2013, the grievor grieved a 20-day suspension that had been imposed on him on August 1, 2013, to be served from August 2 to 30, 2013. The suspension letter reads as follows:

…

> *I have concluded that you falsely registered attendance on August 17, 2012, October 17, 2012, November 13, 2012, December 10, 2012 and January 4, 2013. You provided false information to obtain sick leave and medical/dental appointment leave, when in fact you were in attendance in court. Your actions constitute violations of the Canada Revenue Agency (CRA) Code of Ethics and Conduct and the Internal Fraud Control Policy.*

> *I have also concluded that you were on unauthorized absence from work by leaving the workplace to attend court while on duty without permission on September 19, 2012 and November 27, 2012. You failed to follow the established process for the approval of leave, as required under Article 14 of the Professional Institute of The Public Service of Canada (PIPSC) Collective Agreement and as outlined by the CRA Code of Ethics and Conduct.*
>
> …
>
> *In order to impress upon you the seriousness of your actions, you are hereby suspended without pay for a period of twenty (20) days….*
>
> …
>
> [*Sic* throughout]

[4] On October 9, 2013, the grievor grieved the revocation of his reliability status as well as his termination. The revocation and termination letter dated September 27, 2013, reads as follows:

> …
>
> *The confidence and trust that employees and businesses have in the Canada Revenue Agency (CRA) is a cornerstone of Canada's tax system of voluntary compliance and self-assessment. As a result, employees of the CRA are held to a high degree of trust….*
>
> *A letter and documentation was sent to you on May 21, 2013, to advise you that Allan Dorff, Regional Director, Information Technology Branch, had been made aware of adverse information brought forward against you, specifically with fear of injury/damage by another person, pursuant to section 810(1) of the Criminal Code, criminal charges related to an alias associated with you, violation of the CRA Monitoring of the Electronic Network's Usage Directive, violation of the CRA Security for the Computing Environment Policy, a criminal charge of disobeying a court order and willfully resisting or obstructing a peace officer, contravention of the CRA Code of Ethics and Conduct and the Internal Fraud Control Policy as it relates to submitting fraudulent leave, and failure to report charges to management which is a breach of the CRA Code of Ethics and Conduct. On July 2013, you participated in a Resolution of Doubt Interview as part of the review process of your reliability status with the Canada Revenue Agency.*
>
> *I have reviewed all relevant information … and found that in light of the adverse information at hand you should no*

> *longer have access to the CRA'S assets and information as you are deemed to be no longer reliable and trustworthy. This decision is based on CRA Management losing trust in you to be a reliable employee. This trust has been eroded through a pattern of behavior which does not represent Agency's core values, nor the integrity of being a CRA employee. You have consistently shown the inability to be truthful and have consistently breached or contravened CRA policy and directives. You have not shown any changed behavior, nor have you taken responsibility for your actions. I must thus revoke your Reliability Status effective immediately, pursuant to the Policy on Personnel Security Screening as outlined in Chapter 10 of the Security Volume in the Finance and Administration Manual….*
>
> *As outlined in the Agency's Policy on Personnel Security Screening and as per your most recent letter of offer dated May 9, 2001, the requirement to retain the required reliability status is a condition of employment and failure to retain this reliability status may affect you continuing employment.*
>
> *Therefore, I am hereby notifying you that effective September 27, 2013, your employment with the Agency is terminated for reasons other than breaches of discipline or misconduct in accordance with the authority delegated to me pursuant to Section 51 (1) (g) of the Canada Revenue Agency Act.*
>
> …
>
> [*Sic* throughout]

[5] The grievor referred his grievances to adjudication on February 27, 2015.

[6] The hearing of these matters was postponed twice, at the employer's request. The parties were not available for a rescheduled hearing before May 16, 2017.

[7] 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 Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) and the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) to, respectively, the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

[8] For ease of reading, in this decision, the word "Board" will be used to refer to the Public Service Labour Relations and Employment Board and the Federal Public Sector Labour Relations and Employment Board. Furthermore, the acronym "*FPSLRA*" will be used to refer to either the *Public Service Labour Relations Act* or the *Federal Public Sector Labour Relations Act*, depending on the circumstances.

[9] For the reasons that follow, I conclude that the 10- and 20-day suspensions were unjustified and excessive disciplinary actions. Therefore, the grievances against them are allowed.

[10] I also conclude that the conditions required to revoke the grievor's reliability status were absent at the time the decision to revoke it was made, that that decision was a disguised disciplinary action, and that the consequential termination of his employment constituted a contrived reliance on s. 51(1)(g) of the *Canada Revenue Agency Act* (S.C. 1999, c. 17; *CRAA*) (termination of employment for reasons other than discipline or misconduct), a sham, or a camouflage. In the alternative, I find that the disciplinary revocation of his reliability status, which resulted in his termination, was not for cause.

II. Background

[11] In July 2011, the Internal Affairs and Fraud Control Division ("Internal Affairs"), Security and Internal Affairs Directorate ("the Security Directorate"), Finance and Administration Branch, the Agency, was informed that the grievor might have had criminal charges laid against him. Online court documents revealed that in 2004, he had apparently been charged with fear of injury or damage by another person pursuant to s. 810(1) of the *Criminal Code* (R.S.C., 1985, c. C-46). In addition, Internal Affairs was informed that online court documents listed another name as an alias for the grievor. Internal Affairs noted that a further search for charges under that alias revealed that an additional two charges had been laid in 2003, for criminal harassment and fear of injury or damage by another person.

[12] Between July 2011 and April 2013, Internal Affairs collected information about the grievor. It then produced a report on April 8, 2013, stating that the information gathered during the investigation determined that over the years, he had violated one Agency directive, two of its policies, and its "Code of Ethics and Conduct".

[13] During the investigation, and until his termination, the grievor reiterated that no charge was laid against him in 2004. At that time, in the context of their separation, he and his ex-spouse were in the middle of a child custody and access dispute, and both had been required to sign a peace bond. The grievor reiterated that he did not have an alias, that he has never been convicted of any offence, and that he is sorry if, without knowing it, he had breached Agency directives or policies. He stated that he had not breached its Code of Ethics and Conduct.

[14] On August 21, 2013, the Agency completed a "Security Risk Assessment Report", which concluded that while the grievor had no criminal convictions, he had been charged with offences in the past and had shown remorse too late, and that management's trust in him had been breached. The report stated that "… he … has only shown remorse now during his Resolution of Doubt interview. This alone negatively impacts the Agency's reputation, and moving forward it cannot be explained why someone like this would be retained as an employee." Thus, it found that the security risk he posed was unacceptable and recommended that his reliability status be revoked.

[15] On September 27, 2013, the grievor was informed in writing of the investigation's results. He was also informed that his reliability status was being revoked immediately and that his employment with the Agency was terminated.

III. Preliminary matters

A. Timeliness of the 10-day suspension grievance

[16] The employer originally objected to the Board's jurisdiction to hear the 10-day suspension grievance since it considered this grievance untimely. It alleged that the grievance had been presented late at the third and final level of the grievance process.

[17] At the hearing, it was mentioned that the employer's second-level decision on the grievance was sent to an address for the grievor that he had since moved from.

[18] In the end, the employer withdrew its objection. Therefore, it is unnecessary for the Board to rule on it.

B. Request to call new witnesses

[19] A pre-hearing conference was held before the hearing, which started on May 16, 2017, and totalled 18 days over several sessions. During the conference, each party was invited to present its list of witnesses. As of the conference, the employer planned to call 10 witnesses to testify, and the grievor only 1, himself.

[20] Just before the start of the third week of the hearing, in November 2017, the employer sought leave to call an additional witness and requested that this witness be allowed to testify by videoconference. I accepted its requests. The witness testified by videoconference from Ottawa, Ontario, in November 2017. At that time, the hearing was being held in Vancouver, British Columbia.

[21] Once that witness finished testifying, the employer confirmed that it had completed presenting its evidence. It was the third week of the hearing, and as of then, the Board had heard the employer's 11 witnesses.

[22] In November 2017, before the grievor began presenting his evidence, the parties agreed to participate in a mediation session that I facilitated. The session was inconclusive, and it was agreed that the hearing would continue until the evidence was complete. Since the employer's evidence was closed and only the grievor's evidence remained, it was agreed that three days would be sufficient for him to present his evidence as he was the only one to testify in support of his position. The arguments were also to be presented during these three days.

[23] On the morning the hearing resumed in April 2018, the employer made a last-minute request to the Board. It requested that the Board hear a 12th witness, an employee of Shared Services Canada responsible for providing computer services to the Agency. The potential witness did not have direct knowledge of the facts in this case but would be invited, if authorized, to submit technical evidence for the purpose of commenting on a liasse of documents (Exhibit E-22) that the employer submitted and that details that the Agency's network captured a wireless router's (of the D-Link brand) signals on January 11, 2013. The additional testimony was to establish that that router was the one used, as will be discussed, in the employer's facility called the "Sunset Room" on the same date. The employer submitted that the testimony would simply clarify a technicality.

[24] The grievor had been advised only at midday of the day before of the employer's intention to call a new witness. He strongly opposed the request because (1) more than four months had elapsed since the conclusion of the third hearing week, during which the employer's evidence was closed; (2) in the last four months, the employer had not deigned to inform him of its intention to call a new witness; (3) the employer had taken the trouble to request a subpoena from the Board for this new witness seven days before the resumption of the hearing in April 2018 but had failed to notify him; and (4) if the Board granted the request, it was likely that he would have to ask for an adjournment, to present technical evidence in response to that last-minute testimony.

[25] The grievor pointed out that the Board must discourage any disregard for procedural fairness in its adjudication process. He argued that it was outrageous to attempt to present technical or expert evidence without notifying the other party or, so to speak, by ambush. He added that in the few hours that followed receiving the notice, he was unable to retain the services of an expert to help him better understand the technical evidence and to cross-examine the witness, if necessary. He called for the Board to protect parties appearing before it against another party's unfair and inappropriate practices.

[26] In support of his position, the grievor submitted two adjudication decisions, *Beaulne v. Public Service Alliance of Canada*, 2009 PSLRB 10; and *Barr and Flannery v. Treasury Board (Department of National Defence)*, 2006 PSLRB 85. In *Beaulne*, the adjudicator noted that allowing a party to present expert evidence that had not been shared with the other party until six days before the hearing would have run counter to the objective of procedural fairness. Thus, the adjudicator refused to hear the evidence.

[27] In *Barr and Flannery*, the adjudicator rejected expert evidence that the respondent wished to submit. The adjudicator could not admit it since the witness who was to present it did not possess the independence needed to testify as an expert. The witness was an employee of an agency under the respondent's control. The grievor in this case argued that the additional witness, who was a Shared Services Canada employee, also lacked the necessary independence to present technical evidence at the Agency's request.

[28] The employer replied that it was out of courtesy that it had informed the grievor of its intention to call the witness before the hearing and that it had not been required to because the witness was not an expert in the strict sense of the term.

[29] At the hearing, I dismissed the employer's request to present this evidence. I ruled that as in *Beaulne*, the new technical evidence would not be accepted because the employer had not provided proper notice to the grievor of its intention to adduce it, which amounted to a complete disregard for procedural fairness. I also noted that significant harm would be caused to the grievor if the hearing week in April 2018 had to be adjourned. I note that an adjournment would most likely have been required to allow the grievor to find someone with technical computer network expertise to provide counter-expertise to that new testimony. And at that time, in April 2018, four-and-a-half years had already elapsed since his termination.

[30] However, I suggested to the parties that they take a moment to discuss the matter. I suggested that the employer make use of the opportunity to describe to the grievor the technical nature of the evidence it wished to adduce. It had mentioned that the technical proof it wanted to present was not very complicated. I added that if the grievor had no objection to it being presented, I would allow the employer's new witness to testify.

[31] The parties took a moment. When they returned to the hearing room, they informed me that they had not agreed on the issue. The employer's witness did not testify. Thus, the employer asked me to document my ruling in this decision, to allow the Agency to seek judicial review of it.

C. <u>Request to present rebuttal evidence</u>

[32] Once the grievor finished testifying in April 2018, the employer requested leave to present rebuttal evidence. It asked for permission to call the witness from Shared Services Canada whose testimony had been denied two days earlier. It explained that if there was any doubt about the origin of the router captured by the Agency's network on January 11, 2013, then that person's testimony was necessary.

[33] However, the grievor confirmed that he did not dispute that the router referred to in this decision had been connected to the Agency's network. It is a fact that the Agency's network captured the signals of the router in question. What is not known is

how long it was connected. In the circumstances, the employer acknowledged that the additional witness's testimony was not necessary.

D. Claim of privilege relating to human resources advice to management

[34] At the hearing, the employer objected to the admissibility of documentation with human resources advice to management, alleging that it contained privileged communications between a labour relations advisor and a client.

[35] At law, some privileges are class privileges (i.e., solicitor-client privilege), while others are determined on a case-by-case basis according to what is known as the *Wigmore* test (see *Zhang v. Treasury Board (Privy Council Office)*, 2010 PSLRB 46). A class privilege for labour relations communications, on par with solicitor-client privilege, does not exist.

[36] However, those communications can still be considered privileged if the four conditions of the *Wigmore* test are satisfied. Two of those conditions are (1) that the communications originated in a confidence that they would not be disclosed, and (2) that that confidentiality is essential to the full and satisfactory maintenance of the relation between the parties.

[37] With respect to these conditions, a sign of privilege is that the element of confidentiality has been preserved. In this case, the grievor obtained the documents at issue pursuant to an access-to-information request. Thus, the element of confidentiality was not preserved. Therefore, I rejected the objection and accepted the documents, given their relevance.

E. Objection to jurisdiction relating to the revocation of reliability status and termination

[38] The revocation of the grievor's reliability status occurred on September 27, 2013. His employment was terminated on the same date, allegedly for reasons other than discipline. The letter of that date provided to him included the following passage:

…

> *… I must thus revoke your Reliability Status effective immediately, pursuant to the Policy on Personnel Security Screening as outlined in Chapter 10 of the Security Volume in the Finance and Administration Manual….*

> *As outlined in the Agency's Policy on Personnel Security Screening and as per your most recent letter of offer dated May 9, 2001, the requirement to retain the required reliability status is a condition of employment and failure to retain this reliability status may affect you continuing employment.*
>
> *Therefore, I am hereby notifying you that effective September 27, 2013, your employment with the Agency is terminated for reasons other than breaches of discipline or misconduct in accordance with the authority delegated to me pursuant to Section 51 (1) (g) of the Canada Revenue Agency Act.*
>
> …

[39] Section 51(1)(g) of the *CRAA* (termination of employment for reasons other than discipline or misconduct) provides as follows:

> ***51 (1)*** *The Agency may, in the exercise of its responsibilities in relation to human resources management,*
>
> …
>
> ***(g)*** *provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part.…*

[40] The decision to terminate the grievor's employment was allegedly made on the basis that the employer had legitimate concerns with the risk he represented to it.

[41] On October 9, 2013, the grievor filed grievances against both the revocation of his reliability status and the termination of his employment. The grievances were worded as follows:

> [Revocation-of-reliability-status grievance:]
>
> *The employer sent me letter dated September 27, 2013 (which I received on October 2, 2013) advising me of its decision to revoke my Reliability Status. The employer decision is disguised discipline and was tainted by procedural unfairness. Therefore, I grieve.*
>
> [Termination grievance:]

> *The employer sent me letter dated September 27, 2013 (which I received on October 2, 2013) advising me of its decision to terminate my employment "for reasons other than breaches of discipline or misconduct". The employer's decision to terminate my employment is disguised discipline. Therefore I grieve.*
>
> [*Sic* throughout]

[42] The grievances were referred to adjudication on February 27, 2015, under s. 209(1)(b) of the *FPSLRA* (disciplinary action resulting in termination). As a corrective measure, the grievor seeks that he be reinstated without loss of pay or benefits and that all references to the employer's action to terminate his employment be expunged from his employee records. He precisely requested the following relief with respect to these files:

> [Revocation-of-reliability-status grievance:]
>
> *The employer rescind its decision and reinstate my Reliability Status.*
>
> …
>
> [Termination grievance:]
>
> *①That I be reinstated to my position as an IT infrastructure support Analyst;*
>
> *②That I be paid all wages and benefits lost as a result of employer's* [*sic*] *action;*
>
> ③*That all references to the employer's action to terminate my employment be expunged;*
>
> ④*That I be made whole in every way.*
>
> …

[43] The employer submits that it had legitimate concerns with respect to the risk the grievor represented to it, which led to the revocation decision. It claims that his employment was terminated as he no longer met the minimum conditions of employment. Therefore, it maintains that I do not have jurisdiction over his termination as it resulted from the revocation of his reliability status, which, it alleges, was not disciplinary.

[44] At the hearing, the employer conceded that there is no longer any doubt that, following the Federal Court of Appeal's decision in *Canada (Attorney General) v. Heyser*, 2017 FCA 113, the Board has jurisdiction to deal with a termination resulting from a revocation of reliability status (see *Bétournay v. Canada Revenue Agency*, 2017 FPSLREB 37 at para. 61).

[45] In *Heyser*, at para. 75, the Federal Court of Appeal ruled that the Board has jurisdiction under the *FPSLRA* at ss. 209(1)(b) (disciplinary action resulting in termination) and (c) (in the core public administration, termination for reasons other than discipline) over a termination in the core public administration, whether it resulted from disciplinary action, unsatisfactory performance, or any other reason that did not relate to a breach of discipline or misconduct.

[46] However, s. 209(1)(c) of the *FPSLRA* (in the core public administration, termination for reasons other than discipline) applies only to the core public administration, which, pursuant to s. 2(1) of the *FPSLRA*, does not include separate agencies listed in Schedule V to the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*). The employer is a separate agency listed in Schedule V to the *FAA*, and the termination of the grievor's employment was allegedly made under s. 51(1)(g) of the *CRAA* (termination for reasons other than discipline).

[47] On the other hand, does s. 209(1)(d) of the *FPSLRA* (at a designated separate agency, termination for reasons other than discipline), which applies to separate agencies listed in Schedule V to the *FAA*, apply in this case? It reads as follows:

> ***209 (1)*** *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> …
>
> ***(d)*** *in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*

[48] For its part, s. 209(3) reads as follows:

> ***209 (3)*** *The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).*

[49] The answer is that it does not because when the grievor filed grievances against both the revocation of his reliability status and the termination of his employment, on October 9, 2013, and when he referred them to adjudication, on February 27, 2015, the Agency had not yet been designated by an Order in Council under s. 209(3) of the *FPSLRA* for the purposes of s. 209(1)(d) of the *FPSLRA*. It was so designated later, on May 28, 2015 (in SOR/2015-118).

[50] As such, at the time the grievances against both the revocation of his reliability status and the termination of his employment were referred to adjudication, the only recourse available to the grievor under the *FPSLRA* was that under s. 209(1)(b) (disciplinary action resulting in termination). The question under s. 209(1)(b) is whether the decision to revoke his reliability status was a disciplinary action that resulted in termination.

[51] The Agency maintains that the revocation was an administrative and not a disciplinary measure. It alleged that it revoked his reliability status because it could no longer trust the grievor. According to the employer, this analysis was separate from the disciplinary process.

[52] In other words, the employer argues that the Board does not have jurisdiction to hear this matter on the ground that as a result of the revocation of his reliability status, the grievor no longer met the conditions of his employment. According to the employer, if I am satisfied that he no longer met those conditions, I must conclude that it had cause for terminating him under s. 51(1)(g) of the *CRAA* (termination for reasons other than discipline or misconduct).

[53] Thus, according to the employer, revoking an employee's reliability status is an administrative decision, and it is not open to an adjudicator to examine the merits of such a decision unless it is found to have constituted disguised discipline.

[54] According to the employer, only if its decision to revoke the grievor's reliability status was a disciplinary action resulting in termination would its nature qualify it as an appropriate matter for a reference to adjudication under s. 209(1)(b) of the *FPSLRA* (disciplinary action resulting in termination).

[55] The grievor submits that his reliability status was revoked on the ground that he had risked the Agency's reputation. However, risking that reputation constitutes grounds for discipline under the Agency's Code of Ethics and Conduct. He submits that the revocation and his termination were disguised disciplinary actions.

[56] The grievor further submits that regardless of whether the employer's concerns genuinely related to his reliability as an employee and therefore his entitlement to reliability status, the employer's primary concern was always with disciplinary matters. All the grounds it relied on in revoking his reliability status were based on matters for which he had already been disciplined or for which he could have been disciplined under the Agency's "Discipline Policy".

[57] Therefore, the grievor's position is that he is entitled to have the reasons for his termination reviewed under the just-cause standard; see *Bergey v. Canada (Attorney General)*, 2017 FCA 30 at paras. 77 to 81 and 83. The revocation of his reliability status and the ensuing termination of his employment on that basis were disguised and unjust disciplinary actions (see *Heyser v. Deputy Head (Department of Employment and Social Development)*, 2015 PSLREB 70 (upheld in 2017 FCA 113); and *Féthière v. Deputy Head (Royal Canadian Mounted Police)*, 2016 PSLREB 16 (upheld in 2017 FAC 66)).

[58] The parties agreed that they would proceed with the evidence on the merits and that the employer's objection would be addressed more fully in argument.

[59] Thus, I will examine all the evidence to establish whether it is more likely than not that the revocation of the grievor's reliability status was a disciplinary action resulting in termination.

IV. Issues

[60] The Board must decide the following three issues:

- Did the employer have cause for imposing a disciplinary action in relation to the router incident? If so, was the 10-day suspension excessive? If so, what would have been appropriate in the circumstances?

- Did the employer have cause for imposing a disciplinary action in relation to the grievor's leave usage and attendance registration? If so,

was the 20-day suspension excessive? If so, what would have been appropriate in the circumstances?

- Was the revocation of the grievor's reliability status a disciplinary action resulting in termination? If so, did the employer have cause for imposing a disciplinary action in relation to the events to which the revocation and termination letter referred? If so, was the revocation of his reliability status, which resulted in his termination, excessive? If so, what would have been appropriate in the circumstances?

V. Evidence and findings of facts

A. Inappropriate email incident leading to a one-day suspension

1. Evidence

[61] Before the grievor's employment was terminated, Isha Singh, Investigations Analyst, Internal Affairs, the Agency, investigated an event involving him that took place on December 21, 2012.

[62] Ms. Singh and Filomena Accettura, who from 2011 to 2013 was Assistant Director, Zone 3, IT Branch, Client Computing Services Directorate, Pacific Deskside IT Support, the Agency, testified on the employer's behalf on this issue. The grievor testified on his own behalf.

[63] On December 21, 2012, the grievor sent an email from a co-worker's computer to another co-worker because his co-worker's computer had been left unlocked. He thought it would be a funny way to teach his co-worker a lesson. It was meant only as a joke. The subject of the email was, "What you [*sic*] doing this weekend". The email read as follows: "I have the house to my self [*sic*] you want to come".

[64] Ms. Accettura and Allan Dorff, Regional Director, IT Branch, Client Computing Services Directorate, Pacific Deskside IT Support, the Agency (in 2012 and 2013), heard about this incident, and he instructed her to launch an investigation into it. When she met with the grievor, he explained that it had been a prank.

[65] Ms. Accettura asked Mathew George, Team Leader at the Surrey Tax Centre, in the IT Branch, Pacific Region, the Agency, who was responsible for the unit in which

the grievor worked, to prepare notes of conversations he had about the incident with the grievor and the co-worker from whose computer the email was sent.

[66] In his email to her dated January 8, 2013, Mr. George mentioned that the grievor had said that he had just been joking, that he had been being funny, and that he had had no malicious intent. The co-worker from whose computer the email was sent had said that although sending the email had been inappropriate, he did not intend for it to go beyond Mr. George as he just wanted him to speak to the grievor and explain to him that it had been inappropriate.

[67] On January 9, 2013, Mr. Dorff informed Ms. Singh of what he called "… an incident involving the [grievor] where he went to other employees' unlocked workstations and sent emails from their computers …." Ms. Singh further noted, "… [Mr. Dorff] was also seeking advice on what to do with [the grievor] as their history is quite 'bumpy' …."

[68] In an email dated January 11, 2013, Ms. Accettura informed Paul Cultum, Labour Relations Advisor, Human Resources, Pacific Region of the Agency that she had consulted Mr. George. He had reported to her that sending inappropriate emails from co-workers' computers had happened before in the office. In particular, he reported that it had happened many times and that in fact, he had done it at one time too "… because that was the culture of IT. We like to play tricks on each other and catch the others [*sic*] mistakes especially if you leave your computer unlocked you are fair game."

[69] However, Ms. Accettura said that pursuant to the Agency's harassment training, the expectation was that sending inappropriate emails from co-workers' computers should not occur again.

[70] On January 21, 2013, Ms. Accettura informed Ms. Singh that she had revoked the grievor's access rights to the network due to the email incident.

[71] Ms. Accettura completed an investigation report on February 15, 2013. She concluded that on December 21, 2012, the grievor contravened the Agency's "Electronics Network Policy Guidelines". She did not conclude that he had contravened any Agency harassment policy.

[72] The grievor attended a disciplinary hearing on February 26, 2013, on this incident. Furthermore, on April 8, 2013, and with respect to this matter, Internal Affairs concluded that he had breached the "Electronic Networks' Usage Directive". Its report read in part as follows:

…

> ***Security Breaches***
>
> *December 21, 2012,* [an] *IT Infrastructure Support Analyst, received an email from* [a co-worker], *in which the subject read: "What you doing this weekend?" followed by "I have the house to my self you want to come".* [The IT Infrastructure Support Analyst] *informed management that Mr. Jassar sent the email from* [the co-worker]*'s desktop. When management met with Mr. Jassar, he reported that it was a prank, and that he did it to teach* [the co-worker] *a lesson about leaving his computer unlocked. Furthermore, when management met with* [the co-worker] *to discuss the incident, he indicated that Mr. Jassar had done this on another occasion, but he had not reported it.*
>
> …
>
> ***Conclusion***
>
> *The information gathered during the investigation determined that Mr. Jassar's use of* [the co-worker's] *email account to send* [the IT Infrastructure Support Analyst] *an email, using another user's network account, was a violation of the Monitoring of the Electronic Networks' Usage Directive.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[73] Ms. Accettura then issued a one-day suspension letter to the grievor on April 29, 2013, to be served on April 30, 2013, in which she stated that he had violated the "Monitoring of the Electronic Networks' Usage Directive". Again, she did not allege that he had contravened any Agency harassment policy. The one-day suspension letter, dated April 29, 2013, indicated that "… should there be any further acts of misconduct, you may be subject to more severe disciplinary measures up to and including termination of your employment with the CRA."

[74] The grievor did not grieve the one-day suspension. However, his reliability status was revoked, in part, because the employer maintained that he had breached that directive and its Code of Ethics and Conduct.

2. Findings of fact

[75] The grievor accepted responsibility for his action of sending a prank email using a co-worker's computer.

[76] The evidence shows that sending emails from co-worker's computers was part of the IT culture, that the grievor's team leader had done it himself, and that the other employees in the grievor's work area liked "… to play tricks on each other and catch the others [*sic*] mistakes especially if you leave your computer unlocked you are fair game." While the employer provided harassment training and expected that such pranks would no longer take place, similar incidents had happened at times, apparently with the team leader's condonation.

[77] I note that the employer presented no evidence and offered no explanation about why the content of the email at issue might constitute harassment. Therefore, I find that any allegation about the potentially harassing content of the email has no foundation. The only remaining issue with respect to the email relates to the grievor having sent it from a co-worker's station, regardless of its content.

B. The router incident that led to the 10-day suspension

1. Evidence

[78] The following people testified for the employer about the router incident: Ms. Singh; Gerry Schreiber, Team Leader, Surrey Tax Centre; Eugene Kruper, Senior IT Infrastructure Support Analyst at the Surrey Tax Centre, in the IT Branch, Pacific Region, the Agency; Ms. Accettura; and Kenneth Robinson, Senior Technical Specialist, IT Protection Centre, Financial Portfolio for the CRA, Shared Services Canada.

[79] Marc Butler, who in 2013 was Director General, Client Computing Services Directorate, IT Branch, the Agency; Mr. Dorff; and Jason Hugh, who was then Acting Assistant Director, Security Services, Pacific Region, the Agency, also testified for the employer about the risk that the router incident caused to the Agency.

[80] The grievor testified on his own behalf.

[81] Mr. Schreiber testified that on January 11, 2013, he needed to have laptops set up to train new staff. As he knew that the network switch that was necessary to connect the laptops was not available in his division, he obtained a similar device from an Agency regional office where a relative worked. However, it was not a switch but a wireless router. Mr. Kruper later described it as a "consumer-grade wireless router".

[82] The router was to be set up in the Sunset Room at the Agency's Surrey location, where the grievor worked. The request for assistance was forwarded to him for action.

[83] At close to 2:00 p.m. on January 11, 2013, Mr. Schreiber met the grievor in the Sunset Room, gave him the router, and asked him to set up four laptops there.

[84] Later on, Mr. Schreiber wrote in a note requested by Ms. Accettura that when the grievor took the router out of the box, he looked at it and advised Mr. Schreiber that he did not think it was going to work. He tried to set up the laptops and did some wiring. He then gave Mr. Schreiber one laptop to login to, which he was unable to do. The grievor then left. He went to ask Mr. Kruper if there was an extra network switch that he could use instead of the router provided by Mr. Schreiber. Mr. Schreiber noted the following in his note to Ms. Accettura dated January 15, 2013:

…

> *Friday afternoon, sometime close to 2, I met IT in the sunset room and gave them the box from region. Sukh took the router, looked at it and advised he didn't think it was going to work. He continued to set up the laptops and some wiring as well, gave me one to log into and then went and got Gene. I wasn't involved in any of the set-up* [*sic*] *other than delivering the router and logging into a laptop. I can't say what was or wasn't hooked up.*
>
> *Sukh did say he thought it was the wrong thing, so I don't think he used it as he went to get someone to see if there was something he could use instead.*

[85] At the hearing, the grievor explained that when he opened the box Mr. Schreiber had given him, he told Mr. Schreiber that they needed a switch, not a router. He told Mr. Schreiber that it would not work. However, Mr. Schreiber believed the router could be used because his downtown co-workers used one. The grievor showed him that it was not the right device for what he needed to do. While talking with him, he started

preparing the setup but explained to Mr. Schreiber that it was not possible to use the router, so he did not complete the task. He does not recall turning on the router. Once Mr. Schreiber understood that the router was unusable in this setting, the grievor left the Sunset Room to find some assistance, which he sought from Mr. Kruper.

[86] The grievor also remembers that extra cables were in the Sunset Room for the four laptops. He does not think that Mr. Schreiber touched anything while he was gone.

[87] As will be seen later in this decision, the router was turned on and was connected to the Agency's network for a few minutes.

[88] When the grievor informed Mr. Kruper that he had been provided with a router, Mr. Kruper knew that it was not the right device to use. He and the grievor then walked to the Sunset Room. Mr. Kruper said that he unplugged two wires but that he did not remember which ones. He said that he "confiscated" the router as he viewed it as a "security incident". He could not say whether it had been connected to a power source when he removed it.

[89] Mr. Kruper testified that after discussing the matter with his co-workers (in his January 14, 2013, email to Ms. Accettura, he wrote that he had a conversation with another co-worker, Jeff Staniland, and with Mr. George), Mr. Kruper went to Ms. Accettura to report the incident and to tell her that it "… had scared the shit out of [him]", at which time it was 2:30 p.m. Mr. Kruper and Ms. Accettura then went to the Sunset Room but could not find the grievor and Mr. Schreiber. Ms. Accettura then returned to her office and asked to see the grievor.

[90] At the hearing, Mr. Kruper explained that the Agency used wireless routers in some circumstances when Internet access was provided to visitors, like to the auditor general's representatives, but that they were not used to connect to the Agency's network.

[91] Mr. Kruper then returned to the IT office. He admitted that he knew that Mr. Schreiber had not been able to use the laptops to login to the network, but he explained that when he returned to his workstation, he took the initiative, with his smartphone, to power on the router without connecting it physically to the network and that he used his phone to verify whether it was protected via a Wi-Fi password.

[92] I note that in his email he later sent to Ms. Accettura, he wrote that she had asked him to connect the router to a standalone system to ascertain if it had been connected to the Agency's local area network (LAN). However, at the hearing, just before Ms. Accettura was to testify, he admitted that this was a lie. It had been done on his initiative. He conceded that she never asked him to do it.

[93] After he used his phone to check if the router was protected with a Wi-Fi password, Mr. Kruper asked Ms. Accettura to come over. He wanted to tell her that it was not password protected.

[94] Mr. Kruper explained that the grievor and Mr. Schreiber then entered the IT office. Once she joined them, Ms. Accettura asked the grievor if he had powered up the router. He replied that he had not. He stated that without a switch, he was not sure how he could set up the laptops, as the router was not the right device for that job. That was why he had gone to find Mr. Kruper. At that point, Ms. Accettura indicated that she would not create a security incident report.

[95] Mr. Kruper agreed that when the grievor approached him in the computer room, the grievor said that he was looking for a switch because Mr. Schreiber had brought in the router, which the grievor knew he could not use to connect the laptop computers.

[96] In cross-examination, Mr. Kruper admitted that he was not in the Sunset Room when the router was turned on and that he did not know who had been there at that time. He did not know the time of day when the grievor came to speak to him other than that it was in the afternoon.

[97] After Ms. Accettura decided not to write a security incident report, Mr. Kruper took another initiative. He logged in to the Agency's server and requested the dynamic host configuration protocol (DHCP) server logs to see if the router had been registered as communicating on the Agency's network; he wanted to review the leases. The "Log Record Of DHCP Server at 91B snap shot [*sic*] taken January 11, 2013" ("the log record taken January 11, 2013") showed that at one point, the router had been registered as communicating on the network. Its unique identification number appeared in the logs, and it received an Internet Protocol (IP) address lease that expired on "2013-01-19 02:10:01 PM".

[98] So, Mr. Kruper went back to Ms. Accettura with his findings from the log record taken January 11, 2013.

[99] Ms. Accettura reviewed the server logs and then decided to create a security incident report. She attached to it the additional information provided by Mr. Kruper (the log record taken January 11, 2013 and the specifications of the router that he had confiscated). In the report, she wrote that the grievor had connected the router to the Agency's network.

[100] At the hearing, Ms. Accettura was questioned as to whether she had asked Mr. Kruper to connect his personal smartphone to the router to see if it was equipped with safeguards. When she answered, she maintained that she had done so. She did not know that just before she testified, in cross-examination, he had admitted that he had done it on his initiative, before asking her to come to the IT office on the day of the incident. She was not aware of this development at the hearing and maintained that it had been done on her initiative. In cross-examination, she also admitted that before she testified (and contrary to my order on the exclusion of witnesses), she had had conversations with other witnesses about the router incident.

[101] In any case, although Ms. Accettura had told the grievor that she would not create a security incident report, she created one because Mr. Kruper showed her his findings from the log record taken January 11, 2013. At the hearing, she insisted that the router had been fully connected to the Agency's network, which violated its security policy. She added that it was connected to the network probably for approximately half an hour in total. She also specified that because Mr. Kruper did not confirm the grievor's version of the event, she gave no weight to what the grievor said.

[102] At the hearing, Ms. Accettura also acknowledged not being sure whether the grievor or Mr. Schreiber (after the grievor had left to find Mr. Kruper) had powered up the router. Mr. Kruper also confirmed that he did not know if the router's power cord was connected to the electricity power outlet when he entered the room. However, Ms. Accettura deduced that the grievor must have powered up the device and established network connectivity, given his desire to help Mr. Schreiber. This is why she felt confident that this was an important security incident for which he needed to be disciplined. She later gave him a 10-day suspension, to be served from May 1 to 14, 2013.

[103] Part of Ms. Accettura's security incident report, drafted on January 11, 2013, read as follows:

…

> *On January 9, 2013, Jeff Staniland an IT employee managing this case initially had researched and determined that a switch would be required before IT could deliver on this request since the one switch specifically used on site for the purpose of expanding network data ports was already in use. Chantel our client was advised of this the same day. The next day Chantel updated the case so that only 4 laptops needed to be connected in the Sunset room and in addition said she would get a switch from the AC's office downtown as Alicia Schreiber had one to send. Since Jeff would not be in until 9 am on January 11th he requested that Sukh take over the case in the morning because he starts at 7:00 am and would be able to receive the switch and help complete the ticket. Unfortunately what was received was not a switch but a wireless router.*
>
> *At 2:30 pm January 11th 2013 when Gene Kruper brought the device to me he advised that the device had been powered up and fully connected via its main cables to our network data ports in the Sunset Room. When I asked how he had become involved he said that Sukh was having trouble trying to configure the device so that the laptops which Gerry needed connected could communicate through the router. Sukh asked Gene to look at the setup to help him. When Gene arrived at the Sunset Room and saw what had been connected he immediately dismantled the device and brought it upstairs. Gene recognized and advised Sukh that he could not connect anything to the network directly through a router on the network and this was in violation of Security policy.*
>
> *When I asked Gene if he can say without certainty that it was connected he produced a report (see attachment in separate email) which shows through the server log that the IP address of this specific router was in fact registered as communicating on our LAN. When Gene tested the router in standalone mode (not connected to any network) he could connect to its wireless service using his own personal cell phone which meant there were no safeguards on this router and that it was broadcasting freely. He immediately disconnected the device and put it all back in its box.*
>
> *It is unknown at this time how long the router had been connected to our network but since Sukh had only recently tried to get Gene involved it may have been approximately ½ hour before being disconnected.*

> *I asked Sukh in Gene's presence when he began to configure the device if he had powered the device up and placed network cables into the device. Sukh said he went to get Gene for help to determine if he could connect and had never connected the device. This contradicts what Gene found and what our network log demonstrates.*
>
> …
>
> [*Sic* throughout]

[104] Thus, Ms. Accettura concluded that the grievor was responsible for a security breach.

[105] On January 14, 2013, Ms. Accettura completed the "Breach of Information Risk Assessment Tool". The potential impact to the Agency indicated in the tool with respect to the breach of organizational information was "[l]ow impact", which was described as a "[c]ompromise [that] is not reasonably expected to cause injury". At the hearing, Ms. Accettura recognized that Mr. Schreiber had not logged in on any laptop. She then acknowledged not knowing if the laptops had built-in firewalls.

[106] Ms. Accettura's Breach of Information Risk Assessment Tool indicated that the Agency knew that a router had been connected on January 11, 2013, "… but not for how long …". Upon receiving Ms. Accettura's security report, Ms. Singh forwarded it and indicated that the employer did not know if anyone had managed to connect to the Agency's network and that therefore, it was "… impossible to know what if any information was in fact compromised as a result".

[107] On January 16, 2013, Ms. Singh forwarded Ms. Accettura's security incident report to Martin Forget, Electronics Monitoring Officer, Internal Affairs, and asked him to read it. In turn, he asked a senior technical specialist at Shared Services Canada to look at it.

[108] Mr. Robinson then attempted to measure the extent of the risk to the Agency based on what he had been told and provided with. He wrote, "It appear [*sic*] the [wireless router] was connected to RCNet and it appears to have been open which means somebody could have connected to it …." He acknowledged that further inquiries were needed to better understand the exposure to the network. He also indicated the following: "As for what happened here, it appears to have been an error rather than a malicious act to me …."

[109] In the email chain, Mr. Forget then asked Mr. Robinson the following question:

…

> *All that being said, would it be fair to say that even if there was an open connection available for X amount of time, anyone who connects to this AP wouldn't have had the ability to access much, if at all, given that they would not be authenticated on the network? The compromised computers / devices are not be part of the domain in addition to the fact that they do not possess CRA credentials.. etc.*
>
> …
>
> [*Sic* throughout]

[110] Mr. Robinson answered that the risk was minimal but that there was still some vulnerability. Mr. Forget forwarded Mr. Robinson's response to Ms. Singh and added, "My personal opinion is that the risk was very minimal as well."

[111] At the hearing, Mr. Robinson was asked about the Agency's firewall. He mentioned that it is impossible to fully secure a network. Vulnerabilities are normal, which is why firewalls are used. They allow only the traffic that is considered acceptable to a given environment.

[112] Mr. Robinson testified that he was asked to assess what had happened, along with its impact. His understanding is that a wireless device was connected to the Agency's network. He explained that a wireless router is like a back door. The firewall may not apply to such an alternate route.

[113] Mr. Robinson was asked to explain what he intended to say in his email when he wrote, "It appear [*sic*] the [wireless router] was connected to RCNet and it appears to have been open which means somebody could have connected to it …." He explained that the access point accepted wireless connections from other devices. The question then was whether someone could have used it.

[114] Mr. Robinson explained that to better understand the exposure, the employer needed to consider who, outside the Agency, had been within 500 feet of the access point. That distance was also subject to conditions, such as walls or floors being in the path or interference, etc. It came down to whether someone with a device who had intended to harm the Agency had used the access point or router to access its network.

His view was that the risk had been minimal but that there had been potential exposure to one.

[115] In his testimony, Mr. Robinson also agreed that he did not test the router, including its transmission range. He agreed that concrete walls impede the transmission of signals from routers and similar wireless transmitters.

[116] The grievor explained that the Sunset Room is on the lower level of the Surrey Tax Centre building. It has very thick cement walls. The exterior walls are also made of cement and bricks. The road is approximately 500 feet from the room. There are no cafés or restaurants with wireless services near it.

[117] At the hearing, Mr. Robinson recognized that he had had few details about the incident. He said that he had looked over Ms. Accettura's security incident report. He based his assessment on the connection (an open door) to the network that had lasted approximately 30 minutes. His understanding was that someone with a device (like Mr. Kruper with his phone) might have been able to use the router to connect to the network because he read in the report that "there were no safeguards on this router".

[118] Mr. Robinson was asked whether the situation would have been different had the router been password protected. He answered that a password is a safeguard, so someone with a device who intended to cause harm would have needed the router's password to access the network. In that case, there would not be much risk of someone accessing the network.

[119] Mr. Robinson's understanding was also that the door had been open for approximately 30 minutes. He conceded that if that estimate was not accurate, meaning that it had been open for less than 30 minutes, then the risk was less than minimal. At any rate, his initial conclusion was that the risk to the Agency was minimal. He agreed with his assessment at the time that the risk was minimal and could say only that there was "potential exposure".

[120] In any event, because of this incident, Ms. Accettura placed the grievor on restricted duties on February 5, 2013, pending an investigation. She took away his privileged user access rights. As written in a memo to him, his duties and network access were restricted. From that moment, he could not do much. He explained that he was not provided with any meaningful work; he could no longer do his prior work,

could not access network files or help clients access their files, and could not install software. Ms. Accettura recognized that he was left with inventory management (moving equipment) and reading.

[121] In addition, the grievor lost his regularly scheduled on-call evening work. Ms. Accettura confirmed that he could no longer perform it as she considered him untrustworthy.

[122] On February 15, 2013, Ms. Accettura finalized her investigation report on the router incident. Her conclusion was that the grievor had contravened the Electronics Network Policy Guidelines.

[123] The grievor attended a disciplinary hearing on February 26, 2013, about the router incident.

[124] On April 8, 2013, Internal Affairs concluded that the grievor had contravened the Agency's "Security for the Computing Environment Policy". Ms. Singh, who drafted Internal Affairs' investigation report, recognized that she was unfamiliar with the type of IT issue involved in the router incident. She said that she simply relied on part of the initial response provided by Mr. Robinson and that she included the following in the report:

…

> ***Security Breaches***
>
> …
>
> *In a separate incident, on January 11, 2013, Gene Kruper, Senior IT Infrastructure Support Analyst, informed management that when he arrived at a boardroom at the Surrey Tax Centre to assist Mr. Jassar in completing a ticket, he noticed that a wireless router had been powered up and fully connected to the network. Mr. Kruper reported that he immediately dismantled the device, and informed Mr. Jassar that he could not connect anything to the network directly through a router as it was in violation of security policy.*
>
> …
>
> *The Information Technology Protection Centre, Shared Services Canada, confirmed to the Internal Affairs and Fraud Control Division that a wireless router was connected to the Canada Revenue Agency network and was open, which*

> *enabled external connections. Although the risk was minimal, the connection lasted approximately 30 minutes, and could have allowed someone to introduce malware onto the network, or otherwise disrupt services.*
>
> *Management asked Mr. Jassar whether he had powered up the wireless router and connected it to the network. He reported that he had never connected the device, contradicting the findings from the Information Technology Protection Centre, Shared Services Canada, and Mr. Kruper's description of events, which both indicated that the wireless router had been in fact been connected.*
>
> …
>
> ***Conclusion***
>
> …
>
> *The information gathered during the investigation determined that by connecting a wireless router to the CRA network, Mr. Jassar was in violation of the Security for the Computing Environment Policy.*
>
> …
>
> [Emphasis in the original]

[125] At the hearing, Ms. Singh recognized that she did not know whether authentication is required to connect to the Agency's network. She recognized not understanding that subject, what a "domain" is, or how the Agency's credentials work. For example, she clarified that she did not know what an authentication process is in relation to a network.

[126] Ms. Accettura issued a 10-day suspension letter to the grievor on April 29, 2013. She imposed the unpaid suspension on the grounds that he had connected the router to the Agency's network for approximately 30 minutes on January 11, 2013, jeopardizing the "… integrity of the network by allowing the opportunity for external connections to be made, a violation of the Security for the Computing Environment Policy …."

[127] Ms. Accettura wrote the following in the suspension letter: "[i]n rendering my decision, I have considered … aggravating factors which include your lack of remorse, that you would not accept responsibility when the balance of probabilities indicated otherwise including two eye witness [*sic*] accounts …". However, at the hearing, the two

witnesses in question, Messrs. Schreiber and Kruper, confirmed that they had not seen the grievor connect the router. Mr. Schreiber even wrote the following to Ms. Accettura on January 15, 2013: "… I don't think [the grievor] used [the router] as he went to get [Mr. Kruper] to see if there was something he could use instead."

[128] The reason Ms. Accettura chose a 10-day suspension from a possible span of 1 to 20 days is that the grievor maintained that he had not connected the router, which he alleged is why he asked Mr. Kruper for assistance. She did not believe that the grievor had not connected the router and said that he was not credible. As she emphasized at the hearing, she lost trust in him to perform any work safely.

2. <u>Findings of fact</u>

[129] The employer submits that the length of time the router was connected is not relevant; instead, it is simply that the router was in fact connected. It further submits that it need not establish that someone could have connected to its network through the router without a username and password. It is sufficient to show that there was a potential exposure. Mr. Robinson confirmed the potential exposure to a risk.

[130] The employer also submits that the fact that the grievor is unable to remember whether the router was turned on is evidence of dishonesty and gives rise to an adverse inference against him.

[131] The grievor submits that the findings of Messrs. Robinson and Forget that connecting the router created, respectively, a "minimal" and a "very minimal" risk constitute admissions binding against the employer; see *Morrison-Knudson Co. v. British Columbia Hydro and Power Authority*, [1973] B.C.J. No. 472 (QL) at paras. 8 and 9; and *International Brotherhood of Painters and Allied Trades Glaziers, Architectural Metal Mechanics and Glassworkers Union, Local 1527 v. ABC Plastic Pak Ltd.*, [1991] B.C.L.R.B.D. No. 25 (QL).

[132] I find that the grievor attempted to help Mr. Schreiber in good faith. He does not recall turning on the router. He is not the only person who might have powered it up, and the employer had the burden of proving that it he did. However, such evidence was not presented to me. Yet, the employer sees the grievor's inability to remember whether the router was turned on as evidence of dishonesty. I note that the employer's witnesses also could not remember whether the router was turned on. What the

employer views as the grievor's memory lapse and presumed dishonesty is its only reason for disciplining him. Yet, the fact that he does not recall powering up the router and thus connecting it to the Agency's network does not detract from the fact that the employer was unable to establish that he had powered it up.

[133] In her Breach of Information Risk Assessment Tool, Ms. Accettura concluded that the potential impact to the Agency with respect to breach of organizational information was low and was "… not reasonably expected to cause injury".

[134] Mr. Forget supported Ms. Accettura's conclusion. He indicated that the likelihood of someone hacking the network through the router was "very minimal" as "… anyone who connects to this AP [access point] wouldn't have had the ability to access much …."

[135] Mr. Robinson indicated and confirmed at the hearing that there had been only "minimal risk" of the router connection allowing "… somebody to introduce malware into the network or to otherwise disrupt service."

[136] In addition, Mr. Robinson confirmed that he took Ms. Accettura's word that the router had been connected to the Agency's network for about 30 minutes and that it had a range of 500 feet outside the Agency's building. When he testified, he confirmed that he could not substantiate these claims. The length of the alleged connection was not investigated. No tests were conducted of the router's range.

[137] Mr. Robinson also confirmed that he relied on the statement in Ms. Accettura's security incident report that "there were no safeguards on this router". His opinion was that the Agency might have been at risk because he believed that the router was not password protected. However, his opinion remained that the risk was minimal. He recognized that a password for the router would be a valid safeguard for preventing unauthorized network access. I accept Mr. Robinson's assessment that any risk to the Agency's network would have been very minimal.

[138] If I were to accept the allegation that the grievor turned the router on and connected it to the Agency's network, a fact that the employer has not proved, the evidence from the hearing does not substantiate the employer's claim that the router was connected to the network for approximately 30 minutes. While Ms. Accettura estimated that it would have been connected for approximately that long before

Mr. Kruper disconnected the setup sometime between 2:00 p.m. and 2:30 p.m., the half-hour period that she noted is not a reasonable estimate. According to the evidence that was presented, the following events took place in this order between 2:00 p.m. and 2:30 p.m., give or take a few minutes:

- Mr. Schreiber and the grievor met at 2:00 p.m. in the Sunset Room.
- They had a short discussion that lasted probably about five minutes, or approximately until 2:05 p.m.
- The grievor then left the room to join Mr. Kruper in the IT office on another floor; he probably arrived at around 2:10 p.m.
- The log record taken January 11, 2013 suggests that an IP address lease was issued for the router at 2:10:01 p.m. (Exhibits E-22 and E-52)
- After discussing the matter, the grievor and Mr. Kruper left the IT office and returned to the Sunset Room, which is on a lower floor. They probably arrived at around 2:15 p.m.
- Mr. Kruper then disconnected and seized the router, at probably around 2:15 p.m.
- Mr. Kruper then returned to the IT office on a different floor. He probably arrived at around 2:20 p.m.
- Mr. Kruper had a discussion with his colleagues until approximately 2:25 p.m.
- When that ended, Mr. Kruper decided to walk to Ms. Accettura's office.
- He arrived at her office at around 2.30 p.m.

[139] Considering all the events that took place between 2:00 and 2:30 p.m., it would be reasonable to conclude that the router would probably have been connected around 2:10:01 p.m. before Mr. Kruper disconnected the setup at around 2:15 p.m. Thus, a reasonable estimate of how long it would have been connected would be closer to 5 minutes rather than 30.

[140] In addition, the employer did not produce independent clear evidence that the router was not password protected. While Mr. Kruper affirmed that it was not password protected, the employer did not verify that claim. For the following reasons, I find that I cannot give any weight to Mr. Kruper's statement.

[141] First, Ms. Accettura declared that her understanding was that before making this statement to her, Mr. Kruper had selected the Wi-Fi option on his personal cell phone to see if the router was advertising. She assumed that it was advertising; i.e., it appeared as an accessible Wi-Fi connection to the Internet. She then assumed that Mr. Kruper had accessed that connection and that his cell phone had obtained Internet access through it without having to enter a password. However, she admitted that she did not actually see Mr. Kruper do any of that. In particular, she did not see him access the Wi-Fi connection through the router to see if it required a password. She simply took his word that it was not password protected. She acknowledged that she carried out no other verification to see if the router was password protected.

[142] Ms. Accettura's observations, together with the fact that Mr. Kruper made up stories to harm the grievor, as will be seen later with respect to the 2004, 2005, and 2012 events relating to alleged undisclosed criminal charges, lead me to conclude that I cannot take Mr. Kruper's word for it that the router had no password safeguard. Stated simply, Mr. Kruper was not a credible witness. As will be seen, he lied about going to the B.C. Provincial Court with the grievor to draw the employer's attention to the fact that the grievor's name was associated to someone else's name on the B.C. Court Services Online website. As noted, Mr. Kruper lied again when he wrote in an email that Ms. Accettura had asked him to test the router in standalone mode to see if it was password protected. At the hearing, just before Ms. Accettura was to testify, he admitted that he had made this up and that it was a lie.

[143] Thus, it became evident at the hearing that Mr. Kruper was not a candid and credible witness. In fact, as a witness, I found that he bragged about his denunciations of the grievor, and I found him evasive and untrustworthy about the evidence in his testimony. Stated simply, I believe that to harm the grievor, he exaggerated the incident and said that the router had not been password protected.

[144] As Ms. Accettura confirmed, no one other than Mr. Kruper verified whether the router was password protected. The employer relied on this unverified fact in measuring the risk caused to it by connecting the router to its network.

[145] Furthermore, Mr. Robinson said that a password on the router would be a valid safeguard preventing unauthorized network access.

[146] Finally, on April 29, 2013, Ms. Accettura incorrectly concluded that she had "two eye witness [*sic*] accounts" that the grievor had connected the router to the Agency's network. The two witnesses, Messrs. Schreiber and Kruper, confirmed at the hearing that they had not seen him connect the router.

C. Leave usage and attendance registration leading to the 20-day suspension

1. Evidence

[147] Darlene Jensen, Assistant Director, IT Services, Zone 1, IT Branch, Client Computing Services Directorate, Pacific Deskside IT Support, the Agency (in 2012 and 2013), and Ms. Singh testified on the employer's behalf about the grievor's allegedly fraudulent leave. Before becoming the assistant director, Ms. Jensen had been a team leader, and the grievor had been in her team.

[148] The grievor testified on his own behalf.

[149] While investigating the events that led to the revocation of the grievor's reliability status, Ms. Singh noticed that he had appeared in court six times in 2012 and 2013 in relation with a custody dispute with his ex-spouse. Ms. Singh obtained the dates from the Surrey courthouse and communicated them to Mr. Dorff.

[150] On January 10, 2013, Ms. Singh spoke to Ms. Accettura about the leave that the grievor had taken on the days on which he had court appearances. Ms. Singh noted, "… Appear [*sic*] to be some suspicious leave …."

[151] On January 22, 2013, at a management meeting with Ms. Singh and Mr. Cultum, the following was noted:

…

Background:

…

> *In 2012 management became aware that Mr. Jassar may have misrepresented his attendance at work or his leave from the workplace due to illness. Mr. Jassar may have been physically in a court room at the time that he represented that he was home ill, at an appointment or at work. This is currently being investigated by* [Internal Affairs]*; they are running a comparative analysis of his leave over this period and obtaining confirmation of his attendance in court.*
>
> …
>
> [Emphasis in the original]

[152] The same day, Ms. Singh took some notes after having a discussion with Mses. Accettura and Jensen. Ms. Jensen was looking into the leave the grievor had taken on the days on which he had court appearances. According to Ms. Singh's notes, the Agency's labour relations section expressed concerns that she might be reporting and reaching a conclusion on disciplinary issues. At that time, the employer was also managing allegations made against the grievor relating to the inappropriate email incident, the router incident, and undisclosed criminal charges. As Ms. Singh noted, "… for a higher level of misconduct, it may be more appropriate to wait until everything is reported under one memo due to being able to apply aggravating factors with the lower level misconducts …." She suggested that approach because, as she indicated, management wanted to use all those things to reassess the grievor's reliability status. Her notes read as follows:

> …
>
> *… LR's questioned our involvement in discipline and I clarified that we don't do discipline as that is something between LR and mgt but because mgt did express their concerns about the EE and their history, I asked my manager what would be beneficial for mgt. I told them what my role was which is to gather the information and report it but I understood the importance of how and when we report these issues due to mgt's concerns. We also discussed making a recommendation to Security for reassessment of the EE's security clearance* [*sic*] which *they would like to make sure is done….*
>
> …

[153] On January 23, 2013, a conference call was held. Attending were Messrs. Dorff and Cultum, Mses. Jensen, Accettura, and Singh, Denis Maurice (Ms. Singh's manager),

and another person who did not testify at the hearing. Ms. Singh noted the following after the meeting:

…

> … *We discussed the process of handling files with multiple disciplines. Denis confirmed we would report on all issues (email, router, alias and fraud* [leave usage and attendance registration]*) in one memo. Therefore, they may want to wait to issue discipline for 2 of the 4 issues as they don't know how/what will be reported in our memo. We discussed the potential levels of disciplines for the misconducts and issuing discipline separately. Denis did say he is not telling LR what to do, but suggested waiting until the* [January 30, 2013, interview] *is completed concerning the fraudulent leave which can be done quickly, to ensure the right level of discipline is applied based on our report… LR questioned* [Internal Affairs'] *involvement in the email issue and Denis clarified that it is a security breach and it is absolutely something that falls under our mandate.…*

…

[154] On January 23, 2013, a colleague of Ms. Singh, Kinga Stankowska, indicated to Ms. Singh that she called the Surrey courthouse on her behalf "… to confirm which column on the record of proceedings identifies whether or not an individual was present in court …." Ms. Stankowska apparently indicated to Ms. Singh, "… The call agent at the Surry Court house confirmed that the column labeled APNV indicates if the person was present or not. A: Agent present; P: Personal appearance; N: No appearance; V: video appearance …" [*sic* throughout].

[155] Ms. Singh then presumed that the grievor had made personal court appearances six times from August 17 to December 10, 2012.

[156] The grievor testified that he also called the courthouse when he was asked about this issue to find out why "P" had been used on two of the dates on which he had not been present in court (September 19 and November 27, 2012). He said that he was advised that court staff does not ask for the identities of those present. If an individual who is not an agent is present, "P" is entered in the register. If an agent, like a lawyer, is present, then "A" is entered in the register. The grievor later advised his employer of this. A family member had appeared on his behalf a few times.

[157] The employer filed in evidence the grievor's "Personal Leave Status Report" as of January 29, 2013. As of that date, he had used 32 hours of sick leave credits in that fiscal year, with a balance of many hundreds of hours available to him. He took time off for medical appointments on a number of occasions, including 1.5 hours on October 17, 2012, and 2 hours on January 4, 2013, to take a family member to medical appointments. He had 14 hours of annual family related leave credits available to him as of January 29, 2013, which he could have used to take a family member to medical appointments.

[158] Ms. Singh spoke to Ms. Jensen, whom Mr. Dorff, Ms. Jensen's director, had mandated to audit the leave the grievor had used on the court dates. She interviewed the grievor on January 30, 2013.

[159] Ms. Jensen explained that after conducting the interview, she found that she was not satisfied with the grievor's responses. He was told the dates on which he took leave during the January 30, 2013, interview, but could not remember exactly all his past appointments. At the end of the meeting, she provided him with a document listing the dates.

[160] Ms. Jensen then collated all the information available to her from the team calendar and the grievor's recorded leave and prepared a table in which she included estimates of the time she assumed he would have appeared in court. She indicated in the table that she was suspicious of his vague responses at the January 30, 2013, interview. She sent this information to Ms. Singh on March 14, 2013.

[161] After he was provided with the dates of his leave that Ms. Jensen had questioned, the grievor provided notes from his counsel and doctor to justify some of his leave. A February 18, 2013, note from his counsel at the time, Erin Bowman, read as follows:

…

> *I write this letter to confirm that I am counsel for Mr. Jassar. Mr. Jassar is not required to personally attend all court appearances, and I attended as his agent on November 27, 2012 and January 4, 2013. Mr. Jassar was not required to personally attend any of his appearances to date.*

…

[162] The note from his doctor, Robert Pereira, is dated February 21, 2013. It reads as follows: "… Sukhvir [*sic*] Jassar was absent from work on Oct. 17th, Nov 13th and Nov 27th/12 due to the fact that he had to drop [a family member] to the doctor's office …." The grievor also provided his employer with a February 23, 2013, note from Brian Ng, another doctor practicing with Dr. Pereira, which reads as follows: "This letter is to certify that **Sukhbir Jassar** accompanied [a family member] on October 17, November 13, and November 27, 2012 to … medical appointments with another physician, Dr [*sic*] Robert Pereira …" [emphasis in the original].

[163] On March 1, 2013, Ms. Singh reviewed the documents provided by the grievor. She identified contradictions with the employer's information and inquired with her supervisor if they should go back to the grievor and inform him of it. By then, Internal Affairs had confirmed to Ms. Jensen that it considered that a "P" recorded by the court indicated "personal appearance" and that "A" meant "agent".

[164] A document entitled "Justin Code Tables", the key to the B.C. Provincial Court's notations, does not include an entry of "P" for personal appearances in court.

[165] At the time, Mses. Singh and Jensen's understanding of the grievor's appearances in court, compared to the leave he had taken, was as follows:

> **August 17, 2012**:
>
> 7.5 hours - uncertified sick leave ("P" was recorded for a 2:30 p.m. appearance in court);
>
> **September 19, 2012**:
>
> No leave taken, but a meeting was in the calendar for 2:00 p.m. ("P" was recorded for a 1:30 p.m. appearance in court);
>
> **October 17, 2012**:
>
> 1.5 hours - medical appointment at 1:30 p.m. ("P" was recorded for a 1:30 p.m. appearance in court, and the doctor's note states that the grievor dropped a family member off at the doctor's office);
>
> **November 13, 2012:**

7.5 hours - uncertified sick leave ("P" was recorded for a 9:30 a.m. appearance in court, and the doctor's note states that the grievor dropped a family member off at the doctor);

November 27, 2012:

No leave taken ("P" was recorded for a 9:30 a.m. appearance in court, and the doctor's note states that the grievor dropped a family member off at the doctor);

December 10, 2012:

2 hours - uncertified sick leave ("P" was recorded for a 1:30 p.m. appearance in court); and

January 4, 2013:

2 hours - medical appointment at 9:30 a.m. ("A" was recorded for an appearance at 1:30 p.m.).

[166] Several entries in the employer's time sheets indicate that the grievor worked all day on September 19 and November 27, 2012.

[167] The grievor explained that he mistakenly believed that he was allowed to take medical or dental appointment leave when he accompanied a family member to medical appointments.

[168] On March 1, 2013, Ms. Singh called the medical clinics where Drs. Pereira and Ng practiced to confirm the validity of the certificates they had provided. The clinics confirmed that they had issued the medical certificates and that they were valid. However, Ms. Singh noted, "They could not provide me with the times of the appointments."

[169] On March 14, 2013, Ms. Singh had a discussion with management. They saw no need to give the grievor another opportunity to explain his leave usage and attendance registration because "… they were satisfied that they had provided him ample time to submit supporting documents for his leave …."

[170] On April 8, 2013, Internal Affairs concluded that the grievor had "… fraudulently recorded leave for seven days, from which he derived a personal benefit to which he may not have been entitled …." While he did not appear in court on January 4, 2013, Internal Affairs concluded that he had provided no information confirming his two-hour medical or dental appointment at 9:30 a.m. that day.

[171] The minutes of the disciplinary hearing, dated May 24, 2013, which was held with the grievor on this matter, indicate that he responded as follows at the meeting: "I contacted the court, I know some people there; they couldn't verify how they confirm attendance." Ms. Jensen then told him that "… [Internal Affairs] contacted the courthouse and verified the dates and the information that they provided in their report …", to which the grievor said the following: "I talked to them, the court people, and they don't do any verification, they don't check i.d." Ms. Jensen then asked him, "Whom did you talk to? Do you have proof?" He responded as follows: "I just called and they said they don't check." However, Ms. Jensen indicated the following: "We will proceed with the understanding that [Internal Affairs] have proof of what they have placed in the report …."

[172] In April 2013, the grievor prepared a response to Internal Affairs' analysis of his leave usage and attendance registration. He provided it to Ms. Jensen. For each date, he also provided the following information at the hearing, which is presented in this table, with a column indicating whether he made a court appearance on the date in question (note that [*Sic* throughout] applies to the second column):

Court dates	**Response given to Ms. Jensen to the leave analysis by Internal Affairs**	**Leave taken and the explanation provided for it at the hearing**	**Whether the grievor made a court appearance**
August 17, 2012	*I was sick that day, I did not see a doctor. I did go to court for a couple of minutes. The Court wanted to know if I had a lawyer. My response was that I did.*	7.5 hours - uncertified sick leave. The grievor testified that he had a migraine in the morning, took medication, and went to court in the afternoon. He was done at the court after 5 to 10 minutes.	Personal appearance at 2:30 p.m. by the grievor.
September	*I did not go to Court that day. I did not take any time*	None taken (there was a meeting in the	The employer believes that a

19, 2012	*off.* [A family member] *went to court instead. I had a meeting that day at 2.00 PM downtown Vancouver. I did not go to the meeting as it got cancelled.*	calendar at 2:00 p.m.). The grievor testified that he worked at the Surrey Tax Centre from 7:00 a.m. to 3:00 p.m. He had a meeting with his union steward scheduled for 2:00 p.m., which was cancelled, so he stayed at work.	personal appearance was made at 1:30 p.m. The grievor testified that he did not attend court on that date but that a family member did.
October 17, 2012	*I took 1.5 hours leave for a medical\dental appointment. I dropped* [a family member] *off at our doctor's office, went to Court for about 10 minutes and then went back to the doctor's office and picked up my* [family member]. *Dr.'s office is about 8-10 minutes from the courthouse.*	1.5 hours - medical appointment at 1:30 p.m. (The doctor's note states that the grievor took a family member to the doctor's office.) On October 17, 2012, one of the grievor's family members had a medical appointment. He took the family member to the doctor's office, and from there, he went to the court for a few minutes to see if he was needed. After that, he returned to the doctor's office.	Personal appearance at 1:30 p.m. by the grievor.
November 13, 2012	*I was sick that day. I went to court at 9.30 AM for about 10 minutes.*	7.5 hours - uncertified sick leave. (The doctor's note states that the grievor took a family member to the doctor's office.) The grievor testified that at 6:30 a.m., he was not feeling well. He called in sick and did not start work at 7:00 a.m. At 9:00 a.m., he went to court for 5 to 10 minutes. After that, he returned	Personal appearance at 9:30 a.m. by the grievor.

		home, still not feeling well. In the afternoon and evening, he felt better. He had a shift with the IT extended support program that was from 6:00 p.m. to 6:00 a.m., which he worked. This work is done from home via a laptop.	
November 27, 2012	[A family member] *went to court for me. I did not go. I accompanied* [a family member] *to an appointment to our doctor's office after work.*	None taken. (The doctor's note states that the grievor took a family member to the doctor's office.) The grievor testified that he worked from 7:00 a.m. to 3:00 p.m. that day at the Surrey Tax Centre. After work, he took a family member to the doctor's office. He did not appear in court.	The employer believes that a personal appearance was made at 9:30 a.m. The grievor testified that he did not attend court on that day but that a family member did. Ms. Bowman also appeared in court.
December 10, 2012	*I did take two hours off as sick leave from 12.30 to 3 PM. I did go to court for 5-10 minutes. I am sorry for taking the sick leave.*	2 hours - uncertified sick leave. The grievor testified that he started working at 7:00 a.m. He said that he did not feel well in the afternoon. He had a headache, and his head was spinning. He took sick leave from 1:00 p.m. to 3:00 p.m. After he left work, he went to the court for 5 to 10 minutes.	Personal appearance at 1:30 p.m. by the grievor.
January 4, 2013	*I took 2 hours for a medical/dental appointment in the morning. There was a court date in the afternoon. I*	2 hours - medical appointment at 9:30 a.m.	Ms. Bowman appeared on behalf of the grievor. The

	did not personally go to court that day.	The grievor testified that he started working at 7:00 a.m. He and a family member both had doctor's appointments at 9:30 a.m.	grievor did not appear in court at 1:30 p.m.

[173] At the hearing, the grievor also explained that the courthouse is only 8 to 10 minutes' drive from the Surrey Tax Centre and only 8 to 10 minutes from his medical clinic. He explained that when he showed up at the court, it was not to testify, and that there was no court sitting. It was simply to make an appearance. His attorney represented him at times. Other times, a family member went on his behalf. He went to the court on some of the dates only to sign a record.

[174] On April 8, 2013, Ms. Singh, who drafted Internal Affairs' investigation report, concluded that the grievor was guilty of fraud. The report, signed by her supervisor, Josée Labelle, Director, Internal Affairs, the Agency, stated the following:

> …
>
> ***Fraud***
>
> …
>
> [Internal Affairs] *obtained the court documents … and they indicated that he had seven court dates…. Management provided* [Internal Affairs] *with Mr. Jassar's leave status to compare with the dates of his court appearances. The review determined several days of questionable leave. A detailed analysis of these occurrences is presented in Annex 1 at the end of the report.*
>
> *On January 30, 2013, management met with Mr. Jassar to discuss the circumstances surrounding his leave. During the interview, Mr. Jassar reported that he has had to attend court during work hours; however, Mr. Jassar was unable to recall his attendance for these dates.*
>
> *Subsequent to the interview, management afforded Mr. Jassar the opportunity to collect information for these dates to justify his leave. Mr. Jassar's* [*sic*] *provided one document from his legal counsel indicating that they attended as his agent on November 27, 2012 and January 4, 2013, which was reflected in the court documents.* [The reports concluded that the grievor made a personnel appearance in court on November 27, 2012, and that an

> agent appeared on his behalf on January 4, 2013.] *However, the court documents indicated that Mr. Jassar was also present on November 27, 2012.*
>
> *Mr. Jassar also provided two medical certificates which covered three of the dates, October 17, November 13, and November 27, 2012. One note indicated that Mr. Jassar accompanied his spouse to her medical appointments on those days, while the second note which covered the same three days, indicated that he dropped his spouse off at the doctor's office.* [Internal Affairs] *validated that these notes were produced by the clinics, but could not confirm whether Mr. Jassar was present at the clinic on those days.*
>
> *Mr. Jassar's explanation of his whereabouts* [the February 18, 2013, note from Ms. Bowman, the February 21, 2013 medical note from Dr. Pereira, the February 23, 2013, note from Dr. Ng and the grievor written response about his leave usage and attendance registration that he provided to Ms. Jensen] *conflicts with the information gathered during the investigation. According to Mr. Jassar, on multiple occasions, he attended* [a family member]*'s medical appointments, whereas* [Internal Affairs] *determined that he was present in court during those days for his criminal proceedings.*
>
> ***Conclusion***
>
> …
>
> *The information gathered during the investigation determined that Mr. Jassar fraudulently recorded leave for seven days, from which he derived a personal benefit to which he may not have been entitled, in contravention of the CRA Code of Ethics and Conduct and the Internal Fraud Control Policy.*
>
> …
>
> [Emphasis in the original]

[175] A copy of the April 8, 2013, Internal Affairs investigation report was provided to the grievor on May 17, 2013.

[176] The grievor attended a disciplinary hearing on May 24, 2013, conducted by Ms. Jensen, with the assistance of Mr. Cultum. The grievor was accompanied by Mike Kreuzkamp, a Professional Institute of the Public Service of Canada (PIPSC) representative, who attended as an observer and to support him. The minutes specified that the purpose was to address the April 8, 2013, Internal Affairs

investigation report. Ms. Jensen informed him that she would discuss only the portion of the report titled "Fraud".

[177] At the disciplinary hearing, Ms. Jensen suggested to the grievor that he would have claimed family related leave had he accompanied a family member to a doctor's appointment on October 17, 2012. When she asked him if he had "… anything to add about this date …", the grievor replied that he "… should have used another leave; I needed to accompany [a family member]." At the hearing, Ms. Jensen stated many times that had he accompanied a family member to a doctor, he would have requested a different leave type than what was in the record.

[178] At the disciplinary hearing, Ms. Jensen asked the grievor, for each single date in dispute, if he had "… anything to add …", to which he finally replied as follows: "Should I get another note? What do you want it to say?" Mr. Kreuzkamp ultimately asked Ms. Jensen, "Are you going to offer [the grievor] access to [the Employee Assistance Program]? He is pretty stressed out."

[179] Before adjourning the disciplinary hearing, Mr. Cultum specified the following: "We … want to make sure that you fully understand that what you did was wrong and that you are now clear on what requirements there are as to leave, leave requests and reporting processes."

[180] After the May 24, 2013, disciplinary hearing, Ms. Jensen consulted the Agency's labour relations section. On August 1, 2013, she issued a 20-day suspension letter to the grievor in which she concluded as follows:

…

> *I have concluded that you falsely registered attendance on August 17, 2012, October 17, 2012, November 13, 2012, December 10, 2012 and January 4, 2013. You provided false information to obtain sick leave and medical/dental appointment leave, when in fact you were in attendance in court. Your actions constitute violations of the Canada Revenue Agency (CRA) Code of Ethics and Conduct and the Internal Fraud Control Policy.*
>
> *I have also concluded that you were on unauthorized absence from work by leaving the workplace to attend court while on duty without permission on September 19, 2012 and November 27, 2012. You failed to follow the established processes for the approval of leave, as required under Article*

> *14 of the Professional Institute of The Public Service of Canada (PIPSC) Collective Agreement and as outlined by the CRA Code of Ethics and Conduct.*
>
> *In determining the appropriate level of discipline to render, I have considered multiple aggravating factors. There were seven (7) separate events from August 17, 2012 to January 4, 2013 in which you falsely registered your attendances or were on unauthorized absence from work. You have been an employee of the Canada Revenue Agency for 13 years and ought to have known the proper procedures for requesting leave and the reporting to work process. When given the opportunity to substantiate your absences, you supplied medical notes that did not support your leave requests on the dates in question, but in fact contradicted them. When asked about your court appearances, you were uncooperative and not forthcoming. You did not admit culpability in any of the seven (7) situations nor showed any remorse at any time. I find that your actions were both willful and premeditated.*
>
> …
>
> *In order to impress upon you the seriousness of your actions, you are hereby suspended without pay for a period of twenty (20) days. This decision is made in accordance with the authority delegated to me by the Commissioner under Section 51(1)(f) of the Canada Revenue Agency Act. This suspension will be served from August 2, 2013 to August 30, 2013….*
>
> …
>
> [*Sic* throughout]

[181] At the hearing before me, Ms. Jensen clarified that the grievor had reviewed the October 11, 2012, version of the Agency's Code of Ethics and Conduct and that he had confirmed reading it. However, I was provided with no independent evidence supporting this allegation. She added that she concluded that he had committed fraud because of the following: "I received no proof that his leaves were 100% the truth."

[182] Ms. Jensen imposed the 20-day unpaid suspension on the grievor, to be served form August 2 to 30, 2013, on the grounds that he had allegedly provided false information to obtain sick leave or medical or dental appointment leave on August 17, October 17, November 13, and December 10, 2012, and on January 4, 2013. In addition, she relied upon him allegedly leaving the workplace, while on duty and without permission, to attend court on September 19 and November 27, 2012.

[183] On November 27, 2013, Dr. Pereira wrote another note, similar to the one he had written on February 21, 2013, which read as follows: "This is to confirm that [one of the grievor's family members] attended [an] appointment with me on Nov 27th/2012 at 3:30 pm. [That family member] was accompanied by … Mr. Sukhvir [*sic*] Jassar." Ms. Jensen testified that she never saw this letter.

[184] On June 2, 2014, Ms. Bowman prepared another letter, addressed to Harinder Mahil, the grievor's PISPC representative at the time, to whom she confirmed the following:

…

> *In response to your April 11, 2014 letter, we have obtained the Record of Proceedings from Surrey Provincial Court. I confirm that Mr. Jassar was not required to personally attend all court appearances, and on November 27, 2012 and January 4, 2013, I attended on his behalf.*
>
> *The only day Mr. Jassar was required to personally attend was on May 29, 2013. It is consistent with my memory that* [one of the grievor's family members] *attended court on his behalf on occasion.*

…

[185] Ms. Bowman attached to her letter the B.C. Provincial Court "Record of Proceedings and Enforcement of Information" relating to the grievor. At the hearing, Ms. Jensen testified that she never saw that letter from Ms. Bowman.

2. <u>Findings of fact</u>

[186] The employer submits that the grievor did not provide a clear and forthright explanation of where he was and when on the dates in question. It had concerns for a number of reasons, including that on several occasions, he had alleged that he was sick but had gone to court. The dates coincided. Similarly, he used the wrong leave type when taking a family member to a doctor. If it was not fraud, it was certainly a misrepresentation of his leave. He never came clean with the employer. The employer distinguished the case of *Canadian Merchant Service Guild v. Desgagnés Marine Petro Inc.*, [2017] C.L.A.D. No. 145 (QL). The employee in that case reported his mistake and prepared a report, which the grievor in this case did not do.

[187] The grievor submits that the only evidence from the employer showing that he attended court on September 19 and November 27, 2012, is double-hearsay evidence from Ms. Stankowska, who did not testify at the hearing, and that Ms. Stankowska contacted an unidentified person at the Surrey Court House and was told that the "P" notation indicated a personal appearance on the B.C. Provincial Court Record of Proceedings and Enforcement of Information relating to the grievor. Such double-hearsay from an unidentified person cannot be relied upon or given any weight; see *Murray v. West Arm Truck Lines Ltd.*, [2009] C.L.A.D. No. 389 (QL) at paras. 103 and 104; *Lapostolle v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 134 at paras. 70 and 71; *Amalgamated Transit Union, Local 1374 v. Greyhound Canada Transportation ULC*, [2009] C.L.A.D. No. 286 (QL) at paras. 12 and 25; and *Basra v. Deputy Head (Correctional Service of Canada*, 2012 PSLRB 53 at paras. 92 to 95.

[188] The grievor submits that no affidavit was provided from an official from the B.C. Provincial Court to confirm the meaning of the "P" notation (see s. 30(4) of the *Canada Evidence Act* (R.S.C., 1985, c. C-5)).

[189] The grievor submits that the reliable evidence (the several entries in the employer's time sheets and Ms. Jensen's confirmation in both her direct and cross-examination) indicates that he was at work on September 19 and November 27, 2012.

[190] The grievor further submits that he attended court while on sick leave on August 17, November 13, and December 10, 2012. He admits that he did attend court on those days for a few minutes but states that he was also sick on those days. It does not constitute sick leave fraud to go to court when one is sick. Attending court for a few minutes does not mean that one is well enough to work a regular shift. The onus was on the employer to show that he was not sick on those dates, which it failed to satisfy.

[191] And on two occasions, the grievor took the wrong leave type to bring a family member to a doctor's office. Specifically, on October 17, 2012, and January 4, 2013, he took medical or dental appointment leave to accompany a family member to medical appointments during working hours of 1.5 hours and of 2 hours, respectively.

[192] With respect to October 17, 2012, and January 4, 2013, the grievor submits that he and Dr. Pereira confirmed that he had accompanied a family member to a medical

appointment. For the January 4, 2013 leave, he submits that he made no appearance in court and that Ms. Bowman appeared on his behalf.

[193] The grievor adds that he simply made a mistake with respect to whether he should have claimed the leave as medical or dental appointment or family related leave, which did not deserve discipline; see *Canadian Merchant Service Guild*, at para. 84. On the first date, while he took a family member to a medical appointment and then dropped by the Court for a few minutes before returning to pick up that family member, he simply multitasked. On the second date, he did not go to the Court.

[194] The grievor also accompanied a family member to a medical appointment on November 13, 2012, which Dr. Pereira also confirmed. He was sick that day and did not go to work.

[195] With respect to the November 27 appointment, it was at 3:30 p.m., after he had finished work. He did not take leave to attend it.

[196] I find that five times, i.e., on August 17, October 17, November 13, and December 10, 2012, and on January 4, 2013, the grievor took time off from work either because he was sick or because he had to take a family member to medical appointments. I further find that the grievor took no time off on September 19 and November 27, 2012.

[197] Ms. Jensen testified at the hearing before me that she was not satisfied that the grievor had experienced a serious illness that precluded him from performing his duties. However, I note that the only requirement for sick leave is to be unable to perform duties because of a physical or mental condition.

[198] If in this case the employer did not believe that the grievor was unable to perform his duties because he left his home to make short appearances in court, it could have asked for medical certificates, but it did not. The only evidence presented was that the grievor was unwell on August 17 and November 13 and on part of the day of December 10, 2012, which made him unable to perform his duties.

[199] The grievor's Personal Leave Status Report as of January 29, 2013, shows that he did not use a significant amount of sick leave from August 2012 to January 2013 and that many hundreds of hours of sick leave credits remained available to him.

[200] In sum, the grievor testified that on August 17, November 13, and December 10, 2012, he had felt unwell, which had made him unable to perform his duties. The employer presented no evidence to the contrary. On those dates, and for short periods, he did make brief appearances at court, as follows:

- On August 17, 2012, the grievor was sick and took the day off as a sick day; he did make a brief appearance at court.

- On November 13, 2012, he was sick and took the day off as a sick day; he did make a brief appearance at court. He was available for remote callout work that evening and carried out his shift.

- On December 10, 2012, he took two hours off as sick leave from 1:00 to 3:00 p.m. He was not feeling well, but he did go to court that day for a short period of about 5 to 10 minutes.

[201] The grievor recognized that he made a mistake in that he had claimed medical or dental appointment leave instead of family related leave on October 17, 2012, and on January 4, 2013. On October 17, 2012, he took 1.5 hours of leave for a medical or dental appointment to drop off a family member at a doctor's office. He did go to the courthouse for a short time, 5 to 10 minutes, while the family member was at the doctor's office, and he then picked up that family member. The doctor's office is about 8 to 10 minutes from the courthouse.

[202] On January 4, 2013, the grievor took two hours of medical or dental appointment leave from 9:30 a.m. to 11:30 a.m. to attend a doctor's appointment with a family member. He did not attend court that day. His lawyer attended on his behalf.

[203] With respect to the two last dates, September 19, 2012, and November 27, 2012, the grievor did not take any time off and did not attend court. On September 19, he had a meeting at 2:00 p.m. at the Agency's downtown Vancouver location, but it was cancelled, so he spent the day working his regular shift at the Agency's Surrey location. On November 27, he took a family member to a medical appointment after his working hours had ended; the appointment was at 3:30 p.m.

[204] The grievor indicated that on September 19, 2012, and November 27, 2012, a family member attended court on his behalf. On November 27, 2012, his counsel,

Ms. Bowman, also attended court on his behalf. She confirmed as much in her letters dated February 18, 2013, and June 2, 2014.

[205] The following four of Ms. Jensen's conclusions in the suspension letter are incorrect:

- the grievor attended court in person on September 19 and November 27, 2012, and on January 4, 2013;
- he falsely registered his attendance at work on September 19 and November 27, 2012, and was on an unauthorized absence from work on those dates;
- he falsely claimed sick leave on August 17, November 13, and December 10, 2012; and
- he falsely claimed medical or dental appointment leave on October 7, 2012, and January 4, 2013, while disregarding that he had sufficient family related leave credits for the time that he took to accompany a family member to medical or dental appointments.

[206] The grievor testified that he mistakenly believed that he was allowed to take medical or dental appointment leave when accompanying a family member to medical appointments. The employer presented no evidence showing that he did not honestly believe that he could use medical or dental appointment leave or that he intended to obtain a benefit to which he was not entitled. The evidence clearly showed that he had 14 hours of annual family related leave credits still available to him as of January 29, 2013, which would have been amply sufficient to cover the full 3.5 hours that he took to accompany a family member to doctor's appointments on October 17, 2012, and January 4, 2013. Furthermore, it is a fact well known by those familiar with the federal public sector that unused family related leave credits cannot be transferred to the next fiscal year or cashed in; whatever unused balance is left at an employee's credit at year's end (March 31) is lost.

[207] Finally, Ms. Jensen incorrectly reported as follows: "You did not admit culpability in any of the seven (7) situations nor showed any remorse at any time. I find that your actions were both willful and premeditated" [*sic* throughout].

That is incorrect. At the grievor's May 24, 2013, disciplinary hearing, he indicated that perhaps he should have used a different leave when he took time off to accompany a family member to medical appointments. In addition, in the response he prepared to Internal Affairs' analysis of his leave, which he gave to Ms. Jensen, he had written the following for the December 10, 2012, date: "I did take two hours off as sick leave … I did go to court for 5-10 minutes. I am sorry for taking the sick leave."

D. Revocation of reliability status leading to the termination of employment

[208] The revocation and termination letter mentioned the following five distinct incidents:

…

> [1]… *fear of injury/damage by another person, pursuant to section 810(1) of the Criminal Code, criminal charges related to an alias associated with you,* [*and failure to report charges to management which is a breach of the CRA Code of Ethics and Conduct*], [2] *violation of the CRA Monitoring of the Electronic Network's Usage Directive,* [3] *violation of the CRA Security for the Computing Environment Policy,* [4] *a criminal charge of disobeying a court order and willfully resisting or obstructing a peace officer, contravention of the CRA Code of Ethics and Conduct*, [5] *the Internal Fraud Control Policy as it relates to submitting fraudulent leave, ….*

…

[209] I will now address all the incidents.

1. Alleged fear of injury under s. 810(1) of the *Criminal Code*, alleged failure to report criminal charges to management in 2004, and alleged use of an alias

a. Evidence

[210] In 2011, the employer was made aware of allegedly undisclosed criminal charges against the grievor and of an alleged alias he used to hide additional criminal charges that had been brought against him.

[211] The employer called several witnesses to testify about this information. They were Marilyn Collins, Manager, Security Services, Surrey Campus, Finance and Administration, the Agency; Ms. Singh; Mr. Dorff; Mr. Kruper; Mr. George; Ms. Jensen; Messrs. Hugh and Butler; and Michel Lafleur, who was in 2013 an Intelligence Analyst,

Security Risk Assessment Section, Assets Protection and Security Services Division, Security Directorate, Finance and Administration Branch of the Agency.

[212] The grievor also testified at the hearing. He explained that his country of birth is India. He was an Agency employee from May 1, 1999, to September 27, 2013, working as an IT infrastructure support analyst classified at the CS-01 group and level. His duties included installing, monitoring, troubleshooting, and supporting computer hardware and software. He was in a CS-02 pool before being terminated on September 27, 2013.

[213] He explained that in December 2004, he was involved in a dispute with his former spouse over the custody of their children. His former spouse alleged that he had assaulted her and filed information, pursuant to s. 810 of the *Criminal Code*, of fearing that the grievor would cause personal injury. He then hired a lawyer.

[214] In May 2005, the grievor and his former spouse were asked to sign a peace bond, which contained typical conditions that require that one person not go near the other person or the other person's residence. The grievor was not charged with a criminal offence, and there was no trial. His understanding was that the peace bond had settled the matter. He and his former spouse formally ended their relationship in 2005. He testified that this matter was not related to his CS-01 duties at the Agency.

[215] The grievor remembered speaking about this to some of his colleagues at the office when it happened. He remembered talking to Mr. George, his team leader, Ms. Jensen, then also a team leader, and his co-workers at the time, including Mr. Kruper. He had gone through a difficult period in 2004 and 2005 and had shared that with the people around him. He said that he was an "open book".

[216] At the hearing before me, the grievor was asked whether he had ever used an alias to hide criminal charges that had been filed against him. In particular, he was asked whether he had ever used the alias of "P***" (anonymized in this decision). He responded that he had not. He also confirmed that he had never been charged with or convicted of a criminal offence under that name.

[217] The grievor was asked if he knows Mr. P***. He responded that he does; that person is a distant family member and is 11 years younger than him. He explained that he had posted $1000 in bail at court for Mr. P*** many years ago, in June 2003. The

application for acceptance as surety was filed as an exhibit. The grievor explained that he had designated Mr. P*** on that form as his friend because a services clerk of the B.C. Provincial Court had told him to, given that stating that he was a distant family member was not an option. The grievor explained that he had provided that form to the employer, probably in 2012.

[218] The grievor also described an incident with Mr. P*** that happened many years ago. He explained that around the same time, probably in 2004 or 2005, he was a passenger in a car driven by Mr. P***. The car was pulled over for speeding, and Mr. P*** accidently grabbed the incorrect wallet, which contained the grievor's identification. When the police officer issued the speeding ticket, Mr. P*** informed the officer that the ticket was not in his name but in the grievor's name. The officer corrected the information at the scene and reissued the ticket to Mr. P***. The grievor concluded that this might have been why Mr. P***'s name had been linked to his in the court records.

[219] The grievor filed in evidence the "Security Screening Certificate and Briefing Form" that shows that he obtained a Level II (secret) security clearance in 2008, which came into force on March 31 of that year. Before then, he had had an Agency enhanced reliability status.

[220] The grievor also filed in evidence the certificates of merit he received during his 14-year career at the Agency (1999 to 2013), including an appreciation award in recognition of his commitment to excellence in reaching the Agency's goals during the 1998-1999 fiscal year, a certificate of appreciation for his "… outstanding contributions during the 2010 Olympic games …", and a certificate of excellence in relation to a Windows 7 workshop in 2011.

[221] He also explained that over the last few years of his employment, the Agency rewarded employees when their team leaders recognized that they had gone above and beyond their regular work duties. So, he received about 15 items in recognition of his dedication, such as bags, t-shirts, and lunch boxes, which he brought to the hearing. The employer inspected them before cross-examining the grievor, and both parties agreed that there was no need to retain them as exhibits.

[222] Ms. Collins testified that in July 2011, one of the grievor's co-workers, Mr. Kruper, brought to her attention information about the grievor.

[223] The employer introduced in evidence the December 18, 2015, version of the Agency's "Internal Investigations into Alleged or Suspected Employee Misconduct Policy", which requires employees "… to promptly report to their manager … any allegation, suspicion, or information concerning employee misconduct." The employer produced no evidence with respect to the requirement, or even the existence, of that policy in 2011.

[224] Mr. Kruper informed Ms. Collins of an incident that happened when he was at the courthouse with the grievor in 2011. Ms. Collins immediately wrote an email describing her conversation with Mr. Kruper. Her email is dated July 7, 2011, and reads as follows:

…

> *I have had the opportunity to follow-up* [*sic*] *by phone with* [Mr. Kruper] *who had raised concerns regarding a co-worker and a possible alias.* [Mr. Kruper] *advised that he was with a co-worker, Sukh Jassar, at the courthouse and for whatever reason Sukh ran his own name in the BC Court Services Online database and the search generated a number of charges. When* [Mr. Kruper] *questioned Sukh on the various charges, he stated that Sukh acted strangely and then admitted to having some* [problems with his former spouse] *that were before the courts right now.*
>
> *Later from his residence* [Mr. Kruper] *was a little concerned about the matter and he conducted his own search of the BC Court Services Online database (included below) and thought that he should advise security as a precautionary measure.*

…

[225] Information about court proceedings is publicly accessible through the B.C. Court Services Online website. The information can include a file number, the type of proceedings, the date on which proceedings were initiated, the registry location, the style of cause, the names of parties and counsel, a list of filed documents, the appearance details, the terms of order, and any caveat details. A disclaimer on the website indicates that "The data is provided 'as is' without warranty of any kind …. The Province does not warrant the accuracy or completeness of the data …."

[226] At the hearing, the grievor was asked whether he had ever been to the courthouse with Mr. Kruper. He replied that he had not.

[227] In her email of July 7, 2011, Ms. Collins included the record discovered by Mr. Kruper on the B.C. Court Services Online website. It referred to a Sukhbir Jassar with the same year of birth as the grievor and to a known alias of P***, with a different year of birth. According to the website, one "charge" under s. 810(1) (fear of injury or damage by another person) of the *Criminal Code* had been laid against the person named Jassar and two charges had been laid against the P*** alias, one under s. 264 (criminal harassment) of the *Criminal Code*, and another under s. 810(1) (fear of injury or damage by another person) of the *Criminal Code*.

[228] At the hearing, Mr. Kruper admitted that he never went to the Surrey Court House with the grievor and that he had invented that story. To discover the information, he had conducted research from his work office and from his home. At the hearing, he added the following: "What I do on my own time is my own business."

[229] The B.C. Court Services Online website linked the P*** alias to the grievor's name, which suggested that he was using that alias to hide criminal charges against him. As will become apparent later in this decision, the P*** alias became linked to his name due to a technical error on the B.C. Court Services Online website. At the hearing, the employer recognized that that website has been corrected and that the erroneous P*** alias is no longer linked to his name.

[230] When Ms. Collins was given the printouts of Mr. Kruper's research suggesting that a "charge" had been laid against the grievor in 2004 and that he was using an alias to conceal other "charges", she immediately reported it to Internal Affairs. Ms. Singh was assigned the file.

[231] Ms. Singh explained that Internal Affairs immediately opened a file to investigate the grievor. Like Mr. Kruper had done, she searched the B.C. Court Services Online website and discovered the same record he had found. She then advised Mr. Dorff of her findings. He asked her to request a Royal Canadian Mounted Police (RCMP) background check on the grievor.

[232] In addition to the P*** alias, Mr. Dorff came to suspect that the grievor had used a T*** alias. He informed Ms. Singh, who, on July 19, 2011, wrote the following in her notes: "… based on emails received from … it appears that [the grievor] may have had another name: T*** (different [date of birth]) …."

[233] On August 4, 2011, Mr. Dorff informed Ms. Singh that he was confident that the grievor was Mr. T***. Ms. Singh noted the following: "I spoke to Allan Dorff and he was confident that he remembers Mr. T*** from a few years ago at Collections in Burnaby-Fraser, and it is sure they are the same person."

[234] On August 10, 2011, Ms. Singh reviewed pictures of the grievor and Mr. T*** and concluded that they were not the same person. She noted that "… they were both employed at the same time in two different locations." She then continued documenting the grievor's file for off-duty conduct.

[235] On August 26, 2011, Mr. Dorff confirmed to Ms. Singh that he would wait to receive the RCMP background check on the grievor and that waiting for it would create no risks to the Agency. Mr. Dorff informed Ms. Singh that he would not interview the grievor before receiving the results of the RCMP background check.

[236] Approximately eight months later, in the week of April 23, 2012, the RCMP confirmed that a search of the grievor's name, date of birth, and fingerprints in the National Repository of Criminal Records database revealed no criminal convictions.

[237] On April 27, 2012, Ms. Singh emailed the following to Mr. Dorff: "As agreed, you will be conducting an administrative investigation to determine the circumstances surrounding **off-duty conduct by Sukhbir Jassar** …" [emphasis in the original]. She included a link to a guide and added, "Please take into consideration that you be [*sic*] required to re-assess [*sic*] the employee's reliability status due to the criminal charges." She asked Mr. Dorff to write a report and advised him as follows: "The disciplinary process can be engaged once the investigation is considered to be completed …."

[238] On July 17, 2012, Ms. Singh emailed Mr. Dorff again. She confirmed that she had looked into his "… suspicions that Mr. Jassar was once known as [Mr. T***] …." She noted that "[a]fter further review, we had gathered enough information to conclude that they were not the same people." She noted that the RCMP's background check of the grievor returned negative results. She explained that "[a]t this point, it is important to meet Mr. Jassar and inform him that this information was brought to our attention …." Her email continued as follows:

> *… It will serve as a fact-finding meeting gather* [*sic*] *further information and to help you reach a conclusion. The court documents allude to Mr. Jassar being charged, and given his*

> *conversation with* [Mr. Kruper] *as seen above, it appears to be valid information. You could start with explaining that violations of the Criminal Code of Canada is a breach of the Code of Ethics and Conduct (off-duty conduct) and this is why you are discussing this matter, as it will help determine whether his charges are considered a breach and if it is a conflict with his current duties. I have included information from the Code of Ethics and Conduct concerning the Criminal Code below:*
>
> *Off-duty conduct that may attract disciplinary action up to, and including, termination of employment includes conduct that:*
> *☐ is harmful to the employer's reputation (for example – personal violations of the laws that the CRA administers);*
>
> *☐ renders you unable to perform your duties in a satisfactory manner;*
>
> *☐ is a violation of the Criminal Code or is injurious to the general reputation of the CRA and its employees; or*
>
> *☐ makes it difficult for the employer to manage its operations efficiently and to direct its workforce.*
>
> ***You must report the situation to your manager without delay if:***
> *☐ you are charged under any Canadian laws, regulations, or federal statutes, related to your official duties (including traffic violations if you are driving a CRA vehicle); or*
>
> *☐ you are arrested, detained, or charged with a violation of the* Criminal Code, *when the violation could impact or be perceived to impact your official duties.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[239] On August 8, 2012, Mr. Dorff interviewed the grievor to clarify "… [his] off-duty conduct to determine whether [his] personal affairs have a connection or impact on [his] employment with the CRA …." The grievor reported that an incident occurred in 2004 that related to family matters about the custody of his children. He stated that he had not been convicted criminally and that the matter had been resolved by a peace bond that both he and his former spouse had signed.

[240] At the hearing, the grievor explained that his understanding was that a person does not plead guilty when he or she enters into a peace bond. If one is signed, then there are no charges. He was also told that the peace bond expired after six months. Thus, he understood that no finding of guilt was made or conviction registered as he had agreed to sign the peace bond. He also reiterated that he openly discussed and reported the events at the time. And he insisted that he had no alias.

[241] An excerpt of management's notes taken during the August 8, 2012, interview indicates that the grievor had reported the following, among other things, to Mr. Dorff:

…

> … *There was an incident in 2004 with my* [former spouse]. *No charges were filed and there were no convictions.* [The grievor's former spouse] *attempted to lay charges to get control of the family matters with the kids. It is currently before the courts so I cannot discuss the details. My counsel has advised that I would be in contempt of court. Charges may have been laid Charges were not laid it was hearsay, but they were not followed through. It was resolved by a peace bond. That will be expunged this year* [2012].
>
> …
>
> [*Sic* throughout]
>
> [Emphasis added]

[242] At the hearing, the grievor added that he had been advised that the record of the peace bond he had signed was to have been retained for only two years. However, the police department in Delta, B.C., kept the record longer than that, in error. He had recently asked that it be expunged. Thus, he had reported to Mr. Dorff on August 8, 2012, the following: "That [the record of the peace bond] will be expunged this year."

[243] At the hearing, the employer informed me that it had in hand a copy of the peace bond signed by the grievor on or around May 25, 2005. The employer recognized that it had never been shared with him, and therefore, it was not filed as evidence. However, I note that the employer knew about the peace bond.

[244] Mr. Kruper also testified on this subject, initially stating that the grievor had never told him about his problems with his former spouse that were before the court. On the other hand, when questioned about it and shown Ms. Collins' note that

Mr. Kruper had had conversations with the grievor about it, Mr. Kruper conceded that people at the office knew about the grievor's court problems at the time. Ms. Jensen testified that she did not recall hearing the grievor discuss his court problems at work.

[245] On the other hand, Mr. George, who was the grievor's team leader during those years, recognized that the grievor had told him about alleged false accusations that his former spouse had made against him to obtain sole custody of their children. Mr. George specifically confirmed that the grievor had kept him aware of the events with respect to the fact that his former spouse had involved the police to take away his children. Mr. George conceded that the grievor might have talked about a charge at that time. He just did not remember if that word or other words, like "peace bond", had been used. Mr. George said that he had advised the grievor to hire a lawyer to defend himself against the alleged false accusations.

[246] Nevertheless, on August 8, 2012, just after interviewing the grievor, Mr. Dorff asked Mr. George whether the grievor had advised him as his team leader that criminal charges had been laid against him in 2004. Mr. George said that he responded that he did not remember hearing of charges. In an email to Labour Relations, Mr. Dorff noted that Mr. George responded, "Not to my recollection." I note that Mr. Dorff did not ask Mr. George if he knew of the grievor's family problems at the time. However, as already mentioned, at the hearing, Mr. George clarified that he clearly knew about the alleged false accusations and conceded that the grievor might have talked about a charge at that time. He just did not remember if that specific word was used.

[247] On September 21, 2012, Mr. Dorff conducted a further interview of the grievor to follow up on the interview of August 8, 2012. Mr. Dorff informed him that none of his previous team leaders remembered being informed of criminal charges against him in 2004. It is worth nothing at this stage that Mr. Dorff had not asked any of those previous team leaders if they knew of the grievor's family problems in 2004. The grievor again clarified that no charges had been laid against him but that his former spouse had attempted to have charges laid against him while seeking custody of their children. He said that a peace bond had been in place.

[248] In an undated summary of the case, Internal Affairs determined that the grievor's statement that the 2004 off-duty incident had been resolved by a peace bond

was correct. It noted that "… he was not convicted, and it was resolved by a peace bond. A review of this information proved to be true."

[249] On December 9, 2012, Ms. Singh attended a meeting. It was decided that Internal Affairs would close, as unfounded, its file on the 2004 allegation of fear of injury under s. 810(1) of the *Criminal Code* and of using an alias. However, the file remained open.

[250] On December 19, 2012, Ms. Singh called the Surrey courthouse. She noted the following: "… called Surrey Court again to verify the term 'alias'. Said it only means another name the accused goes by …." At the hearing, she said that she was told that an alias is not created as a result of a bail posting. Therefore, she concluded that the grievor's explanation that he had no alias but that once, in the past, he had posted bail for a distant family member was not credible, and she did not pursue her inquiries to find out if he was telling the truth. At the hearing, she recognized that she made no attempt to reach Mr. P*** to ask this question.

[251] Once Ms. Singh completed her investigation of the information that Mr. Kruper had brought against the grievor, she prepared a report that consolidated Internal Affairs' findings, which was dated April 8, 2013. The findings were drafted by Ms. Singh and were signed by her manager, Ms. Labelle.

[252] With respect to the alias issue, the report indicated that the RCMP's background check of the grievor had returned negative results on April 27, 2012, which confirmed that he had no convictions on record. However, Internal Affairs did not elaborate the alias issue and concluded as follows:

…

> ***Alias***
>
> *The online court documents listed* [Mr. P***] *as an alias for Mr. Jassar. A further search for charges under this alias revealed and additional two charges laid on December 1, 2013: Criminal harassment and fear of injury/damage by another person.*
>
> *On August 8, 2012, when questioned about the alias, Mr. Jassar reported that* [Mr. P***] *was* [a distant family member] *for whom he had posted bail in 2003. When the Internal Affairs and Fraud Control Division contacted the Surrey Provincial Court, they reported that an alias is used as an*

> *alternative name for the accused, and would not be created as a result of a bail posting as explained by Mr. Jassar.*
>
> *Management also discussed the 2003 and 2004 charges with Mr. Jassar. He reported that they were family matters related to the custody of his children. Mr. Jassar stated that he had not been convicted, and the matter was resolved by a peace bond. On April 27, 2012, the Royal Canadian Mounted Police's background check for Mr. Jassar returned negative results, which confirmed that there were no convictions on record.*
>
> *When asked whether he reported the charges to management in 2003 and 2004, Mr. Jassar reported that he had. Management subsequently met with several of his past supervisors to validate this information. All indicated that Mr. Jassar had not reported the charges to them.*
>
> …
>
> ***Conclusion***
>
> …
>
> *The information gathered during the investigation determined that Mr. Jassar failed to report to management that he was criminally charged, thereby breaching the CRA Code of Ethics and Conduct.*
>
> *Due to the uncertainty surrounding the alias, the Internal Affairs and Fraud Control Division recommends a review of Mr. Jassar's reliability* [status]*. A copy of this memo will be placed on Mr. Jassar's personnel security screening file to indicate that there is adverse information known about him.*
>
> …
>
> [Emphasis in the original]

[253] On April 19, 2013, Sylvain Trottier, Director, Assets Protection and Security Services Division, Security Directorate, Finance and Admnistration Branch, the Agency, asked Mr. Dorff to review the grievor's reliability status. Mr. Trottier attached to his request a guidance document, which reads in part as follows:

> …
>
> *In checking reliability, the question to be answered here is whether the individual can be relied upon not to abuse the trust that might be accorded. Is there reasonable cause to believe that he / she may steal Agency valuables, exploit CRA assets and information for personal gain, fail to safeguard*

> *CRA information or assets entrusted to him / her, or exhibit behavior* [*sic*] *that would reflect negatively on his / her reliability.*
>
> *If the answer is yes, the revocation / denial of the Reliability Status becomes a possibility. The individual must be interviewed in person and provided with an opportunity to clarify and explain this information before a final decision is made. Such decision will involve an assessment of any risks attached to maintaining his appointment 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.…*
>
> …
>
> [Emphasis on the original]

[254] On May 28, 2013, Mr. Dorff sent a letter to the grievor to inform him of the review of his reliability status. The letter also referred to and relied on the information in the April 8, 2013, Internal Affairs investigation report, which the grievor had received a copy of on May 21, 2013. Internal Affairs is part of the Security Directorate.

[255] Mr. Dorff's letter invited the grievor to an interview to be conducted on July 12, 2013, and informed him of the following:

> …
>
> *If adverse information about an individual is identified, a review of his or her Reliability Status is undertaken to determine if the adverse information is considered an ongoing risk in relations to the position held by the individual.…*
>
> …
>
> *The adverse information contained in the Internal Affairs and Fraud Prevention report … provided to you on May 21, 2013, has resulted in an administrative review of your Reliability Status as per CRA Personnel Security Screening Policy. As such, I am required to assess the impact of the adverse information on your Reliability Status as it relates to your position as Information Technology Analyst, Information Technology Branch, Pacific Region Deskside Support.*
>
> …
>
> [Emphasis added]

[256] The grievor's interview was rescheduled for July 17. On that day, Mr. Mahil sent a letter to Mr. Dorff on behalf of the grievor. Mr. Mahil highlighted that the grievor stood by his comments that he had never used any alias. Mr. Mahil's letter, as follows, also urged Mr. Dorff to delay reviewing the grievor's reliability status:

…

> *Mr. Jassar stands by his comments to the Internal Affairs investigator. He says that he never used any alias. Mr.* [P***] *is* [a distant family member] *whose address is: … Mr.* [P***] *is employed by ….*
>
> …
>
> *I urge you not to review Mr. Jassar's reliability status until this matter has been further investigated.*
>
> …

[257] It is not clear whether Mr. Dorff considered Mr. Mahil's request to delay reviewing the grievor's reliability status. At the hearing before me, Mr. Dorff testified that he could not recall if he had seen Mr. Mahil's letter of July 17, 2013. There is no evidence that the employer took steps to contact Mr. P***, and Mr. Mahil's request to postpone the reliability status review was disregarded.

[258] The interview took place on July 17, 2013. Messrs. Dorff and Hugh led it. In attendance were Mr. Cultum and Michelle Smith, Manager, Labour Relations, Human Resources Branch, the Agency. The grievor attended with Mr. Mahil.

[259] Mr. Lafleur testified that in this case, the Security Directorate helped prepare the questions that the grievor was asked. However, no Security Directorate representative was present during the July 17, 2013, interview.

[260] Messrs. Dorff and Hugh explained that they prepared the questions to be asked to the grievor at the July 17, 2013, interview. Mr. Lafleur reviewed them. Management had decided that Mr. Mahil was not authorized to answer any of the questions on behalf of the grievor. Mr. Hugh emphasized that Mr. Mahil was not authorized to speak on the grievor's behalf at the interview.

[261] During the July 17, 2013, interview, Mr. Hugh specifically asked the grievor questions about the alleged P*** alias. As he had indicated in August 2012, the grievor again stated as follows:

- The grievor had posted bail for a distant family member.

- In 2003, he was a passenger in his distant family member's car when that person was given a speeding ticket. When that person realized that by mistake he had given the grievor's identification to the police officer, the officer corrected the speeding ticket immediately.

- The grievor had not known that the P*** alias had been associated with his name on the B.C. Provincial Court website.

- Since he volunteers, the grievor requires a criminal record check twice a year, and no alias issue ever came up.

- He never allowed his distant family member to use his name.

- Eventually, he retained Tyrone Duerr, a lawyer, to have the B.C. Provincial Court website corrected to remove the P*** alias associated with his name.

[262] Mr. Hugh took notes during the July 17, 2013, interview. His exchange with the grievor is reproduced in the Security Risk Assessment Report. I will now reproduce only the questions asked about the alias issue, as follows:

…

Jason Hugh – Question:

- *According to the Surrey Provincial Court, an alias would not have been created as a result of posting bail for your* [distant family member]. *Can you explain why the alias of* [P***] *was associated with you?*

Sukhbir Jassar – Answer:

- *One of two things could have happened. Either it was an error by the provincial court through posting bail for his* [distant family member] *or it occurred when his* [distant family member], [P***], *was pulled over during a traffic violation.*

- *For the latter, approximately ten (10) years ago, his* [distant family member] *was driving … with Sukhbir Jassar as a passenger. His* [distant family member] *was pulled over for speeding and accidently grabbed the incorrect wallet which had Sukhbir Jassar's*

identification. Upon realizing the mistake, it was corrected at the scene. Sukhbir Jassar stated he was surprised this alias could have happened from this incident as it was corrected at the scene.

- *He has requested his lawyer to remove this alias, which he claims is incorrect. Sukhbir Jassar never gave his* [distant family member] *authority to use his name. Sukhbir stated he was "just trying to help his* [distant family member] *out."*

- *Sukhbir Jassar stated he was surprised that the alias existed as he is a volunteer and as such requires a criminal record check twice a year and this name has never come up.*

- *He had not previously looked to get the alias cleared up as he did not know about it.*

Jason Hugh – Question:

- *In regards to your criminal arrest and charges from 2003 and 2004, can you explain why none of your supervisors have a record of you reporting these charges?*

Sukhbir Jassar – Answer:

- *He didn't know why the supervisors had no record of it, he "believed" he had reported it.*

- *Sukhbir stated he was going through a difficult personal period dealing with a divorce. He had many personal issues and was emotionally distraught.*

Jason Hugh – Question:

- *Could you please clarify the status of the criminal matters involving you that are presently before the courts? What is the nature of the charges you are facing? Are these matters a continuation of the August 2012 incident or are these new charges based on a more recent incident?*

Sukhbir Jassar – Answer:

- *The issue currently before the courts is related to the August 2012 incident.*

- *Sukhbir Jassar stated his* [former spouse] *took him to court and retrieved a court order for the policy* [*sic*, corrected at hearing as "police"] *to pick up his children without any notice. It was a shock and he didn't know*

> *what was happening. This charge has been removed since by the Supreme Court Judge and dismissed in provincial court. This action by his* [former spouse] *was a breach of a court order.*
>
> …

[263] On August 6, 2013, Mr. Hugh wrote the following to Mr. Dorff:

> …
>
> *… I am trying to work with* [the Security Directorate] *on some of the follow-up issues to the* [July 17, 2013 interview] *(such as confirmation of alias, status of current charges, etc), however the Director and Manager are both away from the office. In the meantime, I have drafted a copy of the Risk Assessment based on what we have at the moment.*
>
> …
>
> [Emphasis added]

[264] Mr. Hugh confirmed that his questions about the status of the "current charges" and whether the grievor had used an alias were never answered by the Agency's staff. He confirmed that thus, he only recycled Ms. Singh's information and the grievor's answers at the July 17, 2013, interview.

[265] Mr. Lafleur explained that in this case, Mr. Dorff was delegated to complete the risk assessment, but the responsible director, Mr. Butler, had to approve its content and decide whether to maintain or revoke the grievor's reliability status. Thus, Mr. Hugh drafted the Security Risk Assessment Report for Mr. Dorff, who later signed it.

[266] On August 20, 2013, Mr. Hugh also drafted a letter to revoke the grievor's reliability status and terminate his employment. He was missing only the grievor's birthdate and the date on which he had started with the Agency.

[267] On August 21, 2013, Mr. Hugh sent the draft Security Risk Assessment Report to Messrs. Dorff, Lafleur, and Trottier. Mr. Dorff signed the report on that same day.

[268] Mr. Hugh recognized that he had relied in part on the information from the April 8, 2013, Internal Affairs investigation report when on August 21, 2013, he concluded that the employer could no longer trust the grievor. Specifically, he wrote the following in his report:

…

- *December 18, 2004, Sukhbir Jassar was charged with fear of injury/damage by another person, pursuant to section 810(1) of the Criminal Code.*

- *Court documents listed* [P***] *as an alias for Sukhbir Jassar, under which two additional charges were laid on December 1, 2003, which were criminal harassment and fear of injury/damage by another person, pursuant to section 810(1) of the Criminal Code.*

- *When questioned regarding both sets of charges by CRA Management in August 2012, Sukhbir Jassar stated the charge from December 18, 2004 was resolved by peace bond and he had not been convicted, to which a background check of Sukhbir Jassar confirmed. In regards to the alias, Sukhbir Jassar stated that it was an error on the part of the Surry Provincial Court and that* [P***] *was his* [distant family member] *who he posted bail. The Internal Affairs investigative report determined that the alias would not have been created as a result of a bail posting as explained by Sukhbir Jassar.*

- *In both instances from 2003 and 2004, Sukhbir Jassar claimed he had reported the charges to his supervisor, follow-up with Management does not validate this claim. The investigative report determined this breached his CRA Code of Ethics and Conduct.*

…

[*Sic* throughout]

[269] As the revocation of the grievor's reliability status and ensuing termination were imposed because of the risk he allegedly posed to the Agency, it is necessary to examine how this risk was presented in the Security Risk Assessment Report. That report reads in part as follows:

…

Analysis

Risk to the CRA

At the time of the Internal Affairs investigative report, Sukhbir Jassar did not possess a criminal record. He had been charged with one criminal offense, and the alias attributed to him had two criminal charges. According to Surrey Provincial Court documents, Sukhbir Jassar has an

alias of [P***], *who had two charges laid on December 1, 2003, criminal harassment and fear of injury/damage by another person. Sukhbir Jassar's claim when questioned by CRA Management on August 8, 2012 was that it was his* [distant family member]*'s name for whom he had posted bail. During the same meeting, when questioned about these charges who he alleges were his* [distant family member], *Sukhbir Jassar claimed that he had reported them to his supervisor as per the Code of Ethics and Conduct. He further claimed that all of the charges were personal and related to a custody issue of his children. Sukhbir Jassar admitted to the charges to which he had previously stated were his* [distant family member]. *The statements made by the employee are not clear and lack credibility. Sukhbir Jassar had stated that all of the charges were resolved through peace bond with no criminal convictions, as of April 27, 2012 he had no criminal convictions to his birth name.*

In both the 2003 and 2004 cases, when questioned, Sukhbir Jassar claimed to have reported them to his supervisors at the time. The Internal Affairs investigation report determined that none of his supervisors at the time of his charges or subsequent court appearance dates were notified of the criminal charge. He failed to report thus breaching the CRA Code of Ethics and Conduct. The CRA Code of Conduct and Ethics states that an employee's off-duty conduct is usually a private matter, however, they must be careful that it does not affect their image and performance as an employee. By not reporting the criminal charges, it shows a lack of compliance with CRA policy, and most importantly poor judgement on the part of Sukhbir Jassar.

… There is a pattern of behavior which has led to numerous criminal charges being laid to Sukhbir Jassar, as well as the alias connected to him, [P***]. *This pattern shows that the employee has been unable to change behavior which has led to criminal charges and puts the Agency's reputation at risk.*

…

In this case, the Sukhbir Jassar has at a minimum shown continued poor judgment, a lack of credibility and to be less than reliable. This puts the reputation of the Agency at risk.

…

[*Sic* throughout]

[Bold in the original]

[Emphasis added]

[270] It concluded in part as follows:

…

Conclusion

…

Sukhbir Jassar expressed some remorse that the events had occurred, however, he has not previously shown the ability to change his actions or behavior. He has shown himself to be at the very least charged with criminal offenses on a least two occasions, and there is reasonable belief that he was charged with two additional criminal charges under an alias. His own statements confirm that the charges under the alias were against him, yet he contradicts this by stating that the alias is his [distant family member]. *In previous meetings outlined in the investigative report, he has tried to provide explanations for all of the incidents and charges as misunderstandings and has only shown remorse now during his Resolution of Doubt interview. This alone negatively impacts the Agency's reputation, and moving forward it cannot be explained why someone like this would be retained as an employee.*

Through all of the charges and numerous interviews on the subjects with management, Sukhbir Jassar has taken actions that prescribe to trying to hide this information from his employer. The investigative report determined he did not report any of these offenses… His actions characterize him to lack credibility, and that he cannot be trusted to be forthcoming with his employer.

…

For these reasons, it is recommended that Sukhbir Jassar's reliability status be revoked.

…

[*Sic* throughout]

[Bold in the original]

[Emphasis added]

[271] Mr. Butler signed the revocation and termination letter on September 27, 2013.

[272] When Mr. Dorff testified, he insisted that it could not be because the grievor had posted bail for his distant family member that he ended up having that member's name reported on the B.C. Court Services Online website as his alias. In addition,

Mr. Dorff insisted that it could not be because that family member was pulled over once by police that the grievor ended up having that member's name inscribed as an alias. Mr. Dorff simply stated that it was not his role to clarify the alias issue. However, he had the discretion to decide that the two explanations that the grievor had provided for the alias did not satisfy him. So, he used his judgment to decide that the grievor did not merit the Agency's trust. In his view, the employer's assets were at risk.

[273] When he was questioned further about his decision, Mr. Dorff insisted that the issue was not about whether charges, a peace bond, or an "Undertaking to a Peace Officer or an Officer in Charge" existed but rather whether the grievor's response and rationale for the alias were plausible. Mr. Dorff's decision was clear; he did not believe the grievor's explanation. Therefore, the grievor's reliability status had to be revoked, which is the recommendation he made to his manager, Mr. Butler.

[274] Messrs. Dorff and Hugh admitted not knowing the difference between posting a bond with a court and being charged with a criminal offence. They admitted not having read s. 810 of the *Criminal Code* (which states that allegations may be made under s. 810(1) that a person fears that another person will cause personal injury), even though they specifically wrote that the grievor had been "charged" with a criminal offence concerning fear of injury pursuant to s. 810(1).

[275] Mr. Butler testified at the hearing before me that with respect to the alias issue, he understood that the court documents listed P*** as an alias for the grievor and that there was a reasonable belief that he had received two criminal charges under the alias.

[276] Mr. Butler acknowledged that he does not know the difference between someone signing a peace bond under s. 810 of the *Criminal Code* and being charged with a criminal offence. He did not review s. 810 before he decided to revoke the grievor's reliability status and terminate his employment. Mr. Butler's understanding was that the grievor had been charged with multiple offences.

[277] Mr. Butler confirmed before me that he is now aware that the grievor never had an alias and that the B.C. Court Services Online website has been corrected, which he was informed of after the grievor had been terminated.

[278] On May 27, 2014, Evelyn Wong, Acting Labour Relations Technical Consultant, Human Resources, Pacific Region, the Agency, wrote to Ruth Colbourne, a senior

human resources programs and policy analyst for the Agency, stating the following: "[i]n the attached email you will also find screen captures of the Eservice website listing Mr. Jassar's alias in 2011. Paul [Cultum] verified today the alias are [*sic*] no longer attached to Mr. Jassar's name in the Eservice website (screen shot [*sic*] below) …."

[279] At the hearing, the grievor was asked if he took steps to have Mr. P***'s name, which had formerly been associated to his name as an alias, removed from the B.C. Court Services Online website. He answered that he had done so and that he had hired a lawyer, Mr. Duerr, to help him correct it.

[280] The grievor produced written communications from the summer of 2014 between Mr. Mahil, a PIPSC representative, and Mr. Duerr. He also produced written communications between Mr. Duerr's office and B.C. Crown counsel. All those communications were about correcting the erroneous P*** alias associated with the grievor's name on the B.C. Court Services Online website.

[281] The evidence shows that as of August 26, 2014, Mr. Duerr worked on having the B.C. Court Services Online website corrected to remove the erroneous P*** alias associated with the grievor's name. Mr. Duerr first contacted the office manager and Crown counsel in Penticton, B.C., who, in turn, took steps to correct the error. On September 2, 2014, the manager informed counsel that "Corrections is working on it now." On September 12, 2014, the manager indicated that the error had been corrected, as follows: "Where I look I don't see any association of the 2."

[282] On September 18, 2014, Mr. Mahil informed the employer that the error had been corrected. Specifically, on that date, Mr. Mahil emailed the following to Ms. Colbourne:

…

> *Mr. Jassar had retained lawyer Tyrone Duerr to deal with the alias matter. The lawyer has been advised by the Provincial Crown that any association between Mr. Jassar and the other party has been removed. A copy of the email from Mr. Duerr to Mr. Jassar is attached.*

…

[283] Those communications, as well as screenshots of the website, confirm that no alias remains associated with the grievor's name on that website.

[284] On October 15, 2014, Mr. Mahil forwarded to Ms. Colbourne the complete email exchange between Mr. Duerr and the manager in Penticton.

[285] Finally, the grievor submitted another document in evidence that further establishes that on October 5, 2016, a search conducted on his name on the B.C. Court Services Online website to find if he was using an alias had the following result: "There are no results that match your search criteria …."

[286] The grievor obtained several documents from the employer through an access-to-information request, which included a screen capture from the B.C. Court Services Online website dated October 14, 2014, showing that no alias was then associated with his name.

b. Findings of fact

[287] The employer maintains that even if the grievor did not have an alias, the fact that he did not inform management of the criminal charge laid against him in 2004 was a valid reason to conclude that it was necessary to revise his reliability status.

[288] The grievor submits that s. 810(1) of the *Criminal Code* is not actually a section under which charges can be laid; instead, it provides for a hearing to determine whether the person against whom the allegations have been made should be required to enter into a "peace bond".

[289] The grievor further submits that from 2003 to 2005, the version of the Agency's Code of Ethics and Conduct that was in force was the February 22, 2001, version. Its section on "off-duty conduct" differed slightly from the October 11, 2012, version of that code. The 2001 version required the Agency's employees to report to their managers if they had been "… arrested, detained, or charged for a violation, **related to [their] official duties** …" [emphasis in the original]. I note that the employer produced no evidence that at all material times, the grievor knew of the existence of the February 22, 2001, version of the Agency's Code of Ethics and Conduct or of its content.

[290] I come to the following conclusions. In 2004 and 2005, the grievor was embroiled in several legal difficulties surrounding the custody of his children.

Messrs. Kruper and George knew about those difficulties, and Mr. George was the grievor's manager at that time. Although allegations were made against the grievor pursuant to s. 810(1) of the *Criminal Code*, he entered into a "peace bond", and no charges were laid against him.

[291] In 2011, Mr. Kruper found information on the B.C. Court Services Online website. He had been looking for entries about the grievor. Mr. Kruper made up the story about going to the courthouse with the grievor to report to the employer the information he had found about the grievor. After Mr. Kruper printed several screen captures from the website on which the grievor's name appeared, he provided them to Ms. Collins, who was then the Agency's manager of security services at its Surrey location. The captures indicated that the grievor was using the P*** alias.

[292] One screen-capture page indicated under the "Charges" tab that somebody with a variation of the grievor's name had been "charged" under s. 810(1) of the *Criminal Code* with "fear of injury/damage by another person" on December 18, 2004. The "Sentences-Disp." tab indicated that the disposition of the matter had been a 12-month recognizance on May 25, 2005, otherwise known as a peace bond.

[293] Details associated with the variation of the grievor's name included his full name and the P*** alias. The birth year associated with the variation of his name was in the 1960s.

[294] In addition to providing this information to Ms. Collins, Mr. Kruper provided her with screen captures on Mr. P***. The birth year associated with Mr. P*** was in the 1980s.

[295] Mr. Dorff confirmed to Ms. Singh that despite the information brought against the grievor in July 2011, there were no risks to the Agency, and the employer could wait for the RCMP's background check.

[296] In the week of April 23, 2012, the employer received the results of a criminal record search of the grievor based on his name, birthdate, and fingerprints. The RCMP indicated that he was not associated with "… any existing Criminal Record of conviction which may be disclosed in accordance with Federal Laws."

[297] On April 27, 2012, Ms. Singh dismissed the fact that the RCMP had indicated that the grievor was not associated with any existing criminal record of conviction.

In an email, she advised Mr. Dorff that the Agency had become aware that the grievor might have an alias and that the screen captures from the B.C. Provincial Court website indicated that he had been "charged" not only with fear of injury or damage by another person under his own name but also with criminal harassment and fear of injury or damage by another person under that alias.

[298] Ms. Singh asked Mr. Dorff to conduct an investigation to determine the circumstances of the grievor's off-duty conduct, including the alleged "charge" under s. 810(1) of the *Criminal Code* of fear of injury or damage by another person and the charges related to the P*** alias. She wrote to Mr. Dorff as follows: "The disciplinary process can be engaged once the investigation is considered to be completed …."

[299] On July 17, 2012, one year after Mr. Kruper had provided to Ms. Collins the screen captures of the B.C. Court Services Online website, Ms. Singh advised Mr. Dorff to interview the grievor about his off-duty conduct. Ms. Singh advised Mr. Dorff that "… you contact your labour relations advisor before meeting with Mr. Jassar …" and that "… if there is evidence of misconduct, labour relations will be able to assist you in terms of discipline."

[300] The February 22, 2001, version of the Code of the Ethics and Conduct required Agency employees to report to their managers if they had been "… arrested, detained, or charged for a violation, **related to [their] official duties**" [emphasis in the original].

[301] Despite the fact that according to Ms. Singh, the alleged off-duty conduct went back to 2003 and 2004, in her email to Mr. Dorff, she cited the wording of the October 11, 2012, version of the Agency's Code of Ethics and Conduct, not the one in place in 2003 and 2004.

[302] On August 8, 2012, Mr. Dorff interviewed the grievor. He was questioned on the "charges" against him, including under the P*** alias. He explained that an incident occurred in 2004 involving his former spouse. He indicated that one charge might have been laid but that it was not followed up and that the matter was resolved via a peace bond, which is consistent with the screen captures from the B.C. Provincial Court's website.

[303] In addition, on January 22, 2013, Mr. Cultum wrote the following in a briefing document about the grievor: "… [Internal Affairs is] currently completing [its]

investigation and [has] found that there is no connection to the workplace as the incidences [*sic*] were of a domestic nature and would not affect his ability to do his job."

[304] The grievor's birthdate was specified in the documents that the employer received from the RCMP with respect to the criminal record search of the National Repository of Criminal Records database. The employer knew that he had been born in the 1960s and not in the 1980s, like Mr. P***.

[305] The grievor voluntarily identified Mr. P*** as a distant family member during his August 8, 2012, interview with Mr. Dorff and indicated that he had put up bail for Mr. P*** in the past. The "Application for Acceptance as Surety" signed by the grievor with respect to Mr. P*** confirms this and is part of the evidence.

[306] The grievor stated the truth when he answered that he had not been convicted of a criminal offence.

[307] Internal Affairs' undated summary of the case confirms that the grievor had no criminal convictions on record as of April 2012 and that the 2004 and 2005 events had been resolved by the peace bond.

[308] The grievor was asked if he had advised his managers of the 2004 "charge". He indicated that he had done so, that he "was an open book" and transparent, and that his co-workers had known what he was going through.

[309] At the hearing before me, Ms. Jensen was unable to recall whether the grievor had spoken to her about the 2004 and 2005 events. Mr. George testified that he could not recall if the grievor had used the word "charge", but he did recall conversations with him. He remembered that the grievor had said that his former spouse had tried to take away his children, that the police had been involved, and that false allegations were made against him under s. 810(1) to the *Criminal Code*. Mr. George remembered advising the grievor to hire a lawyer.

[310] With respect to an alias, the grievor indicated to Mr. Dorff during the August 8, 2012, interview that he had never used any, including that of P***.

[311] On December 9, 2012, Mses. Singh and Labelle met and decided to close Internal Affairs' file, as the allegations were unfounded.

[312] The grievor was not required under the February 22, 2001, version of the Agency's Code of Ethics and Conduct to advise his managers of the 2004 allegations made against him pursuant to s. 810(1) of the *Criminal Code*, as he had not been "… charged for a violation, **related to [his] official duties** …" [emphasis in the original]. Nevertheless, the evidence establishes that he did report to his supervisor that he had had legal problems that had involved his former spouse. As for the matter that directly involved him in 2004 and 2005, the April 8, 2013, Internal Affairs investigation report Affairs thus incorrectly concluded that he "… failed to report to management that he was criminally charged …."

[313] In addition, the Internal Affairs investigation report, which was the basis for requesting a review of the grievor's reliability status, indicates that an alias "… would not be created as a result of a bail posting …" and concluded that there was "… uncertainty surrounding the alias …."

[314] Ms. Singh admitted that she made no efforts to contact Mr. P*** to confirm that he was one of the grievor's distant family members or that criminal charges were laid in 2003 against Mr. P***, not the grievor. When she testified, she was confused and did not acknowledge that the P*** alias was no longer associated with the grievor's name.

[315] Thus, on April 8, 2013, Internal Affairs incorrectly concluded that the grievor had failed to inform the employer of criminal charges and incorrectly suggested that it could not clarify whether he had used the P*** alias. It stated that given the uncertainty with the alias, his reliability status should be reviewed. The report concluded as follows:

> *Due to the uncertainty surrounding the alias, the Internal Affairs and Fraud Control Division recommends a review of Mr. Jassar's security clearance* [*sic*]. *A copy of this memo will be placed on Mr. Jassar's personnel security screening file to indicate that there is adverse information known about him.*

[316] Consequently, the Agency initiated the reliability status review process based on the alleged alias.

[317] The grievor took steps to have the B.C. Provincial Court website corrected to remove the P*** alias associated with his name, which the employer knew about.

[318] In the summer of 2014, the B.C. Court Services Online website was corrected to remove the erroneous P*** alias associated with the grievor's name.

[319] By May 27, 2014, the employer had determined that the P*** alias was no longer associated with the grievor's name on the B.C. Court Services Online website. This was communicated to Ms. Colbourne, who was present throughout the hearing before me but never testified.

[320] On September 18, 2014, Mr. Mahil, on behalf of the grievor, forwarded to Ms. Colbourne an email from Mr. Duerr indicating that the Surrey court had advised that the erroneous association between the P*** alias and the grievor's name had been corrected, something that the employer had known since the end of May 2014.

[321] A subsequent review of the B.C. Provincial Court's website on October 5, 2016, confirmed that no alias is associated with the grievor's name.

[322] Despite being aware since May 27, 2014, that the P*** alias was no longer associated with the grievor's name on the B.C. Court Services Online website, the employer persisted at the hearing before me with its allegations that the grievor had been criminally charged under his name and that he had failed to report that information to management at the time.

[323] In his submissions, the grievor listed a significant amount of inaccurate information in the Security Risk Assessment Report and in the revocation and termination letter. I agree with his argument.

[324] In particular, during the July 17, 2013, interview, Mr. Hugh misinterpreted what the grievor said as constituting an admission that the 2004 charges under the alias had been laid against him. Mr. Hugh misconstrued the grievor's response despite the following:

- The grievor provided two plausible explanations for why his name had been associated with Mr. P***'s on the B.C. Provincial Court's website.
- He had indicated that he had asked his lawyer to have the alias removed because it was incorrect.

- He had indicated that he was surprised by the alias because he is subject to criminal record checks twice a year, and the name has never come up.

[325] Mr. Hugh falsely concluded in the August 21, 2013, Security Risk Assessment Report that the grievor's "… own statements confirm that the charges against the alias were against him …." That report wrongly concluded that "[b]y not reporting the criminal charges, it shows a lack of compliance with CRA policy, and most importantly poor judgement on the part of Sukhbir Jassar." It also falsely concluded that the grievor had tried to hide criminal charges laid against him in 2003 and 2004.

2. Alleged violation of the Agency's "Monitoring of the Electronic Network's Usage Directive"

a. Evidence

[326] The evidence relating to this incident and my findings of fact with respect to it were reported earlier in this decision. On April 29, 2013, the grievor received a one-day disciplinary suspension, to be served on April 30, 2013, for sending a prank email using a co-worker's computer on December 21, 2012, and he accepted responsibility for his action.

[327] The employer called Messrs. Hugh and Butler to testify about this allegation brought against the grievor.

[328] Mr. Hugh recognized that he had relied in part on the following information from Internal Affairs' April 8, 2013, investigation report when on August 21, 2013, he concluded that the employer could no longer trust the grievor. Specifically, he wrote the following in his report:

…

- *On December 21, 2012, Sukhbir Jassar was found in violation of the CRA Monitoring of the Electronic Network's Usage Directive when he used a co-workers e-mail account to send an e-mail to another co-worker.*

…

[*Sic* throughout]

[329] As the revocation of the grievor's reliability status and ensuing termination were done because of the risk he allegedly posed to the Agency, it is necessary to examine how this risk was presented in the August 21, 2013, Security Risk Assessment Report. That report reads in part as follows:

…

> **Analysis**
>
> Risk to the CRA
>
> …
>
> *Sukhbir Jassar also showed poor judgment in using another employee's e-mail account. When questioned, Sukhbir Jassar stated he wanted to teach the employee a lesson for not locking their account and stated it was a prank. This conduct does not reflect the core values of the Agency of being professional and showing integrity. This violation of the Monitoring of the Electronic Network's Usage Directive does not reflect the image or reputation the Agency promotes. All employees are bound by these Directives, however, being an Information Technology (IT) employee, it should be Sukhbir Jassar who promotes compliance, not breaches it.*
>
> …
>
> *In this case, the Sukhbir Jassar has at a minimum shown continued poor judgment, a lack of credibility and to be less than reliable. This puts the reputation of the Agency at risk.*
>
> …
>
> [*Sic* throughout]
>
> [Bold in the original]

[330] It concluded in part as follows:

…

> **Conclusion**
>
> ,,,
>
> *Sukhbir Jassar expressed some remorse that the events had occurred, however, he has not previously shown the ability to change his actions or behavior….*
>
> …

> *Sukhbir Jassar is either being not being truthful or cannot be trusted to understand and uphold the security policies and directives, nor the Code of Ethics and Conduct as it relates to two security breaches….*
>
> …
>
> *For these reasons, it is recommended that Sukhbir Jassar's reliability status be revoked.*
>
> …
>
> [*Sic* throughout]
>
> [Bold in the original]

[331] Mr. Butler considered that an employee's behaviour becomes a serious issue when it creates a risk to the Agency. With respect to the security breach, he relied on the information in both Internal Affairs' April 8, 2013, investigation report and the August 21, 2013, Security Risk Assessment Report to conclude that the grievor's behaviour had created a risk to the Agency.

b. <u>Findings of fact</u>

[332] My findings of fact with respect to this incident were reported earlier in this decision.

[333] In his submissions, the grievor listed a significant amount of inaccurate information in the Security Risk Assessment Report and in the revocation and termination letter. I agree with his argument. For example, when Mr. Hugh transcribed in the August 21, 2013, Security Risk Assessment Report the grievor's responses from the July 17, 2013, interview, he noted that the grievor indicated that he regretted his actions. But Mr. Hugh then incorrectly stated in the conclusion of the Security Risk Assessment Report as follows: "Throughout the interview, Sukhbir Jassar failed to admit responsibility for his actions, failed to show remorse for his actions, and failed to indicate that his behaviour would be corrected in the future." In cross-examination, Mr. Hugh recognized that the grievor showed remorse for his actions at the July 17, 2013, interview. However, the grievor's remorse was not given any weight or was ignored.

[334] In fact, the evidence showed that the grievor regretted sending the prank email and that he had apologized to the co-worker whose email account he had used.

[335] Mr. Hugh concluded as follows that the grievor's prank email had hurt the Agency's image and reputation: "This violation of the Monitoring of the Electronic Networks' Usage Directive [*sic*] does not reflect the image or reputation the Agency promotes …." However, the grievor alleged that risking the Agency's reputation is not a criterion to use when assessing someone's reliability status. I agree with his argument. Mr. Hugh was supposed to use the specific reliability criteria from the Agency's guidance document provided by Mr. Trottier to Mr. Dorff on April 19, 2013.

3. Alleged violation of the Agency's "Security for the Computing Environment Policy"

a. Evidence

[336] I reported earlier in this decision the evidence relating to this incident and my findings of fact. On April 29, 2013, the grievor received a 10-day disciplinary suspension, to be served from May 1 to 14, 2013, for installing and powering up a wireless router on January 11, 2013, and for connecting it to the Agency's network. I found that the employer has not established that the grievor had powered it up. I accepted that any potential risk to the Agency's network as a result of the wireless router connection would have been very minimal and that no actual risk to the Agency's network has been established.

[337] The employer called, among others, Messrs. Hugh and Butler to testify about this allegation brought against the grievor.

[338] Mr. Hugh recognized that he had relied in part on the information from Internal Affairs' April 8, 2013, investigation report when on August 21, 2013, he concluded that the employer could no longer trust the grievor. Specifically, he wrote the following in his report:

> …
>
> - *On January 11, 2013, Sukhbir Jassar was found in violation of the CRA Security for the Computing Environment Policy when he connected a wireless router to the CRA network for approximately 30 minutes.*
>
> …
>
> [*Sic* throughout]

[339] As the revocation of the grievor's reliability status and ensuing termination were done because of the risk he allegedly posed to the Agency, it is necessary to examine how this risk was presented in the August 21, 2013, Security Risk Assessment Report. That report reads in part as follows:

…

Analysis

Risk to the CRA

…

Again, Sukhbir Jassar showed incredibly poor judgment when connecting a wireless router to the CRA network. In an attempt to action a request to set-up network connection to a client, there was potential for the CRA computing systems to be compromised. The Internal Affairs investigative report did identify the risk as being minimal, however when questioned about the incident, Sukhbir Jassar claimed he had never connected the device. His claim contradicted the findings of the Information Technology Protection Centre, Shared Services Canada, and the employee who witnessed the incident. The investigative report determined Sukhbir Jassar did indeed connect the wireless router. While violating the Security for the Computing Environment Policy is a concern to the Agency, it is troubling that Sukhbir Jassar lied about not connecting the device. This shows a lack of credibility and shows the employee to be less than reliable.

…

In this case, the Sukhbir Jassar has at a minimum shown continued poor judgment, a lack of credibility and to be less than reliable. This puts the reputation of the Agency at risk.

…

[Bold in the original]

[Emphasis added]

[*Sic* throughout]

[340] It concluded in part as follows:

…

Conclusion

…

> *Sukhbir Jassar expressed some remorse that the events had occurred, however, he has not previously shown the ability to change his actions or behavior….*
>
> *Sukhbir Jassar is either being not being truthful or cannot be trusted to understand and uphold the security policies and directives, nor the Code of Ethics and Conduct as it relates to two security breaches. During the Resolution of Doubt interview, he claimed that to this knowledge he did not connect the router despite being provided clear evidence to the contrary, but also stated he regretted taking the action and didn't know it constituted a security beach despite having just returned to work following an action plan specifically highlighting the CRA Code of Ethics and Conduct and Electronic Networks' Usage Policy.*
>
> …
>
> *For these reasons, it is recommended that Sukhbir Jassar's reliability status be revoked.*
>
> …
>
> [*Sic* throughout]
>
> [Bold in the original]
>
> [Emphasis added]

[341] In that report, Mr. Hugh reported that the grievor showed remorse too late in process, which impacted the Agency's reputation. In cross-examination, Mr. Hugh recognized that the grievor showed remorse for his actions at the July 17, 2013, interview. However, his remorse was not given any weight or was ignored.

[342] In fact, the evidence showed that the grievor indicated to Mr. Hugh that he regretted that the router had been connected to the Agency's network and said that any connection was an accident. He apologized, indicated that he felt very bad that it happened, and stated that he had not intended to violate protocol or to harm anyone or the network.

[343] At the hearing before me, Mr. Butler testified that because of the router incident, he considered there was a reasonable cause to believe that the grievor could fail to safeguard the Agency's information. He was aware the grievor had already been disciplined for this incident.

[344] Mr. Butler considered that an employee's behaviour becomes a serious issue when it creates a risk to the Agency. With respect to this security breach, he relied on the information in both Internal Affairs' April 8, 2013, investigation report and the August 21, 2013, Security Risk Assessment Report to conclude that the grievor's behaviour had created a risk to the Agency. He considered the router incident serious but was not aware that the IT experts, Messrs. Robinson and Forget, had respectively qualified the risk to the Agency as "minimal" or "very minimal". Nor was he aware that the Breach of Information Risk Assessment Tool prepared by Ms. Accettura stated that the potential to the Agency was "low impact", which was described as follows: a "[c]ompromise is not really expected to cause injury."

b. Findings of fact

[345] Earlier in this decision, I reported my findings of fact with respect to this incident.

[346] In his submissions, the grievor listed a significant amount of inaccurate information in the Security Risk Assessment Report and in the revocation and termination letter. I agree with his argument. In particular, Mr. Hugh transcribed in the August 21, 2013, Security Risk Assessment Report the grievor's responses from the July 17, 2013, interview, stating that he indicated that he was unaware if the router had been connected to the Agency's network and that he regretted that it had happened. But Mr. Hugh then incorrectly stated in the conclusion of the Security Risk Assessment Report as follows: "Throughout the interview, Sukhbir Jassar failed to admit responsibility for his actions, failed to show remorse for his actions, and failed to indicate that his behaviour would be corrected in the future."

[347] Mr. Hugh concluded in his report that the grievor connected the router "… despite having just returned to work following an action plan specifically highlighting the CRA Code of Ethics [*sic*] and Electronic Networks' Usage Policy [*sic*]". As the grievor alleged, Mr. Hugh made a mistake by referring to that policy. The action plan Mr. Hugh mentioned covered the December 21, 2012, prank email. In the 10-day suspension letter for the router incident, the employer referred to and relied on the Security for the Computing Environment Policy, not the "Electronic Networks' Usage Policy".

[348] In support of the claim that the grievor had shown poor judgment, Mr. Hugh referred to the router's brief connection to the Agency's network. However, he only recycled false information in Internal Affairs' April 8, 2013, investigation report that employees had witnessed the grievor connecting the router. None of the employer's witnesses was able to say that he or she had witnessed him connecting it to the Agency's network.

[349] Mr. Hugh also reported that during the August 17, 2013, interview, the grievor was presented with "… clear evidence showing he had connected the router to the network …." He displayed the log record taken January 11, 2013, which suggests that the connection was made at 02:10:01 p.m. as its unique identification number appeared in the log and it had received an IP address lease, but it does not show who connected the router to the network. Therefore, Mr. Hugh's notes are misleading.

[350] In addition, Mr. Hugh relied on the findings in Internal Affairs' April 8, 2013, investigation report to conclude that there was a security risk to the Agency. However, many of the facts in that report are inaccurate.

[351] Finally, Mr. Butler indicated that the router incident established the grievor's failure to safeguard the Agency's information, but he did not put forward that the grievor was suspected of stealing any Agency valuables or exploiting its assets and information for personal gain.

4. Criminal charges of disobeying a court order and willfully obstructing a peace officer and failure to report criminal charges to management in 2012

a. Evidence

[352] The employer called several witnesses to testify about these incidents. They were Ms. Singh and Messrs. Dorff, Hugh, and Butler.

[353] The grievor also testified.

[354] The grievor was involved in other proceedings under the *Criminal Code* in August 2012, again with his former spouse. On or before August 1 (the date is unclear in the evidence), a custody order was issued in relation to his children. His evidence is that on the same date, his children ran from his former spouse's house following an argument. For a while, he and his former spouse were unable to locate them. He found

them later on at a friend's house. His former spouse called the police and alleged that he had taken them without consent.

[355] On August 3, 2012, the grievor signed an Undertaking to a Peace Officer or an Officer in Charge that included abstaining from communicating with his children and reporting to a bail supervisor. On August 17, 2012, it was modified to allow him to communicate with his children in accordance with an order for access made by a family court.

[356] On August 8, 2012, Mr. Dorff interviewed the grievor to clarify "… [his] off-duty conduct to determine whether [his] personal affairs have a connection or impact on [his] employment with the CRA …". The grievor reported that there was an incident in 2004 that related to family matters about the custody of his children and that those family matters were before the court as of August 8, 2012. An excerpt of management's notes taken during the August 8, 2012, interview indicates that the grievor had reported the following, among other things, to Mr. Dorff:

> …
>
> … *There was an incident in 2004 with my* [former spouse]… [The grievor's former spouse] *attempted to lay charges to get control of the family matters with the kids. It is currently before the courts so I cannot discuss the details. My counsel has advised that I would be in contempt of court….*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis added]

[357] On September 18, 2012, the police laid against the grievor a charge of disobeying a lawful court order, pursuant to s. 127 of the *Criminal Code*, and another charge of wilfully obstructing a peace officer, pursuant to s. 129(a) of the *Criminal Code*.

[358] On November 13, 2012, the Undertaking to a Peace Officer or an Officer in Charge was modified again. The grievor was no longer required to report to a bail supervisor.

[359] The grievor was asked whether the incident that occurred on or about August 1, 2012, was related to his official duties. He responded "No, not at all." His

understanding was also that given that he had signed an Undertaking to a Peace Officer or an Officer in Charge, he was no longer charged with criminal offences in relation to the incident.

[360] On December 9, 2012, when Ms. Singh informed Mr. Dorff that Internal Affairs would close, as unfounded, its file on the 2004 allegations of fear of injury under s. 810(1) of the *Criminal Code* and of using an alias, he asked her if she had seen that two "additional charges" had been laid against the grievor. She responded that she had not.

[361] On December 12, 2012, Mr. Dorff sent Ms. Singh information about the two charges in 2012 against the grievor related to the custody order. Ms. Singh looked up the information on the B.C. Court Services Online website. She indicated in a note that "[t]he charges are for wilfully resisting or obstructing a peace officer and disobeying a court order."

[362] On January 9, 2013, Ms. Singh spoke to Mr. Dorff. She explained that Internal Affairs was planning "… on waiting for the court documents before we know how to move forward …." Ms. Singh noted, "… [Mr. Dorff] was also seeking advice on what to do with [the grievor] as their history is quite 'bumpy' …."

[363] On January 10, 2013, Ms. Singh called the Delta Police Department's headquarters about the new charges against the grievor that had been laid in 2012. She learned the name of the investigating officer, with whom she had a conversation. He informed her of the following, according to her note:

…

> *He then clarified that Mr. Jassar was informed of a court order, presumably the custody order for his children. When the police left the residence of his former* [spouse]*, his children left the home and met Mr. Jassar in a pre-determined location. From there, he handed the children over to his current spouse, and* [the grievor's current spouse] *passed them to* [a friend]*.* [The friend of the grievor's current spouse] *hid the children for seven hours while the police was* [*sic*] *attempting to locate them. This is why he was charged for obstruction.*

…

[364] No corroborating evidence was presented at the hearing before me to establish the accuracy of the oral summary that Ms. Singh obtained from the officer. The grievor was asked if the officer had spoken to him. He answered in the negative.

[365] Internal Affairs' April 8, 2013, investigation report, which Ms. Singh drafted, confirms that the criminal charges laid against the grievor in 2012 were not related to his official duties. In fact, the report contained the following conclusion with respect to his leave usage and attendance registration in 2012 and 2013: "During a conversation with the assigned detective of the Delta Police Service on January 10, 2013, [Internal Affairs] confirmed that the charges were related to family matters surrounding his former spouse and children."

[366] On January 22, 2013, management met with Ms. Singh. As stated in a briefing document prepared by Mr. Cultum, the purpose of the meeting was "… to take steps to clarify what the issues are, who is involved in the investigation of each and what stage they are at." The briefing document also mentions the following:

> …
>
> ***Purpose:***
>
> …
>
> *It became apparent early in the discussion that Isha* [Internal Affairs] *felt that she and her manager (Denis Maurice) are in a position to be giving advice to management on how to build a case against* [the grievor]*, strategies to follow and course of action, including quantum of discipline to be administered.*
>
> …
>
> ***Background:***
>
> *Mr. Jassar has been investigated by* [Internal Affairs] *for incidences relating to charges for violating a court order and obstructing a police officer.* [Internal Affairs are] *currently completing their investigation and* [have] *found that there is no connection to the workplace as the incidences* [*sic*] were *of a domestic nature and would not affect his ability to do his job.*
>
> …
>
> [*Sic* throughout]
>
> [Bold in the original]

[Emphasis added]

[367] Mr. Hugh recognized that he had relied in part on the following information from Internal Affairs' April 8, 2013, investigation report when on August 21, 2013, he concluded that the employer could no longer trust the grievor. Specifically, he wrote the following in his report:

…

- *During the investigation, it was discovered that Sukhbir Jassar has additional charges pending against him. On August 1, 2012 he was charged with disobeying a court order and willfully resisting or obstructing a peace officer.*

…

[*Sic* throughout]

[368] As the revocation of the grievor's reliability status and ensuing termination were done because of the risk he allegedly posed to the Agency, it is necessary to examine how this risk was presented in the August 21, 2013, Security Risk Assessment Report, which reads in part as follows:

…

Analysis

Risk to the CRA

…

On August 1, 2012, Sukhbir Jassar was charged with disobeying a court order and willfully resisting or obstructing a peace officer. Internal Affairs communications with Delta Police confirmed were related to family matters surrounding his former spouse and children. There is a pattern of behavior which has led to numerous criminal charges being laid to Sukhbir Jassar… This pattern shows that the employee has been unable to change behavior which has led to criminal charges and puts the Agency's reputation at risk.

…

In this case, the Sukhbir Jassar has at a minimum shown continued poor judgment, a lack of credibility and to be less than reliable. This puts the reputation of the Agency at risk.

…

[*Sic* throughout]

[Bold in the original]

[Emphasis added]

[369] It concluded in part as follows:

…

Conclusion

…

Sukhbir Jassar expressed some remorse that the events had occurred, however, he has not previously shown the ability to change his actions or behavior. He has shown himself to be at the very least charged with criminal offenses on a least two occasions… This alone negatively impacts the Agency's reputation, and moving forward it cannot be explained why someone like this would be retained as an employee.

Through all of the charges and numerous interviews on the subjects with management, Sukhbir Jassar has taken actions that prescribe to trying to hide this information from his employer. The investigative report determined he did not report any of these offenses. A recently as August 1, 2012, he was charged again and failed to report this to this employer… His actions characterize him to lack credibility, and that he cannot be trusted to be forthcoming with his employer.

…

For these reasons, it is recommended that Sukhbir Jassar's reliability status be revoked.

…

[*Sic* throughout]

[Bold in the original]

[370] When Mr. Dorff testified, he expressed his view that the Agency's Code of Ethics and Conduct is clear. The criminal charges laid against the grievor constituted a solid reason to revoke his reliability status. He emphasized that because of the discrepancy — the grievor repeated twice that no charges were outstanding against him (from 2004 and 2005) in August 2012, but new charges were laid against him in September 2012 — he lost trust in the grievor. He highlighted that the grievor did not satisfy him that he was truthful, which spoke to his character. Mr. Dorff did not remember that on

August 8, 2012, the grievor had indicated to him that matters involving his former spouse were then before the courts and that his understanding was that he could not discuss the details, on the advice of his counsel. At that time, Mr. Dorff had not questioned the grievor about it.

[371] At the hearing before me, Mr. Butler explained that his understanding was that the grievor had been charged with multiple offences, including disobeying a court order and wilfully obstructing a peace officer on August 1, 2012. Mr. Butler recognized that he did not know whether the grievor had been convicted of an offence in 2012. In his view, the charges themselves were sufficient to justify his termination.

b. Findings of fact

[372] The employer submits that the question is not whether the charges laid against the grievor on September 18, 2012, related to his official duties but whether the employer had valid reasons to initiate a review of his reliability status. The employer submits that he did not come clean and that he did not inform management of the new charges. Thus, it had valid reasons to initiate the review of his reliability status.

[373] The grievor submits that none of the charges laid against him on September 18, 2012, related to his official duties. The accusations laid by a court liaison officer concerned two related incidents that took place on or about August 1, 2012, which were alleged violations of the *Criminal Code* for disobeying a lawful court order made on that date and for wilfully obstructing a peace officer. The court order was a custody order with respect to the grievor's children. None of the alleged violations had anything to do with his official duties.

[374] The grievor adds that the employer reached the conclusion that the charges laid in 2012 had nothing to do with his official duties. A briefing document prepared by Mr. Cultum on January 22, 2013, reports that "… [Internal Affairs is] currently completing [its] investigation and [has] found that there is no connection to the workplace as the incidences [*sic*] were of a domestic nature and would not affect his ability to do his job."

[375] The grievor also submits that the August 2012 custody dispute occurred almost eight years after the 2004 events that had led to the 2005 peace bond. Suggesting that this establishes a pattern of questionable behaviour is simply absurd; see *Canadian*

Merchant Service Guild, at para. 89. Rather than recognizing that events separated by an almost eight-year time span clearly show no pattern of questionable behaviour, Mr. Hugh drew the opposite conclusion in the August 21, 2013, Security Risk Assessment Report, stating that the fact that "… two criminal charges span over a decade …" showed a pattern of questionable behaviour over that period despite the almost eight-year gap.

[376] I find that the grievor did refer to family matters being before the court in his August 8, 2012, interview with Mr. Dorff. Mr. Dorff did not ask any questions about them but instead focused on the alleged P*** alias and the matters involving the grievor's former spouse in 2004 and 2005, which had resulted in the peace bond.

[377] The grievor signed the Undertaking to a Peace Officer or an Officer in Charge on August 3, 2012. He was then charged on September 18, 2012, for disobeying a court order in relation to the custody of his children and for willfully obstructing a peace officer.

[378] The Agency's Code of Ethics and Conduct in force in the summer of 2012 was the March 26, 2012, version. Its section on "off-duty conduct" required the Agency's employees to report to their managers if they had been "… arrested, detained, or charged for a violation of the *Criminal Code*, when the violation could impact [their] official duties." The question was therefore whether "the violation could impact" the griever's IT analyst duties, as the grievor worked in computer science and was an IT analyst. I note that the employer produced no evidence that at all material times, the grievor knew of the existence of the March 26, 2012, version of the Agency's Code of Ethics and Conduct or of its content.

[379] Internal Affairs found that the August 1, 2012, incidents had no connection to the workplace as the "incidences [*sic*] were of a domestic nature and would not affect [the grievor's] ability to do his job."

[380] Based on the March 26, 2012, version of the Agency's Code of Ethics and Conduct, the grievor was not required to report the 2012 charges to his managers. Despite that, he did mention that matters were then before the courts at his August 8, 2012, interview with Mr. Dorff, who did not pursue the issue.

[381] In his submissions, the grievor listed a significant amount of inaccurate information in the Security Risk Assessment Report and in the revocation and termination letter. I agree with his argument.

[382] In particular, the August 21, 2013, Security Risk Assessment Report wrongly concluded that the grievor had failed to say anything about the charges laid in 2012, and Mr. Hugh simply assumed that the grievor had been required to report them under the Agency's Code of Ethics and Conduct, despite Internal Affairs' conclusion that "… there is no connection to the workplace as the incidences [*sic*] were of a domestic nature and would not affect his ability to do his job."

[383] In that report, Mr. Hugh acknowledged that the charges had been related to family matters involving the grievor's former spouse and children. Mr. Hugh incorrectly concluded those had been laid on August 1, 2012. The court documents filed at the hearing before me made it clear that the charges were laid on September 18, 2012, in relation to an incident that allegedly occurred on August 1, 2012.

[384] Mr. Hugh also incorrectly concluded that "[t]here is a pattern of behavior [*sic*] which has led to numerous criminal charges being laid to Sukhbir Jassar, as well as the alias connected to him …." I find that the grievor has shown no pattern of questionable behaviour with respect to the custody disputes of 2004 and 2012. The matters of 2004 and 2005 were resolved by a peace bond, with no criminal conviction. Furthermore, he was never charged with a criminal offence under the P*** alias. Thus, the information in the August 21, 2013, Security Risk Assessment Report is incorrect that "… [t]here is a pattern of behavior [*sic*] which has led to numerous criminal charges being laid to Sukhbir Jassar, as well as the alias connected to him, [P***] …".

[385] Mr. Hugh also concluded in the August 21, 2013, Security Risk Assessment Report that the grievor's behaviour at the August 8, 2012, and July 17, 2013, interviews "negatively impacts that Agency's reputation". Quite frankly, I find it a stretch of the imagination to entertain the notion that the custody disputes in which the grievor was involved or the answers that he provided at those interviews might have affected the employer's reputation. Had the employer properly investigated the facts, given due consideration to the grievor's explanations, and tried to understand the real nature of the proceedings in which he was involved, it would have realized how preposterous

that conclusion was. I find that no reasonable, informed person aware of all the facts, viewing the matter realistically and practically and having thought the matter through, would conclude that the grievor's behaviour at those interviews "… negatively impacts that Agency's reputation."

5. Leave usage and attendance registration and alleged contraventions of the Agency's Code of Ethics and Conduct and "Internal Fraud Control Policy"

a. Evidence

[386] I have reported earlier in this decision the evidence relating to this incident. On August 1, 2013, the grievor received a 20-day disciplinary suspension, to be served from August 2 to 30, 2013, for his leave usage and attendance registration in 2012 and 2013.

[387] I found that with respect to the two dates, September 19, 2012, and November 27, 2013, the grievor did not take any time off and did not attend court.

[388] I also found that with respect to three times at issue, August 17 and November 13 and on part of the day of December 10, 2012, the only evidence presented was that the grievor was unwell on those dates, which made him unable to perform his duties. The employer could have asked for medical certificates if it did not believe that he was unable to perform his duties because he left his home to make short appearances in court, but it did not.

[389] I also found that on two occasions, the grievor claimed medical or dental appointment leave to accompany a family member to a doctor's office when he should have claimed family related leave instead. I further found that the employer presented no evidence showing that he deliberately claimed the wrong type of leave or that he intended to obtain a benefit to which he was not entitled.

[390] The employer called Messrs. Hugh and Butler to testify about these allegations brought against the grievor.

[391] Mr. Hugh recognized that he had relied in part on the information from Internal Affairs' April 8, 2013, investigation report when on August 21, 2013, he concluded that the employer could no longer trust the grievor. Specifically, he wrote the following in his report:

…

- *Between August 17, 2012 to January 4, 2013, it was determined that Sukhbir Jassar fraudulently recorded leave for seven (7) days, from which he derived a personal benefit to which he may not have been entitled, which contravened the CRA Code of Ethics and Conduct and the Internal Fraud Control Policy. In six (6) of these cases, Sukhbir Jassar either submitted uncertified sick leave, medical/dental appointment or no leave, when court documents showed he personally appeared in court relating to the August 1, 2012 criminal charges.*

…

[*Sic* throughout]

[392] As the revocation of the grievor's reliability status and ensuing termination were done because of the risk he allegedly posed to the Agency, it is necessary to examine how this risk was presented in the August 21, 2013, Security Risk Assessment Report. That report reads in part as follows:

…

Analysis

Risk to the CRA

…

… the Internal Affairs investigative report determined that Sukhbir Jassar fraudulently submitted leave requests (or did not submit any) during times he made court appearances. During a January 30, 2013 meeting with CRA Management, Sukhbir Jassar admitted to attending court during work hours, however in three (3) of the seven (7) instances he produced medical certificate where he claimed to have dropped off his spouse for appointments. The investigative report determined that Sukhbir Jassar's explanations for his whereabouts conflicted as it appeared he was in court. Submitting fraudulent leave requests (and/or not reporting absences), is a contravention of the CRA Code of Ethics and Conduct and the Internal Fraud Control Policy. This action shows the employee to not be reliable in performing his duties, and is another example of him not being forthcoming with his employer.

In this case, the Sukhbir Jassar has at a minimum shown continued poor judgment, a lack of credibility and to be less than reliable. This puts the reputation of the Agency at risk.

…

[*Sic* throughout]

[Bold in the original]

[393] It concluded as follows:

…

Conclusion

…

Sukhbir Jassar expressed some remorse that the events had occurred, however, he has not previously shown the ability to change his actions or behavior….

Through all of the charges and numerous interviews on the subjects with management, Sukhbir Jassar has taken actions that prescribe to trying to hide this information from his employer… furthermore, there is no record of submitting any leave to any of the six (6) instances of attending court during work hours, instead submitting other leave records or not submitting any leave at all. His actions characterize him to lack credibility, and that he cannot be trusted to be forthcoming with his employer.

…

For these reasons, it is recommended that Sukhbir Jassar's reliability status be revoked.

…

[*Sic* throughout]

[Bold in the original]

[394] Mr. Butler considered that an employee's behaviour becomes a serious issue when it creates a risk to the Agency. With respect to the alleged fraud (the use of leave), he relied on the information in both Internal Affairs' April 8, 2013, investigation report and the August 21, 2013, Security Risk Assessment Report to conclude that the grievor's behaviour had created a risk to the Agency.

b. <u>Findings of fact</u>

[395] I reported earlier in this decision my findings of fact with respect to this incident.

[396] In his submissions, the grievor listed a significant amount of inaccurate information in the Security Risk Assessment Report and in the revocation and termination letter. I agree with his argument.

[397] Specifically, Internal Affairs' April 8, 2013, investigation report concluded that the grievor's "… explanation for his whereabouts conflicts with the information gathered during the investigation …" as "… [Internal Affairs] determined that he was present in court during those days …." These findings were based on incorrect facts as they failed to take into account that he did not personally attend court on two occasions.

[398] At the July 17, 2013, interview, the grievor "… stated he had made a mistake and tried to multi-task [*sic*] doing two things at the same time. He stated it was not a great thing to do and he did not feel good about it …."

[399] When Mr. Hugh transcribed in the August 21, 2013, Security Risk Assessment Report the grievor's responses from the July 17, 2013, interview, he noted that the grievor indicated that he regretted his actions. But Mr. Hugh then incorrectly stated in the conclusion of the Security Risk Assessment Report as follows: "Throughout the interview, Sukhbir Jassar failed to admit responsibility for his actions, failed to show remorse for his actions, and failed to indicate that his behaviour would be corrected in the future."

[400] In the Security Risk Assessment Report, Mr. Hugh also reported that the grievor showed remorse too late in the process, which impacted the Agency's reputation. In cross-examination, Mr. Hugh recognized that the grievor showed remorse for his actions at the July 17, 2013, interview. However, his remorse was not given any weight or was ignored.

[401] In fact, the evidence showed that the grievor stated that he did not feel good about briefly attending court while on sick leave and that he had made a mistake. He also admitted that he should have taken different leave when he attended court or took a family member to a doctor. He said that he was sorry, that he had been doing many things at once, and that he recognized that he had lacked judgment.

[402] While the August 21, 2013, Security Risk Assessment Report concluded that the grievor either fraudulently submitted leave requests or did not submit any for court

appearances between August 2012 and January 2013, it incorrectly concluded that his actions were fraudulent, that he contravened "… the CRA Code of Ethics and Conduct and the Internal Fraud Control Policy …", and that his actions "characterize him to lack credibility, and that he cannot be trusted to be forthcoming with his employer …." Although he did not choose the right absence code when he took a family member to a doctor, this did not demonstrate that he had intended to defraud the employer. At the July 17, 2013, interview, he did not try to evade any of the questions put to him about his leave usage and attendance record.

6. Reliability status review process followed by the employer and the revocation of reliability status and termination

[403] I will now deal with the evidence relating to the process followed by the employer for reviewing the grievor's reliability status.

a. Evidence

[404] Messrs. Lafleur, Hugh, Dorff, and Butler and Ms. Jensen testified for the employer about the review of the grievor's reliability status, the recommendation to revoke it, and the decision to terminate him.

[405] The grievor testified on his own behalf.

[406] Mr. Hugh explained that on April 8, 2013, Internal Affairs recommended that the grievor's reliability status be reviewed. Mr. Hugh also explained that in his role at the time as Acting Assistant Director, Security Services, Pacific Region, the Agency, he was mandated to conduct a risk assessment based on the information received from Internal Affairs.

[407] The grievor returned to work from suspension on May 17, 2013, on an action plan. His access privileges to the CRA mainframe were suspended, pending the security review.

[408] Mr. Lafleur explained that management is responsible for initiating a review of an employee's reliability status when it becomes aware of adverse information about him or her. If management determines that the adverse information is serious enough to potentially lead to the revocation of the employee's reliability status, an interview is to be conducted to allow the employee to respond to the adverse information.

[409] Mr. Lafleur explained that one of his specific tasks at the time was to develop for management the document entitled "DRAFT Guidelines for the Review for Cause of a Reliability Status". He added that although they were not in effect in 2013, they were used as guidance for management in this case between May and October 2013.

[410] Mr. Lafleur explained that thus, the Security Directorate had provided management with the Agency's "Appendix A - Guidance" document from the DRAFT Guidelines for the Review for Cause of a Reliability Status that his section had prepared for cases of adverse information against employees. The document states the following:

…

> ***7. Appendix A — Guidance on the Review of Adverse Information***
>
> *In accordance with the provisions of the Policy on Personnel Security Screening of the Canada Revenue Agency (CRA), management is to review this information in relation to the position occupied, in consultation with* [the Security Directorate]*. Once a decision is reached, management advises* [the Security Directorate] *of their decision to maintain or revoke the Reliability Status of the individual. In cases where the Reliability Status is revoked, management advises the appropriate authority (e.g. Labour Relations, Resourcing).* [The Security Directorate] provides the following guidance for cases where adverse information exists about an individual.
>
> ***Criminal Convictions***
> *First, the existence of a criminal record can be, but need not to be, sufficient grounds to revoke / deny reliability status. A criminal record should be considered in light of such matters as the duties and tasks to be performed, the nature and frequency of the offence, and the passage of time. However, if conviction(s) do exist, the responsible ML2 or their delegate will need to determine the following:*
>
> - *The person's attitude towards the unpardoned offence or the offence for which a record of suspension has not been received, and the extent to which the individual has changed behavior in this regard, and*
> - *The likely recurrence of similar offense and its potential effect upon job reliability.*
>
> ***General Considerations***
> *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.*

> *Is there reasonable cause to believe that he / she may steal Agency valuables, exploit CRA assets and information for personal gain, fail to safeguard CRA information or assets entrusted to him / her, pose a threat to the safety of other clients (taxpayers) or Agency employees or exhibit behavior that would reflect negatively on his / her reliability.*
> *If the answer is yes, the revocation / denial of the Reliability Status becomes a possibility.*
>
> …
>
> [*Sic* throughout]
>
> [Bold in the original]
>
> [Emphasis added]

…

[411] On April 19, 2013, Mr. Trottier asked Mr. Dorff to review the grievor's reliability status. His role was "… to review the adverse information contained in the investigation report and evaluate the security risk in relation to the position in question …." The grievor had held an IT analyst position.

[412] Mr. Dorff was to use the specific reliability criteria, as follows, from the Agency's guidance document:

…

> *… Is there reasonable cause to believe that he / she may steal Agency valuables, exploit CRA assets and information for personal gain, fail to safeguard CRA information or assets trusted to him / her, or exhibit behaviour that would reflect negatively on his / her reliability.*

…

[413] Mr. Lafleur explained that following an interview, a formal risk assessment must be completed, in consultation with the Security Directorate, to outline all the relevant facts and to guide management to a recommendation.

[414] Mr. Lafleur testified that the Security Directorate provides advice on how to conduct an interview. In this case, it helped prepare the questions that the grievor was asked at the July 17, 2013, interview. However, no representative of it was present during the interview.

[415] For his part, Mr. Hugh was to provide expert support to management on the technical security aspects of the reliability status review and the July 17, 2013, interview.

[416] On the day of the July 17, 2013, interview, Mr. Mahil sent a letter to Mr. Dorff reiterating that the grievor had never used an alias, that Mr. P*** was his distant family member, and that the employer could contact Mr. P*** at his home, through his employer, and by telephone. Mr. Mahil urged the employer not to review the grievor's reliability status until the alleged alias issue had been further investigated.

[417] At the hearing before me, Mr. Hugh explained that he did not have an investigative role. He testified that he only recycled Internal Affairs' investigative report, to which he added the information from the interview.

[418] The August 21, 2013, Security Risk Assessment Report concluded in part as follows:

…

> **Conclusion**
>
> *Management has considered all of the information provided by Sukhbir Jassar during the Resolution of Doubt interview. The concerns raised in the Investigative Report leading to the Resolution of Doubt interview relate to his credibility, reliability and trustworthiness, and no information from the interview alleviated these concerns.*
>
> *Throughout the interview Sukhbir Jassar failed to admit responsibility for his actions, failed to show remorse for his actions, and failed to indicate that his behaviour would be corrected in the future.*
>
> …
>
> *Sukhbir Jassar stated all of the issues were during a certain period of time while he was dealing with personal issues, and that the fourteen (14) plus years of service were fine until the issues arose. While this may be seen as a mitigating factor for his behavior, two of the criminal charges span over a decade.*
>
> *Sukhbir Jassar's position as a network administrator with privileged user rights gives him access to the Agency's entire network, and he has shown neither to be reliable nor trustworthy. He offered information during the resolution of doubt interview that contradicted earlier documented*

> *statements. Based on the Code of Ethics and Conduct, his actions could be perceived to impair his ability to make decisions with integrity, and in the best interest of the CRA.*
>
> *Allowing employees to continue in the work environment where he would have access to sensitive information could likely be perceived as poor decision-making on the CRA's part and have a negative impact on the Agency's reputation.*
>
> *Management has reviewed the CS-01 work environment in consideration of positions not requiring access to sensitive information. There is only one CS-01 work description available in the Pacific Region and the position requires employees to install, monitor, troubleshoot and support computer hardware and software; administer components of CRA and CBSA network infrastructure; log, monitor, and investigate and resolve incidents. All of which require varying degrees of* Privilege User *system access and access to sensitive information as well as the system rights to grant access to others.*
>
> *While the employee holds no criminal convictions, there have been charges and arrests. The review of reliability status revolves around an overall assessment of the adverse information obtained as it relates to his ability to perform his duties to the level of trust required. The confidence and trust that the public has in the CRA is a cornerstone of Canada's tax system of voluntary compliance and self-assessment. As a result, employees in the CRA are held to high degree of trust. The conduct demonstrated by this employee raises doubts and continues to pose a serious concern to management. Management's trust in the employee has been breached and the security risk posed by the employee is deemed to be unacceptable.*
>
> *For these reasons, it is recommended that Sukhbir Jassar's reliability status be revoked.*
>
> …
>
> [*Sic* throughout]
>
> [Bold in the original]

[419] Mr. Lafleur, who received the draft Security Risk Assessment Report from Mr. Hugh, explained that his role was to provide advice to Messrs. Dorff and Hugh. He had a guidance role. The decision to terminate the grievor was management's.

[420] On the grievor's return to work on September 3, 2013, after the 20-day suspension served from August 2 to 30, 2013, Ms. Jensen assigned him "… alternate

duties until further notice … [d]ue to management's ongoing review of [his] reliability status …" and "… to ensure the integrity of the Agency's information systems and to minimize the risk to the Agency …." She removed his privileged network access. His duties were limited to tasks such as researching information, preparing guidelines and reports, and reviewing the knowledge required to perform his duties.

[421] On September 11, 2013, Mr. Dorff placed the grievor on leave with pay pending the final review of his reliability status. Mr. Dorff advised him that he would be contacted as to when a final decision would be made. At the hearing before me, Mr. Dorff testified that he based his decision on the risk that he thought the grievor represented to the Agency's assets.

[422] The revocation of the grievor's reliability status occurred on September 27, 2013. On the same day, his employment was terminated, allegedly for administrative reasons. The revocation and termination letter dated September 27, 2013, and provided to him included the following:

…

> *The confidence and trust that employees and businesses have in the Canada Revenue Agency (CRA) is a cornerstone of Canada's tax system of voluntary compliance and self-assessment. As a result, employees of the CRA are held to a high degree of trust….*
>
> *A letter and documentation was sent to you on May 21, 2013, to advise you that Allan Dorff, Regional Director, Information Technology Branch, had been made aware of adverse information brought forward against you, specifically with fear of injury/damage by another person, pursuant to section 810(1) of the Criminal Code, criminal charges related to an alias associated with you, violation of the CRA Monitoring of the Electronic Network's* [*sic*] *Usage Directive, violation of the CRA Security for the Computing Environment Policy, a criminal charge of disobeying a court order and wilfully resisting or obstructing a peace officer, contravention of the CRA Code of Ethics and Conduct and the Internal Fraud Control Policy as it relates to submitting fraudulent leave, and failure to report criminal charges to management which is a breach of the* CRA Code of Ethics and Conduct. *On July 17, 2013, you participated in a Resolution of Doubt Interview as part of the review for cause of your reliability status with the Canada Revenue Agency.*

> *I have reviewed all relevant information including what you presented during the resolution of doubt interview and found that in light of the adverse information at hand you should no longer have access to the CRA's assets and information as you are deemed to be no longer reliable and trustworthy. This decision is based on CRA Management losing trust in you to be a reliable employee. This trust has been eroded through a pattern of behavior which does not represent the Agency's core values, nor the integrity of being a CRA employee. You have consistently shown the inability to be truthful and have consistently breached or contravened CRA policy and directives. You have not shown any changed behavior* [*sic*]*, nor have you taken responsibility for your actions. I must thus revoke your Reliability Status effective immediately, pursuant to the Policy on Personnel Security Screening as outlined in Chapter 10 of the Security Volume in the Finance and Administration Manual. This decision is subject to review and redress through the internal grievance procedure.*
>
> *As outlined in the Agency's Policy on Personnel Security Screening and as per your most recent letter of offer dated May 9, 2001, the requirement to retain the required reliability status is a condition of employment and failure to retain this reliability status may affect you continuing employment.*
>
> *Therefore, I am hereby notifying you that effective September 27, 2013, your employment with the Agency is terminated for reasons other than breaches of discipline or misconduct in accordance with the authority delegated to me pursuant to Section 51(1) (g) of the Canada Revenue Agency Act.*
>
> …

[423] At the hearing before me, Mr. Butler explained that he had had discussions with Messrs. Dorff and Lafleur before signing the September 27, 2013, revocation and termination letter. He explained that once he reviewed all the information that Mr. Dorff had provided to him, which included Internal Affairs' April 8, 2013, investigation report and the August 21, 2013, Security Risk Assessment Report, he concluded that the grievor could no longer be trusted and that he should no longer have access to the Agency's assets and information.

[424] Mr. Butler confirmed that he reviewed both Internal Affairs' April 8, 2013, investigation report and the August 21, 2013, Security Risk Assessment Report. Given the number of events they raised, he found that he could no longer trust the grievor to

follow the Agency's rules, directives, and policies. He explained that the trust in him was eroded because of his obvious lapses in judgment or his mistakes. Thus, the Agency lost trust in him to safeguard the information in its custody.

[425] Mr. Butler was also asked if he was familiar with the Agency's guidance document that the Security Directorate had prepared for cases of adverse information brought against employees. He affirmed that he had seen it in a previous context and that he was familiar with it. That document states that in accordance with the provisions of the Agency's "Personnel Security Screening Policy", management is to review the adverse information in relation to the position occupied and then advise the Security Directorate of its decision as to whether to revoke the employee's reliability status. At the hearing, he was reminded that the following test appears in this document:

…

> ***General Considerations***
> *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.*
> *Is there reasonable cause to believe that he / she may steal Agency valuables, exploit CRA assets and information for personal gain, fail to safeguard CRA information or assets entrusted to him / her, pose a threat to the safety of other clients (taxpayers) or Agency employees or exhibit behavior [sic] that would reflect negatively on his / her reliability.*
> *If the answer is yes, the revocation / denial of the Reliability Status becomes a possibility.*
>
> …
>
> [Bold in the original]
>
> [Emphasis in the original]

[426] Mr. Butler explained that he was satisfied that revoking the grievor's reliability status was possible because of a pattern of behaviour. He considered that keeping the grievor on staff created a risk for the Agency, given the number of incidents in which he had been involved. Mr. Butler agreed that there was no reasonable cause to believe that the grievor would steal or exploit the Agency's assets. However, because of the router incident, he considered there was a reasonable cause to believe that the grievor could fail to safeguard the Agency's information. He was aware the grievor had already been disciplined for this incident.

[427] Mr. Butler said that he was also aware that the 2001 Agency's Code of Ethics and Conduct highlighted the following in a box:

…

> ***Note:*** *If you are arrested, detained, or charged for a violation,* ***related to your official duties****, of Canadian laws, regulations, or a federal statute, including traffic violations if you are driving a CRA vehicle, or the* Criminal Code*, you must report the situation to your manager without delay.*
>
> …
>
> [Emphasis in the original]

[428] Mr. Butler considered that an employee's behaviour becomes a serious issue when it creates a risk to the Agency.

[429] Mr. Butler confirmed that he is aware that the grievor never had an alias and that the B.C. Court Services Online website has been corrected, which he was informed of after the grievor had been terminated.

[430] At the hearing, I asked Mr. Butler whether he would make the same decision to terminate the grievor had he learned only that day that an amount of the information he had been provided with was inaccurate. His answer was firm: "Yes. On the whole, there still remained an issue of trust."

b. Findings of fact

[431] The evidence shows that on August 6, 2013, Mr. Hugh had intended to follow up on the unresolved issues, which included whether the alleged alias use had been confirmed and the current status of the charges against the grievor. However, he admitted that those questions were not answered. No further investigation of the alleged alias issue took place, and the decision to revoke the grievor's reliability status and to terminate his employment was based on the recommendations that Mr. Hugh made in the August 21, 2013, Security Risk Assessment Report.

[432] Despite Mr. Mahil's request that the August 17, 2013, interview be postponed until the employer had investigated the alleged alias issue, Mr. Dorff proceeded with the interview. Again, no further investigation took place.

[433] The August 21, 2013, Security Risk Assessment Report concluded that the grievor had "… shown continued poor judgment, a lack of credibility and to be less than reliable …." It further concluded that "[t]his puts the reputation of the Agency at risk." Mr. Hugh relied upon a non-existent pattern of criminal behaviour, despite the fact that the grievor had no criminal convictions to his name. Finally, with respect to the risk to other employees, Mr. Hugh concluded that the grievor did "… not appear to pose a risk to the employees at the Agency."

[434] Risking the Agency's reputation is not a criterion for assessing someone's reliability status. Mr. Dorff was supposed to use the specific reliability criteria from the Agency's guidance document prepared by the Security Directorate for cases of adverse information being brought against employees. Those criteria were the following:

> *Is there reasonable cause to believe that he/she may steal Agency valuables, exploit CRA assets and information for personal gain, fail to safeguard CRA information or assets trusted to him/her, or exhibit behaviour that would reflect negatively on his/her reliability.*

[435] I find as a fact that the employer did not use any of those criteria when it assessed whether the grievor represented a risk.

[436] Specifically, contrary to its policy, the employer did not assess whether there was reasonable cause to believe that the grievor might steal its valuables, exploit its assets and information for personal gain, fail to safeguard its information or assets entrusted to him, or exhibit other similar behaviour that would jeopardize its operations.

[437] As mentioned, risking the Agency's reputation was not a legitimate criterion for assessing the grievor's reliability status. Nor were the impressionistic assertions of it having lost confidence in his credibility, reliability, and trustworthiness. Mr. Dorff was supposed to use the specific reliability criteria from the Agency's guidance document prepared by the Security Directorate for cases of adverse information being brought against employees. He did not use them.

[438] Mr. Hugh drafted the Security Risk Assessment Report. It concluded that the employer could not trust the grievor and recommended revoking his reliability status, which would result in the termination of his employment. That report provided incomplete and erroneous facts and an analysis that ignored the appropriate criteria.

Its clear intent was to revoke his reliability status; it did not approach the evidence in an objective way, and it considered only the evidence needed to support the view that he was not a credible, reliable, and trustworthy employee. It failed to give due considerations to his explanations. In a few words, it served to support management's case.

[439] Mr. Dorff reviewed the draft Security Risk Assessment Report prepared by Mr. Hugh and agreed with its contents, thus endorsing a representation of facts that was not real. Mr. Dorff signed the report on August 21, 2013. I note that as a witness, I found Mr. Dorff argumentative, evasive, inflexible, and reluctant to concede what clearly should have been conceded. For example, he had difficulty recognizing that Mr. P***'s date of birth in the court record differed from the grievor's date of birth. He added that it was not his job to investigate the facts. However, the evidence clearly established that Mr. Dorff did meet with the grievor on July 17, 2013, for the purpose of assessing, in light of the information in the April 8, 2013, Internal Affairs' investigation report, whether there was reasonable cause to believe that the grievor represented, as an IT analyst, an unacceptable risk to the Agency's operations. Furthermore, I note the evidence reported earlier in this decision that Mr. Dorff had also met with the grievor on August 8 and September 21, 2012, for the purpose of investigating the events reported by Internal Affairs.

[440] Mr. Lafleur also reviewed the draft report before Mr. Dorff signed it and submitted his recommendations. Mr. Lafleur emphasized that when he reviewed the report, he kept in mind that the test is the following: Does the adverse information generate an unacceptable security risk? The Security Directorate's advice to his client was that if so, and if management decided that the employee's reliability status should be revoked, then the report had to mention that the security risk posed by the employee was deemed unacceptable. Those words were added in the report.

[441] In turn, Mr. Butler relied on an incomplete and erroneous report of facts and on an analysis that ignored the appropriate criteria to conclude that keeping the grievor on staff created an unacceptable risk for the Agency.

[442] The September 27, 2013, letter revoking the grievor's reliability status and terminating his employment simply reiterated the grounds set out in the Security Risk

Assessment Report for revoking his status. There can be no doubt that the employer relied on information that was false and that it should have known was false.

[443] With respect to whether there was reasonable cause to believe that the grievor exhibited "… behaviour that would reflect negatively on his/her reliability …", the employer relied on a number of grounds that did not relate to an objective unacceptable risk to the Agency's operations — which, according to Mr. Lafleur's testimony on behalf of the employer, is really what a security risk assessment is all about — or that were proven false or unfair, including the following:

- the grievor's alleged use of the P*** alias in 2003;
- his custody dispute in 2004 and 2005;
- his alleged violation of the Agency's Code of Ethics and Conduct in 2004 and 2005 by failing to report alleged criminal charges that as the employer admits, did not relate to his job;
- his prank email, which was part of the IT culture at the time;
- his alleged act of connecting a wireless router to the Agency's network for approximately 30 minutes;
- his custody dispute in 2012;
- his alleged violation of the Agency's Code of Ethics and Conduct in 2012 by failing to report criminal charges that as the employer admits, did not relate to his job; and
- his alleged fraudulent leave usage and attendance registration between August 2012 and January 2013.

[444] Messrs. Dorff and Butler testified at the hearing before me that they still believe that the grievor is not a reliable employee. Mr. Dorff, in particular, views him as not reliable based on the theory that he has a pattern of behaviour that does not represent the Agency's core values. However, representing those values is not a criterion for assessing whether there is reasonable cause to believe that the grievor represents an unacceptable risk to the Agency's operations. Messrs. Dorff and Butler still maintain that for screening an employee, trust is very important. That may be so, but the

evidence before me does not establish that the grievor cannot be trusted within the meaning of the guidance document that Mr. Trottier attached to his request to Mr. Dorff on April 19, 2013.

VI. Analysis

A. Did the employer have cause for imposing a disciplinary action in relation to the router incident? If so, was the 10-day suspension excessive? If so, what would have been appropriate in the circumstances?

1. Did the employer have cause for imposing a disciplinary action in relation to the router incident?

[445] On April 29, 2013, the grievor received a 10-day disciplinary suspension, to be served from May 1 to 14, 2013, for risking the Agency's network and violating its Security for the Computing Environment Policy by installing, connecting, and powering up a wireless router to its network. According to the employer, the incident happened at about 2:00 p.m. on January 11, 2013, in the Sunset Room of the Surrey Tax Centre.

[446] The employer submits that the document entitled "Log Record Of DHCP Server at 91B snap shot taken January 11, 2013", considered in light of the wireless router's unique identification number, is evidence that the router was connected to the Agency's network. The log suggests that an IP address lease was issued for the router at 2:10:01 p.m. In addition, the employer submits that when it estimated that the router had been connected to the Agency's network for approximately 30 minutes, it was the best estimate at the time.

[447] The employer further submits that it proved that the grievor violated the Security for the Computing Environment Policy, even if the violations might have been committed via his sheer incompetence. It also submits that Mr. Kruper did not lie about the router incident.

[448] The employer relied on the following cases in support of its position: *United Steelworkers of America, Local 8773 v. Hendrickson Spring (Stratford Operations)*, [2012] O.L.A.A. No. 440 (QL) at paras. 2, 6, and 7 (the grievor wrongly denied wrongdoing); *Minaker v. Toronto-Dominion Bank*, [2003] C.L.A.D. No. 39 (QL) at paras. 32 to 36 (the complainant had been reckless in his behaviour of downloading material through unsanctioned channels); *Krain v. Toronto-Dominion Bank*, [2002] C.L.A.D. No. 406 (QL) at paras. 13, 15, 17, and 21 (the complainant had downloaded software from

the Internet); *Ontario Public Service Employees Union v. Sheridan College Institute of Technology and Advanced Learning* (2010), 201 L.A.C. (4th) 243 at paras. 15, 53, and 60 (the grievor had lied to the employer and had not been forthright); and *National Automobile, Aerospace, Transportation and General Workers Union (CAW-Canada), Local No. 27 v. General Dynamics Land Systems - Canada* (2012), 229 L.A.C. (4th) 174 at paras. 74 and 75 and 91 to 93 (given the nature of the business, the grievor's repeated use of unauthorized software had been a very serious offence).

[449] The grievor submits that on the other hand, the employer has not demonstrated that he violated the Security for the Computing Environment Policy.

[450] The grievor further submits that the minimal risk associated with the router's momentary connection to the Agency's network was emphasized by the security features incorporated into the Agency's computing environment that are referred to in its Security for the Computing Environment Policy. In particular, everyone using the Agency's computing systems needs a user identifier and password. No confidential, secret, top secret, or classified information is "… to be collected, created, processed or stored on [*sic*] using any Agency IT computer system that is connected to the Agency network …" (paragraph 14). The Internet may be accessed only via the Agency's LAN, which "… is more secure than a stand-alone Internet PC solution …" (paragraph 49). "[Q]uestionable or suspect sites/categories will be blocked from access …" (paragraph 54). An "access control system" is in place that "… verifies the identity, authentication and authorization of system users …" (paragraph 81). In addition, a "… log of all invalid access attempts is to be maintained and regularly reviewed …" (paragraph 81).

[451] The grievor submits that no evidence was produced showing that an invalid access attempt was made via the router in the Sunset Room on January 11, 2013. There is "[c]ontinuous network monitoring including network intrusion detection and network malicious code detector capability …" (paragraph 87). "[V]irus detection/removal software" is in place (paragraph 91). "Boundary safeguards" and mechanisms, such as firewalls, further "… limit access to the internal network …" (paragraphs 94 and 95).

[452] The grievor submits that a simple mistake does not justify imposing discipline; see *Canadian Merchant Service Guild*, at para. 84. The same goes for not knowing or recalling how the router was briefly connected; see *Amalgamated Transit Union, Local*

1374, at para. 21; and *Desjarlais v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 88 at para. 156. At most, a written warning might have been appropriate; see *Desjarlais*, at para. 159.

[453] In addition, the grievor reiterates that while Ms. Accettura concluded that the router was connected to the network for approximately half an hour, this presumption was not supported by any evidence. Nor was the statement that there were eyewitnesses to the router being powered up.

[454] As corrective action, the grievor seeks that the suspension be rescinded, that he receive the salary and benefits lost as a result of it, and that he be made whole in all respects.

[455] As the Federal Court of Appeal held in *Basra v. Canada (Attorney General)*, 2010 FCA 24 at para. 26, the employer bears the onus of proving the underlying facts that are invoked to justify imposing discipline. This applies to both the facts justifying its imposition and its appropriateness.

[456] The evidence revealed that the router had been connected to the Agency's network but for a very brief time and at very minimal risk to the Agency, although without any evidence that a security breach arose from that connection. Furthermore, the evidence did not reveal who powered it up.

[457] The evidence adduced by the employer does not demonstrate that the grievor violated its Security for the Computing Environment Policy as was set out in the 10-day suspension letter issued on April 29, 2013. Any violations might have resulted from somebody else's actions. The employer has not established clearly that the grievor breached that policy.

[458] Therefore, I am not satisfied that the employer has established that it had cause for imposing a disciplinary action on the grievor in relation to the router incident.

2. If the employer had cause for imposing a disciplinary action in relation to the router incident, was the 10-day suspension excessive? If so, what would have been appropriate in the circumstances?

[459] As I have found that the employer did not have cause for imposing a disciplinary action on the grievor in relation to the router incident, it is not necessary to address the remaining issues with respect to that incident. In any event, had he

powered up the wireless router, I believe that a warning would have been sufficient, in the circumstances of this case.

B. Did the employer have cause for imposing a disciplinary action in relation to the grievor's leave usage and attendance registration? If so, was the 20-day suspension excessive? If so, what would have been appropriate in the circumstances?

1. Did the employer have cause for imposing a disciplinary action in relation to the grievor's leave usage and attendance registration?

[460] On August 1, 2013, the grievor received a 20-day disciplinary suspension, to be served from August 2 to 30, 2013, for violating the Agency's Code of Ethics and Conduct and Internal Fraud Control Policy by falsely claiming leave and registering work attendance between August 2012 and January 2013.

[461] The employer submits that the grievor engaged in wrongdoing and that he was uncooperative during the investigation. He did not admit culpability and showed no remorse. The employer insists that during his interview with Ms. Jensen, he was evasive and uncooperative. It also submits that his actions were wilful and premeditated, which warranted the 20-day suspension.

[462] The employer submits that the fact that the grievor popped into court for only 5 to 10 minutes is not relevant; instead, it is that he engaged in wrongdoing and was not forthright about it.

[463] The employer submits that if the grievor had really called the courthouse to check why "P" was noted in the record when he said he was not present in court, he would have made a note of it. Any reasonable person would have documented it. However, I note that the employer omitted to explain why it was more reasonable for Mses. Singh and Stankowska not to document in the Internal Affairs' logs that were provided in evidence at the hearing before me the names of any of the Surrey Court staff and medical clinics' staff to which they spoke during their investigation.

[464] In support of its position, the employer referred me to the following cases: *Morrow v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 43 at paras. 181, 187, 193, 195, and 198 (the grievor did not come clean); *Thomson v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-27846 (19980402), [1998] C.P.S.S.R.B. No. 20 (QL) at 63 and 64 (the employer proved the fraud); *Wentges v. Deputy Head (Department of Health)*, 2010 PSLRB 24 at paras. 72, 82, and 89 (there was

insubordination; if the termination was not justified, then discipline was warranted); and *Hickling v. Canadian Food Inspection Agency)*, 2007 PSLRB 67 at paras. 110 and 118 (the grievor had been untruthful and was not credible).

[465] The grievor submits that the Agency assumed that because he spent a few minutes in court when he was on sick leave that he was well enough to work. There is no evidentiary basis for that assumption; see *Blackburn v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 49 at para. 311. Even if he was negligent in how he scheduled his time off, he did not deserve a 20-day suspension; see *Potvin v. Treasury Board (External Affairs Canada)*, PSSRB File No. 166-02-23870 (19940318), [1994] C.P.S.S.R.B. No. 42 (QL) at 22.

[466] The grievor also submits that he was not absent from work on two of the seven dates at issue and that he used the wrong leave type when taking a family member to a doctor.

[467] As corrective action, the grievor requests that the suspension be rescinded, that he receive all wages and benefits lost as a result of it, and that he be made whole in every way.

[468] Firstly, I find that the employer did not demonstrate that the grievor was absent from work on September 19 and November 27, 2012. To the contrary, the evidence establishes that he was at work for his regular shifts on those dates.

[469] Secondly, concerning the times that the grievor was on sick leave and showed up briefly in court, I reach the following conclusion. Ms. Jensen testified at the hearing before me that she was not satisfied that he had experienced a serious illness that precluded him from performing his duties. However, I note that the only requirement for sick leave is to be unable to perform duties, whether because of an illness or injury. In fact, clause 16.02 of the collective agreement applicable in the circumstances (between the Agency and the PIPSC for the Audit, Financial and Scientific Group that expired on December 21, 2014 , "the collective agreement"), provided as follows:

ARTICLE 16

SICK LEAVE

…

> ***16.02*** *An employee shall be granted sick leave with pay when the employee is unable to perform the employee's duties because of illness or injury provided that:*
>
> *(a) the employee satisfies the Employer of this condition in such a manner and at such a time as may be determined by the Employer,*
>
> *and*
>
> *(b) the employee has the necessary sick leave credits.*

[470] If in this case the employer did not believe that the grievor was unable to perform his duties because he had to leave his home to make short court appearances, it could have asked for a medical certificate, but it did not.

[471] The only evidence presented at the hearing before me was that the grievor was unwell, which made him unable to perform his duties on August 17 and November 13 and on part of the day of December 10, 2012. The employer presented no evidence to the contrary. The fact that the grievor reported to the Surrey courthouse for a few minutes on days on which he claimed sick leave does not mean that he was well enough to perform his duties at work on those days. His bad faith could not be presumed.

[472] Thirdly, I find that although the grievor did not choose the right absence code when he took a family member to a doctor, the employer did not demonstrate that he did not honestly believe that he could use medical or dental appointment leave on those occasions or that he intended to obtain a benefit to which he was not entitled.

[473] Specifically, on October 17, 2012, the grievor took 1.5 hours of leave for a medical or dental appointment to bring a family member to a doctor's office. And on January 4, 2013, he took 2 hours of leave for the same reason.

[474] The fact that he brought a family member to a doctor's office is confirmed by medical notes from Dr. Pereira on February 21, 2013, and from Dr. Ng on February 23, 2013. The grievor went to the Surrey courthouse for a few minutes while his family member was at the doctor's office, which he never denied.

[475] The fact that the grievor reported to the Surrey courthouse for a few minutes on October 17, 2012, does not mean that he did not accompany a family member to a doctor's office on that day. He simply used the wrong leave.

[476] I note that the grievor had ample family related leave credits still available to him to cover the full 3.5 hours that he took to accompany a family member to doctor's appointments and that he would have lost all remaining unused family related leave credits at the fiscal year-end (March 31, 2013).

[477] The Federal Court of Appeal held in *Basra*, 2010 FCA 24 at para. 26, as follows:

> *[26] The employer bears the onus of proving the underlying facts which are invoked to justify the imposition of discipline… This applies to both the facts justifying the imposition of the discipline as well as the appropriateness of the discipline.*

[478] The evidence that the employer adduced does not demonstrate that the grievor falsely claimed leave and registered work attendance between August 2012 and January 2013. Furthermore, it demonstrates no violations of the Agency's Code of Ethics and Conduct and the Internal Fraud Control Policy as was set out in the termination decision of September 27, 2013.

[479] Therefore, I find that the employer has not established that the grievor was in clear breach of its Code of Ethics and Conduct or Internal Fraud Control Policy.

2. Did the employer have cause for imposing a disciplinary action in relation to the grievor's leave usage and attendance registration? If so, was the 20-day suspension excessive? If so, what would have been appropriate in the circumstances?

[480] As I have found that that the employer did not have cause for imposing a disciplinary action on the grievor in relation to his leave usage and attendance registration, it is not necessary to address the remaining issues with respect to those incidents.

C. Was the revocation of the grievor's reliability status a disciplinary action resulting in termination? If so, did the employer have cause for imposing a disciplinary action in relation to the events to which the revocation and termination letter referred? If so, was the revocation of the grievor's reliability status, which resulted in termination, excessive? If so, what would have been appropriate in the circumstances?

[481] On September 27, 2013, the grievor's reliability status was revoked, which resulted in the termination of his employment for being no longer reliable and trustworthy because of the following:

…

> *… fear of injury/damage by another person, pursuant to section 810(1) of the Criminal Code, criminal charges related to an alias associated with you, violation of the CRA Monitoring of the Electronic Network's Usage Directive, violation of the CRA Security for the Computing Environment Policy, a criminal charge of disobeying a court order and willfully resisting or obstructing a peace officer, contravention of the CRA Code of Ethics and Conduct and the Internal Fraud Control Policy as it relates to submitting fraudulent leave, and failure to report charges to management which is a breach of the CRA Code of Ethics and Conduct.*
>
> …

1. Was the revocation of the grievor's reliability status a disciplinary action resulting in termination?

[482] As I have explained earlier in this decision, the *FPSLRA* vests me with the jurisdiction to adjudicate the grievor's termination only if it resulted from disciplinary action. The employer objected to my jurisdiction, alleging that the termination of his employment resulted from the "administrative action" of revoking his reliability status, which it said was based on considerations that had nothing to do with discipline. On the other hand, he alleges that its decision to revoke his reliability status was a "disguised disciplinary action", because, according to him, it was truly based on disciplinary considerations.

[483] Therefore, I must determine whether the revocation of the grievor's reliability status was a disciplinary action, as the termination of his employment resulted from that decision. There is no dispute between the parties that the termination of his employment resulted from the decision to revoke his reliability status. The evidence before me amply supports that assertion.

[484] In cases such as this, employers have been required to establish that they had an administrative reason for terminating an employee's employment. In the case before me, the cause on which the employer relied in the revocation and termination letter was that the grievor was no longer reliable and trustworthy. To discharge its burden of persuading me that his termination resulted from an administrative reason, the employer must establish on a balance of probabilities that it had legitimate reasons to consider that he represented an unacceptable risk to its operations when it revoked his reliability status. I agree with Mr. Lafleur's testimony on behalf of the employer that this is truly what a security risk assessment is all about.

[485] Once that onus is met, then the burden shifts to the grievor to contradict the employer's evidence or, still on a balance of probabilities, to establish that the reasons advanced by the employer are a contrived reliance on the risk he represented to its operations, a sham, or a camouflage.

[486] It is instructive to look at what the Federal Court wrote in *Canada v. Rinaldi* (1997), 127 F.T.R. 60 at footnote 15. It noted that when an employer alleges that its decision to terminate an employee's employment cannot be examined at adjudication, the employee bears the onus of proving that "… the conditions required … were in fact not present at the relevant time and that the employment cannot therefore have been terminated [for the reasons alleged by the employer]."

[487] The employer submits that it acted in a timely manner in addressing the different incidents on which it relied in support of revoking the grievor's reliability status and that it cannot be perceived to have condoned those incidents because of the passage of time.

[488] The employer also argues that the evidence has shown that the grievor had engaged in a pattern of misconduct. The incidents in which he was involved revealed bad judgment and that he was unreliable, which justified the revocation of his reliability status and his termination.

[489] The employer adds that while the grievor did express some remorse, he did so only at the end of the process. The problem was that he did not come clean with the employer about what was really going on or what had happened. He was involved in criminal matters.

[490] The grievor submits that on the other hand, on December 9, 2012, after interviewing him and some other employees, Internal Affairs decided to close its file on him with respect to an alleged fear of injury under s. 810(1) of the *Criminal Code* and his alleged failure to report criminal charges to management in 2004. Ms. Singh noted that she "… had a meeting with Denis and Josée and we decided that we would close this file as unfounded." However, on September 27, 2013, the employer decided to rely on old and false allegations to revoke the grievor's reliability status and to terminate his employment.

[491] In particular, the grievor submits that the process was unfair and improper. Had the employer attempted to discipline him for the 2004 to 2005 events, it would have been found untimely; see *Murray*, at para. 107; *International Union of Operating Engineers, Local 796-B v. University of Ottawa* (1994), 42 L.A.C. (4th) 300 at 308 and 312 to 313; and *Canadian Union of Public Employees, Local 410 v. Greater Victoria Public Library* (2004), 135 L.A.C. (4th) 38 at 65 to 66. To get around its timeliness problem, the employer simply added those matters to the grounds for terminating the grievor's employment under the guise of revoking his reliability status.

[492] The grievor further submits that the employer's failure to act in a timely manner also constituted a form of condonation. An employer cannot rely on past conduct for which no discipline was imposed to justify a termination; see *Morrison v. Kispiox Band (Council)*, [2000] C.L.A.D. No. 708 (QL) at paras. 28 and 34.

[493] The grievor submits that one point highlighted in the September 27, 2013, revocation and termination letter, which also highlights the unfairness of the process and of the decision, was the claim that he had "… not shown any changed behavior [*sic*] …." This goes back to the false claim in the August 21, 2013, Security Risk Assessment Report that because he had been involved in proceedings in 2004 and 2005, which did not result in a conviction, and again in August 2012, almost eight years later, this showed a pattern of behaviour.

[494] The grievor insists that contrary to the September 27, 2013, revocation and termination letter, he did take responsibility for his actions. For example, at the July 17, 2013, interview, he indicated that he regretted the router incident and that he felt very badly that it happened, even though he had not intended to violate protocol, and he did not know how the router had been connected to the Agency's network.

[495] The grievor also submits that the September 27, 2013, revocation and termination letter fails to indicate or consider that he never intended to connect the router to the Agency's network or to violate any Agency policies and directives.

[496] The grievor further submits that the employer never gave him the opportunity to change his behaviour. It quickly escalated its actions against him from a 1- to a 10- to a 20-day suspension to termination. However, from the inappropriate email of December 21, 2012, to his termination on September 27, 2013, the grievor did display behavioural changes. There were no further incidents of him using a co-worker's

computer to send a prank or any other similar type of email. There were no incidents of him connecting the wrong kind of equipment to the Agency's network. And the last day on which he used his medical or dental appointment leave to accompany a family member to a doctor's office was January 4, 2013. Other than the time he spent serving his 1-, 10-, and 20-day suspensions, he was employed at the Agency up to September 27, 2013, without any incidents of any kind with respect to his conduct as an Agency employee and his compliance with its policies, directives, and Code of Ethics and Conduct.

[497] The grievor also submits that the employer initiated the reliability status review while relying not only on the 2 disciplinary incidents for which he had served 1- and 10-day suspensions respectively (the suspension letters with respect to those incidents were both issued on April 29, 2013) but also on the events from 2004 and 2005, based on the false information that he had used the P*** alias in 2003 and that he had failed to report to management the proceedings under his own name in 2004 and 2005 that had resulted in the peace bond.

[498] Based on the evidence presented at the hearing and outlined earlier in this decision, I find that the employer did not prove the cause on which it relied to revoke the grievor's reliability status, which resulted in the termination of his employment. The evidence did not establish that the conditions required to revoke his reliability status, which would have been that the employer had legitimate reasons to consider that he represented an unacceptable risk to its operations, were present at the time the decision was made.

[499] With respect to the alleged fear of injury under s. 810(1) of the *Criminal Code* and the alleged failure to report criminal charges to management in 2004, I have found that the employer relied on inaccurate information; that Mr. George, the grievor's manager at the time, was aware of the grievor's legal entanglements relating to the custody of his children; that those entanglements were not related to his official duties; and that they did not lead to the laying of criminal charges against him.

[500] With respect to the alleged use of an alias, I have found that the employer relied on inaccurate information, that the P*** alias associated with the grievor's name on the B.C. Court Services Online website was an error, and that the employer should have

realized so from the start as the B.C. Court Services Online website reported different birthdates for the grievor and Mr. P***.

[501] With respect to the alleged fear of injury under s. 810(1) of the *Criminal Code*, the alleged failure to report criminal charges to management in 2004, and the alleged use of an alias, I have found that on August 26, 2011, Mr. Dorff confirmed to Ms. Singh that the grievor represented no risk to the Agency's operations.

[502] With respect to the inappropriate email incident, I have found that sending emails from co-worker's computers was part of the IT culture, that the grievor's team leader had done so himself, and that it appeared that the employer had condoned such behaviour in the past.

[503] With respect to the router incident, I have found that the employer relied on inaccurate information, that the grievor is not the only person who might have powered it up, and that the employer did not prove that he did it. I further found that the potential risk of the router incident to the Agency' information was very minimal and that it "… was not reasonably expected to cause injury." I note that Ms. Accettura placed the grievor on restricted duties on February, 5, 2013, pending an investigation. However, the investigation did not establish that he represented an unacceptable risk to the Agency's operations.

[504] With respect to the criminal charges of disobeying a court order and willfully resisting or obstructing a peace officer and to the failure to report criminal charges to management in 2012, I have found that the employer relied on inaccurate information, that the grievor informed Mr. Dorff on August 8, 2012, of his custody dispute being before the courts, that those entanglements were not related to his official duties, and that the employer was aware of that last fact. I further found that charges were not laid against him until after the August 8, 2012, interview.

[505] With respect to leave usage and attendance registration, I have found that the employer relied on inaccurate information and that the grievor claimed the wrong type of leave for the 3.5 hours that he took to accompany a family member to a doctor's office. Specifically, he was not absent from work on two of the seven dates at issue, to the contrary of the employer's claims, and he was unwell on three occasions, which made him unable to perform his duties. I further found that the employer presented no evidence showing that he did not honestly believe that he could use medical or

dental appointment leave to accompany a family member to the doctor's office or that he intended to obtain a benefit to which he was not entitled.

[506] With respect to the reliability status review process followed by the employer, the revocation of the grievor's reliability status, and the termination of his employment, I have found that contrary to its policy, the employer did not assess whether there was reasonable cause to believe that he might steal its valuables, exploit its assets and information for personal gain, fail to safeguard its information or assets entrusted to him, or exhibit other similar behaviour that would jeopardize its operations.

[507] Furthermore, I have found that instead, the employer applied irrelevant considerations and that it relied on impressionistic assertions of having lost confidence in the grievor's credibility, reliability, and trustworthiness. Finally, I have found that the August 21, 2013, Security Risk Assessment Report provided incomplete and erroneous facts and an analysis that ignored relevant criteria; that its clear intent was to revoke the grievor's reliability status; that it did not approach the evidence in an objective way; that it considered only the evidence needed to support the view that he was not a credible, reliable, and trustworthy employee; and that it failed to give due consideration to his explanations.

[508] At the end of the day, once all the evidence has been weighed, all that remains from the August 21, 2013, Security Risk Assessment Report are concerns about the grievor having been charged in 2012 with, but never convicted of, criminal offences relating to the custody dispute about his children that had no relation to the duties of his position and about him using the wrong leave code in relation to 3.5 hours that he took leave for to accompany a family member to a doctor, when he had sufficient unused and non-transferable family related leave credits still available to cover that time.

[509] I find that the conditions required for the employer to revoke the grievor's reliability status, which would have been that it had legitimate reasons to believe that he represented an unacceptable risk to its operations, were not present at the time and that his employment could not have been terminated for those reasons. As a result, I find that the termination was a contrived reliance on s. 51(1)(g) of the *CRAA* (termination of employment for reasons other than discipline or misconduct), a sham,

or a camouflage and that it was a disguised disciplinary action that vests me with the jurisdiction to examine it. Therefore, I dismiss the employer's objection to the Board's jurisdiction to hear the grievance about the termination.

[510] Nevertheless, I wish to comment on the context of the employer's decision to revoke the grievor's reliability status.

[511] I note with interest that on April 27, 2012, Ms. Singh asked Mr. Dorff to conduct a formal investigation into the grievor and to reassess his reliability status and that she informed Mr. Dorff that the investigation could lead to discipline. Again, on July 17, 2012, in writing to Mr. Dorff, she specifically refers to the grievor's alleged off-duty conduct of 2004 as being contrary to the Agency's Code of Ethics and Conduct and that it might attract disciplinary action, up to and including termination. The employer clearly had discipline on its mind at that time. Ms. Singh advised Mr. Dorff to contact his labour relations adviser before meeting with the grievor and stated that if there was evidence of misconduct, the Agency's labour relations branch would be able to assist Mr. Dorff "in terms of discipline".

[512] On January 23, 2013, a conference call was held. Attending were Messrs. Dorff, Cultum, and Maurice, Mses. Jensen, Accettura, and Singh, and another person who did not testify at the hearing. As can be seen as follows in Ms. Singh's notes, the employer clearly still had discipline on its mind at that time:

> … *We discussed the process of handling files with multiple disciplines. Denis confirmed we would report on all issues (email, router, alias and fraud* [leave usage and attendance registration]*) in one memo. Therefore, they may want to wait to issue discipline for 2 of the 4 issues as they don't know how/what will be reported in our memo. We discussed the potential levels of disciplines for the misconducts and issuing discipline separately. Denis did say he is not telling LR what to do, but suggested waiting until the* [January 30, 2013, interview] *is completed concerning the fraudulent leave which can be done quickly, to ensure the right level of discipline is applied based on our report… LR questioned* [Internal Affairs'] *involvement in the email issue and Denis clarified that it is a security breach and it is absolutely something that falls under our mandate….*

[513] Mr. Butler revoked the grievor's reliability status and consequently terminated his employment on September 27, 2013. That decision was based on the August 21, 2013, Security Risk Assessment Report. Mr. Hugh recognized that that

report relied in part on information from Internal Affairs' April 8, 2013, investigation report.

[514] The September 27, 2013, revocation and termination letter, the August 21, 2013, Security Risk Assessment Report, and the April 8, 2013, Internal Affairs investigation report contained references to alleged violations of the Agency's Monitoring of the Electronic Network's Usage Directive, Security for the Computing Environment Policy, Code of Ethics and Conduct, and Internal Fraud Control Policy, which alleged that violations are not by themselves indicative of legitimate security concerns about an employee. An employee's lack of compliance with or perceived unwillingness to follow established procedures is normally indicative of training, performance, or behavioural problems, which are best addressed through processes that have nothing to do with security.

[515] I also note that in the process leading to the revocation of the grievor's reliability status and at the hearing before me, the employer referred to what it perceived were his lack of remorse and unwillingness to change his behaviour. The concepts of remorse and potential for behavioural change are often used by employers and decision makers alike to assess the appropriateness of a disciplinary action in light of an employee's misconduct and personal circumstances. However, I do not understand the relevance of those concepts in assessing the risk that the grievor might have represented to the Agency's operations in this case.

[516] The employer's reliance on the grievor's alleged violations of its directives, policies, and code of ethics, as well as on his perceived lack of remorse and willingness to change his behaviour, confirms my finding that the revocation of his reliability status was a disguised disciplinary action.

[517] Furthermore, the disproportionate severity of the effect that the revocation of the grievor's reliability status had on his personal life compared to the irrelevance of the 2012 charges to the duties of his position and to the triviality of using a wrong leave code in relation to 3.5 hours that he took to accompany a family member to a doctor, when he had sufficient unused and non-transferable family related leave credits still available to cover that time, is another factor that points to the employer having taken disciplinary action against him; see *Canada (Attorney General) v. Frazee*,

2007 FC 1176 at para. 28, which refers to *Association of Allied Health Professionals Ontario v. Toronto East General & Orthopaedic Hospital Inc.* (1989), 8 L.A.C. (4th) 391.

2. If the revocation of the grievor's reliability status was a disciplinary action resulting in termination, did the employer have cause for imposing a disciplinary action in relation to the events to which the revocation and termination letter referred?

[518] To borrow the words of the Honourable Justice de Montigny in *Féthière*, 2017 FCA 66 at para. 22, "[t]his case arises in the context of recent conflicting decisions from the [Federal Court of Appeal]." In *Heyser*, 2017 FCA 113, and *Canada v. Bétournay*, 2018 FCA 230, the Court took opposite views of what constitutes the appropriate course of action when an employer's alleged administrative action is found truly disciplinary.

[519] In *Heyser*, 2015 PSLREB 70, the adjudicator found that contrary to the employer's assertions, the alleged administrative termination of an employee's employment was not for cause because the conditions required to revoke the employee's reliability status were absent at the time the employer made the decision. If the adjudicator found that the revocation did not constitute cause, the employer had sought leave to argue that the termination was instead a legitimate disciplinary action. The adjudicator did not allow the employer to rely, at adjudication, on new and different grounds in support of termination. The adjudicator reinstated the employee into her position.

[520] In *Heyser*, 2017 FCA 113, the Federal Court of Appeal confirmed as correct the adjudicator's ruling not to allow the employer to rely on a different cause in support of termination. In explaining its finding, the Court offered the following comments:

…

> *[37] At paragraph 157 of the Board's reasons, the adjudicator indicated that the applicant had asked him to consider, in the alternative, that the respondent's termination constituted a disciplinary action. The adjudicator refused to assent to the applicant's request because this would result in unfairness to the respondent. At paragraph 161 of the Board's reasons, he explained his view in the following terms:*
>
> > *At adjudication, the employer attempted to change the grounds it had relied upon for the termination throughout the process. It would have been unfair to*

> *the grievor, and contrary to the rules of natural justice, to allow the employer to argue that her termination was disciplinary in the event that it failed to prove that the termination resulted from a non-disciplinary action. The employer made a strategic decision to revoke the grievor's reliability status instead of pursuing the disciplinary process. Therefore, I find that the grievance in PSLREB File No. 566-02-8831 [the first grievance] will be allowed.*
>
> *[38] Although the applicant does not challenge that part of the Board's decision, it is my opinion that the adjudicator was correct in refusing to consider, as the applicant urged him to do, the respondent's termination as a disciplinary action on the part of the employer. As there can be no doubt that the applicant terminated the respondent's position on a non-disciplinary ground (i.e. the loss of the reliability status), it was not open to the applicant to change the ground of termination because it feared that it might lose on the stated ground of termination. Consequently, I will say no more on this issue.*
>
> …
>
> *[77] It is my view that if the revocation is justified on the basis of the relevant policies then the resulting termination was for cause. In other words, as is the situation here, when the employer terminates an employee on non-disciplinary grounds, i.e. because the employee has lost his or her reliability status, the Board must determine whether the revocation leading to the termination is justified. If so, the employer has shown that the termination was made for cause. If the employer is unsuccessful in demonstrating that the revocation was based on legitimate grounds, then there is no cause for the termination and the employee, as the adjudicator so ordered in this matter, must be reinstated.*
>
> *[78] In such a scenario, it is not open, as I indicated earlier, for the employer to change its tack, as the employer attempted to do before the Board, and assert that the termination should be considered, in the alternative, as having been made on disciplinary grounds so as to allow the employer to argue that if termination is not the proper sanction, then some lesser sanction is in order.*
>
> …
>
> [Emphasis added]

[521] In *Bétournay*, 2017 FPSLREB 37, the Board found that a "… suspension without pay was not based on any administrative concerns but rather was disguised discipline …." The Board went on to find that "[t]he employer imposed the suspension under

false pretences; it was not justified administratively." On the basis of those findings, it ordered the employer to reimburse the employee the wages and related benefits to which she would otherwise have been entitled during the suspension.

[522] In *Bétournay*, 2018 FCA 230, the Federal Court of Appeal overturned the Board's decision, for the following reasons:

…

> *[34] The Board was correct to consider the administrative or disciplinary nature of the suspension because it goes to its jurisdiction to deal with the grievance. Only suspensions that constitute discipline are grievable and may be referred to adjudication under paragraph 209(1)(b) of the FPSLRA. With this in mind, it was entirely open to the Board to examine not only the impact of the suspension on the employee, but also the employer's actual intention (see* Bergey *at para. 37). After noting that the denial of wages could be indicative of discipline because of its punitive effect, the Board considered the Agency's Discipline Policy, pursuant to which the employer can order the temporary removal of an employee during an investigation if the employee's presence at work poses [TRANSLATION] "a reasonable immediate and serious risk" to the Agency.*
>
> *[35] It is in this context that the Board considered the Agency's concerns regarding harm to its reputation and its fear that the employee would reoffend. The Board rejected the Agency's justifications on these points. First, the Agency's reputation could not be threatened since just a few people outside the workplace knew about the respondent's misconduct. Second, the risk of the respondent reoffending was in no way connected to the performance of her duties; the risk would remain the same so long as the respondent was employed at the Agency, even if she was no longer performing her duties. These conclusions are not called into question by the applicant.*
>
> *[36] Nevertheless, the Board was required to take its analysis a little further. It was not enough to conclude that the suspension was disguised discipline; it was also necessary for it to decide whether, under subsection 12(3) of the FAA, the suspension had been imposed for just cause (see* Bergey *at paras. 35–36;* Basra v. Canada (Attorney General), *2010 FCA 24 at para. 29, [2010] F.C.J. No. 76 (*Basra*). To satisfy this standard, the Board was required to consider whether the respondent's misconduct was sufficiently serious to justify the suspension as discipline (see* McKinley v. BC Tel, *2001 SCC 38, [2001] 2 S.C.R. 161 at paras. 29, 48 and 57;* Basra

> *at para. 29). However, the Board did not proceed with this second part of the analysis.*
>
> …
>
> *[40] It is true that the Board referred to the unjustified nature of the suspension without pay numerous times (see, in particular, paras. 96, 102–103 and 137 of the decision). But, as mentioned earlier, the justification sought by the Board in its examination of the suspension was just for the purpose of establishing its disciplinary or administrative nature. Viewed in this way, the Board was completely justified in considering only the arguments put forward by the applicant to argue that it was an administrative measure (risk of reoffending, harm to the Agency's reputation).*
>
> *[41] However, once the Board decided that the suspension was a disciplinary action, it had to go further and determine whether it was proportional to the gravity of the alleged conduct. At that point in its analysis, the Board could no longer limit its examination to the explanations provided by the Agency to show that the suspension was a purely administrative measure, or rely on the section of the Discipline Policy on administrative suspensions. Rather, it had to ask itself whether the Agency had proven the impugned conduct of the respondent (unauthorized access and abuse of authority) and, if so, whether the disciplinary action was excessive (see* Basra *at paras. 24–26 and 29;* Tobin v. Canada (Attorney General)*, 2009 FCA 254 at para. 45, [2009] F.C.J. No. 968;* Canada (Attorney General) v. Grant*, 2017 FCA 10 at para. 5, [2017] F.C.J. No. 41 (*Grant*)). In other words, the Board was then required to focus on the reasons that led the Agency to take this disciplinary action in order to verify that the impugned conduct of the employee was sufficiently serious to justify imposing a suspension without pay. Even on a generous reading of its reasons, it is clear that the Board failed to do this.*
>
> …
>
> [Emphasis added]

[523] As a result, I face the uncomfortable task of having to choose which of those opposite views, of what constitutes the appropriate course of action when an employer's alleged administrative action is found truly disciplinary, should apply in this case. Should I follow *Heyser*, 2017 FCA 113, and reinstate the grievor because the employer did not have cause for termination as the conditions required to revoke his reliability status were not present at the time? Or rather, should I follow *Bétournay*, 2018 FCA 230, and ask myself the following questions: While the conditions required

to revoke his reliability status were not present at the time, would the employer otherwise have had cause to impose a disciplinary action in relation to the alleged circumstances to which the revocation and termination letter alluded? If so, would termination have been an excessive disciplinary action? If so, what other disciplinary action would have been appropriate in the circumstances?

[524] On my instructions, the Board's Secretariat staff sought from the Registry of the Federal Court of Appeal an English version of *Bétournay*, 2018 FCA 230, which had been rendered in French on December 18, 2018. That English version was obtained on January 31, 2019. On February 1, 2019, I asked the parties to file submissions to address the potential conflict between *Heyser*, 2017 FCA 113 at paras. 37, 38, 77, and 78; and *Bétournay*, 2018 FCA 230 at paras. 34 to 36 and 40 to 41.

a. Submissions of the parties

i. The employer's submissions

[525] The employer filed its submissions on February 22, 2019.

[526] The employer submits that there is no conflict between *Heyser*, 2017 FCA 113, and *Bétournay*, 2018 FCA 230. *Bétournay*, 2018 FCA 230, was not a security case. According to the employer, "… the *Heyser* approach, as argued by the employer in this case, is the appropriate approach which requires an analysis of whether or not the revocation was based on 'proper and legitimate' grounds …". The employer added the following:

…

> *The Federal Court of Appeal's holding in* Heyser *that the Board has "full jurisdiction" to review departmental revocation decisions "on the basis of the relevant facts and in light of the relevant policies" connotes both a substantive and procedural review whereby the Board member may step into the shoes of the departmental security officer and assess the evidence through a security or reliability lens because "proper and legitimate grounds" must necessarily be anchored in the overarching and broader context of employee reliability, namely, an employee's honesty, integrity and trustworthiness as well as the employer's legitimate need to protect and preserve its tangible and intangible assets and information.*

…

ii. <u>The grievor's submissions</u>

[527] The grievor also filed his submissions on February 22, 2019. He submits that "[t]he *Bétournay* decision makes it clear by citing and relying on the *Bergey* decision that the proper standard to apply is the just cause standard …." He reiterates that the *Bergey* decision clarified that when it is found that a revocation of reliability status and termination of the employment constituted disguised disciplinary action, the just-cause standard applies.

[528] The grievor also points out that *Heyser*, 2017 FCA 113, dealt with a review of non-disciplinary action pursuant to s. 209(1)(c) of the *FPSLRA*. Therefore, the Federal Court of Appeal found that it was not "… necessary … to resort to the concept of disguised discipline to assert … jurisdiction under paragraph 209(1)(*b*) since the Board has full jurisdiction under paragraph 209(1)(*c*) to deal with non-disciplinary terminations …." He adds the following:

…

> *Whether a review under Section 209(1)(c) requires something less than the application of the just cause standard applicable to disciplinary terminations is not a question that this Board needs to answer in the circumstances of this case. In Mr. Jassar's case, which is one of disguised discipline being reviewed pursuant to Section 209(1)(b) of the* [*FPSLRA*]*, the proper standard to be applied is the just cause standard, as in Bergey and as in Bétournay….*

…

[529] Finally, all his arguments are summarized as follows in the conclusion of his submissions:

> *The Bétournay decision confirms the approach taken in the Bergey case, relied upon by Mr. Jassar in final argument, that in cases of disguised discipline reviewed pursuant to Section 209(1)(b) of the* [*FPSLRA*]*, the onus is on the employer to show just cause for the revocation of Mr. Jassar's reliability status and the termination of his employment. Whether a lesser standard applies in cases of non-disciplinary terminations reviewable pursuant to Section 209(1)(c) of the* [*FPSLRA*] *is not something that the Board needs to decide in this case.*
>
> *There is no conflict between the* Bétournay *and* Heyser *decisions because the former case dealt with disguised discipline reviewable pursuant to Section 209(1)(b) of the*

> [*FPSLRA*] *on the just cause standard, whereas the* Heyser *case dealt with a non-disciplinary termination reviewable under Section 209(1)(c) of the* [*FPSLRA*]. *Therefore, there is no need for this Board to "reconcile" the two decisions, as they were decided under two different sections of the* [*FPSLRA*].
>
> *The important thing is that in Mr. Jassar's case, which is one of disguised discipline reviewable under Section 209(1)(b) of the* [*FPSLRA*], *the Federal Court of Appeal has made clear, first in* Bergey *and then as reaffirmed in* Bétournay, *that the just cause standard applies when determining whether the employer's revocation of Mr. Jassar's reliability status and the termination of his employment should be set aside because the employer has failed to satisfy the onus upon it to show that it had just cause to revoke Mr. Jassar's reliability status and to terminate his employment.*
>
> *The lesser standard of review argued for by the employer in this case (whether the employer had "legitimate concerns" regarding Mr. Jassar's reliability and his alleged risk to its security) is completely inapplicable in cases of disguised discipline. As the employer has failed to satisfy the onus upon it to show just cause for revoking Mr. Jassar's reliability status and for terminating his employment, his grievances regarding the revocation of his reliability status and the termination of his employment must be upheld.*

iii. <u>The employer's rebuttal submissions</u>

[530] The employer filed rebuttal submissions on March 4, 2019. It submits that the "for cause" standard applies to this case pursuant to ss. 12(2) and (3) of the *FAA*. It adds the following:

> …
>
> *Adjudications under section 209(1)(b) and (c) are subject to subsection 12(3) of the* FAA. *Contrary to Mr. Jassar,s* [*sic*] *argument … a grievance referred to adjudication under paragraph 209(1)(c) of the F*PSLRA *is subject to the for cause standard specified in subsection 12(3) of the* FAA.
>
> …

[531] The employer insists that "Bétournay was <u>not</u> a security or revocation of reliability status case …" [emphasis in the original]. It adds that *Heyser*, 2017 FCA 113, has determined that an adjudicator has jurisdiction over revocation-of-reliability cases. Therefore, it is no longer necessary to resort to the disguised-discipline analysis. The employer points out that "… *Heyser* was decided after the *Bergey* case relied upon by Mr. Jassar …."

[532] The employer submits that there are two points to note from the dictum found at paragraphs 73 to 79 in *Heyser*, 2017 FCA 113. They are the following:

…

> … *First, it is no longer necessary to resort to the doctrine of disguised discipline when dealing with revocation of reliability cases. Secondly, according to the FCA, the "for cause" analysis required in suspension and revocation of reliability status cases must be carried out in light of the relevant facts and relevant employer policies in order to determine whether or not the suspension or revocation was based on* proper and legitimate grounds*.*
>
> …
>
> [Emphasis in the original]

[533] The employer completes its arguments as follows in the conclusion of its statement:

> *During the hearing, the issue arose as to whether 209(1)(c) was applicable in Mr. Jassar's case since at the time of the reference to adjudication, the CRA was not designated pursuant to section 209(3) of the* FPSLRA*; discussions on this issue resulted in the Board Member concluding that she would proceed to consider the grievances under section 209(1)(b). The analysis in* Bétournay *is therefore relevant to her deliberation.*
>
> *The employer reiterates its comments at the hearing that the proper analytical framework for dealing with suspension and revocation of reliability status cases is what the FCA has outlined in the* Heyser *case.*

iv. The grievor's rebuttal submissions

[534] The grievor also filed rebuttal submissions on March 4, 2019.

[535] First, the grievor states that *Bétournay*, 2018 FCA 230 at para. 34, refers to the "… employer's 'actual intention' in addition to the impact of the action taken against the employee when considering whether the action was disciplinary in nature …." It notes that the Federal Court of Appeal "… in *Bétournay* then cites paragraph 37 of the *Bergey* decision in support of that proposition."

[536] The grievor adds that "[p]aragraph 37 of the *Bergey* decision states that it is 'the employer's actual (as opposed to stated) intentions' that must be considered …." In

that paragraph, the Federal Court of Appeal also emphasized that determining whether an employer's actions were disciplinary is a 'fact-driven inquiry.' The grievor submits that the Court stated in addition that "… some 'situations are obviously disciplinary' …", such as in his case.

[537] Second, the grievor states that as he did not grieve the revocation of his reliability status and the termination of his employment under s. 209(1)(c) of the *FPSLRA*, "the Heyser approach is inapplicable." Precisely, he submits the following:

…

> *Because Mr. Jassar's case is one of disguised discipline reviewable under the just cause standard, not a case of non-disciplinary termination under paragraph 12(1)(e) of the FAA, the test in* Heyser *has no application in this case. However, if the* Heyser *test did apply in this case, which is specifically denied, the employer has misconstrued the test set forth by the Federal Court of Appeal in the* Heyser *case for assessing non-disciplinary terminations grieved under Section 209(1)(c) of the* [*FPSLRA*].
>
> *In cases of non-disciplinary terminations pursuant to paragraph 12(1)(e) of the FAA, grieved under Section 209(1)(c) of the* [*FPSLRA*], *the Federal Court of Appeal in* Heyser *did not endorse a "subjective" test whereby all the employer has to do is show that it had "legitimate concerns" regarding Mr. Jassar's reliability. Rather, the Federal Court of Appeal held that the onus is on the employer to show that it revoked Mr. Jassar's reliability status on "proper and legitimate grounds" (*Heyser*, at paragraph 76). This is an objective test.*
>
> *Applying the objective test from* Heyser, *the employer failed to establish that it had proper and legitimate grounds for revoking Mr. Jassar's reliability status and terminating his employment. As in the* Heyser *case, all of the factors relied upon by the employer to revoke Mr. Jassar's reliability status were or "could have been addressed through the disciplinary process" (*Heyser v. Deputy Head (Dept. of Employment and Social Development*), 2015 PSLREB 70, at paragraph 153).*
>
> *For the reasons set forth in Mr. Jassar's final written argument in paragraphs 38 – 96, even if the* Heyser *test, properly interpreted as an objective test, applied, the employer has in any event failed to show that there were proper and legitimate grounds providing cause to revoke Mr. Jassar's reliability status and to terminate his employment.*

…

b. Which of the *Heyser*, 2017 FCA 113, or *Bétournay*, 2018 FCA 230, approaches should I apply to this case?

[538] The Board asked the parties to file written submissions on whether *Bétournay*, 2018 FCA 230, applies to these grievances and, as the case may be, on the effect that it may have on the grievor's revocation-of-reliability-status and termination grievances. Specifically, the Board invited their submissions on the conflict, if any, which may exist between *Bétournay*, 2018 FCA 230 at paras. 34 to 36 and 40 to 41; and *Heyser*, 2017 FCA 113 at paras. 37, 38, 77, and 78.

[539] I will examine the two approaches to determine which of the *Heyser*, 2017 FCA 113, or *Bétournay*, 2018 FCA 230, approaches I should apply to this case.

[540] Before doing so, I note that both the adjudicator in *Heyser*, 2015 PSLREB 70, and the Board in *Bétournay*, 2017 FPSLREB 37, first turned their minds as to whether the evidence before them supported the respondents' claims that the challenged actions were legitimate administrative actions, which means for cause. In both cases, the adjudicator and the Board applied the approach in *Rinaldi* and determined whether the respondents had established the cause on which they relied for taking the alleged administrative actions or whether "… the conditions required … were in fact not present at the relevant time and that the [actions] cannot therefore have been [for the reasons alleged by the respondents]."

[541] In *Heyser*, 2015 PSLREB 70, the adjudicator found that the alleged administrative action had not been taken for cause. He refused to allow to respondent to allege at adjudication a different, disciplinary cause in support of the challenged action, and he allowed the grievance for that reason. His approach was confirmed in *Heyser*, 2017 FCA 113. However, in *Bétournay*, 2017 FPSLREB 37, while the Board found that the alleged administrative action had not been taken for cause and that it was really a disguised disciplinary action without cause and it allowed the grievance for that reason, *Bétournay*, 2018 FCA 230, overturned that approach.

i. The *Heyser*, 2017 FCA 113, approach

[542] In *Heyser*, 2017 FCA 113, the Federal Court of Appeal clearly stated at paragraph 38 as follows:

> *… As there can be no doubt that the applicant terminated the respondent's position on a non-disciplinary ground (i.e. the loss of the reliability status), it was not open to the applicant to change the ground of termination because it feared that it might lose on the stated ground of termination….*

[543] At paragraph 77, the Court commented that "… when the employer terminates an employee on non-disciplinary grounds, i.e. because the employee has lost his or her reliability status, the Board must determine whether the revocation leading to the termination is justified" and added that "[i]f the employer is unsuccessful in demonstrating that the revocation was based on legitimate grounds, then there is no cause for the termination and the employee, as the adjudicator so ordered in this matter, must be reinstated."

[544] Finally, the Court wrote at paragraph 78 as follows:

> *… it is not open, as I indicated earlier, for the employer to change its tack, as the employer attempted to do before the Board* [*sic*]*, and assert that the termination should be considered, in the alternative, as having been made on disciplinary grounds so as to allow the employer to argue that if termination is not the proper sanction, then some lesser sanction is in order.*

[545] Although those comments were in obiter, they make for a very strong case.

[546] The comments in *Heyser*, 2017 FCA 113, are in accordance with the current state of labour adjudication in Canada. As Brown and Beatty explain in *Canadian Labour Arbitration*, at paragraph 7:2200, usually, an employer is not allowed to rely at adjudication on new, different grounds in support of termination. Although their explanation is offered in the context of disciplinary terminations, I can think of no reasons that they would not apply equally to all terminations. They offer the following:

> ***7:2200 — Alteration of Grounds***
>
> *Arbitrators generally require employers to justify the sanctions they impose on the same grounds they refer to when they actually discipline an employee, even though at common law an employer can rely on any ground to justify a dismissal, regardless of when it was discovered. In* Aerocide Dispensers Ltd.*, Professor Bora Laskin (later Chief Justice of Canada) first advanced the principle that employers should be held "fairly strictly to the grounds upon which (they have) chosen to act" and that arbitrators should "not . . . permit an assigned cause to be reformed into one different from it*

merely because the evidence does not support the assigned cause but rather something like it". It was his view that an employer should not be allowed either to enlarge the grounds by adding new allegations, or to change how it characterized the same set of facts.

Over the years, Chief Justice Laskin's approach has met with a good deal of sympathy from other arbitrators. Altering the grounds on which disciplinary action is defended is widely seen as raising questions about the employer's bona fides *and the fairness of the disciplinary procedure. Following Laskin's lead, arbitrators have refused to permit employers to introduce evidence of events that are not closely related to those initially communicated to the employee, or to turn the incident that precipitated the case into a different offence. Arbitrators have been especially vigilant in cases where it appears the employer was aware of the additional grounds at the time that it acted, or where it could have discovered them relatively easily. So too in cases in which the events which the employer wishes to add occurred after discipline was imposed. As well, where the employee has not been given adequate notice of the employer's intention to justify its action on a different basis, and/or the collective agreement contains explicit limits on the reasons an employer can advance, arbitrators have held employers to their original allegations.*

The principle that an employer cannot justify disciplining an employee on grounds that are different from those it gave when the penalty was actually imposed is, however, neither absolute nor inviolable. Many exceptions and limitations have been recognized. Arbitrators often allow an employer to add grounds that were unknown and not easily discoverable at the time it effected the discipline. This is especially true in cases where the surreptitious nature of the grievor's offence made earlier discovery difficult. Arbitrators are also more inclined to allow employers to rely on incidents and events that are closely related to and/or which provide further examples of those on which they originally relied. Grounds that arise after the decision to discipline has been taken but before it has been imposed on the employee have been declared to be legitimate as well. In addition, there is a general consensus that the Aerocide *rule does not preclude arbitrators from reviewing incidents in the grievor's employment history, including those that occur after the decision to discipline has been taken, for the purpose of determining the appropriate remedy or penalty in a case. Similarly, "post-discipline facts" may be admitted if they bear on the grievor's credibility, the voluntariness of an alleged quit, or if the union waives its right to object. Indeed, some arbitrators have come full circle and have allowed employers to put forward new reasons for their decision to*

> *discipline where the only change involves the legal characterization of an incident or event, and not the introduction of new facts. On this line of reasoning, an employer may argue that an employee has been discharged for just cause even though it initially took the position that he or she had retired or quit. (By parity of reasoning, it has been held that a trade union, grieving the propriety of a disciplinary sanction, may also properly advance additional and novel legal arguments at the hearing which were not previously raised in the grievance process.) At the extreme, some arbitrators have been inclined to allow an employer to alter the basis of its discipline where the employee and/or the union have had enough notice and no prejudice will result.*
>
> *In all cases in which employers have been allowed to alter the grounds on which disciplinary penalties can be defended, the employee and/or the union must be given sufficient notice of the change so that they can properly prepare their cases. Typically, if an adjournment is necessary to give the employee time to consider the new grounds, it will be granted. Furthermore, should the arbitrator uphold the employer's action on any of the new grounds, it would appear that the discipline is effective only from the point in time at which the new allegations were first made. In all events, even when an employer is held to the original grounds it gave to justify its decision, it is generally recognized that it may exercise its disciplinary powers a second time based on the reasons it was not allowed to raise.*
>
> [Emphasis in the original]

[547] I note that the employer admitted in its February 22, 2019, submissions that "… *Heyser* simply affirms the well-recognized principle in arbitral jurisprudence that the employer may not change the grounds of its impugned decision mid-steam [sic]." This admission accords with the findings of the Federal Court in *Johnson v. Canada (Treasury Board) et al.* (1993), 70 F.T.R. 217 at paras. 10 and 11, which read as follows:

> ***[10]*** *In my view the adjudicator committed a patently unreasonable error of law when he sustained the twenty-day suspension of the applicant on the grounds of "unusual personal behaviour" after finding there is no basis for the one employment misconduct allegation of sexual harassment for which he was punished….*
>
> ***[11]*** *The adjudicator did deal with the question before him and decided in favour of the applicant. He then went on and decided a question which was not before him since there was no separate allegation referred to in the grievance or the letter of complaint sent by the Public Service Commission….*

[Bold in the original]

[548] There are good policy reasons for binding an employer to the grounds on which it relied at the time of termination and for not allowing it to change those grounds at adjudication.

[549] In *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109, the Federal Court of Appeal determined that an employee is not allowed to raise for the first time at adjudication an issue that is substantially different from those that the parties discussed during the employer's internal grievance process. This principle has been faithfully applied in federal public sector adjudications ever since.

[550] To apply the same prohibition to an employer and to not to allow it to change at adjudication the essence of the dispute that the parties discussed during the employer's internal grievance process seems to strike a fair balance. In other words, what is good for the goose is good for the gander. At the end of the day, not allowing an employer to change at adjudication the grounds for termination goes to preserving the fairness of the adjudication process.

[551] The adjudicator in *Heyser*, 2015 PSLREB 70 at para. 161, was of the view that "[i]t would have been unfair to the grievor, and contrary to the rules of natural justice, to allow the employer to argue that her termination was disciplinary in the event that it failed to prove that the termination resulted from a non-disciplinary action" and observed that "[t]he employer made a strategic decision to revoke the grievor's reliability status instead of pursuing the disciplinary process." The Federal Court of Appeal's obiter in *Heyser*, 2017 FCA 113, echoes those comments.

[552] In the recent decision *Gill v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 55, the Board had to deal with an employer's attempt to change at adjudication the grounds for a termination. The Board expressed the following comments at paragraphs 188 to 191 with respect to the fairness of that strategy of the employer:

> ***188*** *The concept in* Burchill *applies equally to the employer. It is certainly both unfair and prejudicial to the grievor when, more than six-and-a-half years after it terminated his employment, he has to try to defend against allegations of which he was not fully made aware, and he*

> *was not required to address when moving his grievance forward through the grievance and adjudication processes.*
>
> ***189*** *By relying on s. 62 of the* [*Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13]*, the employer chose to "… shield [its] termination decision from review for cause" (as stated in* Bergey*). In bringing his grievance forward, the grievor was led to believe that the course of action he had to take and the burden of proof he had to meet was that the employer's actions had been a sham, a camouflage, or in bad faith.*
>
> ***190*** *Therefore, now, some six-and-a-half years later, the employer, after stating that it terminated his employment under s. 62 of the* [*Public Service Employment Act*]*, cannot change tack and allege that his performance was unsatisfactory and that it terminated him under s. 12 of the* FAA*. The employer could have chosen to terminate him for unsatisfactory performance under the provisions of the* FAA*. It did not. Had it done so, back in 2012, the grievor would have known the facts and documents to gather and the witnesses to speak to, so that he could be in a position to address that specific action and those specific facts.*
>
> ***191*** *The test that the parties have to meet to address a termination for unsatisfactory performance is much different than establishing that the employer was engaged in a sham, a camouflage, or bad faith by relying on s. 62 of the* [*Public Service Employment Act*]*.*
>
> [Bold in the original]

[553] Not only is preserving the fairness of the adjudication process an important interest, but also it is one reason that Parliament enacted the *FPSLRA*. Indeed, its preamble specifically states that the fair resolution of employment disputes is one of the purposes of the enactment, as follows:

> *Recognizing that*
>
> …
>
> *the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment;*
>
> …
>
> *NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:*

[554] Finally, there is another aspect of fairness that needs mentioning, which is an employer's duty of good faith and fair dealing in the manner of termination.

[555] In *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701 at para. 95, although in the context of crafting an appropriate remedy, the majority of the Supreme Court of Canada taught us that "… employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal …". At paragraph 98, that majority offered the following precisions:

> *98 The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. In order to illustrate possible breaches of this obligation, I refer now to some examples of the conduct over which the courts expressed their disapproval in the cases cited above.*

[556] For its part, the minority of the Court found at paragraph 146 that "… the law has evolved to the point of recognition of an implied contractual obligation of good faith in the contract of employment to treat the employee with good faith in dismissing him or her." In *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 58 and 81, the Court confirmed that employers have a duty of good faith and fair dealing in the manner of a termination.

[557] In *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55 at 65, the Supreme Court of Canada extended to administrative suspensions an employer's duty of good faith and fair dealing.

[558] Binding an employer to the grounds on which it relied at the time of termination and not allowing it to change those grounds at adjudication seems a logical extension of an employer's duty of good faith and fair dealing in the manner of a termination. Indeed, how could an employer have been "… at a minimum … candid, reasonable, honest and forthright …" with its employee at the time of termination if it is allowed to change at adjudication the grounds for the termination? Or how would allowing an employer to change at adjudication the grounds for termination respect the injunction against a "… conduct that is unfair or in bad faith by being, for example, untruthful, misleading or unduly insensitive"?

ii. The *Bétournay*, 2018 FCA 230, approach

[559] In *Bétournay*, 2018 FCA 230, the Federal Court of Appeal favoured an approach much different from that in *Heyser*, 2017 FCA 113. In *Bétournay*, 2018 FCA 230, the Court found at paragraph 36 that "[i]t was not enough to conclude that the suspension was disguised discipline; it was also necessary for [the Board] to decide whether, under subsection 12(3) of the FAA, the suspension had been imposed for just cause …" and that "[t]o satisfy this standard, the Board was required to consider whether the respondent's misconduct was sufficiently serious to justify the suspension as discipline …."

[560] At paragraph 41, the Court stated that "… once the Board decided that the suspension was a disciplinary action, it had to go further and determine whether it was proportional to the gravity of the alleged conduct", that "… the Board could no longer limit its examination to the explanations provided by the Agency to show that the suspension was a purely administrative measure, or rely on the section of the Discipline Policy on administrative suspensions", that the Board "… had to ask itself whether the Agency had proven the impugned conduct of the respondent (unauthorized access and abuse of authority), and that if so, whether the disciplinary action was excessive …". It specified that "… the Board was then required to focus on the reasons that led the Agency to take this disciplinary action in order to verify that the impugned conduct of the employee was sufficiently serious to justify imposing a suspension without pay."

[561] *Bétournay*, 2018 FCA 230, requires that the Board determine on the sole basis of the record before it whether the employer's disguised disciplinary action might have been otherwise justified as a legitimate disciplinary action. Essentially, it requires that I now deem that the termination of the grievor's employment was made under s. 51(1)(f) of the *CRAA* (disciplinary action including termination). However, the parties have not requested that I do so, and with the greatest respect for the contrary opinion, *Bétournay*, 2018 FCA 230, provides no specific reasons explaining why I should.

[562] In the case before me, the employer elected not to use its disciplinary powers under s. 51(1)(f) of the *CRAA* (disciplinary action including termination) to terminate the grievor's employment, although nothing prevented it from using them. Had it elected to follow a disciplinary approach, the grievor would have been entitled to the protection of the collective agreement.

[563] Most collective agreements in the federal public sector contain procedural safeguards for matters involving discipline. The one in this case is no exception. For example, employees are entitled to be represented by their bargaining agents at meetings relating to disciplinary matters. In this case, although the grievor was accompanied by bargaining agent representatives at meetings relating to the incidents of concern to the employer, the employer did not allow his representatives to make meaningful representations at those meetings. I am aware that in *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)(QL), the Federal Court of Appeal decided that any procedural defects within an employer's disciplinary process are corrected by the hearing *de novo* at adjudication. However, there are cases when that hearing *de novo* cannot correct fundamental violations of representational rights; for example, see *Evans v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-25641 (19941021), [1994] C.P.S.S.R.B. No. 129 (QL); *Shneidman v. Canada Customs and Revenue Agency*, 2004 PSSRB 133; and *McQuaid v. Canadian Food Inspection Agency*, 2006 PSLRB 87.

[564] Another procedural right in the collective agreement is the employer's obligation to notify the grievor in writing of the reason for his termination. In the case at hand, I have found that the reason on which the employer relied in the revocation and termination letter was that he was no longer reliable and trustworthy. The requirement in *Bétournay*, 2018 FCA 230, for me to determine on the sole basis of the record before me whether his disguised disciplinary termination might have been justified for another reason as a legitimate disciplinary action negates that term and condition of employment of the grievor, which is clearly set out in the collective agreement.

[565] At adjudication, the employer objected to the Board's jurisdiction to hear the termination grievance on the ground that the termination was not disciplinary. Throughout the hearing before me, it maintained that the grievor's termination had nothing to do with disciplinary reasons. The requirement in *Bétournay*, 2018 FCA 230, for me to determine on the sole basis of the record before me whether his disguised disciplinary termination might have been justified for another reason as a legitimate disciplinary action would ignore the position the employer took throughout the internal grievance process and the representations that it made at the hearing before me. According to what the Federal Court decided in *Stringer v. Canada (Attorney*

General), 2013 FC 735 at para. 72, a failure to give due consideration to a party's main argument on a central issue of a dispute amounts to unreasonableness.

[566] After weighing the evidence, I found that the employer's termination of the grievor's employment was not a legitimate exercise of its authority under section 51(1)(g) of the *CRAA* (termination of employment for reasons other than discipline or misconduct) and that it was a disguised disciplinary action. The requirement in *Bétournay*, 2018 FCA 230, for me to determine on the sole basis of the record before me whether the grievor's disguised disciplinary termination might have been justified for another reason as a legitimate disciplinary action deprives my main finding of any real legal effect. The employer has not discharged its burden of establishing on a balance of probabilities that the termination of the grievor's employment was made under s. 51(1)(g) of the *CRAA* for the cause that it alleged. Now that the employer has failed in what it had set out to do, *Bétournay*, 2018 FCA 230, requires me to give its decision another chance and to determine on the sole basis of the record before me whether it might have been justified for another reason as a legitimate disciplinary action. I am aware of no legal proceedings in which a party that fails on the merits of the case gets a second chance to have its action justified, on the basis of the decision maker's analysis, for new and different reasons that were not alleged in the first place.

[567] I do agree that when an employer openly takes a disciplinary action against an employee, the criteria set out in *Wm. Scott & Co Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1, are to be applied to determine whether it had cause to impose discipline and whether the action imposed was proportionate to the employee's misconduct. This approach works well when an employer alleges that the action taken was indeed disciplinary. However, when an employer masquerades what is essentially an illegitimate action under a false veneer of legitimacy, applying *Wm. Scott & Co Ltd.* leads to significant problems.

[568] As mentioned, *Bétournay*, 2018 FCA 230, requires that I give the employer's decision another chance and that I determine on the sole basis of the record before me whether it might have been justified for another reason as a legitimate disciplinary action. As noted, the revocation and termination letter mentioned five distinct incidents. Although it alluded to those incidents, it did not allege that they were the reasons for revoking the grievor's reliability status. To the contrary, the revocation and termination letter clearly alleged that the revocation of his reliability status, which

resulted in the termination of his employment, was itself not based on those incidents but on the employer's belief that he was no longer reliable and trustworthy.

[569] At the hearing before me, the employer presented no evidence to establish that it would have had cause to impose a disciplinary action on the grievor and that termination would not have been excessive in the circumstances. Furthermore, it presented no arguments to the effect that it would have had any cause to terminate his employment for disciplinary reasons. I therefore have before me a record that contains no evidence and no arguments from the employer that could help me in the task of determining, as requested by *Bétournay*, 2018 FCA 230, whether the criteria set out in *Wm. Scott & Co Ltd.* have been met. In my view, to require at adjudication that I determine on the sole basis of the record before me whether the termination of his employment might have been justified for another reason as a legitimate disciplinary action would raise important issues of natural justice and would run contrary to the purposes of the fair and credible resolution of matters arising in respect of terms and conditions of employment that are stated in the preamble to the FPSLRA. As an independent and impartial decision maker, I am not allowed to make a party's case on that party's behalf.

[570] In addition, to require at adjudication that I determine on the sole basis of the record before me whether the termination of the grievor's employment might have been justified for another reason as a legitimate disciplinary action seems at odds with my functions under Part 2 of the *FPSLRA*. Those functions are to hear a grievance *de novo* and to decide on it anew. My task, as I understand it, is to determine whether the employer has discharged its burden of establishing that on a balance of probabilities, the action that it alleges it took was legitimate in the circumstances of the case.

[571] I note that the approach taken in *Bétournay*, 2018 FCA 230, is based on different cases. Specifically, *Bétournay*, 2018 FCA 230, refers to *Bergey*, at paras. 35 and 36; *Basra*, 2010 FCA 24 at paras. 24 to 26 and 29; *McKinley v. BC Tel*, 2001 SCC 38 at paras. 29, 48, and 57; *Tobin v. Canada (Attorney General)*, 2009 FCA 254 at para. 45; and *Canada (Attorney General) v. Grant*, 2017 FCA 10 at para. 5. On the other hand, I note that *Bétournay*, 2018 FCA 230, makes no mention of *Heyser*, 2017 FCA 113.

[572] In *Bergey*, at para. 36, the Federal Court of Appeal stated as follows:

> *Where the Board* [*sic*] *determines that the employer's actions constitute a disguised act of discipline, as this Court noted in Basra at paragraphs 24 to 29, the PSLREB* [*sic*] *is tasked with reviewing what occurred and deciding whether the employer possessed cause to impose the sanction or take the measure in question….*

[573] Paragraphs 35 and 36 offer no additional reasons in support of that statement.

[574] *Bétournay*, 2018 FCA 230, as does *Bergey*, relies on *Basra*, 2010 FCA 24 at paras. 24 to 29, which read as follows:

> *[26] The employer bears the onus of proving the underlying facts which are invoked to justify the imposition of discipline: Palmer & Snyder,* supra*, at paragraph 10.67. This applies to both the facts justifying the imposition of the discipline as well as the appropriateness of the discipline.*
>
> *[27] In this case, the respondent took the position that it did not discipline the appellant, as a result of which it could not, without contradicting itself, lead evidence of the conduct which justified the discipline. Instead the issue before the adjudicator was cast in terms of the decision in* Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9 (*Larson*), a case which dealt with the suspension of a CSC employee who was charged with a criminal offence. The Larson factors assume that the measure is disciplinary in nature, and seek to assess whether the continued employment of the employee presents a serious and immediate risk to the legitimate concerns of the employer (*Larson*, at para. 161).*
>
> *[28] The difficulty with this approach is that it skips the first step in the process which is the proof by the employer of the facts which justify the imposition of discipline. In the case of the CSC, disciplinary conduct is the subject of the Code of Discipline and the Standards of Professional Conduct. In* Tobin*, this Court held that the employer was entitled to assess employee conduct by reference to the Code of Discipline and Standards of Professional Conduct: see paragraphs 46 and 47.*
>
> *[29] As a result, the adjudicator's first task upon rehearing the matter is to determine if the employer has proven that there has been a breach of the Code of Discipline or Standards of Professional Conduct. If the employer satisfies that burden, the next question is whether the disciplinary measure imposed was excessive. If not, the measure stands. If the adjudicator finds that the measure is excessive, then the adjudicator must address the question of the appropriate measure. These are discrete questions, each of which merits*

> *careful consideration. They cannot simply be subsumed into an analysis of the* Larson *factors, which do not deal with the question of whether the employer was justified in imposing a disciplinary measure.*

[575] With all due respect, *Basra*, 2010 FCA 24, provides no reasons in support of the direction to allow an employer to contradict itself and to present new evidence and new arguments to support the legitimacy of a suspension, as a deemed disciplinary action, after it failed to justify the legitimacy of the suspension that it had imposed on the employee as a non-disciplinary action. Paragraphs 26 to 29 do not explain why an employer shall be given that second chance. I also note that unlike in *Bétournay*, 2018 FCA 230, *Basra*, 2010 FCA 24, remitted the matter to the original adjudicator for a new hearing.

[576] *Bétournay*, 2018 FCA 230, also relies on *Tobin*, at para. 45, which provides as follows:

> *[45] Having established that the applications judge had the right to raise the issue of the standard against which to measure Mr. Tobin's conduct, the question of which standard applies remains. Much of the debate before the applications judge and before this Court turned on the effect to be given to the Commissioner's Standards and specifically whether they were "binding" on the adjudicator. What "binding" means in this context is not entirely clear. The function of an adjudicator is to determine if the facts relied upon by the employer in sanctioning an employee have been established and, if they have, to assess whether the penalty imposed by the employer is appropriate.*

[577] In *Tobin*, the adjudicator had to determine whether an employer's decision to impose a disciplinary action on an employee for an off-duty violation of its code of conduct was justified. Based on the joint submissions of the parties before him, the adjudicator applied criteria developed by case law for off-duty-conduct discipline.

[578] On judicial review, the Federal Court was of the view that instead, the adjudicator should have applied the employer's code of conduct. On appeal, the Federal Court of Appeal confirmed the approach preferred by the reviewing court.

[579] As a result, what I understand from *Tobin*, at para. 45, is that I have to determine if the cause on which the employer relied in support of the termination of the grievor's employment has been established. I have already found that the employer

has failed to do so. In my view, *Tobin*, at para. 45, does not require that I then determine on the sole basis of the record before me whether the termination of the grievor's employment might have been justified for another reason as a disciplinary action.

[580] *Bétournay*, 2018 FCA 230, further relies on *Grant*, at para. 5, which reads as follows:

> *[5] Turning to the issue of whether the Board committed a reviewable error in its treatment of the disciplinary issue, we believe that when fairly read the PSLREB's reasons show that the Board turned its mind to whether cause existed for the impugned decisions and found that the CBSA did not establish cause. We agree with the respondent that the portion of the reasons that deals with the disciplinary issue cannot be read in isolation from the rest of the reasons, which make it clear that the PSLREB found there was no cause for the impugned actions as the CBSA failed to establish that they were reasonably necessary. There was ample evidence before the Board from which it could have reached this conclusion and therefore its determination cannot be said to be unreasonable.*

[581] I understand this paragraph to show that the Board did find that the employer's action was not justified as a disciplinary decision. Again, in my view, it does not require that I determine if the termination of the grievor's employment might have been justified for another reason as a disciplinary action.

[582] Finally, *Bétournay*, 2018 FCA 230, relies on *McKinley*, at paras. 29, 48, and 57. *McKinley* dealt with a common law wrongful-dismissal lawsuit alleging that Mr. McKinley had been terminated without proper notice and without cause. In defence, his employer alleged that it had offered him an adequate compensation package in lieu of reasonable notice and that it had cause for dismissing him because he had been dishonest with it. At paragraphs 29, 48, and 57, the Supreme Court of Canada wrote the following:

> *[29] When examining whether an employee's misconduct – including dishonest misconduct – justifies his or her dismissal, courts have often considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist.*

…

> *[48] In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.*
>
> …
>
> *[57] Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.*

[583] My understanding of those paragraphs is that they deal with the issue of whether dismissal is a proportional response in light of the seriousness of an employee's conduct. I note that in *McKinley*, the employer did not rely on cause at the time of termination, which is not unusual when dealing with the termination of a contract of employment at common law, and that the employer alleged cause for termination only in response to a lawsuit. At common law, an employer is not required to allege cause in support of termination, contrary to the employer's obligation in this case. Again, in my view, this case does not require that I determine whether the termination of the grievor's employment might have been justified for another reason as a disciplinary action.

iii. <u>Application to the case at hand</u>

[584] Based on my review of the opposite stands that *Heyser*, 2017 FCA 113, and *Bétournay*, 2018 FCA 230, took of what constitutes the appropriate course of action when an employer's alleged administrative action is found truly disciplinary, I am

giving preference to that expressed in *Heyser*, 2017 FCA 113. For the reasons that I gave in reviewing both decisions, I believe that *Heyser*, 2017 FCA 113, accords with the current state of labour adjudication in Canada and with the terms and conditions of employment in the collective agreement. I also believe that it better promotes the purposes of the fair and credible resolution of matters arising in respect of terms and conditions of employment that are stated in the preamble to the *FPSLRA* and that it better fosters harmonious labour relations in the federal public sector.

[585] I have already found that the conditions required for the employer to revoke the grievor's reliability status, which would have been that it had legitimate reasons to believe that he represented an unacceptable risk to its operations, were not present at the time and that his employment could not have been terminated for those reasons. As a result, I found that the termination was not for the cause alleged by the employer but that it was a contrived reliance on s. 51(1)(g) of the *CRAA* (termination of employment for reasons other than discipline or misconduct), a sham, or a camouflage and that it was truly a disguised disciplinary action. Applying the approach in *Heyser*, 2017 FCA 113, my findings are sufficient to dispose of the merits of the grievance before me.

[586] Nevertheless, and only for the purposes of discussion, I wish to clarify that I would have granted the grievance had I applied the approach in *Bétournay*, 2018 FCA 230. Had I determined whether the termination of the grievor's employment might have been justified for another reason as a legitimate disciplinary action, I would have examined the incidents to which the revocation and termination letter alluded and would have found no misconduct on the part of the grievor that might have constituted cause for imposing discipline.

[587] With respect to the alleged fear of injury under s. 810(1) of the *Criminal Code*, and the alleged failure to report criminal charges to management in 2004, I have found that the employer relied on inaccurate information; that Mr. George, the grievor's manager at the time, was aware of the grievor's legal entanglements relating to the custody of his children; that those entanglements were not related to his official duties; and that they did no lead to the laying of criminal charges against him. Therefore, I would have found no related misconduct on his part that might have constituted cause for imposing discipline.

[588] With respect to the alleged use of an alias, I have found that the employer relied on inaccurate information, that the P*** alias that was associated with the grievor's name on the B.C. Court Services Online website was an error, and that the employer should have realized so from the start as the website reported different birthdates for the grievor and Mr. P***. Therefore, I would have found no related misconduct by the grievor that might have constituted cause for imposing discipline.

[589] The employer had already imposed a one-day disciplinary suspension on the grievor with respect to the inappropriate email incident. For that reason alone, I would have found that it could not rely on that incident in support of the disciplinary termination of his employment, as doing so would have constituted double jeopardy, or a second disciplinary action, for the same misconduct arising out of the same incident; see *Canadian Labour Arbitration*, at paragraph 7:4240.

[590] Furthermore, I have already found that sending emails from co-worker's computers was part of the IT culture, which the grievor's team leader had done, and that it appeared that the employer had condoned such behaviour in the past. Therefore, I would have found no related misconduct on the part of the grievor that might have constituted cause for imposing discipline.

[591] The employer had already imposed a 10-day disciplinary suspension on the grievor with respect to the router incident. Again, for that reason alone, I would have found that it could not rely on that incident in support of the disciplinary termination of his employment, as doing so would have constituted double jeopardy for the same misconduct arising out of the same incident; again, see *Canadian Labour Arbitration*, at paragraph 7:4240.

[592] In addition, I have found that the employer relied on inaccurate information, that the grievor is not the only person who might have powered up the router, and that the employer did not prove that he did it. Therefore, I would have found no related misconduct on the part of the grievor that might have constituted cause for imposing discipline.

[593] With respect to criminal charges of disobeying a court order and willfully resisting or obstructing a peace officer and to the failure to report criminal charges to management in 2012, I have found that the employer relied on inaccurate information, that the grievor informed Mr. Dorff on August 8, 2012, of his custody dispute being

before the courts, that those entanglements were not related to his official duties, and that the employer was aware of that last fact. I further found that charges were not laid against him until after the August 8, 2012, interview. Therefore, I would have found no related misconduct on his part that might have constituted cause for imposing discipline.

[594] The employer had already imposed a 20-day disciplinary suspension on the grievor with respect to his leave usage and attendance registration. Once again, for that reason alone, I would have found that it could not rely on that incident in support of the disciplinary termination of the grievor' employment, as doing so would have constituted double jeopardy for the same misconduct arising out of the same incident; again, see *Canadian Labour Arbitration*, at paragraph 7:4240.

[595] Moreover, I have found that the employer relied on inaccurate information and that the grievor claimed the wrong type of leave for the 3.5 hours that he took to accompany a family member to a doctor's office. I further found that the employer presented no evidence showing that he did not honestly believe that he could use medical or dental appointment leave to accompany a family member to the doctor's office or that he intended to obtain a benefit to which he was not entitled. Therefore, I would have found no related misconduct on his part that might have constituted cause for imposing discipline.

[596] Finally, the evidence before me established no other possible misconduct on the part of the grievor that might have constituted cause for imposing discipline.

3. <u>Remedy</u>

[597] The grievor testified at the hearing about the days, months, and years that unfolded after his termination of employment and about the financial and emotional toll that he and his family endured as a result. All aspects of his life were turned upside down.

[598] The grievor also testified about his many efforts spent finding other employment since his termination, about which he provided detailed evidence.

[599] After finding no work, the grievor also explained that he enrolled in computer courses to update his skills.

[600] The employer did not contradict or discredit the grievor's evidence with respect to the issue of remedy.

[601] Section 228(2) of the *FPSLRA* specifies that "[a]fter considering the grievance … the Board … must render a decision, make the order that … the Board considers appropriate in the circumstances …."

[602] The grievor requests his "… immediate reinstatement with no loss of seniority and full compensation for all wages, overtime and benefits lost since his termination on September 27, 2013, including sick leave credits …" and relies on *Unifor, Local 101R v. Canadian Pacific Railway Co.* (2014), 241 L.A.C. (4th) 417 at para. 81. He offers that all the employment income that he has earned since his termination be deducted from the money the employer owes him for lost compensation. As I am not called to pronounce on the application of the duty to mitigate damages with respect to compensation lost as a result of a termination of employment without cause in the federal public sector, I decline to make any finding.

[603] The grievor submits that he is "… entitled to a tax gross up on all lost income …" and relies on *Canadian Auto Workers, Local 88 v. Cami Automotive Inc.* (1999), 86 L.A.C. (4th) 272 at paras. 32 and 33.

[604] With respect to all monetary remedies, the grievor seeks an award of "… compound interest on all amounts owed him …". He referred me to the following decisions in support of his claim: *King v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 84 at para. 123; and *Pugh v. Deputy Head (Department of National Defence)*, 2013 PSLRB 123 at para. 224. He submits that the applicable interest rates are set out in the British Columbia *Court Order Interest Act* (R.S.B.C. 1996, c. 79) and in the Bank of Canada's "Policy Interest Rate" table.

[605] In addition, the grievor submits that he is "… entitled to all pension contributions or adjustments necessary to put him in the position he would have been had he not been terminated on September 27, 2013 …" and relies on *Unifor, Local 101R*, at para. 81.

[606] The grievor also requests that "… documents pertaining to … the revocation of his reliability status and the termination of his employment should be removed from his personal file …" and relies on *Blackburn*, at para. 324.

[607] The grievor requests no punitive damages or damages for psychological injury resulting from the manner of his termination.

[608] The employer objects to the request that the grievor be reinstated with no loss of seniority and submits that loss of seniority does not apply.

[609] The employer also objects to the request that the grievor be compensated for overtime. It submits that the evidence does not specify the amount he made in overtime. While he might have made approximately $5000 in overtime one year, it is not guaranteed that he would have made the same amount in the following years.

[610] Finally, the employer requested that it not be required to compensate the grievor for lost wages resulting from delays that he caused in the pursuit of his grievances and from the length of time the Board took to adjudicate them, as the employer is not responsible for those delays. I find this request outrageous, disingenuous, and vexatious.

[611] First, the employer adduced before me no evidence in support of its claim that the grievor caused any delays in processing his grievances. A bald allegation is insufficient to meet its burden to establish its allegation.

[612] Second, the employer does not stand before me with clean hands. The hearing of these matters was postponed twice, both times at its request. The first time was on September 14, 2015, and the second time was on May 12, 2016. Furthermore, I note that the parties were not available for a rescheduled hearing before May 16, 2017. Had the employer been able to proceed with these cases as originally scheduled, the time that it took to adjudicate them would have been at least 18 months shorter.

[613] Last, it is trite law that a grievor is entitled to be made whole in the event that his or her grievance is upheld. A grievor is entitled to be put back in the same position he or she would have been in had the events that gave rise to the grievance not occurred. It would be patently unfair to hold the grievor responsible for part of the length of the proceedings in this case. Therefore, I deny the employer's request. In any event, as I have already noted, the grievor offers that all employment income that he has earned since his termination be deducted from the amount the employer owes him for lost compensation.

[614] I consider that the appropriate remedy is to reinstate the grievor in his position retroactive to September 27, 2013, with no loss of pay or benefits. I note that while the employer disputed the amount of overtime that he would have worked had it not been for his termination, it did not dispute that he would indeed have worked some overtime. In the circumstances, I find it fair to consider that he would have worked the average amount of overtime worked by IT support analysts classified at the CS-01 group and level at the Surrey Tax Centre who were available for overtime.

[615] I note that the grievor's circumstances are different from those in *Canadian Auto Workers, Local 88 v. Cami Automotive Inc.* I am not satisfied that a tax gross-up is needed in this case.

[616] Finally, I have no reservations with respect to awarding interest on money owed to the grievor. He requested the policy interest rate set by the Bank of Canada, and I do not find that rate excessive.

[617] I invite the parties to resolve between them the exact amount owed to the grievor as a result of this decision. Should they be unable to agree, I will remain seized of that matter for a period of 90 days.

VII. Other comments

[618] Now that I have addressed all the issues that were before me, except for the one that I remitted to the parties about the exact amount owed to the grievor as a result of this decision, I would like to express some comments on what transpired from the evidence and the hearing before me.

[619] For reasons that did not truly come to light at the hearing, the employer formed the opinion that the grievor was not a desirable employee.

[620] The employer began to manage the events addressed in this decision on July 7, 2011, after one of the grievor's co-workers notified it of information about him that he found on the B.C. Court Services Online website. At that time, the employer was of the view that waiting to receive an RCMP background check on him would create no risks to it. In the week of April 23, 2012, the RCMP confirmed that he had never been convicted criminally.

[621] Nevertheless, the employer questioned the grievor on August 8 and September 21, 2012, about the P*** alias and his custody entanglements of 2004 and decided on December 9, 2012, to close its investigation of those issues.

[622] On December 21, 2012, the grievor sent an inappropriate email from a co-worker's workstation, and on January 7, 2013, the employer questioned him about it. From then on, he faced a succession of events that culminated with the termination of his employment on September 27, 2013. I can only imagine what an ordeal that period was for him.

[623] On January 11, 2013, the router incident occurred. At that time, the employer assessed that the incident was unlikely to be detrimental to its network and confirmed that it truly represented a very minimal risk. Yet, on February 5, 2013, it restricted the grievor's duties pending its investigation of that incident.

[624] On January 13, 2013, the employer received confirmation from the Delta Police Department that charges laid against the grievor in 2012 related to a custody dispute.

[625] On January 22, 2013, the employer decided to ensure that the grievor's reliability status would be reviewed. What triggered that decision remains unclear because it knew that he had never been convicted criminally, that charges laid against him in 2012 related to a custody dispute, and that the router incident represented a minimal risk to its network. It is true that he had sent an inappropriate email on December 21, 2012. It is also true that the employer was already investigating his leave usage and attendance registration, but it had not yet confronted him about it and did not yet know whether there was an explanation for it. It did not yet know whether it should be concerned. However, it is clear that the employer's intention to review his reliability status materialized on January 22, 2013.

[626] Eight days later, on January 30, 2013, the employer questioned the grievor for the first time about his leave usage and attendance registration.

[627] On February 26, 2013, the employer held a disciplinary hearing with the grievor about the inappropriate email incident and the router incident.

[628] On April 8, 2013, Internal Affairs recommended that the employer review the grievor's reliability status "[d]ue to the uncertainty surrounding the alias …", despite

the facts that the employer had decided on December 9, 2012, to close its investigation of that issue and that he had never been convicted criminally.

[629] On April 29, 2013, the employer imposed on the grievor both a 1-day suspension for the inappropriate email incident and a 10-day suspension for the router incident. He served those suspensions consecutively from April 30 to May 14, 2013.

[630] On May 24, 2013, the employer held a disciplinary hearing with the grievor about his leave usage and attendance registration. On that occasion, his representative informed the employer that he was "… pretty stressed out."

[631] On May 28, 2013, the employer informed the grievor that it was conducting a review of his reliability status and that his employment might be terminated as a result. It suspended his "… access privileges to the CRA mainframe … pending this security review."

[632] On July 17, 2013, the employer questioned the grievor again about the P*** alias and his custody entanglements of 2004, despite knowing that he had never been convicted criminally. It also questioned him again about the inappropriate email incident leading to his 1-day suspension, the router incident leading to his 10-day suspension, and his leave usage and attendance registration. It also questioned him about the charges laid against him in 2012, despite having received confirmation six months earlier from the Delta Police Department that the charges laid against him in 2012 related to a custody dispute.

[633] On August 1, 2013, the employer imposed on the grievor a 20-day suspension for his leave usage and attendance registration. He served it from August 2 to 30, 2013. While he served it, Mr. Dorff recommended that the employer revoke his reliability status. The employer never truly allowed him back to work after that.

[634] When the grievor returned to work after that suspension, the employer again assigned him to alternate duties pending the review of his reliability status. Four days later, it placed him on leave with pay pending the review. Twenty days later, it revoked his status and terminated his employment.

[635] At the end of the day, when everything is considered objectively, one is left with a very clear impression that the employer lost focus and went overboard.

[636] I have found that the employer's investigation of the events generated inaccurate information. I have also found that its assessment of the events was based on irrelevant considerations and that it ignored relevant factors. I am deeply concerned by the cavalier attitude with which it managed the events addressed in this decision, and my sense of justice is offended by the high-handed manner in which it treated the grievor. Frankly, what was done in this case departed significantly from any duty of good faith and fair dealing that an employer owes its employee.

[637] I do not believe that rendering this decision without expressing these additional comments would be sufficient to denounce the employer's conduct in this case and to deter it from treating other employees in the way it treated the grievor.

[638] Although these additional comments will not negate the anguish that the grievor has endured since 2013, I truly hope that they will provide him with some sense of retribution.

[639] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VIII. Order

[640] The grievance about the 10-day suspension in relation to the router incident is allowed, and the suspension is overturned. I order the employer to remove from its files any mention of that suspension and to pay to the grievor the salary and benefits to which he would otherwise have been entitled from May 1 to 14, 2013, subject to the usual deductions.

[641] I order the employer to pay interest on the amount owed under paragraph 640, at the applicable policy interest rate set by the Bank of Canada, to be calculated and compounded annually from May 14, 2013, until payment is made.

[642] The grievance about the 20-day suspension in relation to leave usage and attendance registration is allowed, and the suspension is overturned. I order the employer to remove from its files any mention of that suspension and to pay to the grievor the salary and benefits to which he would otherwise have been entitled from August 2 to 30, 2013, subject to the usual deductions.

[643] I order the employer to pay interest on the amount owed under paragraph 642, at the applicable policy interest rate set by the Bank of Canada, to be calculated and compounded annually from August 30, 2013, until payment is made.

[644] I declare that the termination of the grievor's employment was not for the cause alleged by the employer but that it was a contrived reliance on s. 51(1)(g) of the *CRAA* (termination of employment for reasons other than discipline or misconduct), a sham, or a camouflage and that it was truly a disguised disciplinary action.

[645] I dismiss the employer's objection to the Board's jurisdiction to hear the grievance about the termination of the grievor's employment.

[646] The grievance about the termination of the grievor's employment is allowed. I order the grievor reinstated into his position, with pay and without loss of benefits, retroactive to September 27, 2013.

[647] I order the employer to remove from its files any mention of the revocation of the grievor's reliability status and the termination of his employment.

[648] I order the employer to remove from its files Internal Affairs' April 8, 2013, investigation report and any related documentation.

[649] I order the employer to remove from its files the August 21, 2013, Security Risk Assessment Report and any related documentation.

[650] I order the employer to pay to the grievor the salary and benefits, including compensation for the average amount of overtime worked by IT support analysts classified at the CS-01 group and level at the Surrey Tax Centre who were available for overtime, to which he would otherwise have been entitled since September 27, 2013, subject to the usual deductions and to the employment earnings that he managed to obtain from other sources.

[651] I order the employer to pay interest on the amount owed under the last paragraph, at the applicable policy interest rate set by the Bank of Canada, to be calculated and compounded annually from September 27, 2013, until payment is made.

[652] I will remain seized of any issue relating to the calculation of the amounts owed under paragraphs 640 to 643, 650, and 651 for a period of 90 days from the date of this decision.

May 17, 2019.

Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board