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



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

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BETWEEN

**GERMAIN PELLETIER**

Grievor

and

**CANADA REVENUE AGENCY**

Employer

Indexed as

*Pelletier v. Canada Revenue Agency*

In the matter of an individual grievance referred to adjudication

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

**For the Grievor:** Himself

**For the Employer:** Pierre-Marc Champagne, counsel

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Heard at Montreal, Quebec,  
October 23 to 26, 2018, and April 8 to 11 and May 28, 2019.  
(FPSLREB Translation)

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**REASONS FOR DECISION****FPSLREB TRANSLATION**

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**I. Individual grievance referred to adjudication**

[1] On March 18, 2015, the employment of Germain Pelletier (“the grievor”) with the Canada Revenue Agency (CRA or “the employer”) was terminated following an investigation by the employer’s Internal Affairs and Fraud Control Division (IAFCD), and his reliability status was revoked. The grievor filed a grievance against the termination and the revocation of his reliability status, which the employer dismissed. On April 1, 2016, he referred his grievance to adjudication before the Public Service Labour Relations and Employment Board, which became the Federal Public Sector Labour Relations and Employment Board (“the Board”) on June 19, 2017.

[2] The grievance read as follows:

[Translation]

*I challenge my termination as set out in the employer’s letter dated March 18, 2015. I find that the reasons in support of my termination are not founded in fact or in law. The employer acted abusively and was negligent in its analysis of the situation.*

*I also challenge the revocation of my reliability status.*

[3] The termination letter, signed by Henri Bettez, Director of the Western Quebec Tax Services Office (TSO) from 2014 to 2019, cites as the employer’s reasons for the termination the following:

[Translation]

...

*I carefully reviewed the information about you in the investigation report by the Internal Affairs and Fraud Control Division that mentions situations of grave misconduct in the performance of your duties in the Audit Division of the Western Quebec Tax Services Office of the Canada Revenue Agency (CRA).*

*Following my review, I find that you breached the CRA Code of Ethics and Conduct. In particular, you committed grave misconduct in performing your duties as a manager of Aggressive Tax Planning, the position you held as of the events.*

*You exceeded your authority by allowing files to be processed that were not under your responsibility. Specifically, you facilitated the processing of adjustment requests and voluntary disclosure files without your superiors’ knowledge and abused your authority by requiring that your subordinates process these files when this duty was not part of your business line. By doing so, you bypassed the*

*existing internal control rules. You also made unauthorized accesses and allowed transactions to be conducted with representatives who were not officially authorized on the taxpayer files in question.*

*Your actions, which constituted preferential treatment for those taxpayers, allowed them to reduce their tax debts and avoid applicable penalties. By doing so, clearly, you lacked loyalty to your employer and undermined the CRA's integrity and reputation.*

*In addition, the investigation found that you owned rental properties for which you did not make any confidential disclosures, which is a breach of the Directive on Conflict of Interest and Post-Employment....*

[4] The termination letter is dated March 18, 2015, but it states that the termination was to take effect retroactively to March 12, 2014, when the grievor was suspended from his duties, without pay, during the investigation.

[5] For the following reasons, I find that the grievor's conduct did not justify imposing discipline. I also find that his reliability status must be restored. Therefore, he should be reinstated to his position as of March 12, 2014, the date on which his employment was terminated.

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

### **A. The witnesses**

[6] The employer called the following to testify:

- Chris Docherty, Acting Director General, Security and Internal Affairs Directorate;
- Jacynthe Tremblay, Director, Western Quebec TSO (which includes the Laval, Gatineau, and Rouyn-Noranda TSOs), in 2013 and 2014 (now retired);
- Joël Tremblay, Investigator, IAFCD;
- Serge Gagné, Investigator, IAFCD;
- Marie-France Leduc, Investigator, IAFCD;
- Garnel Augustin, Auditor, Laval TSO (now retired);
- Jean-Paul Dufour, Auditor, Laval TSO (now retired);

- John Lyssikatos, Assistant Director, Audit, Laval TSO (now retired); and
- Henri Bettez, Director, Western Quebec TSO, from 2014 to 2019 (now retired).

[7] The grievor testified and called Gabriel Lavoie, Team Leader, Workload Development, 2010 to 2015 (now retired).

## **B. The investigation**

[8] The employer adduced as evidence the investigation report on the grievor's alleged misconduct. It is clear from the testimonies that the investigation findings were the basis for the termination. Therefore, the investigation report must be analyzed in detail.

[9] Mr. Tremblay is one of three investigators who participated in the investigation, along with Ms. Leduc and Mr. Gagné. At the hearing, he explained that a preliminary investigation in January 2014 led to an in-depth investigation beginning in March 2014. The grievor was suspended without pay on March 12, 2014, when the in-depth investigation began. The preliminary investigation consisted of verifying electronic leads; the in-depth investigation included reviewing documents and interviewing people who might have had information.

[10] Mr. Tremblay indicated that an investigation of two other employees led the IAFCD to 21 “[translation] questionable files” that implicated the grievor. Those 21 questionable files were the beginning of the investigation and, ultimately, would be its essential content.

[11] Mr. Tremblay explained that first, the investigation focused on a review of paper and electronic documents relating to the questionable files. The starting point was the Audit Information Management System (AIMS), in which auditors record their work on files. The AIMS provides information such as the file number, the taxpayer's name, the auditor, the type of audit, the number of hours the auditor spent on the file, the supervisor's name, and the CRA program under which the file is being processed.

[12] Each of the 21 questionable files is studied in depth in the investigation report. I will review them in the following paragraphs. To preserve the confidentiality of the taxpayers' information, they are identified only by initials. I identify the employer's

witnesses by their names. I identify employees involved in this case only by their initials. It would be unfair to tarnish their reputations given that they were not present at the hearing to defend their interests. Similarly, I identify people from outside the CRA who were involved in this case only by their initials.

[13] I note that in this decision, the terms “supervisor” and “team leader” are synonymous and are used interchangeably. Auditors report to a team leader, and team leaders report to a manager. From June 2009 to September 2013, the grievor was a manager in small and medium enterprise (SME) audit. (The termination letter incorrectly indicates that he was a manager in Aggressive Tax Planning.) Ten team leaders reported to him, including PS, MM, and MA, who are mentioned often in the evidence. Before being appointed to SME audit, from July 2003 to June 2009, the grievor was the team leader of International Tax. From April 2008 to June 2009, his manager was GM.

## **1. Files**

### **a. The RA file**

[14] This file was opened on October 27, 2009, and closed on November 16, 2009, and was checked by the supervisor on December 3, 2009, according to the AIMS. The auditor was Jean-Paul Dufour, and his team leader was PS. A note in the file indicates that a Mr. GW brought the RA file to the Laval TSO and met with the grievor, who asked Mr. Dufour to process the file.

[15] It should be noted that Mr. Dufour’s name comes up often in the questionable files. He testified at the hearing. He was unable to confirm that in fact the grievor had given him the RA file. When he was asked who had given him the files on which he worked according to the investigation report, he spontaneously replied PS, MM, and MA.

[16] According to the investigation report, the auditor processed the RA file in an extremely summarized manner. There was no audit of numbers and no financial statement. There were just totals that led to an amount to be paid in taxes for the previous three years, with no penalty or justification for the lack of one.

[17] The audit sheet is signed by PS, as it should have been, as she was the team leader. However, in the note in the file, Mr. Dufour indicated that he presented the

results of his audit to the grievor on November 4, 2009. Mr. Dufour could not explain or confirm that note at the hearing.

[18] The only link to the grievor is the fact that his name appears in Mr. Dufour's notes. At the hearing, he could not confirm that the grievor had in fact assigned him the file.

**b. The LA and LE files**

[19] These files were processed together. The taxpayers were spouses. Like in many other files, they were assigned to an audit program known as the "Deeds Project". For now, I will simply note which files were assigned to that project (17 of the 21 files). Later on, I will explain the Deeds Project.

[20] The auditor on these files was Mr. Dufour. The supervisor was MA, another team leader who reported to the grievor. The note in the file indicates the following:

[Translation]

*Germain Pelletier gave me the LA file and advised me that it was a new client of [OPC] and that Mr. [OF] gave him the attached file adjustment request to audit because he did not want to take on a new client without a tax check, to ensure that everything was legit.*

[21] According to the AIMS, the first file was opened on February 9, 2010, and the second on February 10, 2010, and they were completed on May 20, 2010. The closing date for both files in the notes in the file is April 27, 2010. Mr. Dufour could not explain the date discrepancy in the notes in the file or confirm that in fact the grievor had assigned him the files.

[22] The audit was very much a summary. In addition, the evidence indicates that a taxpayer (or his or her representative) is not supposed to contact the audit section to have an audit conducted; the section determines which taxpayers will be audited. The evidence also shows that the process is more like a voluntary disclosure, which falls under another CRA area.

**c. The CD file**

[23] This file was processed between March 16 and 18, 2009. The auditor on this file was Garnel Augustin, for whom the grievor was the team leader.

[24] The notes in the file indicate that the grievor assigned the file to Mr. Augustin. It consisted of an amended tax return with an assessment but no penalty.

[25] In relation to this file, found on the grievor's computer was a draft agreement setting the amount of additional income that CD reported and an estimate of the taxes payable. In return, the taxpayer would agree to not exercise the taxpayer's rights to recourse under the *Income Tax Act* (R.S.C. 1985, c. 1 (5th Supp.); *ITA*).

[26] The agreement was created on February 25, 2009, and apparently, the grievor made the last amendment. The people whose names appear for signatures (the agreement was not signed) are GD, GM, the grievor, and a representative from Revenu Québec. The heading indicates that the agreement is between CD and the CRA, as represented by GM.

[27] When this file was processed, the grievor was a team leader in International Tax. His manager was GM.

[28] According to the report, the file was processed incorrectly, and the agreement was highly irregular. I note that it is not signed.

**d. The AA file**

[29] The grievor's name does not appear anywhere in this file or in any of the other remaining files, except one. The only link to him is the fact that the auditor's supervisor reported to him. In other words, his name does not appear in 17 of the 21 questionable files.

[30] The file was assigned to the Deeds Project. The auditor was Mr. Dufour, and the supervisor was MA. The file was opened on March 26, 2010, and revised by MA on May 20, 2010. An agreement offer prepared by Mr. Dufour was dated March 26, 2010, indicating unreported interest on foreign investments.

[31] Other than the fact that the grievor's name is not in the notes in the file, the first note is very similar to the one in the LA file; it is a new client of the OPC accounting firm, and Mr. OF asked for an audit to ensure that his new client was "[translation] legit".

[32] Once again, the file was processed in a much summarized manner, and it lacked all supporting documents and any analysis. The client was entitled to a reassessment, without a penalty.

[33] In this file, the representative indicated is not the firm OPC.

**e. The CN file**

[34] The data in this file are similar to those in the last file. It has the same auditor and supervisor, same opening and revision dates, same source, i.e., the firm OPC, and the same explanation in the notes in the file. Again, the representative indicated in the file is not the firm OPC. The file was assigned to the Deeds Project.

[35] This file also seems to have been processed in a much summarized manner, and no penalty was added for a correction to the return over three years. The agreement offer prepared by Mr. Dufour is dated March 22, 2010, indicating unreported interest on foreign investments.

[36] The grievor's name appears nowhere in the file.

**f. The FC file**

[37] In this file, the auditors and supervisors are the same, and the file was also opened on March 26, 2010 (revised on May 12, 2010). The file is again from Mr. OF, who requested an audit to ensure that his new client was "legit".

[38] As in the preceding files, the figures are provided, the auditor carries out no analysis, and the reassessment is established without any penalty. The agreement offer prepared by Mr. Dufour is dated March 26, 2010, indicating unreported interest on foreign investments. As in all the files, there are no bank records mentioning the investments.

[39] The file was assigned to the Deeds Project.

**g. The GG file**

[40] Once again, the same scenario took place. Mr. Dufour opened the file on March 26, 2010, and his supervisor, MA, revised it on May 21, 2010. The file was audited at Mr. OF's request, who wanted "legit" clients. It is an assessment of unreported income on foreign investments. The file was assigned to the Deeds Project. It includes no bank



statements or other supporting documents. Mr. Dufour's settlement offer is dated March 26, 2010.

**h. The GJ file**

[41] This file reflects the same reality as that of the preceding files. Mr. Dufour was the auditor, and MA was the supervisor. It was opened on March 26, 2010, and revised on May 20, 2010. The file contains the same note about the source and the reason for the audit. It is an assessment of unreported interest on foreign investments for the years 2006 to 2008, with no financial statements or other supporting documents. The file was assigned to the Deeds Project. In this case, the representative indicated in the file is not Mr. OF's office. Curiously, the settlement offer prepared by Mr. Dufour is dated February 24, 2010.

**i. The MS file**

[42] Mr. Dufour opened this file on March 26, 2010, and MA was the supervisor who revised it on May 20, 2010. The note in the file is the same as to the source and the reason for the audit and as to the assessment of unreported foreign interest over three years, without a penalty. The file was assigned to the Deeds Project. The representative indicated in the file is not Mr. OF's office. The settlement offer prepared by Mr. Dufour is dated March 26, 2010.

**j. The PG file**

[43] Mr. Dufour opened this on March 26, 2010, and MA was the supervisor who revised it on May 21, 2010. Once again, the source and the reason for the audit are the same, with an assessment of unreported foreign interest over two years, without a penalty. The settlement offer prepared by Mr. Dufour is dated March 26, 2010.

[44] The file was assigned to the Deeds Project. The representative indicated in the file is not Mr. OF's office.

**k. The RE file**

[45] Mr. Dufour opened this file on March 26, 2010, and MA was the supervisor. The settlement offer prepared by Mr. Dufour is dated the same day, indicating unreported interest on foreign investments from 2006 to 2008. According to the notes in the files, the file is from Mr. OF.

[46] The file was assigned to the Deeds Project. The representative indicated in the file is not Mr. OF's office.

**l. The ME file**

[47] According to the AIMS, this file was opened on May 10, 2010, and Mr. Dufour was the auditor. The supervisor, MA, revised it on May 31, 2010. According to the notes in the file, it was apparently opened on April 13, 2010. The settlement offer prepared by Mr. Dufour is dated April 15, 2010.

[48] Once again, it involves unreported income, the amount of which is set out in the audit letter. The file is from Mr. OF's office. This time, he is registered as the taxpayer's representative. The file was assigned to the Deeds Project.

**m. The FG file**

[49] This file was opened on June 2, 2010. Mr. Dufour was the auditor, and MA was the supervisor. The file was assigned to the Deeds Project.

[50] This time, it involves a request by Mr. GW, on behalf of one of his clients, for an audit of interest income for 2007 to 2009.

[51] The settlement offer prepared by Mr. Dufour is dated June 2, 2010, for unreported interest on foreign investments. The representative indicated in the file is not Mr. GW.

**n. The SH file**

[52] Once again, this is a request from Mr. GW for an audit of interest income for 2007, 2008, and 2009. The file was opened on June 2, 2010, by Mr. Dufour as the auditor, and MA was the supervisor. The settlement offer prepared by Mr. Dufour is dated June 2, 2010. The amounts of unreported interest on foreign investments are established for the three years in question. The representative in the file is not Mr. GW.

**o. The BL file**

[53] This file is from a Mr. PP. According to the notes in the file, it was opened on July 5, 2010, but according to the AIMS, it was opened on July 26, 2010. The supervisor was MA. The file was assigned to the Deeds Project.

[54] The settlement offer prepared by Mr. Dufour is dated July 5, 2010, indicating unreported interest on foreign investments for four tax years, from 2006 to 2009.

[55] Other irregularities are manifest. The taxpayer's address in the notes in the file does not match the one in the AIMS, and the representative is not the same.

[56] This file, like all the files assigned to the Deeds Project, includes the following sentence in the auditor's report, always prepared in the same way to explain why a penalty was not applied:

[Translation]

*... On instructions from [the taxpayer's name or simply "his client"], the representative gave us information and documents that we could never have obtained without their cooperation....*

**p. The CL file**

[57] This file was opened on July 26, 2010, according to the AIMS, but on July 29, 2010, according to the notes in the file. The auditor was Mr. Dufour, and the supervisor was MA. The settlement offer prepared by Mr. Dufour is dated July 29, 2010, indicating unreported interest on foreign investments for 2007, 2008, and 2009. No penalty is imposed, and it includes the same sentence as justification.

**q. The DC file**

[58] The auditor was Mr. Dufour, and the supervisor was MA. According to the AIMS, the file was opened on July 26, 2010, but according to the notes in the file, it was opened on July 5, 2010. The settlement offer prepared by Mr. Dufour is dated July 5, 2010. It establishes unreported interest on foreign investments. The file was assigned to the Deeds Project and included the same sentence as justification for not applying a penalty.

**r. The FV file**

[59] The file was opened on July 5, 2010, according to the notes in the file. The auditor was Mr. Dufour, and the supervisor was MA. The file was received from Mr. GW and was assigned to the Deeds Project. The audit consisted of determining the amount of unreported interest on foreign investments.

[60] The settlement offer prepared by Mr. Dufour is dated July 5, 2010, and the auditor's report includes the same sentence as justification for not applying a penalty. The representative in the file is not Mr. GW.

[61] Curiously, to me, this file seems confused with another one (SH).

**s. The BG file**

[62] According to the AIMS, this file was opened on April 6, 2010, by Mr. Dufour as the auditor, and MA was the supervisor. According to the notes, the taxpayer is a client of Mr. OF, who apparently "[translation] ... asked that the file be audited following a prior contact made with the CRA's Laval TSO by the previous representative ...".

[63] According to the notes, the file was opened on March 26, 2010. It was assigned to the Deeds Project. The settlement offer prepared by Mr. Dufour is dated January 26, 2010, and uses the figures proposed by the "previous representative" in January 2010 as part of an agreement to report foreign investment income that the taxpayer reportedly inherited on the death of his father.

**t. The G Co. file**

[64] This file is completely different from the other files. It dates to September 2008, when the grievor was a team leader in International Tax and reported to a manager, GM.

[65] A lawyer representing G Co. contacted GM to discuss tax planning that included a "straddle loss". I recall from the grievor's explanations at the hearing that it was a highly complex transaction. The tax analysis had to be done by specialists. According to the grievor, no one at the Laval TSO had the skills to deal with this issue.

[66] However, GM asked the grievor to attend a meeting with G Co.'s lawyer to discuss the straddle loss transaction. The grievor testified that as he left that meeting, he told GM that he did not have the skills to help her in this matter.

[67] GM assigned the file to Mr. Dufour, who processed the file according to instructions received from the clients. The file then came up again, with all the flaws inherent in highly questionable processing.

[68] The investigation report stated the following facts:

[Translation]

...

*During a search by internal investigators of Germain Pelletier's office carried out on March 17, 2014, a file was found containing several documents (totaling 366 pages) related to the audit of [G Co.]. The documents included correspondence, financial statements, accounting records, different tax forms, the notes to Jean-Paul Dufour's file, a corporate status form, documents extracted from the minutes (description of share capital, shareholders, share certificates), and a copy of the memo mentioned above. It is surprising that all these documents were recovered at Germain Pelletier's office, when no trace of the audit file was found...*

[69] At the hearing, the grievor explained that the documents had been placed in his office but that he had had nothing to do with the file, except for his manager's initial request to attend the meeting with the lawyer. When these events occurred, he was Mr. Dufour's supervisor, but no documents show that he revised this file.

## **2. The Deeds Project**

[70] CRA auditors had discovered the tax potential of private loans entered into before a notary, which generated unassessed interest. The Laval TSO purchased a database that listed about 26 000 notarized loan deeds. The objective was to investigate the loans to determine whether interest income had been reported and if not, to assess it.

[71] When the grievor became an SME audit manager, the project was already underway, but it had not received any resources from Ottawa. At the request of his superiors, he submitted a business case to Ottawa in 2009 to support the project, which was authorized for two years.

[72] As noted by the investigators, this project involved private loans in Quebec for the purchase of real property. It was in no way related to reporting interest from foreign investments.

[73] However, according to the explanation provided by Mr. Lavoie, who was responsible for workload under the grievor's direction, the assignment of files to the project was quite broad and included assessing capital gains on the sale of real property. Both Mr. Lavoie and the grievor were convinced of a link between capital gains and the deeds.

[74] Mr. Lyssikatos, the grievor's immediate supervisor, testified that the project was the subject of quarterly reports that seemed complete and compliant.

[75] The grievor testified that the project was the work of MM, who had created and administered it. The grievor signed the reports as a manager, but he had no idea of the specific files assigned to the project.

### **3. The interviews**

[76] The investigation included interviews. Reading the minutes of the interviews, it is striking to note the little evidence about the grievor. In the following paragraphs, I will summarize the content of those interviews.

[77] MA: He confirmed that the Deeds Project was developed by MM. He replaced MM, but the files had already been assigned to the auditors. I quote MA's words from the investigation report: "[translation] [T]he Deeds Project could involve just about anything. Germain Pelletier might have assigned files directly to auditors when he was the manager, but he did not know if he assigned files to Jean-Paul Dufour."

[78] The grievor reportedly told him, when he began in his position, to process notarized deed files as MM had done. Finally, he said that Mr. Dufour seemed to be following instructions from MM.

[79] PS: She worked under the grievor's supervision, but she never referred to him in terms of assigning files to auditors. PS's signature is on the audit report for the RA file, but she does not remember it. The investigation report states, "[translation] She had not received instructions from a third party on processing this file."

[80] Mr. Dufour: He did not meet with the investigators but agreed to answer some questions by telephone. In his telephone interview, he did not implicate the grievor. He remembered that MM had assigned him the straddle loss file.

[81] Mr. Augustin: He remembered that the grievor had given him the CD file. The grievor had told him to simply reproduce the adjustments that were already calculated and not to impose a penalty. It was simply a matter of closing the file, as all the calculations had been done.

[82] In cross-examination at the hearing, Mr. Augustin confirmed that the grievor had spoken with him about the representative who had power of attorney from CD.

[83] Mr. Lyssikatos: During his interview, he spoke mainly about the movement of managers between positions at the Laval TSO. He confirmed that the procedures for the questionable files were not consistent with the rules. He mentioned the grievor as part of the Deeds Project and of his management responsibilities, but the only reference to the allegations against the grievor is as follows in the investigation report:

[Translation]

...

*He did not recognize the name [OF], but he might have heard the name [GW] when he worked in Montreal. The [OPC] and [GWP] accounting firms apparently should not have approached Germain Pelletier to ask him to have their clients' files audited. It was unacceptable that Germain Pelletier then accepted the representatives' files directly, as he should have referred them to the Voluntary Disclosures Program ....*

[84] When he was asked at the hearing about his direct knowledge of the grievor's involvement in the facts under investigation, Mr. Lyssikatos replied that that paragraph corresponded to the questions the investigators asked him. They had asked, "[translation] Is it acceptable that ...", adding the subject's name; i.e., the grievor's name. According to Mr. Lyssikatos, his response would have been the same had they inserted his name, as in, "Is it acceptable that John Lyssikatos ...". He would have replied that it was not acceptable. That said, he confirmed at the hearing that he had no personal knowledge of the grievor having in fact done so. He testified at the hearing that he was stunned by the grievor's sudden suspension.

#### **4. The investigation's findings**

[85] The investigation found that the grievor "[translation] acted outside his duties as an auditor, without the diligence expected of a Government of Canada employee, and breached the Code of Ethics and Conduct" based on the following behaviours:

- refusing to cooperate with the internal investigation;
- agreeing to process taxpayer requests that were not part of his division's mandate, thus bypassing the CRA's control measures;
- treating certain taxpayers preferentially, which allowed them to reduce their tax debts and avoid penalties;

- abusing his authority by asking two auditors under his direction to process voluntary disclosures by taxpayers; and
- making unauthorized accesses of confidential information about several taxpayers and meeting with representatives who, according to the file, did not have the taxpayers' power of attorney.

[86] The investigation also found that the grievor had breached the "Directive on Conflict of Interest" by not submitting a voluntary disclosure form about his rental properties.

### **C. The grievor's explanations**

[87] The grievor did indeed chose not to cooperate with the investigation. He refused to meet with the investigators. Once the investigation ended, Mr. Bettez sent him a letter on November 18, 2014, inviting him to a disciplinary hearing to discuss the investigation report, which had been heavily redacted, including all the information on the 21 questionable files. Only the investigation findings remained in the redacted report, but it was impossible to understand how the investigators arrived at those findings.

[88] On November 20, 2014, the grievor responded to Mr. Bettez's letter with "[translation] some preliminary comments". He essentially replied that the Deeds Project had been carried out correctly and that Headquarters had always accepted the reports. He denied that the files had been processed inappropriately. Given that no details were provided on the files in question, he did not provide any other explanation.

[89] At the hearing, the grievor explained why he had refused to meet with the investigators. When he was suspended on March 12, 2014, the director of the office, Ms. Tremblay, gave him no reason for the suspension except that an investigation would be conducted. The grievor said that he had been prepared to answer the investigators' questions.

[90] However, the next day, Royal Canadian Mounted Police (RCMP) officers came to his home to ask him questions. The officers seemed aware of his suspension and asked him many questions about his colleagues. It made the grievor uncomfortable, and he contacted a criminal lawyer, who advised him to not cooperate any further in



the employer's investigation. According to his lawyer, it was best to wait for the employer's allegations after the investigation and to respond to them then. When the grievor received the redacted copy of the investigation report, he thought that his letter denying any misconduct would suffice while waiting for details of the allegations against him. When he was terminated, he still did not have a clean copy of the investigation report. He obtained it only via a Board order after referring his grievance against the termination to adjudication.

[91] The grievor provided the following explanations in response to the investigation report.

[92] For the first RA file, the grievor denied meeting with Mr. GW and assigning the file. Assigning files was not part of his duties. Team leaders are responsible for the workload, and those overseeing the auditors assign files to them. In addition, Mr. Dufour was unable to confirm that the grievor had assigned the file to him, despite the note in the file indicating as much. The grievor noted that in the AIMS, the file was first opened in February 2009, when he was not yet working as an SME manager and Mr. Dufour was not in his sector. The grievor added that the managers never looked at the details of the files. The team leader revised an auditor's work. In this case, PS was the team leader.

[93] For the LA and LE files, the grievor also claimed that he had not been aware of everything. Once again, Mr. Dufour was unable to confirm at the hearing that the grievor had in fact assigned him the files, contrary to what was indicated in the notes in the file.

[94] For the CD file, the grievor explained that his manager at that time, GM, asked that the file be processed. It was related to assessing a capital gain. The grievor accessed the file to find out who had power of attorney for the taxpayer. He had had conflicts with his manager before and did not object to processing the file. Undoubtedly, the memo was found on his computer because his manager had sent it to him. He did not sign anything, even though his name appears in the memo.

[95] The grievor was never involved in any files processed by Mr. Dufour for which MA was the team leader. According to the grievor, the manager's role was not to closely check files processed by auditors and revised by the team leader. At the time, 10 team leaders reported to him. He did not assign files directly to the auditors.

[96] At the hearing, the grievor explained that he was never directly involved in the Deeds Project, which MM had set up and administered. He had submitted the business case to Headquarters in Ottawa to obtain resources, at his assistant director's request, and had signed the quarterly reports. He relied on the team leaders to ensure that the files were processed correctly.

[97] Finally, for the G Co. file, he did go with GM to meet with the lawyer. He stressed the fact that the straddle loss exceeded the competency of everyone at the Laval office, including him. GM assigned the file directly to Mr. Dufour, and the grievor heard nothing more about it.

[98] In his testimony, the grievor mentioned his serious conflicts with his manager, GM, and with MM, who reported to him. The conflicts with GM were professional; i.e., disagreements over how to process certain files. At one point, the grievor refused to sign an audit report, for ethical reasons, and senior management reproached him for his insubordination.

[99] The relationship with MM was tense, particularly because the grievor had given him a performance evaluation that MM had felt was unsatisfactory.

#### **D. The decision to terminate the grievor's employment**

[100] Mr. Bettez, who signed the termination letter, testified at the hearing. He stated how the investigation results had surprised him. In his opinion, the grievor had been a rising star, and senior management had hoped that he would continue on that path. I note that Mr. Lyssikatos also testified that he had been very surprised by the allegations against the grievor. According to him, they did not align with his profile.

[101] When Mr. Bettez received the investigation report, he wanted the grievor's explanations. However, the grievor did not want to attend a disciplinary meeting and sent the letter mentioned earlier, denying the allegations and claiming that the Deeds Project was in order.

[102] For Mr. Bettez, the denial confirmed the accuracy of the investigation report. He did not understand why the grievor did not want to explain himself in person and did not want to obtain all possible explanations about the investigation findings. In Mr. Bettez's eyes, the fact that the grievor seemed to understand the report's contents and

that he responded to it by claiming that the Deeds Project was in order confirmed that the grievor had been complicit in all the investigated files.

#### **E. The revocation of reliability status**

[103] Following the investigation's findings, the grievor's reliability status was revoked. The reasons for the revocation are set out as follows in the letter dated March 31, 2015, and signed by Mr. Docherty:

[Translation]

...

*When negative information is discovered that may be serious enough to revoke reliability status, a review of reliability status is initiated to determine whether the negative information is deemed an ongoing risk in relation to the person's position. In such situations, the person is invited to an interview and given the opportunity to provide additional information that is considered in the final decision to maintain or revoke his or her reliability status.*

*As described in our correspondence dated November 19, 2014, and February 20, 2015, the negative information in the investigation report of the Internal Affairs and Fraud Control Division led to the initiation of a justified review of your reliability status, in accordance with the CRA's Directive on Personnel Security Screening. That review was initiated because:*

- you did not safeguard the Agency's information and assets when you made unauthorized accesses;*
- you used the CRA assets and information to which you had access for the benefit of third parties when you treated taxpayers preferentially by allowing them to reduce their tax debts and avoid the imposition of different penalties and by agreeing to process requests from clients and their representatives without the knowledge of your superiors and by circumventing internal controls; and*
- you demonstrated behaviour harmful to your reliability.*

*In our correspondence dated November 19, 2014, we invited you to take part in a preventive interview in person on November 21, 2014, to give you the opportunity to address the negative information on hand. That interview was postponed to December 5, 2014, and you did not present yourself. A second interview was scheduled for February 16, 2015, following your disciplinary hearing, and you did not present yourself. To provide you a final opportunity to address the negative information on hand and the risks noted earlier, you were invited to contact Sylvain Bayeur, A/Assistant Director, Security, Quebec Region, before March 3, 2015, to choose to respond during a face-to-face interview, a*

*telephone interview, or by submitting a written communication. You did not communicate with Mr. Bayeur and did not submit any written communication before the March 10, 2015, deadline. Consequently, since you did not reply to that letter, a decision was made based on the information currently available.*

*We have concluded that therefore, you represent a serious and imminent risk to the security of the Agency's information and material assets and that your continued access to CRA information, assets, and premises at this time would constitute an unacceptable security risk. Consequently, we must immediately revoke your security clearance, in accordance with the CRA's Directive on Personnel Security Screening. This decision is subject to review and recourse through the internal grievance process.*

[104] As with the disciplinary investigation, the grievor chose not to meet with the assistant director of the security section to explain himself, despite multiple invitations.

[105] Mr. Docherty testified that the reliability status review resulting from the information divulged by the investigation is a completely separate process. The review is not related to the misconduct but to the future of the employee-employer relationship. In other words, can the employer continue to trust the employee? The fact that the grievor did not agree to present his views on the investigation findings was a major factor in the risk assessment. The security service had on hand only the allegations from the report, to which the grievor had not replied. Mr. Docherty concluded that the grievor's actions, uncontested, posed a serious risk to the CRA's security.

[106] In cross-examination, Mr. Docherty stated that his concern in the security investigation was not to verify the accuracy of the investigation findings but to provide a fair procedure for the grievor to respond to the allegations. According to him, it was not his role to redo the investigation but to give its subject an opportunity to present his point of view.

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

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

[107] The important thing in this case is the concept of trust. There is no doubt that the grievor was an excellent employee; all the witnesses who had supervised him confirmed it. The problem, and the reason the employer lost trust, was the lack of explanation in the face of an overwhelming amount of facts.

[108] The employer acknowledges that there is no flagrant evidence. However, there is enough evidence when the facts are considered as a whole.

[109] The employer first had suspicions; hence, it carried out the investigation. The grievor's categorical refusal to cooperate seriously undermined the employer's trust.

[110] It must be noted that in the CRA context, trust is paramount, not only the employer's trust in its employees, but also, more importantly, the taxpayers' trust in the tax system.

[111] The employer summarized the evidence as follows. Some investigations had revealed irregularities in certain files at the Laval TSO. All the files had one thing in common: the grievor, primarily as a manager. In addition, his name appears in four of the files, which is material evidence of his involvement.

[112] According to the employer, all the files have striking similarities: preferential treatment, an audit that is very much a summary, no penalties, voluntary disclosure even though that is not the Laval TSO's mandate, and a seemingly low assessment for the amounts owed, which are not even verified by complete documentation. This seriously undermines trust in the system, which the CRA obviously wants to maintain to continue to obtain taxpayers' cooperation.

[113] The investigation confirmed the suspicions, and the grievor provided no explanation. The employer noted the importance that the jurisprudence places on the duty of an employee suspected of wrongdoing to respond to the employer's allegations. In particular, the employer cited *Canada Post Corporation v. Association of Postal Officials of Canada*, [1996] C.L.A.D. No. 621 (QL), in which an employee, caught in the act of apparent theft, refused to provide the least explanation, citing advice received from a criminal lawyer. Ultimately, the adjudicator did not believe the employee's explanation of his actions and upheld the termination. In that decision, the adjudicator stressed the importance of employees explaining their behaviour to the employer when it suspects serious misconduct.

[114] The employer also cited *Laplante v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 104 (application for judicial review dismissed in 2008 FC 1036), to argue that circumstantial evidence can be enough to establish facts on the preponderance of the evidence.

[115] Several facts combined to implicate the grievor in the files, and he provided no explanation during the investigation or to the decision maker, Mr. Bettez. The grievor is named in four files. Even at the hearing, he did not clearly explain why he assigned the CD file to Mr. Augustin and why, as a team leader, he did not note all the audit discrepancies in this file. His actions in the G Co. file were also not clearly explained at the hearing. He was asked to attend a meeting because the file was very technical, and he said that he did not handle the file. Yet, the entire file was found in his office. As for the other files, the grievor's defence was that he was a manager; therefore, he was not responsible. However, in both cases for which he was the team leader, he blamed his manager.

[116] The grievor pleaded ignorance of the files assigned to the Deeds Project. However, he was responsible for that project. He blamed MM, but he did not ensure that the project was going well and that it was not a cover-up of dishonest transactions.

[117] The grievor claimed that the redacted copy of the investigation report did not allow him to respond to the employer's accusations. However, he did not try to meet with Mr. Bettez to ask for more details. And despite the redaction, the report the grievor received provided the essence of the allegations against him, as follows:

[Translation]

*The information gathered also established that Germain Pelletier, Manager, Audit Division, Western Quebec TSO, seems to have accepted voluntary disclosure files on the pretext of initiating audits at the request of representatives. The files identified include significant amounts of foreign investment income, and although the income was not reported, no penalty for gross negligence was applied. The files were assigned to auditors, but the items in the files suggest that no audits were actually carried out.*

*... Most of the files were coded as part of the Deeds Project carried out by the Audit Division of the Western Quebec TSO.*

[118] In his letter addressed to Mr. Bettez following his receipt of the redacted copy of the investigation report, the grievor simply defends the Deeds Project, without actually responding to the misconduct allegations, namely, accepting files from taxpayers' representatives that involved foreign investment income.

[119] Therefore, Mr. Bettez was justified to fear that the grievor was unreliable, particularly as he did not seem to assume any responsibility.

[120] The employer cited the following decisions about the obligation of employees to explain behaviour that it considered questionable: *Canadian Union of Public Employees, Local 1252 v. Horizon Health Network*, [2018] N.B.L.A.A. No. 4 (QL) (CUPE); *Sarens Canada Inc. v. General Teamsters, Local Union No. 362*, [2017] A.G.A.A. No. 31 (QL); and *Toronto (City) v. Toronto Civic Employees' Union, Local 416*, [2017] O.L.A.A. No. 367 (QL).

[121] Finally, according to the employer, even were the Board to find that there were insufficient grounds for termination, further damages should not be awarded, as it acted to the best of its knowledge, given the grievor's lack of explanation.

## **B. For the grievor**

[122] The breach of trust that the employer invoked is attributable to it, in how it treated the grievor. All the witnesses acknowledged that he was an excellent employee. Yet, when the questionable files surfaced, he was denied an explanation and thus the opportunity to defend himself.

[123] The grievor had changed sections when the employer suspended him; he had no idea what the misconduct allegations could be. He was prepared to cooperate with the investigation until the RCMP officers showed up the day after his suspension, to question him. Not only did he not know the allegations, but also, he was facing a possible criminal investigation. That was when he contacted a lawyer specializing in criminal matters, who advised him to remain silent.

[124] It is clear that the employer terminated him based on an investigation report to which he was unable to respond in an informed manner and based on his preliminary answer, by which he tried his best to make it clear that he had done nothing wrong in the Deeds Project. Only in September 2017, after the Board made its order, was he able to see an unredacted copy of the investigation report.

[125] The information available to the RCMP when the officers met with him indicated that the CRA was cooperating fully with the RCMP's investigations. That was not reassuring. Some of those involved in the questionable files had to leave the CRA fairly quickly, and the RCMP was looking for information.

[126] Mr. Bettez said that he was troubled by the investigation report. However, he did not seek to validate the investigation findings. The employer did not take any steps,

based on agendas, telephones, expense accounts, or emails, to verify whether the grievor had in fact met with taxpayer representatives as Mr. Dufour had indicated in his notes. In fact, he had never met them, and the employer had no evidence, except Mr. Dufour's notes, who did not confirm anything under oath at the hearing.

[127] The grievor explained that he did not want to meet with the investigators because he felt that for some reason, they simply wanted to reinforce a decision that had already been made to terminate him.

[128] In the CD file, his manager, GM, had said that he simply had to process the file as it was. He simply checked the power of attorney. The auditor did the processing, under GM's direction. The grievor did not object because he had just had another conflict with GM; he had spoken against processing another case and had been accused of insubordination.

[129] The dates on the questionable files coincided with the dates on which Mr. Dufour and MM were at the Laval TSO. MM oversaw the workload for the Deeds Project. After MM's departure in 2011, there were no more questionable files.

[130] The grievor submitted that the investigation report findings are arbitrary and based on spurious links. Circumstantial evidence is not enough in this case to prove that he truly did anything wrong. He cited *Nehmé v. Deputy Head (Department of Public Works and Government Services)*, 2017 PSLREB 14, which deals in particular with circumstantial evidence. I will return to this in my analysis.

[131] According to the grievor, there was a serious lack of procedural fairness in how the employer acted by not providing him with any details of the allegations. He cited *Shneidman v. Canada Customs and Revenue Agency*, 2004 PSSRB 133, in which the adjudicator set aside the termination decision because of serious procedural failings at the moment of the termination. I will return to this in my analysis.

[132] The grievor acknowledged that maybe he should have done more and ensured a closer follow-up. That said, he did not do anything with respect to the questionable files. He had just begun as a manager of SME audit, which was not his specialty. He was responsible for 10 team leaders and tried to administer as best he could.



[133] He argued for his reinstatement. According to him, he was a reliable and respected employee. Were he reinstated, he would from then on be very vigilant.

#### IV. Confidentiality order

[134] The employer asked that the taxpayer information be sealed. That is consistent with ss. 241(1) and (4.1) of the *ITA*, which read as follows:

*241(1) Except as authorized by this section, no official or other representative of a government entity shall*

*(a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;*

*(b) knowingly allow any person to have access to any taxpayer information; or*

*(c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act or for the purpose for which it was provided under this section.*

...

*(4.1) The person who presides at a legal proceeding relating to the supervision, evaluation or discipline of an authorized person may order such measures as are necessary to ensure that taxpayer information is not used or provided to any person for any purpose not relating to that proceeding, including*

*(a) holding a hearing in camera;*

*(b) banning the publication of the information;*

*(c) concealing the identity of the taxpayer to whom the information relates; and*

*(d) sealing the records of the proceeding.*

[135] It is also consistent with the Board's decision in *Iammarrone v. Canada Revenue Agency*, 2016 PSLREB 20, as follows:

...

*12 The parties jointly asked that I not disclose information protected under that Act and that I speak about the different situations described in the evidence without revealing taxpayers' names or other personal information. Similarly, the parties asked that certain taxpayer information evidence be sealed.*

*13 To determine the merits of this request, I reviewed the parameters that have become known as the “Dagenais/Mentuck” test. The hearings of quasi-judicial tribunals are usually public, and so are the documents on file, including exhibits that the parties adduced. However, under certain circumstances, the tribunal may impose access restrictions on exhibits adduced as evidence if it is determined that the need to protect another important right must take precedence over the open court principle. The Supreme Court of Canada reformulated the Dagenais/Mentuck test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. At paragraph 53, the Court stated that a confidentiality order under Rule 151 of the Federal Courts Rules, (SOR/98-106), can be issued only if the following are met:*

...

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

...

*14 A few years later, the Court ruled that the Dagenais/Mentuck test applied to all discretionary decisions that limit the right to information during judicial proceedings (see *Vancouver Sun (Re)*, 2004 SCC 43). Recently, at paragraph 13 of *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, the Court confirmed that “[t]he analytical approach developed in Dagenais and Mentuck applies to all discretionary decisions that affect the openness of proceedings.” It must be noted that I heard no arguments in support of the public interest in the transparency of the proceedings in this case.*

*15 It is apparent that some evidence in this case contains personal and confidential information gathered as part of the taxpayer’s obligation to file tax returns under the Income Tax Act since taxpayers are required to disclose that information. I agree that protecting information that could identify taxpayers is an important interest for Canadian society: maintaining the public trust in the integrity of Canada’s tax system and ensuring tax compliance on behalf of governments across Canada, to contribute to Canadians’ economic and social well-being. I also agree that in the context of the hearing in this case, public access to information that identifies taxpayers could seriously compromise that interest and that a sealing order is necessary to prevent that risk.*

*16 Although it is clear that some evidence containing information identifying Canadian taxpayers is essential to rendering a decision on the merits of this case, my opinion is that the salutary effects of an order to seal that information outweigh the deleterious effects to open and accessible quasi-judicial proceedings. In the circumstances, I feel that it is more important to protect the information in question than the public right to access it. Consequently, the following evidence containing personal and confidential information about Canadian taxpayers who are not parties to this dispute and that identifies them is sealed....*

...

[136] I see no reason to adopt an approach in this case different from that in *Iammarrone*. Exhibits E-1 and E-2, as well as tab 5 of Exhibit E-3, shall be sealed.

## **V. Analysis**

### **A. The termination**

[137] To determine whether discipline was justified, the classic analysis to apply was first set out in *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 Can. LRBR 1. Did the employee commit misconduct that warranted imposing a disciplinary measure? If so, was the measure imposed excessive? If the Board finds that it was excessive, what other just and equitable measure can be substituted?

[138] The first question to be answered is whether there was misconduct. In the termination letter, the employer accuses the grievor of several things.

[139] First, he is accused of having processed files that were not under his authority and of having knowingly avoided internal rules of control. The grievor stated that he was not aware of the contents of the 17 files assigned to the Deeds Project or of the adjustment files for which Mr. Dufour and his team leader were responsible in the cases of PS and MA. I note that Mr. Dufour spontaneously named those two people as having assigned files to him during that period, as well as MM. Despite the notes in two files indicating the grievor's name, at the hearing, Mr. Dufour refused to confirm that the grievor had assigned those files.

[140] Given the weakness of the employer's evidence, I do not believe that it proved on the preponderance of the evidence that the grievor was involved in 19 of the questionable files.

[141] That leaves two files. The grievor did not deny having been aware of them, but he attributed responsibility for them to his manager at the time, GM. I believe the grievor's explanation that he did not want to create a conflict with his manager. In one file, the one for CD, he turned a blind eye to the auditor's summary processing. However, I lack evidence to censure that behaviour, in particular GM's version (who has retired and was not called to testify).

[142] As for the G Co. file, I cannot find the grievor responsible. He gave his opinion that he did not have the competency to process the file, and GM chose to assign it to an auditor even less specialized than the grievor. The person responsible is not the grievor.

[143] I find the situation quite similar to that in *Grant v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 37, in which Ms. Grant's employment was terminated following an investigation into serious misconduct in which she had been only indirectly involved. In the interview before her termination, she was unable to respond to the allegations in an investigation report that was almost entirely redacted. Finally, the Board found that the employer did not demonstrate misconduct on her part.

[144] The termination letter added that the grievor allegedly made unauthorized accesses. The only access shown in the evidence was in the CD file, for which he was the team leader. He explained that he had wanted to verify who the authorized representative in the file was and to make a certain follow up on it. Given his team leader responsibilities, I do not see how accessing that file would be considered unauthorized.

[145] The termination letter also stated that the grievor allegedly allowed "... transactions to be conducted with representatives who were not officially authorized ...". Apart from the contradiction with the previous allegation of accessing a file to check the registered power of attorney, I accept the grievor's explanation that this type of check would be the team leader's responsibility, not the manager's, which was his role in 19 of the 21 files.

[146] The letter indicates that the grievor did not make the confidential disclosure of his ownership of rental properties, which, according to the letter, was "... a breach of the Directive on Conflict of Interest and Post-Employment." He did not deny that he did not make the confidential disclosure. On the other hand, it appears that the

properties and their profits were properly reported in his tax returns. I did not receive much evidence on this issue at the hearing, and I am not satisfied that the ownership of rental properties necessarily creates a conflict of interest for someone who works at the CRA and who correctly reports the related income. In any event, if it is misconduct, it seems to me that under progressive discipline, it could not justify termination on its own but rather a reminder to complete the confidential disclosure, at most.

[147] Altogether, it seems to me that the employer has not shown that in light of the evidence, the grievor committed misconduct. The employer's evidence is essentially circumstantial, as it acknowledged at the hearing.

[148] As for the circumstantial evidence, the grievor cited *Nehmé*. In that case, Ms. Nehmé's employment was terminated because she was suspected of having cheated in two appointment processes for positions above her own. There was no direct evidence that she had cheated, only conjecture by the responsible authorities that she must have, as her notes prepared before the interview were so comprehensive, despite the fact that she was not supposed to access any information sources.

[149] The Board found that there was no evidence that Ms. Nehmé had cheated. Circumstantial evidence was not enough, as there was a plausible explanation for the comprehensive preparatory notes, particularly because Ms. Nehmé's explanation was more likely than that of the employer.

[150] In this case, the circumstantial evidence establishes a certain link between the 21 questionable files and the grievor. However, on closer examination, the link is tenuous. In 19 of the 21 files, the grievor was a manager, not a team leader. Mr. Lyssikatos and the grievor testified on a manager's role; they are responsible for general supervision, not close supervision, which is the responsibility of the team leader. The other two files, for which the grievor was in fact the team leader, can be explained otherwise.

[151] In *Nehmé*, the Board cited the following passage from *Hodge* (1838), 2 Lewin 227, 168 E.R. 1136, to point out the risk of relying on circumstantial evidence:

*... the proneness of the human mind to look for — and often slightly to distort the facts in order to establish such a proposition [guilt] — forgetting that a single circumstance which is inconsistent*

*with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt.*

[152] Balanced against the employer's circumstantial evidence, I have evidence of a professional path that was not only irreproachable but also stellar. The events that led to the termination were in a very specific environment, with two known superiors (GM and MM) and two specific subordinates (Mr. Dufour and MA). When the vast majority of the questionable files (19) were processed, the grievor had just assumed his new manager duties. He was not in his area of specialty and was responsible for 10 teams. He let everyone do their jobs. I cannot find that his behaviour justified imposing discipline.

[153] The grievor cited *Shneidman*, which, as he understood it, would allow the termination decision to be set aside due to a lack of procedural fairness. I cannot interpret that decision in the same way.

[154] Indeed, the adjudicator in that case set aside the termination because Ms. Shneidman had been unable to provide her union representative with an unredacted version of the investigation report. The grievor drew a parallel to his situation, in which he was unable to obtain an unredacted copy of the report until after the referral to adjudication.

[155] *Shneidman* was not upheld on judicial review, for technical reasons. The judicial review decision did not answer the substantive question of whether a lack of procedural fairness is enough to set aside a termination.

[156] Regardless, in this case, I believe that the lack of evidence is enough to set aside the termination. The lack of procedural fairness that the grievor perceived was corrected by holding a hearing before a neutral body — the Board.

[157] The employer cited the grievor's lack of cooperation in the investigation not as a ground for termination but as an aggravating factor.

[158] When the grievor was suspended from his duties, long after the alleged events, he had no idea of the allegations. The next day, RCMP officers knocked on his door. This could have impacted his willingness to cooperate in the employer's investigation.

[159] The employer presented me with considerable jurisprudence that stresses the importance of a person threatened with discipline presenting a clear and plausible

explanation of his or her actions. The grievor did not do that before the hearing, primarily due to a lack of trust. Therefore, the employer had no response to its suspicions. The result was termination.

[160] I understand the grievor's hesitation to cooperate in the investigation because he had been visited by RCMP officers and because his lawyer had advised him to wait to see the evidence before reacting to it.

[161] As noted in *CUPE*, the employer had the burden of proving that on the preponderance of evidence, the grievor's conduct justified imposing discipline on him. I am of the view that the employer has not met that burden. Almost all the allegations in the termination letter are unsubstantiated, including the grievor's role in the vast majority of the files.

[162] The employer sought to confirm its suspicions against the grievor by making a broad assertion (he was a manager and therefore was guilty) and by suggesting that the witnesses had said things that had in fact been misinterpreted (as testified by Mr. Lyssikatos).

[163] Unlike several decisions cited by the employer, the grievor provided a reasonable explanation at the hearing. However, his silence as of the termination cost him dearly.

[164] The hearing before the Board was another opportunity for the grievor to explain himself because the employer was unable to or did not want to listen to him. I am somewhat sensitive to the employer's argument that there was nothing to listen to. However, I allow the grievance because I find that the employer did not show that the grievor's behaviour justified imposing discipline on him. I believed the grievor when he stated that he was not involved in the files that were the basis for the investigation. That would be completely contrary to his entire professional profile. There is no direct trace of his involvement.

## **B. Reliability status**

[165] The parties did not directly address the revocation of the reliability status in their arguments, but that revocation was challenged in the grievance. The only evidence that I received on this matter, from Mr. Docherty's testimony, was that the security services had received the investigation report, and as a result, the reliability

status review had been justified. However, since I have found that the investigation findings are not supported by the evidence before me and that there is no evidence of behaviour by the grievor that could justify legitimate concerns that he presented a risk to the employer, I find that the employer has not shown grounds for revoking his reliability status.

### **C. Remedy**

[166] As I have found that no discipline was warranted in the circumstances, the grievor is reinstated into his position.

[167] At the beginning of the hearing, the employer raised that I was seized of a grievance against the termination and that there was no grievance against the suspension. However, I note that the employer chose to make the termination date retroactive to the suspension date; i.e., March 12, 2014. Thus, given that decision of the employer, the reinstatement shall be from that date.

[168] The grievor's reliability status is reinstated.

[169] In his grievance, the grievor also sought moral and punitive damages for the way he was treated, particularly for not having a clear statement of the alleged facts.

[170] I believe that the hearing in this case has shed light on all the facts of the case and that the grievor's reinstatement into his position is the proper remedy. Although I find it regrettable that the employer decided to terminate him based on such weak evidence, as in *Grant*, I do not believe that there was any malice or doggedness by the employer. In accordance with the reasoning in *Honda Canada Inc. v. Keays*, 2008 SCC 39, I do not believe that there was a separate tort that would justify an award of damages.

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

*(The Order appears on the next page)*



**VI. Order**

[172] Exhibits E-1 and E-2, as well as tab 5 of Exhibit E-3, are sealed.

[173] The grievance is allowed.

[174] I order the employer to reinstate the grievor to his position effective March 12, 2014.

[175] I order the employer to reimburse the grievor for his salary, benefits, and pension, subject to the usual deductions.

[176] I order the employer to reinstate the grievor's pension rights as if his employment had never been terminated, on the understanding that he must reimburse pension amounts received.

[177] The grievor's reliability status is reinstated.

[178] I shall remain seized for 90 days of any question relating to the calculation of the amounts due under paragraph 175.

December 3, 2019.

FPSLREB Translation

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