

**Date:** 20191202

**Files:** 566-02-9644 to 9647, 10121,  
11621, and 12603

**Citation:** 2019 FPSLREB 115

*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

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BETWEEN

**VIVIAN VALDERRAMA**

Grievor

and

**DEPUTY HEAD**  
**(Department of Foreign Affairs, Trade and Development)**

Employer

Indexed as

*Valderrama v. Deputy Head (Department of Foreign Affairs, Trade and Development)*

In the matter of individual grievances referred to adjudication

**Before:** John G. Jaworski, a panel of the Federal Public Sector Labour Relations  
and Employment Board

**For the Grievor:** Amy Kishek, Public Service Alliance of Canada

**For the Employer:** Joel Stelpstra, counsel

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Heard at Ottawa, Ontario,  
October 23 to 25, 2017.

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**REASONS FOR DECISION**

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**I. Individual grievances referred to adjudication**

[1] Vivian Valderrama (“the grievor”) was, as of the grievances and hearing, employed by the Treasury Board (TB or “the employer”) at Foreign Affairs, Trade and Development Canada (FTDC) as an international development officer, classified at the program manager (PM) 03 group and level. The terms and conditions of her employment were governed in part by an agreement between the TB and the Public Service Alliance of Canada for the Program and Administrative Services group, which was signed on March 1, 2011, and expired on June 20, 2014 (“the collective agreement”).

**A. The grievances in file nos. 566-02-9645 and 9646**

[2] On July 4, 2013, the grievor was given a three-day disciplinary suspension for failing to adhere to her set working hours and for the inappropriate use of her government-issued credit card. On July 24, 2013, she grieved both the discipline and the employer’s unreasonable denial of her request to work flexible hours. As remedy, she requested the following:

- that her hours of work be changed from 09:00 to 17:00 to 09:30 to 17:30;
- that the employer respect the collective agreement;
- that the July 4, 2013, letter be rescinded, that all evidence of it be removed from the employer’s files, that it be destroyed in her presence and that of her bargaining agent, and that it not be replaced by any other discipline;
- that she be fully reinstated;
- that she be credited with the three lost days of pay and benefits into her leave account;
- that she receive an updated corrected copy of her leave account and leave credits for 2013-2014;
- that the employer provide her with written assurance that she would not be subject to any prejudice for filing the grievance;
- that she be made whole; and
- any other corrective measures that an adjudicator may impose.

[3] At the third level of the grievance process, the discipline was reduced to a one-day suspension.

**B. The grievances in file nos. 566-02-9644 and 9647**

[4] On July 26, 2013, the grievor was given a five-day disciplinary suspension for failing to adhere to her set working hours. On August 7, 2013, she grieved both the discipline and the employer's unreasonable denial of her request to work flexible hours, and she requested the following:

- that the July 26, 2013, letter be rescinded, that all evidence of it be removed from the employer's files, that it be destroyed in her presence and that of her bargaining agent, and that it not be replaced by any other discipline;
- that her request to change her hours of work be granted;
- that the collective agreement be respected;
- that she be credited with the five lost days of pay and benefits;
- that she be made whole;
- that the employer provide her with written assurance that she would not be subject to any prejudice for filing the grievance; and
- any other corrective measures that an adjudicator may impose.

[5] At the third level of the grievance process, the discipline was reduced to a three-day suspension.

**C. The grievance in file no. 566-02-10121**

[6] On February 7, 2014, the grievor was given a five-day disciplinary suspension for failing to adhere to her set working hours by arriving late to work and for her interaction with and attitude towards a colleague and external partner in an email exchange. On March 17, 2014, she grieved the discipline and requested the following:

- that the February 7, 2014, letter be rescinded, that all evidence of it be removed from the employer's files, that it be destroyed in her presence and that of her bargaining agent, and that it not be replaced by any other discipline;
- that the collective agreement be respected;
- that she be credited with the five lost days of pay and benefits;

- that her request to change her hours of work be granted;
- that the employer provide her with written assurance that she would not be subject to any prejudice for filing the grievance;
- that she be made whole; and
- any other corrective measures that an adjudicator may impose.

**D. The grievance in file no. 566-02-11621**

[7] On April 13, 2015, the grievor was given a 10-day disciplinary suspension for failing to adhere to her set working hours by arriving late to work. On May 6, 2015, she grieved the discipline and requested the following:

- that the April 13, 2015, letter be rescinded, that all evidence of it be removed from the employer's files, that it be destroyed in her presence and that of her bargaining agent, and that it not be replaced by any other discipline;
- that the collective agreement be respected;
- that she be credited with the 10 lost days of pay and benefits;
- that the employer cease to use her access-pass record as a time clock to monitor her attendance;
- that the employer provide her with written assurance that she would not be subject to any prejudice for filing the grievance;
- that she be made whole; and
- any other corrective measures that an adjudicator may impose.

[8] 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 Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue

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*.

#### **E. The grievance in file no. 566-02-12603**

[9] On October 14, 2015, the grievor was given a 20-day disciplinary suspension for failing to adhere to her set working hours by arriving late to work. On October 26, 2015, she grieved the discipline and requested the following:

- that the October 14, 2015, letter be rescinded, that all evidence of it be removed from the employer's files, that it be destroyed in her presence and that of her bargaining agent, and that it not be replaced by any other discipline;
- that the collective agreement be respected;
- that she be credited with the 20 lost days of pay and benefits;
- that the employer cease to use her access-pass record as a time clock to monitor her attendance;
- that the employer provide her with written assurance that she would not be subject to any prejudice for filing the grievance;
- that she be made whole; and
- any other corrective measures that an adjudicator may impose.

[10] The grievor referred the grievances to adjudication under s. 209(1)(a) and (b) of the *PSLRA*.

[11] 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").

#### **II. Summary of the evidence**

[12] The grievor holds a Bachelor of Arts degree from Concordia University, a Masters of Public Administration from Carleton University, and a certificate in

translation. She began her career in the federal public service in December of 2007 at the Canadian International Development Agency.

[13] As of the hearing, Steve Jaltema was employed by the TB as a deputy director and development counsellor at the Government of Canada's Mission to the Association of Southeast Asian Nations in Jakarta, Indonesia. At the time relevant to the discipline and the grievances, he was a manager in the Governance Section of the FTDC's Sustainable Economic Growth and Governance Directorate and was the grievor's immediate supervisor. He reported to François Montour, Director General of that directorate.

[14] At the time relevant to the discipline and grievances, the grievor lived in the vicinity of Elgin and Catherine streets in downtown Ottawa, Ontario, and her work unit was located at 200 Promenade du Portage in Gatineau, Quebec ("Place du Portage"). The distance, depending on the route, is just under 4 km.

[15] Mr. Jaltema testified that about 120 people were in the work unit and that it had a flat management structure. They dealt with a dozen or so Canadian international organizations that had high profiles and direct links to both the public and the media. He said that it was not unusual for their decisions to be raised in the House of Commons during question period and in discussions that ministers' offices held with the organization.

[16] He stated that fixed hours of work were set in the grievor's work unit to allow for assigning and monitoring work. He said he needed to know the hours of work of the employees reporting to him so that he could manage and assign work and deal with things, including urgent and unexpected requests.

[17] Mr. Jaltema testified that he became the grievor's supervisor in April of 2013 and that at that time, he had been briefed about concerns her previous supervisor had identified, specifically difficulties with respect to her arrival and departure times for work and difficulty receiving feedback. He said that just before the grievor transferred to his team, she was provided with a letter dated March 12, 2013 ("the March 12 letter"), from Mr. Montour, the relevant portions of which state as follows:

...

*The purpose of the following is to outline the administrative conditions, the mechanisms associated with application for and authorization of various forms of leave, and the behaviour expectations in the work environment, which you must fulfil in the context of your employment.*

**Work schedule**

*Your hours of work will be within the acceptable core working hours from 9:00 to 17:00 with a half hour for lunch. You are entitled to two (2) rest periods of fifteen (15) minutes per full-time day worked (one in the morning and the other in the afternoon), where operational requirements permit.*

*Unauthorized absences will be considered a leave without pay and therefore, is non-pensionable.*

*Flexible hours of work are allowed with the employer's consent, operational circumstances and requirements permitting.*

**Behaviour expectations in the workplace with which you must comply**

*I expect you to show an attitude of professionalism and respect at all times on the job, to do your part toward creating a healthy work environment, and to show cooperativeness and tact in your relations with colleagues, such as:*

- Accepting opinions that differ from yours;*
- Accepting directives, recommendations, feedback or comments from your managers;*
- Accepting that you cannot always be right;*
- Demonstrating proper judgment;*
- Communicating respectfully verbally and via email to management, our colleagues and partners.*

*You are expected to comply with the conditions outlined in this letter. Failure to do so may result in progressive disciplinary measures, possibly leading to your dismissal.*

...

[Sic throughout]

[Emphasis in the original]

[18] The grievor testified that the change to her hours of work was not discussed with her; she was just told that her hours would be from 09:00 to 17:00. She said that before receiving the letter, she had worked in another area, and her start and finish times had been flexible in that she had started between 09:30 and 10:00 and had finished between 17:30 and 18:00. She confirmed that she received the March 12 letter and understood that her start time was to be 09:00 and that her finish time was to be 17:00.

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**A. The collective agreement**

[19] Article 19 of the collective agreement is entitled “No Discrimination”, and clause 19.01 states as follows:

**19.01** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*

[20] Article 25 of the collective agreement is entitled “Hours of Work”, and the clauses from that and some following articles that are relevant to these grievances are as follows:

...

**General**

**25.01** *For the purpose of this Article:*

(a) *the week shall consist of seven (7) consecutive days beginning at 00:00 hours on Monday morning and ending at 24:00 hours on Sunday;*

(b) *the day is a twenty-four (24) hour period commencing at 00:00 hours.*

**25.02** *Nothing in this Article shall be construed as guaranteeing minimum or maximum hours of work. In no case shall this permit the Employer to reduce the hours of work of a full-time employee permanently.*

**25.03** *The employees may be required to register their attendance in a form or in forms to be determined by the Employer.*

...

**25.05** *The Employer will provide two (2) rest periods of fifteen (15) minutes each per full working day except on occasions when operational requirements do not permit.*

**Day Work**

**25.06** *Except as provided for in clauses 25.09, 25.10 and 25.11:*

(a) *the normal workweek shall be thirty-seven decimal five (37.5) hours from Monday to Friday inclusive;*

*and*

(b) *the normal workday shall be seven decimal five (7.5) consecutive hours, exclusive of a lunch period, between the hours of 7 a.m. and 6 p.m.*



**25.07** *Employees shall be informed by written notice of their scheduled hours of work. Any changes to the scheduled hours shall be by written notice to the employee(s) concerned.*

**25.08 Flexible Hours**

*Subject to operational requirements, an employee on day work shall have the right to select and request flexible hours between 7 a.m. and 6 p.m. and such request shall not be unreasonably denied.*

...

**Article 28**

**OVERTIME**

...

**28.03 General**

*(a) An employee is entitled to overtime compensation under clauses 28.05 and 28.06 for each completed period of fifteen (15) minutes of overtime worked by him or her when:*

*(i) the overtime work is authorized in advance by the Employer or is in accordance with standard operating instructions;*

*and*

*(ii) the employee does not control the duration of the overtime work.*

...

**28.04 Assignment of Overtime work**

*(a) Subject to operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.*

...

**Article 44**

**LEAVE WITHOUT PAY FOR PERSONAL NEEDS**

**44.01** *Leave without pay will be granted for personal needs in the following manner:*

*(a) subject to operational requirements, leave without pay for a period of up to three (3) months will be granted to an employee for personal needs;*

*(b) subject to operational requirements, leave without pay for more than three (3) months but not exceeding one (1) year will be granted to an employee for personal needs . . . .*

...

[Emphasis in the original]

**B. Pass logs**

[21] As of the hearing, Daniel Lavigueur was employed by the TB. He was a physical security coordinator and had been one at the Place du Portage complex for six years. He was responsible for coordinating all aspects of building security, which included the grievor's work areas, and all access-control programs for all ingress and egress points to and from government work areas.

[22] Mr. Lavigueur testified that employees who are permitted access into government work areas are issued personal access passes that identify them. They allow employees access to their work locations through barriers, including doors, which are locked. He stated that all employees are supposed to swipe their passes when they enter their work areas; they are not supposed to follow someone else without swiping their own passes. That practice is known as "tailgating".

[23] When a pass is used to unlock an entry point, a computerized record is made of the location and the pass used, along with the time the pass was used to open a particular access location to allow entry. This information can be accessed and sorted. According to Mr. Lavigueur, the recorded access times are in Eastern Standard Time or Eastern Daylight Time as appropriate, depending on the time of year.

[24] He stated that at management's request, he could produce reports showing an employee's use of his or her pass to traverse the controlled access points in the Place du Portage complex. The reports indicate the date and time and the access point used. He testified that from time to time, he was asked to produce reports on the grievor's pass usage for certain time frames, which he said he did. Entered into evidence were reports of her pass usage ("the pass logs") for time frames relevant to the discipline.

[25] The pass logs set out the relevant information in columns. It includes the grievor's name, her visible pass number, a code related to the pass, a date and time (in the format "hour: minute; seconds") noted every time her pass was swiped, whether access was successful or denied, and where it was swiped for access.

[26] I heard no evidence as to whether telephones or work computers displayed or were configured to the same time that the access-card system used and recorded.

[27] I heard no evidence about any clocks in the grievor's work area.

[28] I heard no evidence that the grievor or any other employee was able to know the time recorded in the security system for their particular passes when they were swiped.

[29] In an email exchange on August 5 and 6, 2015, Mr. Lavigueur confirmed to the grievor that the system that records employees' passes and generates reports was not created to control employees' hours of work but for security purposes; it is synchronized to the security network, so therefore, there could be a difference of a few minutes compared to clocks on office computers; an employee could enter the building with another employee; and the security doors of the grievor's work area allowed more than one employee to enter on the same pass swipe.

[30] In cross-examination, Mr. Jaltema confirmed that the grievor's work location changed sometime in the late summer of 2015; the exact date was not given. The significance of the change was that at Place du Portage, where all the alleged misconduct took place, employees' passes opened a door through which multiple people could pass once it was open.

### ***C. Values and Ethics Code for the Public Sector***

[31] Entered into evidence was a copy of the *Values and Ethics Code for the Public Sector* ("the V&E code"), the following portions of which were highlighted for me:

...

#### ***Stewardship***

*Federal public servants are entrusted to use and care for public resources responsibly, for both the short term and long term.*

...

#### ***Expected Behaviours***

*Federal public servants are expected to conduct themselves in accordance with the values of the public sector and these expected behaviours.*

##### ***1. Respect for Democracy***

◦ *Public servants shall uphold the Canadian parliamentary democracy and its institutions by:*

...

◦ *1.2 Loyally carrying out the lawful decisions of their leaders and supporting ministers in their accountability to Parliament and Canadians.*

...

## 2. *Respect for People*

◦ *Public servants shall respect human dignity and the value of every person by:*

...

◦ *2.3 Helping to create and maintain safe and healthy workplaces that are free from harassment and discrimination.*

◦ *2.4 Working together in a spirit of openness, honesty and transparency that encourages engagement, collaboration and respectful communication.*

...

[Emphasis in the original]

### **D. The July 4, 2013, discipline: three-day suspension without pay reduced to one day (file nos. 566-02-9645 and 9646)**

#### **1. Attendance**

[32] Mr. Jaltema testified that in April of 2013, the grievor's scheduled hours of work were from 09:00 to 17:00.

[33] Entered into evidence was an email dated March 19, 2013, from the grievor to Messrs. Jaltema and Montour and stating as follows:

...

*I have no problem starting at 9:00 and finishing at 5:00. Up to now, I have arrived in between 9:30 and 10:00 and left in between 6:00 and 7:00. As I informed you on several occasions, I am required to put in some additional time, which it [sic] has always been on my own time - no overtime charged . . . .*

...

[34] Mr. Jaltema testified that shortly after the grievor started reporting to him, he began to notice that she was not coming into work on time. He said that he spoke to her about it and that on May 24, 2013, at 09:55, he emailed her, stating as follows:

...

*I noticed that you are still not in this morning. When you are running late, please let me and Christopher know. Please make sure to put in the time you arrived late in the system. It is important to keep consistent hours. I am fully prepared to be flexible about times when unexpected things come up, but this needs to be discussed in advance.*

Thank you

Steve

...

[35] The grievor responded at 10:53 that morning, stating as follows:

...

*I am sorry for this morning. I arrived at 10:00, since my bus was running late due to the rain. Unfortunately, I did not have my cell with me to call you or Christ saying that I would arrive late. For that hour, I will fill out a vacation leave form and send you for your approval.*

*Please be sure that I will call you and Christ informing that I would [sic] be late if something unexpected happens again.*

*Thanks.*

*Vivian*

...

[36] “Christ” is short for “Christopher” who, at the time, was Mr. Jaltema’s assistant. Mr. Jaltema said that all employees who reported to him were required to advise him and Christopher if they would be late or absent.

[37] Mr. Jaltema stated that on June 5, 2013, he discussed with the grievor her hours of work, which he summarized in an email he sent to her the next day at 14:19. He said that it was not the first discussion he had had with her about her hours of work. The relevant portions of the email state as follows:

...

*I thought it would be helpful if I wrote a quick note summarizing the main points from our conversation about my expectations of work hours yesterday. This is not an exhaustive summary of the whole conversation, but just the key points.*

- *My expectations are that your working hours are 9-5, Monday to Friday*
- *I explained that for planning work, meetings, etc., it is important that all team members have consistent and regularly scheduled hours of work, not a range (for example starting work between 9-10 am, and ending between 5-6 pm unfortunately doesn’t work, as it makes scheduling meetings and assigning work difficult)*
- *You noted that this is not your preference, but agreed to stick to the 9-5 hours*
- *I explained that it is not expected or acceptable for employees to work beyond their scheduled working hours,*

*and that my expectation on this is consistent for all team members*

- *I explained why I don't want people working extra hours beyond regularly scheduled hours (we talked about consistency among team members, workload, work-life balance, avoiding burn-out [sic], equitable distribution of work, etc.)*

- *You were hoping that there be [sic] some flexibility to stay a bit late on your own volition from time to time to catch up on reading media articles, documents sent around from information, and cleaning up your office. I explained that occasionally staying a bit late could be okay, but "a bit" is really 15-45 minutes or so from time to time, and is not something I expect or encourage, and is not authorized overtime*

- *I explained that my expectations are that all employees stick to their regular work hours, but that I can be flexible in the event of occasional and infrequent unexpected things that come up (for example, repair person coming to the house, taking a pet to the vet, etc.) These should be cleared in advance and be infrequent*

*I think our conversation yesterday was quite constructive, and I hope that having this email as a record of our conversation will be helpful as a reference.*

...

[38] On June 11, 2013, at 15:20, the grievor emailed a response. She embedded the following comments into Mr. Jaltema's email:

...

*Thank you for your follow up [sic] message outlining the key points of our conversation of June 6 regarding your working hours expectations toward me. First of all, I would like to reiterate to you that I will comply with all of your expectations. However, since I may not have explained myself well about some of the points during our conversation during our discussion, please find my clarifications in blue.*

...

I realized that you are only giving an example, but I would like to point out that I did not ask you if I could come to work and finish working within a time range. Considering that I live in Ottawa and use public transportation to come to work, I asked you if I could come at 9:30 and finish at 5:30. I respect your decision to decline my request even though you did not tell me why you could not accept mine while you accepted some other Governance staff members' requests to start past 9:00 a.m.

...

As you say, sometimes unexpected things happen. Therefore, as much as one would like to clear in advance with you, it is not always possible to do that. However, I can assure you that I have always done my best to make suitable arrangements, so that I can come to work on time, and will continue doing so.

...

[39] With respect to the grievor's request to alter her hours to be from 09:30 to 17:30, Mr. Jaltema said that he told her that if she demonstrated consistency in coming into work on time (for a 09:00 start), he would in turn grant the change to the 09:30 start time. He said that despite this incentive, she could not meet the 09:00 start time.

[40] With respect to the grievor's comment that she was late due to public transit, Mr. Jaltema stated that the majority of his employees at the time used public transit and had no difficulty getting into work on time.

[41] The following email exchange between Mr. Jaltema and the grievor, dated June 25, 2013, was entered into evidence:

[Mr. Jaltema to the grievor, at 16:45:]

...

*I came to your office to discuss the [client name omitted] audit issue this morning at about 9:20 or so, but you were not yet in the office.*

*Sticking to regular business hours seems to be a reoccurring [sic] challenge. I will be inviting you for a meeting on working hours later this week to discuss this. Please let me know if there is any time on Friday that you are unavailable.*

...

[The grievor to Mr. Jaltema, at 17:28:]

...

*I do not mean to make excuses, but I went to Montreal to see my family for the weekend and arrived late last night. Since [sic] I arrived in the office at 9:35 this morning and I am making up my time now, but I will be leaving in five minutes.*

*I am available any time to meet with you on Friday.*

...

[42] Mr. Jaltema received a copy of the grievor's pass log for April 2 to June 25, 2013. There were data points for 48 days. A labour relations (LR) advisor created a summary of the log's contents, which was sent to Mr. Jaltema. The summary indicated that on each of the grievor's workdays in that period, there was no record of

her pass being used before 09:00. A review of the pass log entered into evidence disclosed the following:

- on 1 day, the data for the grievor's first use of the pass was illegible;
- for the 47 days with legible data points, it was first used more than 5 minutes after 09:00;
- 5 times on those 47 days, it was first used between 09:00 and 09:29;
- on 23 of those 47 days, it was first used between 09:30 and 10:00;
- on 19 on those 47 days, it was first used more than 2 hours after 09:00;
- of those 19 days, 11 of those first uses were more than 2.5 hours after 09:00, and the remaining 8 were recorded in the afternoon.

[43] The evidence disclosed that during that time, the grievor was not told that her pass was being used to monitor her workplace arrivals; nor did she receive the pass logs until or about the time of the disciplinary hearing.

[44] Mr. Jaltema compiled his own log of times on which he had been personally aware that the grievor did not arrive at work on time. It states as follows:

- *10/04/2013 I noticed that Vivian was late, did not pursue*
- *11/04/2013 I noticed that Vivian was late, did not pursue*
- *24/05/2013 Vivian was 1 hour late for work. I followed up with her verbally and in writing. She responded to the email*
- *05/06/2013 Vivian was late. We had a lengthy discussion about expectations, and I followed up in writing. Vivian responded to the email*
- *19/06/2013 Vivian stayed very late at work without authorization. I followed up by email. She responded to the email*
- *21/06/2013 Vivian was 35 minutes late for work. I followed up in writing. Vivian responded to the email*
- *25/06/2013 Vivian was late for work. I followed up in writing. Vivian responded to the email*
- *25/05/2013 Vivian stayed late at work without authorization. She sent me an email at 5:30 pm*
- *26/06/2013 Vivian was still at work at 5:45 pm. I verbally asked her to leave the office, as it is after hours*

[45] On July 2, 2013, the grievor emailed Mr. Jaltema. Under the collective agreement, she requested changing her hours of work from a 09:00 to a 09:30 start time. In the



email, she said that arriving to work for 09:00 was difficult for her because she lived in Ottawa and used public transit. He responded five minutes later. He said that they could discuss it at their meeting later that day on working hours.

[46] The grievor testified that her bus commute normally took 45 minutes but that in the winter, it took 1 hour.

[47] The grievor testified that she did not always swipe her pass to enter her work area because sometimes, people held the door open for her. She stated that sometimes as she entered, she would tell them that she was swiping just to make sure.

[48] Despite arriving late some days, there was no evidence that the grievor did not put in full 7.5-hour workdays as required or that she did not submit leave requests when appropriate.

## **2. American Express card**

[49] The grievor was issued an American Express credit card (“the Amex card”), which was to be used only on government business. The evidence disclosed that she used it five times between May 20, 2013, and June 16, 2013, for purchases not related to government business.

[50] Mr. Jaltema stated that the grievor told him that the Amex card resembled her personal credit card and that she had used it mistakenly. She also said that although originally the Amex card had had a different personal identification number (PIN), she voluntarily changed it so that it matched her personal credit card PIN.

[51] Before she used the Amex card in May and June of 2013, earlier, in July of 2012, she had been given a warning about using it inappropriately.

[52] On June 27, 2013, she wrote to the Amex card travel services team and voluntarily asked it to cancel her card as she did not foresee travelling for several years. It was cancelled.

## **3. Discipline**

[53] On July 2, 2013, Mr. Jaltema met with the grievor and her bargaining agent representative to discuss her use of the Amex card and her trouble adhering to her scheduled work hours. On July 4, 2013, he disciplined her by suspending her from

work without pay for three days. The relevant portions of the letter of discipline, dated that same day, state as follows:

*This letter follows our pre-disciplinary meeting of July 2, 2013 regarding work hours and inappropriate use of your American Express corporate travel card. . . Prior to that meeting, I provided you with a copy of the record I obtained of your use of your access card to enter the workplace with the times and dates of entry between April 1 and June 25 2013, as well as the report of use of the corporate credit card for non-travel related expenses. . . .*

*I have carefully reviewed the documentation and have considered the explanations that you provided during our meeting. In particular, I have considered the following:*

*Working Hours:*

- you received an Administrative Letter from the Director General in March of this year clearly noting that your working hours are 9am-5pm;*
- we have had several follow-up discussions and written communication [sic] since that time during which I made it very clear that my expectations were that you keep consistent working hours from 9am-5pm;*
- you committed to respecting those working hours on various occasions but have failed to do so; and*
- the access card report shows that you were consistently late for work despite the above, and that you have consistently stayed beyond approved working hours.*

*Misuse of the Corporate Travel Credit Card:*

- when you applied for your American Express card, you agreed to terms of use that explained that misuse could result in disciplinary action;*
- you received a warning in July of 2012 regarding the first inappropriate use of the card;*
- you used the card four (4) times inappropriately between May and June 2013;*
- you repaid the amount owing on your card; and*
- you recognized your own challenges with the card, and as your contribution to resolving the problem, you voluntarily chose to cancel your corporate credit card.*

*In light of the above considerations, I have concluded that it is appropriate to issue you a three (3) work day [sic] suspension from work, without pay. . . .*

*These acts of misconduct are serious and I am expecting you to immediately correct your behaviour. Subsequent offences could lead to more severe measures, including up to dismissal.*

*Rather than go in that direction it is my hope that you will greatly increase your effort to adhere to the work conditions we have gone over. At our meeting on July 2, 2013 you committed to using your access card every morning when you arrive at work. I will monitor your punctuality through reviewing the time of day that you enter the building using your access card.*

...

[54] During the grievance process, this discipline was reduced to a one-day suspension.

**E. The July 26, 2013, discipline: five-day suspension without pay reduced to three days (file nos. 566-02-9644 and 9647)**

[55] Entered into evidence was a pass log for June 2 to July 24, 2013. A summary of its information was prepared and entered into evidence. There were 14 days with data points. The log disclosed the following:

- on 1 day, the grievor's pass was first used before 09:00;
- on 3 days, it was first used within 5 minutes after 09:00;
- on 10 days, it was first used more than 5 minutes after 09:00;
- of those 10 days, 5 times, it was first used within 20 minutes of 09:00;
- of those 10 days, 4 times, it was first used more than 30 minutes after 09:00;
- of those 10 days, 1 time, it was first used between 10:00 and 10:30; and
- of those 10 days, 1 time, it was first used after 10:30.

[56] Despite arriving late on some days, there is no evidence that the grievor did not put in full 7.5-hour workdays as required or submit leave requests when appropriate.

[57] On July 25, 2013, Mr. Jaltema met with the grievor and a bargaining agent representative to discuss her scheduled work hours. On July 26, 2013, he disciplined her by suspending her from work without pay for five days. The relevant portions of the letter of discipline, dated that day, state as follows:

...

*This letter follows our pre-disciplinary meeting of July 25, 2013 regarding work hours. You were given an opportunity at that meeting to explain why you have been unable to adhere to set working hours. You were accompanied by your union representative . . . .*

*Prior to that meeting, I provided you with a copy of the record I obtained of your use of your access card to enter the workplace with the times and dates of entry. We also spoke on several occasions about the need to keep consistent working hours from 9am-5pm since you joined the Governance Section on April 1 of this year. Three weeks ago, on July 4, 2013 you were issued a disciplinary three (3) day suspension from work for failure to adhere to working hours. At that time, you committed to adhering to the scheduled working hours. Despite these prior discussions, clear expectations, and a very recent disciplinary action, you have not been keeping consistent working hours.*

...

*... At our meeting on July 2, 2013 you committed to using your access card every morning when you arrive at work. I will continue to monitor your punctuality through reviewing the time of day that you enter the building using your access card. These reports should indicate to me that you have entered the building by 9am on work days [sic].*

...

[58] The evidence disclosed that the grievor did not receive the pass logs until or about the time of the disciplinary hearing.

[59] On February 6, 2014, after the third level of the grievance process, this discipline was reduced to a three-day suspension.

**F. The February 7, 2014, discipline: five-day suspension without pay (file no. 566-02-10121)**

**1. Attendance**

[60] When he was asked about the grievor's attendance after the July 26, 2013, discipline was imposed, Mr. Jaltema said that it seemed to improve somewhat but not to the extent he had expected. He also said that sometime around then, she raised a medical issue and provided a doctor's note dated August 1, 2013 ("the August 1 note"), which states as follows:

...

*This letter is to certify that due to a medical condition, Vivian requires some flexibility in her arrival time at work. On certain days when her medical condition is exacerbated, it may take her some additional time to prepare for work and this should be taken into account with regards to her start time.*

...

[61] On August 7, 2013, Mr. Montour emailed both the grievor and Mr. Jaltema with respect to the August 1 note, stating as follows:

...

*I acknowledge receipt of the medical note signed by Dr. Zahra Saleh dated August 1, 2013, that you gave me yesterday afternoon.*

*We are willing to provide you with the flexibility required. As such, you may start your workday between 7:30 am and 9:00 am. Your work day [sic] will end between 3:30 pm and 5:00 pm depending on your arrival time.*

*Should you not be able to arrive before 9:00 am, I ask that you give your manager, or myself while he is on holiday, a call before 9:00 am to advise that you will be late and give us your arrival time. As explained in the doctor's note, on certain days when your medical [sic] is exacerbated, you may not be able to arrive for 9:00am. Should this be the case, we will ask you to submit a sick leave request since your late arrival would be due to your medical condition. Please not that if your medical condition is such that you are not capable to prepare for work on time, your capacity to perform work on that day might be diminished. I would therefore encourage you to take the whole day as sick leave and get good rest at home.*

...

[62] Mr. Jaltema testified that while he was aware of Mr. Montour's email, the grievor had told him that the flex hours start time had to be between 08:00 and 09:30. On August 21, 2013, Mr. Jaltema and the grievor met and discussed the matter. On August 27, 2013, he emailed her, as follows:

...

*This letter follows our meeting of August 21, 2013 regarding your request for special consideration for your work hours due to a medical condition. At that meeting, you shared new information about your medical condition and why it is a challenge for you to adhere to consistent working hours in the morning and respect a 9am start time.*

...

*... Though you had already been given a flexible work arrangement allowing you to come to work within a 90 minute window (arrival between 7:30am and 9am and ending work between 3:30pm and 5pm), you explained that you wish to have that window be changed to accommodate a later start time, due to your doctor's availability. I thanked you for your openness in voluntarily offering more information about the nature of your medical needs. I committed to considering your request, in light of*

*the operational context and a duty to reasonably accommodate your medical needs. This letter, and today's meeting, are a response to that meeting.*

*I will accommodate your request for a later flexible arrival and departure time from the office, to meet your medical needs. Your arrival time will therefore be between 8am and 9:30am on work days, with a departure time of between 4pm and 5:30pm, depending on your arrival time that day.*

*Your flexible working arrangement does not exempt you from being on time for work, or disciplinary action if you fail to do so. You are expected to work for 7.5 hours per day, with two 15 minute rest periods, one in the morning and one in the afternoon, when operational conditions permit, and a 30 minute lunch. Should your medical condition prevent you from being available to come to work before 9:30am, you must phone me to inform me of your tardiness, and you must enter the time late appropriately according to the type of leave taken. Whenever practical, late arrivals and doctor's visits should be planned in advance. Annual leave will not be issued for unplanned lateness. Unplanned lateness that is not sick leave or any other form of leave eligible in your collective agreement, it will be considered unauthorized leave, and will be deducted from your pay. Should you fail to swipe your access card before 9:30am, and fail to call ahead, you will be considered late, and disciplinary action may result. Similarly, you are expected not to work unauthorized overtime. Should you stay at the office beyond your regular working hours, disciplinary action may result. I will continue to monitor your adherence to working hours using your use of your access card. Because your working hours begin at 9:30am at the latest, you are expected to be at your desk ready to work by 9:30am. The card report should indicate that you have entered the work place before 9:30am, with 9:30am being the latest entry time acceptable.*

*In order to allow for this accommodation, your work duties will be modified to reduce the impact of your flexible work hours on internal and external stakeholders with whom you work. . . .*

. . .

[Sic throughout]

[63] Mr. Jaltema stated that at times, the grievor was late and did call. However, she did not consistently let him know in advance or seek approval. He said that sometimes, she arrived late, without explanation.

[64] Entered into evidence was a pass log for July 25 to August 16, 2013. There were 11 days with data points. The log indicated the following:

- on 2 of the days, the grievor's pass was first used before 09:00;
- on 5 of the days, it was first used within 5 minutes after 09:00;

- on 4 of the days, it was first used more than 5 minutes after 09:00;
- of those 4 days, the times shown were 09:06, 09:07, 09:09, and 09:28; and
- a handwritten note for August 16, 2013, indicated an initial pass use of 11:20.

[65] On August 15, 2013, Mr. Montour emailed the grievor (copying Mr. Jaltema). He reminded her of her work hours and advised her that on August 13 and 14, he had noticed that she was still in the office at around 17:30. He mentioned that not complying with her hours of work could lead to further disciplinary measures, up to and including termination of employment. She replied in email (copying Mr. Jaltema), stating that on August 13, she worked until 17:10 because she understood that he had wanted a briefing note by the end of the day, and that on August 14, she worked until 17:05. She then stayed to clean her office and left at 17:25.

[66] Entered into evidence was a series of emails dated from August 16 to September 12, 2013, between the grievor, Mr. Jaltema, and Kimberley Heuckroth (who acted for Mr. Jaltema on August 16, 2013). On that day, the grievor arrived sometime between 11:10 and 11:20. She called Ms. Heuckroth and emailed her. Also entered into evidence was an email from Mr. Jaltema dated September 19, 2013, reporting to labour relations (LRs) that the grievor had arrived late on August 16, at 11:20, on August 28, at 09:32, and on September 13, at 09:31. In his email, he suggested continuing to monitor her but to take no action.

[67] Entered into evidence were pass logs for September 13, 2013, to January 6, 2014, which had data points for 52 days and indicated the following:

- on 38 of the days, the grievor's pass was first used before 09:30;
- on 7 of the days, it was first used within 5 minutes after 09:30;
- on 4 of the days, it was first used within 10 minutes after 09:30, including once at 09:37 and 3 times at 09:38;
- on November 28, it was first used at 11:08 (due to her medical appointment, of which she had advised Mr. Jaltema); and
- on 2 other days, its first use was noted as 10:58 and 20:24 respectively.

[68] Entered into evidence was a pass log for January 7 to 13, 2014. There were 5 days with data points. It indicated the following:

- on 1 day, the grievor's pass was first used before 09:30;
- on 1 day, it was first used at 09:30;
- on 2 of the days, it was first used within 5 minutes after 09:30; and
- on 1 day, it was first used more than 5 minutes after 09:30, at 09:47.

[69] Entered into evidence was an email dated November 8, 2013, from the grievor to Mr. Jaltema stating that on Tuesday, November 12, she might be a half hour late because she had committed to making a dessert for the potluck that day, and she needed to prepare it in the morning. The pass log indicated that her pass was first swiped that day at 10:58.

[70] On January 13, 2014, the grievor emailed Mr. Jaltema, advising that she would start working at 09:00 as she had completed her therapy and had "completely recovered." Also on that day, Mr. Jaltema emailed LRs, copying Mr. Montour and stating as follows:

...

*I have reviewed the attendance during the period, and here is my analysis of the raw data:*

- *since October 4, 2013, Vivian has shown up just over two thirds of days that she has come to work either right at 9:30am, or just before*
- *this is not consistent with the instructions she was given (namely, that she should arrive before 9:30am, so that she is at her desk working by 9:30am)*
- *she arrived late for work 18 times during the period (later than 9:30am) - **including today***
- *of those 18 times, I note that 1 was for a doctor's appointment she notified me about in advance (28/11/2013) so shouldn't count*
- *of the remaining 17 times, she only told me about 3 of them (15/11/2013, 16/12/2013, and 07/01/2014) . . .*

...

- *she came to work 1 Saturday evening, and 1 Sunday evening, without a business reason I am aware of, and without prior approval (December 1 and 2).*
- *she arrived very early for work 1 day (6:34am), and then left, due to stress, and took a sick day (December 3) - which she later told me about as related to mental health. . .*



- *her card usage illustrates that she continues to stay at work later than 5:30pm despite several discussions, verbal and written instructions not to do so, in some instances very late, without authorization*
- *her card usage tells that she enters and leaves the workspace very frequently - for example, she entered through a security door 14 times on December 13*

...

[Sic throughout]

[Emphasis in the original]

## 2. “Rainbow of Hope”

[71] “Rainbow of Hope” was a project to build a school in an area of Peru devastated by an earthquake. The project was being coordinated out of Edmonton, Alberta. The grievor stated that her involvement started sometime in 2010. Michelle Veilleux was the manager responsible for the proposal.

[72] According to the grievor, the proposal contained misrepresentations. An email chain was entered into evidence. The first email was from the project manager in Peru. It was sent on January 19, 2014, and stated that he was sending documentation with respect to the transfer of land, a building, and equipment. It was sent following a conference call that included him, the grievor, and Ms. Veilleux. The grievor responded to him on January 22, 2014 (“the January 22 email”), stating as follows:

...

*Thank you for providing us with additional documentation about the school complex including the recently obtained construction permit. However, based on the notes that I took about a phone conversation held with Rainbow of Hope for Children’s CEO [name deleted] in September 2012 after he submitted his final project report attaching a statement (Constancia) from the ‘Direccion Regional de Educacion de Ica (DREI)’ through which it acknowledges receipt of the land where the complex was built, he informed me that Rainbow was the owner of the complex building and that in order to transfer it legally to the DREI and comply with the Contribution Agreement’s disposal of assets requirement, a declaration of factory was essential. He reiterated this requirement in several emails he sent me copying you to inform me about the progress you were achieving in obtaining such a document. I wish you much success in completing this process and transferring the complex building legally to the DREI.*

...

[73] The January 22 email was copied to Ms. Veilleux as well as the individual who had signed the contribution agreement. Ms. Veilleux responded that same day, copying Mr. Jaltema and stating as follows:

...

*I'm surprised by your email below.*

*I told you that from my point of view [the project manager] had provided sufficient proof of the transfer of the school to the Peruvian Government.*

*Please write him back that we considered that he has complied with this aspect of the contribution agreement. However, if he feels that it could be useful for the sustainability of the school, he could pursue to get a declaration of factory, but we will not continue to insist upon this document.*

*I consider that you have done your job to ensure the sustainability of the project.*

*The only aspect that could now require your follow-up [sic] would be related to the financial audit.*

*To conclude, I felt that the tone of your email was assertive and could be perceived as aggressive or non-collaborative.*

...

[74] On January 23, 2014, Mr. Jaltema emailed the grievor (copying Ms. Veilleux), stating as follows:

*The Manager responsible has determined that due diligence has been exercised, and that nobody is trying to "deceive" the Government of Canada, and it is clear that the Government of Canada interests have been addressed, and public funds safeguarded. The responsible Manager has explained this to you, and given you instructions in this respect, and you can document this to the project file. Now that aspect of the file is closed. The implication that the Manager is not concerned with due diligence or safeguarding public funds is an inappropriate and incorrect interpretation of the facts.*

*The way you have chosen to address this issue is serious and will be the subject of follow-up.*

...

[75] The grievor testified that the instruction she received in a one-on-one meeting with Ms. Veilleux was to close the file. In the hearing, when the grievor was brought to the January 22 email and asked what she had been doing, she responded that in her mind, she had been following that instruction. She stated that she did not agree with Ms. Veilleux's decision but that Ms. Veilleux had the final word. The grievor's

interpretation was that in their January 22 and 23 emails, Ms. Veilleux and Mr. Jaltema interpreted the January 22 email as non-compliance. She understood that her email could be interpreted differently.

[76] The grievor said that she felt that Ms. Veilleux was “testing” her project management skills and that she knew that the grievor had delegated authority. Ms. Veilleux was testing her to see if the grievor would accept what the local partner (in Peru) was telling her. She said that if it was a test, she wanted to play it safe, because Ms. Veilleux could revoke her authority. The grievor then admitted that she went overboard and that she felt that she became emotional and did not think it through.

[77] On February 6, 2014, the grievor sent a follow-up email to the January 22 email, which she described as “clarifying” because both Ms. Veilleux and Mr. Jaltema felt that the January 22 email was ambiguous. It stated as follows:

...

*Further to my email from January 21, 2014, Michelle Veilleux, Sustainable Economic Growth Section Manager, considers that Rainbow of Hope for Children has complied with contractual obligations for the disposal of assets based on the documents that you provided us. However, if you feel that it could be useful for the sustainability of the school complex, she says that you could continue with the declaration of factory process, but Partnerships for Development Innovation will not continue to insist that you do so.*

...

[78] In cross-examination, the grievor confirmed that at the third-level grievance hearing, she did not raise the potential of her delegated authority being at risk.

[79] The grievor created an eight-page printed document that was entered into evidence and that is entitled “Chronology of events – Insubordination and hours of work (Vivian Valderrama – June 30, 2014)”. She confirmed that it was created after the February discipline and during the grievance process. In cross-examination, she also confirmed that nowhere does that document refer to the concern of her delegated authority being removed. She also confirmed that nothing in her grievance presentation reflected that she felt that Ms. Veilleux was testing her.

[80] In her evidence-in-chief, the grievor did not disclose her exchanges with Mr. Jaltema and Ms. Veilleux between January 23 and February 6. The following are the relevant portions of those exchanges:

[The grievor to Mr. Jaltema (copying Ms. Veilleux), January 23 at 12:17:]

...

*Please note that I turned the page the moment that Michelle instructed me to stop doing due diligence on the legal transfer of the school. That is precisely why in the last line of the second paragraph, I am wishing them success in completing the transfer process and not asking them to submit a copy of the declaration of factory. . . . Nonetheless, as you indicate, I will send [the project manager] another email clarifying that I will no be following up on this particular issue as per management's instructions.*

*While my email can be characterized as stern, I really believe that it can also be characterized as polite. As for being unappreciative, I thanked [the project manager] for sending additional documentation. . . .*

*Perhaps Michelle could clarify why she thinks my message could be perceived as 'aggressive or non-collaborative'. In what sense?*

*I really thought that management would have appreciated my pointing out to Rainbow in an indirect and polite manner that they are incurring in contradictions: the CEO informing me that Rainbow owned the complex building and that the declaration of factory was essential for the legal transfer of the school, and sending me updates prepared by [the project manager] himself about the progress made in this regard. And [the project manager] telling Michelle and I during the meeting that the declaration of factory is not necessary and that it is only a land title. Actually the declaration of factory is the following:*

...

*Given all of the above, I have to conclude that at Rainbow, it seems that the right hand does not know what the left is doing, or that Rainbow is trying to deceive DFATD hoping to have their holdback payment released to them.*

*In any event, I won't follow up on this, since Michelle instructed me to stop doing due diligence with regard to the legal transfer of the school complex to the local authorities, and, implicitly, exercising my duty as a public functionary, to protect the Canadian Government's interests and tax payers moneys.*

[Sic throughout]

...

[The grievor to Ms. Veilleux (copying Mr. Jaltema), January 29 at 16:45:]

...

*Please accept my apologies for insinuating that you may not be concerned about protecting the interests of the Government of Canada and taxpayers' moneys [sic]. As a project officer, I take this responsibility so seriously that sometimes it clouds my reasoning. Rest assure [sic] that this won't happen again.*

...

[Ms. Veilleux to the grievor (copying Mr. Jaltema), February 4 at 15:11:]

...

*Did you send an email to [the project manager] on the fact that we considered that he has complied with the contribution agreement as I ask you to do?*

...

[The grievor to Ms. Veilleux (copying Mr. Jaltema), February 4 at 16:33:]

...

*I haven't done it yet. I wanted first to discuss this issue with Steve, as I consider it a very sensitive one that could have re-precautions [sic] for DFATD for the following reasons:*

- 1) setting a precedent (it could be taken as though Rainbow is given a [sic] special treatment);*
- 2) if there is an ATIP about this project the legal transfer document (declaration of factory) may not be part of it, since Rainbow is being given the choice to obtain this document or not.*

*This discussion took place yesterday. I presume he informed you about it. Since I have done my job as a project officer to red flag issues to management, the text of the email that I intend to send [the project manager], is the following:*

...

***Further to my email from January 21, 2014, Michelle Veilleux . . . considers that Rainbow of Hope for Children has complied with the disposal of assets of the Contribution Agreement that your organization signed in March 2009. However, if you feel that it could be useful for the sustainability of the school complex, she says that you could continue with the declaration of factory process so that the legal transfer of the school complex to the Direccion Regional de Educacion de Ica (DREI) is completed, but we will not continue to insist that you do so.***

...

*Please review the above text and let me know if you agree with it.  
Steve: I would also appreciate your approval.*

...

[Emphasis in the original]

...

[Mr. Jaltema to the grievor (copying Ms. Veilleux), February 5 at 17:22:]

...

*You have expressed your opinion on this matter, and management has taken a decision. Whether you agree or not with the decision taken, it is your job to implement management's decision based on the documentation provided my [sic] [the project manager]. You are instructed to immediately: 1) send Rainbows of Hope an email that clearly informs them that DFATD considers that they have complied with contractual requirements without asking for further documentation on the transfer for disposal of assets and that we will no longer request any further documentation; and 2) stop further challenging management's decision on this matter - the opportunity has passed and a decision has been taken.*

*Your email to [the project manager] should say the following:*

***Further to my email from January 21, 2014, Michelle Veilleux, Sustainable Economic Growth Section Manager, considers that Rainbow of Hope for Children has complied with contractual obligations for the disposal of assets based on the documents that you provided us. However, if you feel that it could be useful for the sustainability of the school complex, she says that you could continue with the declaration of factory process, but we will not continue to insist that you do so.***

*I expect you to follow these instructions without delay. Please copy both Michelle and myself on your email to [the project manager].*

...

[Emphasis in the original]

...

[The grievor to Mr. Jaltema (copying Ms. Veilleux), February 6 at 14:51:]

...

*I am sorry that you feel I am challenging Michelle's decision to inform [the project manager] that we won't follow up on the disposal of assets issue of Rainbow of Hope for Children's project in Peru any more. My intention has never been to do so. Let me remind you that when she asked me not to follow up on this matter any more [sic] and send an email to him accordingly, I carried out her instructions, even though I did not use her exact words in the email sent to him on Jan 21.*

*As I indicated to you during our meeting of Feb 3rd and restated in my reply to Michelle of the following day, I was of the opinion that it was better not to be too explicit about not continue [sic] insisting on the disposal of assets issue in the email to [the project manager], since there could be repercussions for DFATD at the later date for the reasons I pointed out in my email to her. I agree*

*that I should have discussed this with you and Michelle prior to sending my email to him. In any event, I would like to stress that I really believe that it was my duty as a project officer to red-flag issues to management. I regret that you have taken it as if I were challenging Michelle's decision.*

*I will send [the project manager] shortly another email using the text you have edited and will copy it to you and her.*

...

### 3. Discipline

[81] On February 3, 2014, Mr. Jaltema met with the grievor and her bargaining agent representative to discuss her attendance and the Rainbow of Hope file. On February 7, 2014, he disciplined her by suspending her from work without pay for five days. The relevant portions of the letter of discipline dated that day state as follows:

...

*The present is pursuant to the disciplinary hearing that was held on February 3, 2014 during which you were accompanied by your union representative, Anna Bogdanthukral, and I was accompanied by Guillaume Séguin, Labour Relations Advisor.*

*During that meeting, you were provided with the opportunity to present your version of the facts with regards to your lateness at work and your interaction and attitude towards a colleague and an external partner (Rainbows [sic] of Hope) in an email exchange.*

...

*These acts of insubordination are serious and I am expecting you to immediately correct your behaviour. Any subsequent offences will not be tolerated and may result in more severe disciplinary measures up to and including dismissal.*

*During our meeting on February 3, 2014, you requested and I agreed to modify your working hours and as such, your new working hours are 9:00 a.m. to 5:00 p.m. Please note that I will monitor your attendance through the building access card system.*

...

[82] The evidence disclosed that the grievor did not receive the pass logs until or about the time of the disciplinary hearing.

#### **G. The April 13, 2015, discipline: 10-day suspension without pay (file no. 566-02-11621)**

[83] The grievor testified that between January and March of 2015, her 94-year-old mother, who had been living in Montreal, Quebec, began to live with her. She said that she tried to rise earlier, help her mother, and get things done ahead of time for her and

that a neighbour took care of her mother after lunch. As of the hearing, her mother had moved back to Montreal. The grievor admitted that she never disclosed any of it to her employer at the relevant time.

[84] Entered into evidence were pass logs for February 3, 2014, to March 5, 2015. There were 218 days with data points. They indicated the following:

- on 62 days, the grievor's pass was first used at or before 09:00;
- on 36 days, it was first used within 5 minutes after 09:00;
- on 120 days, it was first used more than 5 minutes after 09:00; and
- of those 120 days, on 43 days, the first use was more than an hour past 09:00.

[85] Breaking down the pass logs of February to August 31, 2014, which contain 120 days with data points, indicates the following:

- on 58 days, the grievor's pass was first used either at or before 09:00;
- on 31 days, it was first used within 5 minutes after 09:00;
- on 31 days, it was first used more than 5 minutes after 09:00;
- of the 31 days of the first use being more than 5 minutes after 09:00, the times shown of first use were as follows:
  - 3 times at 09:06,
  - 4 times at 09:07,
  - 2 times at 09:08,
  - 2 times at 09:09,
  - 1 time at 09:10,
  - 2 times at 09:11,
  - 1 time each at 09:12, 09:13, and 09:15, respectively, and
  - 2 times at 09:16; and
- of those same 31 days, on 11 of them, the first use was more than an hour past 09:00.

[86] Breaking down the pass logs of September 2014 to March 5, 2015, which contain 96 days with data points, indicates the following:



- on 4 days, the grievor's pass was first used either at or before 09:00;
- on 5 days, it was first used within 5 minutes after 09:00;
- of the 96 days, on 87 days, it was first used more than 5 minutes after 09:00;
- of those 87 days, on 29 days, the first use was between 09:07 and 09:29;
- of those 87 days, on 9 days, the first use was between 09:30 and 09:35, and on 4 days, the first use was between 09:37 and 10:00;
- of those 87 days, on 31 days, the first use was after 10:00; and
- of those 31 days, on 18 days, the first use was more than 3 hours after 09:00.

[87] In her evidence-in-chief, the grievor admitted that between mid-October of 2014 and March of 2015, she was late a couple of times per week. She stated that she arrived between 09:15 and 09:20.

[88] On March 31, 2015, Mr. Montour met with the grievor, her bargaining agent representative, and Mr. Jaltama to discuss her scheduled work hours. On April 13, 2015, Mr. Montour disciplined her by suspending her from work without pay for 10 days. The relevant portions of the letter of discipline dated that day ("the April 13 letter") state as follows:

...

*The present is pursuant to the disciplinary hearing that was held on March 31, 2015 during which you were accompanied by your union representative, Anna Bogdan, and I was accompanied by Steve Jaltama, Deputy Director of the Governance Section (KGG) and Guillaume Séguin, Senior Labour Relations Advisor.*

*During that meeting, you were provided with the opportunity to present your version of the facts with regards to your lateness at work.*

*I have reviewed all the information gathered and considered the explanation that you provided during our meeting. You acknowledged the facts that you have been arriving late to work on numerous occasions since mid-October because of personal reasons and indicated that you didn't inform your supervisor because you were hoping that your personal situation would get better. I have determined that your behaviour constitutes insubordination.*

...

*This act of insubordination is serious and I am expecting you to immediately correct your behaviour. Any subsequent offences will*

*not be tolerated and may result in more severe disciplinary measures up to and including dismissal.*

*I must remind you that your hours of work are 9:00 a.m. to 5:00 p.m. Please note that management will continue to monitor your attendance through the building access card system.*

...

[Sic throughout]

[89] The evidence disclosed that the grievor did not receive the pass logs until or about the time of the disciplinary hearing.

**H. The October 14, 2015, discipline: 20-day suspension without pay (file no. 566-02-12603)**

[90] On April 29, 2015, the grievor requested a change to her hours of work from 09:00-17:00 to 09:30-17:30 due to a family situation. It was granted, which was confirmed in an email from Mr. Jaltema on May 1, 2015. The date on which the change was implemented was not clear in the evidence. It could have been that date.

[91] Entered into evidence were the grievor's pass logs for April 28, 2015, to the end of July 2015; however, 3 logs were for April 28 to 30, 2015. There were 57 days with data points. The pass log for May 1 to the end of July 2015, indicated the following:

- on 19 days, her pass was first used either at or before 09:30;
- on 9 days, it was first used within 5 minutes after 09:30;
- on 29 days, it was first used more than 5 minutes after 09:30;
- of those 29 days, on 9 days, it was first used between 09:35 and 10:00, and on 1 day, it was at 10:15; and
- of those 29 days, 19 entries are more than 1 hour after 09:30.

[92] With respect to April 28 to 30, 2015, the pass log shows first uses at 09:09, 09:33, and 09:12, respectively.

[93] The grievor produced into evidence a document that set out her recorded arrival times for May 5 to July 24, 2015, covering 27 days on which information was recorded. It stated the following:

- on 17 days, the time recorded showed that she was at work either at or before 09:30;

- on 5 days, the time recorded showed that she was at work within 5 minutes after 09:30;
- on 2 days, no time was indicated, just “late arrival informed to supervisor”;
- on 1 day, a certified medical appointment was recorded; and
- on 1 day, it was recorded that she had attended a session outside the office that her supervisor had approved.

[94] In her evidence, the grievor confirmed that she had not shown that document to Mr. Jaltema.

[95] The grievor produced into evidence a document entitled “Vivian Valderranma [sic] – Work Hours July 2015”. It addressed instances of recorded times from the pass logs that she disagreed with and set out the following:

- with respect to the recorded July 7 entry time of 12:44, she stated that she had a pre-approved medical appointment;
- with respect to the recorded July 8 entry time of 11:53, she stated that she arrived at work at 09:30;
- with respect to the recorded July 15 entry time of 09:28, she stated that she arrived at work at 09:30;
- with respect to the recorded July 16 entry time of 10:47, she stated that she informed her supervisor that she would be late and had approved vacation leave;
- with respect to the recorded July 17 entry time of 13:20, she stated that she arrived at work at 09:30;
- with respect to the recorded July 20 entry time of 09:28, she stated that she arrived at work at 09:30;
- with respect to the recorded July 21 entry time of 09:48, she stated that she informed her supervisor that she would be late and had approved vacation leave;
- with respect to the recorded July 23 entry time of 09:59, she stated that she arrived at work at 09:30; and

- with respect to the recorded July 24 entry time of 11:55, she stated that she arrived at work at 09:30.

[96] In the document, the grievor also stated that there were discrepancies between the times set out in the pass log as her first entries into the workplace and her actual arrivals. She stated both in the document and in her testimony that at times, when she arrived, the door was open or held open for her, and she then entered.

[97] On August 17, 2015, Elissa Golberg, Assistant Deputy Minister, Partnerships for Development, Innovation Branch, met with the grievor, her bargaining agent representative, and Michelle Veilleux, the grievor's acting supervisor, to discuss the grievor's attendance. On October 15, 2015, Ms. Golberg disciplined the grievor by suspending her from work without pay for 20 days. The relevant portions of the letter of discipline dated that day state as follows:

...

*The present is pursuant to the disciplinary hearing that was held on August 17, 2015 during which you were accompanied by your union representative, Shahrzad Sedigh, and I was accompanied by Michelle Veilleux, acting Director General, Sustainable Economic Growth (KGD) and Guillaume Séguin, Senior Advisor, Labour Relations Center of Expertise (HSSS).*

*During that meeting, you were provided with the opportunity to present your version of the facts with regards to your lateness at work.*

*I have reviewed all the information gathered and considered the explanation that you provided during our meeting. The card reports [pass logs] suggest that you have been late on several occasions between May and August 2015. You were informed on different occasions that management would continue to monitor your attendance through the building access card system. I find that, based on the balance of probabilities, you have been late on numerous occasions without providing any justification. I have therefore determined that your behaviour constitutes insubordination.*

...

*This act of insubordination is serious and I am expecting you to immediately correct your behaviour. Any subsequent offences will not be tolerated and will result in the termination of your employment.*

*I must remind you that your hours of work are 9:30 a.m. to 5:30 p.m. Please note that management will continue to monitor your attendance through the building access card system and that you are required to swipe your card each day when you arrive. . . .*

...

[98] The evidence disclosed that the grievor did not receive the pass log until or about the time of the disciplinary hearing.

[99] The grievor stated that in preparation for her grievance hearing, she reviewed her pass-log records and reached out to colleagues to determine whether she had arrived at work on time or late.

### **III. Summary of the arguments**

#### **A. For the employer**

[100] The grievor chose not to comply with basic directions.

##### **1. Attendance**

[101] With respect to the lateness issue, the grievor had been given clear instructions and expectations. Without notice or justification, she was repeatedly late. She was given warnings to no avail and continued to arrive late. Minor discipline was imposed, which later became more serious.

[102] The grievor had been provided with the March 12 letter before Mr. Jaltema became her supervisor. After that, he was concerned by her tardiness, which was validated by the pass logs that he requested and received.

[103] Despite being warned and disciplined, the grievor's attendance behaviour did not change. The tardiness pattern continued, which was serious.

[104] There was a lull between July of 2013 and January of 2014, during which Mr. Jaltema gave the grievor time to improve. She requested a medical accommodation, which was approved. It involved changing her set work hours. At some point, she advised Mr. Jaltema that the need for the medical accommodation had passed, and she returned to her 09:00 to 17:00 work hours. For a period, her attendance improved, but then, it slipped again. A review of the pass logs disclosed that she was frequently late, despite being told that she was being monitored and despite knowing the risks.

[105] The employer was clear. It informed her of her hours of work and that it was monitoring her arrival times. While it accepted that the grievor disagreed with how it was monitoring her, she was aware of the expectation.

[106] Even after four suspensions, the grievor continued to fail to adhere to her hours of work. While it appears trivial that at times, she arrived mere minutes after the designated start time, it was not. While the workplace was hardly a factory floor with specific needs and requirements, she had been repeatedly told and warned of the expectation of her and of the consequences. She was repeatedly reminded of the requirements, and repeatedly, she was late.

[107] The grievor's explanations do not stand up; they are lacking. Rather than showing up for work on time or admitting to her errors, her response was to challenge the pass logs' accuracy. At the end of the day, she had control over her access card and her access to the workspace.

[108] While at the end of the day, the grievor might have been unhappy with her work situation, and that unhappiness might have been legitimate, it did not justify a lack of respect for her work schedule, especially in the context of the consequences that had been made clear to her.

[109] The employer had concerns with respect to the grievor's attendance. It set measures and explained the consequences. It balanced her needs with its needs and those of other employees, and it took external stakeholders into account. Mr. Jaltema testified that he required consistency and that he had to apply it in a balanced way to meet the obligations of the organization. When she needed and requested an accommodation, it was granted, and her work hours were adjusted accordingly.

## **2. Amex card**

[110] With respect to the Amex card, the discipline was reduced from three days to one day. This was done despite the fact that the grievor had previously received a warning.

## **3. Rainbow of Hope**

[111] The grievor's behaviour with respect to the Rainbow of Hope situation was clearly insubordination. She was involved in two weeks of back-and-forth messaging with her superiors. She was supposed to take action but did not. Her email response to Ms. Veilleux was offensive; she questioned Ms. Veilleux's fiscal probity.

[112] The employer referred me to *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 CLRBR 1, *Cooper v. Deputy Head*  

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

(*Correctional Service of Canada*), 2013 PSLRB 119, *Nowoselsky v. Treasury Board (Solicitor General Canada)*, PSSRB File No. 166-02-14291 (19840724), [1984] C.P.S.S.R.B. No. 120 (QL), *Bétournay v. Canada Revenue Agency*, 2012 PSLRB 128, *Byfield v. Canada Revenue Agency*, 2006 PSLRB 119, *Phillips v. Deputy Head (Canada Border Services Agency)*, 2013 PSLRB 67, *Beer v. Treasury Board (Solicitor General - Correctional Service Canada)*, PSSRB File No. 166-02-23075 (19930217), [1993] C.P.S.S.R.B. No. 75 (QL), *Leduc v. Treasury Board (National Defence)*, PSSRB File Nos. 166-02-15153 and 15779 (19860922), [1986] C.P.S.S.R.B. No. 238 (QL), *Riche v. Treasury Board (Department of National Defence)*, 2013 PSLRB 35, *Yarney v. Deputy Head (Department of Health)*, 2011 PSLRB 112, and *Morrow v. Treasury Board (Department of Natural Resources)*, 2017 FPSLRB 8.

[113] The employer repeated basic directions to the grievor. Again and again, she failed to meet them. The employer conveyed clear expectations and gave clear notice. She failed to abide by them.

[114] The employer acted reasonably in its efforts to try to regularize the grievor's behaviour.

[115] The employer requested that the grievances be dismissed.

## **B. For the grievor**

[116] The grievor submitted that I had to address the following four main questions:

1. Did the employer delay applying discipline?
2. Was there misconduct?
3. Was the discipline for the misconduct appropriate?
4. If the discipline was not appropriate, what is appropriate?

[117] The grievor submitted that even when a collective agreement does not impose time limits with respect to imposing discipline, the employer must sanction employees for wrongdoing reasonably expeditiously. If employees breach a rule, a delay addressing it can lead them to believe that their actions are being condoned.

[118] The delay dealing with the alleged tardiness made it difficult for the grievor to address it and account for her whereabouts when she was provided with the access-card logs at the disciplinary hearings.

[119] The employer could offer no explanation for the delay. When the delay was put to Mr. Jaltema in cross-examination, he indicated that the Assistant Deputy Minister got to the file as soon as she could. This was not appropriate; it was not sufficient with respect to applying the process. It should have been raised with the grievor and not allowed to stand over many months. The grievor referred me to *Canadian Union of Public Employees, Local 1718 and Valerie Dobson v. Stapleford Medical Management Inc.*, 2007 CarswellSask 132.

[120] A legitimate production request was made. The employer did not comply with it. The grievor's position was that she had legitimate reasons for not being at work on time.

[121] Article 25 of the collective agreement provides for flexible working hours. The employer did not apply it and denied the grievor flexible working hours. The evidence disclosed that she requested them numerous times and that her requests were denied. The evidence disclosed that she came into work between 09:30 and 10:00, while the employer wanted her to adhere to a 09:00 to 17:00 workday. The denial was punitive; the employer denied a right enshrined in the collective agreement.

[122] Mr. Jaltema inverted article 25. Rather than providing operational reasons, he asked the grievor to have her hours adjusted. There were no operational requirements for a 09:00 start time. Employees had different hours of work. The employer's only stated reason was to have employees at work at specific hours and to assign work and schedule meetings. There was no operational requirement.

[123] Hours of work are not the same as arriving to work on time. The employer set the grievor up to fail by assigning her start times that could not suit her commute, lifestyle, or past work schedule. The denial of the request for flexible work hours contributed in part to some of the late arrivals.

[124] Public transit and how the grievor got to work were not Mr. Jaltema's prerogative. He should not have made that assessment.

[125] There was no evidence of time theft, of a failure to attend work, of the grievor's work being administrative in nature and contingent on others, or of others' work being contingent on hers. There was no operational issue.



[126] The grievor did not dispute that work hours have to be consistent; however, the window could have been set to between 07:00 and 18:00. She referred me to *Cloutier v. Treasury Board (Department of Citizenship and Immigration)*, 2007 PSLRB 46.

[127] The grievor submitted that the employer failed to meet its burden of proof. The pass logs are flawed. She worked in a high-traffic area with an uncontrolled access point; there was no security desk. It is not disputed that she entered the area behind other colleagues. The system is not accurate to the minute.

[128] In the pass logs, some late entries can be explained, while some cannot. Managing an employee's attendance requires a manager checking whether the employee has arrived. The security logs may be relied on for only so much, and they do not excuse a lack of supervision. They help and are a guide but cannot be the only evidence. The grievor referred me to *Pronovost v. Canada Revenue Agency*, 2017 PSLREB 43, in which the principle of the logs is analogous to time sheets.

[129] The grievor also referred me to *BA International Inc. v. Amalgamated Transit Union, Local 279*, 2010 CanLII 17184, *The Government of the Province of British Columbia v. B.C. Government and Service Employees' Union* (2003), 116 L.A.C. (4<sup>th</sup>) 193, and *Canada Post Corporation v. Canadian Union of Postal Employees* (1990), 18 L.A.C. (4<sup>th</sup>) 64.

[130] With respect to the discipline related to the Rainbow of Hope school project, the grievor's actions fell short of insubordination or abusive conduct. Conduct that expresses disagreement is not insubordination. There was no evidence that she intended to disobey. Review the evidence. She did not defy a clear order. She referred me to *Lortie v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 108.

[131] With respect to the issue involving the Amex card, the grievor owned up to the mistake. It was a trivial event, and the evidence supports that she made an honest mistake. There is no evidence of fraud or of her not exercising caution.

[132] The grievor also referred me to *Pugh v. Deputy Head (Department of National Defence)*, 2013 PSLRB 123.

**C. Amount of the discipline**

[133] The grievor acknowledged that sometimes, she did arrive late to work. The severity of the punishment of the 10- and 20-day suspensions was excessive. An employer should take into account the seriousness of the offence and recognize that discipline is used to correct behaviour and that it should not be arbitrary or harsh. The employee's state of mind should also be taken into account. These are not necessarily equal and can be weighted when determining the penalty to impose on an employee.

[134] When the grievor's state of mind is considered, the question becomes whether her behaviour was premeditated. Her intention was to meet the requirements of being at work on time. She expressed herself in that manner, with deference, and complied with the collective agreement requirement by requesting flexibility under article 25.

[135] If there was insubordination, it certainly was not in the top tier of that behaviour; lateness is usually dealt with through an attendance management program. Otherwise, her behaviour was condoned. The grievor was placed on a progressive discipline path when the behaviour continued, which was still quite *di minimis*, all things considered.

[136] There is little to no evidence that the grievor's performance suffered.

**D. The employer's reply**

[137] The pass logs are clear. The grievor knew what was being assessed and counted. She had the opportunity to put evidence in front of the decision maker, which she did.

[138] A pattern appeared over time. There was no single, discrete incident of misconduct but instead a number of different incidents that became a pattern over time.

[139] While a number of times, the grievor was late by only a few minutes, at times under five minutes, she was still late. She was given opportunities to adapt to her hours (grace periods) to see if the pattern would return. The employer was not being heavy-handed.

[140] Either the grievor was regularly late, which was a pattern that the employer wanted to correct and that was proven by the pass logs, Mr. Jaltema's evidence, and the grievor's evidence, or the pass logs were inaccurate, because she either could not

or did not swipe her pass. On examining the pass logs, it is clear that she swiped her pass on entry, maybe not at 09:00 but at 09:45, and the time of 09:45 cannot be accounted for as her second or third workplace entry.

[141] There is a distinction between a breach of policy and insubordination. When dealing with insubordination, there is no obligation to prove intention. It requires only a clear refusal, not an employee purposely outwardly displaying an intention not to obey.

[142] With respect to the Rainbow of Hope school, the grievor was told to say one thing but said that another thing was more appropriate. That was still insubordination.

[143] With respect to article 25 of the collective agreement, the wording includes “shall not be unreasonably denied.” There is a reasonable test to apply. Operational requirements are set out in different ways in the collective agreement.

#### **IV. Reasons**

[144] Adjudication hearings with respect to discipline under s. 209(1)(b) of the *Act* are hearings *de novo*, and the burden of proof is on the respondent.

[145] The usual basis for adjudicating discipline issues is by considering the following three questions (see *Wm. Scott & Company Ltd.*): Was there misconduct by the grievor? If there was misconduct, was the discipline imposed by the employer an appropriate penalty in the circumstances? If the discipline imposed was not appropriate, what alternate penalty is just and equitable in the circumstances?

##### **A. Time, hours of work, and the collective agreement**

[146] Five of the grievances before me deal with discipline assessed against the grievor. Three relate only to the timeliness of her attendance at work, and two deal with both that timeliness and an isolated incident unrelated to her attendance. I will deal with the individual grievances and the misconduct particular to them separately in these reasons. However, certain aspects of the evidence and the argument on the timeliness of her attendance at work are the same for all the discipline and grievances.

[147] During the time frame covering the discipline that led to all the grievances, the grievor worked at Place du Portage in Gatineau and lived in downtown Ottawa. She worked days on a 37.5-hour workweek of 5 days per week, Monday through Friday,

meaning 7.5 hours each day. The collective agreement provided that those 7.5 hours were to be worked between 07:00 and 18:00.

[148] To access her work area, the grievor and other employees required a security pass, which is common in today's world. They are not unique to the employment world or the federal public sector. Employers issue passes to persons who are entitled to access certain areas of work locales. The passes are usually cards of some type with some form of embedded electronic or magnetic code that has to be activated in some way to unlock whatever security feature is used to control access. Most modern hotel keys are now of this form.

[149] Depending on the location, a tap or a swipe of a pass either opens a security gate or unlocks a door. The security-gate system is intended to ensure that only a person with a pass authorized to enter an area (or pass through a particular point) is granted access. If someone does not have a pass or his or her pass is not activated for a particular area, the gate will not open. Such gate systems appear common in modern rapid-transit or subway systems.

[150] The evidence before me disclosed that at Place du Portage, the security feature for the grievor's work area was a locked door. A swipe or tap of a pass unlocked the door and allowed entry. However, the evidence also disclosed that once it was unlocked, any number of people could enter as long as it remained open, which could be done by simply holding it open. In the security business, this is known as tailgating.

#### **1. The pass simply records when it is swiped or tapped**

[151] Entered into evidence were a series of pass logs that covered certain periods, including those that coincided with the time frames that the employer alleged that the grievor was late for work. Sometime in April of 2013, Mr. Jaltema started to use the security pass system to monitor her attendance. He did so at the employer's peril, as the pass logs merely contained information as to when the grievor actually swiped her card to enter the secure work area. Put more simply, the logs show when **she** unlocked the door.

[152] While Mr. Jaltema did tell the grievor that he would monitor her through the security system, the system simply records pass usage and not someone's actual attendance. Assuming that the grievor never let anyone use her pass, of which there is

no evidence, at best, the pass logs simply detail the times when she swiped or tapped her pass at secure access points, synchronized to a clock or timepiece internal to the security system.

[153] An employee could ostensibly tailgate into the work area every time. As such, he or she could be at work on any given day, and the pass logs would have no record of it. While this is unlikely to occur every time, it would not be unreasonable to say that during the morning rush hour, when large numbers of employees arrive at work, many of them tailgate into secure areas without actually swiping (or tapping) their passes.

[154] Employees can be at work on time without records being made of their passes being swiped.

## **2. The meaning of the times recorded in the pass logs**

[155] It is not uncommon these days for clocks or timepieces to be embedded into or to form part of the many electronic devices and appliances that exist in our modern world, such as landline telephones, smart phones, computers, microwave ovens, tablets, and televisions, to name a few of the most obvious.

[156] I note that in the Board's offices, there are four visible wall clocks, including in the kitchen. No two of them display the same time. A clock was at the back of the room in which this hearing took place; I noted that it did not display the same time as my watch or smart phone. Nor did it coincide with the times displayed on the Board's other four wall clocks.

[157] There was no evidence that the time recorded by the Place du Portage security system was accurate in relation to other clocks or timepieces, such as the grievor's work computer or telephone, let alone any wall clocks in her work area, her watch, her personal cell phone, or her smart phone.

[158] While Mr. Lavigueur testified that the security system's clock was accurate and that it was set to either Eastern Standard Time or Eastern Daylight Time (as the time of year dictated), and I suspect there was some measure of accuracy in the clocks, computers, and telephones in the grievor's work area, there was no evidence that they were synchronized to the time recorded in the security system. In short, depending on the wall clock, telephone, or computer system being relied on, the timepieces or equipment may display different times.

[159] The evidence disclosed that the grievor received the pass logs either close to or when her disciplinary hearings were held. There was no evidence that she was aware of the times that the security swipe-card system was recording.

[160] Given the potential for some difference between the clocks in the grievor's work area and the time pieces that she might have relied on, when I reviewed the pass logs, I grouped the times recorded as the first pass-swipe into a minimum of these three categories:

1. at or before the stated work start time (09:00 or 09:30, depending on the discipline and grievance);
2. within five minutes of the stated work start time; and
3. more than five minutes after the stated work start time.

[161] In short, given the incongruences with respect to determining the exact time, some buffer of time should be recognized to address the discrepancies and inconsistencies between the times that the grievor might have believed she was working with, be it from timepieces in her workspace, her home, or on her person, and those of the security system, of which she had no idea of the time it kept in relation to the timepieces that she might have relied on. That said, I am of the view that a buffer of five minutes would be reasonable to take into account any differences. As such, if the grievor arrived within five minutes of either 09:00 or 09:30 (depending on her start time), it should be considered that she was on time.

[162] Based on this, if I simply assesses the grievor's attendance based only on the pass logs, on a balance of probabilities, the following four things may be extrapolated from them with some degree of certainty:

1. If a swipe or tap of the pass was recorded before the grievor's designated start time (either 09:00 or 09:30), more likely than not, she had arrived at work on time.
2. If a swipe or tap of the pass was recorded within 5 minutes of her designated start time (either 09:00 or 09:30), more likely than not, she had potentially arrived at work on time.
3. If a swipe or tap of the pass was recorded more than 5 minutes after her designated start time (either 09:00 or 09:30) but less than about 15 to 30

minutes after it, it is more likely than not that those swipes or taps were accurate representations of her arrivals at work as she would not have arrived for work at the designated start time only to immediately leave and return within minutes of that time.

4. If a swipe or tap of the pass was recorded more than 30 minutes after her designated start time (either 09:00 or 09:30), without any other information other than the pass log, it is certainly possible that she tailgated into the workplace and that she then left it and returned.

### **3. The employer's method of monitoring the grievor's attendance**

[163] The employer chose to monitor the grievor's attendance by obtaining pass logs related to access points to the work area. I was provided with no evidence that swiping or tapping her pass was a term and condition of her employment.

[164] The grievor was not disciplined for failing to swipe or tap her pass. While she might have been told that Mr. Jaltema would monitor her that way and she might even have agreed to use her pass or try to use it, if she did not, it does not equate to her being late. Nor did her agreement to use her pass somehow change the burden of proof in a Board hearing such that she was imposed a reverse onus to disprove that she was late based on the information in the pass logs.

[165] There are much easier and more accurate ways to monitor attendance. The simplest, considering that she worked with a computer, was that Mr. Jaltema could have required her to email him upon her arrival at her desk. Logging in takes seconds, and emails have timestamps. The parties could quite simply have agreed that the time on the computer would be considered the accurate basis for her start time, and as such, there would have been no dispute.

### **4. Staying past her scheduled end time**

[166] At times in the evidence and the documents, mention is made that the grievor remained at work past her scheduled ending time (be it 17:00 or 17:30).

[167] There was no evidence that the grievor ever sought overtime for that time. Nothing suggests that employees are unable to remain in their work locations or offices past the time required to complete their 7.5-hour workdays. Clearly, this situation is reminiscent of *Pugh*, which the grievor referred me to.

[168] As will be set out later in this decision, on some days, the grievor arrived late to work. On those days, if she left at her specified end time, she was guilty of two separate types of misconduct, which are arriving late and time theft (not putting in a full workday).

[169] There was no evidence that the grievor was up to no good or something nefarious when she remained in the office past her scheduled end time. There was no evidence that she attempted to receive overtime pay. Remaining at work past 17:00 or 17:30, as was the case, did not meet the definition of misconduct.

## **5. The collective agreement**

[170] Clause 25.08 of the collective agreement allows employees the right to select and request flexible work hours between 07:00 and 18:00. This does not mean that they can come and go as they please or set or alter their work hours on a whim or at will, depending on their personal schedules. Employers are entitled to expect their employees to show up for work at their assigned or agreed upon hours of work. Flexibility can be governed by the type of work a particular work unit does as well as by the time-sensitive nature of that work.

[171] The evidence disclosed that before Mr. Jaltema became the grievor's supervisor, she had flexible start and finish times. The March 12 letter merely fixed her hours of work as of that date as from 09:00 to 17:00. The evidence before me clearly disclosed that she understood the change and that at least in the spring 2013 time frame, she agreed that she would adhere to those hours.

### **B. The July 4, 2013, three-day suspension (reduced to one day)**

[172] The alleged misconduct that resulted in the three-day suspension on July 4, 2013, was twofold in that the grievor did the following:

1. she did not maintain consistent working hours of 09:00-17:00, as agreed; and
2. she misused her government-issued Amex card.

#### **1. Attendance**

[173] The evidence established that on several occasions between April 2 and June 26, 2013, the grievor did not arrive to work on time. The evidence was a



combination of the pass logs, email correspondence between the grievor and Mr. Jaltema, and Mr. Jaltema's evidence.

[174] The grievor was well aware that her hours of work were from 09:00 to 17:00, Monday to Friday, which she acknowledged several times both verbally and in writing to Mr. Jaltema. The written confirmations were set out earlier in this decision. In addition, Mr. Jaltema kept his own record of her tardiness, which he raised with her and occasionally confirmed in writing.

[175] I am satisfied that the employer established that on a balance of probabilities, the grievor was late a number of times between April 2 and June 26, 2013. As such, despite the rather poor wording of the July 4, 2013 letter, misconduct occurred with respect to her attendance.

## **2. Amex card**

[176] The evidence also disclosed that the grievor misused her government-issued Amex card by using it for personal purchases. The evidence disclosed that she had done so in the not too distant past and that she had been warned about it approximately one year earlier, in July of 2012.

[177] The grievor admitted the misuse and explained that the Amex card looked like her personal credit card and that she had altered its PIN to match that of her personal card. While that certainly made things more convenient, had she left the PINs different, it might have alerted her to the fact that she had mistakenly taken out and used the wrong card. She should have known better and should have taken precautions. In addition, she admitted that she did not travel much on government business (hence the reason for voluntarily asking that the card be cancelled), and as such, the problem could have been easily alleviated by removing the Amex card from her wallet and leaving it somewhere secure, at either her home or her office. I am satisfied that the employer established that on a balance of probabilities, misconduct occurred with respect to the grievor's use of her governmental Amex card.

## **3. Quantum of discipline**

[178] As misconduct has been established, the only question left for me to determine is whether the discipline was appropriate in the circumstances. For the misconducts of both her tardiness and her misuse of the Amex card, the grievor was given a three-day

suspension without pay. During the grievance process, it was reduced to one day. I am satisfied that based on all the facts and the jurisprudence, the one-day suspension was not inappropriate; as such, I am not prepared to alter it.

#### **4. Breach of the collective agreement**

[179] As part of the grievance, the grievor alleged that the employer breached article 25 of the collective agreement. At some point in early June of 2013, she requested a change to her hours from a 09:00 to 17:00 to a 09:30 to 17:30 workday. Mr. Jaltema responded that if she demonstrated a consistent on-time arrival for a 09:00 start, he would grant the request.

[180] While in his evidence, Mr. Jaltema did explain the need for employees to have fixed daily hours of work as opposed to flexible start and end times (as the grievor had enjoyed before the March 12 letter), I heard no evidence as to why he did not change her hours from a 09:00 to a 09:30 start time, other than that she was unable to get in on time for 09:00. There was certainly no evidence of an operational requirement that would suggest that she could not fulfil her 7.5-hour workday between 09:30 and 17:30, as opposed to 09:00 and 17:00. Therefore, his refusal was a breach of the collective agreement.

[181] While the grievor's request in mid-June of 2013 might not have had a bearing on her tardiness before she made it, a change to 09:30 could certainly have negated her tardiness after that.

[182] The evidence did not disclose that the grievor did not put in a full 7.5-hour workday, despite her arrival times. It was not suggested that she was guilty of what is commonly referred to in employment law circles as time theft.

### **C. The July 26, 2013, five-day suspension (reduced to three days)**

#### **1. Attendance**

[183] The alleged misconduct that resulted in the five-day suspension of July 26, 2013, was that the grievor did not maintain the consistent working hours of 09:00 to 17:00 that she had agreed to.

[184] The employer relied on the pass logs for June 27 to July 24, 2013. As set out earlier, the pass logs detailed when the grievor swiped or tapped her pass at an access

location. Based on what I set out at the start of these reasons and on the pass logs, during this period, there were 14 days with pass data. Based on my finding that a pass swipe within 5 minutes of the set scheduled start work time would potentially be within the range of being on time, the pass logs disclose that the grievor was on time on 4 of the 14 days.

[185] Again, based on the pass logs, on 10 days, the first swipe of the grievor's pass occurred after 09:05. On 5 of those 10 days, the first swipe was noted as being within 20 minutes of 09:00. Based on what I determined and set out at the start of these reasons, it is highly unlikely that she arrived before 09:00, tailgated into her work area, went to work, and then left her work area, only to return within the first 20 minutes of the workday. Therefore, I find that on those 5 days, she was late for work.

[186] Of the 10 days on which the first swipe of the grievor's pass was made after 09:05, on 5 of them, the swipe was made more than 30 minutes after 09:00. Of those 5 days, 2 of the swipes were at 10:00 and 10:30, respectively. Based on what I set out at the start of these reasons, there is insufficient information, based solely on the pass logs and given the amount of time that passed since a 09:00 start time, to determine that the grievor had not entered before 09:00 by tailgating.

[187] I am satisfied that the employer established on a balance of probabilities that on at least 5 days between June 27 and July 24, 2013, the grievor was late for work.

## **2. Breach of the collective agreement**

[188] Also as part of this grievance, the grievor alleged that the employer breached article 25 of the collective agreement by not granting her requested change of work hours from a 09:00 to a 09:30 start time. As already set out in the section addressing the July 4, 2013, discipline, there was no reason compatible with article 25 to refuse her request. As such, I find that the employer was in breach of the collective agreement.

[189] If I view the information in the pass logs in light of the grievor's legitimate request to alter her start time to 09:30, and if it had been granted, the information indicates that she would have been at work on time 10 times.

[190] The original discipline in this matter was a five-day suspension. However, during the grievance process, it was reduced to three days. Based on the employer's

continued breach of the collective agreement, I am prepared to further reduce this discipline to a two-day suspension.

#### **D. The February 7, 2014, five-day suspension**

[191] The alleged misconduct that resulted in the second five-day suspension on February 7, 2013, was twofold in that the grievor did the following:

1. she did not maintain consistent working hours as agreed; and
2. she was insubordinate in her interactions with a colleague and external partner with respect to the Rainbow of Hope school project.

##### **1. Attendance**

[192] The letter of discipline dated February 7, 2014, was not specific as to the time frame considered with respect to the grievor's lateness in arriving at work. The disciplinary hearing on the discipline took place on February 3, 2014. As such, I suspect that the time frame covered would have been between the previous discipline (July 24, 2013) and February 3. As February 3 was a Monday, the period covered ostensibly was July 25, 2013, through January 31, 2014.

[193] Pass logs were available for July 25, 2013, to January 31, 2014, and the grievor's hours of work changed twice, as follows:

1. July 25 to August 16, 2013: her hours of work were 09:00-17:00;
2. October 4, 2013, to January 13, 2014: her hours of work were 09:30-17:30; and
3. January 14 to 31, 2014: her hours of work were 09:00-17:00.

[194] From July 25 to August 16, 2013, there were 11 days of data on the grievor's pass. Based on my finding that a pass swipe within 5 minutes of the set scheduled start work time would potentially be within the range of being on time, the pass log discloses that she was on time on 7 of the 11 days. For 4 of the 11 days, the pass log discloses entries at 09:06, 09:07, 09:09, and 09:28. Also based on what I determined and set out at the start of these reasons, it is highly unlikely that she arrived before 09:00, tailgated into her work area, went to work, and then left her work area only to return at 09:06, 09:07, 09:09, and 09:28. Therefore, I find that on those 4 days, she was late for work.

[195] From October 4, 2013, to January 13, 2014, the grievor's hours of work changed to 09:30 to 17:30. The pass logs for this period disclose 42 days of data on her pass usage. Based on my finding that a pass swipe within 5 minutes of the set scheduled start work time would potentially be within the range of being on time, the pass log discloses that she was on time or potentially on time for 35 of the 42 days.

[196] Of the remaining 7 days, the pass logs disclose that for 4 of them, the grievor arrived at 09:37 once and at 09:38 three times. Again, given a 09:30 start time and the fact that the clocks she relied on either in her home or in her office might have been off, arriving at 09:37 and 09:38 was late.

[197] The evidence disclosed that the first swipes on the remaining three days were made at 10:58, 11:08, and 20:24, respectively. As for the 11:08 swipe, which occurred on November 28, 2013, the evidence disclosed a medical appointment of which the grievor had advised her supervisor. As for the 10:58 and 20:24 swipes, based on what I determined and set out at the start of these reasons, there is insufficient information, based solely on the pass logs and given the amount of time that passed since a 09:30 start time, to assume that she had not entered before 09:30 by tailgating.

[198] From January 14 to 31, 2014, the grievor's hours of work changed back to 09:00 to 17:00. The pass logs for this period disclose 10 days of data on her pass. Based on my finding that a pass swipe within 5 minutes of the set scheduled start work time would potentially be within the range of being on time, the pass log discloses that she was on time or potentially on time on 4 of the 10 days. Of the remaining 6 days, on 3 of them, she arrived at 09:06, 09:07, and 09:11, respectively, and on the remaining 3 days, she arrived at 09:13, 09:15, and 09:18, respectively. Again, it is highly unlikely that she tailgated at or before 09:00 and then left the office area only to re-enter shortly after her 09:00 start time. Therefore, I find that during this period, the grievor was late on those 6 days.

[199] Based on my assessment of the evidence and my findings, the employer did establish that on a balance of probabilities, between July 25, 2013, and January 31, 2014, the grievor was late for work on 14 days.

## **2. Rainbow of Hope**

[200] The February 7 letter states that the part of the discipline with respect to this matter was for the grievor's "... interaction and attitude towards a colleague and an external partner (Rainbows [*sic*] of Hope) in an email exchange." Mr. Jaltema characterized the interaction and attitude as insubordination.

[201] With respect to the external partner, the email that was suggested as insubordinate was the January 22 email. Ms. Veilleux suggested in an email she sent the same day that the "tone" of the January 22 email was assertive and that it could be perceived as aggressive or non-collaborative. Perhaps she read and interpreted the email differently than I do. On the face of it, I do not read into it any tone. The facts with respect to the Rainbow of Hope school project as presented do not convince me that the grievor acted in a manner that could be characterized as misconduct.

[202] Had Ms. Veilleux testified, perhaps a clearer picture would have emerged such that I could understand why she and in turn Mr. Jaltema felt that the January 22 email was inappropriate. I suspect there is more to the story than the grievor and Mr. Jaltema have told me.

[203] The other part of the misconduct alluded to with respect to this portion of the February 7, 2014, discipline was also grounded on an interaction and attitude towards a colleague, who was identified as Ms. Veilleux.

[204] The email exchanges that follow the January 22 email clarify the facts somewhat and clearly indicate that the grievor felt that not all the steps necessary to protect the Canadian government's financial investment in the project were being followed.

[205] Entered into evidence was a copy of the V&E code. It contains a heading, "Stewardship", which could be described as part of the mission statement. The following is stated under it: "Federal public servants are entrusted to use and care for public resources responsibly, for both the short term and long term."

[206] I have no reason to doubt that as did her colleagues, the grievor had and continues to have a duty to protect the interests of the Canadian government, her employer, and Canadian taxpayers. At some juncture while doing so, I also have no doubt that their actions may move from a legitimate inquiry into what is appropriate or inappropriate into behaviour that would fall into the domain of misconduct.

[207] It is clear that based on the emails sent to Mr. Jaltema (copied to Ms. Veilleux), the grievor suggested that Ms. Veilleux was not doing what she was supposed to do to protect the government's financial investment in Peru. The relevant portion of the grievor's January 23, 2013, email stated as follows:

...

*... I won't follow up on this, since Michelle instructed me to stop doing due diligence with regard to the legal transfer of the school complex to the local authorities, and, implicitly, exercising my duty as a public functionary, to protect the Canadian Government's interests and tax payers moneys [sic].*

[208] In that sentence, the grievor clearly stated to both Mr. Jaltema and Ms. Veilleux that her view was that she had been instructed to stop acting prudently and to stop protecting the interests of the government and taxpayers. She clearly levelled against Ms. Veilleux a very serious allegation of mismanagement if not of an outright breach of her fiduciary duty.

[209] The grievor, Ms. Veilleux, and Mr. Jaltema have a duty to their employer; they are required to raise these concerns internally. That said, there are ways to appropriately raise concerns and discuss them, however difficult and heated those discussions may be, which can and should happen when one is entrusted with protecting the employer's assets. Substantive constructive facts should be presented and arguments made. The grievor's actions did not amount to this but instead were inappropriate statements that amounted to a sarcastic bald allegation of wrongdoing against Ms. Veilleux.

[210] To a certain extent, the grievor admitted it, as she did apologize to Ms. Veilleux in a later email on January 29, 2013, in which she said that she takes her responsibilities so seriously that "... sometimes it clouds [her] reasoning."

#### **E. Quantum of discipline**

[211] Since I established misconduct by the grievor with respect to both her lateness and her conduct as it related to the interaction with Ms. Veilleux on the Rainbow of Hope school project, the sole question I have to determine is whether the discipline of the five-day suspension was appropriate.

[212] It is not clear that any breakdown was done with respect to the amount of discipline that was accorded to the grievor's lateness versus the amount accorded to her interaction with and attitude towards Ms. Veilleux and the external partner.

[213] With respect to tardiness, it is clear that over the period starting as far back as March of 2013, the employer was concerned with the grievor's lateness on arrival.

[214] The evidence before me disclosed that despite having already been disciplined twice (via the three-day suspension and the five-day suspension that was reduced in the grievance process), the grievor did not alter her behaviour significantly enough to ensure that she arrived at work either on time or within a reasonable time after her scheduled start time.

[215] Given that discipline is supposed to be corrective, and given that the grievor had been disciplined before (at least in part) for the same behaviour and that that discipline had been reduced, I see no reason to alter the amount of discipline that would be accorded to her attendance issue.

[216] With respect to the misconduct characterized as an attitude and the interaction on the Rainbow of Hope school project, I have found that the grievor's behaviour towards Ms. Veilleux amounted to misconduct; however, she did apologize, almost immediately.

[217] As the five-day suspension was imposed for all the misconduct, and as I have found that the grievor did not misconduct herself with respect to the external partner, the discipline should be somewhat reduced. I would reduce it by one day. As such, the grievance in file no. 566-02-10121 is partially allowed, and the five-day suspension is reduced to a four-day suspension.

### **1. The April 13, 2015, 10-day suspension**

[218] The misconduct outlined in the April 13 letter relates only to the grievor's attendance. The operative part of the letter states as follows:

...

*During that meeting, you were provided with the opportunity to present your version of the facts with regards to your lateness at work.*



*I have reviewed all the information gathered and considered the explanation that you provided during our meeting. You acknowledged the facts that you have been arriving late to work on numerous occasions since mid-October because of personal reasons and indicated that you didn't inform your supervisor because you were hoping that your personal situation would get better. I have determined that your behaviour constitutes insubordination.*

...

[219] The April 13 letter does not set out specifically what period the discipline covers on the grievor's work attendance. However, given that it mentions that she had acknowledged arriving late to work since mid-October, and given that I was presented with no other evidence setting out the specific period covered, I shall take it that the employer considered the period as beginning on October 20, 2014 (the date of the pass log provided, starting in mid- to late October), and as ending on March 31, 2015, which was the date of the disciplinary hearing.

[220] That said, the pass logs entered into evidence included the period after February of 2014 to the end of March 2015, encompassing 218 days of data.

[221] From October 20, 2014, to March 31, 2015, the grievor's hours of work were from 09:00 to 17:00. The pass logs disclose 79 days of data on her pass usage. Based on my finding that a pass swipe within 5 minutes of the set scheduled start work time would potentially be within the range of being on time, the logs disclosed that she was on time or potentially on time for 3 of the 79 days. The logs also disclosed the following:

- 10 times, her first swipe was within 15 minutes after 09:00;
- 21 times, it was between 15 and 30 minutes after 09:00;
- 19 times, it was between 30 minutes and 1 hour after 09:00;
- 8 times, it was between 1 and 2 hours after 09:00; and
- 18 times, it was more than 2 hours after 09:00.

[222] Based on the pass logs, on 10 days, the first swipe of the grievor's pass was made after 09:05 but before 09:15. On 21 days, the first swipe was after 09:15 but before 09:30. Based on what I determined and set out at the start of these reasons, it is highly unlikely that she arrived before 09:00, tailgated into her work area, went to work, and then left her work area only to return within the first 30 minutes of the

workday. Therefore, I find that on at least 31 days during this period, she was late for work.

[223] On 19 days, the first swipe of the grievor's pass was made after 09:30 but before 10:00. Looking closer at this data, of those 19 days, on 15, the swipe was made between 09:31 and 09:41. Again, based on what I determined and set out at the start of these reasons, it is highly unlikely that she arrived before 09:00, tailgated into her work area, went to work, and then left her work area only to return within the first 30 to 41 minutes of the workday. Therefore, I find that on those 15 days of this period, she was late for work.

[224] The remaining days involve times that are late enough into the working day that the evidence is not sufficient on a balance of probabilities to prove that the grievor had not tailgated in at an earlier time and then left and returned.

[225] The grievor argued that condonation has occurred. In *Chopra v. Canada*, 2014 FC 246, the Court stated as follows at paragraphs 195 to 198, 205, 208, and 209:

*[195] . . . a long delay in imposing discipline may entitle an employee to assume that their conduct has been condoned by their employer, where no other warning or notice of potential discipline is given. Allowing employees to believe that their behaviour has been tolerated, thereby lulling them into false sense of security only to punish them later, is unfair to employees . . . .*

*[196] In assessing whether discipline ought to be set aside because of delay, arbitrators consider three main factors. These are the length of the delay, the reasons for the delay, and any prejudice caused by the delay . . . .*

*[197] Where there has been a delay in imposing discipline, an arbitrator is required to balance the employer's explanation for the delay against whatever prejudice has been suffered by the grievor as a result in order to reach a "just and equitable resolution of those competing interests". . . .*

*[198] The arbitrator in the Lawrie Grievance went on to observe that just as a grievor must pursue his or her grievance rights under a collective agreement in a timely fashion, "so may an employer lose its right to discipline an employee for alleged acts of misconduct because of delay in exercising that right". . . .*

. . .

*[205] . . . The relevant question was whether they [Drs. Chopra and Haydon] were made aware in a timely manner that their employer believed that their comments warranted discipline.*

. . .

[208] . . . Indeed, Health Canada allowed Drs. Chopra and Haydon to make numerous public statements over an extended period of time without ever advising them that it believed that their comments warranted discipline.

[209] Health Canada was aware of each of the applicants' public comments at, or shortly after the time that the comments were made. As a consequence, there could be no suggestion that the delay in imposing discipline could be justified on the basis that the employer had only recently become aware of Drs. Chopra and Haydon's comments.

[226] The facts disclosed that certainly for the discipline rendered on July 4 and 26, 2013, and February 7, 2014, the employer monitored the grievor's attendance, albeit in a questionable fashion by way of the pass logs, and that it disciplined her after relatively short periods. However, the discipline rendered on April 13, 2015, arrived 14 months after the previous discipline. While it appears that the discipline covered a period of only roughly 5 months, this assumes that the employer was considering only the period commencing in mid-October of 2014. The hearing on this discipline was held on March 31, 2015, and only then did she receive the pass logs. The employer could have brought the pass logs to her attention in a timely manner. It did not.

[227] It was certainly open to Mr. Jaltema to continue to monitor the grievor's attendance in a more hands-on way, such as by checking her workstation daily to see when she arrived or by asking her to email him on her arrival. He did neither. As such, the employer was left with evidence that was sometimes questionable and inaccurate.

[228] In fact, before me, when he was questioned about the grievor's attendance issues, Mr. Jaltema indicated that he did not believe that they had improved. Yet, despite having disciplined her progressively through a three-day and then two five-day suspensions, and with a view that her attendance had not improved, the employer did nothing about it between February 4, 2014, and the discipline hearing on March 31, 2015. Indeed, a review of the pass logs indicates that her attendance remained an issue, yet the employer did nothing about it.

[229] This is not to suggest that every act of misconduct for which discipline is not rendered quickly will be set aside, due to condonation. However, in these circumstances, the difficulty is that the grievor, who was being vigorously taken to task about her attendance, appeared to not have changed her ways and was not told anything for well over a year. If I follow the reasoning in *Chopra*, as set out earlier, it

was incumbent on the employer to act sooner than it did. As such, in these circumstances, the grievor has established condonation. Therefore, I find that despite the fact that the evidence disclosed that on at least 45 days, more likely than not, she was late for work, by delaying acting on it, the employer condoned her behaviour. As such, I am prepared to set aside the discipline.

## **2. The October 14, 2015, 20-day suspension**

[230] The misconduct alleged and set out in the letter of discipline of October 14, 2015, which resulted in the 20-day suspension, was that “[t]he card reports [pass logs] suggest that you have been late on several occasions between May and August 2015.”

[231] Again, the evidence that the employer relied upon was the pass logs. As set out earlier, the pass logs set out when the grievor swiped or tapped her pass at an access point. The letter of discipline does not say when in May of 2015 the period commences; however, the pass-logs evidence covers that entire month. And the letter does not set out when in August of 2015 the time frame under consideration ends. However, since the disciplinary hearing took place on August 17, 2015, I assume that the time considered would have been up to and including that date. But no pass logs were entered into evidence after the end of July of 2015. As such, the evidence covers the three months of May, June, and July of 2015. During that period, the grievor’s hours of work were set at 09:30 to 17:30.

[232] Based on the pass logs, this period had 57 days of pass data. Based on my finding that a pass swipe within 5 minutes of the set scheduled start work time would potentially be within the range of being on time, the pass logs disclose that the grievor was on time on 28 out of the 57 days.

[233] Based on the pass logs, on 5 days, the first swipe of the pass was made after 09:30 but before 09:45. Based on what I determined and set out at the start of these reasons, it is highly unlikely that the grievor arrived before 09:30, tailgated into her work area, went to work, and then left her work area only to return within the first 15 minutes of the workday. Therefore, I find that on those 5 days, she was late for work. Likewise, the pass logs indicate that on another 5 days, the first swipe of her pass was made after 09:45 but before 10:00. For the reasons already set out, I find that also on those 5 days, she was late for work.

[234] Of the remaining 18 days, on 1 day, the first swipe of the grievor's pass is shown as being made after 10:00 but before 10:15. On 17 days, the first swipe was made after 10:30. Based on what I determined and set out at the start of these reasons, there is insufficient information, based solely on the pass logs and given the amount of time that passed since a 09:30 start time, to assume that she had not entered before 09:30 by tailgating and then left and returned.

[235] Therefore, I am satisfied that on a balance of probabilities, the employer established that on at least 10 days between May 1 and July 31, 2015, the grievor was late for work.

[236] It is clear from the evidence that the employer increased the discipline progressively as it assessed the grievor as reoffending. It started with a 3-day suspension. It then rendered two 5-day suspensions, a 10-day suspension, and finally, the 20-day suspension. It did reduce the initial 3-day suspension to 1 day and the initial 5-day suspension to 3 days, which I further reduced to 2 days. I reduced the third discipline from a 5-day suspension to 4 days. I allowed the grievance on the 10-day suspension based on the principle of condonation. Given that I have found that the grievor was late on at least 10 days, and given that the employer had been using a process of progressive discipline, it would be appropriate to reduce the penalty from a 20-day suspension to a 10-day suspension.

## **V. Conclusion**

[237] In total, the grievor came before the Board with 5 grievances against discipline that totalled 39 days of suspension. I have reduced the discipline to a total of 17 days, and the employer is required to reimburse her the equivalent of 22 days of salary and any equivalent benefits, less the appropriate statutory and union dues deductions.

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

*(The Order appears on the next page)*

**VI. Order**

[239] The grievance in file no. 566-02-9644 is dismissed.

[240] The grievance in file no. 566-02-9645 is partially allowed. The five-day suspension that was reduced to a three-day suspension is further reduced to a two-day suspension as a remedy for the employer's breach of the collective agreement in the grievance in file no. 566-02-9647.

[241] The grievance in file no. 566-02-9646 is allowed.

[242] The grievance in file no. 566-02-9647 is allowed.

[243] The grievance in file no. 566-02-10121 is partially allowed. The five-day suspension is reduced to a four-day suspension.

[244] The grievance in file no. 566-02-11621 is allowed.

[245] The grievance in file no. 566-02-12603 is partially allowed. The penalty is reduced from a 20-day suspension to a 10-day suspension.

[246] The employer shall reimburse the grievor the equivalent of 22 days of salary and any equivalent benefits, less the appropriate statutory and union dues deductions.

December 2, 2019

**John G. Jaworski,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**