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Citation: 2016 PSLREB 110

Public Service Labour Relations and Employment Board Act and Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

TIMOTHY PHILPS

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Philps v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Himself

For the Employer: Christine Langill, counsel

Heard at Vancouver, British Columbia,
October 20 to 23, 2015, and April 19 to 22, 2016.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Timothy Philps, the director of programs for the Pacific Region of the Canada Revenue Agency (CRA or "the employer"), grieved a 30-day suspension without pay that the CRA imposed upon him as the result of an alleged violation of its "Code of Ethics and Conduct" ("the Code") and for an alleged abuse of authority involving younger female employees. The grievance was referred to adjudication on September 23, 2014.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

II. Summary of the evidence

[3] For most of what transpired below, the grievor was in an acting position as the director of the employer's regional tax services office (TSO) in Penticton, British Columbia. He was alleged to have acted inappropriately with younger female employees by inviting them to his home and providing them with alcohol and at other times meeting them in hotels and bars. Those allegations were the subjects of two investigations.

[4] The first was a harassment investigation, which concluded that because these interactions constituted off-duty conduct, the employer's harassment policy did not apply, even though the grievor's actions had violated the Code. The second, which was far broader in scope than the first, was an investigation by the employer's Internal Affairs and Fraud Prevention (IAD) branch, which concluded that the grievor had

behaved unacceptably and had breached the Code and the employer's expectations of an executive category employee.

[5] In addition, it was determined that the grievor had demonstrated an inordinate degree of leniency with respect to disciplining a male colleague with whom he socialized and whom the employer subsequently terminated. The second investigation also concluded that the grievor had used his corporate American Express credit card (AMEX) for personal purchases when he was not on travel status and that he had failed to pay its outstanding balance within the required 120 days.

[6] Ms. H.testified that she and her friend, Ms. P., were both employed in the CRA's Penticton office in 2010. The grievor was their director for the better part of that year. Ms. H. and Ms. P. occupied cubicles on the first floor, while the grievor's office was located on the second floor. Whenever he was in the Penticton office, the grievor made a point of stopping by the young women's cubicles two to three times a week, to socialize. Ms. H. described the grievor as personable and friendly but stated that she felt that he was more friendly towards her than towards others, which made her feel uncomfortable. As others noticed the amount of attention that the grievor was demonstrating towards Ms. H., rumours started about their relationship.

[7] In the summer of 2010, the grievor asked Ms. H. if she knew of anyone who could babysit for him on a particular Wednesday. As she took Wednesdays off that summer, she volunteered to babysit while the grievor, his wife, and another couple went on a tour of the local wine region. This was confirmed via email. For babysitting, the grievor paid Ms. H. $200 and gave her a bottle of wine. On his return, he drove her home in a rented vehicle, which he referred to as the "pimp mobile". They were accompanied by his son.

[8] Ms. H. was a member of the Pacific Region Next Generation Committee, which was meant to facilitate the transfer of knowledge from senior to junior employees. Its purpose was to identify likely candidates for succession planning purposes. The grievor was the "Next Generation Champion" (a member of the executive category assigned to certain key employer initiatives to provide guidance and opportunities to promote the purposes of the committee).

[9] On November 24, 2010, the grievor invited Ms. H. and Ms. P. to an event at his condo, where he lived alone, for an evening of networking with him and Kully Mann,

who at that time was the director of security at the employer's regional office in Vancouver, British Columbia.

[10] As the evening event approached, the grievor began calling and texting Ms. H. at work. He wanted to know what he should purchase for the young women to drink when they were at his condo. Ms. H. tried to politely decline the invitation but was not allowed to; the grievor was very insistent that she attend and being a senior manager who may have been able to influence her career, Ms. H. feared to not attend would have a negative impact on her career. When she and Ms. P. arrived at approximately 18:00, they discovered that only they, the grievor, and Mr. Mann would be there. No one else had been invited.

[11] According to her evidence, it was clear to Ms. H. that the grievor and Mr. Mann knew each other very well. Ms. H. and Ms. P. were offered hors d'oeuvres and drinks and were then given a tour of the grievor's condominium, during which Mr. Mann insisted on taking away their cellphones. At some point, the door to the guest room closed, and Ms. H. realized that Ms. P. was no longer sitting at the grievor's condo bar with her. Ms. H. tried to open the guest room door but the grievor stopped her and insisted that she give him a hug. She believed that the demand for a hug was a ploy to prevent her from opening the guest room door to check on her friend, who was in there with Mr. Mann.

[12] The grievor and Mr. Mann continued to serve drinks for the women, and according to Ms. H., she had more than was appropriate. At some point, the group went to the bar across the street from the grievor's home and were then to go on to a late dinner. The group was at the bar for 30 to 45 minutes, following which they went into the attached restaurant, where they sat in a u-shaped booth and in which the grievor put his hand on Ms. H.'s leg. While at the bar, several rounds of drinks were consumed, at least one of which was provided by Ms. P.. At approximately 23:00, Mr. Mann told the group that he had kissed Ms. P., who was at that point in the bathroom being sick. Ms. H. testified that the grievor did not react when he heard about the kiss.

[13] Ms. H. left the group in search of Ms. P.. She found her lying on the bathroom floor, in an incoherent state. After Ms. P.'s boyfriend came to collect her, Ms. H. rejoined the grievor and Mr. Mann. Realizing that her keys and cellphone had been left

at the grievor's condo, she returned there with him. The grievor insisted that Ms. H. not drive as she was intoxicated, but she was not comfortable staying with the grievor and left. The grievor had been very flirtatious with her, and she was not comfortable in his presence.

[14] Following the event, Ms. P. withdrew from the Next Generation Committee. Ms. H. continued with it and attended the annual general meeting in Vancouver on November 29, 2010. When she arrived at the hotel the night before, she was met by a card from the grievor welcoming her to Vancouver. It was accompanied by a bottle of wine, a cheese tray, and two wine glasses. Ms. H. understood this as meaning that the grievor intended to share the wine and cheese with her. She checked with the other attendee from Penticton, P.C., to determine if he had received a similar welcome gift; he had not. Later that evening, she received a call from the grievor inviting her to join him in the hotel bar for drinks.

[15] Ms. H. did meet the grievor for drinks, which he bought for her. He made a complimentary comment about her appearance. He again put his hand on her thigh, which made her feel uncomfortable. Rather than offend an executive who could help her career, she moved her leg away from him. She eventually went back to her room alone.

[16] The next day, according to Ms. H., after the meetings concluded, she and Mr. P.C. joined the grievor in a downtown Vancouver bar, where they stayed and drank so long that Ms. H. and Mr. P.C. missed their flight. The grievor arranged for Ms. H. and Mr. P.C. to take the next flight. On it, Ms. H. discussed with Mr. P.C. what she perceived as the preferential treatment she received from the grievor.

[17] The grievor told Ms. H. about the complaint that Ms. P. had filed against him. He phoned Ms. H. using her personal cell phone number and discussed with her the possibility that she could be a witness for him. Eventually, two investigators interviewed her, which caused her concern for her career. She told them that she felt compelled to socialize with the grievor. Her CRA job was her first real job. She believed that she had to please her boss and that saying no to him was not an option. She did not know what control he had over her career.

[18] The grievor and Ms. H. sent each other text messages until December 6, 2010. After that, he continued to keep track of her throughout the investigations into his

conduct. Eventually, she stopped answering his calls. A dinner he had planned for members of the Next Generation Committee was cancelled. Ms. H. contacted him in hopes of setting up a time to meet with him with a third person present. She invited him to a get-together, which she later cancelled. She also cut off any further ongoing communication with him once he left the Penticton office, as to continue communications with him was very stressful and a burden.

[19] Ms. A. testified that she reported to and socialized with the grievor when he was in the employer's Burnaby Fraser TSO in Surrey, British Columbia. Like Ms. P. and Ms. H., Ms. A. was a member of the Next Generation Committee.

[20] In December 2009, after a meeting in Vancouver, she invited the grievor to lunch. He agreed and asked her if she was interested in participating in consuming tequila shots in an email he sent to her on their work email accounts. Ms. A. thought it inappropriate to respond to such an invitation via the employer's email system.

[21] The two did meet for lunch, where they discussed both work and personal matters. They discussed the rumours surrounding the grievor's inappropriate conduct. Apparently, senior CRA employees had raised concerns with management about his relationships with young ambitious women in the workplace. Ms. A. was concerned that she was lumped in with those women, known as "Timbits", who were perceived to be garnering favours and career advancement from the grievor.

[22] At lunch that day, Ms. A. and the grievor consumed alcohol, which he paid for, according to her. After lunch, they did not go back to the meeting but rather went to a lounge in a nearby hotel and continued to drink. Again, the grievor paid for the drinks. He encouraged her to stay at the bar and offered to get her a hotel room so that she would not have to take the train alone, which made Ms. A. feel very uncomfortable; it was highly inappropriate, in her estimation. She eventually did take the train; she was equipped with Mr. Mann's telephone number so that he could arrange for her to get her car out of the parking garage at the Surrey office after hours. This was not the only time she had met with the grievor for drinks over lunch, but it was the last time.

[23] It was known that the grievor had acted inappropriately at other work-related social events, an example of which was, according to T.C., who worked for the grievor in December 2006, at the Christmas party they both attended in 2006, at which an incident involving Mr. Mann and Mr. T.C.'s girlfriend occurred. Apparently, Mr. Mann

came up to the woman in question, grabbed her around the waist, and proceeded to grind his genitals into her behind. According to Mr. T.C., the grievor was aware of Mr. Mann's behaviour and did nothing. Similar types of behaviour were described by another employee, including descriptions of the relationship between Mr. Mann and the grievor, which she described as being very close, in her opinion.

[24] Mr. T.C. was reluctant to discuss this incident with the grievor as the grievor and Mr. Mann were friends. He was afraid to report the incident because of the potential impact on his job; he was afraid that he would be denied job opportunities. This was confirmed by Brenda Hermann, another CRA employee who attended the Christmas party, who testified about the relationship between the grievor and Mr. Mann and the steps she took to address the events that occurred at the Christmas party. On many other occasions in the past, Mr. Mann had acted inappropriately, and the grievor, who was his manager, did not address them. Eventually, after assigning Ms. Hermann the investigation into Mr. Mann's conduct, the grievor recognized the need to discipline Mr. Mann for his unacceptable conduct.

[25] Darrell Mahoney was the assistant commissioner for the employer's Pacific Region from April 2008 to June 2011. When he took the position, the departing assistant commissioner briefed him on rumours about the grievor's conduct with younger women. In fiscal year 2008-2009, Mr. Mahoney did not observe any behavioural or performance issues with the grievor. When the grievor took the acting assignment in the Penticton TSO, Mr. Mahoney received reports of rumours concerning the grievor's inappropriate behaviour around young women in the workplace from the grievor's immediate supervisor. By the end of 2010, Ms. P. filed a harassment complaint against the grievor.

[26] Mr. Mahoney testified that the employer required a very high level of trust in the grievor as was evident in the accountability profile for both his substantive position and his acting assignment. As a member of the employer's executive cadre, the grievor was expected to demonstrate the leadership competencies outlined in the profiles and to establish trust within the regional management team.

[27] The grievor was responsible for up to 400 employees, depending on the time of year. He was required to demonstrate a high level of trust along with the CRA's core values and ethics. He was in charge of a TSO, and the employer expected him to treat

the employees working there with respect and integrity. According to Mr. Mahoney, he was the face of the CRA in that office. As champion of the Pacific region's (the region) New Generation group, he was expected to be a role model for the employer's younger employees in the region and to be their link to and voice with the regional management team.

[28] As the grievor's manager, Mr. Mahoney was responsible for assessing the grievor's performance. He met with the grievor at least six times per year on a one-to-one basis in addition to those times they met as part of the regional management team or at other management meetings. At no time did Mr. Mahoney remember the grievor raising health or addiction issues with him during the meetings. In September 2010, the employer identified problems with the grievor's presence in the office, his lack of interest in learning programs, and his relationships with his staff.

[29] When the issue of his attendance was raised with the grievor, he typically responded that he was working from home. Despite being advised of the employer's concerns with his attendance and behaviour in the workplace, there was no improvement, according to Mr. Mahoney. The grievor's attendance and conduct in the office got worse; when he was present, he was not engaged in program delivery. Mr. Mahoney raised his concerns at the regular bilateral meetings he had with the grievor. In Mr. Mahoney's recollection, the grievor demonstrated the same pattern of behaviour and absences while at the employer's Surrey office. Despite the employer's concerns, the grievor never identified any reason to Mr. Mahoney for the behaviours that were causing those concerns.

[30] Despite all this, Mr. Mahoney testified that he was not aware the grievor had demonstrated any inappropriate behaviour towards his female employees until Ms. P. filed her harassment complaint. Once the employer received her complaint, the grievor was ordered to return to its Surrey regional office. He was assigned to the organizational transformation portfolio in an attempt to separate him from the complainant. In the meantime, the employer engaged a consultant, Ms. Carol-Ann Hart to investigate Ms. P.'s complaint.

[31] As a CRA executive, the grievor, like all CRA employees, was responsible for ensuring that he was aware of the Code and for conducting himself in accordance with it. That compliance formed part of his job offer and accountability agreement. At the

time of the events, according to Mr. Mahoney, the regional management team was making concerted efforts to work on and promote ethics in the region. Harassment prevention sessions were held across the region, which included vignettes on acceptable and unacceptable behaviours, as a follow-up to the results of the 2008 public service employee survey where many CRA employees reported that they had been harassed in the workplace.

[32] The employer hired Ms. Hart to investigate Ms. P.'s harassment complaint. The terms of reference of the investigation required her to determine if the employer's harassment prevention policy and the Code had been violated. She concluded that based on her investigation and after speaking to all the relevant witnesses, harassment had not occurred, as the events Ms. P. complained of occurred outside the scope of her employment. However, she concluded that the grievor had breached the Code by having a relationship with two junior female employees, which was detrimental to the employer's reputation. He was clearly in a superior power position, being the senior manager of the TSO where the junior employees worked.

[33] The grievor met with Ms. Hart. According to her, he never raised any medical issues to excuse his behaviour. Nor did he provide any medical notes in his defence. He did not appear incapacitated to her and did not at any time ask to postpone or reschedule their meetings. The grievor replied to her preliminary report in February 2012. He disagreed with Ms. P.'s version of the events of the evening in question. Rebuttal witnesses were identified and interviewed, and the grievor was given the opportunity to review their statements and those of the other witnesses and to provide his comments before the final report was released.

[34] Based on Ms. Hart's conclusion that the Code had been breached, the employer referred the matter to the IAD to investigate the alleged breach. David Morgan was assigned to conduct the investigation based on terms of reference the employer provided to him. He was also to investigate the grievor's misuse of the employer's AMEX, which had been discovered after Ms. P. made her complaint.

[35] Mr. Morgan interviewed 12 witnesses, including the grievor, whom he interviewed twice. He reviewed email and text correspondence between the grievor and female employees. When asked about these communications, the grievor denied any romantic feelings towards his employees. Mr. Morgan also went to the bar and

restaurant where the grievor went with Ms. P., Ms. H., and Mr. Mann, to see the security video recordings from the night in question.

[36] He also obtained the grievor's AMEX statements, which set out the grievor's expenditures. When the grievor was asked about the inappropriate AMEX charges, he told Mr. Morgan that they were made in the two-week period while he was gravely ill before being hospitalized. Three charges had been made to the AMEX within the Vancouver area when the grievor was not on travel status. In addition, he had allowed his AMEX to become more than 120 days delinquent, which violated the employer's travel card use policy.

[37] During his investigation, Mr. Morgan examined whether the grievor had exceeded his authority under section 34 of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*) when he authorized the payment of Mr. Mann's tuition for the master's degree program in which he was registered. He also concluded that the grievor failed to properly deal with Mr. Mann's behaviour at the CRA's Christmas party in 2006, which meant he showed a friend preferential treatment in both instances. The abuse of the employer's AMEX was confirmed as was the grievor's inappropriate behaviour with young female junior employees in the workplace.

[38] Maureen Phelan assumed the role of assistant commissioner of the CRA's Pacific Region upon Mr. Mahoney's departure. She first met the grievor as a colleague on the regional management team in 2002. For several years, she had had no contact with him. When she assumed the assistant commissioner role, she became his manager. She was unaware that he had any health issues until October 2011, when he left work for medical reasons and provided her with a series of doctor's certificates. The grievor remained on sick leave through December 2012. The employer was provided no information as to the reason the leave was required. A review of the grievor's leave reports indicated that he took no sick leave in 2009 and 2010. In 2011, he took 982.5 hours of sick leave.

[39] Ms. Phelan received the IAD's report on October 2, 2013. Mr. Morgan concluded that the grievor had contravened the Code with respect to his use of the employer's AMEX but that he had not violated the *FAA*. Mr. Morgan determined that the grievor's actions that gave rise to Ms. P.'s complaint had breached the Code's sections concerning off-duty conduct. Based upon this report, she concluded that discipline was

warranted. The grievor had demonstrated a history of inappropriate behaviour, which the employer had to address. A disciplinary hearing was held, which the grievor attended on his own, even though he was advised that he could bring a representative if he chose to.

[40] At the disciplinary hearing held on December 3, 2013, the grievor told Ms. Phelan of his struggles with alcohol. He told her that he was an alcoholic and that he had received treatment for it, yet he provided no medical certificates to support this information. What struck Ms. Phelan at the meeting was the grievor's lack of accountability and remorse. In her opinion, he failed to recognize the impact his actions had on others.

[41] On January 14, 2014, Ms. Phelan met again with the grievor. At that meeting, he advised her that the CRA had sorely failed him and that a former assistant commissioner had tried to derail his career. Again, he made no indication of any remorse over his treatment of the young women over whom he was in a position of authority.

[42] The grievor had violated section 3 of the Code, which deals with the care and use of the employer's property, including the AMEX. His off-duty conduct had violated the off-duty conduct provisions, and he had failed to demonstrate a manager's leadership role as identified in the Code. He was the director of a TSO, one of the highest positions in the region. A violation of the Code is classified as a "group 5 offence" under the CRA's "Discipline Policy", making it one of the most egregious offences, in the employer's mind. The penalty for such an offence ranges from a 20-day suspension without pay to termination.

[43] However, she did take this new information from the grievor about his struggles with alcohol into account, along with other mitigating and aggravating factors. The aggravating factors included the natures of the offences; the inappropriate behaviour towards young women in his chain-of-command, including texting them; the inappropriateness of inviting them to his home and of taking them out to a bar, especially when they were already intoxicated; the inappropriateness of attempting to socialize with Ms. H. and sending her the welcome gifts; the "liquid" lunches with Ms. A.; the relationship with Mr. Mann; and his lack of remorse, and they all warranted

more than a minimum penalty. The investigations demonstrated a pattern of behaviour on the grievor's part, which was an aggravating factor.

[44] The mitigating factors included the grievor's tenure, clean discipline record, performance, which was excellent, and issues with alcohol. Ms. Phelan was not convinced of the causal relationship between the grievor's alcohol addiction and his misconduct. It does not excuse inappropriate behaviour. However, had it not been for the fact that the grievor was suffering from an alcohol addiction, Ms. Phelan would have terminated him. She determined that the appropriate penalty would be a 30-day suspension without pay. She testified that it was one of the hardest decisions she had made in her career but that her instincts said that, and she was hopeful, he could be rehabilitated.

[45] On cross-examination, Ms. Phelan testified that she had noticed that the grievor had been away from the workplace "a fair bit" and that when he was present, his hours were erratic, and he would leave without notice. She was aware as early as July 2011 that he was unhappy in the workplace and unwell, as he had stated as much in an email to her.

[46] Following a meeting on September 12, 2011, Ms. Phelan noted in a summary of the meeting that he was in poor health. When she went to see him on September 16, 2011, to talk to him about the meeting on September 12, she found him asleep at his computer, and she could hear snoring through his door. She remembers smelling alcohol. Ten days later, she found him in his office in a completely inebriated state, according to her notes.

[47] When asked if she thought that the grievor might have a medical condition, Ms. Phelan testified that with respect to that day, she knew he was drunk and that he was buckling under pressure. She had assumed that the grievor had had a liquid lunch, but she did not see it as part of a pattern. She made no connection between his drastic loss of weight and alcoholism. He eventually left on sick leave on September 27, 2011. She knew something was wrong but did not conclude that he had a specific medical condition; she assumed his illness and issues were stress related.

[48] Ms. Phelan and the grievor spoke again on October 18, 2011. He was still not forthcoming with anything specific. He explained that he had been hospitalized for a week and explained the events that required the hospitalization. He was unclear about

his illness and indicated that the doctors were trying to "rule out the bad stuff". The treatment plan he described to Ms. Phelan was benign in her opinion: sleep, rest, and weight gain. The grievor's hospitalization was confirmed by a medical certificate that he provided to her on October 26, 2011. There was no mention of the nature of his illness.

[49] The grievor remained on sick leave for a long time. On October 1, 2012, Ms. Phelan received a notice from the CRA's Executive Human Resources Office advising her that the grievor was close to exhausting his leave and identifying the possibility of providing him management sick leave. Rather than that, Ms. Phelan took the opportunity to contact the grievor to discuss his return to work. They met on October 16, 2012, at which point he advised her that he was an alcoholic. He had been to a treatment centre on Vancouver Island and was on the road to recovery. Throughout this period, Mr. Morgan's investigation was ongoing. While communicating with the IAD after being advised of the grievor's medical issues, Ms. Phelan expressed her concern that the ongoing investigation might induce a relapse.

[50] The grievor eventually provided Ms. Phelan with a medical certificate indicating that he was fit to return to work full-time. She testified that based on it, she assumed he was fit to undergo the investigation. On the basis of the IAD's report and not Ms. Hart's report, Ms. Phelan decided to discipline the grievor, in consultation with the employer's labour relations representative.

[51] The grievor testified at length on his own behalf. He described his significant "adventure" with alcohol addiction, which has been a life-long problem for him, especially during the last 20 years. His CRA positions at both the Vancouver and Penticton offices entailed considerable travel and time away from home. He was alone a significant amount of time. He would begin drinking while commuting from his home to his office.

[52] According to the grievor, the Burnaby Fraser TSO, where his office was located, had numerous rumours circulating about him. When he was offered the opportunity to take an acting assignment in the Penticton TSO, he saw it as a way of getting away from these rumours. He testified that he expressed his misgivings about the assignment to Mr. Mahoney because he knew it would not be in his best interests.

Mr. Mahoney gave him an ultimatum — if the grievor expected to progress in his career, he would go to Penticton without his family.

[53] At this point, the grievor testified that he was in the advanced stages of alcoholism. According to him, the people in the Penticton office noticed as much. He was frequently absent and inaccessible to them. He described his time in that office as less and less productive. He could not make it through seven hours without a drink, which was the reason for his attendance problem. He was unable to put in a full day without a drink because he was in physical pain caused by alcohol. If he did make it to 4 p.m., he would be shaking and pacing by then. He had to move continuously to walk the pain off. When he left at 4 p.m., he would go to the bank machine, make a withdrawal, and then walk the block to the liquor store. He could not walk the two blocks back to his condo without drinking the liquor he had just bought, so he would go to the washroom of the nearest hotel and drink enough to make the shaking go away. He then drank through the night until it was time to go to work the next day.

[54] The grievor described himself as a very high-functioning alcoholic who knew right from wrong even when he was drunk, although in the later stages of his addiction, he had difficulty thinking things through, but he never ran afoul of the rules. He was very clever at disguising his drinking, so much so that his family was unaware that he was an alcoholic. At one point when he was hospitalized, he fooled his doctor into believing that he was ready to make significant changes to his life, in order to be released.

[55] From the time the grievor took the acting assignment in Penticton until October 2011, the only thing that occupied his mind was obtaining and consuming alcohol. It was the only thing that mattered, and it kept the pain away. He was aware of the rumours circulating and had heard the term “Timbits” being used to describe the women in his office that he was friendly with and was very upset by this term. He denied favouring younger female employees as Mr. Morgan said he did. The grievor was mandated to promote and focus on younger employees and did promote males as well as females.

[56] Eventually, after Ms. P. filed her harassment complaint, the grievor testified that he returned to a special advisor position in the Vancouver regional office. At no point had Ms. H. indicated to him that she was uncomfortable with the events of the night in

question. In fact, she sought him out two weeks later and sent him personal notes after that. There was no indication that she thought of him as predatory. Before he left Penticton, he thanked the staff of the restaurant and bar where the November 24, 2010, events occurred for the welcome that they had given him during his stay in Penticton. He also apologized for involving them in the situation that resulted in his return to Vancouver.

[57] Between January and October 2011, the grievor stated that he was in the final stages of alcoholism. He no longer had a period in the day when he was productive; by that time, he was drinking 24 hours a day, 7 days a week. He stopped caring for himself, no longer exercised, and stopped grooming. He hid alcohol everywhere but in the office. Instead, he left the office to drink. At the end, he was drinking two or three quarts of alcohol a day. He was not eating and was no longer able to walk well. While on a trip to visit his in-laws in 2011, it became clear to him that he was powerless over alcohol and that he could no longer make rational decisions. His judgement was dimmed by alcohol, and his behaviour changed when he was intoxicated.

[58] Over the next few months, the grievor spent time in the hospital due to the acuteness of his disease, after which he was in and out of treatment. He advised Ms. Phelan of what had happened and told her he would be off indefinitely. Medical notes were provided to support his absences.

[59] By April 2012, the grievor came to the point where he recognized that his life was unmanageable. He was powerless over alcohol. At that point, he surrendered and entered a treatment centre on Vancouver Island. He completed the 56-day program, in which he was medically detoxed. He relapsed once he was released but was sober from December 1, 2012, to the hearing. He now sees that it was not right of him to conduct himself with women as he did.

[60] The grievor still attends Alcoholics Anonymous meetings. He described steps of the program requiring him to make a list of all who have been harmed and once done to make amends to each person wronged when it is reasonable to. Every step of the way, he has accepted responsibility for his actions and was forthcoming in his meeting with Ms. Phelan in January 2014. It would have been inappropriate to make amends in these circumstances.

[61] The grievor's evidence about his relationship with Ms. H. did not differ in any significant detail from the one she provided in her evidence. The only discrepancy was in the description of who bought some of the drinks at the bar. According to the grievor, Ms. P. obtained and supplied the party with complimentary alcohol, which she was able to do because she worked there part-time. Likewise, his evidence concerning his meetings with Ms. A. did not differ significantly from hers.

[62] The grievor denied abusing anyone, contrary to the conclusions of, in his words, the "witch-hunt" embarked upon by the employer and perpetrated by Mr. Morgan. He admitted that in his alcoholic stupor, he did not see to his own financial responsibilities as he should have, and that for that reason, his AMEX was allowed to go 120 days past due. He admitted using it when he was not on travel status.

[63] In the grievor's opinion, the penalty the employer imposed should have been of less than 30 days if it had taken his alcoholism into account. Again in his opinion, the employer did not consider it; nor did the employer take into account the medical information he provided. No medical experts were consulted by the employer.

III. Summary of the arguments

A. For the employer

[64] Misusing the employer's AMEX violates the Code and constitutes a "group 4 violation" under the employer's Discipline Policy. Off-duty conduct of the nature described in this case also violates the Code and constitutes a violation ranging from "groups 2 to 5" of the employer's Discipline Policy, depending on the circumstances. The favouritism the grievor showed towards Mr. Mann was a "group 5" offence as an abuse of the grievor's financial authority under the *FAA*.

[65] The grievor was not forthcoming in his evidence. When the evidence would have demonstrated his culpability, he claimed he had no memory. When he sought to absolve himself, his recollections were clear. Throughout the grievance process, and even at the hearing, the grievor showed no remorse. He has not recognized the impact of his actions on others. He failed to model the CRA's values as expected of a CRA executive. This all formed part of the aggravating factors considered when determining the discipline to be imposed.

[66] Mitigating factors were considered, such as the grievor's clean record and his addiction. Alcoholism does not excuse his behaviour. As the champion for the CRA's Next Generation group, the employer was justified in its expectations that he would be a role model for young employees. The behaviour he demonstrated did not meet these expectations, and the employer was justified imposing discipline for that failure. The employer is not required to create rules for every possible circumstance that may arise in the workplace. An employee is expected to use common sense to recognize where the line is and not to cross it (see *Gannon v. Treasury Board (National Defence)*, 2002 PSSRB 32).

[67] There is no dispute over the allegations concerning the employer's AMEX. Furthermore, the grievor has acknowledged that the events of November 24, 2010, were inappropriate and that it was inappropriate to buy Ms. A. drinks on December 9, 2009. Both investigations, by Ms. Hart and Mr. Morgan, concluded that the grievor had violated the Code by pursuing inappropriate relationships with junior employees. The question of favouritism towards Mr. Mann was raised in the course of Mr. Morgan's investigation. Regardless of the fact that the incidents dated to 2006, they were discovered in the course of that investigation. The employer is entitled to impose discipline as a result of discovering things through an investigation, regardless of when they occurred.

[68] Any procedural defects in the investigative process were cured by this hearing (see *Patanguli v. Canada (Citizenship and Immigration)*, 2014 FC 1206; *Bridgen v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 92; and *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)(QL)). Ms. Hart's investigation was properly convened as a result of Ms. P.'s harassment complaint. The far-reaching nature of Mr. Morgan's investigation reflects how widespread the grievor's inappropriate behaviours were.

[69] The grievor demonstrated an ongoing pattern of behaviour and misconduct in which he showed favouritism to Mr. Mann. They came to light through the investigation, and regardless of the delay discovering them, discipline was warranted. As an executive, the grievor was trusted to follow through on obligations. He told the employer he would deal with the Christmas party incident and did not. The delay dealing with the matter was mitigated by the length of time it took to complete the investigation because of the grievor's absence from the workplace (see *Nicolas v.*

Deputy Head (Department of Fisheries and Oceans), 2014 PSLRB 40; and *Community Living Espanola v. Canadian Union of Public Employees, Local 2462*, 84 C.L.A.S. 216).

[70] The grievor has still not demonstrated remorse for his actions. He apologized to the staff of the restaurant and bar in Penticton, yet he has not apologized to his victims. His lack of remorse and accountability was evident throughout this process. He said little on direct examination about anything substantive other than how things like the Timbits rumours affected him and about his life as an alcoholic. He blamed others for his situation. As an executive, the grievor should have known what was appropriate and what was not and should have known that inviting young female employees to his condo was inappropriate.

[71] As his defence, the grievor claimed that the employer should have known about his medical issues. However, he provided this information to Ms. Phelan only after he was disciplined. The series of medical notes he submitted in support of his absences from the workplace were from his family physician and the internal medicine department of St. Paul's Hospital in Vancouver. None mentioned alcoholism or identified any restrictions on decision making or interacting with female employees. Ms. Phelan recognized that the grievor had lost a significant amount of weight but did not conclude that it was due to alcoholism. She testified that she believed it to have been stress related, due to the ongoing investigations. According to the grievor, he is very clever and able to fool people.

[72] If the grievor intended to raise a medical defence, medical information was required (see *Halfacree v. Canada (Attorney General)*, 2014 FC 360; and *Cassin v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 37). He provided no expert evidence of his illness causing his misconduct or of its impact on his decision making abilities, even though both are required to support a medical defence (see *Winnipeg (City) v. Amalgamated Transit Union, Local 1505* (2006), 147 L.A.C. (4th) 162; *Saputo Foods Ltd. v. Teamsters Local Union No. 464*, [2009] B.C.C.A.A.A. No. 133 (QL); and *Health Employers Association of British Columbia v. British Columbia Nurses' Union* (2006), 147 L.A.C. (4th) 146).

[73] This is not an accommodation case — it is a discipline case, which the grievor hoped to mitigate by blaming his alcoholism. Unlike the situation in *MacArthur v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 90, the grievor took no

responsibility for his actions or any steps to deal with his alcoholism. He did not attend a rehabilitation program until 2012, despite the fact that Ms. P. filed her complaint in 2010. He testified that he was embarrassed by his actions, yet he never apologized to anyone. He described himself as a high-functioning executive, which was supported by Mr. Mahoney's evidence.

[74] The grievor selectively sent personal emails to female employees and called meetings with them. His behaviour showed planning; the things he did were not done on the spur of the moment. This is not a case of drunken texting. He intended to set up rendezvous with young female employees. He has expressed no remorse or indicated any insight into the unacceptable nature of his actions.

[75] The employer demonstrated that the grievor is guilty of culpable activities worthy of discipline. Unless a penalty imposed by the employer was clearly wrong or unreasonable, an adjudicator should not alter it (see *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119; and *Ranu v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 89). An employee may be disciplined for off-duty conduct (see *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28).

[76] Ms. Phelan considered all the information, including the aggravating and mitigating factors, and determined that the offensive behaviour warranted a 30-day suspension without pay, particularly in light of the grievor's lack of admission of culpability or any expression of remorse. He provided no medical evidence to indicate that he was not responsible for his actions (see *Canadian Postmasters and Assistants Association v. Canada Post Corporation* (2001), 102 L.A.C. (4th) 97). His behaviour with junior employees was clearly incompatible with his role as a champion of youth and was worthy of serious discipline (see *Richer v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 10).

[77] Alcoholism is not an absolute shield against the grievor's responsibility for his actions. Merely because his condition might have warranted accommodation was not enough to relieve him of establishing the existence of a disability that prevented him from being responsible for his actions. He was still required to prove at adjudication all the elements necessary to establish his grounds for overturning the employer's discipline (see *Ahmad v. Canada Revenue Agency*, 2013 PSLRB 60). The parties have

accepted that the grievor was an alcoholic, but it does not explain away his behaviour. Furthermore, it was raised only at the disciplinary phase and not during the two investigations.

B. For the grievor

[78] The employer belittled and minimized the grievor's addiction. The perception that he should have dealt with it was demonstrated through the employer's profound lack of understanding of the disease. The fact that the grievor is an executive does not exempt him from alcohol abuse. This stigma prevents acknowledgement and treatment and keeps alcoholic executives in a world of secrecy. The grievor is ashamed and regrets what he did in the grip of his addiction.

[79] This case is about fairness. The CRA did not ensure procedural fairness and did not apply its policies without bias. It is obligated to act fairly and to ensure procedural fairness (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817). The general way in which the employer made its decision in this case was a denial of natural justice. It did not follow its policy on investigating misconduct. Once misconduct was determined, its labour relations branch decided the penalty. A labour relations officer was not qualified to determine the causal relationship between the grievor's addiction and the wrong committed.

[80] The employer must be held accountable to follow its policies and respect its employees' rights. It could not simply order another investigation because it did not like the results of the first. Mr. Morgan could not have been given carte blanche to investigate everyone under the sun to find something, which the employer did. The IAD's investigation was a look into an alcoholic's life for the past 10 years in the hope of finding something upon which to discipline him. It was simply a witch-hunt.

[81] Ms. Phelan was unfair to the grievor while he was trying to recover. He could not recover while Mr. Morgan ran around behind him in search of any wrong he might have committed. The grievor was at the centre of the Spanish Inquisition, and anything that came out of it must be dismissed.

IV. Reasons

[82] The grievor argued in his grievance that there was a breach of natural justice in the investigative process. It is trite law that hearings before an adjudicator are de novo

hearings and that any prejudice or unfairness that a procedural defect might have caused are cured by those adjudications (see Maas v. Deputy Head (Correctional Service of Canada), 2010 PSLRB 123 at para. 118; Pajic v. Statistical Survey Operations, 2012 PSLRB 70; and Tipple, at 2). Any such deficiency is remedied by the adjudicative process, and for that reason, are not addressed in this decision. He also argued that Mr. Morgan's report should be rejected as a breach of natural justice as many of the incidents and behaviours Mr. Morgan investigated dated back nearly 10 years.

[83] The employer is obligated to pursue and investigate an employee's inappropriate workplace behaviour in a timely fashion. For that reason, I determine that only the incidents involving Ms. P., Ms. H., and Ms. A. and the misuse of the AMEX will be evaluated against the reasonableness of the penalty. To do otherwise would be to breach natural justice, particularly since I agree with the grievor's description of Mr. Morgan's wide-ranging and open-ended investigation; in my opinion, it was a witch-hunt. That is not to say that the conclusions in Ms. Hart's investigation report are not valid and worthy of discipline. It was open to the employer to discipline the grievor on the basis of that report alone, even without the conclusion that harassment did not occur, as the employer was not obligated to accept Ms. Hart's conclusions. It was open to the employer to find that misconduct occurred.

[84] I have no doubt that the grievor did engage in inappropriate relationships with at the very least Ms. P., Ms. H., and Ms. A. during 2009-2010. As a senior member of the regional management team, and in particular as the champion of the regional Next Generation Committee, they perceived him to be in a position to assist them in their career progressions. Even if he did not have actual influence, the perception was sufficient to make his pursuit of relationships with these women outside the office inappropriate.

[85] The grievor doggedly pursued relationships with these women, as demonstrated by the numerous emails and text messages the employer submitted as exhibits. He did not deny that he sought those relationships. He also did not deny that he was aware of the Timbits rumours. Ms. H. was brutally forthright in her testimony when she said she agreed to socialize with the grievor because of his position and because she thought it might help her career.

[86] In his evidence, the grievor tried to deflect the responsibility for his actions by revealing his life-threatening voyage through alcohol addiction. He is to be commended for his sobriety, but part of that sobriety is accepting responsibility for his harmful deeds and making amends. I agree with Ms. Phelan's assessment that he has not accepted any responsibility and that he has no remorse for his actions. I find that her testimony was open, honest, and forthright. She was a highly insightful and credible witness.

[87] The grievor acknowledged that he violated the employer's policy on the use of the AMEX. He used it when he was not on travel status and allowed it to be delinquent beyond the 120-day repayment deadline. He again raised his alcoholism to explain this conduct; however, he provided no medical expert evidence to establish that alcoholism was a causal factor in his misconduct with respect to his pursuit of relationships with Ms. P., Ms. H. and Ms. A. or the AMEX (see Health Employers Association of British Columbia). If an employee remains capable of making rational decisions or retains that ability to some degree, then that employee is capable of being held responsible for bad decisions and for choices made (see Winnipeg (City)).

[88] The grievor has not claimed that he was discriminated against on the basis of the prohibited ground of disability, which, under section 25 of the Canadian Human Rights Act, R.S.C. 1985, c. H-6 ("the CHRA"), includes "any previous or existing dependence on alcohol." However, even if he had alleged discrimination in this case, I would not have found, based on the evidence, a prima facie case of discrimination since there was no medical expert evidence before me to establish that the grievor's alcohol addiction was a causal factor in his misconduct. Given this finding, it would have been unnecessary for me to have considered whether the employer made out a statutory defence under section 15 of the CHRA to establish that it had accommodated the needs of the grievor to the point of undue hardship.

[89] The grievor's evidence was that he was very high functioning and that he was adept at fooling people. He admitted that he should not have pursued relationships with young women in his sphere of influence. His story of his journey through alcoholism is insufficient to prove that on the balance of probabilities, he was incapable of reasoning and recognizing what was appropriate and what was not.

[90] The grievor also claimed that the employer should have known that he was an alcoholic. He did not establish on the balance of probabilities that the employer knew of his alcohol addiction during the material times in question, namely, the incidents involving Ms. P., Ms. H., and Ms. A. in 2009-2010, or the misuse of the AMEX. On the grievor's own evidence, he was adept at covering up his addiction, and was a very high-functioning alcoholic. Moreover, the evidence leads to a clear finding that Ms. Phelan took his alcohol addiction into account when she determined the penalty to impose on him. But for this mitigating factor, the grievor would have been terminated. Employers are not psychic, and the onus is on employees to bring necessary information to the attention of their employers at the first opportunity (see Ahmad; and Bygrave v. Treasury Board (Canada Border Services Agency), 2010 PSLRB 78).

[91] The series of medical notes the grievor submitted in support of his absences from the workplace were from his family physician and the internal medicine department of St. Paul's Hospital. None mentioned alcoholism or the need for accommodation or identified any restrictions on decision making or interacting with female employees. Ms. Phelan testified that she recognized that the grievor had lost a significant amount of weight, but it was not conclusive evidence of whether the employer knew that he was an alcoholic. She testified that she believed it was stress related due to the ongoing investigations. According to the grievor, he is very clever and able to fool people, even his physicians. It is a great leap to conclude that a high-functioning employee with good performance reviews who has only recently developed attendance issues is an alcoholic in need of accommodation.

[92] The employer need not codify all behaviours of its employees, identifying what is appropriate and what is not. Not all incidents of misconduct or improprieties are written in rules and policies. Common sense and the fundamentals of good conduct must also form part of an employer's expectations (Gannon). Any culpable violation of these expectations is worthy of discipline as were the grievor's actions in this case. Common sense should have told him that given his position of authority, it was inappropriate to invite two young women to his condo for drinks with him and another manager. He aggravated it by insisting that they accompany the men to a bar and then to dinner. The grievor's conduct involving Ms. A. was also highly inappropriate.

[93] It does not matter that the wrongful actions occur while off duty (Basra) if the misconduct has an adverse effect on the employer's reputation. A reasonable person

would conclude in this case that a senior manager, who was perceived as having influence over the careers of young women, violated the Code by pursuing inappropriate relationships with them, regardless of whether or not it was after hours. In fact, this is not a true case of conduct outside work hours as the grievor pursued the women in question during work hours via personal interactions, text messages, and emails.

[94] Ms. Phelan described the aggravating and mitigating factors she assessed when determining the appropriate penalty, including the grievor's alcoholism, which was disclosed to her during the disciplinary phase of this process. She brought to the decision compassion for the grievor's situation while at the same time holding him accountable for his actions. She was as credible in that as she was throughout her testimony. Terminating the grievor was considered, but given the mitigating factors, and her belief that he was redeemable, she determined that a 30-day suspension without pay was appropriate.

[95] It is important to note that Ms. Phelan imposed the 30-day suspension without pay in the context of three specific infractions, including the grievor's display of an inappropriate degree of leniency towards Mr. Mann, who was inappropriate with young women in the workplace. As I indicated at the outset of these reasons, I have not included a consideration of this third infraction in my determination of whether the discipline imposed was appropriate. So as to leave no doubt, I have determined based on the evidence presented at this hearing, that a disciplinary penalty of 30-days without pay for the incidents involving Ms. P., Ms. H., and Ms. A., together with the misuse of the AMEX, is appropriate and warranted.

[96] It is not my role to interfere with a disciplinary penalty that is neither wrong nor unreasonable (Cooper). I am satisfied that discipline was warranted, as discussed earlier, and the penalty imposed is at the bottom end of the spectrum identified in the employer's discipline policy. That being said, it was neither wrong nor unreasonable.

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

(The Order appears on the next page)

V. Order

[98] The grievance is dismissed.

November 24, 2016.

Margaret T.A. Shannon,
a panel of the Public Service Labour Relations and Employment Board