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

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

BETWEEN

DREW WOODCOCK

Grievor

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Woodcock v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Douglas Hill, counsel

For the Respondent: Christopher Hutchison, counsel

Heard at Kingston, Ontario,
February 18 to 20, 2020.

REASONS FOR DECISION

I. Introduction

[1] Drew Woodcock ("the grievor") began his employment with the Canada Revenue Agency (CRA or "the employer") in June of 1985. He was planning to retire in June of 2020 with 35 years of service. However, on August 24, 2016, after 31 years of service, the employer terminated his employment, for disciplinary reasons.

[2] For much of his career, the grievor worked in direct client service, most recently as an SP-05 senior individual services agent, however, when the CRA's service model changed to a nationally centralized 1-800 number his position was eliminated. When he accepted a position as an SP-05 non-filer field officer, the grievor's duties changed significantly. His job was no longer to provide direct client service, but rather to ensure that non-filing taxpayers filed their tax returns.

[3] It was clear that the grievor had enjoyed his previous client-service role, in which he helped taxpayers with any tax-filing problems. He had done it for many years in a small office and had gotten to know some clients well. Most recently in that role, his job was to offer technical support that the entry-level employees could not provide. The more complex issues were referred to him. He found the job rewarding, was proud of his dedication to client service, and, as he put it, tried to always go the extra mile.

[4] However, it appears that the grievor became overly comfortable in this role and that he repeatedly disregarded some of the CRA's most basic and important rules. When the employer investigated his system accesses for the previous four years (the maximum possible due to limited storage capacity) a very clear pattern emerged.

[5] Among other things, the grievor had repeatedly ignored the prohibition against accessing taxpayer accounts outside his assigned workload. He made 621 unauthorized accesses to 15 different taxpayer accounts from January 1, 2012, to August 21, 2015. For the first nine months of the audit period the grievor was still working in client service. After November, 2012 he was a non-filer field officer. The unauthorized accesses occurred during both periods.

[6] Most of the taxpayers whose accounts he accessed were family members or friends and their family members. One was the ex-spouse of a friend. One was simply a taxpayer he continued to assist although he no longer worked in client service. Most of

the accesses, with the possible exception of his friend's ex-spouse, occurred in the course of providing preferential treatment to those taxpayers whose accounts he accessed.

[7] I accept the employer's submission that in the circumstances of this case, its bond of trust with the grievor, which is necessary for him to carry out his duties, has been irreparably broken. Accordingly, termination was not an excessive response to his misconduct.

II. Background

[8] In July 2015, the CRA received an anonymous tip alleging that the grievor was declaring an incorrect marital status on his income tax returns. The allegation was investigated and determined to be unfounded, but the investigation brought to light certain questionable accesses that he had made to taxpayer accounts. This led to a local management review that revealed numerous unauthorized accesses, which then required further investigation.

[9] In April 2016, the CRA's Internal Affairs and Fraud Control Division (IAFCD) began an investigation. The grievor was interviewed on May 18, 2016, and was given an opportunity to respond to the allegations that he had made repeated unauthorized accesses into multiple taxpayer accounts, including for the purpose of providing preferential treatment to 15 individuals; that he had put himself in a conflict of interest by not disclosing that he had prepared a T1 return that contained business income, contrary to policy; that he had assisted a family member with her private tax affairs, giving her privileged access to insider information; and that he had made inappropriate remarks with respect to the CRA's actions on her account.

[10] The grievor was accompanied by a union representative. He was shown the audit trail, given the name of each taxpayer whose account he had accessed, and given an opportunity to explain. At the end of the interview, he read the notes that the investigator had taken of his answers and acknowledged their accuracy by signing each page. There was no suggestion of any lack of procedural fairness in the investigation process.

[11] The grievor initially denied all the allegations. He denied completing any tax returns except his own, and those of two family members. He denied making any

unauthorized accesses. He denied that he had prepared a tax return that contained a declaration of business income.

[12] However, when he was shown the audit trail of 621 accesses, the grievor admitted that he had made them. When he was shown proof of the business income return, he admitted preparing it, but said that he did not know that doing so was contrary to policy. He was not forthright in the interview, as suggested by his representative. Rather, he began with total denials and incrementally admitted to his misconduct only when the employer showed him proof.

[13] Additionally, although the grievor ultimately acknowledged his misconduct, he also sought to downplay or justify it in several ways. When he was asked about the assistance he had given one family member, he responded that he saw it as client service. He was just trying to help, was programmed to provide good service, and did not see how it was preferential treatment. He felt that he helped everyone in the same way. He told the investigator that he had read the CRA's *Code of Ethics and Conduct* ("the *Code*") and that he had acknowledged it, but he did not recall reading anything about not providing preferential treatment.

[14] On May 24, 2016, the IAFCD confirmed to local management that the grievor had indeed made the unauthorized accesses. He was placed on indefinite administrative suspension on June 9, 2016, pending the outcome of the investigation.

[15] On June 15, 2016, the IAFCD's final investigation report concluded that the grievor had contravened both the *Code* and the *Directive on Conflict of Interest and Post-employment* ("the Directive") that were in effect at the time, as follows:

- he made 621 unauthorized accesses to the information in 15 taxpayer accounts that were unrelated to his official workload;
- he repeatedly provided preferential treatment to those taxpayers by stepping outside his official role and accessing their accounts either to prepare their income tax returns or assist them with their CRA tax affairs, when this went beyond and conflicted with his assigned duties; as a result, these taxpayers benefitted from a direct service not offered to general taxpayers stemming from their personal relationships with the grievor;
- he found himself in a conflict of interest by not disclosing in the form of a confidential report that he had prepared a T1 return that contained business income;
- he found himself in a serious conflict of interest by assisting a family member with her private tax affairs and by giving her privileged access to insider information and to knowledge acquired through his CRA employment; and

- he made inappropriate remarks about the CRA's actions on his family member's taxpayer account.

[16] The grievor participated in a disciplinary hearing held on July 28, 2016, accompanied by a union representative. He was given a copy of the investigation report, and the employer confirmed with him that he had reviewed it. He was given an opportunity to explain the conduct described in the report or to bring forward any new information. On the same day, a "Resolution of Doubt" interview was held, as part of the "Review for Cause" of his reliability status.

[17] The grievor's employment was terminated on August 24, 2016. On September 1, 2016, he was informed that his reliability status was revoked. He filed a grievance with respect to his termination and two grievances with respect to the revocation of his reliability status. On April 3, 2017, they were referred to the Public Service Labour Relations and Employment Board, now named the Federal Public Sector Labour Relations and Employment Board ("the Board").

III. Issue

[18] At the hearing, the grievor withdrew the revocation of reliability status grievances 566-34-13951 and 13952, leaving only the termination grievance to be determined.

[19] The employer submitted that given the grievor's serious and repeated misconduct, the bond of trust in the employment relationship has been irrevocably broken, and that termination was the only viable option.

[20] The grievor admitted that the misconduct occurred. However, he stated that in light of his 31 years of discipline-free service and other mitigating factors, progressive discipline should have been applied. He asked that consideration be given to the fact that he did not wish to return to the workplace and sought reinstatement only for the purpose of bridging the financial gap to retirement. His representative submitted that the termination should be reduced to a suspension of 15 to 30 days.

[21] Accordingly, the only issue to be determined is whether a lesser penalty should be substituted for the termination.

IV. Confidentiality order

[22] At the hearing, the employer requested that some of the exhibits entered in this matter be sealed, as they contain taxpayers' names and confidential personal information. The grievor did not object. However, I am obliged to consider not only the parties' views but also the public interest in maintaining the open court principle which must be weighed against any serious risk to the interests of third parties in the confidentiality of their tax and other personal information.

[23] In these circumstances, the Board applies what has become known as the "*Dagenais/Mentuck*" test, (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, 2001 SCC 76), which was reformulated in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. Despite the importance of the open court principle, a confidentiality order can be made when:

> […]
>
> *(a) such an order is necessary in order to prevent a serious risk to an important 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.*

[24] I find that the requested order is necessary to prevent a serious risk to the privacy interests of third-party taxpayers who were not otherwise involved in these proceedings. I further find that the beneficial effect of the order sought outweighs any harmful effect on the right to free expression, including the public interest in open and accessible adjudication proceedings. Accordingly, the exhibits will be sealed.

V. Reasons for decision

[25] *Wm. Scott & Co. v. Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98 (QL), provides the framework for the analysis that I must conduct in this case. Having heard the evidence, I must now answer the following three questions: (1) Was there cause for discipline? (2) If so, was termination an excessive response in all of the circumstances? (3) If it was excessive, what alternative should be substituted? (see also *Basra v. Canada (Attorney General)*, 2010 FCA 24 (CanLII)).

A. Was there cause for discipline?

[26] The grievor admitted to the misconduct, but argued that he deserved a lesser penalty than termination. However, during the hearing, the grievor continued the same pattern that was evident at the investigation interview. Although he took the position that he did not deny the misconduct, he tried to downplay the extent of it or to justify it in different ways.

[27] He continued to suggest that some of the accesses that took place in 2012 might have been legitimate, as he was still working in client services from January to November 2012. However, all the accesses made before November 2012, when he was still in client services, were made for friends or family, and therefore, violated policy on that basis. He could point to none that were legitimately made as part of his job in client services.

[28] The grievor also tried to justify some of the later, post-2012 accesses. He did not challenge the employer's evidence that they were not made in respect of non-filers and that they were not within his assigned workload. But he submitted that although he was in a new role, his phone number and office had not changed. Because he had dealt with so many clients over the years, client-service inquiries kept coming to him via mail, phone, or from the clerk in the office. This was a symptom of what the grievor called the "small office syndrome". Thus, he effectively wore two hats — that of a non-filer field officer and that of a client-services agent. He suggested that he felt obligated to continue dealing with these inquiries out of a desire to help people and to "go the extra mile", especially given the frustration that taxpayers were experiencing with the new client-service model.

[29] This testimony was not persuasive. The grievor had no business responding to the inquiries of tax filers simply because some might have come to him. He was supposed to work on obtaining the compliance of non-filers — that was his job.

[30] Hank Koudsi, Assistant Director of Revenue Collections at the time, testified that when the service model changed, an entire communications package was prepared. The closing of the service counter was phased-in, presentations were made to employees, and an email was sent nationally from the CRA's commissioner. All employees received clear email instructions from Mr. Koudsi to refer any walk-in clients to a service options leaflet available in the lobby and to the 1-800 number. If a

taxpayer had a dire problem, it could be referred to a problem resolution officer, but a conversation with the team leader would have been the place to start, in such a case.

[31] The grievor could not explain why he continued to provide a service that was no longer his job to provide after November 2012 and that no longer existed after October 1, 2013.

[32] It is important to note that the grievor's accesses would not have been legitimate even had they resulted from a kind-hearted inability to extract himself from self-assigned client-service duties, as he suggested. However, with the possible exception of a few accesses made to help a taxpayer with a foreign pension issue in 2014 and 2015, the vast majority of his unauthorized accesses did not, in fact, result from inquiries of this type. Nothing in the evidence supported his narrative of a continuing dedication to his former, and now, in his opinion, ill-served clients.

[33] The reality is that the grievor did not provide client service to random taxpayers who continued to contact him with client-service inquiries. Rather, he accessed the accounts of friends and family to prepare their tax returns for them. Admitting the misconduct, but then putting forward this fictional justification for it, raises a serious issue of credibility.

[34] Based on the evidence, I find that there was cause for discipline in respect of the numerous unauthorized accesses. As well, the grievor has admitted the other acts of misconduct (preparation of T1 business income return, assisting his family member and providing insider information, and making inappropriate comments regarding CRA's actions). I must now determine if termination was an excessive penalty for this misconduct.

B. Was termination an excessive response in all the circumstances?

1. CRA employees' awareness of the policies

[35] I was referred to the *Code* (2012) and its later version, the *Code of Integrity and Professional Conduct* (2015) as well as several versions of the *Directive* (collectively, "the policies"). The relevant portions of the different versions of these policy documents are substantially the same and show that the type of misconduct in which the grievor engaged has been consistently prohibited for decades.

[36] The 2012 *Code* begins with a message from the CRA's commissioner and the deputy commissioner of revenue that reads in part as follows:

> *… Section 241 of the* **Income Tax Act** *directs us to be absolutely scrupulous with respect to the protection and security of taxpayer information. We must ensure that any access or disclosure of this information is only for purposes authorized under legislation. Any misuse of taxpayer information will result in serious disciplinary measures including termination of employment….*
>
> *If you are new to the CRA, you must certify that you agree to abide by the standards set out in the Code. All employees are also asked to review their obligation under the Code on an annual basis.*

[37] Under the heading "Your Expected Standard of Conduct" in section c), "Care and use of Agency information (confidentiality)", the Code states as follows:

> *You are not permitted to serve friends, acquaintances, family members, colleagues, or former colleagues as clients (for example, as taxpayers, contractors, or organizational representatives). Should this occasion arise, you must first notify your manager, who will ensure that someone else serves them….*
>
> …
>
> ***You must never:***
>
> ***Access any information that is not part of your officially assigned workload;***
>
> ***Disclose any CRA information that has not been made public; or***
>
> ***Use any CRA information that is not publicly available, for personal use, gain or financial benefit for yourself, your relatives or anyone else.***
>
> *To do so would compromise the integrity of the tax system and the protection of taxpayer information. It could also place you in a serious conflict of interest situation, which could attract a severe disciplinary measure including termination of employment, and could lead to criminal charges.*
>
> [Emphasis in the original]

[38] In section g), "Electronic networks access and use" one finds the following warning:

> *You must only use the CRA's primary computer systems and databases, such as Rapid and Corporate Administration System*

> *(CAS), for **authorized business purposes**, that is, for carrying out tasks that form part of your assigned workload.…*
>
> *You are reminded, each time you sign on, that CRA computer systems and electronic networks are for **authorized business purposes only** … except for the very limited personal use provided for, under certain conditions, in the **Monitoring of the Electronic Networks' Usage Policy**.…*
>
> *Employees must be aware that **all information** obtained, stored, sent, or received using the CRA electronic networks is **subject to routine monitoring**, and will be reviewed when there are reasonable grounds to do so.*
>
> [Emphasis in the original]

[39] And in section q), "Public criticism of the CRA", it states the following:

> *As a CRA employee, you must make sure that your public statements or actions do not impair your ability to carry out your duties or call into question your impartiality in carrying out those duties. You should use internal means to bring any criticisms you may have to the attention of CRA management.*

[40] The *Directive* sets out some of the relevant obligations of CRA employees. The 2014 version, for example, sets them out at section 7, "Roles and responsibilities", as follows:

> ***7.1 Employees:***
>
> *CRA employees have an obligation to **prevent, identify, disclose** and **manage** any conflict of interest that arises between their official duties and their private interests and/or outside business activities and must:*
>
> …
>
> *(k) Not serve or deal with file(s) of friends, family members, acquaintances, business associates, current/former colleagues, or current/former superiors unless prior approval from their direct manager has been obtained.…*
>
> …
>
> *(m) Not assist any person, entity, or current/former colleague, or current/former superior in dealing with the CRA, where this could or will result in preferential treatment or privileged access.*
>
> …
>
> *(p) Not bring discredit to the CRA or the Government of Canada.*

…

(r) Not directly or indirectly use, or allow the direct or indirect use of, any property belonging to, or leased by the CRA or the Government of Canada, for anything other than officially approved activities.

…

[Emphasis in the original]

[41] Two witnesses spoke to the importance of the policies, Mr. Koudsi and David Beamer, an assistant director. They addressed the need to protect taxpayers' private information for Canada's tax system to operate effectively and with integrity. They described how it was clearly and frequently communicated to employees that they were to access only those files within their caseloads. And they explained the importance of avoiding preferential treatment, or even the appearance of it, to maintain Canadian taxpayers' trust.

[42] Employees are regularly reminded to never deal with the files of family members, friends, or acquaintances. The prohibition makes no distinction between friends and acquaintances. If a friend, acquaintance, or family member account shows up in an employee's assigned workload, he or she must immediately advise his or her supervisor, who will assign the taxpayer account to another employee.

[43] Mr. Koudsi has been with the CRA for 28 years and is currently the director of the East Central Ontario Tax Services Office. At the time of these events, he was the assistant director of revenue collections. The grievor reported to his direct supervisor, who reported to the manager, who, in turn, reported to Mr. Koudsi.

[44] Mr. Koudsi testified that when employees begin their CRA employment, they are obliged to take an oath or affirmation that commits them to uphold and protect the confidentiality of taxpayer information. Mr. Beamer testified that as the assistant director, whenever he had new teams starting, he always talked to them about this and let them know the serious consequences, up to termination, of violating the policies. He also recounted that when he started at the CRA 20 years ago, his manager explained that he would have access to a significant amount of information. In the plain talk of days gone by, his manager told him that if he touched anything out of his workload, his manager would fire him.

[45] Mr. Koudsi explained that every year after the initial affirmation, employees are asked via an email to enter the Corporate Administration System (CAS) and go to the section called "My Commitment" to repeat the affirmation process and to disclose anything they have done or are doing that may be contrary to policy. Employees can, and should, disclose any such issues with their supervisors at any time. However, in addition, a disclosure process is built into the yearly affirmation process.

[46] Beyond the yearly affirmations, the policies are also regularly brought to the attention of CRA employees by other means, such as town hall discussions. The expectation of compliance with the policies is reinforced via emails from Human Resources or from the CRA's commissioner. In November 2013, the CRA's Security Directorate put out some case scenarios, which were examples that explained different kinds of policy violations and the results of such misconduct. Whenever the policies are revised, the new versions are sent with an explanatory email and are posted on the CRA's local area network.

[47] On a day-to-day basis, each time employees log on to the local area network, they receive a reminder that access to information is on a need-to-know basis and that the information is to be treated with respect. When entering the CRA system, another message appears to the effect that unauthorized access is not permitted, and a warning appears that the employee could be audited.

[48] In Mr. Koudsi's opinion, even if an employee does not look at the policies, more than enough regular reminders are given.

2. The grievor's awareness of the policies

[49] The grievor told the investigator that he had read the *Code*. He testified at the hearing that he knew that the *Code* existed but that he was not familiar with it. He said that he was not aware of the existence of the *Directive* and further that he had never read any of the policies "cover to cover".

[50] The grievor testified that he had thought that he could access taxpayer information if the taxpayer "authorized" him because that was how it was done in client services. He did not know that he was allowed to access only those taxpayer accounts that were in his assigned workload. He was not aware of any prohibition against servicing family and friends; nor did he see how assisting his family member

was providing preferential treatment. He said that he did not know that he was not allowed to prepare a tax return that contained business income. He now understands that all those actions were contrary to policy and stated that he would not have engaged in them had he known it at the time.

[51] When the grievor was initially hired, he was given the policies in pamphlet form. He testified that he probably looked at them but that he was told to just put them in his briefcase, which he did. It is not clear when the yearly affirmation process began or if it was always in place during his employment. In any event, he described his yearly procedure, at least since the affirmation process has been done by email. He testified that year after year, he simply clicked the electronic button to affirm his commitment, despite not having read the policies or disclosed anything he was doing that was contrary to them, as required.

[52] It is hard to fathom that after decades of public service, the grievor could be so entirely unaware of such basic policies. The best way to assess credibility is to subject the witness' story "to an examination of its consistency with the probabilities that surround the currently existing conditions." (*Faryna and Chorny*, [1952] 2 D.L.R. 354, at p. 357). New employees might be able to say that they did not know or understand the policies. An employee, who has been in a workplace for 31 years and who is reminded of them daily on logging in, hears about them at town hall discussions, receives emails about them from several sources, and is asked annually to review and affirm them, simply cannot make that claim.

[53] Further, the grievor's initial denials to the investigator strongly suggest that he did know the policies. If he really thought he was doing nothing wrong, as he claimed, why did he initially deny making any unauthorized accesses, until he could no longer sustain those denials in the face of the audit trail's irrefutable proof? Why did he say that he had never prepared a business income return, only to later say that he did not know that preparing one was against policy?

[54] In cross-examination, the grievor was referred to a section in the *Code* that contains three example scenarios about accessing and disclosing taxpayer information. The scenarios include: being asked by a relative to access their tax information, being asked by a colleague to access a famous hockey player's tax information, and wanting to access one's own tax information. The grievor offered the observation that he was

frustrated with himself because he knew he should not access either his own or the famous hockey player's information but that he had never realized that he could not access family members' files. Having never read the policies, he knew there was a prohibition against two types of misconduct, which he was not alleged to have engaged in, but was entirely unaware that the type of access he did engage in was prohibited. This is not credible.

[55] In addition, the grievor acknowledged that even when he was in client services, if a family member came to the counter, he would try to get someone else to serve them, but would serve them himself if no one else was available. While far from adhering to the actual policy, even this kind of effort to avoid the appearance of providing preferential treatment belies his testimony that he had no idea that there was anything wrong with helping friends and family.

[56] The grievor either kept himself ignorant of the policies throughout a long career or was simply not truthful about his lack of awareness. The evidence points to the latter.

3. Contradictions in the grievor's testimony about his taxpayer friendships

[57] A number of times at the hearing, the grievor denied being friends with the two taxpayers on whose behalf, directly or indirectly, most of the accesses were made. The investigator's notes show that he hinted at some kind of friendship connection with both of them, suggesting that he had "befriended" them through his client-service work and that he had continued to help them as clients. However, at the hearing, he said that they were simply former clients from his time in client services whom he continued to help. He categorically denied being friends with either of them.

[58] However, the wife of one of these taxpayers confirmed to the investigator that the grievor and her husband were long-standing friends who socialized regularly. She gave specific examples, including weekly meals together and the grievor visiting their home. The grievor prepared yearly tax returns for this taxpayer, his wife, his wife's daughter, his son, and his son's girlfriend. He accessed the account of this taxpayer's ex-wife on one occasion using software that located the account via her street address. And it was this taxpayer for whom he prepared a T1 return declaring business income.

[59] The second taxpayer told the investigator that he and the grievor had been good friends for more than 20 years and that they met through the first taxpayer. The investigation report notes that the grievor had changed the address of this taxpayer's wife in 2001. The grievor prepared yearly tax returns for this taxpayer, his wife, and his son, who was overseas.

[60] Much of the evidence of these friendships was in the investigator's notes of the grievor's interview and the investigation report. The investigator was not available to testify due to being on leave. However, both documents were entered into evidence on consent. The grievor had been given the notes to review for accuracy, and had signed each page. He had been given the investigation report, and at the disciplinary hearing had confirmed that he had reviewed it, and had the opportunity to contest any part of it. At the hearing before me, he could think of no reason that the first taxpayer's wife or the second taxpayer himself would invent long-standing friendships with him. Nor could he suggest how or why the investigator would have recorded this information about two different individuals, had it not been relayed to her.

[61] As mentioned earlier, the policies make no distinction between friends and acquaintances. Even if these two taxpayers could be characterized simply as former clients whom the grievor had gotten to know well, he still could not have legitimately accessed their accounts and their family members' accounts, even when he was in client services. And he certainly could not have legitimately done so when he was a non-filer field officer and they were not in his assigned workload.

[62] However, this evidence is important because it contradicts the grievor's testimony. He had a number of opportunities during the hearing to acknowledge his friendships with these two individuals, which clearly led him to offer them and their families significant preferential treatment. He denied any friendship with them throughout the hearing.

4. Progressive discipline - seriousness of the misconduct

[63] The grievor argued that given his long service and clean disciplinary record, progressive discipline should have been applied. Progressive discipline should certainly be applied when misconduct which is concerning occurs but is not so serious as to break the bond of trust between an employer and an employee. However, when

misconduct is serious enough, termination can be justified, even when it is the first recorded incident of misconduct.

[64] The repetitive nature of the grievor's misconduct is very concerning. His unauthorized accesses occurred year after year, right before the filing deadline. Just looking at the four years of the audit, 621 unauthorized accesses is a very large number that cannot be ignored. It goes far beyond other CRA cases dealing with these kinds of infractions. The closest one to which I was referred was *Campbell v. Canada Revenue Agency*, 2016 PSLREB 66, which upheld the termination of a grievor who had engaged in the same kind of misconduct for very similar motivations but who had made significantly fewer unauthorized accesses.

5. Mitigating and aggravating factors

[65] Mr. Beamer testified that he reviewed the CRA's *Directive on Discipline* and that he followed its guidance. It provides a suggested range of disciplinary measures for different acts of misconduct.

[66] He considered all the mitigating factors, namely, the grievor's years of service, employment record, cooperation with the investigation, and remorse shown during it. The grievor's representative noted that the grievor's cooperation was not mentioned as a mitigating factor in the termination letter. I agree that it is a good practice to mention any mitigating or aggravating factors relied upon in the termination letter. However, it is not a requirement. The grievor's representative did not otherwise challenge Mr. Beamer's testimony that he considered this factor, and I accept that he did.

[67] The grievor's representative also submitted that the employer misapplied the significant number of repeated accesses and the preferential treatment as aggravating factors, rather than as the misconduct itself. I do not read the termination letter that way. I think that the employer simply listed the mitigating factors and then addressed the misconduct. The large number of accesses could be considered an aggravating factor, but I see no reference to aggravating factors in the letter.

[68] The grievor's representative argued for other mitigating factors, submitting that the grievor's only intent was to help people and not to defraud the employer in any way, that he derived no personal financial benefit, and that he was forthright and

remorseful when confronted with his misconduct. It was also argued that his work environment should be taken into account; that is, the small office syndrome that saw him wearing multiple hats and continuing to engage in client service.

[69] In his testimony, Mr. Beamer identified as aggravating factors the many inappropriate accesses over multiple years, the grievor's critical and disrespectful email that was not reflective of the CRA's core values, and the grievor's continuing suggestion that he was trying to improve the CRA's poor client service. The employer also argued that the grievor's continued suggestion that some of his accesses might have been legitimate was an aggravating factor.

[70] I accept that the grievor derived no financial benefit from his actions and had no intent to defraud the employer for personal gain.

[71] I have already addressed the small office syndrome argument. Far from being a mitigating factor, it is a fictional narrative raising a serious credibility issue, which is an aggravating factor. In connection with this narrative, the grievor also categorically denied that he was friends of long standing with the two taxpayers for whom he had made the majority of the unauthorized accesses. This was patently false.

[72] Finally, the grievor's representative raised the grievor's 31 years of service as a mitigating factor. Long service can be a mitigating factor, of course, but it can also be an aggravating factor. Although the employer listed it as a mitigating factor, in my view, in these circumstances, it is an aggravating factor. After three decades with the CRA, the grievor should have known better, and as I have found, likely did know better.

[73] As for the submission that the grievor was forthright and remorseful during the investigation, I note that the employer's witnesses said that he did show remorse and that he was cooperative. I saw no true remorse in his continued attempts to justify his conduct by stating that he had just tried to help people, however, I accept the employer's view that he was remorseful in the interview and that it should be considered a mitigating factor. However, I do not accept the employer's assessment that the grievor was either cooperative or forthright. The investigator's notes, which the grievor reviewed and signed as accurate, indicate otherwise. Blanket denials, followed by slow admissions only in the face of irrefutable proof, cannot be so characterized.

[74] I am of the view that the aggravating factors, the most important of which are the grievor's lack of candour, far outweigh those few factors that could be said to mitigate the misconduct.

[75] New evidence came to light at the hearing through the grievor's testimony. This new evidence revealed information related to other acts of misconduct that had occurred prior to discharge, but that did not form the basis of any allegations against the grievor. The employer sought to rely on this information only as an aggravating factor.

[76] I find that this information could have been known to the employer prior to discharge (see *Air Canada v. Canadian Auto Workers, Local 2213 (Desroches Grievance),* [1999] C.L.A.D. No. 713, 86 L.A.C. 4th 232 (QL)). It simply had not applied due diligence or turned its mind to the significance of the facts that were in its possession. Accordingly, I have not considered this information for any purpose in reaching my conclusion.

VI. Conclusion

[77] I find that the grievor made a very large number of unauthorized accesses to taxpayer accounts over multiple years and provided preferential treatment to a wide circle of friends, acquaintances and family members. He failed to disclose that he had prepared a tax return that declared business income, which was contrary to policy. He provided a family member with insider information and made inappropriate remarks about the actions CRA had taken on her account.

[78] I find that the bond of trust between the employer and the grievor is broken and cannot be repaired. Termination was not an excessive response in all the circumstances.

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

(The Order appears on the next page)

VII. Order

[80] The termination grievance 566-34-13953 is dismissed.

[81] The following exhibits will be sealed: Exhibit 4, Tabs 1, 2, 4, and 10; Exhibit 6; and Exhibit 7.

June 29, 2020.

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