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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

LIZA MEDEK

Grievor

and

NATIONAL RESEARCH COUNCIL OF CANADA

Employer

Indexed as
Medek v. National Research Council of Canada

In the matter of an individual grievance referred to adjudication

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Christine Poirier and Tia Hazra, Professional Institute of the Public Service of Canada

For the Employer: Richard Fader, counsel

Heard at Ottawa, Ontario,
May 15 to 17 and October 23 and 24, 2018.
(Written submissions filed December 5 and 7, 2018.)

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Liza Medek ("the grievor") obtained a post-professional master's of architecture degree from McGill University in 1994. She has been a practising architect since 1990 and is a fellow of the Royal Architectural Institute of Canada. Her curriculum vitae indicates that she was an industrial technology advisor ("ITA") in the Industrial Research Assistance Program ("IRAP") with the National Research Council of Canada ("NRC" or "the employer") from 1993 to 2015.

[2] The employer maintained that she was an ITA from 2003. Before that, she was a network ITA at Carleton University in Ottawa, Ontario. On March 10, 2015, she was terminated from her employment as an ITA in the NRC IRAP with the NRC for allegedly counselling an applicant to falsify or misrepresent information in support of its proposal for NRC IRAP funding. In investigating the alleged misconduct, the employer determined that it also had concerns about the management of several of her other files.

[3] On March 16, 2015, the grievor filed a grievance stating that the decision was based on false information obtained in the course of a flawed investigation and that it constituted an abuse of authority. Her termination was in violation of her collective agreement and applicable NRC policies, including its disciplinary policy.

[4] As corrective action, she requested reinstatement retroactive to the date of dismissal; no loss of pay, or benefits; compensation for pain and suffering; destruction of the letter of termination and all documentation related to the disciplinary investigation, in her presence; any other measure to fully remedy the situation; and to be made whole.

[5] In its final response, the employer denied the grievance, stating that no new information or evidence was provided to alter its original decision to terminate her employment as outlined in the letter of termination.

[6] For the reasons that follow, I find that the termination was without cause. At the parties request, I agreed to bifurcate the hearing. Therefore, this decision only deals with liability. What remedies flow from the unlawful termination is left to the parties to negotiate, with or without the assistance of the Board's Dispute Resolution Services

(DRS). In the event that the matter of remedy is unresolved, I will remain seized to address the matter.

II. Preliminary issues

A. Employer's request for a sealing order

[7] As will become clear as the facts of this case unfold, three companies filed complaints against the grievor. At the end of the hearing, after all of the evidence was tendered, the employer requested that the names of the three companies, along with their principals, be anonymized in my decision. The employer also sought redactions to many of the documents that were filed as evidence before the Board. I would be remiss if I were not to provide a comment on the timing of this request. As a senior counsel who has appeared before the Board on numerous cases, I would have expected that counsel for the employer would have ensured that his request was made at the outset of the hearing. If it had been made in a timely manner, I would not have had to invite the parties to submit written submissions on the employer's request at the conclusion of the hearing. Moreover, the logistical problems that this late request created could have been avoided. In the future, I expect counsel to make such requests at the earliest opportunity.

[8] Counsel for the employer provided written submissions on the matter on December 8, 2018. He included a colour-coded 14-page chart listing the documents the employer claims should be redacted. The parties were able to agree on a number of redactions pertaining to the exhibits. The chart sets out all of the agreed on redactions. The redaction requests that have not been agreed on are denotated as Red, Yellow or Turquoise on the chart.

[9] The employer maintained that these documents contain confidential business and personal information. The employer claimed that their redaction or a sealing order for them is necessary to prevent a serious risk to the companies involved.

[10] The employer argued that the proposed redactions are minimally impairing and that they are targeted specifically at the impugned information. Moreover, the redacted information would attract minimal public interest in the context of the issue before the Board. As such, the redactions would not offend the presumption of open courts. It would be highly prejudicial to the businesses and the people involved if this information were disclosed or made publicly available. As non-parties to the

adjudication, those entities and people did not have the ability to defend their interests or information. Furthermore, privacy should be maintained, to preserve the integrity of the disciplinary process and the process before the Board. The integrity of the process outweighs the public interest in viewing the information sought to be redacted in the exhibits.

[11] Moreover, it argued that a sealing order is the only practical way to maintain the privacy of the information, given the detailed nature of the documents. Conversely, the deleterious effects of a sealing order are minimal, given that the grievance before the Board can be understood without accessing the identified portions of these exhibits, thus preserving the open court principle.

[12] The grievor took the position that the request should have been made before the commencement of the hearing. As I emphasize above, I agree with this sentiment. As directed by me, after weeks of negotiations, the parties were successful at reaching an agreement on the documents that should be redacted. This information includes personal email addresses, financial information, and identities of companies that were not party or relevant to this litigation. The parties produced a chart on consent for both the employer and the grievor. However, the grievor maintained that the remaining documents and portions of them should not be redacted.

[13] The grievor argued that the burden was on the employer to establish that its request satisfied the requisite legal test. It is in the public's interest that all essential information stays on the record, especially non-confidential information, given that there is no prejudice to others. This is consistent with the Supreme Court of Canada's finding that the breadth of any redaction should be kept to a minimum; it should be enough to preserve the interests of a party without preventing the public from understanding what is being decided.

[14] The employer requested that no mention be made of the names of the clients (companies) that complained. The grievor maintained that all three clients and their complaints led to her termination. As such, they are integral to these proceedings and should form part of the public record. The documents and passages that both parties have not agreed be redacted do not contain any information that is confidential in nature. All non-confidential information in relation to any of these entities should

rightfully form part of the public record. This reasoning was followed in *Bétournay v. Canada Revenue Agency*, 2017 FPSLREB 37.

[15] In *Bétournay*, the employer submitted a redacted version of an investigation report and requested that it replace the unredacted version in the Board's file. All the redacted information was public, including the name of the company selling the house at issue in that case, the company's shareholders, and the address of the house. All that information was already available on the Internet.

[16] In *Bétournay*, the Board concluded that it did not see the need for redacting the document at issue in that case because the complaint that gave rise to the grievor's termination was ultimately dealt with in its decision, and there was testimony before it in relation to the items sought for redaction. The employer further requested that the portion of the investigator's report that directly showed his audit trail be sealed. The document contained a list of account numbers, associated sometimes with company names and sometimes with people. The Board concluded that the document disclosed absolutely nothing confidential; it simply showed that research had been conducted in a database. Given that there was no confidential information, the Board did not see the need to seal this document. For all these reasons, the grievor in this case argued that the remaining documents should form part of the public record.

[17] The test to be applied in relation to sealing orders in administrative decisions is set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at paras. 48 and 53 ("*Sierra Club*"). In it, the Supreme Court of Canada considered its jurisprudence relating to publication bans in the criminal law context, specifically in cases such as *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76. Those cases held that when a restriction on freedom of expression is sought, to preserve or promote an interest engaged by legal proceedings, the fundamental question will be whether, in the circumstances, the right to freedom of expression should be compromised. This requires courts to balance freedom of expression on one hand with the right to a fair trial of the accused on the other.

[18] The Supreme Court of Canada has since held that the analytical approach developed in *Dagenais* and *Mentuck* applies to all discretionary decisions affecting the openness of legal proceedings; see *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 at para. 13. That said, *Dagenais* and *Mentuck* were criminal cases, while *Sierra*

Club involved a request for a confidentiality order in the context of an administrative law proceeding. The Court held that in such cases, confidentiality orders should not be issued unless one is necessary to prevent a serious risk to an important interest in the context of litigation because reasonably alternative measures will not prevent the risk.

[19] The Court further held in *Sierra Club* that the risk in question must be "real and substantial"; that is, one that is well grounded in the evidence and that poses a serious threat to the interest in question. In addition, the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, must outweigh its deleterious effects, including the effects on the right to free expression; see *Sierra Club*, at paras. 53 and 54. These principles were recently followed in *Canada (Attorney General) v. Philps*, 2019 FCA 240 at para. 23, and *Malik v. Deputy Head (Canada Border Services Agency)*, 2020 FPSLREB 64 at paras. 6 to 9.

[20] Having set out the germane legal principles, I turn to the various requests. First, the employer seeks the anonymization of the names of the three companies (clients) that made complaints about the grievor. In reaching my decision on the anonymity request, I am very mindful of the FCA's guidance in *Philps*, at para. 28, that I am to weigh the privacy and commercial interests of the companies and principals in question against any possible need to publish their names. I have determined in the circumstances of this case that the three companies (clients) should be anonymized in my decision as "Company P.", "Company M.", and "Company I." respectively. In my view, the privacy and commercial interests of these companies does outweigh any possible need to publish their names. Moreover, the public's knowledge of their names is not germane to the grievor's termination.

[21] Next, should the names of the principals of the respective companies be anonymized in my decision? For the latter two companies, none of the principals were called to testify before me and they are not named anywhere in my decision. Accordingly, it is unnecessary to order that their names be anonymized in the decision. However, counsel for the employer has identified portions of the exhibits (designated Turquoise on the chart) where the full names of Company M. and Company I., as well as the surnames of the principals appear in the exhibits. For the same reasons as above, I will grant the employer's request to redact those portions of the exhibits with respect to this information only.

[22] The request to anonymize the names of the principals of Company P. is a whole different matter. First, they were called to testify at the hearing on behalf of the employer. Secondly, their complaint against the grievor was the main complaint that led to the employer's decision to terminate. In fact, as will be seen later in my decision, the employer saw the complaint by Company P. as sufficient, in and of itself, to justify terminating the grievor. Finally, the evidence presented by the principals of Company P. differed markedly from that presented by the grievor in key respects. As such, I was required to undertake a credibility analysis of the respective witness evidence. In this context, and weighing the privacy interests of the principals of Company P. against the need to publish their names, I have no hesitation. The request to anonymize the names of the principals of Company P. is denied, and they will appear by name throughout my decision.

[23] I now turn to the employer's redaction requests denotated in Red and Yellow on the aforementioned chart. A party seeking a sealing order bears the onus of justifying its issuance based on sufficient evidence that real and significant harm would be caused as a result of making the information public. A general assertion of potential harm is insufficient. The employer must prove real and significant harm to overrule the open court principle. It must establish that the limitation is necessary to prevent a substantial risk to an important interest, that no alternative measures are possible, and that the proposed order is the least intrusive on the public's right to the information that formed the basis of the Board's decision.

[24] Given the nature of the alleged misconduct in this case, some of the evidence presented at the hearing contained companies' financial information and the personal information of their proprietors. The parties have already agreed on the redaction of portions of the exhibits on this basis, and I agree with them. However, the employer asserts that the additional redactions sought (in Red) contain further confidential business information for Company P., as well as (in Yellow) comments made by persons within the NRC about the state of Company P.'s finances.

[25] Having reviewed the portions of the documents sought to be redacted, I agree with the employer that there are some additional references to Company P.'s finances, as well as comments and business advice to/and from the proprietors of Company P. In my view, this information is not germane to the issue before the Board. Moreover, unlike in *Bétournay,* in all likelihood the vast majority of the information sought to be

redacted is not already available on the Internet. Accordingly, I will grant the redaction request by the employer with respect to all of the portions in Red and Yellow on the aforementioned chart.

[26] Therefore, I find that redacting the information identified in both the parties' agreement, as well as the redactions to the exhibits sought in Red and Yellow, and those portions in Turquoise identified above, is necessary to prevent a serious risk to the companies' financial interests and that the salutary effect of the redaction on the efficacy of the administration of justice outweighs its deleterious effects on the right to free expression, including the public interest in open and accessible court proceedings. Moreover, not redacting it would be of no benefit to the merits of this decision. I will have more to say in my order at the end of the decision concerning the logistics of redacting the exhibits.

III. Summary of the evidence

A. The IRAP at the NRC

[27] The employer called David Lisk, Vice President, IRAP, at the NRC. As of the grievor's termination, he was the executive director of the IRAP for the NRC's Ontario region. Overall, he provided leadership for all aspects of the program in the region. He was responsible for hiring new staff and for fielding complaints from clients. He directly managed 5 directors, who in turn managed 5 teams. The entire division encompassed 85 persons, approximately. Dr. Bill Dobson was the grievor's direct supervisor.

[28] Mr. Lisk explained that the objective of the IRAP is to stimulate innovation in organizations which meet the NRC-IRAP criteria. This is largely accomplished by providing funding and technology assistance at all stages of the innovation process, to build their innovation capacity and successfully take their ideas to market.

[29] NRC-IRAP ITAs assist applicants to identify and understand technology issues and opportunities and provide links to the best business and research and development expertise in Canada. The program's mission is to accelerate the growth of applicant organizations by providing them with a comprehensive suite of innovation services and funding. One of the many advantages to having an ITA is direct contact with someone from the government engaging and dealing with a large bureaucracy on a client's behalf.

[30] The IRAP perspective is to look at the complete body of work; that is, the entire project, but to fund only a portion of it. Once the applicant has identified its project and the ITA has identified the piece to be funded by the IRAP, the forms are filled out, assessed, and recommended to the director. Once approved by the director, the contribution agreement is sent to the organization so that it can begin to do the work. The ITA does not have the authority to approve the funding. Only the director has that authority. In this case, Dr. Dobson had that authority.

[31] The grievor called Stephen Palmer to testify. Mr. Palmer worked as a senior ITA and was the director for national initiatives at the NRC IRAP from the mid to the late 1990s. He worked at the NRC IRAP from 1984 to 2013. He reported directly to the vice president of the IRAP. As the director of national initiatives, he was responsible for strategic planning and setting the policies and practices for major programs. He was responsible for personnel-related issues and for developing the personnel working for him, along with carrying out performance reviews and having financial accountability for the programs under his authority. He was the signing authority for the contribution agreements. As the director, he had to determine that funds were available, that a project met the requirements of the program, that the cost of the project was commensurate with the gain, and that the appropriate reviews for the project had been done. If an applicant breached a clause in the contribution agreement, it would be brought to the attention of the director general and to the Finance branch.

[32] Mr. Lisk explained that once the contribution agreement is in place, the firm can claim expenses against it. Most of the IRAP funding is for research and development. Although there are certain flexibilities within the program, the IRAP field manual indicates that the start date of the funded project should be as close as possible to the signature date of the contribution agreement. According to the ITA “Field Guide”, a contribution agreement is in effect from the first day of the project phase to the end of the post-project phase. It identifies the date on which the organization may begin incurring supportable costs, which is the project start date, the date after which the organization may no longer incur supportable costs, which is the project completion date, and the date on which the contribution agreement terminates. Costs incurred either before or after the project phase are not eligible for support.

[33] The guidelines that the ITAs use provide that a contribution agreement is a legal engagement with the Crown and that if an applicant provides a false statement or

misleading information, it is grounds to terminate the contribution agreement. The Field Guide indicates that applicants must demonstrate a willingness to establish and maintain a trusting relationship with the NRC IRAP. This requires a willingness to share accurate information about current and future plans. The information must be accurate, reliable, and timely. All the sensitive information shared with the ITA is stored in SONAR, the NRC's computer system. If a trusting relationship is not in place, the NRC IRAP may decide to halt activities with the organization.

[34] A common profile for an ITA is to have 25 or more years of knowledge and competence to deal with all situations in the field. ITAs do not work in offices; they work in the field. They have offices close to clients rather than direct contact with their managers. They must behave in a manner that is beyond reproach because they represent the Government of Canada within their communities.

[35] The ITA Field Guide helps ITAs through the different aspects of their engagements with clients. It requires interpretation when dealing with each organization because they all operate differently. Upon hiring, the ITAs receive training from the more experienced ITAs. The ITA position description provides that decision making is an integral part of it. The development of trust and credibility with an applicant is paramount, while maintaining the integrity of the IRAP. Applicants may find ITAs through their networks or may apply to the government to have an ITA assigned, but there is also an expectation that ITAs will find applicants.

[36] As an ITA for the NRC-IRAP, the grievor explained that she worked with small and medium enterprises incorporated in Canada for profit and that she assisted them with business services, marketing, and technical advice to help them better their organizations. She would assist them in obtaining funding. Her experience as an architect in the construction industry over the years at the IRAP morphed into working in the high-tech industry, software, and biophotonics areas.

[37] The grievor summonsed Patricia Lowder, an ITA with the NRC IRAP in the NRC's Atlantic and Nunavut region. She joined the NRC in 1990 as a network member and became an ITA in 2003 when the NRC created the IRAP. She has known the grievor for approximately 6 years. She explained that networking is extremely important to ITAs. They all have technical experience. The grievor is an architect and a biologist. They did not know each other until the grievor was terminated. Ms. Lowder explained that she

was the chief shop steward of the Professional Institute of the Public Service of Canada, so she became involved in the grievor's case after the grievor was terminated. Ms. Lowder stated that she was very active in the union and that she represented all four of the union's groups at the NRC.

[38] Ms. Lowder explained that the IRAP process starts out informally. ITAs meet with applicants and are clear with them that there is no money if the project has started. There is a discussion about confidentiality and the protection of the company's intellectual property. There is a commitment from ITAs to applicants that they will not disclose the company's intellectual property to other applicants.

[39] She stated that if a client is not forthcoming with its financial information, the ITA must push back. Most clients are tenacious; it's their technology, and they have poured significant hours and effort into their companies, which are their babies. But without financial documents, an application cannot proceed. She explained that ITAs are technologists and, at the same time, counsellors. If applicants do not cooperate with information sharing, including providing financial information, then there is no trust, and the director must become involved.

[40] ITAs work autonomously but may go to their directors if they have difficulty with clients or for advice. Ms. Lowder explained that as an ITA, she has complaints made against her all the time. An ITA who is not complained about or who has clients that do not complain is not doing his or her job. For example, many clients expect that they can make a proposal today and start the work in a couple of days. But this is not how the IRAP works.

[41] When he received a complaint from a client, depending on its type, Mr. Palmer stated that his approach was to discuss it with the ITA. During his time in the IRAP, he was aware of only one serious financial breach that went to the director general and the Finance branch.

[42] Mr. Palmer stated that it was important for him as a director to get together with the ITAs regularly to determine what was going well, which projects were causing challenges, or the clients that they would be particularly proud of. As a director, his role was to help the ITAs identify what they needed to move forward. It was also his role to mentor and discuss projects with the ITAs. During the contribution agreement process, he would discuss with the ITAs before finalizing the proposals for approval.

[43] Mr. Palmer explained that projects have broad start dates. ITAs can discuss a start date of a project depending on its milestones. If it has materially started and the risk is partly underway, the ITA and the director must go to the client to determine if there is anything left to support. In terms of backdating a start date, he stated that it is unusual but that it could be done in circumstances involving less than a week. Ms. Lowder stated that as far as changing dates, once a proposal is complete, the ITA can recommend a start date, and then it goes to the signing authority.

[44] Ms. Lowder explained that the package prepared for a signing authority must be a complete proposal. If activities and objectives are not identified or listed, there is a back and forth with other ITAs, or if it is an accelerated process, sometimes only the lead ITA will push it back and forth until the proposal is complete. If it involves a new company, the company must be able to afford the rest of the project, and there has to be confirmation that it will be able to pay for the project. If the company is established then the IRAP asks for the last three years of financials; if it is new, then the IRAP requires three months of them. Sometimes projects are carved out in a manner that can be supported and that follows IRAP requirements. The ITAs follow the Field Guide and the listed criteria to ensure that due diligence has been followed before recommending a project for funding. The lead ITA checks in with the other ITAs before making a recommendation for funding. The ITAs can change the recommended amount that a client requests based on the information in the application. But the final signing authority belongs to the director, who has full discretion over the amount.

[45] It is possible to spend four ITA salaries preparing a proposal, and it could still be rejected. There is no negative impact on the ITAs if an application is rejected. The ITAs' performance agreements require them to hit certain dollar targets with respect to projects. ITAs receive credit only once a project is approved.

B. The grievor's interactions with Company P.

[46] The employer called Karen McArthur and Paul McArthur, the principals of Company P. They are spouses. Ms. McArthur is the president and CEO. She explained that they were introduced to the IRAP through contacts who were familiar with IRAP in June 2013. They wrote to the grievor to introduce her to their company. The grievor met with them to introduce them to the IRAP and to learn about the company.

[47] Before the initial meeting, the grievor testified that she did not know the McArthurs. They were not her friends. Outside her ITA relationship, she had no relationship with them. She explained that their product was a data-collecting platform for children with autism. She had nothing to gain from an approved contribution agreement and no personal interest. She was well over her target for that year and did not need them to obtain funding to keep her numbers up.

[48] Dr. Dobson became aware of the grievor's interactions with Company P. through a discussion with her sometime in the middle of 2014. She indicated to him that they were seeking $50 000 in support of their project. She told him that she was working with that amount, and she gave him a heads-up.

[49] The employer and the grievor introduced a series of emails that captured several interactions between her and the principals in the moments leading up to their allegations of the falsification of the start date. The emails indicate that on August 15, 2013, the principals were anxious to get the application process underway. On August 17, 2013, the grievor sent them the relevant forms. On November 20, 2013, the principals submitted their proposal for a small IRAP grant. On the same date, the grievor responded that the IRAP might not have the funds that fiscal year, so the project might have to go into the queue for the next fiscal year. On November 22, 2013, Ms. McArthur sent their application to the grievor for the following year. On the same day, the grievor informed them that the IRAP had no funds for the 2013 fiscal year and that it would apply to a start date of April 1, 2014.

[50] In her interactions with the McArthurs and Company P.'s application process, the grievor testified that she followed all IRAP guidelines, used all the options in the ITA toolkit, and made sure to pass on that information to them. She did anything she could in terms of introducing Company P. to potential funding from Quebec or other provincial links and the Business Development Canada's services, along with communicating with other ITAs to obtain their expertise. The grievor claimed that she did much more than offer the basic services of an ITA. She followed all the steps in the Field Guide.

[51] She ensured that all the criteria under section 1.2 of the client relationship form were followed. She went over their project proposal in great detail. She assisted them with filling it out, explained to them why there had to be action verbs, and assisted

them in tweaking the document to get it to a level at which Dr. Dobson would be able to vet it and do his due diligence. She also went into great detail about the terms and conditions of a contribution agreement. Her job was to vet the client and bring the information to the signing director to the point that he or she could ascertain whether to push the project forward to a contribution agreement. During her preparatory meeting with the McArthurs, she covered all the aspects relating to the consequences that would arise from a breach of the contribution agreement and the conditions to obtain IRAP funding. She informed them that repeatedly in person and in writing, they could not start the work before the contribution agreement was signed.

[52] The grievor testified that between November 2013 and January 2014, she waited for Ms. McArthur to provide her with the missing documentation. In January 2014, the grievor reached out to the principals and asked them if they were still interested in pursuing their application for April 2014. They responded that they wished to pursue the application. From March 11 to 21, 2014, the grievor repeatedly requested that they provide the company's financial statements.

[53] On March 11, 2014, the grievor informed Ms. McArthur that they did not have enough revenue in their bank account to cover the project; nor was it enough for a sustainable business going forward for six months with three employees. Ms. McArthur responded that they had enough revenue to cover the cost on their end but that that was normal for start-up companies, as they have high cash-burn rates far outsizing their revenue rates. The grievor responded that the IRAP is not a bank and that if they needed start-up money, they should apply to the Business Development Bank of Canada ("BDC"). The grievor wrote, "IRAP needs to see revenues or cash in the bank."

[54] The grievor testified that all ITAs work differently and that they all have a large toolkit of resources to provide to their clients, one of which is the BDC. Most ITAs would direct a client to confer with the BDC to obtain funds. It was a usual thing for her to suggest. She explained her statement that the IRAP is not a bank. It is different from a bank. It does not provide repayable loans. It is a contribution agreement. The IRAP looks at different aspects of a company. Companies must be able to show that they are sustainable for at least six months to a year. Banks look for collateral; the IRAP looks for sustainability.

[55] On March 21, 2014, Ms. McArthur sent the grievor the revised documents and an explanation that they had the required revenues in their bank account. The grievor testified that they were still not providing their financial statements to show that Company P. was sustainable.

[56] The grievor went through a series of emails from January 24, 2014, to October 2014, in which she made several attempts to assist the McArthurs with different options and the elaboration of a contribution agreement. She explained that the company began under a different name and then became Company P.. They continually changed the name of their company, which made it confusing and difficult to identify the intellectual property around the product they were developing. As of April 1, 2014, Company P. had a few thousand dollars in its bank account and showed salaried employees at 6 figures per year. The IRAP required that the employees be T4 salaried. This did not make any sense to the grievor and did not meet IRAP requirements. She informed them of that. She requested that they confirm the name of applicant company. On April 8, 2014, the grievor again followed up with Ms. McArthur to obtain the required information. She never received a response from Ms. McArthur.

[57] On April 23, 2014, the grievor again followed up with Ms. McArthur to ask her if she intended to pursue the application. Ms. McArthur responded that she thought that it was best to hold off for the moment, that she did not know how to complete the application properly, and that when she had someone to assist her, she would start up again. The grievor informed her that she could help with the application and suggested that they meet in person on May 6, 2014. The grievor explained that she always gave the client the benefit of the doubt and that she always left the door open. She was always ready to help with the application process.

[58] Ms. McArthur responded to the grievor's email of April 23, 2014, on June 9, 2014. Ms. McArthur asked if there was still money available for 2014 and if the grievor was able to meet. On June 16, 2014, Ms. McArthur sent documents for the grievor's review. The grievor responded the same day and informed her to take IRAP funding out of the project financing section and to add at least one salaried employee to the salary cost section. On that day, the grievor testified that she met with the McArthurs for two hours and that she explained the application document to them in detail. She assisted them in filling out the application detail by detail. The application document was full of handwritten notes. The clients asked if they were allowed to hold

on to the document. They pleaded with her, and they kept it, even though it was messy.

[59] On June 17, 2014, the grievor followed up with Ms. McArthur by email to obtain the subcontractor proposal. In this email, she had to repeat the instructions she had given the McArthurs the day before. She instructed Ms. McArthur to make specific changes to her application. She could not send an incomplete application to Dr. Dobson. It had to be fully vetted; otherwise, he would not look at it. The grievor asked Ms. McArthur to change the start date to July 1, 2014, because Dr. Dobson was often travelling. By the time he returned, he would have at least 12 ITA submissions to look at, which would have taken some time. The start date would need to be pushed back to take that into account. To the grievor's knowledge, the work had not yet begun.

[60] Ms. McArthur stated that sometime in June 2014, the grievor told her and her husband that the IRAP had $50 000 put aside for their project and that "the amount had been earmarked" for them. On June 17, 2014, the grievor wrote to Ms. McArthur to inform her that once she received the subcontractor proposal, she would revisit the project. The grievor asked Ms. McArthur to change the start date to July 1, 2014, and to add specific details to the proposal.

[61] By June 25, 2014, the grievor still had not received the documentation for the small-project proposal. On June 26, 2014, Mr. McArthur sent an email to the grievor including the two IRAP documents, updated as requested, and a quote from Oak Computing to perform the engineering work on the project. On June 30, 2014, Ms. McArthur sent the requested IRAP documents. One was the template for small projects, and the other was the innovation plan describing the firm and the plans. The grievor believes that the document titled "Oak Software Development Agreement, Company P. and Web and Mobile Design and Development" and dated July 2, 2014, was the document that Ms. McArthur attached to her email. On that day, she did not know that the McArthurs would begin work on July 2, 2014.

[62] On June 30, the grievor consulted with another ITA to obtain a second opinion on their technical objectives. On July 4, 2014, she consulted with a different ITA. On July 7, 2014, she had a telephone conversation with the initial ITA. She testified that this project was not in her area of expertise as she is an architect. She spoke with another ITA with experience in this area and asked her for an assessment to see if the

project was “IRAP-able”, according to the IRAP’s research and development criteria. The grievor explained that it is a team effort to put a project through. The document that was prepared by the second ITA was taken away from the grievor during the disciplinary hearing. The ITA agreed with the technical risk but was concerned that the project was being carried out with a subcontractor.

[63] After the phone conversation with the consulted ITA, the grievor sent Ms. McArthur an email to inform her that their application could not be recommended for funding. Written down was that software development was their current practice. There was no mention of research and development and the technical risk, which is fundamental to IRAP projects. The grievor invited Ms. McArthur to revisit her application and informed Ms. McArthur that she would be happy to reconsider it. The grievor explained that she always left a project open to the client to revisit. She did not speak with the McArthurs following this email. On July 21, 2014, the grievor followed up with the McArthurs to find out if they wished to revisit their application.

[64] On August 7, 2014, Ms. McArthur sent an email to the grievor with a revised application in which they had changed some of the elements of their proposal. She requested the grievor’s thoughts on it. The grievor responded by stating not to send any attachments to the IRAP because the NRC had experienced a cyberattack. She wrote that she would contact them once she received more information.

[65] On August 11, 2014, Ms. McArthur sent an email to the grievor, to follow up. After the August 26, 2014 email, the next communication between the grievor and the principals began by email on September 15, 2014, at 11:15 a.m. In the email, the grievor contacted the principals of Company P. to let them know that she had left a voicemail and asked them to return her call. At 12:11 p.m., she sent an email to the principals and informed them that they did not need to change anything in their submission. The proposal referenced in the email was not introduced into evidence.

[66] The grievor again requested that the McArthurs fax their bank statement. At 12:33 p.m., Ms. McArthur asked the grievor to confirm that the only document she required was a bank statement. At 12:41 p.m., the grievor responded, stating that she required the bank statement and the subcontractor proposal with the quote as per the IRAP application. The grievor informed Ms. McArthur that she would send her the number and that Ms. McArthur had to be physically present when the grievor faxed it.

At 4:04 p.m., Ms. McArthur responded that the grievor could send the fax any time after 5:45 p.m. At 4:42 p.m., the grievor responded that she had just received Ms. McArthur's message, that she would be in the office at around 9:00 a.m. the following day, and that she would email Ms. McArthur once she was in the office. Ms. McArthur responded that they were in Florida, that they would land and transfer in Philadelphia at around 8:00 a.m. with a 1.5-hour stopover, and that she would check her email as soon as she was off the plane.

[67] The grievor testified that the email contained attachments about their innovation plan and a template for small projects. The McArthurs were still calling it a different name, even though they had legally changed the company name to Company P. The grievor testified that on August 11, 2014, she did not know that they had started the work. She responded by email and stated that the NRC had just experience a cyberattack and that she would contact them when she had more information.

[68] On August 26, 2014, the grievor responded that the NRC was not able to process projects but that she would like to set it up so that when they did get the green light, the McArthurs could get their application in shape to go ahead. She again repeated her initial instructions on the requirements to get their application approved. She also informed them that the IRAP covered only projects that had not been started. She testified that she also informed the McArthurs of this at their first meeting. The McArthurs did not respond to this email and did not inform the grievor that the project had started.

[69] The grievor recalled that in September of 2014, the NRC had received an indication from its offices in Toronto, Ontario, as to how they could proceed with projects on an interim basis after the cyberattack. They only had the ability to function by fax. SONAR was not accessible. Management had access to it, but she did not. She asked the McArthurs to call her.

[70] Counsel for the employer asked Ms. McArthur to focus on September 15, 2014, the day the grievor allegedly asked Mr. McArthur to falsify the start date of their project. Ms. McArthur stated that she and Mr. McArthur were in Florida exhibiting a product at a conference. They were in their hotel room when she overheard the phone call between Mr. McArthur and the grievor. She stated that it appeared that IRAP money was available and that everything seemed great. Mr. McArthur seemed puzzled

and said, “What?” Ms. McArthur heard him say, “We already started July 1.” Ms. McArthur observed that he seemed confused by what the grievor was asking them to do. After he hung up, Mr. McArthur told her that the grievor had asked them to move the date up and to change the date for the Oak Computing agreement. Ms. McArthur did not feel comfortable doing that. However, the grievor had asked them to do it, and they needed the money. Therefore, they changed the start date.

[71] The employer called Mr. McArthur as a witness. His recollection of his interactions with the grievor before the McArthurs made their complaint is similar to that of Ms. McArthur. He recalled that between July 1, 2014, and August 2014, they had been told that they were not eligible for funding. They made the changes and resubmitted their application. Mr. McArthur recalled that on September 15, 2014, he and Ms. McArthur were in Florida. He stated that the grievor told him that $50 000 could be in their bank account in a couple of days. She asked him if the project had started. He said, “Yes, it started in July.” Mr. McArthur recalled that she said, “The project hasn’t started, right?” The manner in which the grievor asked the question made him conclude that she was asking him to change the start date of the project to October. The McArthurs changed the start date and faxed the information to the NRC’s Toronto office on September 18, 2014. Mr. McArthur confirmed that the Software Development Agreement involving Oak Computing dated July 2, 2014, and the one dated September 15, 2014, are identical except with different dates, as requested by the grievor.

[72] The grievor recalled that Mr. McArthur called her on her mobile phone. He was calling from his mobile phone in Florida, and he said that they had started the project. She testified that she required clarification on what had happened. She was in her office on Sussex Drive in Ottawa, and the mobile reception was poor. She walked out so that she could get a clear understanding. She wanted clarification from him and asked him again, “You didn’t start the project, right?” He replied, “No, we didn’t.” The grievor told Mr. McArthur that he had to fax the documents to the NRC’s Toronto office. She did not see the second software development agreement from Oak Computing, dated September 15, 2014.

[73] After that conversation, the grievor waited to receive the missing financial information from the McArthurs. The subcontractor proposal and the small-project template have a specific spot in which there is a requirement to include the

subcontractor quote. The numbers were not in sync. The subcontractor amount had to match the proposal template for small projects. This needed to be rectified before being sent to the Toronto office for approval. She did not ask Ms. McArthur or Mr. McArthur to change the date with Oak Computing. She did not advise them to change their start date. She did not promise to set aside $50 000. She stated that the allegation that she promised $50 000 did not make any sense. Even a neophyte ITA would not make that promise.

[74] On September 16, 2014, at 10:48 a.m., the grievor sent an email to Ms. McArthur to let her know when she would be ready to fax it. Ms. McArthur did not respond. The next email was from the grievor at 6:28 p.m. to Ms. McArthur, informing her that the document she sent had to be more specific and that it had missing information. She informed Ms. McArthur that she could receive her fax at 2:00 p.m. on September 17, 2014. Ms. McArthur stated that as of 6:59 p.m., she had not faxed her anything yet and asked for her fax number. Ms. McArthur indicated that she would fax it to grievor at 2:00 p.m. the following day.

[75] On September 18, 2014, Dr. Dobson sent an email to the grievor, informing her that he needed a more recent September bank statement from Company P. before continuing his review. The grievor explained that she had been working with the client to obtain that information and that she would again request it. On the same date, Ms. McArthur wrote to the grievor and stated that she was concerned that they would miss out on IRAP funding.

[76] On September 23, 2014, Dr. Dobson expressed some concern with respect to the McArthurs' ability to demonstrate that they had the funds in place to support their share of the project. They showed a significant shortfall. He stated that once they provided clear evidence of sufficient financial resources, he would revisit their application for IRAP funding.

[77] Several days later, Ms. McArthur contacted her mentor, Claude Haw, to tell him what had happened. Mr. McArthur confirmed that he and Ms. McArthur were "not confident" with their application. By that time, they had completed more than half the work, so Mr. McArthur knew that they would not be eligible for funding.

[78] Ms. McArthur said that Mr. Haw told her that she was right and that she should not have changed the date. Mr. Haw told her that she should withdraw her submission.

On September 23, 2014, she sent an email to the grievor, stating that they might not be able to continue with their IRAP proposal. Ms. McArthur wrote that they really needed the IRAP to fund its portion of the project, or they would be "sunk". To not miss their market and to not lose the momentum of their developers, they used their own money to fund their commitment to the development of the product but did not complete the project. They had only started it, as they were under the impression that the IRAP would fund part of it. Ms. McArthur stated that the project began in July and that they had made payments to the developers in July and August. Ms. McArthur asked, "Will this suffice for IRAP?" She went on to say this: "I truly hope so as we would not have started, we were under the impression that we were delayed due to the cyberattack but that the money would be available when the NRC was up and running. If this does not work, we may be forced to withdraw our application." On September 24, 2014, the grievor responded that Dr. Dobson was the reviewing director and that he would like to see a copy of their September 24, 2014, bank statement to continue his review.

[79] The grievor testified that she was not aware that the McArthurs had started the work before September 23, 2014. In fact, she sent an email to Ms. McArthur rejecting the proposal on July 7, 2014, at 2:39 p.m. In August, they did not tell her that the project had started. Before this email, they never told her that they had made a contribution to the subcontractor, Oak Computing. After Ms. McArthur's email of September 24, 2014, informing the grievor that the project had started, in her view, it was now out of her hands, because the proposal was complete. The client said that the project had started, and as far as she was concerned, this meant that management had to say "no" to them.

[80] Later, on September 24, 2014, Dr. Dobson requested that the grievor send him all her emails involving her contacts with Company P. She sent him all of them, as requested.

[81] Mr. McArthur recalled that these email exchanges between the grievor and Ms. McArthur were to inform the grievor that they were running out of money and were unable to fulfil the subcontractor contract. They were under the impression that $50 000 had been reserved for them, as they were told by the grievor on June 16, 2014. Essentially, he stated that he knew that they would receive the funding and that they had already burned through a large amount of money the issue was not whether the NRC would help them but when they would receive the money.

[82] Ms. McArthur explained that at some point in September, she had another conversation with Mr. Haw to determine what they could do to receive the funds. Mr. Haw then reached out to Mr. Lisk. She stated that she was unsure when this happened. She believes that there was an email exchange between Mr. Haw and Mr. Lisk. Mr. Haw was then put in contact with Dr. Dobson.

[83] On October 3, 2014, Dr. Dobson spoke with the grievor. She testified that they discussed the technical research and development activities that the subcontractor had performed under the contract. At 10:47 a.m., the grievor called Ms. McArthur to obtain detailed information about the work that had already been done by the subcontractor. On October 7, 2014, Ms. McArthur provided that information to the grievor, who passed it on to Dr. Dobson.

[84] On October 10, 2014, the grievor had a discussion with Dr. Dobson. According, to her, it appears as though there was a revised project submission. Ms. McArthur continually asked for updates. It went on for a while. From October 21 to October 24, 2014, there were multiple exchanges between her, Ms. McArthur, and Dr. Dobson to complete the contribution agreement. The entire time, she was not made aware that a complaint had been filed against her by the McArthurs.

[85] On November 7, 2014, the grievor sent an email to Mr. Lisk, thanking him for the phone call that day. She confirmed in writing that the main reasons for the delayed project timeline was that the McArthurs had no money and that they were not forthcoming with information, even after repeated requests, along with the cyberattack.

[86] On November 18, 2014, an email was sent to Mr. Lisk. The author's name has been redacted. It indicates frustration with respect to not having the start date for the contribution agreement as July 1, 2014. It indicates that the grievor promised them $50 000 and a July 1, 2014, start date. The author asks to be reassigned to another ITA, have the contribution agreement start date of July 1, and for $50 000 in IRAP money. Mr. Lisk responds that he will bring this up with Dr. Dobson because he is the signing authority.

[87] On November 26, 2014, the grievor followed up with the head office in Toronto on the contribution agreement. She indicated that the McArthurs had made a complaint that the IRAP was taking too long. The grievor testified that this was the

first time that she had seen a client unhappy about a contribution agreement. It was not typical. Whether it is a small or large amount, the money is not repayable, and any amount of funding is usually welcomed. Clients are excited to sign a contribution agreement. The grievor was unsure as to the exact date that she was taken off the file, but at that time, she was still the McArthurs' ITA.

[88] The grievor did not recall seeing a copy of the final contribution agreement. Mr. Lisk and Dr. Dobson did not consult her with respect to backdating the contribution agreement or to the amount to subsidize. The grievor stated that as an ITA, she could not recommend that a project be backdated. She had no say with respect to the approval of the proposal template for small projects.

[89] In an email dated December 4, 2014, to Kerri Pereira, IRAP Human Resources Generalist, the grievor stated that she would not have told the client about a start date. The dates are often changed due to delayed processing in the Toronto office. In her testimony, she added that because of the cyberattack, she did not feel that it was necessary to determine a start date. She left it up to Dr. Dobson to decide it. The cyberattack was very disruptive to everyone.

[90] In cross-examination, Ms. McArthur explained that during her first contact with the grievor in June of 2013, she introduced the grievor to Mr. Haw. She agreed that all her communications with the grievor were predominantly by email. She was aware of the fact that her company needed cash on hand to receive IRAP funding. In April 2014, the grievor experienced difficulty obtaining financial information from Company P. She agreed that the grievor had still been waiting on her to obtain the bank statements. As of June 25, 2014, the grievor was still waiting on her to provide the required financial information to complete the application process.

[91] In further cross-examination, Ms. McArthur agreed that on July 7, at 2:39 p.m., the grievor informed her that "the application could not be recommended for funding". The reason was that there was no mention of demonstrated research and development, which is fundamental to IRAP projects. The grievor invited the principals to revisit their application and stated that she would be happy to look at the revision. Ms. McArthur denied knowing that the grievor could not approve funding.

[92] Ms. McArthur agreed with the grievor's representative that on July 21, 2014, the grievor wrote to her to inform them that their application had been rejected. She

agreed that the grievor invited her to resubmit her application. On August 7, 2014, Ms. McArthur was aware that her application had been rejected, and she submitted a new application, as indicated in her email to the grievor at 12:42 p.m. Ms. McArthur was also aware that because of the cyberattack, she could not send anything by email. She was aware that it affected the NRC's ability to receive documents and process applications.

[93] In cross-examination, Ms. McArthur agreed that they had already started the work in July 2014, that she knew that her application would not be recommended for funding, and that they would submit a new application on August 7, 2014. Ms. McArthur acknowledged that the grievor told her that only projects that had not yet begun were eligible for IRAP funding.

[94] In further cross-examination, Ms. McArthur acknowledged that on August 26, 2014, the grievor wrote her an email, advising her on the information to include in her application, and that the grievor told her, "IRAP only covers projects that have not been started. Each action verb needs specific quantifiable clarification/definition. For a 50k application we are looking at a total project cost of about 120k."

[95] In further cross-examination, Ms. McArthur agreed that she wrote to the grievor on September 15, 2014, at 12:33 p.m., to confirm the missing documentation. Ms. McArthur agreed that the emails indicate that on September 18, 2014, she submitted her application to the Toronto office. Ms. McArthur stated that she had no idea that her application was not being assessed by the grievor because this occurred four years before the hearing. She could not remember whether she chose to send the grievor the June financial statement instead of the July or August statement. The grievor's representative referred Ms. McArthur to an email exchange dated September 18, 2014, in which the grievor informed her that the June financial statement was not sufficient and that a September financial statement was required.

[96] In cross-examination, Ms. McArthur recognized her email exchange with the grievor on September 18, 2014, about their application being held up because they could not provide a financial statement for September. Ms. McArthur also acknowledged that the email exchange between her and the grievor dated

September 24, 2014, informed the grievor for the first time that the project had begun in July 2014.

[97] In further cross-examination, Ms. McArthur could not disagree that an email from the grievor to her and copied to Dr. Dobson on September 24, 2014, indicated that Dr. Dobson was the reviewing director on their project and that he needed a copy of their September financial statement to continue his review. Ms. McArthur acknowledged that the October 25, 2014, email to Mr. Lisk containing her complaint and the related documentation was submitted after their application was approved. The application originally approved by Dr. Dobson indicated a start date of September 2014, for IRAP funding of $40 000. Ultimately, the approved contribution agreement indicated an August 1, 2014, start date. Ms. McArthur agreed that there were different phases to their project and that although they were hoping for a July start date, they were comfortable with an August 2014 start date. She indicated that had the IRAP agreed to a July start date, they would have been approved for the entire $50 000. She could not remember if this amount was to cover part of her salary.

[98] Again, in cross-examination, Ms. McArthur acknowledged that the complaint against the grievor dated October 25, 2014, was filed after their acceptance of the contribution agreement. Ms. McArthur stated that the complaint was made shortly after they returned from Florida and that it started with Mr. Haw contacting Mr. Lisk, whom he knew professionally. Before that, she did not file any complaints against the grievor.

[99] In redirect, Ms. McArthur was asked how she could reconcile the emails from June 16, 2014, when she was told that her application had been denied, with the conversation with the grievor on September 15, 2014. She stated that she thought that their application was good to go and that $50 000 had been set aside for their project. Ms. McArthur stated that she was confused later when she was told that it would not work out. The email that she sent on June 26, 2014, about the Oak Computing document is the same as the July 2, 2014, document in which she was asked by the grievor to change the start date.

C. The complaint filed by the McArthurs in October 2014

[100] In October 2014, Dr. Dobson discovered the McArthurs' displeasure at not receiving what they alleged the grievor had promised them they would receive.

[101] Mr. Lisk explained that the grievor's termination was prompted by a complaint filed by the principals of Company P. on October 25, 2014. They alleged that the grievor had encouraged them to make a false statement, which would be contrary to the terms and conditions of the contribution agreement. He recalled meeting with Mr. and Ms. McArthur on two occasions but could not remember the exact dates. He explained that the relationship between the ITA and an applicant is paramount. If the relationship is not working well and is not beyond reproach, it can negatively impact the program and harm the applicant's business. For this reason, he asked Dr. Dobson to remove the grievor as the ITA from Company P.'s project. He did not mention being contacted by Mr. Haw, who was not called as a witness.

[102] During Mr. Lisk's meeting with the McArthurs, they discussed the details of the grievor's engagement with them. The McArthurs explained that they had been working with the grievor since the summer of 2013 to construct a project proposal. Only in July 2014 was there a solid proposal for a piece of work the grievor was prepared to recommend to her director. Unfortunately, the cyber intrusion occurred, which halted the funding. The McArthurs alleged that after that intrusion, on September 15, 2014, the grievor asked them to falsify the start date of their project.

[103] Mr. McArthur recalled meeting with Mr. Lisk in late September or early October to explain what had happened. As a result of that meeting, they were informed that a certain level of support would be given and that another specialized advisor would be assigned to them. Mr. McArthur stated that Mr. Lisk asked him to write a letter with the details of his conversation with the grievor. Mr. McArthur stated that he delivered the letter within a week of the meeting.

[104] On the cover page to the McArthurs' undated complaint, Mr. McArthur wrote:

> *… its participation in the IRAP program has been handled in a manner far beyond simple negligence, perhaps into an area where they did not wish their company to go. Our ITA, Liza Medek, has been our only contact with the program since onset, and we have received limited, confusing, and on one occasion, very poor advice on how to satisfy the submission requirements. The advice of note is where I was directly asked to resubmit my project dates for an already submitted and started project. This did not, and does not seem to me to be sound advice, and while I did indeed resubmit the project; it was followed up in short order with an email to Liza further detailing that we are already underway, and if this*

> *disqualifies us, then we would be happy to withdraw. Please consider this an official complaint.*

[105] In a typed document attached to the cover letter, Mr. McArthur indicated this:

> *On September 15, sometime after 11:15 a.m., I received an e-mail from Liza Medek, our ITA handling our IRAP submission. The e-mail was a request to call her. Sometime between 11:15 a.m. and 12:11 pm, I did speak with Liza regarding our IRAP submission. At that time I was advised that there was 50,000$ put aside for our project, that it would take 2 days to process, and that we did not need to alter the technical aspects of the submission. I asked Liza at that time to follow up in writing that we do not need to change anything, and she did so, at 12:11 pm the same day.*
>
> *At that time, Liza asked me if our project had started, as our original date to start was in the past. I answered that yes, indeed it had started. At this point she asked me again, but with a slightly differently worded question…"You have not started yet, right?" I found it a bit confusing, but played along. At this time she then asked me to alter the dates on my submission, to reflect a future date of October 1st as my start date. I said I could give that to her, but the project is underway and has burned money already. After submitting the revised date documents, we followed up with a written explanation to Liza that the project was already underway, and if that would disqualify us we were happy to withdraw the submission. Our offer to withdraw the submission did not receive an acknowledgement.*

[106] Mr. McArthur signed the document but did not date it. He recalled writing the letter with the events fresh in his mind. The chronology and the emails that were attached to the complaint mostly came from Ms. McArthur. Mr. McArthur explained that the chronology states that on June 16, 2014, the grievor told them that she had $50 000 set aside for their project. Mr. Lisk testified that he received this letter scanned to PDF and attached to an email that was sent to him on October 25, 2014. I note that that was the day after the contribution agreement was signed.

[107] Ms. McArthur testified that she "was also involved in the drafting of both letters and that the purpose of these letters was to get the money in some sort of fashion." Mr. McArthur wrote it and asked her if it was sound. Ms. McArthur did not edit the letters for their contents. She stated that at that point, they had not received IRAP money. Within a few weeks, the response from the IRAP was that they would not receive $50 000 but only $40 000, and only after the complaint was resolved.

[108] Ms. McArthur explained that she wrote a chronology that accompanied these letters. The chronology combined some of the email exchanges that Mr. and Ms. McArthur had had with the grievor. Ms. McArthur's notes, which were filed into evidence, indicate that on September 15, 2014, the grievor called and said that their company would receive the money within two business days. The grievor asked Mr. McArthur if the project had started, and he said, "Yes." The grievor said, "Let me ask you again. Has the project started?" Mr. McArthur said "No?" The grievor said, "Good, the money will be in your account within two business days," and added that she did not need anything else. She then sent them an email requesting the revised contract from the subcontractor.

[109] In cross-examination, Mr. McArthur acknowledged that Mr. Lisk asked him to send him a letter with a narrative and to write a complaint against the grievor. He explained that both contain similar information and that they were written within a few days of each other.

[110] In cross-examination, Mr. Lisk was asked about his notes pertaining to his teleconference with Mr. McArthur. Although he agreed that nothing in his notes references a phone call between the grievor and Mr. McArthur on September 15, 2014, and that there are no notes with respect to any allegations to falsify dates, he recalled that Mr. McArthur was unhappy with the start date of the project. He agreed that initially, the applicant wanted $200 000 to $250 000. However, the grievor suggested $50 000, and the approved amount was $40 000.

[111] In further cross-examination, the grievor's representative suggested to Mr. Lisk that the McArthurs were unhappy with the September 1, 2014, start date of the contribution agreement because they had started the project in July 2014 or even sooner but that Dr. Dobson was willing to support the work to be done only as of August 2014. That is why the contribution agreement date was changed from September 1, 2014, to August 1, 2014, and was not signed by the applicants until December 2014. Mr. Lisk stated that he could not comment on that because he was not in "their heads".

[112] The grievor's representative referred Mr. Lisk to an email from the McArthurs dated November 18, 2014, in which they asked to be assigned to yet another ITA. They

asked that the contract start date be July 1, 2014, so that they could make use of the full $50 000 of IRAP money. Mr. Lisk agreed that they wanted more.

[113] As for the date change on the contribution agreement from September 1, 2014, to August 1, 2014, Mr. Lisk could not answer how the grievor could have benefitted from the date change. On further cross-examination, Mr. Lisk recalled the email that the grievor sent to Dr. Dobson on October 24, 2014, which contained the milestones of her interactions with the McArthurs and the main reasons to justify the delayed project timeline. The grievor indicated that they had no money and that they were not forthcoming with information, even with repeated requests and after the cyberattack. Mr. Lisk agreed that these were all valid reasons that could delay the timeline for the project.

[114] In cross-examination, Mr. McArthur acknowledged that the subcontractor proposal dated July 2, 2014, was submitted with their June 2014 application and that the September 15, 2014, subcontractor proposal was submitted with the October 2014 application. He disagreed with the proposition that the grievor did not ask him to change the start date. He was confident that she asked him to change it, along with part of his submission.

[115] In further cross-examination, Mr. McArthur acknowledged that on July 7, 2014, at 2:39 p.m., he was informed that his application dated June 2014 with a start date of July 2014 had been denied. Mr. McArthur also acknowledged that on August 26, 2014, at 9:16 a.m., he was again informed that the IRAP only covers projects that have not started.

[116] In redirect, counsel for the employer asked Mr. McArthur how he could reconcile the June 16, 2014, email in which he was told that there was $50 000 set aside, with the July 7, 2014, email in which the grievor informed them that she could not recommend their application for approval. Mr. McArthur was not sure why the grievor told them that there was money set aside for them.

[117] The day before the complaint was filed, on October 24, 2014, the grievor sent Dr. Dobson an email summary of her actions on the file since her initial contact with the applicant. She told him that the applicants would make a complaint. He asked her to produce a chronology of all her interactions since 2013. Mr. Lisk explained that the

purpose of this was to obtain the grievor's perspective with respect to what had actually transpired.

[118] Dr. Dobson had the delegated authority to approve the funding. The McArthurs were strapped for cash. He understood that they had no cash because they had spent all their money on the project, and it became an issue of when the project had started. The remaining $10 000 was to support Ms. McArthur's salary. The IRAP would not cover that. The purpose of the IRAP is to promote expertise and innovation, which is the key rationale for the support. The McArthurs assumed that if the IRAP would support $40 000, then why file a $50 000 application? Dr. Dobson understood that the McArthurs were frustrated at the fact that they were told that $50 000 was approved and that they would not receive it.

[119] A review of the documents filed into evidence demonstrated that the proposal template for small projects was dated June 26, 2014. The project start date was indicated as July 2, 2014, with an expected duration of four months. The initial contribution agreement indicated that it came into effect on September 1, 2014, and terminated on December 31, 2014. Dr. Dobson signed that agreement on October 20, 2014. I note that this was four days before the complaint was received. He explained that the September 1, 2014, date was chosen to reflect the work that had to be done but that the contractors had not yet done.

[120] Based on the information from the grievor and the McArthurs, it became clear that they were not happy with $40 000. The McArthurs informed him that they had started the work at the end of June or early July with the expectation that they would receive $50 000 when SONAR was up and running again. They were looking for a significant amount of money to pay part of the salary envelope. Dr. Dobson explained that the IRAP would never do that.

[121] Mr. Lisk recalled that the cyberattack shut down the NRC's computer system, SONAR. Because of the cyberattack, the NRC had to operate without computers and email for several weeks. Some projects were in limbo because the IRAP had to convert to a paper process. Because of this blackout period, applicants that had submitted an acceptable proposal were allowed to select a start date that was acceptable to them, regardless of the actual start date of the project. It took six weeks before the IRAP could normally process applications for contribution agreements.

[122] Because of the delay caused by the cyber intrusion, Dr. Dobson did not want to penalize the McArthurs. He agreed to modify the project start date to August 1, 2014, so that they had enough contract work to support a $40 000 contribution agreement. Unbeknownst to Dr. Dobson, the McArthurs had a discussion with Mr. Lisk. They had 45 days to sign the contribution agreement. The final contribution agreement was signed by Dr. Dobson on October 21, 2014, but the McArthurs signed it only on December 12, 2014. Ultimately, the August 1, 2014, date was selected to accommodate the work that had not been done.

[123] Ms. Lowder explained that the cyber intrusion caused chaos. Upper management did not know how best to manage the situation. The ITAs had to go to their clients and advise them to try to reduce their costs. They had no way to access their files and no way of performing their due diligence. Some clients incurred significant costs for July, and they had no way to access their subsidies. Although it was possible, she was not aware of any projects being backdated because of the cyberattack.

[124] In cross-examination, Ms. Lowder stated that as the signing authority, management could have done whatever it wanted to as per its financial authority. In cross-examination, Dr. Dobson agreed that he had the full signing authority for contribution agreements. He had the authority to determine a start date based on his due diligence and to ensure that a project met all the criteria. When reviewing documentation, he could go back to the ITA and request more information, or he could simply turn the application down.

[125] Even if a project is recommended by an ITA, Dr. Dobson could refuse a contribution agreement. He could also backdate the start date of a project for delays caused by the NRC. He explained that for the Ontario region, the NRC looked at backdating in some cases to account for the delays caused by the cyberattack. In the case of Company P., he was satisfied that there was enough contract work to use the $40 000.

[126] In further cross-examination, Dr. Dobson agreed that if there was information missing, the contribution agreement could not be approved. The emails introduced into evidence demonstrated that the McArthurs were not providing the necessary financial information, which was part of the reason for the delay approving the

contribution agreement. The contribution agreement could not be approved without accurate information.

[127] In cross-examination, Dr. Dobson agreed that the grievor informed the McArthurs in March of 2014 that the IRAP only covers projects that have not been started. He also agreed with her statement that the "IRAP is not a bank and that if they needed start-up money they should contact BDC and that IRAP needs to see revenues or cash in the bank." He did not mention that the language she used was inappropriate.

[128] For the period of March 2014 to April 2014, the email exchanges between the McArthurs and the grievor demonstrate the grievor's insistence on obtaining Company P.'s financial statements. Only on June 9, 2014, did they respond to her and ask whether there was still money available for 2014 and whether she could meet with them.

[129] In cross-examination, Dr. Dobson stated that the McArthurs' frustration was mainly with the fact that they were promised $50 000. They were under the impression that it was just a matter of time, and they would receive it. In the overall process, management's concern was that the firm was expecting to receive the money. Even though the McArthurs did not provide any additional information to support their allegation, Dr. Dobson stated that he had no reason to doubt them. He never saw documentation from the grievor to the McArthurs promising them $50 000, except for an email she sent in January 2014 stating that the IRAP had set aside $50 000 for their project.

[130] The grievor's representative informed Dr. Dobson that the grievor would testify that she never promised the McArthurs $50 000. This allegation was not put to her at her disciplinary hearing. Dr. Dobson could not deny or confirm this.

D. Disciplinary and fact-finding hearing, December 2014

[131] On December 1, 2014, Mr. Lisk wrote to the grievor, inviting her to participate in a mandatory interview. The subject line indicated that it was in reference to a disciplinary hearing. In this letter, he states that he received a complaint alleging that she had mishandled and provided inappropriate information to a client in the preparation of its project proposal. The purpose of the disciplinary hearing was to gather facts and to provide the grievor with an opportunity to hear, understand, and

respond to the complaint. Ms. Pereira accompanied him at this meeting. The letter warned the grievor that disciplinary action could be taken, depending on the results of the investigation. During this time, she was not suspended from work. She had only been removed from working on Company P.'s file. She continued with her normal ITA duties. She testified that this was the first time she was officially informed that the McArthurs' complaint was against her, personally.

[132] On December 4, 2014, Mr. Lisk met with the grievor, her union representative, and Ms. Pereira, who was the note taker. Mr. Lisk stated that he presented the grievor with the events as presented by the McArthurs, along with the allegations in writing. The McArthurs specifically alleged that they were asked to change the start date of their project from the end of July to early October and to affirm that no work had been done to the piece that the IRAP was to fund.

[133] The grievor recalled seeing the complaint signed by Mr. McArthur at the end of the disciplinary hearing. She was not shown the chronology he had signed or the emails and the chronology that accompanied the complaint. She was not informed of the discrepancies between what she said and the allegations against her. She was not shown the Oak Computing document dated September 15, 2014. The first time she saw it was during the hearing before the Board.

[134] Ms. Pereira stated that her involvement in this matter began at the request of Mr. Lisk. He told her that he had received a complaint and asked her to develop questions and to schedule a fact-finding meeting with the grievor. She stated that the events had occurred four years prior to the adjudication and that she recalled the cyber intrusion. She remembered emailing the grievor to schedule a disciplinary and fact-finding hearing. In her view, a disciplinary hearing and a fact-finding hearing are the same thing. The letter to the grievor was titled "Disciplinary Hearing" to ensure that the grievor knew that she could be disciplined. The written version of the McArthurs' complaint was not shared with the grievor either before or during the disciplinary fact-finding meeting.

[135] Ms. Pereira stated that she remembered the grievor asking for a copy of the complaint before the meeting. She stated that the practice was not to share it before the meeting, which was held to obtain the grievor's version of the situation. Ms. Pereira informed the grievor that the contents of the complaint would be shared with her at

the fact-finding or disciplinary hearing and that she would have an opportunity then to respond to it.

[136] She recalled that the grievor experienced difficulties obtaining copies of her emails on account of the cyberattack. The grievor was told to make herself familiar with Company P.'s file to be in a position to answer questions. The grievor informed her that she could not access her files. Ms. Pereira stated that she contacted the Information Technology branch to see if there was a way to help the grievor obtain the emails that would be discussed during the disciplinary hearing. A report summarizing the files was obtained but ultimately was not helpful to the grievor.

[137] The list of questions that she and Mr. Lisk developed was entered into evidence. Mr. Lisk asked the questions but not all of them, and Ms. Pereira recorded the grievor's answers as she responded to the questions.

[138] Her disciplinary hearing fact-finding notes dated December 4, 2014, were taken verbatim during the meeting. She reviewed them before giving her testimony. Her role was only to take notes. If she wrote down a question, it was because management repeated it. It is possible that she did not receive an answer, that she went off-track, or that she rephrased the question. Ordinarily, she did not write down questions; she would register only the employees' answers as they spoke.

[139] Ms. Pereira stated that the grievor was accompanied by Nancy Stonelake, her local union representative. The questions were asked in such a manner that there would be no break in the flow. Mr. Lisk asked the grievor if she knew when Company P.'s project started. Ms. Pereira's notes indicate that the grievor stated that the project was submitted on September 15, 2014, that she knew that the project had started, and that she had a conversation with Mr. McArthur in which he said that they had started and in which she told him, "You can't have started the project because IRAP won't cover it. So you haven't started the project, right?" Mr. McArthur said, "Right.'" The grievor asked if she was in trouble for saying that. Mr. Lisk said, "It is an unfortunate conversation." At this point, the grievor asked to take a break with her union representative. The break lasted approximately 15 minutes. Ms. Pereira stated that she reviewed the questions and her notes during the break.

[140] Mr. Lisk recalled that the grievor was unclear on her statements with the client. At first, she admitted to them, but after returning from the break with her union

representative, she recanted and instead accused the client of lying. She was trying to obfuscate the fact that she had asked the client to change its project start date even though she knew that the project had already started. She admitted to doing so but then recanted and accused the client of lying. He took strong offence to this.

[141] Because of the grievor's difficulties obtaining her emails due to the cyberattack, Mr. Lisk permitted her to present documents in support of her answers by email. The grievor sent her explanations on December 4, 2014, at 6:03 p.m. She sent Ms. Pereira and Mr. Lisk an email, indicating that upon further reflection of the sequence of events as well as the letter provided by the applicant, she now realized what might have contributed to the misunderstanding. She wrote the following:

> *Especially after having had the opportunity to digest the applicant's undated letter, she came to the conclusion that because the contribution agreement was backdated, this proved to the applicant that in fact, IRAP projects can start prior to the signing of the contribution agreement, which made her original statement, that the clock starts only after the contribution agreement is signed as [sic] misinformation.*

[142] In her email, the grievor states that it was never explained to the applicant that it was an anomaly because of the cyberattack and not normal practice as she had initially explained to the applicant. She indicated that it needed to be explained to the applicant. At all times, her intentions were in the best interests of the applicant. On December 5, 2014, she forwarded an email dated August 26, 2014, in which she informed the applicant that the IRAP only covers projects that have not been started.

[143] The grievor testified that at that time, she was not provided with the complaint or the details of the alleged date confusion. Moreover, she could not access her files. Ms. Pereira did offer to provide her with the first few lines of her emails in case it might assist her in responding to Mr. Lisk's questions, but it was not helpful, as most of the information was erased by the cyberattack. All the information was truncated.

[144] Mr. Lisk believed that the email exchanges with the grievor and the chronology submitted by the McArthurs supported their allegations. In his view, the grievor should have realized that the work had begun before the delay from the cyberattack. She knew the rules and understood how the program worked. He was bewildered as to why she would counsel an applicant to change the start date of its project.

[145] Mr. Lisk stated that the grievor should have communicated with Dr. Dobson to determine a solution. She should have made sure that the proposal was on track and should have taken advantage of the ability to sign the contribution agreement on one day with a different start date in August, when the McArthurs had actually started the project. This did not happen. The grievor did not solicit the support of her director and instead suggested that the applicant change the project start date or that in essence, it falsify its proposal.

[146] In cross-examination, Mr. Lisk agreed that the grievor was cooperative during the fact-finding meeting. The grievor was not suspended during the investigation, and she performed all her ITA duties for several months before being terminated. Mr. Lisk preferred to give the McArthurs the benefit of the doubt because he believed that they could not have known that it was possible to change the start date of a contribution agreement unless the grievor told them so.

[147] The grievor's representative indicated to Mr. Lisk that the grievor would testify that she did not recant her statement at the fact-finding meeting. He indicated that he stood by his testimony that she did in fact recant it.

[148] Because of this complaint, on December 15, 2014, Mr. Lisk sent another letter to the grievor with the subject line, "Administrative Investigation". In this letter, he indicates that further to his letter of December 1, 2014, and his subsequent meetings with her, another investigation of her past and current IRAP client files would be conducted. He indicated that she would be contacted and afforded the continued opportunity to participate in the investigation. He also reminded her that she was entitled to representation during the course of the investigation. The grievor recalled the letter. She informed Mr. Lisk that she would do anything to help with the investigation.

E. The complaint received in December 2014

[149] The investigation report prepared by Ms. Pereira, indicates that in December 2014, management was alerted to a client complaint against the grievor. Company M., the client, claimed that the grievor never got back to it after their initial meetings and that it felt blown off by her. It stated that she and Company M. met on September 17, 2014, to discuss the project proposal. She told the client that the concept was not appealing and in fact awful and that it was not her area of expertise.

She said that potentially, it could make money, but that she could not know because she did not know what younger people do these days. The investigation report indicates that the grievor told Company M. that if it opened a bank account and deposited the funds, she was willing to support the project within her limit of $50 000, in addition to supporting up to 80% of salaries.

[150] The report further indicates that the grievor said that Company M. might be eligible for money from Quebec if it relocated there and that she would get in touch with an ITA in Quebec. During a phone meeting, the grievor stated that the ITA told Company M. that she did not like that idea and that the IRAP could not work with the client based on optics or perception. The report states that the grievor stated that she had a phone call with Company M. In her testimony, the grievor indicated that she does not recall the details, only that the company was not ready for the IRAP.

[151] At page 204, the investigation report states that on September 19, 2014, Company M. sent an email and thanked the grievor for the heads-up. It indicated that it would like to start working on the application. The grievor responded that there was still some research to do on her end with respect to identifying the technical risk and reviewing the business plan. Company M. stated that it had researched similar IRAP success stories and projects with similar risks and provided the company names to the grievor. She emailed that every situation, client, and project is different and requested its business plan, bank statement, and a brief outline of the technical difficulties of the project. She stated that on October 14, 2014, Company M. said that it was finalizing its business plan, and it requested to meet. She stated that she suggested November 30. She stated that on October 15, the client said, “OK”. She also stated that she asked the client for a high-level description of the project. On December 6, 2014, Company M. emailed her, indicating the steps it had taken, including preparing a business plan and opening a bank account.

[152] The client stated that it would have some employment opportunities for recent graduates in the near future and that it was eager to carry out a patent search to move forward with funding. It inquired about when they would meet to discuss the next steps. On December 8, the grievor responded as follows: “I have asked this numerous times: I would like to have a paragraph to provide a high level view of the company and the project.” Company M. apologized and sent a paragraph to provide a high-level view of the company and the project. The grievor responded on December 9, stating

that it did not define a business and suggested that Company M. take the lead to study the "Business Model Canvas" through a Wikipedia example on how to set up a business. The grievor indicated that the business was at too early of a stage.

[153] The report indicated that the client sent an email to the grievor on December 9. The email stated that the client was confused about how they had gotten to this point since their initial conversation. The client stated that at the end of their initial meeting, she articulated that she clearly saw the earning potential of the mobile app and that if the client opened an account and deposited funds, she would support it within her $50 000 limit, in addition to providing 80% of salaries. The report indicated that Company M. opened a corporate account and took several steps to start its company.

[154] The report stated that Company M. indicated that this was far more than what the grievor had asked it to accomplish since their first meeting, yet it was being told it was in too early a stage and to search Wikipedia for assistance. Company M. went on to state that based on the grievor's email of September 19, it was under the impression that it had to fax her, to a confidential line, its business plan, bank statements, and a brief outline of the technical difficulties of the project. The client stated that it still did not have that fax number. Company M. claimed that the grievor made it clear that it should not send confidential information by email due to the cyberattack. Company M. stated that its business plan was thorough and that it defined the business and project but that it needed an opportunity to present it since it could not be emailed. Company M. agreed that the paragraph did not set out a detailed explanation of its business but stated that it was a high-level overview that left out confidential information. The report goes on to add that Company M. claimed that it took thorough notes during the first discussion with the grievor, as it valued everything she had to say, and that it combed through every communication between them and did not find that she had asked it to send a paragraph even once, much less several times. The Wikipedia link that she sent could be useful to some companies, but Company M. felt that it was far beyond that stage and did not agree that it was in too early a stage for IRAP funding. It claimed that the time was optimal as it had paid for the beta version, was close to taking the app public, and would need funding to expand to different mobile platforms. Company M. felt that it had been nothing but open, honest, very receptive, and thankful for the grievor's advice and questions since the beginning. The report went on to state that Company M. felt that something considerable had changed on the grievor's end, and it was not clear as to what had changed or why.

[155] The report indicates that the grievor consulted with another ITA with expertise in the area, who suggested that she call yet another ITA. The grievor spoke with Company M., said that the letter was inaccurate and cantankerous, and said that she felt that a written apology was in order. A meeting was set up with Company M. for December 12, 2014. The grievor said that on December 11, she talked to the client again, which agreed that at the first meeting, the grievor had said that this was not her area of expertise. However, Company M. maintained that she had said that she "clearly" saw earning potential for its product. The grievor also said that Company M. indicated that it was insulted by her reference to the Business Model Canvas, that she never got back to it with a fax number, and that it never received a request for a paragraph. The grievor told Company M. that the letter was threatening, to which the principal responded that she was threatening him that if he did not write an apology, the meeting would not take place. The report indicated that she clarified that she never gave an ultimatum. The grievor emailed her supervisor, Dr. Dobson, asking to speak with him, and a meeting was scheduled with Company M. The meeting date was changed to December 17. The grievor's objective for the meeting was in her words to "calm the client down and recover without escalation" with observations of her apologies for her part in the miscommunication. The employer did not file into evidence the emails or documents on which the report was based.

[156] Ms. Pereira went through her notes from the disciplinary fact-finding meeting that were dated February 13, 2015. She noted that Mr. Lisk asked the grievor about her interactions with Company M. The grievor stated that the client had copied its business plan from a post on the Internet. It was looking for IRAP funding for an app. Because she was not an app specialist, she brought in one of her colleagues to assist. The app rated a person's beauty. Ms. Pereira's notes indicate that the grievor stated that the NRC should not be connected to rating beauty.

[157] Ms. Pereira's notes indicate that Mr. Lisk asked the grievor why she had pursued the project if she felt that way about the NRC and rating beauty. She stated that the principal of Company M. was the son of a brilliant scientist and that meeting him was worth it. She gave it the benefit of the doubt. She suggested that it attempt to obtain funding from the BDC. She asked Company M. for a brief, high-level description of its product, so she could give it to Dr. Dobson. The idea was awful, and she had second thoughts about the firm. There was a delay on her part because this was not her area of expertise, so she brought in her colleague, who was a technology advisor. She

claimed that the client did not send the high-level description of the project as she had requested.

[158] Mr. Lisk asked her why Company M. thought it would receive $50 000. The grievor responded that Company M.'s contacts had experience with the IRAP and that they had told the client that this is what it could expect. She provided it with assistance by giving it the resources to establish a business plan. Mr. Lisk asked her if she had felt intimidated by the client and whether it was difficult for her to tell it that its project was not suitable for funding. The grievor said, "No." Mr. Lisk asked her if she was concerned that Company M. would make a complaint against her if she did not continue with the proposal. She said, "No." Ms. Pereira's notes indicate that she was not concerned about Company M. making a complaint until she received an email from the principal that said that he had misunderstood and that it was his mistake or error. Ms. Pereira could not specify what this was about. Ms. Pereira's notes indicate that Mr. Lisk then asked the grievor if she had threatened Company M. if it did not apologize and if she had told Company M. that she would not work with it. She stated, "No."

[159] In cross-examination, Mr. Lisk's attention was brought to page 204 of the March 2015 investigation report, which references the complaint filed by Company M. in December 2014. The report indicates that Company M. felt that it had been blown off by the grievor. Mr. Lisk could not remember whether this matter was brought forward by the grievor to management. He also did not recall whether it was brought to the grievor's attention at the second fact-finding meeting, in February 2015. The grievor's representative indicated that witnesses for the grievor would testify that it was not brought to her attention at the February 2015 fact-finding meeting.

[160] The grievor testified that she never received a formal complaint from Company M. She stated that it was a young client and that it sought IRAP funding for a contribution agreement. She recalled a conversation with one of the two partners and that a disagreement arose about comparing her to his father. She told the client that she would end the conversation and that they could speak the next day. She informed Dr. Dobson immediately of this conversation. No complaint was ever shared with her.

[161] Dr. Dobson testified that the grievor alerted him to the fact that Company M. would complain. She wanted to make sure that when the complaint was made, there

would be nothing that he would not be aware of. This had nothing to do with the complaint filed by the McArthurs and Company P., but it was a sign that potentially, something else was going on.

[162] In cross-examination, Dr. Dobson agreed that the grievor brought this to his attention, which was when he heard about it. He agreed that she sought his advice on how to handle the client and the difficulties that had arisen around December 9, 10, and 11. He disagreed that it was his role as the director to advise ITAs on how to best handle difficult clients. He expected ITAs to be able to deal with firms.

[163] In cross-examination, Mr. Lisk acknowledged that Dr. Dobson communicated with Company M. in December 2014. He could not recall whether he met with it in person or via a telephone call. An email dated December 23, 2014, with the subject line "Recent IRAP interactions", seems to indicate that it was via a phone call. He stated that the client shared its frustrations about the grievor and that this complaint formed part of the reasons for her termination. There was a miscommunication between the grievor and the client. She provided it with erroneous information and mismanaged its file. Mr. Lisk explained that the grievor was an experienced ITA, the firm was very young, and she let it raise its expectations.

F. The complaint received in April 2013

[164] Ms. Pereira's notes, dated February 13, 2015, indicate that Mr. Lisk then went on to ask the grievor about Company I. The investigation report indicates that a complaint was received on April 10, 2013. Company I. indicated that the grievor was inaccessible, did not provide assistance, had poor communication, did not have relevant expertise, and did not provide any value to the company. The principal of Company I. found the grievor frustrating and difficult to work with. Its simple questions, which could have been cleared up with an explanation by phone, instead turned into frustrating, endless email exchanges. The investigation report states that Company I. claimed that the grievor lacked an understanding of documentation requirements, which meant that it was not assisted in providing complete information up front, it received an urgent call to revise information because submissions were deemed incomplete, and it believed that it lost several opportunities because of the grievor's poor work habits. The investigation report goes on to add that when the grievor changed offices, Company I. was not informed of the new address. It had faced enormous challenges finding early adopters in the hospital sector and hoped that the IRAP could help it overcome this

issue. Repeated requests to meet were deferred by months, and the meetings never happened.

[165] The investigation report indicated that Company I. felt that the grievor had connected it only with the resources in her immediate circle of personal contacts. The principal found that she brought no added value other than the IRAP funds. It was reluctant to complain out of fear of jeopardizing future project funding opportunities. Through his colleagues, the principal had heard that ITAs were much more helpful. He wanted a new ITA but had no mechanism to request one. Because the grievor was so unsatisfactory, in the fall of 2013, he ceased seeking any support from the IRAP. The official complaint from this client was not filed into evidence.

[166] Mr. Lisk asked the grievor for her recollection of her experience with Company I. and if she spent any time discussing the submission with the principal. She said that she spent the most time with this client because it submitted 9 or 10 projects, totalling over $200 million. Ms. Pereira's notes indicate that the grievor stated that she had confidence in this client and that she put it in contact with other specialists. She discussed with Company I.'s principal how he did business. He changed the scope of the project. She had to badger him to invoice. He was not providing invoices for his claims; he let some people go, then he let a large number of people go. The grievor claimed that Company I. had a trend of firing people. At times, when the company did invoice, it was at the last minute. Company I. made a submission for another project, but its financials were not up to par, and then, its office moved. For this project, although Company I. appeared more focused and was engaged with partners, when she denied supporting the principal's project for funding, he became extremely upset. The principal had invited her to two galas. She attended and sat with him. The grievor stated that his financials were not good. Sales were down. She had done 9 projects with him before this one. She could not confirm the total amount of IRAP funding for the projects.

[167] In cross-examination, Mr. Lisk was asked about the post-assessment NRC IRAP "Feedback and Complaints Procedures" document. He did not know whether the April 2013 complaint was received pursuant to the post-assessment feedback procedure. He did not know whether it had been resolved. He could not confirm that no further action was taken as of April 22, 2013. He agreed that on paper, it appeared that the grievor was made aware of this complaint only at the February 2015 fact-finding

meeting, in February 2015. At that meeting, the document that was shared with her about the April 2013 complaint was different from the email received by Dr. Dobson on December 18, 2014. Mr. Lisk agreed that the text is similar, but the December 2014 communication was new. The email complaint sent to Dr. Dobson on December 18, 2014, was not shared with the grievor during the February 2015 disciplinary hearing. Ultimately, Mr. Lisk agreed that the fact-finding meeting concluded that she did not mislead the client.

[168] In cross-examination, Dr. Dobson stated that the complaint received in April 2013 originated from a post-project assessment report. Company I. provided its assessment, which was then sent to the national office. The client confirmed that the grievor had said that the principal was "greedy". Dr. Dobson confirmed that he followed up on this complaint on April 22, 2013, and that the grievor was not disciplined for it.

[169] The grievor summoned Glen McDougall to testify on her behalf. As of his testimony, he was the managing partner of Doyle Tech Corporation. It is a high-tech consulting firm offering different services, and it has a fair amount of interactions with several Government of Canada departments. It provides consultation services and mentorship, advice, and guidance. It contacts the IRAP to provide assistance. He explained that for the past 20 years, Doyle Tech has had a significant amount of interactions with ITAs at the NRC. He has worked closely with several ITAs and has performed a significant amount of strategic planning. The company has an extremely good reputation with the federal government. Executives from the company were active on the NRC's board of directors. Because of this, the NRC has an excellent reputation with the firm.

[170] Mr. McDougall met the grievor at an industry event in which his firm was a participant. When he spoke to the grievor, he discovered that they had much in common. At that point, he started discussions with her and developed a professional relationship with her. As of the date of his testimony, he had remained in contact with her professionally.

[171] Mr. McDougall discussed the April 2013 complaint with Mr. Lisk. He knew the principal of Company I. well. He had met the complainant at an industry event. The grievor introduced him to Company I. He explained that Doyle Tech became advisers to

Company I. and for several years, a board member. Mr. McDougall suggested to Company I.'s principal that he needed to do some introspection and encouraged him to look at things in a different way. After Mr. McDougall's criticism of him, he decided that Mr. McDougall was not suitable as one of his advisors. During the time that he was involved with Company I. the grievor went through hoops to do whatever she could to assist him but it was never enough for him. Company I. was solely focused on obtaining funding from the IRAP and not on his business, as much as he should have.

[172] Ms. Lowder explained that the NRC IRAP has feedback and complaint procedures dated December 2012, which are embedded in the ITA Field Guide. Many ITAs did not even know that these procedures existed. It is a client process, in which clients can complain to the president of the NRC. The complaint is then sent to the director to be dealt with. The ITA who is the subject of the complaint then sends all emails and information to justify his or her actions in the application. Usually, the director stands by the ITA with respect to his or her decision and that of the ITA team of not recommending a project for funding. She explained that currently, this process is being used as a stick against ITA colleagues, to allow applicants to shop for an ITA. Sometimes, applicants hear what they want to hear, and they do not understand why their applications are not approved for funding. Sometimes, applicants just do not understand the process, and so, they file complaints. The director usually becomes involved and contacts the client to discuss the issue and obtain more information. Ms. Lowder stated that most ITAs are not aware of this process and that in her experience, the NRC only began training ITA staff on this process more than seven years after it was adopted.

[173] Mr. Lisk mentioned that another firm that the grievor had worked with for several successive years on several projects had made a complaint against her. In this case, the grievor came to the conclusion that the firm was not achieving commercial results with the funding. Ultimately, it was asked to continue on its own. A decision was made based on the grievor's recommendation that the IRAP would no longer provide funding to the firm. Mr. Lisk agreed that it is fair for an ITA to have those discussions with a firm and to determine that it has not progressed in its plans. However, good practice dictates that she should have shared that information with the director before informing the firm of the IRAP's decision to discontinue working with it. This was mishandling a file, not misleading the firm.

[174] In cross-examination, Mr. Lisk confirmed that he did not take any notes during the disciplinary interviews and that he relied on Ms. Pereira to take them.

G. Disciplinary and fact-finding meeting, February 13, 2015

[175] On February 6, 2015, Mr. Lisk wrote another letter to the grievor, titled "Disciplinary Hearing". He informed her that the purpose of the meeting was to discuss the management of some of her prior files, about which the applicants had filed complaints. The clients alleged that she provided confusing and conflicting information and that she did not provide the required advice. The purpose of the meeting was to provide her with an opportunity to hear, understand, and respond to the complaints filed against her and to collect information that would assist in determining whether the misconduct allegations were substantiated. As a result of the investigation flowing from Company P., and depending on the facts, the letter stated that disciplinary action could be taken. Ms. Pereira would be present.

[176] Mr. Lisk explained that the disciplinary meeting of February 13, 2015, began with the grievor's representative questioning the investigation. At the start, the grievor presented some information pertaining to the initial complaint, specifically about the McArthurs' behaviour during the application process. She indicated that the new ITA was having problems with them completing their contribution agreement, which was why it was signed off only in December 2014. Again, the grievor reiterated that the McArthurs were difficult to deal with and were not providing the required information to complete the contribution agreement. The grievor claimed that the cheques provided by the McArthurs did not add up to the invoices and the claims. The conversation did not go well between the McArthurs and their new ITA. The new ITA did not want to work with them anymore, because they were liars. The new ITA signed the claim, but Dr. Dobson sent an email, stating that if Company P. were audited, the IRAP would not take responsibility for the claim.

[177] Ms. Pereira testified that the same process was followed at this meeting as at the earlier disciplinary meeting. The questions were developed ahead of time with Mr. Lisk. He would ask a question, and she would write down the grievor's answers. She did not write the question before registering the answers. If she wrote a question in her notes, it was because Mr. Lisk repeated it or asked a follow-up question. The grievor and Chloe Charbonneau-Jobin, her union representative, were present. The union representative had questions about the process because the grievor did not have

access to her documents. She asked if the grievor would be allowed to present information after the meeting if she were not able to answer a question. She stated that a disciplinary hearing is held to impose discipline. In this case, there had been no investigation into any misconduct. She argued that the employer cannot impose discipline on an employee years after the fact. She also stated that the issues raised by the employer were in fact performance-related and not discipline-related.

[178] The grievor testified that she was not shown the complaint filed by Company M. in December 2014. She was not shown the complaint filed by Company I. in April 2013; nor was she shown the document at pages 195 and 196 of the employer's book of exhibits. After the disciplinary hearing, she did receive an email from Ms. Pereira dated February 9, 2015, which contained what appeared to be a complaint from Company I. from 2013. She explained that Mr. Lisk held a promotion case, which she had prepared, in one hand and the Company I. email in another. Mr. Lisk dismissed her earlier promotion request. She was not shown pages 197 and 198 of the employer's book of exhibits. She was never disciplined for this complaint; nor did she ever receive any negative feedback.

H. The investigation report flowing from Company P.'s complaint

[179] Ms. Pereira testified that she produced the investigation report after the discussions with the grievor and the timelines received from the clients that had complained. On page 200 of the investigation report, there is a list of persons and documents that were used in the creation of the report. Ms. Pereira stated that those persons were not interviewed separately. It is a summary of the file. It was put together after the first fact-finding disciplinary hearing with the grievor. The grievor's comments on the documents attached and the emails were obtained for the fact-finding meetings.

[180] The grievor testified that before her termination, she was not given a copy of the report or an opportunity to comment on it.

[181] In cross-examination, Ms. Pereira stated that she was the lead person from Human Resources on the file. There were no voice recordings made, and Mr. Lisk did not take notes. He might have scribbled down some questions, but nothing more. She drafted the investigation report. The grievor was supposed to be offered an opportunity to comment on the report, but it was not shared with her. Only the

information that formed part of it was shared with her, not the report itself. Ms. Pereira's recollection is that these were documents that the grievor brought to the meetings or things that were brought to her attention.

[182] In further cross-examination, Ms. Pereira stated that she was not present for the interviews with the clients who had made the complaints against the grievor. Therefore, she did not have any notes. The contents of these conversations appear only in the report. She could not recall which documents were put to the grievor during the disciplinary fact-finding meetings. She does not know if the contents of those interviews were shared with the grievor or if Mr. Lisk simply asked the questions.

[183] Again, in cross-examination, Ms. Pereira was referred to page 200 of the investigation report, which references the complaint received from Company M. in December 2014. She stated there was a complaint, in the form of either an email or a letter addressed to Mr. Lisk, or it might have come through the NRC's 1-800 number. Those are the two ways in which Dr. Dobson would have been aware of the complaint. The grievor's representative stated that the grievor would testify that she was never shown a complaint other than about communication issues that she brought to her director's attention.

[184] In further cross-examination, Ms. Pereira stated that the fact-finding report was composed of the analysis of the information that the NRC and Mr. Lisk had on file and consisted only of what they had gathered. The report was part of the material that formed the basis of the decision-maker's package. She could not confirm whether the grievor was shown the complaint filed by Company P. She could not confirm if the chronology created by Ms. McArthur was shared with the grievor. She wrote the investigation report by working from Mr. Lisk's notes taken from his discussions with the clients. Mr. Lisk was trying to determine whether he should investigate because of the inflammatory comment that "IRAP is not a bank". Mr. Lisk would have shared his jotted-down notes with her. Those notes were not shared with the grievor; Ms. Pereira did not keep or destroy them.

[185] In further cross-examination, Ms. Pereira's attention was taken to paragraph 1 of page 202 of the report, specifically to the sentence, "According to the client, the ITA informed the client at the meeting that she has 50k set aside for the project, the client just needs to make a few changes to the application, need more action verbs." She

stated that she was not at that interview. It was taken from somewhere, from some notes or from an email that she had seen.

[186] The grievor's representative brought Ms. Pereira's attention to page 163 of her notes of the disciplinary fact-finding meeting of December 4, 2014. She stated that nowhere is it indicated that Ms. Pereira informed the grievor that she had allegedly informed the client that she had set aside $50 000 for the project. Ms. Pereira agreed that she did not have it in her notes but stated that she believed that there was a question about $50 000. It came from something, but she does not know what. In her notes, there is no follow-up question for the statement that the client alleged was made.

[187] The grievor's representative brought Ms. Pereira's attention to page 202, paragraph 4, of the investigation report, which references that the grievor had a discussion with another ITA about Company P. Ms. Pereira agreed that this was not discussed during the fact-finding meeting, and there were no questions to that effect.

[188] Ms. Pereira agreed with the grievor's representative that the fact-finding report was not shared with the grievor and that she was not offered an opportunity to comment on it. Her understanding was that the grievor saw all the pieces that formed the basis of the report. The report was ultimately provided to Bogdan Ciobanu, the IRAP's vice president and the decision maker, and Mr. Lisk. She also agreed that the amounts of the contribution agreements were not discussed specifically with the grievor. There were questions, but there are no notes on her answers. The questions were prepared before the meeting, but not all of them were asked. Sometimes, Mr. Lisk would choose to skip over a question and go to another one because the grievor had answered it, or there was already sufficient information.

[189] The grievor's representative brought Ms. Pereira's attention to page 204 of the investigation report. Ms. Pereira agreed that it was not indicated that the grievor had alerted management to the complaint that would be filed against her in December 2014. The grievor's representative suggested that this was misleading. Ms. Pereira did not answer.

[190] In further cross-examination, Ms. Pereira agreed that on page 206 of the report, it is not indicated that Dr. Dobson addressed this complaint in April 2013 and that no further action was required from the NRC. She agreed that the union representative at

the time alleged that the April 2013 complaint had been tampered with, due to the fact that it was an extraction from SONAR. Her email dated February 9, 2015, at 3:41 p.m., to Ms. Charbonneau-Jobin contained the complaint received from the client in December 2014 and differed from the original complaint received on April 10, 2013. She agreed that they were different complaints.

[191] In cross-examination, Mr. Lisk acknowledged that the missing pages from the investigation report were his notes and that they were his edits of the report. These pages were withheld from disclosure on the basis of s. 12(1) of the *Privacy Act* (R.S.C., 1985, c. P-21). He acknowledged that it was pursuant to his recommendation that the grievor's employment was terminated. The investigation report supported his recommendation to terminate her employment. Ms. Pereira agreed that the complaint shown to the grievor was not the one that is referenced in the investigation report.

[192] Mr. Lisk did not know if the grievor was given an opportunity to comment on the investigation report before her termination. In cross-examination, Dr. Dobson stated that he was not familiar with the NRC's "Human Resources Manual" and its policies on discipline.

I. The decision to terminate the grievor's employment

[193] Mr. Lisk testified that an IRAP staff member asking an applicant to put in writing something that is untrue to obtain funding is a grave mistake. To compound it, for the staff member to then flip-flop back and forth and say that he or she did it and then to deny it and blame it on the applicant is serious misconduct. Because there was no indication of acceptance of responsibility and because the grievor blamed the applicant, he lost faith in her ability to engage appropriately with applicants. On the balance, he found the clients more credible than the grievor. After taking everything into account, he had no choice but to recommend that she be dismissed.

[194] The employer called Mr. Ciobanu. He signed the termination letter. He was responsible for all the IRAP. He knew the grievor before his involvement in this matter. He had had contact with her during regional meetings. There were approximately 400 employees at this time. He retired in December 2016. He read the file and met with the representatives of Human Resources and with the management team on multiple occasions. Based on the evidence and the recommendations from management, his

understanding, and the analysis of the file, he made the decision to terminate the grievor.

[195] Mr. Ciobanu testified that he could not consider a less-severe disciplinary measure because of the seriousness of the grievor's actions noted in the initial complaint that was filed in October 2014. The fact that she advised the client to lie and to basically defraud the government by charging more for a project than the client was to receive was severe misconduct and unacceptable behaviour from an ITA.

[196] In those days, the IRAP was a $350 million program. ITAs had a huge responsibility to invest in the most promising companies in the country, to find the best opportunities to invest, and to determine the right amount of money to invest. Her behaviour was unacceptable, and moreover, the grievor did not show any remorse. The bond of trust had been irrevocably broken and could not be restored.

[197] Mr. Ciobanu went on to explain that in addition to this grave misconduct, there were other concerns about the management of other files. There were complaints from other clients, which were analyzed by regional management and investigated. They showed that there were deficiencies in the files, that the clients were unsatisfied, and that the image and reputation of the program were affected. In his view, the October 2014 complaint filed by Company P. was sufficient grounds to terminate the grievor's employment. She was terminated for violating the NRC's Code of Conduct.

[198] Mr. Lisk explained that all staff attended mandatory training on the new NRC IRAP "Code of Conduct" ("the Code"). The purpose was to remind them and the ITAs to be mindful of their obligations and responsibilities under the Code when recommending contribution agreements, which flow money directly into a firm. It was also training on access-to-information and privacy (ATIP) processes and on how to deal with contractors, as well as writing proposals for clients. The grievor attended this training on March 6, 2014.

[199] In cross-examination, Mr. Ciobanu stated that he was aware that the grievor had had no prior discipline. He reviewed several documents, the fact-finding report, and notes from meetings with Human Resources and management. He was not aware that the grievor had not been permitted to review the fact-finding report, but he was sure that the NRC's procedure had been followed. The grievor's representative stated that

the grievor would testify that she was not permitted to respond to all the information in the report. Mr. Ciobanu did not respond.

[200] In further cross-examination, Mr. Ciobanu agreed that the complaints mentioned in the termination letter about her deficiencies handling these files were addressed with the grievor. He was not aware that these complaints were over two years old and that they were not addressed with her in a timely manner. The April 2013 complaint was not shared with the grievor at the fact finding meeting in February 2015. He was not aware of how these complaints were dealt with by management. He knew that when dealing with serious allegations, such as the one involving the October 2014 complaint, management looks at a wider array of activities. He was not aware of what management did with respect to the NRC's policy on the principles of discipline pertaining to the April 2013 complaint.

[201] In cross-examination, Mr. Lisk recognized that the grievor had no prior discipline record. He also recalled that her performance, on the recommendation of Dr. Dobson, met the CTE. He was responsible for all staff CTEs under him as per the recommendations of the directors who reported to him.

[202] Mr. Lisk could not deny that the grievor was given a rating of "exceeded expectations" for her commitment to contribute to the NRC's mission and operating priorities for the performance review period of April 1, 2012, to March 31, 2013. He also recognized that she exceeded expectations by taking on more projects than was expected of her. The CTE for that year states, "It is evidence of Liza's recognized and distinguished career, reflecting admirably on NRCs top talent." She was bestowed a fellowship in the Royal Architectural Institute of Canada, which is a lifetime-achievement award. This honour was given to her in recognition of her tireless volunteer activities, her work as a practising architect, and most importantly, her outstanding career at the IRAP over the previous 20 years.

[203] In the performance agreement CTE for the April 2013 to April 2014 fiscal year, she received a rating of "exceeded expectations" from her supervisor for her commitment to contributing to the NRC's mission and operating priorities. There was no mention of deficiencies with respect to her file management. There was no negative feedback and no mention of the Company I. complaint. Nor was there mention of a need to improve client relationships.

[204] In further cross-examination, Mr. Lisk recognized receiving letters of appreciation from different clients in 2013 and in 2015 with respect to the grievor's handling of their projects. He could not deny that the letters comment on the valuable assistance she provided with the application and reporting process, as well as her attention and dedication. In his response, Mr. Lisk made sure to underscore the fact that Dr. Dobson did not comment on the grievor's CTE.

[205] In redirect, Mr. Lisk indicated that a situation in which a client is asked to falsify information is distressing. The grievor always met expectations and in some cases, exceeded them. It was a surprise to him. The letters of appreciation that arrived after the complaint did not factor into the process because they did not speak to the issues before him.

[206] Mr. McDougall found the grievor very knowledgeable. Her impact on his company was invaluable; she was a great contact who provided incremental advice to the company and its clients. In all his business interactions, he found that she had a very high work ethic. He deals with a large number of ITAs, and he found her one of the very best for the IRAP. He never came close to questioning her integrity, and her behaviour was always beyond reproach. She always went the extra mile, whether she was working directly or indirectly for the IRAP.

[207] He spoke with Mr. Lisk about the grievor's termination. He was shocked and dumbfounded. He told the grievor to let him know if there was anything he could do to help, because it was the right thing to do. He stated that he told Mr. Lisk the same things that he testified to about the grievor. Mr. Lisk discussed the grievor and her work with him. Mr. McDougall informed Mr. Lisk that the grievor's conduct was beyond reproach and that she was one of the best ITAs he had ever worked with. In his mind, it did not add up that she was being terminated.

[208] Mr. Palmer testified that he was part of the panel that hired the grievor and that he has known her for 20 to 25 years. He knew her when he interviewed her. As her senior ITA supervisor and mentor and then as her director, he would often transfer clients to her because he liked her approach and the way she established relationships with clients, and her ability to handle a large client load was impressive. At times, she had the highest client load of all the ITAs. He had a positive impression of her, and he was impressed at the way she handled clients.

[209] The grievor testified that she reported to Dr. Dobson for approximately six to seven years. Her relationship with Dr. Dobson was, generally speaking, good. At times, it was difficult to get hold of him, because he was busy. He was in charge of international development in addition to the NRC's Ontario region. He travelled often, and receiving return calls from him was not the easiest and a bit frustrating. Other than that, they got along.

[210] The grievor went through her performance reviews from April 2010 to 2011 and from 2012 to 2013. Overall, her performance evaluations were fully satisfactory. In some years, she doubled the number of projects she did. In the 2012-to-2013 performance review, she significantly exceeded expectations. She was honoured that year and became a fellow of the Royal Architecture of Canada. She was given a lifetime-achievement award, and a book was written. According to the grievor, she was amongst the top 10% of talent at the NRC.

[211] In the April 2013 to April 2014 performance review, she met all expectations. She exceeded her project deliveries as she had found approximately 30 new clients for that year. There were no formal complaints made against her for that year. She received multiple thank-you letters from clients and positive comments. She received letters such as these in 2014 as well. Before her termination, she had never been disciplined by her employer.

[212] Although she was taken off Company P.'s IRAP application in November 2014, she remained an ITA and continued to work with other clients until her termination in March 2015. The grievor testified that there were no conditions imposed on her between the date of the complaint and her termination.

[213] The grievor testified that she agreed that she could have had better communication with these clients and that she learned from her mistakes. She recognized that communication was a problem and that she could have had better communication with the McArthurs to get the project approved She recognized that she should have sat down with them and helped them write the proposal and that she should have followed up with longer emails, more succinct details, and to-do lists as well as met with them more often. Also, it would have been preferable for her to insist on a single point of contact, to avoid confusion. It would have led to more clarity. She recognized that there was significant lack of clarity in her communications with the

McArthurs. Clarity and communication are key to the development of a contribution agreement and in managing a client's expectations.

IV. Summary of the arguments

[214] The parties provided their closing arguments by written submissions. What follows is a summary of those submissions.

A. For the employer

[215] The employer maintained that the grievor had the opportunity to tell the truth and to set the record straight but that she did not take advantage of that opportunity. She lied and showed no remorse during the investigation. This was in and of itself grounds for the termination of her employment.

[216] Mr. Lisk testified that ITAs must be "beyond reproach" as they are the representatives of the Government of Canada in the community; they are mentored, developed, and then operate autonomously, and they might not see their directors every week. He testified that all ITAs are provided with the Field Guide in their first week of employment, which is central to their work. Ms. Lowder, the witness for the grievor, indicated that the ITA Field Guide is like their Bible.

[217] The standard-form proposal document created by the NRC IRAP includes this statement: "The submission of false or misleading representation of information is grounds for immediate termination of this proposal." The Field Guide establishes the following points:

- The client relationship is handled by the ITA.
- The key to success is integrity and transparency, and in accordance with the Code, an ITA must be prepared to say, "No."
- Any uncertainty about eligibility for contribution or support should be discussed with the ITA's director and, when appropriate, referred to the executive director.
- The contribution agreement is a legal document between the NRC and the firm that describes the obligations of each party and the condition for payment within the context of a specific approved project.
- On the key contribution agreement dates: a contribution agreement is in effect from the first day of the project phase to the end of the post-project phase. The key contribution agreement dates identify the date on which the firm may begin incurring supportable costs and the project start date (start of the project phase). Costs incurred before or after the project phase are not eligible for support.

- The firm should be reminded that it must assume responsibility for any costs incurred before the agreement is signed in case the proposal or expense is rejected or cancelled, even if those costs were incurred between the dates of the proposed project phase.
- While approval is made at the director level, the lead ITA's recommendation is the culmination of the due-diligence process and takes into account all information accumulated and assessed before the submission of the contribution agreement for approval. The lead ITA must make an explicit and candid recommendation as to, in the lead ITA's best professional opinion, why financial support by the NRC IRAP is warranted.
- The lead ITA must ensure that all criteria related to a firm's eligibility for a financial contribution are met. If the firm does not meet the eligibility criteria, then it must be stated explicitly, and a justification for support must be provided.

[218] The Code states that employees must act at all times in ways that preserve the NRC IRAP's good reputation and must conduct NRC business in a manner beyond reproach, ethically and with integrity.

[219] Mr. Lisk testified that while a company might have a large ongoing project, pieces of that project are discrete and supportable independently as an IRAP project.

[220] The McArthurs testified that they first contacted the grievor in June 2013 to explore a contribution agreement with the IRAP.

[221] In late 2013, efforts were made to submit a proposal, and the first submission was sent on November 22, 2013. Ultimately, there were no funds left in the program, and the program and the proposal had to wait until the following year.

[222] Communications between Company P. and the grievor began again in January 2014. Documents were submitted, and guidance was provided from the grievor, including identifying a late start date of July 1, 2014.

[223] The McArthurs testified that on June 16, 2014, the grievor told them that $50 000 had been set aside for their project. In a document titled "Proposal Template for Small Projects" dated June 26, 2014, the expected start date for the project is listed as July 2, 2014.

[224] Mr. Lisk testified about the cyberattack on the NRC's networks on July 28 or 30, 2014. The material filed at the hearing indicates August 7, 2014. By August 26, 2014, the grievor was again providing advice to Company P. on its proposal. Mr. McArthur testified that the cyberattack had no impact on the start of the project.

[225] In an August 26, 2014, email, the grievor confirmed her understanding that the IRAP only covers projects that have not been started. Mr. Lisk testified that this confirmed that she understood the rules and that it is bewildering how she could have then asked the client to specify a different start date.

[226] The McArthurs testified that the grievor spoke with Mr. McArthur on September 15, 2014, and asked Company P. to alter the start date on its submission from July 1 start to October 1, which it did. The McArthurs testified clearly and convincingly about the conversation that occurred on October 15, and both were firm during cross-examination that this occurred.

[227] Neither witness had any obvious motivation to lie. By testifying honestly, they had to disclose the unsavoury fact that they submitted a falsified document to a tribunal that will release a publicly available decision.

[228] In their evidence, the McArthurs identified an original contactor agreement with a start date of July 2, 2014, and a completion date of October 17, 2014. They also identified the same agreement, further to the request of the grievor, with a start date of October 1, 2014, and a completion date of January 31, 2015.

[229] The McArthurs testified that shortly after submitting the altered documentation, they had second thoughts. They wrote to the grievor on September 23, 2014, indicating that they were in crisis mode, that the project had in fact started in July, and that if it disqualified them from funding, then it would be fine.

[230] In the contribution agreement, valued at $40 000 and signed by the NRC on October 20, 2014, the project start date is listed September 1, 2014.

[231] A second version of this document was signed by the NRC on October 21, 2014, with a project start date listed as August 1, 2014.

[232] Mr. Lisk testified that a project start date can be the date that an acceptable project arrives in circumstances such as the cyber intrusion, due to which the NRC had to turn off its computers for weeks. The project was kept in this limbo so as not to disadvantage the company.

[233] Mr. Lisk testified that what the grievor did, however, was to ask the company to change the start date on the paperwork. He stated that such a false statement was not

appropriate and that an ITA encouraging a company to make one was a grave mistake. When he was asked what the grievor should have done in the context of the cyber intrusion, Mr. Lisk testified that "Ms. Medek should have communicated the situation with her director to look for a solution and not to tell the company to submit a false document."

[234] When he was asked why the IRAP eventually signed the contribution agreement with an August 1, 2014, start date, Mr. Lisk testified that the NRC was delayed in executing the agreement and did not want to penalize the company for the challenges associated with the cyber intrusion. The portion of the project that the IRAP would support started on August 1, 2014.

[235] Dr. Dobson testified that he looked at the Company P. documents and that the work that started in June or July 2014 was consultant work and salary support for Ms. McArthur. He testified that he realized that work had been done on the project when the company said that there was not enough contract work to use the $40 000 and that "it was an issue of when it would start".

[236] Dr. Dobson testified that the contribution agreement with the September 1 start date was based on information from the grievor that this date reflected work that had to be done but that had not been done by that point. The second contribution agreement was signed with an August 1, 2014, start date flowing from discussions with the client and in his words, "to accommodate to the extent that I was willing, work to be done, not work that was done by that point." In cross-examination on this point, he noted, "It was hard to just walk away with all that happened - anything from the cyberattack that allowed us to do something to at least partially resolve the firm's displeasure."

[237] When she was cross-examined on the contribution agreements and the two start dates, Ms. McArthur testified that the Company P. project "had different phases and we could divvy it up; we hoped that IRAP could go back more, but the project was in phases. If we went back to July, we would have qualified for the entire $50 000."

[238] Ms. Lowder, a witness for the grievor, testified that "we carve out what we can support and what we can't."

[239] On October 23, 2014, Mr. Lisk received a phone call from Company P. complaining about the grievor's advice in this matter.

[240] Further to a request from Dr. Dobson, the grievor provided a chronology of her involvement in this file. In the portion covering September 15, there is no mention of the advice provided concerning the alteration of the start date of the project. In fact, the August 26, 2014, entry suggests that she provided the opposite advice.

[241] On October 25, 2014, Company P. made a complaint, in writing, with Mr. Lisk. On December 1, 2014, the grievor was asked to attend the first disciplinary fact-finding hearing, on December 4, 2014.

[242] The grievor attended the meeting with her union representative. Initially, when recounting her version of events and before she saw the written complaint, she was asked, "Did you know when the project started?" She responded: "September 15 project submitted, I knew that the project had started, she had a conversation with Paul where he said they started, and she told him you can't have started the project because IRAP won't cover it… so you haven't started the project, right?" Mr. McArthur said, "Right." At this point, according to the testimonies of Ms. Pereira and Mr. Lisk, the grievor looked at Mr. Lisk and stated, "Am I in trouble for saying that?" He responded, "It is an unfortunate conversation." At this point, the grievor and her union representative took a 15-minute break. After the break, the grievor responded to the following question: "The client made a statement that you suggested to them that they need to lie about whether or not they had started their project and that they need to change the start date to a future date of October 1 on their submission in order to obtain funding. Is this true?" Despite what the grievor stated before the break, she responded with this: "Client lied, I didn't tell him to falsify start date… I would never tell anyone to lie; the clients' statement is a lie." Toward the end of the meeting, the grievor indicated, "I feel the advice I gave was good."

[243] It is important to point out that Ms. Pereira was not cross-examined on the accuracy of her notes from the meeting, that the grievor's representative at the meeting was not called to testify, and that in her testimony before this tribunal, the grievor did not challenge the accuracy of these notes. To the extent that the grievor challenged their accuracy in argument, a negative inference should be drawn from her failure to call her representative as a witness. See *Ayangma v. Treasury Board*

(Department of Health), 2006 PSLRB 64 at para. 62. It is also worth noting that Mr. Lisk's testimony on the meeting was consistent with Ms. Pereira's.

[244] It is trite to point out that the grievor's memory of the events would have been better in December 2014 than it is today. She had ample opportunity in subsequent written communications with management to back off her statement and to admit that she told the client to alter the start date, which she failed to do.

[245] On December 15, 2014, the grievor was informed that the NRC was conducting a further investigation into her past and current files. Mr. Lisk testified that this was to address two other complaints that had been received concerning her. On February 6, 2015, the grievor was provided specifics and was asked to attend a disciplinary hearing concerning the Company M. and Company I. files.

[246] On the Company M. complaint, Mr. Lisk testified that the firm felt that the grievor had promised a project that could not be delivered and that this miscommunication caused it to become frustrated with the IRAP. On cross-examination, he stated that the grievor was a very experienced ITA and that she led the client to false conclusions, so it was a mismanagement of the file.

[247] On the Company I. complaint, Dr. Dobson, in cross-examination, confirmed in his review of the file that the grievor had provided information on how the file was handled that was contrary to that of the company. He testified that based on his communications with the company, its version of events was more accurate.

[248] The termination letter was based on the Company P. incident, and it references several other files that reflected deficiencies.

[249] The decision maker, Mr. Ciobanu, testified that the termination was justified by the grievor's actions on the Company P. file. When he was pushed on cross-examination, he testified as follows: "Company P. would have been enough to me for termination; the Company I. and Company M. complaints were not essential to the termination."

[250] In the alternative, it is well established that even in cases in which all the grounds cited in the termination letter were not established, the Board's role is to assess the seriousness of the grounds that were established in the determination of cause. See *Dearnaley v. Treasury Board (National Defence)*, PSSRB File Nos. 166-02-

15008, 15009, 15154, and 15155 (19851101), [1985] C.P.S.S.R.B. No. 246 (QL) at para. 166, *McIntyre v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-25417 (19940718), [1994] C.P.S.S.R.B. No. 101 (QL) at 27, *Gravelle v. Deputy Head (Department of Justice)*, 2014 PSLRB 61 at paras. 78 to 93, and *Lloyd v. Canada Revenue Agency*, 2017 FPSLREB 22 at paras. 37 to 44.

[251] Ultimately, management was left with a serious incident committed by an ITA with 12 years of service, compounded by the fact that she was not telling the truth and showed no understanding or remorse.

[252] The grievor was terminated on March 10, 2015.

[253] The jurisprudence on the falsifications of documents is well established. See *Sheppard v. Canada Post*, [1991] 25 C.L.A.S. 486, *Renouf v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File Nos. 166-02-27766 and 27865 (19980608), [1998] C.P.S.S.R.B. No. 45 (QL), *Moore v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-23658 (19930527), [1993] C.P.S.S.R.B. No. 98 (QL), *Pagé v. Deputy Head (Service Canada)*, 2009 PSLRB 26; *Gangasingh v. Deputy Head (Canadian Dairy Commission)*, 2012 PSLRB 113, *McEwan v. Deputy Head (Immigration and Refugee Board)*, 2015 PSLREB 53, and *Labourers' International Union of North America, Local 493 v. Waste Management of Canada Corporation* (2017), 133 C.L.A.S. 42.

[254] In terms of mitigating factors, the jurisprudence states that the acceptance of wrongdoing is the most significant factor. See *Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43, *Way v. Canada Revenue Agency*, 2008 PSLRB 39, and *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62.

[255] Throughout the entire process, the grievor denied any wrongdoing and challenged Company P.'s version of the events that occurred on September 15, 2014. The grievor, in her opening statement, stated that there was "no wrongdoing" and that the September 15, 2014, conversation did not go as presented by the McArthurs.

[256] However, the grievor's version of events at the December 4, 2015, disciplinary fact-finding meeting, before she received the details of the complaint, stated almost precisely what the McArthurs said she did.

[257] The grievor's initial reflection on the events was nearly identical to the complaint itself. Only after being told by Mr. Lisk that the statement was "unfortunate" and after a 15-minute break with her union representative did the grievor completely retract this statement and suggest that the client was lying.

[258] The only reasonable inference to be drawn from either recollection of events is that the grievor told Mr. McArthur to alter the start date of the proposal, to secure funding from the IRAP.

[259] At the hearing before this tribunal, the grievor, recalling the conversation that occurred in September 2014, provided a detailed and carefully tailored version of it.

[260] The grievor's version in testimony before this tribunal was a follows: "Paul stated that 'we did start the project'. I was not sure why he said that; I needed clarification… I was not sure if he said he started or didn't start the project, and I said, 'You didn't start the project, right?' He said, 'No.'"

[261] The grievor's initial statement during the December 4 disciplinary fact-finding meeting was this: "September 15 project submitted, she knew that the project had started, she had a conversation with Paul where he said they started, and she told him you can't have started the project because IRAP won't cover it… so you haven't started the project right? Paul says, 'Right.'"

[262] The latest version is different in these few key aspects: a) the grievor did not know that the project had started, and b) Mr. McArthur did not clearly say that it had started before the grievor stated, "You can't have started the project, right?"

[263] However, this very detailed account was raised for the first time at the hearing, and it clashes with the version provided when the events were fresh in the grievor's memory. She stated unequivocally in December 2014 that she knew that the project had started, and that Mr. McArthur had confirmed as much before she said, "You can't have started the project, right?"

[264] The version that should be preferred is the one that is consistent with the McArthurs' testimonies, which were stated closer in time to the actual events and reflected in the contemporaneous notes of Ms. Pereira, who was not cross-examined on the accuracy of those notes.

[265] This is a serious disciplinary matter in which the grievor continued to show no understanding or remorse. In fact, she is continuing to mislead. Mr. Ciobanu testified that the behaviour was unacceptable, that the grievor showed no remorse, and that as a result, the bond of trust was broken and cannot be repaired

[266] The employer respectfully submitted that this case was appropriate for termination and asked that the grievance be dismissed.

B. For the grievor

[267] This case is the culmination of a severely flawed and procedurally unfair investigation conducted by the employer, the NRC, and its unreasonable decision to terminate the grievor's employment as a result of its investigation.

[268] The grievor worked as an ITA for the IRAP for 22 years, first as a network member working under the IRAP and then as a direct employee of the NRC. Throughout, she was functionally supervised by someone within the IRAP. Her role and responsibilities were identical for those 22 years.

[269] It was not disputed that she was a highly productive and performant employee who carried a significant workload. Moreover, her approach was described as holistic and as leaving a positive impression. She is and was a professional answerable to several codes of conduct, the NRC's first and foremost, and then that of the Ontario and Quebec colleges of architecture. She stood to lose a lot for telling clients to falsify information.

[270] Her latest evaluations demonstrated that she met all expectations, if not exceeded them. Those evaluations also demonstrated that she was performing at a high level and exceeding certain targets. She was bestowed a fellowship in the Royal Architectural Institute of Canada because of her tireless volunteer activities, her work as a practising architect, and most importantly, her outstanding career at the IRAP of over 20 years.

[271] Her director and her executive director both conceded that for the period in question, she was not told that there were any issues with her communications with clients or that she needed to improve her file management.

[272] Discipline grievances require the adjudicator to determine whether the employer has proven misconduct, and if so, whether the discipline was proportional to the misconduct. If the discipline was not proportional, the adjudicator must determine what fair discipline would be. If there was no misconduct, the second branch of the test need not be considered. The grievor maintained that there was no misconduct.

[273] The employer bears the burden of proving alleged misconduct. In *McKinley v. BC Tel*, 2001 SCC 38 at paras. 48 and 49, the Supreme Court of Canada established that whether an employer is justified dismissing an employee on the grounds of dishonesty is a question that requires making an assessment of the context of the alleged misconduct. Specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. It also explained that to be determined is (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities, and (2) if so, whether the nature and the degree of the dishonesty warranted dismissal. This test does not blend the questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced.

[274] In *McKinley*, at para. 53, the underlying approach proposed is the principle of proportionality. An effective balance must be struck between the severity of the employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth that individuals frequently derive from their employment.

[275] The employer did not meet its burden of proof in this case. It did not prove misconduct. The documentary evidence did not support the allegations made by the complainant Company P. To the contrary, the email exchanges clearly demonstrate that it knew that the proposal package it submitted on June 26, 2014, was rejected, that it had to submit a revised application, and that it could not start the project before it was approved.

[276] Moreover, where the evidence testified to by Mr. McArthur contradicts that of the grievor, the grievor's testimony should be favoured, as it is supported by the documentation and is more credible.

[277] The document that the employer relied on to support Mr. McArthur's claim that he was asked to change the date of his submissions was a subcontractor quote that the grievor never saw until the hearing of her grievance before the Board in May 2018.

[278] The grievor had nothing to gain from Company P. being granted a contribution agreement with the IRAP. She testified to the effect that she had no relationship with the McArthurs other than being their lead ITA. She did not require signing this client to meet her yearly target for contribution agreements and did not obtain any benefit from its product being funded by the IRAP.

[279] Company P. testified that it needed the money from the IRAP or it was sunk. The factual analysis in this case is crucial. The evidence presented by the employer did not establish the grievor's deceitful conduct on a balance of probabilities. It did not meet its burden of proof of establishing misconduct.

[280] Alternatively, to the extent that the grievor was at all culpable, it potentially amounted to a lack of proper communication and a failure to ensure that her client understood clearly what had to be done.

[281] If there was misconduct, the discipline imposed on the grievor was not proportional. A factual analysis is required at this step. To assess the seriousness of the misconduct, the facts established at the hearing must be considered and balanced.

[282] In *Gannon v. Treasury Board (National Defence)*, 2002 PSSRB 32 at para. 130, the former Public Service Staff Relations Board (PSSRB) recognized that people sometimes make mistakes and sometimes misconduct themselves in the course of their employment. The general rule is that the employer is entitled to discipline employees for misconduct, not mistakes. If the employee's misconduct can be characterized as a mistake and as an error in judgment that was not made in bad faith or in harbouring any ill or malicious intent, then discipline that leans to leniency and a warning to stop the conduct in the future will normally suffice, depending of course on the circumstances of the incident. Not all incidents of misconduct or improprieties are written in rules, guidelines, or policy.

[283] The test is what would be viewed as proper according to a reasonable person in like circumstances. In this instance, the application of the objective, reasonable-person test in like circumstances would not view the confusion as the product of bad faith or

malicious intent but rather as a failure in communication between the parties. In *Gannon*, the grievor was in a managerial position, which was of high trust and had much autonomy. He had enjoyed a positive working relationship with his employer for many years. He had been given a clear warning by his employer that his conduct was unacceptable, and yet, he continued to engage in it. The adjudicator found that had he not been caught, he would likely have continued the behaviour.

[284] In contrast, although the grievor had autonomy and a high level of trust, the alleged misconduct was an isolated incident in the context of a highly chaotic work environment due to the cyber intrusion. She was not warned of any issues with clients or with file management, and she demonstrated that she understood that she should have involved her director sooner when faced with a difficult situation. This was shown to the employer approximately two weeks after Mr. Lisk made his comment to her during the first disciplinary hearing, on December 4, 2015.

[285] In *Douglas v. Treasury Board (Human Resources Development Canada)*, 2004 PSSRB 60, the grievor, a program officer, was terminated for having placed herself in a conflict of interest, afforded preferential treatment to a member of the public, released confidential information to him, falsified documents, attempted to fraudulently obtain employment benefits for them, accessed confidential information for personal purposes, and been untruthful to her team leader. Specifically, she listed an individual as a common-law spouse to get him on the Public Service Health Care Plan and falsified documents to obtain for him dependent-care costs in the amount of $7500.

[286] In that case, the PSSRB determined that the infractions were serious and that the grievor occupied a position of trust, working under minimal supervision and handling public funds. However, the PSSRB found that the evidence demonstrated that this was a one-time convoluted indiscretion. In this case, as in *Douglas*, the employer did not demonstrate that the grievor's actions were repetitive. It relied on the fact that this was one serious event. But it failed to account for all the evidence demonstrating that confusion, uncertainty, and delay surrounded the submission of the project. Further, the grievor had no personal investment in seeing a contribution agreement granted. She was forthcoming to her director, Dr. Dobson, when she was made aware of Ms. McArthur's email on September 23, 2014, stating that the project had already started.

[287] In contrast to all the cases in both of the employer's books of authorities, the grievor stood to gain nothing. This evidence is uncontested. In contrast to the cases it cited, it did not demonstrate that it suffered any prejudice as a result of the alleged misconduct. It made no claim that it was caused any prejudice as a result of the grievor's alleged actions. It had all the facts with respect to the project and related spending incurred in July and August when it not only offered a contribution agreement to Company P. but also further backdated a new contribution agreement after the McArthurs complained.

[288] In *Cassell v. Irving H. Miller*, 2016 ONSC 5570 at para. 648, the Ontario Superior Court analyzed the case of Mr. Cassell, who had been reckless with the truth with respect to whether he had obtained the appropriate insurance coverage for his homeowner clients. Although the Court found that his actions amounted to misconduct, it found that the employer was not justified terminating him on the basis that the nature and extent of his conduct did not warrant dismissal, there was no evidence of prior conduct going to the issue of his honesty and candour with clients, there was no evidence of prior discipline, and the misconduct had to be looked at in the context of an employee who had worked for the same employer for 10 years, even with some performance issues.

[289] The grievor had no prior disciplinary record, had highly satisfactory performance reviews, and was not warned or told of any client-management issues, negative feedback, or complaints. These factors had to be considered by the employer in its determination of the appropriate discipline, but they were not.

[290] The employer was untimely in imposing discipline. The Board must also consider the question of timeliness when determining whether any discipline ought to have been imposed with respect to the other alleged complaints, which the employer took into account when determining that termination was appropriate.

[291] It was also made very clear that the Company I. complaint was outdated and that it had already been addressed by management directly with the client in April 2013. It should never have been dug up and investigated in February 2015. The employer could not consider this complaint in its decision to terminate the grievor's employment because it had not addressed it in a timely manner, or it had condoned the grievor's behaviour when it chose not to address it with her in 2013. Digging up an

old complaint in an attempt to bolster its decision to terminate her was not reasonable. Moreover, the only testimony on the complaint was from the grievor and was otherwise uncontested. This also applies to the alleged Company M. complaint; only the grievor's testimony was heard with respect to the situation with that client.

[292] The employer bore the onus of demonstrating not only that the grievor's conduct warranted discipline but also that the discipline issued was reasonable.

[293] The employer did not apply progressive discipline. The grievor was given no warning, no feedback, and no communication of the complaint before her termination. Indeed, even though the employer knew that she was a highly productive and competent employee with no prior discipline, it chose to believe the McArthurs. They were first-time clients of the IRAP who by their own admission were desperate for money. The employer chose them over the grievor, who had been working as an ITA for more than 20 years and who had very positive CTEs.

[294] In fact, in this case, the employer did not even consider progressive discipline, and it disregarded important mitigating factors. It did not consider that its employees were working in a climate of confusion with no clear direction as to how to navigate the restrictions imposed because of the cyber intrusion. It did not consider that these were special circumstances, in which the ITA did not have the benefit of reviewing the full package she recommended before sending it to the Toronto office; the ITA was operating somewhat blind and without the benefit of SONAR.

[295] In *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2002 PSSRB 62, a senior project manager was terminated for gross negligence and for engaging in irregular and inappropriate contracting processes, among other allegations. In that case, the committee investigating the grievor's conduct did not show him documentation that it possessed and that it relied on to draw its conclusions. He was shown evidence against him only if he asked for a specific document. Before the hearing, he was not given access to the documents that were intended to be used against him. The PSSRB found that the documentary evidence produced by the employer was incomplete and unreliable. Moreover, it held that the grievor did not have the exclusive and continuous possession of the files by which the employer asked the PSSRB to find that he should be held responsible for missing documents. The PSSRB concluded that the testimonies of three members of the

committee contained inferences, hypotheses, and conclusions based on incomplete documentation. It also found that on the basis of the documentary evidence, the grievor's decisions could not be confirmed or invalidated. The PSSRB found that the overriding consideration was that without sufficient documentary evidence, the employer could not prove that the grievor had engaged in misconduct, and the grievor was prevented from demonstrating the soundness and integrity of the work he did on each file and the decisions he either recommended or made.

[296] The grievor in this case did not have access to her full file and therefore could not compare each version of the proposal template for small projects to explain her actions at each step.

[297] The employer introduced and relied on a new document, which the grievor had never seen before it was brought into evidence during Ms. McArthur's direct examination in May. The document in question is the subcontractor quote from Oak Computing (E-5). Ms. Pereira testified that the documents relied on and possibly presented to the grievor were the same as those listed in the fact-finding report. She also testified that she could not remember whether all of them had been shown to the grievor. Nowhere in her notes is there any mention of a discussion about this document, and it is not listed in the fact-finding report. It is also not listed in the questions (numbered "E6" and "E7") that formed the basis of the questions asked at the fact-finding hearings.

[298] Contrary to what the employer alleged, Ms. Pereira's notes were questioned in cross-examination. The accuracy of her notes and the discrepancy between them and the fact-finding report were questioned. The list of documents in the fact-finding report does not refer to the subcontractor quotes of July 2, 2014, and September 15, 2014. The grievor was not specifically asked about these documents, and therefore, she could not respond to any allegations arising from them. Yet, the employer relied on them in support of the proposition that she would have counselled Company P. to falsify them.

[299] The grievor was forthcoming and cooperative throughout the investigation process. She provided all information to the employer as requested, and then some. The employer, however, continuously misled her and withheld information from her, therefore not allowing her to provide a full response to the allegations against her.

[300] The employer did not fully consider the grievor's rehabilitation. It did not give enough weight to assessing her proven rehabilitative potential. The risk of a repeated confusion after this ordeal is very low. The NRC IRAP no longer operates in the context of the cyber intrusion. The grievor showed then and now that she understands that she should have involved her director sooner when she became aware that there was a possible issue.

[301] The grievor heard what Mr. Lisk told her in the context of the fact-finding disciplinary meeting on December 4, 2014, and she took it to heart. That is why, as has been noted, she reached out immediately to Dr. Dobson when she felt friction with her client, Company M.

[302] Moreover, the employer did not demonstrate that it did not trust that she could continue to perform her full ITA duties while she was being investigated. It did not suspend her, did not restrict her abilities to do her work, and did not limit any of her access to information within the IRAP. She continued to work as she had always done, with no changes. Management took her off only the Company P. file, at the client's request.

[303] The grievor has learned the valuable lesson of the importance of communication. She understands the necessity to ensure that all her advice is clearly understood, to prevent errors. The employer did not demonstrate that it suffered any prejudice or that there is a risk of more prejudice to it should she be reinstated.

[304] The discipline imposed on the grievor, namely, the termination of her employment, is the ultimate discipline in the context of labour and employment. It is the capital punishment of labour law. In this case, it was grossly disproportionate to her alleged misconduct.

[305] The grievor does not dispute that hearings before the Board are hearings *de novo*, which means that this one essentially vitiated the considerable procedural flaws and errors that took place during the investigation process leading to her termination.

[306] However, per the former Public Service Labour Relations and Employment Board's reasons in *Grant v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 37, she asked that the Board take into consideration the impact that the flawed investigation and its erroneous report had on her. She was not given the opportunity

to respond to the very serious allegation that she asked the McArthurs to change the subcontractor quote; nor did she even see the document before the arbitration.

[307] It was not until May 2018 that the grievor was made aware of the several allegations made against her and of several documents that the employer possessed and considered in its decision to terminate her.

[308] The employer cannot now attack the grievor's conduct throughout the investigation given that it has been shown that she was not given the chance to respond to the full extent of the allegations made against her.

[309] The employer cannot advance that the grievor did not show any remorse for or understanding of the seriousness of her alleged misconduct during the course of the investigation if it recognizes that she did not have many of the documents before her and that she did not know exactly what she was being accused of.

[310] If it was truly a *de novo* hearing, her responses, explanations, and recognition of what went wrong, which were heard at the hearing, are what must be considered. The findings of an investigation cannot be relied on solely without considering the many deficiencies in it. It cannot be one or the other but must be both or neither.

[311] In response to the employer's arguments, the cases it relied upon involved self-motivated parties at the times the complaints were made. The McArthurs stood by their word, to save face. They desperately needed funding. They are a married couple, and they invested in their project together. They had every motivation to falsify documents, unlike the grievor, who stood to gain nothing.

[312] In reply to the employer's response and to the version of the phone call that Mr. MacArthur put forward, the grievor maintained that it was not that different from the version she shared on December 4 with her employer. The grievor was consistent in her testimony and in her version of the events in December 2014. She has maintained throughout this process that she never told the clients to lie or to falsify any document.

[313] Ms. Pereira testified that the "Am I in trouble …" note was added after the fact, not immediately after the explanation of the phone conversation.

[314] The grievor agreed that it was an innocuous phone conversation. She remembers it and recalled more detail because ultimately, she was terminated because of it. She had no reason to believe on December 4 that her summary explanation of this phone conversation would ultimately lead to her termination.

[315] The employer made no submissions on the issue of mitigation, as the parties reached an agreement to bifurcate the hearing on the issue of remedy as an alternative, to avoid the need for evidence as it relates to mitigation.

V. Reasons

[316] An adjudicator in a discipline case must assess whether disciplinable conduct occurred, whether the penalty levied was appropriate, and, if not, what the appropriate penalty is; see *Basra v. Canada (Attorney General)*, 2010 FCA 24 at paras. 24 to 26, *William Scott & Co. v. C.F.A.W., Local P-162*, [1977] 1 Can. LRBR 1 at paras. 13 and 14 ("*Wm. Scott*").

[317] The letter of termination states that the grievor was terminated for counselling an IRAP applicant to falsify or misrepresent information, to support its proposal for NRC IRAP funding. The employer maintained that this advice was provided so that the applicant could access NRC IRAP funding of approximately $50 000 that otherwise would not have been approved.

[318] The NRC viewed the grievor's actions as completely unacceptable to her role as an ITA. The letter stated that this action undermined the integrity and professionalism of the NRC's work. In addition to its concerns with her handling of this file, the employer had concerns about the management of several of her other files, which it considered further impaired the reputation of the NRC IRAP. In the employer's view, despite the complaints and the issues raised by clients, the grievor refused to acknowledge the deficiencies in the handling of these files.

[319] The employer bears the onus of proving the underlying facts that are invoked to justify the imposition of the discipline as well as the appropriateness of the discipline; see Palmer & Snyder, *Collective Agreement Arbitration in Canada* (4th ed.), at paragraph 10.67. The standard of proof is the civil standard of the balance of probabilities.

[320] The inquiry into the appropriate penalty requires a review of all the relevant surrounding circumstances, including mitigating factors, such as the employee's state

of mind, which has a direct bearing on culpability and aggravating factors such as the grievor's behaviour during the investigation process (see, e.g., *Wm. Scott*, at para. 14, *Samuel-Acme Strapping Systems v. U.S.W.A., Local 6572* (2001), 65 C.L.A.S. 157 at para. 210, *Georgian Bay General Hospital v. OPSEU, Local 367* (2014), 243 L.A.C. (4th) 112 at paras. 58, 65, 66, and 68, *Fundy Gypsum Co. v. U.S.W.A., Local 9209* (2003), 117 L.A.C. (4th) 58 at paras. 40 and 45, and, more generally, Brown and Beatty, *Canadian Labour Arbitration*, 5th ed., at 7:4424).

[321] Precisely, the question to be asked is whether the grievor's misconduct was sufficiently serious to justify termination as the discipline. Was it proportional to the gravity of the alleged misconduct? (See *McKinley*, at paras. 29, 48, and 57, *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28 at para. 29.)

[322] The letter of termination states that during the disciplinary meeting, the grievor did not acknowledge her misconduct. Instead, she offered explanations to justify her actions. She did not express any regret or remorse. The NRC concluded that the grievor's actions irreparably broke their required relationship of trust.

[323] The employer had to prove the allegations listed in the termination letter, which, in its view, justified the imposition of discipline. Specifically, it had to establish that on a balance of probabilities, the grievor counselled the applicant to falsify or misrepresent information to obtain funding that would not otherwise have been approved and that there were deficiencies in the management of several of her other files, which impaired the reputation of the NRC IRAP.

[324] If the employer satisfied that burden, it then had to demonstrate that the measure imposed was proportional to the gravity of the misconduct. When determining proportionality, I must examine whether the disciplinary measure imposed was excessive by reviewing all the relevant surrounding circumstances, including mitigating and aggravating factors, such as the grievor's state of mind and her conduct during the investigation. If not, the measure stands. If I find that termination was excessive, then I must address the question of the appropriate disciplinary measure warranted in the case.

A. Did the grievor counsel the McArthurs to falsify or misrepresent information to obtain funding that otherwise would not have been approved?

[325] Mr. Lisk testified that the grievor's action of counselling the McArthurs to put in writing something that was untrue to obtain funding was a grave mistake. The grievor violated the NRC's Code of Conduct. Mr. Ciobanu viewed her misconduct as an attempt to defraud the government by charging more for a project than the client should receive; it was severe misconduct and unacceptable behaviour from an ITA. The grievor knew that the falsification of information on a contribution agreement was immediate grounds for the termination of the agreement and that it could have serious implications for an applicant. The McArthurs testified they were also aware of it. They accused the grievor of telling them to falsify the start date on their application, to obtain IRAP funding.

[326] Fraud, theft, and other forms of dishonesty are among the most serious forms of misconduct that an employee can commit. Such behaviour is considered antithetical to the trust that is an essential part of all viable and productive employment relationships. To justify disciplining the grievor for such reasons, the employer must have clear, cogent, and compelling evidence that the grievor counselled the McArthurs to commit fraud and that she did so with a dishonest intent. For the reasons that follow, I find that there is no such evidence. At best, there might have been communication issues between the grievor and the McArthurs, which I qualify as pre-existing performance issues that the employer failed to address in a timely manner.

[327] In his written complaint to Mr. Lisk, Mr. McArthur stated, "we have received limited, confusing, and on one occasion, very poor advice on how to satisfy the submission requirements. The advice of note is where he claims he was directly asked to resubmit my project dates for an already submitted and started project." In another document attached to his complaint, in reference to his conversation with the grievor on September 15, 2014, Mr. McArthur wrote the following:

> *Liza asked me if our project had started, as our original date to start was in the past. I answered that yes, indeed it had started. At this point, she asked me again, but with a slightly differently worded question… You have not started yet, right? I found it a bit confusing, but played along. At this time she then asked me to alter the dates on my submission, to reflect a future date of October 1 as my start date.*

[328] Although those documents are undated, Mr. Lisk confirmed that they were sent to him as PDF scans attached to an email on October 25, 2014, the day after the contribution agreement was signed and approved by the IRAP.

[329] Although there are some significant discrepancies, there are also many similarities in the McArthurs' and the grievor's testimonies. At the hearing, I made sure to take detailed notes of both of their testimonies with respect to their recollections of what was said during their telephone conversation on September 15, 2014. The truth of what was said lies in the overlap of their testimonies and the supporting documentary evidence.

[330] Mr. McArthur testified that on September 15, 2014, he was with Ms. McArthur in Florida. Mr. McArthur stated that he had a telephone conversation with the grievor. The grievor told him that $50 000 could be in their bank account in a couple of days. She asked him if the project had started. He said, "Yes, it started in July." He recalled that the grievor said, "The project hasn't started, right?" The way she asked the question made him conclude that she was asking him to change the project start date from July to October.

[331] Ms. McArthur recalled that she was in a hotel room in Florida when she overheard the phone call between Mr. McArthur and the grievor. It appeared that IRAP money was available, and everything seemed great. Mr. McArthur seemed puzzled and said, "What?" Ms. McArthur heard him say, "We already started July 1." She observed that he seemed confused by what the grievor was asking. After he hung up, he told her that the grievor had asked them to move up the date and to change the date for the Oak Computing agreement. Ms. McArthur did not feel comfortable doing it but nevertheless changed the start date because they were desperate for funding.

[332] The grievor recalled that Mr. McArthur called her on her mobile phone. He called from his mobile phone from Florida, and he said that they had started the project. She testified that she required clarification on what had happened. She was in her office on Sussex Drive in Ottawa, and the mobile reception was bad. She walked out so that she could get a clearer understanding. She wanted clarification from him and asked him again, "You didn't start the project, right?" He replied, "No, we didn't." The grievor told Mr. McArthur that he had to fax documents to the Toronto office. She did not see the second software development agreement from Oak Computing dated

September 15, 2014. The first time she saw the amended document was at the hearing. She denied telling him to change the start date of their project from July to October. She was not provided with a copy of the McArthurs' complaint or the accompanying documentation.

[333] During the disciplinary fact-finding meeting in December 2014, Ms. Pereira testified that she took detailed notes of the grievor's answers to Mr. Lisk's questions. When Mr. Lisk asked the grievor if she knew when Company P.'s project started, she stated that the project was submitted on September 15, 2014, that she knew that the project had started, and that she had a conversation with Mr. McArthur in which he said that they had started and she told him, "You can't have started the project because IRAP won't cover it. So you haven't started the project, right?" The grievor asked Mr. Lisk if she was in trouble for saying that. Ms. Pereira's notes indicate that Mr. Lisk said, "It is an unfortunate conversation." The grievor then asked for a break to discuss with her union representative. Upon returning, she accused the client of lying and stated that she did not tell it to change the start date. The disciplinary fact-finding meeting ended, and the employer did not investigate Company P.'s complaint further.

[334] Therefore, it is a matter of determining which explanation is more probable, the McArthurs, which is that the grievor counselled them to change the start date on their application, or the grievor's, which is that she did not counsel them to change the start date and that she could not properly hear Mr. McArthur during their telephone conversation.

[335] The rule in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, is usually invoked when two oral testimonies are contradictory. It can also be applied to choose between two versions of the same events, as in this case. As stated as follows at page 357 of that case:

> … *The test must reasonably subject his* [the witness's] *story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.…*

[336] On a balance of probabilities, I do not find the McArthurs' or the grievor's testimony an accurate description of what was said during their September 15, 2014,

conversation. What occurred was a misunderstanding between them and a failure on the grievor's part to follow up on Ms. McArthur's September 23, 2014, email stating in writing that they had started the project. I disagree with the employer's statement that the McArthurs had nothing to gain from complaining to Mr. Lisk. On the contrary, based on their testimony and their email to the grievor on September 23, 2014, they were in dire need of financial support from the IRAP. The grievor, on the other hand, had nothing to gain from an approved contribution agreement and from counselling the McArthurs to change the start date on their proposal. She did not attempt to cover up or conceal the McArthurs' September 23, 2014, email and fully participated in the investigation process.

[337] Ms. McArthur testified that after the conversation with the grievor, she discussed the matter with Mr. Haw, "to determine what we could do to get the funds." She testified that Mr. Haw reached out to Mr. Lisk. She stated that she believed that there was an email exchange. Mr. Haw did not testify at the hearing, and Mr. Lisk did not testify about his exchanges with Mr. Haw.

[338] The McArthurs knew that the IRAP only covered projects that had not started. The grievor reminded them of this on August 26, 2014, and according to Ms. Pereira's notes, again on September 15, 2014. They knew that they had to submit a new proposal because their initial proposal had been rejected on July 7, 2014. At that time, there was no evidence to establish that the grievor knew that they had started their project in July. The grievor testified that for the first time on September 15, 2014, she found out that the McArthurs had started work on their project. During their telephone conversation, she informed the McArthurs that the IRAP does not fund projects that have already started. This was not disputed by the employer. I find that the purpose of making the complaint against the grievor was to put pressure on the IRAP to obtain funding.

[339] In response to her involvement in the written complaints submitted to Mr. Lisk, Ms. McArthur testified that she "was also involved in the drafting of both letters and that the purpose of these letters was to get the money in some sort of fashion." This was further corroborated by Dr. Dobson's testimony that before his involvement, there had been a discussion between Mr. Haw and Mr. Lisk about a complaint.

[340] The grievor, on the other hand, had nothing to gain by the McArthurs receiving funding. She had met all her targets for that year and received no compensation as a result of the McArthurs receiving an approved contribution agreement. It had no impact on her performance evaluations. She had no motive and no intent. This was not disputed by the employer.

[341] On September 24, 2014, the grievor sent all her email exchanges with the McArthurs to Dr. Dobson. The contribution agreement was still under review by Dr. Dobson. He was in receipt of the September 23, 2014, email from the McArthurs, stating that they had started the work on their project, and in which Ms. McArthur indicated that if it disqualified them, then so be it. Although I agree with the grievor that at that point, it was up to management to decide whether to approve the application, she should have followed up with the McArthurs and with management to alert them to that fact.

[342] Dr. Dobson and Mr. Lisk did not contact the grievor to discuss the McArthurs' email or attempt to discuss an appropriate start date. The employer chose instead to begin a "disciplinary/fact finding investigation" on the allegation that the grievor had counselled the McArthurs to falsify their application. The employer automatically assumed potential misconduct, even though it knew that it might have been possible to carve up the project to determine an appropriate start date, as the IRAP had often done in the past.

[343] Mr. McArthur's complaint to Mr. Lisk indicates that the grievor had asked him to change the start date. At the hearing, he did not testify that the grievor had asked him to change the start date. However, in cross-examination, he confirmed that he stood by his position that he was in fact asked by the grievor to change the start date. I also note that the complaint was filed on October 25, 2014, the day after the proposal was approved and a month after Ms. McArthur's email dated September 23, 2014, informing the IRAP that they had already started their project. In her September 23 email, there is nothing suggesting or referring to the grievor's alleged suggestion to falsify the start date of their project. At no point during the application process, from June 13 to September 2014, did the McArthurs complain to the IRAP about the grievor. They never asked to be reassigned to a different ITA.

[344] Ms. Lowder and Mr. Palmer testified that when applicants do not cooperate with information sharing, including providing financial information, then there is no trust, and the director must become involved. Ms. Lowder testified that as an ITA, she is complained about all the time. ITAs who are not complained about are not doing their jobs. Mr. Palmer testified that when he received a complaint, his approach was to discuss it with the relevant ITA. He explained that the role of the director is to assist ITAs and to work with them in the development of contribution agreements before finalizing proposals. Mr. Palmer explained that projects have broad start dates. ITAs can discuss a start date for a project depending on the milestones of the project. If the project materially started and the risk is partly underway, the ITA and the director must go back to the client to determine if there is anything left to support.

[345] In terms of backdating a start date, Mr. Palmer stated that it is unusual but that it could be done in circumstances involving less than a week. Ms. Lowder stated that as far as changing dates, once a proposal is complete, the ITA can recommend a start date, and then it goes to the signing authority. The McArthurs were disorganized and contributed to the delay by refusing to provide the required financial information. Throughout the process, the grievor received no assistance from Dr. Dobson. He testified clearly that his expectation is that the ITAs will handle all matters on their own, without his assistance. Mr. Lisk, on the other hand, testified that the grievor should have involved Dr. Dobson sooner.

[346] At no point in the evidence did Mr. Lisk or Dr. Dobson concede that the McArthurs were uncooperative. They did not reach out to the grievor to determine what had happened or how they could identify an appropriate start date. Instead, they chose to begin an investigation into the grievor's management of the file. Throughout the application process, the email correspondence between November 2013 and September 2014 demonstrates that the McArthurs claimed to be in desperate need of funding, yet they were completely uncooperative with the grievor. This was evidenced by their refusal to share their financial information and by them taking long periods to respond to the grievor's requests for information to complete their application.

[347] Applying the test in *Faryna*, based on the evidence and the witness's testimonies; on a balance of probabilities, there is insufficient evidence for me to conclude that the grievor intentionally counselled the McArthurs to falsify or misrepresent information on their application to obtain funding that otherwise would

not have been approved. Ultimately, the McArthurs knew that it was against the rules to misrepresent their information to obtain funding. The cyberattack had no impact on the start of their project. Yet, the employer relied on it to justify changing the start date, so as to not penalize the McArthurs.

[348] Ms. Pereira testified that she recorded the grievor's answers verbatim and contemporaneously as Mr. Lisk asked the questions. I have no reason to doubt the accuracy of her notes. The notes indicate that the grievor stated that the project was submitted on September 15, 2014, that she knew that it had started, that she had a conversation with Mr. McArthur in which he said that they had started it, and that she told him, "You can't have started the project because IRAP won't cover it. So you haven't started the project, right?" This is consistent with the grievor's testimony at the hearing. Nowhere do the notes state that the grievor told the McArthurs to change the start date on their proposal. To the contrary, she again reminded them that the IRAP will not approve funding for projects that have already begun.

[349] Ms. Pereira's notes from the disciplinary fact-finding hearing, combined with the email exchanges between the grievor and the McArthurs and their testimonies, clearly demonstrate that the McArthurs understood the rules but nevertheless decided to submit their proposal with a false start date. There is no indication that the grievor told them to change the start date. She provided all her email communications with the McArthurs to Dr. Dobson, including the September 23, 2014, email in which Ms. McArthur stated that they started their project in July 2014 and that if it disqualified them from funding, then so be it. Dr. Dobson had this information before him when he reviewed the McArthurs' proposal. The grievor was forthcoming with all her information during the investigation process.

[350] The grievor's testimony on her recollection of her conversation with Mr. McArthur was not challenged by the employer. The fact-finding disciplinary hearing ended abruptly when Mr. Lisk stated that it was "an unfortunate conversation." He automatically assumed that the grievor told the McArthurs to change the start date on their proposal instead of questioning her further and giving her a full opportunity to respond. Moreover, she was not provided with a copy of the complaint or the allegations against her. She was not provided with a copy of the investigation report or provided with the documentation that formed the basis of it. Yet, the employer maintained she had the opportunity to tell the truth and to set the record straight,

which she did not take advantage of. It accused her of lying and showing no remorse during the investigation, which in and of itself was grounds for terminating her employment. I find this conduct by the employer high-handed.

[351] Only part of the documentation that formed the basis of the report was filed into evidence. The documentary evidence produced by the employer was incomplete and unreliable. The investigation report contained inferences, hypotheses, and conclusions based on incomplete documentation. The investigation report and most of its contents are completely unreliable.

[352] The accuracy of Ms. Pereira's notes and the discrepancy between them and the fact-finding report were questioned. The list of documents in the fact-finding report does not make any reference to the subcontractor quotes of July 2, 2014, and September 15, 2014. The grievor was not specifically asked about these documents, and therefore, she could not respond to any allegations arising from them. Yet, the employer relied on them in support of the allegation that she counselled Company P. to falsify them and maintained that she was untruthful during the investigation process.

[353] I have no reason to doubt the grievor's testimony that she needed clarification on what had happened to the McArthurs' project. I believe that she was on her mobile phone at her office on Sussex Drive, that the reception was bad, that she walked out so that she could get a clearer understanding, and that she asked Mr. McArthur again, "You didn't start the project, right?" I also find credible her statement that she did not see the second software development agreement from Oak Computing dated September 15, 2014, until and for the first time at the hearing. The changed date on the Oak Computing documents does not demonstrate that she intentionally counselled the McArthurs to falsify the start date. It is conclusive that the McArthurs falsified their application.

[354] Dr. Dobson testified that he became aware of the grievor's interactions with Company P. through a discussion with her sometime in the middle of 2014. She informed him that it was seeking $50 000 in IRAP funding. She gave him a heads-up that she was working with that amount. This is consistent with her testimony and that of Ms. McArthur. Ms. McArthur stated that sometime in June 2014, the grievor told her

and her husband that "the amount had been earmarked" for them. The McArthurs alleged that the grievor promised them $50 000.

[355] I do not find Ms. McArthur's statement credible that she was confused when she was informed by the grievor on June 16, 2014, that their application was denied and that she thought that their application was "good to go" because $50 000 had been set aside for their project. I find the McArthurs' testimony completely disingenuous and self-serving with respect to how they could reconcile the emails from June 16, 2014,when they were told that their application was denied, and Mr. McArthur's conversation with the grievor on September 15, 2014 when he was allegedly told that 50,000$ would be deposited in their bank account. Both testified that they thought that $50 000 had been set aside for their project yet they were informed by the grievor in writing that their application was denied.

[356] If there was a promise to fund $50 000, it was conditional on the provision of the required financial information and the condition that they had not yet begun the work on their project. The McArthurs knew the rules. The grievor testified that she informed them at the outset of their meeting in 2013 that the IRAP only funds projects that have not started. The grievor repeated this to the McArthurs throughout her communications with them in writing. This is evidenced throughout their email correspondence. They also acknowledged this in cross-examination.

[357] The most compelling evidence is the August 26, 2014, email that the grievor sent to Ms. McArthur, informing her that the IRAP only funds projects that have not started. The McArthurs knew that they had begun the work on their project on July 2, 2014, and yet, they chose not to inform the grievor. The email correspondence between the grievor and them between June 2014 and August 2014 clearly demonstrates that at no time did they inform the grievor that they had begun the work on their project. I find that the McArthurs lied on their IRAP application, without any encouragement or direction from the grievor.

[358] The employer argued that it is well established that even in cases in which all the grounds cited in the termination letter are not established, the role of the Board is to assess the seriousness of the grounds that were established at the hearing in the determination of cause. I disagree.

[359] It is trite law that an employer is held fairly strictly to the grounds upon which it chose to act. An employer cannot reformulate an assigned cause merely because the evidence does not support the cause but rather something similar to it. Not allowing an employer to change at adjudication the grounds for termination goes to preserving the fairness of the adjudication process. The termination letter does not make any reference to a promise made to the McArthurs. It specifically states that the grievor counselled the McArthurs to falsify or misrepresent information to obtain funding that would not otherwise have been obtained.

[360] There is no evidence to support the McArthurs' allegation that the grievor intentionally counselled them to falsify their proposal. The grievor stood to gain nothing from an accepted proposal. The McArthurs were desperate for money and used their contacts to make sure they obtained it. There is no evidence to support the allegation that the grievor counselled an IRAP applicant to falsify or misrepresent information to obtain funding that otherwise would not have been approved. Therefore, there is no cause to justify the grievor's termination on that basis.

B. Were there deficiencies in the handling of the grievor's files that impaired the reputation of the NRC IRAP?

[361] The decision maker, Mr. Ciobanu, testified that the termination was justified by the grievor's actions in the Company P. file. In cross-examination, he testified that the Company P. complaint would have been enough for him to justify the termination. The Company I. and Company M. complaints were not essential to the termination. Having determined that there was no evidence of wrongdoing justifying the termination of the grievor on the basis of her actions in her handling of the Company P. file, I must now examine the employer's allegations that there were deficiencies in the handling of the grievor's files that impaired the reputation of the NRC IRAP.

[362] On December 15, 2014, the NRC conducted a further investigation into the grievor's past and current files, to address the two complaints, involving Company I. and Company M. Mr. Lisk testified that Company M. felt that the grievor had promised a project that could not be delivered and that this miscommunication caused the company to become frustrated with the IRAP. He stated that the grievor led the client to false conclusions and that it was a mismanagement of the file. For the Company I. file, the employer was of the view that the grievor provided contradictory information.

[363] In December 2014, the grievor alerted management that Company M. would make a complaint. The email dated December 23, 2014, with the subject line "Recent IRAP interactions", seems to indicate that Dr. Dobson had a telephone conversation with the client. According to Mr. Lisk, the firm was young, and she provided erroneous information and mismanaged its file. She let it raise its expectations.

[364] The Company I. complaint was filed in April 2013 as part of the post-assessment NRC IRAP Feedback and Complaints Procedures document. Initially, Dr. Dobson testified that no further action was taken as a result of this complaint. There was no mention of it in the grievor's performance evaluations, and she was not disciplined for it. The documentary evidence shows that Dr. Dobson followed up with Company I. on December 18, 2014, and that he received a complaint by email. At issue was the fact that she had used the phrasing that it was "greedy".

[365] The grievor testified that during the disciplinary fact-finding meeting, she was not shown the complaint filed by Company M. in December 2014; nor was she shown the one filed by Company I. in April 2013. As mentioned, she was not provided with a copy of the investigation report or the documentation that formed the basis of it. She was not provided with an opportunity to respond to it.

[366] The grievor argued that the employer was untimely in imposing discipline. The Board must consider the question of timeliness when determining whether any discipline ought to be imposed with respect to the other alleged complaints that the employer took into account when determining that termination was appropriate.

[367] For the reasons that follow, I find that there were no deficiencies in the grievor's handling of her files that impaired the reputation of the NRC IRAP. The employer did not adduce any evidence of any impairment to the NRC IRAP's reputation. The employer did not show that it suffered any prejudice as a result of the grievor's handling of the Company P., Company I., and Company M. files.

[368] Mr. Lisk and Dr. Dobson both conceded that for the period in question in 2013 to 2014, the grievor was not informed of any issues with her communications with clients or that she needed to improve her file management. She was given no warning or feedback and received no communication about any complaints pertaining to her work. Throughout the investigation process, from the date the Company P. complaint was filed to the date of her termination, the grievor was not removed from her ITA

functions and continued to work with clients. She was removed from the Company P. file only at the request of the McArthurs. The employer did not suspend her, restrict her ability to carry out her work, or limit her access to information within the IRAP. Presumably, if it had such concerns for its reputation, it would have reassigned her to different work.

[369] Moreover, the employer did not call anyone from Company M. or Company I. to testify about their complaints. The only evidence that was presented was an incomplete and unreliable investigation report. It contained inferences, hypotheses, and conclusions based on incomplete documentation. The employer did not produce all the documentation that formed the basis of the report. It relied on hearsay evidence from Mr. Lisk pertaining to the complaints received by Company I. and Company M. Dr. Dobson testified that the grievor was not disciplined for the Company I. complaint and that she had alerted him to the Company M. complaint.

[370] The only reliable evidence was Ms. Pereira's notes, from which I conclude that the grievor's conduct with respect to these complaints amounted to a lack of proper communication and a failure to ensure that her clients understood clearly what had to be done. The grievor recognized this in her testimony. She acknowledged that she should have used better communication with her clients and involved her director earlier when issues arose. In my view, these deficiencies do not amount to grounds for discipline but are more akin to performance management issues. If the employer had concerns pertaining to the grievor's ability to manage her client's expectations, instead of a disciplinary process, it should have followed a performance management process.

[371] Although there might have been issues with her communication with her clients, they were not deficiencies that impaired the reputation of the NRC IRAP. There was no evidence of impairment to the NRC IRAP. The employer did not demonstrate that it suffered any prejudice as a result of the grievor's handling of the Company I., Company M., or Company P. files. Therefore, I find there was no cause to discipline the grievor on that ground. Having determined that there was no cause to terminate her, I need not answer whether the grievor's misconduct was sufficiently serious to justify the termination.

VI. Conclusion and remedy

[372] Mr. Lisk explained that before February 28, 2003, the grievor was not an NRC employee as she worked at Carleton University, which contracted technology advisors to other not-for-profit organizations. They were called “network members” but operated as technology advisors on staff. The letter of offer dated February 28, 2003, was her official hiring date as an ITA in the IRAP at the NRC. This is also confirmed by the grievor in her CV. She maintained that she was an ITA in the IRAP at the NRC from 1993 to 2015.

[373] As corrective measures, the grievor requested that she be reinstated in her substantive position, retroactive to the date of her dismissal; that she suffer no loss of pay, compensation, or benefits (including pension) as a result of the employer’s actions; that she receive compensation for pain and suffering; that the termination letter signed by Mr. Ciobanu and dated March 10, 2015, be rescinded and destroyed in her presence; that any and all documents related to the disciplinary investigation, including but not limited to any notes, documentary evidence, or the investigation report, be destroyed in her presence; that any mention of discipline be stricken from her personnel file; that she receive any other measure to fully remedy the situation; and that she be made whole.

[374] The parties requested that I grant their joint motion to bifurcate the hearing. At the hearing, I granted this motion and ruled that if I upheld the grievance, I would allow the parties to negotiate the appropriate remedy.

[375] The grievor testified that since her termination, she has been working as an architectural Algonquin senior business manager at BGIS, a subsidiary of Brookfield Properties. Allegations of fraud and dishonesty are serious and potentially very damaging to those accused. When, as in this case, a party makes such allegations unsuccessfully and with access to information sufficient to conclude that the other party was neither dishonest nor fraudulent, damages are appropriate. In the determination of the appropriate remedy, the parties shall take into consideration an award for damages.

[376] Should the parties be unable to agree to an appropriate remedy, they may wish to attempt to mediate the matter with the use of the Board’s DRS.

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

(*The Order appears on the next page*)

VII. Order

[378] The grievance is allowed.

[379] The parties shall have 90 days to attempt to determine the appropriate remedy for the unlawful termination of the grievor. It shall include an award for damages. Should they be unable to determine the appropriate remedy, they may contact the Board's DRS, and engage in mediation to resolve the matter of remedy. If the parties resolve the matter of remedy, they are to inform the Board so it may close its file.

[380] If at the end of the 90-day period, the parties are still unable to resolve the matter of remedy, they shall immediately contact the Board to arrange a videoconference to discuss setting a hearing for the matter of remedy.

[381] The names of the three companies that made complaints against the grievor shall be anonymized in my decision as Company P., Company M., and Company I. All other anonymization requests are denied.

[382] The exhibits shall be redacted as follows. All of the information that the parties have agreed on shall be redacted. As well, the information in the exhibits denoted in Red and Yellow on the employer's December 7, 2018, chart shall be redacted. Finally, the surnames of the principals of Company M. and Company I. where identified in Turquoise in the employer's aforementioned chart shall be redacted.

[383] Within 90 days of the date of this decision, the redacted exhibits are to be filed with the Board. Counsel for the employer shall ensure that the redactions are carried out in accordance with this order. The grievor's representatives are to inform counsel for the employer if they wish to vet the redacted exhibits prior to filing with the Board. The original exhibits shall be sealed with the Board until the redacted exhibits are filed. Once filed, the respective original exhibits shall be returned to the parties, and the redacted exhibits shall form part of the Board's record.

December 30, 2020.

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board