Date: 20190823

Files: 566-02-9219 and 9488

Citation: 2019 FPSLREB 82

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

SYLVIE THERRIEN

Grievor

and

DEPUTY HEAD
(Department of Employment and Social Development)

Respondent

Indexed as
Therrien v. Deputy Head (Department of Employment and Social Development)

In the matter of individual grievances referred to adjudication

Before: Steven B. Katkin, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: David Yazbeck, counsel

For the Respondent: Caroline Engmann, counsel

Heard at Vancouver, British Columbia,

January 20 to 23 and August 31 to September 3, 2015, and March 1 to 4 and July 5, 2016, and at Ottawa, Ontario, August 24, 2015.

(Supplementary written submissions filed June 30, August 11 and 18, and December 15 and 18, 2017).

I. Individual grievances referred to adjudication

[1] Sylvie Therrien ("the grievor") was employed by Service Canada, a part of the department now known as Employment and Social Development Canada ("the employer" or ESDC) as an integrity services investigator (ISI). Her duties included investigating possible fraud in employment insurance (EI) claims, noting overpayments, recommending penalties, and making recommendations to accept or reject claims.

[2] On February 1, 2013, an article appeared in the newspaper *Le Devoir*, referring to a source within Service Canada's Integrity Services unit who divulged that the ISIs' performance was measured based on the savings they generated per month. The article also referenced a statistical table emanating from within the Integrity Services unit's Western Canada and Territories Region (W-T) concerning savings objectives for the region. Similar articles appeared in *Le Devoir* on February 25 and 27, March 5 and 21, and April 22, 2013, referencing other documents originating from within Service Canada and quoting from a source within Service Canada's Integrity Services unit.

[3] Following a preliminary investigation, the grievor was alleged to be the source referenced in the articles who had disclosed documents to the media. Effective May 13, 2013, she was suspended indefinitely without pay pending the outcome of an administrative investigation with respect to the allegations.

[4] On May 24, 2013, the grievor filed a grievance challenging her suspension. This grievance (file number 566-02-9219) was referred to adjudication on November 12, 2013, under s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*).

[5] The administrative investigation concluded that the grievor was indeed the media source and that she had breached her duty of loyalty toward the employer and the Government of Canada. Therefore, the employer informed her by letter that effective October 15, 2013, her reliability status was revoked. As maintaining that status constituted a condition of employment, in a separate letter of the same date, the employer terminated her employment.

[6] On October 30, 2013, the grievor filed a grievance challenging that revocation and the resulting termination, which was referred to adjudication on January 24, 2014, pursuant to s. 209(1)(c)(i) of the *PSLRA* (file number 566-02-9488).

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

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

[9] The grievor admits to leaking departmental information and speaking to the media but believes that she was justified in doing so. She argues that this case is about government wrongdoing, whistle-blowing, and freedom of expression. She believes that the investigation into her actions was unfair and that her subsequent termination was disguised discipline on the part of the employer for her whistle-blowing. For the reasons that follow, I do not accept her arguments, and I dismiss both grievances.

II. Summary of the evidence

[10] During the hearing, the parties presented oral testimony and documentary evidence in both French and English. At the conclusion of the hearing, while cognizant that all the Board's decisions are translated, both parties requested that the original version of this decision be in English.

[11] The employer called the following witnesses to testify: Daniel Comeau, Director General, Internal Integrity and Security, and Departmental Security Officer (DSO); René Pariseau, Information Technology (IT) Advisor, Shared Services Canada (SSC); Jocelyn Côté and Michel Leduc, Senior Investigators, Special Investigations, in the Special Investigations Unit (SIU), ESDC national headquarters; Gary Tiwana, Team Leader, Integrity Services Branch, EI program, and the grievor's team leader; Claude Jacques, Manager, Personnel Security; Andy Netzel, Executive Head, Service Management, W-T, ESDC. And in reply evidence, called were Kevan Peters, Business Expertise Advisor (BEA), Integrity Services, W-T; and Patricia Minichiello, Director, Integrity Services, W-T.

[12] The grievor testified on her behalf.

A. The grievor's employment background

[13] The grievor began her employment with ESDC as a program officer in Prince George, B.C. At the material time, she was granted reliability status and signed an oath of loyalty on December 1, 2010, which reads as follows:

> *I swear that I will faithfully and honestly fulfil the duties that devolve on me by reason of my employment in the public service of Canada and that I will not, without due authority, disclose or make known any matter that comes to my knowledge by reason of such employment.…*

[14] In June 2012, the grievor was informed that her position had been affected by a workforce adjustment. She was subsequently offered and accepted a deployment as an ISI in Nanaimo, B.C., effective October 1, 2012.

[15] There is a National Certification Program for Investigators (NCPI). For new ISIs, the NCPI provides three weeks of classroom training that includes foundational principles of EI entitlement, investigative skills and techniques, and interviewing skills. Following this training, each ISI is assigned to a BEA, who monitors the ISI's work for approximately six months. The goal of the monitoring, which is an integral part of the training program, is that the ISIs understand EI principles, to ensure that they can conduct investigations correctly.

[16] While employed in Nanaimo, the grievor followed the NCPI. She was in training and had a coach. The type of files she was assigned required that she evaluate them

according to certain criteria and then make a recommendation. The criteria included whether claimants had quit their employment or had been laid off for lack of work, whether they were seeking employment, and whether they were entitled to benefits. The ISI then prepares a report with respect to his or her investigation and recommendations, which is forwarded to the Integrity Adjudication Team (IAT) for review and a decision on the claim. As part of her training, the grievor was required to send her reports to her team leader and BEA before they were forwarded to the IAT.

[17] At the grievor's request, she was transferred to Vancouver, B.C., and began working at the employer's Harbour Centre office on January 10, 2013. Following her transfer, she continued to be in training and subject to monitoring. She said that while the work was the same as in Nanaimo, she was treated differently. Namely, as the end of the fiscal year approached, she said that the ISIs were pressured to generate as many EI savings as possible. While savings objectives did exist for fully trained investigators with two years of experience, the grievor did not have a specific savings objective as she was still in training. Still, she felt that the workplace was poisoned, as the focus was on savings. She also claimed that claimants were treated with less respect than in Nanaimo. She complained that the deck was stacked against the unemployed and those from First Nations. Ultimately, she said that she was harassed because she did not apply the EI legislation the way her colleagues said it should have been applied. She gave two examples of having supported claimants when her colleagues would not have done so.

[18] Her first example was that of a First Nations individual working in the fishery industry who left his employment because of harassment two days before the end of the season, when he would have been laid off. Her recommendation was that there was just cause to entitle him to benefits. Her team leader said that payment should be denied.

[19] The grievor entered all the relevant circumstances in a report but says that she was told to omit them. In her view, it was an unjust manipulation of the facts. As mentioned, as she was in training, she was required to send her reports to her team leader and BEA before they were forwarded to adjudication. However, she decided to bypass her team leader and BEA by sending her recommendation directly to the IAT.

[20] The grievor's second example related to a Sudanese immigrant who had resided in Canada for several years and had returned to Darfur to assist his family. While there, he continued filing EI reports and receiving benefits. Her coach told her that the claimant was not entitled to benefits as he was outside Canada and that as the benefits had been paid, she was to recommend the repayment of them and a monetary penalty. She said that she wrote in her report that just cause was not proven, and she included circumstances that he had been held by Sudanese authorities. She again completed her report without consulting her coach, team leader, and BEA.

[21] At the hearing, when Mr. Peters, the grievor's BEA at the time, was informed that the grievor had indicated that she had been directed not to include certain circumstances in her reports, he said that that would not have come from him. His monitoring notes indicate that she needed more facts to support mitigating circumstances if she believed that there was just cause for the actions she was recommending.

[22] The grievor drafted a document dated March 7, 2013, titled "Statement of Issues at work Integrity in Harbour Center [*sic*]", outlining the issues noted earlier in this decision and the harassment she claimed to be experiencing. She sent the document to the Director, Integrity Services, Ms. Minichiello, who received it on March 18, 2013. Ms. Minichiello indicated by email that she would pass the document to Bernice Cook, who would conduct an investigation into the grievor's allegations and would contact her.

[23] Ms. Minichiello testified that before receiving the document, neither the First Nations nor Sudanese claimant's files had been brought to her attention. Furthermore, she indicated that between January 2 and 22, 2013, she had no direct interaction with the grievor. During that period, neither the grievor nor anyone on the management team brought to her attention any information about wrongdoing in the workplace.

[24] Ms. Cook met with the grievor and her union representative, as well as Ms. Minichiello, on April 3, 2013, and interviewed other witnesses in the course of her investigation. Ms. Minichiello communicated the results of the investigation to the grievor by letter dated May 13, 2013, which reads in part as follows:

…

> *I have personally reviewed the particulars of your complaint and the statements obtained from the witnesses. I also reviewed them in a meeting with our Labour Relations Advisor. Much of what has gone awry in this situation seemingly stems from misread, incomplete or misunderstood communication. Every team leader and manager has his or her own unique communication style and approach to issues such as performance management and every employee has his or her own individual preferences as to the style of management employed. Though you may disagree with the approach taken, I assure you that nothing about the management of the Harbour Center [sic] office represents a significant departure from acceptable management practice.*

…

[25] The grievor subsequently requested a transfer back to Nanaimo, but was told that she would go to Burnaby, B.C. Concerning her decision to transfer the grievor to the Burnaby office, Ms. Minichiello said that during a meeting with the grievor on March 26, 2013, it was evident to her that the grievor was stressed by working with the management team at Harbour Centre and that she felt alienated by the staff. Based on how she perceived the grievor's discomfort, Ms. Minichiello decided to place her in an environment more conducive to training and development as an ISI. She also decided to assign the grievor to a new BEA, coach, and team leader, for a fresh start.

B. The grievor's transfer to Burnaby

[26] The grievor began working in the Burnaby office on April 4, 2013. At the material time, Mr. Tiwana was her team leader. His responsibilities included assigning work, coaching and supporting staff, carrying out performance management, managing leave, and identifying tools required to help the staff succeed. He reported to Wanda Morrison, the service manager.

[27] Mr. Tiwana met the grievor in April 2013 when she joined his unit. His director of operations, Ms. Minichiello, directed him to ensure that the grievor had a very supportive environment and that everything possible be done to ensure her success as an ISI. As he did not know the grievor's level of knowledge, Mr. Tiwana decided to treat her as a new hire with a foundation on the ISI role.

[28] Mr. Tiwana spoke with the grievor when she started on April 4, 2013. He said that his conversation with her was the routine one he had with all new employees. It

concerned ground rules, expectations, listening to concerns, and the support that the new employee may require.

[29] The conversation with the grievor stood out to Mr. Tiwana because she began taking issue with routine matters such as break times and calling Mr. Tiwana if she would be late for work. He had not experienced anyone taking issue with those items. When the grievor spoke of her experience at Harbour Centre, Mr. Tiwana told her that he did not wish to hear it, to not create bias. He wished her to have a good environment, to feel supported, and to succeed.

[30] During this conversation, the grievor also spoke about her interpretation of how investigations worked and of how savings are generated and that she was not a fan of Stephen Harper or his government. While everyone is entitled to his or her view, Mr. Tiwana thought this was odd. He was trying to be supportive, but his observation was that she did not agree with the ISI role. His objective was to overcome that and to create a successful environment. In response, he spoke about the structure of the Integrity branch, how savings fit into objectives but are not the sole focus, and key performance indicators.

[31] In an email to the grievor dated April 4, 2013, Mr. Tiwana recapitulated their conversation of that day, to which the grievor replied by email the same day indicating, among other things, the following: "… I want and I am ready to do my work as best as I can." Similarly, on April 4, 2013, in an email addressed to Ms. Minichiello and Ms. Morrison, Mr. Tiwana recapitulated his conversation with the grievor and identified certain flags, mainly with respect to the savings objectives aspect of their conversation.

C. The grievor's comments in the workplace

[32] On April 11, 2013, the Integrity Services branch of the EI program in Burnaby held a strategy planning session. In a memo he drafted later that day, Mr. Tiwana noted his observations of what had occurred during the session.

[33] The meeting involved breakout groups and then discussions with the entire team. One issue discussed was that a number of files were being returned by the IAT. Some of the staff suggested holding a discussion with the adjudicators to identify how the IAT's requirements could be better met.

[34] The grievor objected, stating that in her view, it was unethical and collusion to ensure that the IAT would approve every ISI's recommendation. Mr. Tiwana said she spoke about it quite passionately for some time. He was concerned, as he was trying to increase team morale, and her approach was negative. It almost alienated her from the rest of the team.

[35] Later in the afternoon, another colleague spoke about her concerns with staff recently leaking information to the media about savings objectives. The public was questioning the staff's integrity and the work it performed. While the rest of the team agreed that it was impacting them, the grievor said that if the government was doing something wrong, then people should speak out. Mr. Tiwana said that while he thought that she could hold those views, as it was a formalized setting, he thought he should record it. His superiors, Ms. Morrison and Ms. Minichiello, were made aware of his concerns and observations and requested a copy of his notes.

[36] The grievor acknowledged raising that there could be a conflict of interest with respect to working more closely with the IAT and making the comments about speaking out against wrongdoing in the government. On this last statement, she asserted at the hearing that if there is a conflict between the government and the public, one must be loyal to the government, but if it is contrary to the public interest, one must say so. She testified that the EI fund does not belong to the government but is the workers' money.

[37] On April 16, 2013, Mr. Tiwana and the grievor conversed about how she was adapting to her new position. Again, he recorded their discussion in a memo dated the same day. Among other things, she had identified that she was uncomfortable in her position and that she wished she were in a different position. Her biggest concern was going after people and having to generate savings. She associated this practice with the Conservative government in power. It appeared to Mr. Tiwana that she did not believe in the work being done by the unit. If she did not like the job, he felt that it was an obstacle to her success. He was also concerned because she referred to the government in a negative fashion. He indicated to her that it was their job to support the government, regardless of politics, and referred her to the *ESDC Code of Conduct* ("the Code of Conduct").

[38] At the hearing, the grievor recalled that as indicated in Mr. Tiwana's memo, he spoke about the Code of Conduct and that loyalty to the government was important. She added that the citizens were also her employer and that ultimately, her loyalty was owed to Canadians, as the public interest supersedes everything.

[39] In an email to Mr. Tiwana dated April 16, 2013, the grievor recapitulated their conversation of earlier that day. Among other things, she indicated that during their conversation, she expressed concern about doing her job in a "let's go get them, sort of head hunter [sic] way in order to get my savings number" but that she was willing, interested, and ready to do her job fairly and honestly. She agreed that public servants should not speak against the elected government and that such behaviour is unethical. Ultimately, she thanked Mr. Tiwana for his time and for a "very supportive conversation". At the hearing, she agreed that that was her view at the time.

[40] On April 29, 2013, a meeting was held between the grievor and Ms. Morrison, at which Mr. Tiwana attended and took notes. Ms. Morrison raised concerns that in her email to Mr. Tiwana on April 16, 2013, the grievor had used the term "head hunters [*sic*]" when referring to the Integrity branch. Ms. Morrison gave her an official warning that that could not be said again, referring to the Code of Conduct's value of "Respect for Democracy", failing which administrative or disciplinary action, including termination, could be imposed. The grievor acknowledged that she told Ms. Morrison that she did not think that the government should require them to be headhunters and said that by that phrase, she meant the monthly hunt for savings.

D. Preliminary investigation

[41] As a result of the *Le Devoir* articles, Mr. Leduc and Mr. Côté were assigned to investigate why government documents had appeared in the media. Mr. Leduc was employed by ESDC as a senior investigator in the SIU from 2003 to 2015. Before that, he served with the Sûreté du Québec for 31 years in several roles, during which he acquired broad investigatory experience.

[42] Mr. Côté has been a senior investigator, special investigations, with the Service Canada SIU located in Gatineau, Quebec, since March 2008, reporting to Mr. Comeau. Between 2008 and 2013, he conducted at least 50 investigations. Before joining the

SIU, Mr. Côté served as a police officer with the Sûreté du Québec for 29 years, of which 20 years were spent in criminal investigations.

[43] On April 25, 2013, the investigators received Mr. Tiwana's memos from a Vancouver-based ESDC internal integrity and security manager, Marlene Toivonen, who was aware of leaks of government documents to the media. While the memos did not contain direct evidence about the grievor, the investigators thought they were of some value, as both the grievor and the journalist who wrote the articles were francophone. Since the leaked document was a statistical table sent electronically to hundreds of employees in the Integrity branch, the investigators believed there was a good possibility that ESDC's electronic network had been used to leak it.

[44] The investigators decided to carry out a preliminary analysis of the grievor's ESDC email account and Internet access to determine whether they contained emails sent from that account to the journalist. Mr. Côté performed the analysis. In his analysis of the grievor's Service Canada email account, he did not find a direct link from it to the *Le Devoir* journalist. However, he did find several emails sent from her Service Canada account to one of her personal accounts as well as to the email account of another individual, who would subsequently be identified as a friend with whom the grievor had resided for several weeks in January and February 2013 and who had allowed the grievor to access her laptop computer. This friend did not testify at the hearing, and disclosing her name would serve no benefit to the merits of this decision. Therefore, I have anonymized her name as "Ms. C" in the remainder of this decision.

[45] On January 22, 2013, the grievor sent an email from her Service Canada account to Ms. C's email account. She attached the Integrity Services branch W-T statistical table of savings achievements for December 2012 ("the ISB Savings Report Card") issued on January 16, 2013, by the Executive Director, Integrity Services Branch (W-T). Mr. Côté said that this document, which was only for internal use, was the one referred to in the article published in *Le Devoir* on February 1, 2013. That same day, the grievor also sent an email from her Service Canada account to her personal email account that had attached the December 2012 ISB Savings Report Card together with her personal comments on the documents.

[46] Also on January 22, 2013, the grievor sent an email from her Service Canada account to Ms. C's email address. Attached was a questionnaire that the ISIs used when dealing with clients. In another email on January 22, 2013, from the grievor's Service Canada account to Ms. C's account, she attached the French version of chapter 56 of the Investigation & Control Manual, dealing with performance indicators.

[47] On January 24, 2013, the grievor sent an email from her Service Canada account to her personal account, to which were attached the following documents: chapter 56 of the "Investigation & Control Manual", dealing with performance indicators in both English and French, with her comments inserted in two places; and chapter 10 of the "Digest of Benefit Entitlement Principles", in both English and French.

[48] In an email dated April 2, 2013, and sent from her Service Canada account to her personal account, the grievor attached several documents pertaining to investigative strategy case studies.

[49] The investigators reviewed the documents and the grievor's emails and compared them to the articles published in *Le Devoir* on February 1, 25, and 27, March 5 and 21, and April 22, 2013. Their analysis disclosed some striking similarities between the text of her emails and the *Le Devoir* articles. The article published on February 1 contained almost verbatim the wording she had used in her emails, and the one published on April 22 referred to chapter 19 of the "Integrity Operations Manual".

[50] The results of the analysis of the grievor's Service Canada email account were provided to Mr. Comeau in an email from Mr. Leduc dated May 8, 2013. In it, Mr. Leduc informed Mr. Comeau that based on the analysis, he had reasonable grounds to believe that the grievor had leaked several government documents, and he requested a mandate to initiate an administrative investigation. Mr. Comeau approved the investigation mandate the same day.

[51] Mr. Côté said that the objective of the investigation was to determine whether the grievor had leaked documents designated only for internal use to a third party, whether the leak was made by someone not authorized to disclose the documents, and whether she had contravened government policies.

E. Suspension

[52] By letter dated May 13, 2013, the grievor was informed that an administrative investigation was being conducted with respect to allegations that she might have breached the *Communications Policy of the Government of Canada*, the *Operation Manual for Employment Insurance*, and the Code of Conduct. Specifically, the letter alleged the following:

…

> *On or around January 22, 2013, not being an authorized representative under the Communications Policy of the Government of Canada, you may have divulged to the public, media, family or friends, protected documents, policies/guidelines and other administrative information that were not available to the public….*

…

[53] In the circumstances, the employer determined that the grievor presented "… a reasonably serious and immediate risk to the legitimate concerns of the Department …". As such, she was suspended indefinitely without pay, pending the outcome of the investigation.

[54] The suspension letter further stated that the mandate of the investigation was to ascertain the facts surrounding the allegations, and it invited the grievor to an interview with the investigators to respond to the allegations. The letter further indicated that once the investigation was completed, she would be afforded an opportunity to present any clarifications or extenuating circumstances not addressed in the course of the investigation. After that, management would make a decision on any further action.

[55] According to Mr. Netzel, who issued the letter, he decided to suspend the grievor without pay because he had legitimate concerns that other material might have been released after the ISB Savings Report Card. While the report card was not secret, it was released without context and could have been misleading. Of greater concern were the Integrity Operations Manual and the subsequent documents, as they began to put the EI account at risk. Releasing it to the public provided access to those inclined to play the system. He also considered the security risk to staff in the event a disgruntled claimant took action.

[56] Furthermore, as ESDC was entrusted with private citizens' information, Mr. Netzel testified that he wished to prevent the risk that further releases would disclose that information. While a further investigation was required into the allegations, Mr. Netzel asserted that based on the information available, he determined that the grievor posed a serious and immediate risk to the department.

[57] When he was asked whether he considered options other than suspending the grievor without pay, Mr. Netzel replied that the possible options were finding her another position or suspending her with pay. However, no other positions at ESDC involve employees not dealing with citizens' information.

[58] With respect to the second option, he considered the length of the investigatory process. Someone from the security branch assured him that the process would take seven to eight weeks, which he felt was not overly long. If the allegations were unfounded, the grievor would be reinstated, with back pay.

[59] On May 13, 2013, the day on which she received the letter informing her of her indefinite suspension pending the investigation, the grievor sent emails from her personal account to the journalist at *Le Devoir* and to her former partner that referred to the ISB Savings Report Card that she had previously forwarded to the journalist. The email to the journalist reads as follows:

> [Translation]
>
> …
>
> *I wrote this document from the Service Canada office to send to myself at home. This email was attached to the document saying that they had saved so much and so much in the Western region, the first document, the "report card" that I had sent you, and this on January 22, as you can tell, I was careless and foolish and I got caught, look below the email and the attached document of my work email*
>
> *This is the end of my job.*
>
> …

[60] The grievor's email to her former partner reads in part as follows:

> …
>
> *That is what they have against me. I was foolish and send [sic] an email from my work computer to myself on that date but they*

> *know that then an article appeared in the media right then too. They can make the link. Also the Union told me to be totally honest and tell all right away that it is better….*
>
> …

F. Interview with the investigators

[61] Mr. Côté and Mr. Leduc travelled to Vancouver, where on May 13, 2013, they interviewed Ms. Minichiello and Mr. Tiwana. On May 14, they interviewed Ms. C. On May 15, the investigators interviewed one of the grievor's colleagues and, finally, the grievor.

[62] Counsel for the grievor raised a general objection to the admission into evidence of the investigators' interview notes of the employer's witnesses on the basis that they contained hearsay evidence, except those of Mr. Tiwana, since the employer had announced him as a witness. In addition, Ms. Minichiello testified in the employer's reply evidence. I admitted the remaining interview notes and considered the grievor's objection when assessing the weight to give the evidence. Ultimately, the notes in question about the interview with the grievor's colleague and Ms. C were not material to the issues to be determined in this case. In any event, the information they relayed during their interviews is not in dispute.

[63] The grievor's colleague informed the investigators that he had worked as an ISI in Vancouver with her. He had forwarded the ISB Savings Report Card to her at her request.

[64] Mr. Côté said that during the interview with Ms. C, she confirmed that the grievor had resided with her for six weeks in January and February 2013. During that period, she had authorized the grievor to use her laptop. Ms. C also confirmed her personal email address, to which the grievor had forwarded certain documents. When she was shown that the grievor had forwarded certain documents from work to Ms. C's email address, Ms. C asserted that she had never seen them and that she had not been aware that her email address had been used for that purpose.

[65] The grievor's interview took place on May 15, 2013, from 1:55 p.m. to 4:15 p.m., including breaks, and was conducted in French. The grievor was accompanied by a national union representative, Robert Strang. At the outset, the investigators sought

and received her permission to record the audio of the interview. She was later provided with a copy of the recording. With the agreement of both counsel, the recording of the entire interview was played during the hearing. The Board's copy of this exhibit is on a compact disc and consists of two files, the first of which runs from the beginning of the interview at 2:00 p.m., and the second from approximately 3:15 to the end, at 4:15 p.m.

[66] Mr. Leduc conducted the interview, while Mr. Côté took notes. The interview was conducted in the chronological order of events, with a document being shown to the grievor with each question. She was then asked for an explanation.

[67] When shown the article published in *Le Devoir* on February 1, 2013, the grievor denied knowledge of it and stated that she did not know the journalist, other than from reading his articles. Concerning the ISB Savings Report Card, the grievor said that everyone in the Integrity branch had received it, including her.

[68] As the interview progressed and she was shown documents and emails, the grievor consistently denied having forwarded them to the journalist. She said that as she had been in training, it was normal that she forwarded the work documents to herself, to study them at home. When she was asked why she had forwarded work documents to Ms. C's email address, the grievor responded that she had wanted to show Ms. C the type of work that she was doing.

[69] According to Mr. Côté, during a break requested by Mr. Strang, all the participants exited the interview room. Mr. Strang and the grievor had a private conversation, and then she made a call in a loud voice from her cell phone to a person she identified as her lawyer. She told that individual that she was being detained by the investigators. She then told the investigators that her lawyer said that the *Charter* (in reference to the *Canadian Charter of Human Rights and Freedoms*, Part I of *The Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("the *Charter*")) was still in force and that he wanted to speak with them. She extended her phone to them. Mr. Leduc and Mr. Côté refused to take the phone because they did not know the individual and had no means of identifying him as a lawyer. Mr. Leduc invited her to continue the interview.

[70] The grievor stated that she felt ill at ease during the interview and was tormented by question after question, many of them repetitive. She did not feel that the investigators were open to her. She had thought that the interview was to explain her actions, but she felt that she had already been found guilty. She felt lost and in disarray, and Mr. Strang was not permitted to speak, as he was there only as an observer.

G. Analysis of the laptop computer used by the grievor

[71] Ms. C granted the investigators permission to copy her laptop's hard drive.

[72] Mr. Leduc contacted Mr. Pariseau to carry out forensics on that hard drive. At the relevant time, Mr. Pariseau was an IT analyst with ESDC. His duties included computer forensics, incident handling, vulnerability management, and reverse malware engineering.

[73] As instructed by Mr. Pariseau, Andre Moos, an ESDC IT technician at Harbour Centre in Vancouver created a mirror image of the hard drive and described the process in an email dated May 16, 2013, to Mr. Côté and copied to Mr. Pariseau. When he received the image, Mr. Pariseau copied it onto his forensics computer and redid the duplication process to ensure that it was correct. The original mirror image was kept in a safe. While Mr. Pariseau fully explained the technical aspects of creating a mirror image of a hard drive and the search methods, his testimony was not challenged and thus need not be summarized.

[74] At Mr. Pariseau's request, Mr. Leduc provided a list of keywords to search for on the hard drive, which were related to documents leaked in *Le Devoir*. Mr. Pariseau explained that the results of his search showed a cached copy of the grievor's personal Hotmail account. That account contained emails with attached documents sent from her Service Canada email account to her Hotmail address and then forwarded to the journalist who had written the articles published in *Le Devoir*.

[75] Among the emails, on January 24, 2013, before the first article was published, the grievor wrote to the journalist as follows:

> [Translation]

> *… Here are other documents directly from the internal government site. One of the documents is in English. Please ignore it, as it is simply the English version of the document* Services d'intégrité*, one of the three documents that provides the French version. Take what interests you, and happy reading….*

H. Investigation report

[76] The investigation concluded that the grievor had transmitted to a journalist at *Le Devoir* protected information and information only for internal use, in violation of the *Communications Policy of the Government of Canada* and the Code of Conduct.

[77] The investigation report was provided to Mr. Comeau, who submitted it to Mr. Netzel on July 8, 2013, as Mr. Netzel was responsible for the management of employees in W-T. After the report had been submitted, it was brought to the SIU's attention that the grievor had given an interview to CBC News on July 20, 2013, during which she said she had been the source of the leaks. Mr. Comeau asked Mr. Côté for a follow-up. An addendum to the administrative investigation report, dated July 25, 2013, was prepared but did not alter the conclusions of the investigation report. It did note that in her interview with the investigators, the grievor had denied any participation in disclosing information to the media.

[78] A copy of the administrative investigation report was provided to the grievor on July 31, 2013, and she was invited to present any clarifications or extenuating circumstances in response. At her request, on August 12, 2013, Mr. Netzel provided her with a French translation of the administrative investigation report. By letter to Mr. Netzel dated August 23, 2013, the grievor provided her rebuttal to that report.

[79] In her rebuttal to the investigation report, the grievor indicated that when she transferred from Nanaimo to Vancouver, there was a noticeable culture shift in how the Integrity branch was managed. She said that in Nanaimo, she had been able to discuss a claimant's entitlement to benefits with her team leader, coach, and colleagues and that her questions and viewpoints were considered. While savings were sought, her coach did not tell her what to do to achieve them.

[80] The grievor said that her actions were not politically motivated or done to oppose the minister then responsible for ESDC. She acted in the public interest, recognizing that it could cause public debate. Her rebuttal referred to an extract from

the *Values and Ethics Code for the Public Service* ("the V&E Code"), which states that public servants uphold the public trust. She wrote that she felt that what she was being instructed to do violated the public trust.

[81] In the same vein, the grievor's rebuttal further stated that she considered what she did to be "… a one-time act of whistle-blowing." In her words, "[i]t was a last resort that I did in order to protect the Canadian public. I did so out of love and respect for Canada, its democratic traditions, its people, and its government institutions."

[82] The grievor concluded her rebuttal by providing a summary of mitigating factors, as follows:

> *1) I have worked for over three years as a public servant. I have no disciplinary record and before working in Integrity had met or exceeded my performance expectations.*
>
> *2) I have already been excessively punished. I have been suspended without pay since May of 2013. My dependant son and I have suffered economically because of this punishment. Because of the harshness of the penalty imposed by the department my reputation and image has been tarnished (in the eyes of my co-workers and family, my extended community and the public at large). Punitive measures of such weight presume guilt and perhaps reprisal of a partisan nature. The presumption of guilt is also prejudicial to any grievances or other future actions I make engage in in regards to my situation.*
>
> *3) I was exposed to a workplace culture that violated the values and ethics I swore to uphold. While I viewed my role as one helping to maintain the integrity of the department, I felt that management was more concerned with extracting savings and limiting the amount of monies being distributed regardless of whether eligible or ineligible recipients were being disentitled. I had been told that managers received bonuses which were directly tied to the savings they could produce. Whether that is true or rumour the premium on savings created a culture of indifference toward clients. This culminated in colleagues making disparaging remarks about clients' ethnicity and culture (perhaps in violation of the Canadian Human Rights Act). When I voiced my concerns to team leaders, managers, and directors, no fault was ever found, no constructive solutions were explored, and I was reprimanded for criticizing the government.*
>
> *4) I disclosed information out of her [sic] respect for democracy. I did so because I am accountable to Parliament and the Canadian people as a condition of my employment. I acted in good faith and in a non-partisan manner and I did not profit in any way from my actions. I did so as a matter of conscience.*

> *5) I initially denied disclosing information because I was afraid and intimidated by the employer's heavy-handed approach and the way in which I was being interrogated. My mental condition was also a factor in my knee-jerk denial. I regret answering untruthfully.*

[83] Mr. Netzel read her rebuttal and forwarded it to Mr. Comeau, who said that upon his review of it, as she had not pointed to any error of fact in the administrative investigation report, there was no need to change it.

[84] Mr. Comeau also provided a copy of the grievor's rebuttal to Mr. Côté and asked him to review it to determine whether it changed any of the report's conclusions. After reviewing the rebuttal several times, Mr. Côté determined that it did not change the facts or the conclusions in the investigation report and reported that to Mr. Comeau.

I. Revocation of the grievor's reliability status, and her termination

[85] Following the conclusion of the investigation report, Mr. Comeau decided to have a review for cause carried out on the grievor's reliability status and referred the matter to Mr. Jacques, the manager, personnel security, who conducted such reviews under the *Personnel Security Standard*.

[86] In preparing his reliability status reassessment report, Mr. Jacques said that he was asked to review the SIU's investigation file on the grievor and to submit his assessment and recommendation based on the file. He was provided with the investigation report, the grievor's rebuttal, and all material relevant to the investigation. He then read all the documents, including the investigators' notes and the witness statements. His reliability status reassessment report was submitted to Mr. Comeau on September 10, 2013. His assessment was that the grievor's reliability status should be revoked.

[87] In sum, Mr. Jacques concluded that there was no question that the grievor had disclosed protected information; that her actions had been calculated and premeditated; that although she might not have agreed with internal policies and government strategies, as a public servant, she was bound by rules and regulations to maintain confidentiality; and that her actions had caused embarrassment to the department and the Government of Canada. Overall, he indicated that her actions were inconsistent with the characteristics and expected behaviours necessary to hold

reliability status, namely, (1) whether the individual can be relied upon not to abuse the trust that might be accorded, and (2) there is reasonable cause to believe that the individual may fail to safeguard information.

[88] After reviewing all the documentation, Mr. Comeau decided to revoke the grievor's reliability status and so informed Mr. Netzel by letter dated October 11, 2013. In his letter to Mr. Netzel, Mr. Comeau stated that the grievor posed a serious risk to the employer. He said he arrived at this conclusion because of her lack of remorse, her continued belief that she had disclosed documents for the right reasons, her untrustworthiness with government information and assets, and her continued embarrassment to the government, which could potentially result in aggressiveness towards ESDC employees.

[89] Mr. Netzel notified the grievor that her reliability status would be revoked effective October 15, 2013. Since her employment required a valid reliability status, by letter also dated October 15, 2013, he informed her that her employment was terminated pursuant to s. 12(1)(e) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*). That provision provides that a deputy head in the core public administration may terminate the employment of persons employed in the public service for reasons other than breaches of discipline or misconduct.

III. Summary of the arguments

A. For the employer

[90] The employer initially objected to the adjudicability of both grievances. Its position was that since the grievor's suspension and subsequent termination of employment due to the revocation of her reliability status were purely administrative measures taken under s. 12(1)(e) of the *FAA*, they were not adjudicable pursuant to s. 209 of the *Act*, and it was not open to an adjudicator appointed under the *Act* to examine the merits of those decisions.

[91] In this regard, the parties were invited to provide supplementary written submissions with respect to the Federal Court of Appeal's judgment in *Canada (Attorney General) v. Heyser*, 2017 FCA 113, which was released after the hearing of this matter. The employer acknowledged that as a result of *Heyser*, the Board has full jurisdiction under s. 209(1)(c) of the *Act* to determine whether there are, as stated by

the Court, "proper and legitimate grounds" for revoking reliability status and must determine whether the ensuing termination of employment is for cause "… on the basis of the relevant facts surrounding the revocation and in light of the relevant policies enacted by Treasury Board as the employer". However, with respect to the suspension, the employer maintains that it was an administrative measure and that it had no intent to discipline the grievor. Rather, its decision to remove her from the workplace was most prudent, given the circumstances.

[92] The employer stated that in light of *Heyser*, the concept of disguised discipline is no longer relevant in analyzing the termination. Accordingly, the question to be determined is whether the revocation and ensuing termination were made based on a legitimate ground. The employer submitted that this connotes both a substantive and procedural review of the department's decision by the Board, under which it may assess the evidence through a security or reliability lens. A substantive review of a revocation decision must be carried out from a non-disciplinary perspective and must be governed by the principles and rationale set out in the employer's security policies. In this respect, it states that its decision conformed to the *Personnel Security Standard* and was based on the investigation report and the reliability status reassessment and that there was an immediate and future risk in maintaining the grievor's reliability status.

[93] The employer further submitted that a large part of the grievor's testimony should not be believed, in that the whistle-blowing allegations were contrived after the fact and ought not to be found credible. In any event, for the purpose of determining the termination grievance, the employer contended that it is unnecessary to make a finding as to whether the grievor was a whistle-blower. However, should the Board be of the view that such a finding must be made, it must ask whether when leaking documents to the journalist, she was engaged in whistle-blowing. In the context of this case, the employer submitted that leaking documents to the media does not constitute whistle-blowing.

B. For the grievor

[94] According to the grievor, the Board has full and complete authority to examine all aspects of the revocation process, up to and including the termination. She

maintains that her indefinite suspension without pay pending the outcome of the investigation was the result of disciplinary action or disguised disciplinary action on the part of the employer. The suspension letter referred to policies that she might have violated, which normally would be dealt with through the disciplinary process. Furthermore, the employer's intent in suspending her was disciplinary. While it subsequently chose to follow a non-disciplinary process, the fact that that choice was available is indicative of disciplinary intent or disguised discipline.

[95] With respect to the termination grievance, the grievor contends that the Board has full jurisdiction to "look through" the termination to assess, on its merits, the underlying decision to revoke an employee's reliability status. It is open to the Board to set aside the revocation on the merits, for bad faith, a violation of procedural fairness, or a limitation on *Charter* rights and for any other relevant factors.

[96] In this respect, the grievor stated that no witness contradicted her concerns about the pressure to find savings, the denial of claims to which citizens were entitled, and the penalties that should not have been imposed. She submitted that by leaking departmental information and speaking to the media, she engaged in freedom of expression, which the employer violated by suspending her, revoking her reliability status, and terminating her employment based on those activities. As the employer's actions can be justified only under s. 1 of the *Charter*, and there was no evidence to support such a justification, the grievances should be upheld on that basis alone.

[97] In the alternative, the grievor maintains that the concept of disguised discipline still remains relevant following *Heyser* in determining her revocation and termination grievance. That is, as with the other grounds available to the Board to set aside the revocation on the merits, disguised discipline is also a non-legitimate ground for termination. Therefore, if the Board concludes that there was disguised discipline, then the revocation must be set aside.

[98] The grievor submitted that her termination was disguised discipline on the part of the employer for whistle-blowing and that her actions were consistent with her obligations as a public servant and with relevant policies. In the same vein, the grievor claims that the reliability status reassessment report does not contain an appropriate risk analysis. The finding that she leaked information is insufficient, and the fact that

she did it deliberately does not assess reliability. There was no evidence that she used Ms. C's laptop to conceal her actions. Further, the report's statement that her actions embarrassed the government does not relate to reliability or risk but is an outcome of whistle-blowing. The finding that her actions severed the bond of trust also does not relate to her reliability. It is evidence that the entire process was disciplinary in purpose and intent.

[99] The grievor argued that there was no evidence of harm arising from her actions and that aside from public debate, there were no consequences. Some of the documents she leaked were innocuous and factual in nature, and she did not purport to speak on behalf of the department.

[100] The grievor also submitted that the investigative process and decision to revoke her security status lacked procedural fairness. Among other things, she advanced that she was not given an opportunity to provide an explanation at the reliability status reassessment stage; she was intimidated during her interview, and before her reliability status was revoked, she was not given sufficient notice of the type of case she had to meet or given the opportunity to meet it.

IV. Analysis

A. The suspension grievance

[101] According to the employer, its actions in suspending the grievor were purely administrative measures and not disciplinary, and as such, her suspension is not adjudicable pursuant to s. 209 of the *Act*.

[102] The Board's jurisdiction is drawn from its enabling statutes. Individual grievances are referred to adjudication before it under s. 209 of the *Act*. As mentioned, the suspension grievance was referred to adjudication under s. 209(1)(b), while the termination grievance was referred under s. 209(1)(c)(i). Those portions of s. 209 read 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*

…

> ***(b)*** *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> ***(c)*** *in the case of an employee in the core public administration,*
>
> > ***(i)*** *demotion or termination under paragraph 12(1)(d) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct* ….

[103] For the purposes of s. 209(1)(c), in the case of an employee in the core public administration, I note that s. 2(1) of the *Act* states that the term "core public administration" has the same meaning as in s. 11(1) of the *FAA*. The *FAA* defines "core public administration" as "… the departments named in Schedule I and the other portions of the federal public administration named in Schedule IV." ESDC is named in Schedule I to the *FAA* and, accordingly, is part of the core public administration.

[104] For the Board to take jurisdiction over the suspension grievance, the grievor had to establish not only that she was suspended but also that her indefinite suspension without pay pending the investigation was a result of disciplinary action by the employer.

[105] When determining whether the grievor's suspension was administrative or disciplinary, the context in the time that led to it must be considered, as stated as follows in *Petrovic v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 16 at para. 126:

> *[126] In dealing with such an objection, the task of an adjudicator was set out as follows at paragraph 53 of* Cassin [2012 PSLRB 37]*:*
>
> > **53** Although an employer might characterize a suspension as administrative, an adjudicator is nonetheless required to look behind such a characterization to examine the circumstances of the employer's intent when it decided to suspend a grievor. This requirement was aptly stated by the adjudicator as follows in *King*, at paragraph 62 ….
> >
> > …
> >
> > ***62.*** *The essential point that I draw from* Frazee *and from the* Basra *decisions is that I am required to examine the specific circumstances of this case for evidence depicting the respondent's intent when it decided to suspend the grievor without pay and thereafter. If I am satisfied that*

> *the respondent has proven that, on a balance of probabilities, the intent underlying its "administrative" decision was non-disciplinary at the time of the decision and that it continued to be non-disciplinary during the resulting suspension, I must decline jurisdiction. Conversely, if the respondent has failed in its burden, then I must find that its decision was disciplinary in its essential character regardless of how the respondent described it and that, as a consequence, I have jurisdiction to consider the grievance under paragraph 209(1)(*b*) of the* Act*.*

[106] By email dated May 8, 2013, Mr. Leduc informed Mr. Comeau that based on a preliminary analysis, the investigators had reason to believe that the grievor might have leaked several documents. He requested a mandate for an administrative investigation, which Mr. Comeau approved the same day.

[107] In his letter to the grievor dated May 13, 2013, Mr. Netzel informed her of the administrative investigation into the allegations that among other things, she might have disclosed government documents to the public, media, family, or friends, thus breaching certain government policies. The letter further informed her that as management had determined that she presented a "… reasonably serious and immediate risk to the legitimate concerns of the Department …", she was suspended indefinitely without pay, pending the outcome of the investigation.

[108] Mr. Netzel said that he would have been informed of the preliminary findings of the investigation and that it had reached a stage at which the grievor was a key figure in it. The purpose of the letter was to set out the investigation stage and to invite her to an interview. The letter also set out the allegations, which, if founded, were contrary to policies. Mr. Netzel emphasized that they were allegations at the time, as the investigation was ongoing.

[109] Mr. Netzel testified that he decided that the grievor should be suspended because he had legitimate concerns that other material might have been released after the ISB Savings Report Card, which was released without context and could have been misleading. Of greater concern were the operations manual and subsequent documents, as they began to put EI at risk. Releasing that material to the public provided access to those inclined to play the system and to defraud it. He also

considered the security risk to staff in the event that a disgruntled claimant decided to take action.

[110] Furthermore, as ESDC is entrusted with private citizens' information and he had twice seen claimants' personal information released to the public, he wished to prevent the risk that further releases would disclose that type of information. While a further investigation into the allegations was required, Mr. Netzel asserted that based on the information available, he determined that the grievor posed a serious and immediate risk to the department.

[111] In cross-examination, Mr. Netzel acknowledged that although he did not have specific information that people were attempting to defraud the system, it remained a possibility. He also acknowledged that he had not received a specific threat of a risk to personnel. He was concerned about staff safety as a result of reported situations involving disgruntled members of the public. With respect to the risk of the release of claimants' information, he had no indication that the grievor would do so.

[112] Mr. Netzel testified that while the May 13, 2013, letter referred to administrative or disciplinary measures being taken should the allegations against the grievor be founded, he said that the disciplinary avenue was not followed since, as he understood the process, once the administrative process was begun, the disciplinary process was not to be engaged, to avoid duplication.

[113] Mr. Netzel said that he would consider disciplinary measures only once the investigation was completed. While there were two avenues, disciplinary action and the revocation of reliability status, the latter is in the security realm, over which he had no authority.

[114] In circumstances such as in this case, it is open to the employer to pursue either an administrative or a disciplinary process. The grievor appears to have recognized as much in her argument that the only reason that the employer did not follow the disciplinary process was that it did not have to, which, in her submission, constituted disguised discipline. She did not present any authority to support the proposition that the employer's choice to follow a non-disciplinary process was sufficient to constitute disguised discipline.

[115] The grievor also argued that the suspension letter referred to policies that she might have violated, which normally would be dealt with through the disciplinary process. It seems to me that whether an alleged violation of an employer's policy would normally attract discipline does not mean that that would or must necessarily be the employer's response in all circumstances.

[116] The language of the May 13, 2013, letter, such as, "you may have", "allegations", and "[y]our reliability status or security clearance may also be reviewed …", clearly indicates that at that point, the grievor was being informed of allegations of wrongdoing that the employer would investigate.

[117] Mr. Netzel assessed the risks and decided to remove the grievor from the workplace pending the outcome of the investigation. As he acknowledged, it is true that some of the risks he considered did not ultimately materialize. However, in light of the findings of the preliminary investigation and the several articles that had appeared in *Le Devoir*, it was not unreasonable for Mr. Netzel to have considered and honestly held that there might have been further leaks to the media and that as the grievor had been identified as a potential source of the leaks, she should be removed from the workplace. Furthermore, he testified that there was no other position within Service Canada in which she could perform duties without having access to the employer's electronic systems.

[118] I have found no indication in Mr. Netzel's testimony or elsewhere in the evidence that by suspending the grievor, he acted with disciplinary intent. He was very clear that had he considered disciplining her, it would have been contemplated only once the investigation had been completed. In the circumstances, I find that the employer demonstrated on a balance of probabilities that it had no disciplinary intent when it decided to suspend her without pay pending the outcome of the investigation. I note that no argument was made that her administrative suspension became disciplinary through the passage of time.

[119] Consequently, the employer's objection is sustained with respect to the suspension grievance, and as such, that grievance is dismissed.

B. The termination grievance

[120] While it initially objected to the adjudicability of the termination grievance on the basis that it was an administrative measure, the employer subsequently acknowledged that as a result of *Heyser*, the Board has full jurisdiction under s. 209(1)(c) of the *Act* to determine if the grievor's termination was based on legitimate grounds.

[121] Despite this, the grievor invited me to find that the revocation of her reliability status and termination of employment constituted disguised discipline. However, the judgments of the Federal Court of Appeal in *Bergey v. Canada (Attorney General)*, 2017 FCA 30; *Canada (Attorney General) v. Féthière*, 2017 FCA 66; and *Heyser* have made it abundantly clear that the Board has full jurisdiction over matters relating to the revocation of an employee's reliability status and consequent termination of employment, without resort to the concept of disguised discipline and regardless of the employer's stated reason for the revocation (see *Heyser* at paras. 73, 75 and 79).

[122] The question to be answered in cases such as this one is whether the termination was for cause, namely, whether the revocation of the grievor's reliability status was based on proper and legitimate grounds, and justified on the basis of the relevant policies. In *Heyser*, the Court stated as follows:

…

> *[76] Thus, in circumstances similar to those that gave rise to this litigation, it is up to the Board to determine whether the non-disciplinary termination is for cause. Consequently, the Board must, on the basis of the relevant facts surrounding the revocation and in the light of the relevant policies enacted by Treasury Board as the employer, determine whether the termination is for cause, which means inquiring into whether the revocation is based on proper and legitimate grounds.*
>
> *[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.*
>
> …

[123] Consequently, I do not find it necessary to analyze the termination grievance through the lens of whether the employer's actions constituted disguised discipline. Rather, I will analyze the circumstances of the revocation and termination to determine whether the termination was for cause.

[124] Whether the grievor leaked documents to the media is not at issue, as she first admitted to doing so in the CBC interview of July 20, 2013, and then in her rebuttal to the administrative investigation report dated August 23, 2013. Rather, the grievor's overarching argument is that she was terminated because she is a whistle-blower. She also raised concerns with the fairness of the investigation and, relatedly, the grounds and facts underlying the revocation of her reliability status. As I will explain, I do not accept her arguments, and in my view, her termination was for cause.

1. Is the whistle-blowing defence available to the grievor?

[125] Public servants owe a duty of loyalty to the Government of Canada. The objective of that duty is "… to promote an impartial and effective public service" (see *Haydon v. Canada*, [2001] 2 F.C. 82 at para. 79). As the Federal Court stated in *Stenhouse v. Canada (Attorney General)*, 2004 FC 375 at para. 32, "[t]he freedom of a public servant … to speak out against the interests of his/her employer or supervisor about an illegal act or an unsafe practice or policy is protected in the common law and the Charter … and is commonly called the 'whistle-blower' defence." A public servant's freedom of expression prevails over his or her duty of loyalty to the employer only in certain circumstances, as the Supreme Court of Canada set out as follows in *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455 at 470:

> …
>
> *… As a general rule, federal public servants should be loyal to their employer, the Government of Canada… And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability.…*

…

[126] Other categories of wrongdoing could also include those noted under s. 8 of the *Public Servants Disclosure Protection Act* (S.C. 2005, c. 46; *PSDPA*), such as a misuse of public funds, gross mismanagement in the public sector, or knowingly directing a person to commit wrongdoing.

[127] Despite the employer's contention that it is unnecessary to make a finding as to whether the grievor was a whistle-blower, the Federal Court in *Stenhouse* indicated that "… a public servant … who speaks out on an issue of public importance cannot be dismissed if the case falls within the exceptions identified by the Supreme Court" (at paragraph 34). Similarly, while the grievor argues that the employer's actions in this case can be justified under s. 1 of the *Charter* only as a reasonable limit on freedom of expression, the common law duty of loyalty as articulated in *Fraser* has been found to sufficiently accommodate the right to freedom of expression and therefore constitutes a reasonable limit within the meaning of s. 1 of the *Charter* (see *Haydon*, at paras. 61 to 89). Accordingly, with respect to her claim that the employer terminated her because she is a whistle-blower, the question is whether she spoke out on an issue of public importance that falls within an exception to the duty of loyalty. In my view, her actions did not fall within such an exception.

[128] The grievor identified five media articles of which she was the subject that identified her as a whistle-blower for her disclosures at issue in this case. While the employer did not object to them being entered into evidence, it argued that they were inappropriate opinion evidence for which she provided the only context and that they should not be relied on. It submitted that the authors of the articles were not experts on the subject and that they contained self-serving statements. The grievor argued that the media articles were not tendered as expert evidence but to show that legitimate organizations considered her a whistle-blower.

[129] While certain individuals and organizations may consider the grievor a whistle-blower, the relevance of those points of view in addressing the requirements of the *Fraser* test was not established. Again, the question is whether she spoke out on an issue of public importance that fell within an exception to the duty of loyalty. The media articles are not useful in addressing this question.

[130] The grievor submitted that she falls within the life, health, or safety exception to the duty of loyalty as expressed in *Fraser* because of the effect of this situation on her health and well-being.

[131] Her only reference to her health was made in her testimony and expressed in her statement of issues received by Ms. Minichiello on March 18, 2013, which stated that she found the work atmosphere in the Vancouver Harbour Centre office more difficult and stressful than that in Nanaimo.

[132] The grievor presented no evidence of how the employer's policies jeopardized her health or safety. Nor did she present medical or other evidence of the effects on her health. In my view, her mere assertion that her health was affected, without more, is not sufficient to bring her conduct within that *Fraser* exception. Therefore, I reject the argument that her disclosure of information to the media was to protect her health and well-being.

[133] The grievor also testified that she leaked the documents because they were in the public interest. In her testimony, she stated that in addition to the savings objectives, the basis for doing so was that Service Canada had engaged in gross mismanagement by not allocating public funds where they should have been and that it had "looted" the EI fund.

[134] First, the grievor introduced not a scintilla of evidence to support her allegations of gross mismanagement. Accordingly, I do not accept her claims on those issues. Second, it has been held that "legitimate public concern" is not an additional discrete category of exception to those set out in *Fraser*. In *Read v. Canada (Attorney General)*, 2006 FCA 283, an employee was terminated for breaching his duty of loyalty and oath of secrecy. He had argued that the matters he raised fell within a further exception to a public servant's duty of loyalty to his employer, namely, of "legitimate public concern", which required a public debate. The Federal Court of Appeal rejected that argument and made the following comments with respect to the purpose of the exceptions formulated in *Fraser*, which I believe are relevant to the grievor's claims in this case:

…

> *[119] … **It is important to remind ourselves that the purpose of the exceptions formulated in*** **Fraser** *… **is not to encourage or allow public servants to debate issues as if they were ordinary members of the public, unencumbered by responsibilities to their employer.** Rather, the purpose of the exceptions, as I understand them, is to allow public servants to expose, in exceptional circumstances, government wrongdoing. It appears to me that the exceptions are sufficiently broad to allow public servants to speak out when circumstances arise where disclosure must take precedence over the duty of loyalty.*
>
> *[120] The exceptions formulated in* Fraser *… i.e. where the government is engaged in illegal activity or where its policies jeopardize the life, health or safety of the public or members of the public, are no doubt matters of legitimate public concern. **It is clear, however, from the words used by Dickson C.J. in*** **Fraser** *… **that he did not intend to create an exception so as to allow public servants to voice all of their concerns or disagreements with government policies and departmental activities.** I have no doubt that had that been his intention, the exceptions would have been articulated in a very different manner. Thus, I am in agreement with Harrington J. when he says, at paragraph 109 of his Reasons, that "[h]owever, I do not find that legitimate public interest at large is an exception to the duty of loyalty owed by an employee to his or her employer".*
>
> …
>
> [Emphasis added]

[135] The grievor further testified that she felt compelled to disclose documents to the public because she was not getting anywhere through internal channels. She stated that she expressed issues in the workplace, such as an alleged conflict of interest between the ISIs and the adjudicators, which she raised at the team meeting in Burnaby on April 11, 2013.

[136] The only concrete evidence of the grievor having raised matters internally was that of the statement of issues she sent to Ms. Minichiello with respect to alleged disrespectful behaviour and harassment of her by management at Harbour Centre. Ms. Cook's investigation determined that her claims were not founded, and she did not pursue that matter further. On that point, the grievor was referred to section 3 of the Code of Conduct, titled "Avenues for Resolution", of which item "c", titled "Disclosure of Wrongdoing", sets out the following three avenues to report wrongdoing: the immediate supervisor, the department's senior disclosure officer, or

the Public Sector Integrity Commissioner. She said that she was not aware of the senior disclosure officer but that she knew of the other two.

[137] In any event, the grievor submitted that whether she raised her concerns internally before disclosing documents to the media is not determinative but rather is just a factor to be considered and is not absolute. While that may be true, I note that she herself raised a lack of internal action as a reason justifying her disclosure to the public. Therefore, it was incumbent upon her to advance some evidence to support this contention. As indicated in the preceding paragraph, I find that there is little evidence to support that she raised the concerns that were the subjects of her leaks to management's attention before disclosing the information to the journalist. More importantly, her stated need to go public was not based on any wrongdoing by the government or lack of action. Again, as indicated in *Read*, just because she had concerns or disagreements with the employer's activities or even with its investigation and response, they did not bring her actions within the exceptions formulated in *Fraser*.

[138] The grievor compared herself to the grievors in *Haydon* and argued that if the comments at issue in that case were protected, then her comments should also be protected. The grievors in *Haydon* were drug evaluators responsible for scientific evaluations of new veterinary drug submissions who, among other things, assessed whether new drugs complied with safety requirements. In the course of their duties, the grievors became seriously concerned with the drug approval process generally and with the particular approval process with respect to growth hormones for meat and milk stimulation and antibiotics. They made several repeated efforts to have their concerns addressed internally, including requesting an external investigation, raising their concerns with the Prime Minister and the Minister of Health, initiating several formal grievances within their department, and initiating proceedings before the Board's predecessor, the Public Service Staff Relations Board. They eventually decided to be interviewed on national television, during which they expressed serious concerns with the drug review process and with the impact these problems could have on the health of Canadians. They were reprimanded for breaching their duty of loyalty, and their grievances related to that action were denied by the Associate Deputy Minister of Health Canada.

[139] On judicial review, the Federal Court found that there was sufficient evidence to conclude that the public criticisms fell within one of the exceptions to the duty of loyalty enunciated in *Fraser*, namely, the disclosure of policies that jeopardize life, health, or public safety. Furthermore, the Court was of the view that on several occasions, the grievors endeavoured to have their concerns addressed internally, without success. The Court concluded that having disregarded the context that led to the comments made publicly on national television, the Associate Deputy Minister committed an error in the application of the *Fraser* test, and it set aside his decision.

[140] In this matter, I have found that the grievor does not meet the health or safety exception of the *Fraser* test; nor did she endeavour to have her concerns addressed internally. As such, the context of the decision in *Haydon* is distinguishable from that of the present case, and I find that that decision does not support the grievor's position.

[141] For all the above reasons, I find that the grievor has not established that she spoke out on an issue of public importance that falls within an exception to the duty of loyalty.

[142] Finally, while the parties did not raise it, I wish to address an issue with respect to the Board's jurisdiction as it pertains to the grievor's whistle-blowing allegations. Section 208(2) of the *Act* provides that an employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament. The *PSDPA* is another administrative procedure for redress for alleged reprisals with respect to whistle-blowing. I take notice that the grievor availed herself of that procedure (see *Therrien v. Canada (Attorney General)*, 2015 FC 1351; and *Therrien v. Canada (Attorney General)*, 2017 FCA 14). That said, s. 51(a) of the *PSDPA* states as follows:

> ***51*** *Subject to subsections 19.1(4) and 21.8(4), nothing in this Act is to be construed as prohibiting*
>
> ***(a)*** *the presentation of an individual grievance under subsection 208(1) or section 238.24 of the* Federal Public Sector Labour Relations Act ….

[143] Having considered the scheme of the *Act* and the *PSDPA*, I am satisfied that s. 51(a) of the *PSDPA* applies as an exception to s. 208(2) of the *Act* in this case.

As such, the availability of an administrative procedure for redress under the *PSDPA* does not prevent me from hearing these grievances.

2. Was the grievor treated fairly?

[144] The grievor also raised several arguments alleging that the employer breached procedural fairness during the investigative process. The consistent jurisprudence of this Board and its predecessors is that hearings before an adjudicator are *de novo* hearings and that any breach of procedural fairness that might have occurred is cured by the adjudication of the grievance (see, for example, *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)(QL); *Maas and Turner v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 123 at para. 118; *Pajic v. Statistical Survey Operations*, 2012 PSLRB 70; and *Patanguli v. Canada (Citizenship and Immigration)*, 2015 FCA 291 (application for leave to appeal to the Supreme Court of Canada dismissed in [2016] S.C.C.A. No. 59 (QL)).

[145] Furthermore, the jurisprudence does not support the grievor's argument that this concept is restricted to defects in the grievance process. In any event, as I will now discuss, nothing in the investigation would lead me to conclude that a breach of procedural fairness or natural justice occurred.

[146] The grievor testified that during her interview on May 15, 2013, the investigators intimidated and tormented her with repetitive questions. She felt that she had been pressured into continuing the interview after deciding to leave and that her representative, Mr. Strang, had been prevented from speaking.

[147] Having carefully listened to the entire recording of the grievor's interview, I do not agree with her characterization of that event. Mr. Leduc, who conducted the interview, at all times maintained a respectful and conversational tone. At the beginning, at 2:00 p.m., she was told that it was being recorded and that she would be given a copy of the recording. She was then asked to describe her employment history with the public service, which she did. Mr. Leduc proceeded with the allegations about her conduct. He showed her the articles published in *Le Devoir* and sought her response. She was shown the emails she had sent to her and to Ms. C's personal email accounts, along with the departmental documents she had attached to them.

[148] At approximately the 24th minute of the recording, when the topic was savings objectives, Mr. Strang mentioned his experience working at ESDC.

[149] At approximately the 27th minute of the recording, the grievor was asked whether she had made a certain comment reported in one of the articles, at which point Mr. Strang interjected that it was hearsay, to which the investigators did not react. Approximately one minute later, in response to a question put to the grievor, Mr. Strang again interjected to comment that there was corroboration. At that point, he was told that only the grievor was to reply to the questions put to her.

[150] At approximately the 45th minute, when the grievor was asked for Ms. C's name, Mr. Strang intervened to ask whether that information was relevant. He was told that it was.

[151] At approximately the 58th minute, Mr. Leduc said that they were not there to find a guilty person but that they wanted to understand the situation. The grievor replied that she wanted them to understand that she had not leaked the documents.

[152] The grievor then told the investigators that she would not like to have their job, as it consists of almost torturing people. When Mr. Leduc asked her whether they were torturing her, she replied in a normal and almost jocular tone that she would say that they were torturing her.

[153] Shortly after that, the grievor was told that the investigators were trying to make her understand that it would be in her interest to be candid.

[154] Mr. Strang requested a break at approximately 3:00 p.m. During the break, the grievor phoned her lawyer. Upon returning to the interview room, she said that she had *Charter* rights and that she could leave when she wanted to. She told the investigators that they had all the documentation to do their job without her and that they should do their job, and she would do hers. When they asked her whether they were to understand that she was terminating the interview, she responded that they understood very well. On the recording, the sounds of rustling papers being packed are heard. Both Mr. Côté and Mr. Leduc testified that the grievor had been free to leave the interview at any time.

[155] The grievor ultimately decided to stay and upon the resumption of the interview at 3:15 p.m., Mr. Leduc asked the grievor and Mr. Strang in turn whether they had any questions, to which both replied in the negative.

[156] At approximately the 42nd minute of the second audio file, during a discussion about savings objectives, Mr. Strang commented that the objectives were not uniform for all units. He requested a break at approximately 4:00 p.m. When they resumed, at the grievor's request, it was agreed that the interview would end at 4:30 p.m. In fact, it concluded at 4:15 p.m. At that point, a discussion began about providing a copy of the recording to the grievor.

[157] The employer submitted that the fact that the grievor did not call Mr. Strang to testify about the interview was telling and that thus, an adverse inference should be drawn. In my view, the audio recording is sufficiently clear to enable me to conclude that the investigators did not intimidate her. Their tone was respectful and professional, and Mr. Strang was not prevented from making certain observations.

[158] Another example of an alleged breach of procedural fairness advanced by the grievor was that Mr. Jacques did not meet with her before submitting the reliability status assessment report, which deprived her of an opportunity to provide an explanation at that stage. Furthermore, she was not provided with a copy of it. She argued that she should have had the chance to address any adverse information found in the report.

[159] The uncontradicted evidence of Mr. Jacques was that when he prepares reliability status reassessment reports, he does not meet with the subjects. He prepares his report based on the administrative investigation report and related documentation and makes a recommendation. The report is then submitted to the DSO for a decision.

[160] In Mr. Netzel's May 13, 2013, letter informing her of the suspension, he advised the grievor that her reliability status might be reviewed. She indicated that she was aware of that in her email of the same date to her former partner.

[161] Mr. Jacques based his reliability status reassessment on the administrative investigation report and the relevant material, including the grievor's rebuttal, which

he stated did not address the reliability status issue. There was no evidence of a requirement that the subject of a reliability status reassessment report must be provided a copy of it.

[162] As she was aware that her reliability status might be in jeopardy, the grievor could have addressed that issue in her rebuttal to the administrative investigation report. While she submitted that her rebuttal was not intended to do that, it remains that it was an opportunity to do so. Similarly, it is unclear what further explanation was to be provided at the reliability status reassessment stage that differed from what was found in her rebuttal. In any event, she had the chance to address any issue with the reliability status reassessment report during the hearing.

[163] The last example of an alleged breach of procedural fairness that I shall address is the grievor's testimony and argument that she did not receive a copy of the addendum to the administrative investigation report dated July 25, 2013. Whether she received it is not entirely clear. While Mr. Comeau testified that she did not receive it, when she was shown an email dated August 12, 2013, on which she was not copied but that stated that a translated copy of the addendum had been couriered to her that day and that referred to the extension granted to submit her rebuttal, the grievor said that it did not refresh her memory.

[164] In any event, in my view, it is unnecessary to make a finding of whether she received the addendum. The evidence shows that it did not alter the conclusions of the administrative investigation report. Up to that point, the grievor had denied leaking the departmental documents to the media. The administrative investigation report set out the facts gathered during the investigation and the investigators' conclusion that she was the source of the leaks. During the CBC interview, she admitted that she had leaked the documents, which confirmed the investigators' conclusion.

[165] During the hearing, aside from stating that she had not received a copy of the addendum, the grievor's testimony did not otherwise address that document. She did not contest the addendum's contents or submit that it was erroneous. Therefore, I conclude that with respect to the addendum, she failed to prove a breach of procedural fairness by the employer.

3. Was the grievor's termination for cause?

[166] Maintaining her reliability status constituted a condition of employment for the grievor. If it was revoked for legitimate grounds, then her termination was for cause. In this respect, she claims that the reliability status reassessment report did not contain an appropriate risk analysis.

[167] Reliability status was described as follows in *Bergey*, at para. 23:

> *Reliability status refers to an employee's reliability, trustworthiness and loyalty insofar that the employee can be trusted to deal with confidential matters and government property. It is the lowest level of security status. Currently (and under policies in place at the relevant times) … all federal public servants in long-term positions are required to hold at least a reliability status… In the case of employees in federal departments, reliability status may be granted and revoked by a departmental security officer.*

[168] As stated in paragraph 22 of *Bergey*, pursuant to its authority set out in ss. 7, 11, and 11.1 of the *FAA*, the Treasury Board as the employer promulgated policies governing the security clearance or security status that employees are required to possess. The applicable policy with respect to security status in this matter is the *Personnel Security Standard*, modified in 2002. Mr. Comeau's July 8, 2013, letter transmitting the administrative investigation report to Mr. Netzel stated that the investigation had shown that the grievor had violated the *Communications Policy of the Government of Canada* and the Code of Conduct. The reliability status reassessment report prepared by Mr. Jacques also referred to the V&E Code.

[169] Section 2.1 of the *Personnel Security Standard* states that "[g]ood personnel management requires the examination of the trustworthiness and suitability of all employees to protect the employer's interests." Section 5 of the policy provides that "[a]s a result of an update or a review based on new adverse information concerning an individual, his or her enhanced reliability status or security clearance may be revoked." Appendix B, titled "Guidance on Use of Information for Reliability Checks", stipulates at section 3 the following with respect to assessing reliability:

> *In checking reliability, the question to be answered is whether the individual can be relied upon not to abuse the trust that might be accorded. In other words, is there reasonable cause to believe that the individual may steal valuables, exploit assets and information*

> *for personal gain, fail to safeguard information and assets entrusted to him or her, or exhibit behaviour that would reflect negatively on their reliability. Such decisions are to involve an assessment of any risks attached to making the appointment or assignment, and, based on the level of reliability required and the nature of the duties to be performed, a judgement of whether such risks are acceptable or not.*

[170] The reliability status reassessment report dated September 10, 2013, sets out that paragraph in its section titled, "Part I: Factors in Re-Assessing Reliability Status". Part II of the report reviews the findings of the administrative investigation report, namely, the grievor's "activities and behaviours" contravened the *Communications Policy of the Government of Canada* and the Code of Conduct. The reliability status reassessment report then states that her "actions and behaviours" impact negatively on her reliability as defined by the *Personnel Security Standard* and reproduces the following extracts from section 3 of Appendix B of that document:

> *1. Whether the individual can be relied upon not to abuse the trust that might be accorded.*
>
> *2. Reasonable cause to believe that the individual may steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to him or her, or exhibit behaviour that would reflect negatively on their reliability.*

[171] Part III of the reliability status reassessment report, titled "General Comments", first refers to dictionary definitions of "trustworthiness" and "truthful". It then states that the grievor's activity "… calls into question the trustworthiness and features of character and overall suitability, which are central tenets of obtaining and maintaining a Reliability Status." In his testimony, Mr. Jacques said that "features of character" might have been the wrong choice of words. He meant a person's loyalty and the ability to safeguard information and whether the person is trustworthy.

[172] Part V of the reliability status reassessment report, titled "Recommendation", concludes as follows:

> *Based on the information provided and the evidence uncovered during the course of this investigation, there are no questions in the writer's mind that Sylvie Therrien disclosed and leaked protected information to be used internally. This is confirmed by her own admission to the CBC News reporter during her on-camera interview, where she stated that she leaked them giving for reason that the content was against her values.*

> *Furthermore, there is no doubt that her actions were calculated and premeditated. Therrien used* [Ms. C's] *Personal Computer to access her personal E-mail account and then forwarded the documents to a news reporter from Le Devoir, a Quebec media outlet. These actions were made to ensure that no electronic traces would lead back to her personal computer and ultimately to her.*
>
> *Ms. Therrien may not agree with internal policies and government strategies; however, as a member of the public service, she is bound by rules and regulations to maintain confidentiality. By her actions, she caused embarrassment to the department and the Government of Canada.*
>
> *That being said, a thorough review of this case demonstrates that Ms. Therrien's comportment was not consistent with characteristics or expected behaviours necessary to hold a Reliability Status as defined by in the PSS* [Personnel Security Standard] *under the PGS* [Policy on Government Security] *(and noted in this report). In her actions, outlined in this report, Ms. Therrien's has demonstrated behaviours and activities which have been assessed as incompatible with holding a reliability status.*
>
> *Furthermore, she placed the trust required of her as an employee of HRSDC in jeopardy and is significant enough to sever the bond of trust that exists between the employee and the employer.*
>
> *It is Corporate Security's assessment that Ms. Therrien's reliability status be revoked.*
>
> [*Sic* throughout]

[173] In essence, the reliability status reassessment report summarized the findings of the administrative investigation report on the grievor's actions, referred to certain policies, and determined that her conduct was untrustworthy and incompatible with holding reliability status.

[174] In my view, the conclusions in the reliability reassessment report were based on legitimate grounds.

[175] The first basis for the recommendation to revoke the grievor's reliability status was the fact that she leaked protected information intended to be used internally. This finding was confirmed by the evidence, and she admitted to the leaks. The evidence is also clear that all the documents that she leaked were ESDC internal departmental documents and were not otherwise available to the public. During one of her many denials of leaking documents at her security interview, she said that she and other employees in the Integrity Services branch were aware that they were not permitted to

make government documents available to the media and that doing so would be viewed as very serious. In this respect, section 20 of the *Communications Policy of the Government of Canada*, titled "Spokespersons", reads in part as follows: "An institution's senior management must designate managers and knowledgeable staff in head offices and in the regions to speak in an official capacity on issues or subjects for which they have responsibility and expertise." It is common ground that the grievor was not designated as a spokesperson for the employer and that she was not authorized to provide the information she did to the media.

[176] The second basis for the recommendation to revoke the grievor's reliability status was that her actions were calculated and premeditated and that she had used Ms. C's laptop computer to conceal her actions. The grievor submitted that there was no evidence to that effect and testified that she did not have the knowledge to do it. In my view, her position is untenable. She could have easily used her Service Canada computer and email account to send the documents directly to the journalist. Instead, the evidence is clear that while using her Service Canada computer and email account, she first sent the departmental documents from her computer to her personal email account or to that of Ms. C. She then accessed them on Ms. C's laptop and forwarded them to the journalist via her personal email account. The only logical conclusion to be drawn is that the purpose of her method of sending departmental documents was to avoid detection.

[177] The reassessment report further finds that by her actions, the grievor caused embarrassment to the department and the Government of Canada. In this respect, she argued that the documents that she leaked were innocuous and factual in nature and that no consequences arose from her actions other than having spurred public debate. According to her, the embarrassment was simply an outcome of her whistle-blowing.

[178] However, what the grievor fails to acknowledge is the contribution that her actions had to the public's perception, without her having raised an issue of public importance that falls within an exception to the duty of loyalty. Mr. Jacques explained that his conclusion that the grievor's actions had embarrassed the department and the Government of Canada referred to the statements in her rebuttal to the investigation report that the minister responsible for ESDC at the time had misled Canadians when

she stated that the ISIs had no quotas. Similarly, Mr. Comeau testified that public opinion could potentially have resulted in aggressiveness towards ESDC employees.

[179] While there was no specific evidence of any incidents of such aggressiveness, I do note that Mr. Comeau's comments are commensurate with the concerns that employees of the Burnaby Integrity Services branch raised at the April 11, 2013, strategy planning session. That is, in response to the leaking of information to the media about savings objectives, the team agreed that the public was questioning its integrity and the work it performed, which was impacting them.

[180] The grievor claims that her actions were consistent with her obligations as a public servant and with relevant policies. However, as highlighted in the reassessment report, I find that her behaviour contravened the following values and expected behaviours found in the Code of Conduct and V&E Code: Respect for Democracy, Respect for People, Integrity, Stewardship, and Excellence. Specifically, certain aspects of the values of Respect for Democracy and Integrity were highlighted in the reassessment report.

[181] The Respect for Democracy value in the Code of Conduct reads as follows:

> *The system of Canadian parliamentary democracy and its institutions are fundamental to serving the public interest. Public servants recognize that elected officials are accountable to Parliament, and ultimately to the Canadian people, and that a non-partisan public sector is essential to our democratic system.*

[182] The following expected behaviours for this value were highlighted in the reassessment report:

> *Public servants shall uphold the Canadian parliamentary democracy and its institutions by:*
>
> *i. respecting the rule of law and carrying out their duties in accordance with legislation, policies and directives in a non-partisan and impartial manner.*
>
> …
>
> *ii. loyally carrying out the lawful decisions of their leaders and supporting ministers in their accountability to Parliament and Canadians ….*
>
> …

[183] Although not reproduced in the reassessment report, I note that under the "Loyally carrying out the lawful decisions …" expected behaviour, the Code of Conduct expands upon the duty of loyalty as follows:

> *· As a public servant, you have a duty of loyalty to the Government of Canada and as such, you must ensure that any public statements and actions (including off-duty conduct) support your ability to carry out your duties; preserve impartiality and objectivity in the execution of duties; and reflect positively on the Department.*
>
> *· The duty of loyalty includes a duty to refrain from publicly criticizing the Government of Canada, its policies, priorities, programs or officials.*
>
> …
>
> *· The duty of loyalty means that you have a duty not to disclose any confidential government information, unless legally authorized.…*

[184] This section also summarizes certain principles of the duty of loyalty according to the *Fraser* test, including the following: the duty of loyalty is not absolute — public criticism may be justified in certain circumstances, and the duty must be balanced with other interests, such as the public servant's freedom of expression. It then sets out three situations in which the balancing of interests is likely to result in an exception to the duty of loyalty. They are that the government is engaged in illegal acts; its policies jeopardize life, health, or safety; and the public servant's criticism has no impact on his or her ability to perform the duties of a public servant or on the public perception of that ability.

[185] In terms of the value of Integrity, the reassessment report underscores that public servants shall serve the public interest by, among other things, "… acting in such a way as to maintain their employer's trust." This expected behaviour is explained in the Code of Conduct as, among other things, a responsibility to ensure conduct both at and away from work does not damage the department's reputation or prevent it from operating efficiently on behalf of its clients.

[186] There is no doubt that the grievor was aware of and familiar with the V&E Code and the Code of Conduct. The letter dated September 11, 2012, in which she was offered and accepted a deployment as an ISI in Nanaimo, contained the following:

> *I would like to bring to your attention that employees of the Public Service of Canada are required to observe the* Values and Ethics Code for the Public Sector *and Appendix B of the* Policy on Conflict of Interest and Post-Employment. *In addition, you are responsible for complying with the* HRSDC Code of Conduct. *These Codes and Policy are essential for management of human resources and are part of your conditions of employment. By accepting this offer, you certify that you have read and will comply with these Codes and Policy in the performance of your duties.*

[187] Directly under this paragraph were links to the online versions of those policies.

[188] The grievor also acknowledged receiving Mr. Tiwana's email to her dated April 17, 2013, concerning a training plan, and completing the training, including reviewing the Code of Conduct and the V&E Code. She confirmed as much in an email to him on April 19, 2013.

[189] Furthermore, in her email to the grievor dated May 2, 2013, summarizing their discussion of April 29, 2013, Ms. Morrison wrote the following on the grievor's use of the term "head hunters [*sic*]" when referring to the Integrity branch and how it does not align with the Code of Conduct:

…

> *I also spoke to you about some of the wording you have used in an Email addressed to Gary dated April 16, 2013. I reviewed the HRSDC Code of Conduct and Values and Ethics with you. I advised you that you can no longer make negative references to the government, programs or officials. I advised you that any breaches to the above expectations may result in administrative and/or disciplinary actions up to and including termination. I advised you of how seriously I take this and my expectations for the future, such as ensuring your comments and actions are in line with the Code of Conduct.*
>
> *I advised you to read the Code of Conduct, Respect for Democracy again and to let me know if you have any questions in regards to the Code of Conduct.*
>
> *I have referenced this document for you here:* [link to Code of Conduct]

[190] Lastly, in cross-examination, the grievor agreed that she had read the Code of Conduct and V&E Code and that she felt comfortable with them.

[191] Overall, the reassessment report found that the grievor's actions were incompatible with holding a reliability status. In examining section 3 of Appendix B of

the *Personnel Security Standard*, I accept that the evidence demonstrates that the grievor's actions fell within the following elements of that paragraph: her actions were not consistent with the expected behaviours necessary to be relied on not to abuse the trust that might be accorded her, and such behaviours raise a reasonable cause to believe that she may fail to safeguard information and assets entrusted to her.

[192] The grievor further argues that section 3 of Appendix B of the *Personnel Security Standard* sets out an additional requirement to be met in deciding a question of reliability status, namely, a risk assessment based on the level of reliability required and the nature of the duties to be performed and a judgment as to whether such risks are acceptable. She submitted that as the majority of the documents were disclosed in January 2013, there is no indication that any abuse of trust might continue in the future. Similarly, she contends that the employer did not contemplate an assessment of future risk based on the duties of the position she occupied and that its witnesses did not provide an understanding of her duties to the extent required to assess reliability.

[193] It appears to me that the grievor's argument overlooks the fact that on the most basic level of security status and aside from the specific duties of her position, she required access to the employer's information and assets to perform those duties. Mr. Tiwana testified about the electronic systems to which she had access to perform her duties and referred to a list of them. Furthermore, Mr. Netzel testified that there were no positions at ESDC in which employees did not deal with citizens' information.

[194] In my view, under those circumstances, the factor of the nature of the duties to be performed in the risk assessment did not require the employer to consider each facet of the grievor's work description. The evidence shows that had her employment continued, she could not have performed her duties without access to the employer's information and assets.

[195] Similarly, it is clear from the last part of the recommendations portion of the report that the grievor's actions were serious enough for the employer to conclude that she posed a present and future risk. That is, Mr. Jacques concluded that the abuse of trust was "… significant enough to sever the bond of trust that exists between the employee and the employer." Mr. Jacques testified that in his view, the grievor being

untruthful to the investigators and then admitting in a media interview that she had engaged in the conduct indicated that the trust between employer and employee no longer existed.

[196] Ultimately, the decision as to whether to revoke the grievor's reliability status rested with Mr. Comeau, the DSO. His letter dated October 11, 2013, and informing Mr. Netzel of his decision to revoke it reads in part as follows:

…

> *The* [administrative investigation] *report of July 8th, 2013, clearly indicates that Ms. Therrien's behaviour, activities, actions and her disregard for the Values and Ethics Code for public service employees under Treasury Board Secretariat pose a serious risk to the Department.*

…

[197] As did Mr. Jacques, Mr. Comeau testified that he had concluded that the grievor posed a serious risk because of her lack of remorse, her continued belief that she had disclosed documents for the right reasons, her untrustworthiness with government information and assets, and her continued embarrassment to the government.

[198] In cross-examination, he further stated that the grievor's actions were premeditated, she continued them even after having seen the effect on the public, she used a third-party computer to try to conceal her actions, she lied to the investigators, and she showed no remorse. All those made for too high of a risk to the employer with respect to her future behaviour.

[199] Mr. Comeau's concerns about the grievor posing a serious risk to the department were confirmed at the hearing. During the hearing, she did not show any remorse for her actions. She was apologetic for having lied during the security interview, which she said was a mistake based on advice she had received from a lawyer to completely deny everything. However, she continued to hold the views that she said had led to her decision to make the leaks, namely, the public had the right to the information she disclosed, and the public interest was paramount over her duty of loyalty to the employer. While she was certainly entitled to her opinion on the nature of her duties and government policy, in my view, this supports the employer's assessment of the serious risk with respect to her untrustworthiness with government

information and assets and the bond of trust between employee and employer having been severed.

[200] In all the circumstances, I find that the conclusions in the reliability reassessment report and the revocation of the grievor's reliability status were based on legitimate grounds. As such, the termination of her employment was for cause. Accordingly, her grievance challenging the termination of her employment is dismissed.

V. Request for a confidentiality order

[201] At the outset of the hearing, I informed the parties that I would remove from the "Joint Book of Documents" any document that was not entered into evidence during the course of the hearing and disregard it for the purpose of this decision. Accordingly, pages 450 to 479 of Volume III, tab 20, and pages 622 to 644 of Volume III, tab 23, of the Joint Book of Documents will be removed.

[202] The employer also requested an order that Exhibits E-24, E-25, E-30, E-31, E-44, and E-53, or parts of them, be sealed, which the grievor opposed. In sum, these materials contain investigative strategy case studies and sample questionnaires, certain performance indicators, and investigative materials than contain statistics and performance indicators for the Burnaby office. Before addressing the parties' arguments, I shall set out the guiding legal principles.

[203] The Board operates on the open court principle, which is set out in its "Policy on Openness and Privacy" posted on its website. In accordance with the open court principle, the Board conducts its hearings in public, save for exceptional circumstances. The Board departs from its open justice principles and may grant a confidentiality order concerning specific evidence when such a request accords with recognized legal principles.

[204] In *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at paras. 9 to 11, the Board went through the applicable legal principles in detail, which may be summarized as follows: public access to exhibits and other documents filed in legal proceedings is protected by the right to freedom of expression. However, occasions arise when freedom of expression and the principle of open and public

access to hearings must be balanced against other important rights, including the right to a fair hearing. The Board must balance these competing rights and interests when determining whether to grant a confidentiality order. In making such a determination, the Board must apply the *Dagenais/Mentuck* test, as indicated as follows at paragraph 11 of *Basic*:

> ***11*** *The* Dagenais/Mentuck *test was developed in the context of requests for publication bans in criminal proceedings. In* Sierra Club of Canada*, the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:*
>
> …
>
> *1. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
>
> *2. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*
>
> …

[205] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 55 ("*Sierra Club*"), the Supreme Court of Canada stated the following about the public interest: "… in the words of Binnie J. in F.N. (*Re*), [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields 'where the **public** interest in confidentiality outweighs the public interest in openness' …" [emphasis in the original].

[206] The test to maintain the confidentiality of evidence has a high threshold, with the onus being on the party requesting confidentiality to demonstrate that it meets the requirements of the test.

A. Summary of the arguments

1. For the employer

[207] The employer submitted that as a general rule, internal departmental documents such as the Investigation & Control Manual should be sealed, as they are only for internal use. It referred to Mr. Netzel's testimony on the two types of risk if

the manual were in the public domain. First, certain entities would abuse the information, and second, it would potentially put departmental staff at physical risk when they are sent to investigate in the community.

[208] The employer cited *Yarney v. Deputy Head (Department of Health)*, 2011 PSLRB 112 at paras. 108 and 109, as an example of the Board ordering exhibits sealed. In that case, at issue were commercial interests, namely, the proprietary information of pharmaceutical companies involved in Health Canada's pharmaceutical approval process as well as Health Canada's commercial operations. The employer submitted that the commercial interests in *Yarney* were no different from the training material in this matter and that there is no public interest in making those documents public.

[209] The employer further argued that should the documents fall into the wrong hands, those parties would have limited information, for example only portions of the Investigation & Control Manual, without full knowledge of the program. The employer queried what would unfold if a party had such limited knowledge.

2. For the grievor

[210] The grievor argued that with respect to Mr. Netzel's evidence on the risks of the Investigation & Control Manual being in the public domain, in cross-examination, he admitted that he had not received specific threats to that effect and that it is speculative. As no other evidence was entered about those risks, it is insufficient to justify a confidentiality order.

[211] The grievor added that in *Sierra Club*, the Supreme Court of Canada stated that there must be a "serious risk" to an important interest, which means that the strongest possible evidence is required for a confidentiality order. Furthermore, the employer did not propose reasonably alternative methods to prevent the risk. The employer's argument, which was that there is no public interest in making the documents public, is not the test for sealing. The grievor submitted that the nature of this matter militates in favour of the documents not being sealed.

B. Analysis

[212] Exhibit E-24 consists of investigative strategy case studies that the employer uses to train employees. It submitted that while they are hypothetical case studies, they are proprietary documents, and there is a serious risk of the material being abused. It further submitted that the journalist contacted the department's spokesperson to ascertain the security level of the documents, thus demonstrating that he knew they were protected. The employer also argued that the fact that the grievor had the documents in her personal email account did not make that document in the public domain.

[213] The grievor argued that the fact that this document is proprietary is not in and of itself sufficient to support that it be sealed.

[214] In my view, it is in the public interest that the investigative strategy case studies remain confidential. The employer uses the investigative strategy case studies for training its ISIs and integrity services officers (ISOs). It is in the public interest that EI claimants comply with applicable legislation to be entitled to benefits and not to evade prosecution. If these case studies were disclosed, they might have the effect of claimants orienting their claims based on the information in the studies. Therefore, I order Exhibit E-24 sealed. Furthermore, as pages 389 to 441 of tab 20 of the Joint Book of Documents are a duplicate of Exhibit E-24 and were not entered into evidence, I order them removed from the Joint Book of Documents as mentioned above.

[215] With respect to Exhibit E-25, the employer does not seek to protect the grievor's email from Service Canada to her personal account or the first page, which is the Integrity Services branch's mandate. It seeks to protect the pages that follow, which contain the English and French versions of chapter 56 of the Investigation & Control Manual, dealing with performance indicators. The employer argued that this document is internal and that it indicates how its business is conducted.

[216] More particularly, the employer seeks the sealing of section 56.4.4 to the end of Appendix A in the English version of chapter 56. Sections 56.4.4 to 56.4.6 define certain terms; sections 56.5 and 56.6 concern the determination of savings, section 56.7 contemplates actuarial tables, and section 56.8, which includes several subsections, concerns the calculation of indirect savings. In the French version, it does

not seek protection for the first page of the document or for the comments that the grievor inserted but seeks it for the remainder of the document, up to Appendix A.

[217] Following the French version of chapter 56, 11 pages of the English version of that chapter are repeated, for which the employer seeks protection. Following this second English version, the exhibit contains a second French version of 14 pages, for which the employer also seeks protection. Both second versions of Chapter 56 have the following notation: "Note: All chapters and documents included in the Integrity and Operations Manual are Protected B, for internal use only."

[218] Concerning Exhibit E-25, the grievor submitted that the first page of the 11-page second English version of chapter 56 should not be sealed, as it sets out the table of contents. The grievor submitted that section 56.4.2, titled "Social Insurance Number Investigations", does not constitute a risk, as it states a fact. She advanced the same argument for section 56.7, titled "Actuarial Tables".

[219] While the employer submitted that chapter 56 was of important interest to it, it did not persuade me that a confidentiality order is necessary to prevent a serious risk to that interest. It argued that certain entities could abuse the information and that it would potentially put departmental staff at physical risk when sent to investigate in the community. Having examined the relevant provisions of chapter 56 as described, I fail to see how their disclosure would put departmental staff at physical risk when investigating in the community. While I agree with the employer's submission that it does not have to wait until an incident occurs, it did not demonstrate any nexus between such a potential risk and the provisions of chapter 56.

[220] Similarly, in my view, the employer has not met its onus with respect to its argument that by disclosing chapter 56, certain entities would abuse the information. There is simply no evidence in that respect. Its argument that this document is internal and that it indicates how its business is conducted is not sufficient to meet the test of serious risk to its interest should it be disclosed. Therefore, I reject the employer's request for a confidentiality order for chapter 56 of the Investigation & Control Manual (E-25).

[221] Exhibit E-31 contains the French version of chapter 56, together with an email from the grievor's work computer to Ms. C's email account to which was attached chapter 56. For the same reasons as for Exhibit E-25, the employer requests that the document be sealed, except for the grievor's email and the comments that she inserted. It requests that pages 284 to 378 inclusive of Exhibit 53 be sealed as they consist of duplicates of chapter 56. In view of my ruling on Exhibit E-25, I also dismiss the request for a confidentiality order for Exhibit E-31.

[222] The employer requested that Exhibit E-30 be sealed as it consists of interview techniques in the form of questions. It does not seek protection for the covering email from the grievor's work computer to Ms. C's email account and to which the questions were attached. The grievor submitted that there is no risk for the public to see the sample interview questions.

[223] For each of the interview techniques contained in this exhibit, it is clearly stated that the purpose of the interview is to determine claimants' entitlement to EI benefits or to review their ongoing entitlement to benefits. In order that claimants may demonstrate that that they are validly entitled to EI benefits, I find that it is in the public interest that they not be afforded any potential advantage that may result from accessing the questions the ISIs use to determine entitlement to EI benefits. Accordingly, I order Exhibit E-30 sealed. Furthermore, as pages 272 to 282 of Exhibit 53 are duplicates of the questions in Exhibit E-30, I order those pages sealed.

[224] Lastly, the employer requested the sealing of pages 598 to 610 of Exhibit E-44, as they were not in the public domain and were documents Mr. Tiwana stated he had consulted when preparing for the team strategy session held on April 11, 2013.

[225] He testified about the pages in question in that page 598 was the unassigned caseload for the Burnaby office for the strategy session, page 599 contained the total assigned and unassigned cases for Burnaby, and page 600 was a case breakdown by employee and was only for his own reference.

[226] He shared page 601, titled "Immediate challenges in Burnaby", with staff. Pages 600 and 601 contain staff names. Page 602 is a case comparison with other offices in the same service area, with page 603 being a reference document for page

602. Page 604 is a document provided by the service manager setting out savings objectives for each of the offices in the service area for the fiscal year. Page 605 is an email setting out a snapshot of savings for the fiscal year. Page 606 contains only the signature block of the originator of the email. Page 607 contains a monthly breakdown of savings generated by the investigators. Page 608 shows the number of cases completed by the ISIs and ISOs per month. Page 609 contains savings per month by the ISIs and ISOs in the Burnaby office. Page 610 sets out the number of cases completed per month in the Burnaby office. Several pages of the exhibit contain the first names or first names and surnames of employees.

[227] With respect to Exhibit E-44, the grievor submitted that there is no risk to the employer by disclosing the information in pages 598 to 610.

[228] As described, pages 598 to 610 of Exhibit E-44 contain statistics for the 2012-2013 fiscal year, such as caseloads, savings objectives, and actual savings for several offices in the service area. While those statistics may be of commercial interest to the employer, it has not shown how the public interest favours a confidentiality order for the pages in question.

[229] Therefore, I reject the employer's request for a confidentiality order for pages 598 to 610 of Exhibit E-44. However, those pages contain the names of employees, and their removal would not affect the information contained in them. Furthermore, there is no public interest in disclosing the names. Accordingly, the names of all employees, whether only first names or first names and surnames from pages 598 to 610 will be redacted.

[230] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[231] The grievances are dismissed.

[232] Exhibits E-24 and E-30 are ordered sealed.

[233] The names of employees, whether first names or first names and surnames, shall be redacted from pages 598 to 610 of Exhibit E-44.

August 23, 2019

Steven B. Katkin,

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