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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

CHRISTINE PETIT

Grievor

and

DEPUTY HEAD
(Department of Employment and Social Development)

and

TREASURY BOARD
(Department of Employment and Social Development)

Respondents

Indexed as
Petit v. Deputy Head (Department of Employment and Social Development)

In the matter of individual grievances referred to adjudication

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Kim Patenaude, counsel

For the Respondents: Marc Séguin, counsel

Heard at Ottawa, Ontario,

October 13 to 16, 2020 (by videoconference).
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Introduction

[1] Christine Petit ("the grievor") held a managerial position (AS-05) at Employment and Social Development Canada (ESDC or "the employer"). She was terminated on July 12, 2017. The termination letter, signed by Élise Boisjoly, Assistant Deputy Minister, Integrity Services, ESDC, stated that the employer accused the grievor of "[translation]… recommending that [her] daughter be hired for a casual position and a non-advertised term position, without revealing [their] relationship". The letter reads as follows:

> [Translation]
>
> …
>
> *This is further to the disclosure of the conflict of interest in which you allegedly recommended that your daughter be hired for a casual and then a non-advertised term position, without revealing your relationship.*
>
> *After carefully reviewing the relevant information gathered during this case and the information you provided at the June 16, 2017, disciplinary hearing, I have determined that you placed yourself in a real conflict of interest by giving preferential treatment to a member of your family.*
>
> *The facts gathered revealed that the allegations are founded and that you acted deliberately when you recommended hiring* [your daughter] *on two (2) occasions. It was also confirmed that you made a false statement about your relationship to her when on December 22, 2016, you signed the "Signed Statement of Persons Responsible for Screening/Assessment."*
>
> *This misconduct represents serious violations of the Employment and Social Development Canada (ESDC) Code of Conduct and the Values and Ethics Code for the Public Sector. It was unacceptable behaviour that cannot be tolerated or approved. As a public service employee, you must comply with behavioural standards and the Values and Ethics Code for the Public Service, which constitute the principles by which we perform our roles and responsibilities and are part of our public service terms of employment.*
>
> *Therefore, I must determine the appropriate discipline in the circumstances. Consequently, I considered your work performance, the lack of previous discipline on your file, and the remorse you expressed at the disciplinary hearing.*
>
> *Despite the mitigating circumstances mentioned earlier, I cannot ignore the aggravating factors in this file. The main ones are first, you hold a management position, and it was your duty to set an*

> *example for your employees and demonstrate impeccable behaviour. Second, this is not an isolated incident because you recommended hiring your daughter on two (2) occasions and did not reveal your relationship over a period of ten (10) months. In addition, you admitted to being familiar with the ESDC Code of Conduct and the Values and Ethics Code for the Public Service, and despite that, you did not take steps to avoid or declare the conflict of interest. Then I considered the fact that you signed the "Signed Statement of Persons Responsible for Screening/Assessment", in which you stated that you were not related to the applicant, and the contradictions between the information you submitted in your June 4, 2017, email and what you provided at the June 16, 2017, disciplinary hearing.*
>
> *Consequently, my view is that you abused your authority as a manager by recommending your daughter on two (2) occasions and that you placed yourself in a real conflict of interest. Thus, you irreparably damaged the relationship of mutual trust that is the basis of the employment contract between an employee and his or her employer, which is a definitive breach of trust.*
>
> *In light of the foregoing, I terminate your employment immediately, on July 12, 2017, in accordance with the authority delegated to me under section 12(1)(c) of the* Financial Administration Act*.*
>
> …
>
> *I regret that this measure is necessary, and I am truly sorry.*
>
> …

[2] On August 3, 2017, the grievor grieved her disciplinary termination. She alleged that the employer breached the no-discrimination clause of her collective agreement.

[3] On April 24, 2018, the grievor referred her grievance to adjudication as being about both a disciplinary action resulting in termination and the interpretation or application of a provision of her collective agreement. She gave notice to the Canadian Human Rights Commission that her grievance raised an issue related to the interpretation or application of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). The Commission informed the Board that it did not intend to make representations in this case.

II. Background

[4] Since the termination was a disciplinary action, the first thing to determine is whether the grievor's alleged conduct has been established. If so, and if the case raises an allegation that the disciplinary action was discriminatory, the analysis must assess

the employer's human-rights obligations to determine whether the grievor's alleged conduct justified imposing discipline. If so, then it must be decided whether the termination was an excessive disciplinary action in the circumstances. Finally, if it was excessive, a determination must be made on what other disciplinary action would be appropriate.

[5] For the following reasons, I find that the grievor's alleged conduct was established. I also find that her conduct justified imposing discipline. Finally, I find that the termination was not excessive in the circumstances.

III. Summary of the evidence

[6] The employer called four witnesses, all of whom work at ESDC:
1) André Thivierge who, as of the events at issue, was the director of services, Integrity Branch; 2) Pascal Savard who, as of the events, was the resources manager;
3) Ms. Boisjoly, Assistant Deputy Minister, Integrity Services; and 4) Louise Boucher, Senior Labour Relations Advisor. The employer's witnesses presented their evidence first, to establish that the grievor's alleged conduct took place and that the disciplinary action was neither discriminatory nor excessive.

[7] The grievor testified at the adjudication hearing before me on her own behalf. She presented her evidence after that of the employer, to establish that the termination was a discriminatory action and that it was excessive in the circumstances.

A. For the employer

[8] Mr. Thivierge explained that as the director of services in early 2016, he managed a team of about 14 people. The grievor joined his team and ESDC as a manager (AS-05) on July 18, 2016, through a transfer. She was a finance expert. She began her public service career in 1997, and according to her references, she excelled in finance. As of her hiring, nothing indicated that she had a mental illness. She was rational and very lucid.

[9] The grievor's cousin already worked for Mr. Thivierge, and through her, the grievor learned that the manager position at the AS-05 group and level had to be filled. So, she sent her CV to Mr. Thivierge. During his interview of her, he asked her whether she would have a problem supervising her cousin. The grievor replied in the negative. Mr. Thivierge then informed the senior management committee of the grievor's

relationship to her cousin. Nevertheless, the committee agreed to hire the grievor to fill the position because her qualifications and professional experience were suited to the needs of the position, and she did not expect to encounter any difficulties supervising her cousin.

[10] Mr. Thivierge stated that when she accepted the employment offer, the grievor confirmed in writing that she had read the *Values and Ethics Code for the Public Sector* ("the Public Sector Code"), the *ESDC Code of Conduct* ("the ESDC Code") and Appendix B of the *Policy on Conflict of Interest and Post-Employment* ("Appendix B of the Policy").

[11] Mr. Thivierge described the grievor's many tasks. She supervised a team of three employees at the AS-03 group and level. When she started, she had to compensate for one employee's departure from the group. She also noted that some inequity in the workloads of the three employees she supervised. With Mr. Thivierge's assistance, she redistributed the work tasks among the employees. Two of them received new responsibilities. Yet, it increased their resistance to change, and they cooperated very little with the changes. Mr. Thivierge acknowledged that a significant amount of work had to be done then, and quickly. The team also had a pressing need for operational assistance.

[12] On August 1, 2016, the grievor shared her recommendation with Mr. Thivierge about hiring an employee on a casual basis. At the same time, she told him that she knew of a potential candidate. A week later, she shared her daughter's CV. When she submitted her daughter's application, the grievor failed to declare their relationship. Lacking that information, Mr. Thivierge, and then the management committee, approved the hiring request.

[13] On August 5, 2016, the grievor sent a document entitled "Staffing Request" to Mr. Thivierge, once again failing to disclose her relationship to her daughter. In the document, she stated that she had assessed the applicant through an informal discussion. Once Mr. Thivierge signed the document, the grievor sent it to the Integrity Services Branch's administrative coordinator, with an anticipated employment start date of August 29, 2016.

[14] On August 29, 2016, the grievor's daughter began her duties. It was a casual position at the AS-02 group and level under the grievor's supervision. Her daughter's casual employment was scheduled to end on December 23, 2016. Even though her

daughter was reporting directly to the grievor, her daughter also never declared their relationship. Her duties were to provide administrative and financial support to a portfolio by committing funds, paying invoices, creating detailed reports on the commitments to enable tracking all expenses, and updating certain supplements and creating a budget summary table using Excel.

[15] In late fall 2016, Mr. Thivierge learned that the grievor was experiencing an episode of depression. He authorized her absence from work once a week to participate in therapy sessions. His wish was to reassure her through a respectful and empathetic approach during that difficult period. At that time, Mr. Thivierge was a mental-health champion, and he gave presentations on the topic.

[16] In November 2016, Mr. Thivierge participated in a management discussion with the grievor. They addressed the option of creating a term position in her team. Given that her daughter was performing very well in her casual position, she and Mr. Thivierge agreed that it would be more efficient to offer the term position to her daughter rather than look for a new person. The management committee agreed with that observation. The request to create the position was issued on November 8, 2016.

[17] Towards the end of November or early December 2016, Mr. Thivierge learned that the grievor had developed a gambling addiction. At the time, she requested five weeks of leave to take part in treatment. Mr. Thivierge asked her whether her absence could be postponed until January because a new manager, whose position was at the AS-07 group and level, was expected to join the team at that time; it was Mr. Savard. The grievor agreed to the proposal.

[18] On December 22, 2016, the grievor gave Mr. Thivierge the rationale she had written for hiring her daughter as an employee appointed as an assistant, administrative services (AS-01), for a specified term. He signed the rationale on January 12, 2017. Also on December 22, because Mr. Thivierge was away from his office, the grievor was asked to sign the form entitled, “Signed Statement of Persons Responsible for Screening/Assessment” (“the statement”). She signed it. It included the following, among other things:

> [Translation]
>
> …

> *I, THE UNDERSIGNED, promise to faithfully and honestly fulfil my responsibilities related to this assessment …*
>
> *I have reviewed the list of candidate(s), and to my knowledge, I am not related to any of them ….*
>
> …

[19] In early January 2017, Mr. Savard joined Mr. Thivierge's team, assuming the resources manager position. His mandate included supervising three employees who were managers at the AS-05 group and level, including the grievor. He was also required to improve the working environment. Relationships were strained, including, among others, between the grievor and two of her subordinates.

[20] In the days leading to January 9, 2017, the grievor prepared the request to extend her daughter's casual employment from December 30, 2016, to May 5, 2017. Mr. Thivierge signed the request on January 9, 2017.

[21] On January 13, 2017, the grievor's daughter signed the letter of offer for the AS-01 term position, which was to start on January 16, 2017, and end on January 12, 2018. In accordance with the *Public Service Employment Act*, the grievor administered the oath to her daughter.

[22] On January 24, 2017, the grievor wrote to Mr. Thivierge, stating that she was ill and having a panic attack. At that time, she was having problems with her pay because of the Phoenix pay system. Mr. Thivierge was empathetic in his response the same day. Then, she went on sick leave for a month-and-a-half in January and February 2017. She returned to the office in early March 2017.

[23] On March 28, 2017, the grievor wrote to Mr. Thivierge, stating that she would be away from the office and that she would return the next day. She added that her family had called the police because they feared that she would try to commit suicide.

[24] Mr. Savard supervised the grievor from the beginning of January 2017. He knew that she had experienced a difficult separation, had financial difficulties because of the Phoenix pay system, and was experiencing mental health issues, in part because of her high stress level at work. He did not know that she had developed a gambling addiction. He explained that he consulted the Human Resources Section occasionally since he arrived, so that he could better support her.

[25] On April 19, 2017, Mr. Savard authorized leave without pay for the grievor so that she could undergo therapy.

[26] On May 17, 2017, Mr. Savard sent the grievor a letter in which he informed her of the following:

> [Translation]
>
> …
>
> *This is to report on your personal and professional situation over the past few months.*
>
> *First, the personal problems you told us about three months ago have greatly concerned us. We are concerned for you and your health but also in terms of work, because it has caused absenteeism beyond the norm. It has certainly impacted your work and has meant that the past year has not been easy. However, I note an enormous improvement over the past few weeks. In fact, it seems that you have taken charge of your life to solve your personal problems, which is strongly reflected in your office performance. You are keeping me informed about the steps you are taking, which allows me to better support you through the process.*
>
> *There were also some communication issues with your team. To me, your April 25 meeting with them greatly improved things between you. The fact that you explained yourself face-to-face seems to have been successful. In any case, I am seeing a better synergy between us, which greatly facilitates the work.*
>
> *I wanted to put this in writing to close this chapter.*
>
> …

[27] Mr. Thivierge explained that an incident arose two weeks later, on Friday, June 2, 2017. The grievor's daughter came to see him. She stated that another employee who reported to the grievor had just suggested to her that she was aware of their relationship. The grievor's daughter acknowledged the relationship and informed Mr. Thivierge that the team members were now aware of their situation.

[28] The grievor was on leave that day. However, given what was going on, she hurried into the office to meet with Mr. Thivierge and Mr. Savard. She acknowledged her relationship to her daughter and that hiding it had been wrong, and she apologized. Mr. Thivierge was astounded by the discovery. He felt that she had betrayed him. In his view, it was gross misconduct, given her management responsibilities. Mr. Savard was stunned and disconcerted by the news.

[29] On Sunday, June 4, 2017, the grievor emailed Mr. Thivierge. She apologized for the trouble she had caused in their workplace. She provided her version of the facts and explained why she had decided to hire her daughter. In her words, it had been necessary to hire someone quickly, and the only person who came to mind was her daughter. She also wrote that she did not report the relationship to Mr. Thivierge because she knew that he would not agree to the hiring.

[30] Ms. Boisjoly, the assistant deputy minister to whom Mr. Thivierge reported, explained that she had been notified of the grievor's situation during the same period. She stated that she, Mr. Thivierge, and Mr. Savard met several times with human resources representatives to discuss the situation. She confirmed that she, Mr. Thivierge, and Mr. Savard met regularly to discuss the steps to take in the matter and later on to talk about the most appropriate disciplinary action, given their conclusion that the grievor had committed misconduct.

[31] On Monday, June 5, 2017, after the grievor acknowledged her relationship to her daughter, Mr. Savard informed her daughter and the other members of her team that they had a new supervisor, effective immediately. The team was informed that from then on, it would report to him.

[32] At the same time, Mr. Savard was tasked with meeting with all the members of the grievor's team to gather the relevant facts of the situation, which he did. When he asked the grievor's daughter why she had not revealed their relationship before June 2, she replied that the grievor had asked her not to.

[33] On June 12, 2017, Mr. Savard informed the grievor that facts were still being gathered in the matter. He also informed her that she would soon receive an invitation to a disciplinary hearing. He added that she would have an opportunity to explain herself formally at the hearing and that she could be accompanied by a union representative. He also stated in his email that June 15 or 16 were the dates being considered for the hearing. Finally, he added, "[translation] Notify me of any major difficulties."

[34] The grievor asked that the disciplinary hearing be postponed because she had a heavy workload at that time. However, her request was denied.

[35] The disciplinary hearing took place on June 16, 2017. The grievor was invited to present her version of the facts and any mitigating factors that the management team should consider. At the hearing, she told the management representatives that as of the events, when she had recommended hiring her daughter, she had been troubled and had been experiencing profound distress. She also admitted that had the relationship not been discovered, she would not have revealed it.

[36] Mr. Thivierge, Mr. Savard, and Ms. Boisjoly then began discussing the disciplinary action they considered most appropriate in the circumstances.

[37] The grievor then continued working in her position.

[38] Ms. Boisjoly explained that an employee could remain in his or her position despite a disciplinary process being under way. In such cases, management had to ensure that others' health and safety were not at risk. In this case, there were no risks. Therefore, the grievor was invited to continue her work. Ms. Boisjoly recognized that a large amount of work had to be carried out and that it was a critical period with respect to budgets. The grievor was very productive during that period. Nevertheless, according to Ms. Boisjoly, her managers carefully reviewed the grievor's work, given her alleged conduct and the impact it had on the trust that the employer was entitled to have in her.

[39] Ms. Boisjoly, Mr. Thivierge, and Mr. Savard met a few times to discuss the most appropriate disciplinary action in the circumstances. Little by little, they reached a consensus on the most appropriate disciplinary action: termination. They agreed that termination was the most appropriate, given that they deemed the grievor's alleged conduct very serious and that it was a fundamental breach of trust. They did not consider her mental health issues.

[40] In his testimony, Mr. Savard stated that management considered the option of imposing a 20- to 30-day suspension. It was aware that that action could be appropriate if the trust the employer was entitled to have in the grievor could be restored. However, in this case, the management team concluded that that trust had been irreparably damaged and that termination was the only appropriate action.

[41] Ms. Boisjoly explained that the decision to terminate the grievor had not been easy to make. All three management-team members considered mitigating and other

factors when they considered terminating her. They also considered case law. Their view was that the circumstances justified an action at the extreme end of the spectrum because the trust the employer was entitled to have in the grievor had been irreparably damaged. According to them, the disciplinary system supported termination in such circumstances.

[42] Ms. Boisjoly, Mr. Thivierge, and Mr. Savard considered as mitigating factors that 1) the grievor had 20 years of experience, 2) she had no disciplinary history, and 3) she excelled at her work, and her managers appreciated her greatly.

[43] On the contrary, they considered as aggravating factors that 1) the grievor had 20 years of experience (the same factor as was considered earlier), 2) she knew that she had breached the Public Sector Code and the ESDC Code (which she admitted to at the disciplinary hearing), 3) she concealed her relationship to her daughter for a lengthy period (nine months), 4) she failed to disclose the relationship several times, 5) she lied by signing the statement in which she certified that she was "[translation] not related" to the candidate and by asking her daughter to conceal the relationship, 6) she encouraged a third party, her daughter, to lie (at the disciplinary hearing, she admitted that she had encouraged her daughter not to reveal their relationship, and in January 2017, she recommended that her daughter find work elsewhere to "[translation] limit the damage"), and 7) she held a management position and had to set an example with respect to conflicts of interest and ethics.

[44] Ms. Boisjoly specified that four of the occasions on which the grievor failed to disclose her relationship to her daughter corresponded with different steps of the hiring process, such as 1) when she asked that her daughter be hired and prepared the staffing request on August 5, 2016, 2) when on December 22, 2016, the grievor shared her rationale with Mr. Thivierge for creating a new term AS-01 position, 3) when on December 22, 2016, she signed the statement, and 4) when in the days leading to January 9, 2017, the grievor prepared the request to extend her daughter's casual employment from December 30, 2016, to May 5, 2017.

[45] Ms. Boisjoly acknowledged that the grievor apologized at the disciplinary hearing. However, she was not certain that the grievor expressed true remorse, for several reasons. Among other things, at the hearing, the grievor stated that she had not shown favouritism because the position offered to her daughter in January 2017

was at the AS-01 and not the AS-02 level. She also stated that she wanted her daughter transferred elsewhere and that their relationship never be discovered. According to Ms. Boisjoly, the grievor's main regret was that her relationship to her daughter had been discovered, not that she had violated the two codes.

[46] Ms. Boisjoly also specified that the grievor's mental health issues did not influence her decision because the grievor violated the two codes in August 2016 and then repeatedly after that (in December 2016 and January 2017). Yet, she did not report her mental health issues to Mr. Thivierge until fall 2016. Therefore, the two codes were breached before the mental health issues surfaced.

[47] At the adjudication hearing before me, Ms. Boisjoly gave a detailed explanation of the provisions of the two codes and of the *Policy on Conflict of Interest and Post-Employment* that the grievor violated. Basically, Ms. Boisjoly showed how the grievor used her role to have her daughter hired. Also, the grievor acknowledged that during the nine-month period, she never considered taking steps to reveal the conflict of interest. Ms. Boisjoly explained that the codes and the policy were intended to eliminate preferential treatment and that those subject to them are obliged to declare any actual or perceived conflicts of interest. Yet, in this case, the grievor did not reveal the actual (the fact that she had hired her daughter) or the perceived conflict (the fact that she was her daughter's direct supervisor during the nine-month period).

[48] On July 12, 2017, the grievor was called to a meeting at which Mr. Thivierge informed her of the decision to terminate her employment. At the same time, she received the termination letter, signed by Ms. Boisjoly.

[49] On August 3, 2017, the grievor filed her grievance.

[50] On January 18, 2018, Gail Johnson, Assistant Deputy Minister of the Human Resource Services Branch, heard the grievance at the third level of the grievance procedure ("the grievance hearing before Ms. Johnson" or "the grievance hearing"). The grievor did not appear at it, but her representative submitted documents in support of her position. The grievor submitted these documents at the grievance hearing: 1) a psychological report by Dr. Valérie Bourgeois-Guérin of Y2 Consulting Psychologists dated April 16, 2013; 2) a letter from Dr. Yannick Mailloux of Y2 Consulting Psychologists dated November 9, 2015; 3) a letter from Industrial Alliance dated February 11, 2016; 4) a letter from Josiane Nantel, a human relations officer from

Centre Jellinek, the Centre de réadaptation en dépendance de l'Outaouais of the Centre intégré de santé et de services sociaux de l'Outaouais, dated February 17, 2016; 5) a certificate of medical incapacity signed by Dr. Renu Khullar on March 23, 2016; and 6) a letter from Ms. Nantel dated September 15, 2017.

[51] At the adjudication hearing before me, Ms. Boucher, a senior labour relations advisor, explained that the issue of the grievor's medical condition was raised for the first time at the grievance hearing before Ms. Johnson as a possible cause of the grievor's alleged conduct. The next day, January 19, 2018, Ms. Boucher emailed the grievor's representative on the employer's behalf as a follow-up and complement to the January 18 grievance hearing. The employer explicitly asked whether any functional limitations arose from the grievor's medical condition. If so, it asked her whether she had already requested accommodation. Thus, Ms. Boucher stated the following in her email:

> [Translation]
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> …
>
> *In addition, we discussed the possibility of the employer sending questions to Ms. Petit's doctor. Could you speak with Ms. Petit about it, and if it is agreeable, could you give us the contact information for the doctor to whom our letter will be sent? I protected the document with a password that will follow in another email.*
>
> …

[52] The same day, the union representative replied to Ms. Boucher as follows:

> [Translation]
>
> …
>
> *… respectfully, we refuse to answer any additional questions the employer may have about this grievance, which I stress is not only about the termination of Ms. Petit's employment but also is about the fact that the employer failed its duty to accommodate (article 19) with respect to Ms. Petit's several mental illnesses, about which the union believes that the employer has done nothing.…*
>
> …

[53] On January 23, 2018, Ms. Boucher replied to the union representative by asking the following: "[Translation] Do you refuse … that the employer may contact the doctor for clarification?" The next day, the grievor's representative replied as follows:

> [Translation]
>
> …
>
> *Yes, this is correct. The grievor believes that she has already provided you with a great deal of personal medical information, and if you look at the reports from the different professionals, I believe that you will have your answers about the impact of the medications on her ability to exercise her judgment, among other things.*
>
> …

[54] On March 12, 2018, in her decision at the third level of the grievance procedure, Ms. Johnson denied the grievor's grievance.

B. For the grievor

[55] The grievor explained that she began her career in the federal public service on June 9, 1997. She worked at the Canada School of Public Service, the National Library of Canada, and Global Affairs Canada. She stated that she has mental health issues. Over the course of her life, she had experienced many depressive episodes, including in 1998, 2000, 2005, 2012, and 2013.

[56] The grievor explained that she had been taking the antipsychotic drug Abilify, prescribed by her doctor to stabilize her anxiety, since 2013. Everything went well in the beginning. However, over time, the medication created compulsions. First, she developed an addiction to online shopping. Later on, it turned into a gambling addiction.

[57] The grievor adduced into evidence an alert dated November 2, 2015, issued by the Government of Canada and entitled, "Safety information for antipsychotic drug Abilify and risk of certain impulse-control behaviours". The alert was about the medication that her doctor had been prescribing for her since 2013. It specified that the prescription labels had been updated to indicate an increased risk of impulsive behaviours, like pathological gambling and hypersexuality.

[58] In September 2015, the grievor had another relapse of her recurring major depressive disorder. She explained that she also suffered from an anxiety disorder and that she had addictive personality traits. In October 2015, she consulted Centre Jellinek for the first of two series of treatments.

[59] In December 2015, she entered a one-week treatment at Centre Jellinek.

[60] In 2016, after being away from her job at Global Affairs Canada for 24 months, the grievor took steps to return to work.

[61] On April 1, 2016, she began a progressive return to work at Global Affairs Canada. She was still under the care of her family doctor and Centre Jellinek.

[62] Meanwhile, she learned through her cousin that the ESDC Integrity Services Branch was looking for a senior advisor for a position at the AS-05 group and level in the Planning and Analysis Section.

[63] The grievor sent her CV to the director, Mr. Thivierge. She was then invited to participate in an informal interview with three employer representatives. During the interview, she stated that her cousin worked for Mr. Thivierge and that they were close. According to her, Mr. Thivierge asked her whether she considered that a problem and whether she would be able to directly supervise her cousin. The grievor replied that she did not consider it a problem and that she would be able to supervise her cousin.

[64] The grievor was deemed qualified for and was transferred into the position on July 18, 2016.

[65] So, she assumed her new duties with ESDC on July 18, 2016. She explained that no knowledge transfer took place because the former incumbent had already left. She stated that Mr. Thivierge was also new to his position at that time and that he had little financial knowledge, which he acknowledged at the adjudication hearing before me. Therefore, from the beginning of her employment, the grievor felt overworked and plagued with stress. She stated that she experienced a great deal of difficulty, both at work and in her personal life. The result was that her thinking process was less than optimal and that she exercised poor judgment.

[66] The grievor also explained that she did not have access to financial systems and that she could not familiarize herself with the budgets of the different sections under her responsibility. She was responsible for the budgets of four directors general and one assistant deputy minister. She explained that she had to turn to financial management advisors for most of the financial information on working capital that she needed for all the reports she had to prepare. Based on her recollection, the situation persisted for three or four weeks.

[67] The grievor was also responsible for a three-person team, including two people in AS-03 positions who looked after operations, and one person in an AS-03 position who dealt with salaries. In July 2016, one of the operations incumbents announced to the grievor that she was to leave her position in three weeks. Then, the other person in operations firmly informed her that she would refuse any workload increases resulting from her colleague's departure. According to the grievor, this person also stated that she refused to train the colleague's replacement. Finally, the grievor recalled that the person clearly told her that she would not hesitate to obtain an absentee note from her doctor were her workload increased.

[68] The grievor added that her cousin, who was responsible for the entire salary envelope (and for three quarters of the section's budget), also told her that she needed help; otherwise, she would also have to go on extended sick leave. It was absolutely essential to add another person to the team to reduce her workload because it had increased significantly due to difficulties with the Phoenix pay system.

[69] The grievor also explained that on July 20, 2016, two days after she had assumed her new duties, she experienced a very difficult separation after a 20-year relationship and a move. She spoke with Mr. Thivierge about her difficulties, but the situation was difficult on all sides. She had trouble accessing the financial systems. Despite everything, her workload was significant. Corporate Services, the Assistant Deputy Minister, and Mr. Thivierge regularly required financial information. She was suffering from a gambling addiction at the time. Her feeling of powerlessness was so strong that she was experiencing real distress and was afraid that she would "[translation] crack" and lose her equilibrium.

[70] Nevertheless, over the course of her second week of work, the grievor worked to fill the vacant AS-03 position as soon as possible. It was filled through an internal transfer.

[71] The grievor explained that after completing all the documents required to staff the AS-03 position, she resolved to find an additional person to help her cousin. During a management meeting in early August 2016, she raised the issue of excessive workloads in her section and in the human resources and administrative services teams. She proposed hiring a casual employee at the AS-02 group and level to meet the three teams' needs. Mr. Thivierge and the other team leaders agreed.

[72] The grievor then carried out the necessary work to hire the casual employee. First, she contacted the Human Resources Section to determine whether if a pool of AS-02 candidates was in place from which she could recruit. She was informed that one was in place but that it was a few years old and that it included no candidates at the desired level.

[73] The grievor then reviewed her other options. She recalled that one of her former subordinates at her old department had the skills she was looking for. So, she contacted that person to discuss the opportunity (an at-level assignment). However, the person informed the grievor that she was in a higher-level position at that time and so was not interested in the proposal.

[74] At all costs, the grievor wanted to avoid her cousin going on sick leave. It was urgent that she solve the problem. Thus, on August 4, 2016, she considered the possibility of recommending her daughter to fill the casual position. She deemed her daughter an excellent and qualified candidate, with a proactive attitude and unmatched interpersonal skills.

[75] So, the grievor contacted her daughter to tell her about the casual employment opportunity and the tasks to be performed. She asked her daughter whether she was available to meet the urgent need. Much work had to be done. Her daughter said that she was interested, and she emailed her CV to the grievor on August 5, 2016.

[76] The grievor sent her daughter's CV to Mr. Thivierge but did not tell him it was about her daughter. She explained that the provisions of the *Public Service Employment Act* do not apply to casual employees. Therefore, she believed that there was no conflict of interest. Also, her daughter was enrolled in a study program that was to begin in January 2017. Therefore, it was to be only a temporary position.

[77] Unaware of the relationship between the grievor and her daughter, Mr. Thivierge suggested presenting the staffing request for the grievor's daughter to the staffing committee.

[78] At the August 22, 2016, staffing committee meeting, the appointment of the grievor's daughter was approved. She signed the casual employment offer on August 27, 2016.

[79] On August 29, 2016, the grievor's daughter began to work. She immediately set to the task of producing financial reports, gathering documents to send to division managers, and issuing calls to budget review meetings. She also performed tasks for the human resources team leader and administrative services tasks for Mr. Thivierge. She was also responsible for entering new offer letters for the section and making the changes that the finance team leader (the grievor) requested.

[80] In September 2016, after thoroughly reviewing the internal structure of her team, the grievor recommended reorganizing it. She recommended reallocating her employees' responsibility areas so that each AS-03 would be responsible for a certain division and its payroll. The goal was to minimize the impact on the group if one position occupant were absent. However, two occupants categorically refused to take on new duties. According to the grievor, they also displayed a lack of respect for her.

[81] Later on, the grievor's relationships with two of her employees deteriorated. She explained that when she asked the two subordinates, for example, to contact the managers in their respective responsibility areas to obtain reports or responses to certain questions, they replied that it was her responsibility. She asked for Mr. Thivierge's help, but with little success. She was in a very difficult situation.

[82] In fall 2016, the grievor experienced a relapse of her mental health issues. She had to be absent on sick leave several times. She reported her professional and personal difficulties to Mr. Thivierge. Nevertheless, she continued to manage her section. Several significant challenges had to be met, and she had to make an important presentation about the budget.

[83] On October 4, 2016, the grievor began a second series of treatments at Centre Jellinek. Mr. Thivierge knew that she suffered from depression, and he agreed to her absence one afternoon a week to take part in group meetings. He was not aware of all the details of her health condition.

[84] In fall 2016, the grievor began to reveal some problematic aspects of her personal life to Mr. Thivierge that affected her on a professional level. She believed that in the fall, she spoke with him about her separation, her depression, the stress she was experiencing, her problems with the Phoenix pay system (which caused her financial difficulties, given that she had not received any pay between April 1 and June 29, 2016). After her separation, when the grievor took steps to sell her home,

Mr. Thivierge also granted her the leave she had requested to facilitate visits to her home.

[85] The grievor also stated that towards the end of October or the beginning of November 2016, she informed Mr. Thivierge of the specific nature of her addiction issues. She remembered it because that was when she asked him for an advance of 25 days of sick leave so that she could receive additional care at Centre Jellinek for an addiction. He asked her if she could wait for the arrival of Mr. Savard, the new manager, who was expected in January 2017. She agreed to the request. She stated that it was difficult for her to tell Mr. Thivierge that she suffered from a gambling addiction, given her role as finance manager.

[86] The grievor stated that in July 2016, she began her withdrawal from the antipsychotic drug Abilify, which had contributed to her addictions. She completed her withdrawal in November 2016.

[87] The casual employment of the grievor's daughter was scheduled to end in December 2016. At a management meeting in November 2016, the grievor informed Mr. Thivierge that the section needed permanent help. It was understood that regularly, much work had to be done. Among other things, different financial reports had to be prepared starting in January, ahead of the fiscal year end on March 31. The many tasks associated with the fiscal year end included budget distribution and strategic planning, among others.

[88] The grievor stated that she first recommended addressing the need for support through staffing an AS-01 term position that was available in the human resources team. The person hired in that position could have served the three teams (human resources, finance, and administrative services). However, instead, the human resources team leader recommended creating a new position because she anticipated filling the AS-01 position in human resources in the future. Another option was to extend the casual employment of the grievor's daughter. However, given the permanent need for support in the team, Mr. Thivierge recommended both extending the casual employment of the grievor's daughter and creating a permanent position. It was understood that the grievor's daughter could compete for that position. In addition, all the managers agreed that she had demonstrated her ability to provide real-time good-quality work in a wide range of services.

[89] Therefore, the grievor prepared the request to extend her daughter's casual employment from December 30, 2016, to May 5, 2017, again without revealing their relationship.

[90] On December 22, 2016, the grievor signed the statement attesting that she was not related to the applicant for casual employment. She explained that a human resources representative asked her to sign the form because Mr. Thivierge was away from the office at the time and that the form had to be signed before the offer letter could be issued to her daughter. According to the grievor, the form served only to document the fact that a candidate in the process had indeed been assessed. According to her, through her signature, she confirmed that the candidate for the casual position had been assessed. Only at the disciplinary hearing did she become aware of a paragraph in the document that stipulated that the delegated manager (or representative) declares that he or she is not related to the assessed candidate.

[91] On January 5, 2017, the team welcomed Mr. Savard. He held the operational manager (or resources manager) position. He was responsible for the three teams: finance, human resources, and administrative services. He was the grievor's new supervisor. She stated that she told him about the professional difficulties she had experienced with her team since her arrival in July 2016. She said that she also confided in Mr. Savard about some of her personal difficulties with respect to her health and financial situation.

[92] On January 9, 2017, Mr. Thivierge signed the request to extend the casual employment of the grievor's daughter.

[93] The human resources manager also prepared the request to create a new term position at the AS-01 group and level in the Planning and Analysis Section of the finance team, to look after a large volume of financial tasks. Mr. Thivierge asked the grievor, as the finance manager, to prepare the rationale for creating the new position, with help from human resources and examples that were supplied, which she did.

[94] However, the grievor explained that she had tried to take a step back from the situation, so as not to influence Mr. Thivierge. The last paragraph of the rationale specified that Mr. Thivierge confirmed that he was satisfied that the staffing action was carried out in good faith, without favouritism. The grievor explained that the

paragraph was added by a human resources representative after the grievor had finished preparing the rationale.

[95] The grievor explained that she did not reveal her relationship to her daughter because the grievor was in a bad way, both mentally and physically. She was afraid of losing her daughter's help if she revealed their relationship.

[96] On January 12, 2017, Mr. Thivierge signed the written rationale for hiring the grievor's daughter.

[97] In January 2017, the grievor's pay was again cut without notice. Therefore, she took steps to try to obtain an explanation from the pay centre. She was still in a difficult financial situation due to the deficiencies identified with her pay between April 1 and June 29, 2016, and stated that the stress of the situation significantly affected her mental and physical health.

[98] The grievor stated that her difficulties at work were also significant at that time. In particular, her presentation during a budget meeting "[translation] for the P10 period" ended in disaster. Things went from bad to worse for her. She explained that the stress and anxiety caused by her financial situation and her difficulties at work had morally and physically exhausted her to the point that her loved ones feared that she would attempt suicide.

[99] The grievor stated that in fact, on March 27, 2017, after their telephone conversation, her daughter contacted the police out of fear that the grievor would take her life. The grievor was taken by ambulance to the hospital, where she remained until the next day so that a psychiatrist could assess her condition.

[100] The grievor was discharged from the hospital at midday on March 28, 2017.

[101] The next day, March 29, 2017, despite her fragility, the grievor returned to work, given the large amount of work to complete for the fiscal year end.

[102] On Friday, June 2, 2017, the grievor's relationship to her daughter was revealed. The grievor explained that she was on leave that day. Her daughter called her in the morning, after one of her subordinates hinted to the daughter that she was aware of the daughter's relationship to the grievor. Her daughter immediately called her to

inform her of the recent development. She replied that she would acknowledge their relationship immediately in a conference call with Mr. Thivierge.

[103] After speaking with the grievor, her daughter met with Mr. Thivierge to inform him that the grievor wished to speak with him. His response was to suggest that since the grievor was on leave, the conversation be held on the Monday. However, the grievor's daughter warned him that a conversation was required as soon as possible, because he was to be informed about an important fact that he was unaware of. She then told him that she was the grievor's daughter.

[104] The grievor, no longer able to tolerate the desperate situation, left home the same day for the office to meet with Mr. Thivierge and Mr. Savard. She stated that Mr. Thivierge was furious. He regretted trusting her because they were now in a significant conflict of interest.

[105] On Sunday, June 4, 2017, the grievor sent a long email with her apologies entitled "[translation] Conflict of interest" to Mr. Thivierge and Mr. Savard. She wanted to explain her actions. At the adjudication hearing before me, she stated that her email arose from a mixture of emotions and logic. The employer took it as her deposition, without allowing her to make a formal and considered one. In her email, she acknowledged that it was clear that her decision not to tell the management team about her relationship to her daughter before her daughter's hiring had been an error in judgment, which was then repeated. The reason for it was very simple; deep down, she knew that the management team would not support hiring her daughter, and rightly so. Nevertheless, she needed her daughter's help. But at the hearing before me, she specified that her former partner suggested adding that admission (the error in judgment) to her email. They were not her words.

[106] After that, Mr. Savard took over supervising the grievor's team during the disciplinary investigation. The daily finance work remained under her direction.

[107] The grievor explained that she then worked significant overtime because she had to do all the work without her team's support, apart from that of her daughter. In particular, she and her daughter worked very hard until June 19, 2017, on finalizing the strategic budgets and preparing for them for a presentation on June 19 that was for the directors general and the assistant deputy minister, Ms. Boisjoly.

[108] In June 2017, Mr. Savard also asked for the grievor's help staffing one of the AS-03 positions on his team. She reviewed the applicants, participated in the selection process, and made a hiring recommendation.

[109] Meanwhile, Mr. Savard invited the grievor to a disciplinary hearing on Friday, June 16, 2017. She asked that the hearing date be pushed to after June 19, 2017, given that she had to present the budget planning to the assistant deputy minister, Ms. Boisjoly, on that date. Mr. Thivierge and Mr. Savard refused to postpone the June 16, 2017, date.

[110] At the disciplinary hearing, the grievor raised her depression, her anxiety, and her addiction as mitigating factors in her lack of judgment. Mr. Thivierge and Mr. Savard replied that no reports or documents supported the allegations. She replied that due to the refusal to postpone the date of the disciplinary hearing, she did not have the time to gather the necessary documentation. She also stated that she was unaware of the nature of the disciplinary hearing she participated in on June 16, 2017, and that she was confused on that day.

[111] On Monday, June 19, 2017, as planned, the grievor presented the budget plan to Ms. Boisjoly. To do it, the grievor and her daughter worked all weekend on finalizing the strategic budgets for their presentation. The grievor specified that the reason she had to work all weekend ahead of the Monday presentation was that at the last minute, Ms. Boisjoly had given specific instructions with respect to the salary envelope. Therefore, her daughter helped her over the weekend.

[112] Then, during the week of July 3, 2017, at Mr. Thivierge's request, the grievor prepared a summary of financial highlights for 2016-2017 to be presented during his meeting with Ms. Boisjoly.

[113] On July 12, 2017, after the disciplinary hearing, management informed the grievor that ESDC was terminating her employment. In the termination letter given to her, Ms. Boisjoly concluded that the grievor had placed herself in a real conflict of interest by granting preferential treatment to a member of her family. Ms. Boisjoly specified that the grievor had committed irreparable damage to the trust that the employer was entitled to have in her, which was the basis of the employment contract between an employee and his or her employer. It was a definitive breakdown of the

trust that the employer was entitled to have in her. The grievor collapsed. She had not anticipated such a disciplinary action. She was escorted out of the office.

[114] The grievor insisted that she was desperate when she hired her daughter; she tried to arrange things in an immediate and temporary way, without thinking of the consequences of her actions. She did not think to ask her colleagues whether they knew of anyone qualified who might accept three to six months of casual employment. She insisted that she did not steal from anyone and that she made no personal gain from the situation; it was simply an error in judgment.

[115] The grievor also acknowledged that her health issues were intermittent from 2012 to 2016 and that she revealed nothing to Mr. Thivierge until late in 2016 because she feared that his trust in her would be affected. She stated that she now sees the seriousness of her actions. At the time, her view had been clouded by illness. According to her, her condition prevented her from seeing the consequences of her decisions. She claimed that she was stunned by how the poor decision demolished the career she had built over 20 years. Ultimately, she explained that she had not revealed her relationship to her daughter until her daughter's temporary position was extended because her loyalty to the management team weighed more heavily in the balance. Without her daughter's help, the grievor would not have been able to work because of her mental condition, but she did not want to let down the management team, which was responsible for delivering the required information. Therefore, it was out of distress and to avoid undermining the management team that she chose not to reveal her relationship to her daughter.

[116] According to the grievor, despite her mental condition, she could resume some public service functions. She would no longer be able to tolerate stress. Therefore, she could not resume her old position. However, she could hold a position at the AS-05 group and level, as long as she had only one budget to manage.

[117] On August 3, 2017, the grievor filed her grievance against the termination.

[118] Before the grievance hearing before Ms. Johnson, the grievor's representative asked that someone other than Ms. Johnson, Assistant Deputy Minister, Human Resources Section, be appointed to decide the grievance. The grievor's representative made the request because an email from Ms. Johnson, dated July 5, 2017, showed that

she had been consulted during the disciplinary process and that she had indicated her support for a decision to terminate. The request was denied.

[119] On January 9, 2018, in advance of the grievance hearing before Ms. Johnson, the grievor's representative recommended to the grievor that she not attend the hearing because of her emotional fragility. Her representative wrote the following to her: "[translation] I know you want to attend, except that I have reservations, concerns, and a responsibility with respect to the state of your health, which means that I do not want this to be the reason for another anxiety attack."

[120] The grievor was then informed that the employer wanted to question her doctor. In the beginning, she wanted to cooperate, and she asked to see the employer's questions for her doctor.

[121] On January 22, 2018, the grievor's representative replied to her that the employer's questions were "[translation] uncomplicated"; they were about her supervisory experience. Her representative recommended that she turn down the proposal because they were "[translation] trick questions to provide more justification for their decision to terminate [her employment]".

[122] The grievor said that ultimately, she considered that it would not be helpful to respond to the employer's questions, among other things because she had changed doctors four times in the meantime. She explained that among other things, her first doctor had retired, and that the second doctor was on sick leave, so her current doctor was not familiar with her medical history. Anyway, according to her, her entire life was described in the binder that her representative had presented to Ms. Johnson, which included documents used in treating her mental health issues from 2012 to 2016.

[123] On March 12, 2018, Ms. Johnson decided the grievance at the final level of the grievance procedure. She denied it.

IV. Summary of the arguments

A. For the employer

[124] According to the employer, it demonstrated that 1) the grievor committed misconduct, 2) the disciplinary action of termination was appropriate, and 3) it did not violate the collective agreement's no-discrimination clause.

[125] First, the employer stated that it had a valid reason for imposing discipline on the grievor for the alleged behaviour and that the termination was not excessive in the circumstances.

[126] The grievor held a position at the AS-05 group and level. She was terminated because she had placed herself in a conflict of interest and had violated the ESDC Code, the Public Sector Code, and Appendix B of the Policy. By her admission on June 4, 2017, she did not report her relationship to her daughter to Mr. Thivierge because she knew that he would not have supported hiring her daughter.

[127] A conflict of interest is a very serious offence in the public service and a clear violation of both codes. The grievor used her authority as a manager to benefit her daughter, which clearly violated the codes.

[128] Although the grievor performed well at work, had no disciplinary record, and apologized for the alleged behaviour, it was still a significant conflict of interest, and the codes and Appendix B of the Policy should apply. The employer considered that she had a lengthy career and that she had been a supervisor for about 10 years. Nevertheless, being a supervisor also carries higher expectations.

[129] Therefore, the employer considered the grievor's familiarity with the codes an aggravating factor. In addition, although she expressed some remorse, she stated that she had not intended to disclose her relationship to her daughter and that had it not been reported, she would never have revealed it because she did not want to lose her daughter's help. Also, she lied or concealed the truth several times. It occurred when on December 22, 2016, she confirmed in her signed statement that she was not related to the applicant for casual employment. It also happened when she prepared the rationale for hiring her daughter for the term position and when she concealed the fact that the candidate she had assessed was her daughter.

[130] The employer stressed that the Public Sector Code spells out the public service values and includes measures for dealing with conflicts of interest. Also, the ESDC Code identifies integrity as a value. It is the cornerstone of good governance and democracy. The employer stated that the grievor violated the behaviour expected at point ii) of the ESDC Code under "c) Integrity", which reads as follows:

> **Public servants shall serve the public interest by:**

…

ii) never using their official roles to inappropriately obtain an advantage for themselves or to advantage or disadvantage others.

- *You are not to use your position or title to influence treatment for yourself, your family, friends or anyone else. For example, you are giving preferential treatment if you provide someone with information that is not publicly available.*
- *If you are a participant in the decision making process in a staffing action, you cannot help family or friends who are competing for the job. In such situations, it might be necessary to recuse yourself from the Department's recruitment process.*
- *You cannot use your official identification or job title to obtain any private or personal advantage or benefits for yourself, or for others, such as* family *or* friends*. You must never represent yourself as being on official government business when on personal time, such as on vacation at a hotel, to gain an advantage.*
- *Benefitting from a standard corporate discount offered to all government employees is permissible (e.g. a fitness centre or automobile insurer). It is acceptable to use your public servant identification to receive a discount when:*
  - *there is no real, apparent or potential conflict of interest affecting your objectivity in carrying out your official duties; and*
  - *there is no expectation on the part of the company or organization that it will get something in return from you.*

[Emphasis in the original]

[131] According to those provisions, the grievor was not allowed to recommend hiring her daughter for a casual position or for a non-advertised term position without revealing their relationship. The grievor should have withdrawn from the staffing process.

[132] The employer also brought to my attention the following expected behaviours stated at sections 3.2 and 3.3 of the Public Sector Code under the value "Integrity":

…

3. ***Integrity***

- Public servants shall serve the public interest by:

…

- *3.2. Never using their official roles to inappropriately obtain an advantage for themselves or to advantage or disadvantage others.*
- *3.3 Taking all possible steps to prevent and resolve any real, apparent or potential conflicts of interest between their official responsibilities and their private affairs in favour of the public interest.*

…

[133] The employer also brought to my attention section 2.5 of Appendix B of the Policy, which sets out how a public servant must avoid any preferential treatment.

[134] Relying on *Gannon v. Treasury Board (National Defence)*, 2002 PSSRB 32 ("*Gannon* (2002)"), the employer stated that an employer is not required to adopt a policy on common sense or to instill common sense in its employees. Paragraph 127 reads as follows:

> *[127] Common sense dictates that sending and receiving most private and intimate messages at work is improper, and the employer is not obligated to present a policy on common sense nor to educate its employees on common sense.*

[135] The employer also brought my attention to some excerpts from certain other decisions, including in particular *McIntyre v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File No. 166-02-25417 (19940718). In that case, which also addressed conflicts of interest, the adjudicator stated the following at page 23:

…

> *The employee is responsible to ensure that a conflict of interest does not exist. Mr. McIntyre has not met this responsibility either with his brother-in-law's companies or with one of his own numbered companies. He is clearly in breach of his employer's Code of Conduct and the Conflict of Interest Code. On the whole of the evidence and the arguments presented, I must conclude that the grievor's breaches justify his termination ….*

…

[136] In summary, according to the employer, the grievor's conflict of interest constituted extremely serious misconduct in this case, especially since she was a supervisor.

[137] Second, the employer stated that given the seriousness of the misconduct, the disciplinary action was reasonable. It argued that the Board should intervene to change disciplinary action only if it was excessive. Yet, according to it, the disciplinary action was proportional to the seriousness of the act.

[138] Ms. Boisjoly outlined the aggravating and mitigating factors, which she reviewed before choosing termination as the action she considered most appropriate.

[139] The employer stressed that in their book entitled *Canadian Labour Arbitration*, authors Brown and Beatty state that an employer must decide whether an employee can be rehabilitated. The employer stated that *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62 at para. 180, as follows, helps with making that decision:

> *[180] Discussing rehabilitative potential and the corrective approach, Brown and Beatty write as follows:*
>
> > The critical question for arbitrators using a corrective approach is the grievor's capacity to conform to acceptable standards of behaviour in the future. To answer this question requires an assessment of the grievor's ability and willingness to reform and rehabilitate himself or herself so that a satisfactory employment relationship can be re-established. In a word, the arbitrator must decide whether the person is "redeemable". On this view, as one arbitrator pointed out, the checklist of mitigating factors "are but general circumstances of general considerations which bear upon the employee's future prospects for acceptable behaviour, which is the essence of the whole corrective approach to discipline.
> >
> > In assessing whether a viable employment relationship can be re-established, arbitrators put great weight on whether the employee has tendered a sincere apology and/or expressed real remorse. The assumption is that the employees who do so recognized the impropriety of their behaviour and are likely to be able to meet the employer's legitimate expectations.

[140] In this case, the employer stated that it could not conclude that the grievor had the potential to behave acceptably in the future. Specifically, on June 4, 2017, she acknowledged in her emailed apology that she had made an error in judgment. However, she specified in her email that even though it was a prohibited behaviour, she had chosen to keep secret her relationship to her daughter because she knew that the management team would not authorize hiring her daughter. Later, at the

adjudication hearing before me, she stated that the admission in her email did not come from her, that her former partner had made her add that sentence, and that she did not agree with that "[translation] statement" (meaning the admission). Therefore, she basically denied that her behaviour was unacceptable. According to the employer, it cast doubt on the sincerity of the remorse she expressed.

[141] The employer maintained that the grievor irreparably lost the trust that it was entitled to have in her. Thus, in its view, the disciplinary action was appropriate.

[142] Third, the employer stated that there was no causal link between the grievor's medical condition and the alleged behaviour. In her testimony, she did not state that she had told her employer during the events that her judgment errors resulted from her medical condition. In addition, no medical report or clear and convincing evidence ever established such a link.

[143] Specifically, the grievor did not present that defence to the employer during the events. Only at the grievance hearing before Ms. Johnson did she allege for the first time that her judgment errors resulted from a medical condition. That was when she presented her employer with medical reports that established that she had suffered from depression and addiction between 2012 and 2016, a period that preceded her hiring at ESDC. However, the medical reports did not specify that her health status as of the events and her alleged behaviour had a causal link.

[144] The employer added that no reason had arisen to doubt the grievor's abilities each time she recommended hiring her daughter without revealing their relationship. She had no performance issues, performed well, and was reliable.

[145] Although Mr. Thivierge and Mr. Savard were receptive to the grievor's requests for leave to remedy her personal problems, they were unaware of the extent of them and of her health issues. For example, when she separated from her partner and began the process of selling her home, Mr. Thivierge granted her the leave she requested to facilitate showing her home. Then, when she requested leave to participate in group sessions with respect to her depressive state, Mr. Thivierge and Mr. Savard granted it to her so that she could take part in the group meetings.

[146] The employer added that it did everything it could to support the grievor in her work. Yet, she never informed it that she suffered from a condition that could affect

her judgment. On the contrary, she was reliable, efficient, and professional in her duties. She effectively managed major budgets.

[147] Thus, only later, at the grievance hearing before Ms. Johnson, did the grievor raise the possibility that her medical condition had influenced her judgment during the alleged events. The employer then agreed to consider the possibility as long as evidence supported her words. Therefore, it suggested to her that she send specific questions to her doctor so that the doctor could specify whether her medical condition and alleged conduct had a causal link. The questions were necessary because the medical reports she had brought to the employer's attention at the grievance hearing were not recent and dated to before ESDC hired her (from 2012 to early 2016). Therefore, it did not know her medical condition's impact on her judgment.

[148] The employer relied on some decisions to justify its position.

[149] In *Peterson v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 29, the Board stated that it was not the employer's burden to prove or disprove that a medical defence existed. The grievor had the burden of proving such a defence.

[150] According to the employer, in this case (as in *Peterson*), the grievor failed to establish a diagnosis or clear and convincing evidence related to her status that would have been retroactive to the time of the alleged conduct. She failed to present such evidence both before the employer and at the adjudication hearing before me. Thus, the employer was unaware of the existence of a link between her health and alleged conduct, and it could not consider those facts as mitigating factors. In *Peterson*, the Board stated the following at paragraph 126:

> *[126] As the Supreme Court of Canada stated as follows in* Cie minière*, at para. 13:*
>
> > 13 … [A]n arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review **at the time that it was implemented**. Accordingly, once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator, fair and equitable….

[Emphasis in the original]

[151] The employer stressed that because the grievor's medical condition and her alleged conduct had no link or nexus, she did not establish a medical defence. The Board stated the same as follows in *Shandera v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 26 at para. 349:

> *[349] I carefully reviewed the jurisprudence that the employer cited and concluded that no matter the test that is applied to the circumstances of this case, the grievor has not established a medical defence as there is no demonstrated link or nexus between his health and the misconduct. In the absence of that link, clearly, there has been no displacement of responsibility from the grievor to render his conduct less culpable.*

[152] The employer added that the grievor knew the difference between right and wrong and that she knew what she was doing, as was so in *Chatfield v. Deputy Head (Correctional Service Canada)*, 2017 PSLREB 2. In that case, the adjudicator stated the following at paragraph 57:

> *[57] As the former Board noted in* Casey v. Treasury Board (Public Works and Government Services Canada)*, 2005 PSLRB 46 at paras. 190-191, it cannot be inferred that a disability like alcohol addiction has any bearing on a serious act of misconduct in the absence of any evidence to that effect. The only conclusion that can be drawn in such circumstances is that the employee "knew the difference between right and wrong" and understood what she was doing, particularly given that the grievor said that she had ceased "binge drinking" by mid-January 2012.*

[153] The employer heavily emphasized the fact that the grievor failed to present it with clear and convincing evidence, for example, from a qualified practitioner, establishing that the medications she took or her medical condition could have affected her state of mind to the point that she should be relieved of all responsibility for her actions. Thus, according to the employer, I should not give much weight to her defence that she should not be held responsible for her alleged conduct. The Board concluded the same as follows in *Gauthier v. Canada Revenue Agency*, 2017 PSLREB 57 at para. 85:

> *[85] I am not inclined to give much weight to the grievor's explanations of the effect of her painkilling medication on her judgment and as justification for her actions. No evidence from a qualified practitioner was presented to establish that the*

> *medication she was taking could affect her state of mind to the point where she should be excused from any responsibility for her actions.*

[154] The employer insisted that the link between an addiction and adverse treatment cannot be assumed; it has to be based on evidence. In support of that argument, it brought *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, to my attention, in which the Supreme Court of Canada stated the following at paragraph 39:

> ***39*** *It cannot be assumed that Mr. Stewart's addiction diminished his ability to comply with the terms of the Policy. In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether the protected characteristic is a factor in the adverse impact will depend on the fact and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence:* Health Employers Assn. of British Columbia v. B.C.N.U.*, 2006 BCCA 57, 54 B.C.L.R. (4th) 113, at para. 41.*

[155] The employer also brought *Aujla v. Deputy Head (Correctional Service of Canada)*, 2020 FPSLREB 38, to my attention. That case mentioned that one cannot assume that an addiction diminished an employee's ability to comply with workplace rules. The burden imposed on an employee seeking to establish a nexus between his or her disability and an alleged adverse impact is heavy. The Board wrote the following at paragraphs 112 and 113:

> *[112] In* Stewart v. Elk Valley Coal Corporation*, [2017] 1 SCR 591("*Elk Valley*"), a failure to comply with the company's drug policy resulted in the employee's termination. The Supreme Court of Canada rejected the argument that the employee's addiction was a factor in the dismissal. At paragraph 39, the Court found that it cannot be assumed that an addiction diminishes an employee's ability to comply with workplace rules. That case elevates the burden on an employee seeking to establish a nexus between his or her disability and the claimed adverse impact.*
>
> *[113] It cannot be assumed that because the grievor has a substance-abuse disorder, the nexus is automatic. There is no evidence that the employer was even aware that he had a disability. It was never made aware that he had that disorder; in fact, he repeatedly denied using cocaine. In addition, even if he has such a disorder, there is no evidence to link it to his termination. There is no evidence that he lacked the capacity to make rational*

> *choices or that he lacked the ability to follow the employer's policy. Dr. Jack testified that he knew right from wrong. He testified that he knew that using cocaine was wrong. He told Dr. Jack that he feared for his job. Therefore, there is no* prima facie *evidence of discrimination.*

[156] In this case, the employer recognized that it had a duty to inquire about the grievor's alleged disability, which it tried to do. However, she did not provide it with any clear and convincing evidence of a causal link between her medical condition and her alleged conduct.

[157] In addition, the employer wished to reply to the grievor's statement that she was unaware of the nature of the disciplinary hearing in which she participated on June 16, 2017. It did not agree with the statement. It adduced into evidence an email sent to her on June 12, 2017. In it, Mr. Savard informed her that she would be invited to a disciplinary hearing so that she would have "[translation] the opportunity to explain herself formally." He added that she could be accompanied by a union representative. The dates June 15 and 16 were suggested, subject to "[translation] any major difficulties".

[158] For those reasons, the employer stated that the grievor did not establish that her medical condition prevented her from complying with the two codes and with Appendix B of the Policy.

B. For the grievor

[159] The grievor stated that she recognized that the employer had a valid reason for imposing discipline for her alleged behaviour. However, termination was excessive in the circumstances. It did not give sufficient weight to the mitigating factors.

[160] First, with respect to the alleged conduct, the grievor did not dispute that she violated some provisions of the codes and of Appendix B of the Policy. However, according to her, as mentioned, the employer did not consider the mitigating circumstances.

[161] The grievor stated that her work performance in the public service since 1997 was excellent. However, she regularly suffered from episodes of depression. Her condition steadily deteriorated at work in 2016 and in 2017. Because of her condition, she was unable to perceive the consequences of her decisions.

[162] Second, with respect to the most appropriate disciplinary action in this case, the grievor stated that the employer did not give sufficient weight to the mitigating factors, which included her 20 years of public service. As Mr. Thivierge noted, in 2016, among other things, her references stated that she had excellent judgment, was organized, and had good control of her files. She added that for 19 years, she was a high-performing employee with good judgment. Under the circumstances, what was the explanation for her showing incredibly poor judgment in 2016 and 2017? She stated that it was because of on one hand the medication she was taking that she was finally able to wean herself from in November 2016 and on the other hand her feeling deep personal and professional distress then because of her depressive state. Because of that distress, she was unable to complete all her work duties, and, discouraged and exhausted, she asked for her daughter's help.

[163] The grievor stated that the employer's three witnesses all confirmed that when they chose to terminate her, they gave no weight to her medical condition. However, her employer knew since fall 2016 that she suffered from a medical condition. At that time, she was depressed and was seeing someone about a gambling addiction. In March 2017, she also suffered a relapse. According to her, the employer had the duty to ask her questions then, to check whether her lack of judgment was connected to her medical condition.

[164] The grievor stated that several signs demonstrated that her life was not going well. When she began in her position, the breakup occurred, after more than 20 years of marriage. In addition, according to her, her depressive state adversely affected her thinking, and her memory was affected. She asked Mr. Thivierge for authorization to attend group therapy near the end of 2016. She was absent on sick leave in January and February 2017. Beginning in January 2017, she also had difficulties with her pay, and her questions about the Phoenix pay system were not answered. However, I note that she adduced no related evidence. She stated that she had been left behind. Given all those difficulties, she said that she suffered another depressive episode and that she landed in hospital in March 2017. In April 2017, she requested leave to receive therapy. Then on Sunday, June 4, 2017, she expressed all her despair in her email to her supervisors.

[165] The grievor stated that knowing all that, the employer should have considered the fact that her judgment could have been affected by her condition. In addition, she

provided medical information to the employer at the grievance hearing before Ms. Johnson.

[166] According to the grievor, the trust that the employer was entitled to have in her could be restored. However, the employer did not really examine that possibility. Instead, its decision was based solely on the seriousness of her alleged conduct or on the seriousness of her error.

[167] Specifically, the grievor stated that if the trust that the employer was entitled to have in her was truly broken, it would not have allowed her or asked her to work overtime to prepare the strategic presentation for Ms. Boisjoly on June 19, 2017. Instead, if the trust it was entitled to have in her was truly affected, it would have suspended her while waiting to make a decision about the appropriate disciplinary action.

[168] The grievor insisted that she is logical when she is in a normal state. She showed poor judgment because she was ill.

[169] The grievor brought *Basra v. Canada (Attorney General)*, 2010 FCA 24 at para. 24, to my attention. In that case, on learning directly from the Crown prosecutor that criminal charges had been filed against the appellant for events that had taken place 18 months earlier, the employer suspended the appellant without pay indefinitely while awaiting the results of an investigation. The decision was upheld several times, and the appellant challenged his suspension without pay on the grounds that it was a disciplinary action.

[170] According to the grievor, in this case, she would have been suspended without pay as was Mr. Basra had the employer's trust in her drastically deteriorated. On the contrary, she was not suspended, and the employer trusted her with presenting the budgets to Ms. Boisjoly.

[171] The grievor also brought *Da Cunha v. Treasury Board (Employment & Immigration Canada)*, PSSRB File No. 166-02-24725 (19931108), to my attention. In that case, the grievor was an immigration advisor. He was removed from his duties for intervening in immigration cases involving members of his family. He had sent messages to the visa offices in New Delhi, India, about applications from his nephew and his nephew's partner, using federal government stationery and

telecommunications equipment. The grievor had also processed and approved his sponsorship undertaking. In addition, he had not checked whether the appropriate duties had been paid in New Delhi. The actions violated the *Conflict of Interest and Post-Employment Code for the Public Service*. On one hand, the adjudicator in *Da Cunha* was not convinced that the grievor truly appreciated the seriousness of his actions. On the other hand, she decided that the termination was not justified, given his record of 11 years of discipline-free service and recommendation letters. The adjudicator also noted that the 11-month delay in the investigation had been disproportionate. Thus, it seemed that the employer had not lost confidence in the grievor's abilities. He was reinstated to his duties.

[172] Therefore, the grievor stated that if in *Da Cunha*, the trust that the grievor's employer was entitled to have in him could be restored, then the trust that the employer in this case is entitled to have in the grievor could also be restored.

[173] The grievor also stated that in their book entitled *Canadian Labour Arbitration*, at 7:4424, about an employee's state of mind, authors Brown and Beatty state that a mitigating circumstance closely linked to an employee's ability to change his or her behaviour is the employee's intent and state of mind at the moment of the alleged conduct. According to that excerpt, premeditated or persistent negligence is always considered more reprehensible than a momentary failure and an absence of malicious intent. According to the authors, it is especially true when an employee allegedly acted fraudulently or abused or challenged the employer's authority.

[174] Conversely, according to Brown and Beatty, adjudicators have modified the discipline imposed when an employee's negligence arose from these and other similar reasons: a reasonable error committed in good faith, domestic and emotional issues, a medical condition, incorrect orders from a superior, alcohol or drugs, a gambling habit, or provocation by clients or other employees.

[175] Brown and Beatty conclude that when the employee's state of mind displayed characteristics that were both reprehensible and irreproachable and when that state of mind raised disciplinary considerations and other human-rights considerations, adjudicators have tried to balance the two. Nevertheless, and no matter the approach adopted, the outcomes of these cases were strongly influenced by the degree of

addiction or distress and by the extent to which the employees in question were able to act intentionally and to control their behaviour.

[176] In this case, the grievor stated that the evidence showed the lack of malicious intent on her part, that she was strongly influenced by the psychological distress that resulted from her medical condition, and that under the circumstances, the termination was unjustified, given her record.

[177] Third, according to the grievor, the evidence showed that discrimination occurred. The employer's witnesses testified that they were informed of her health issues only in fall 2016. According to her, instead, the employer chose to turn a blind eye to the obvious signs of distress, particularly the many periods of sick leave she requested. According to her, the alleged conduct undoubtedly merited disciplinary action but something lesser than termination.

[178] The grievor also stated that she was confused during the disciplinary hearing on June 16, 2017. Her request to postpone the hearing was denied. She was overwhelmed with work and stressed because of her strategic budget presentation of Monday, June 19, 2017. Therefore, she was unable to present her position well at the hearing.

[179] The grievor also brought to my attention *Douglas v. Treasury Board (Human Resource Development Canada)*, 2004 PSSRB 60. In that case, the grievor was terminated when an investigation revealed that she had participated in processing the application of her partner, with whom she was living when the application for a skills-development benefit was submitted. Her employer concluded that she had given preferential treatment to a member of the public known to her, placed herself in a conflict of interest, released confidential information to that person, falsified documents, attempted to fraudulently obtain employment benefits for that person, lied to her team leader, and accessed confidential information for personal purposes. She attributed her actions to the fact that she suffered from bipolar disorder and that she was in the midst of a hypomanic episode as of the incident.

[180] The adjudicator concluded that the employer had established the grievor's alleged conduct. With respect to the medical defence, the adjudicator held that the grievor's illness had contributed to her making impulsive decisions. He was convinced that her illness had influenced her judgment to the point that she was no longer able to tell right from wrong and that she could not understand that she was committing

fraud and violating departmental policies and the conflict-of-interest code. He relied on the balance of probabilities to reach that conclusion. He dismissed the medical defence but stated the following at paragraph 116:

> *[116] It is my belief that the grievor's illness contributed to her making impulsive decisions, such as her living large, buying a $20,000 truck, and starting a relationship with Mr. "S". However, on the balance of probabilities I am not satisfied that her illness marked her judgment to the point that she did not realize that she was committing fraud and violating departmental policies.*

[181] Therefore, the adjudicator concluded that the grievor acted inappropriately and that her infractions were very serious because she held a position of trust and worked under minimal supervision. However, he concluded that they were one-time acts of convoluted indiscretion. He held that she had worked for 20 years, that she had a good professional record with no infractions, and that she admitted to giving preferential treatment and placing herself in a conflict of interest. Ultimately, she was reinstated to her position, but she was not entitled to any sum or benefits from the date of her suspension. The adjudicator ordered that she continue to receive appropriate medical treatment and that she participate in a monitoring program in cooperation with Health Canada and her doctor.

[182] The grievor also brought my attention to *Gannon v. Canada (Attorney General)*, 2004 FCA 417, in which the Federal Court of Appeal overturned the remedy that the adjudicator granted in *Gannon* (2002). Mr. Gannon was a human resources officer. His former partner had sued him for support for their child. In the context of that suit, he filed documents with the court of appropriate jurisdiction in which he falsely declared a lower income than what he was receiving. That earned him a five-day suspension from his employer. He then hired his former partner despite his employer's policy prohibiting human resources officers from hiring family members. He asked his former partner not to reveal their former relationship to his employer. However, in the end, his employer found out about it.

[183] Mr. Gannon was suspended while awaiting the outcome of an investigation into the allegations of abuse of authority because he had allegedly intimidated and harassed his former partner during her employment. During the investigation, Mr. Gannon's employer noted that he had applied for positions in four federal departments by submitting a CV in which he falsely claimed to have a bachelor's

degree. His employer later terminated him, retroactive to the date of his suspension. At adjudication, Mr. Gannon's employer stated that he had not been forthright and that he had not acknowledged that his conduct was unacceptable. In addition, Mr. Gannon held a position of trust, and his employer could no longer trust him.

[184] The adjudicator concluded that the evidence did not confirm the allegation by Mr. Gannon's employer that he had used unacceptable hiring practices. However, she deemed that even had Mr. Gannon's former partner been qualified to hold the position for which he had hired her, the hiring was inconsistent with their employer's policy because Mr. Gannon and his former partner continued to have a personal relationship. The adjudicator's findings included that the fraudulent CV that Mr. Gannon wrote with the clear intention of obtaining advancement warranted discipline. However, she found that under the circumstances, termination was an excessive disciplinary action. She also found that reinstating Mr. Gannon to his duties would not have been warranted. Thus, instead of reinstating him, she granted him a benefit of six months' pay. Nevertheless, a judicial review of that finding was granted. Given the adjudicator's finding that the termination was excessive, according to the Federal Court of Appeal, she should have rescinded the termination and substituted a lesser penalty (Mr. Gannon was later reinstated instead of receiving compensation in salary).

[185] In *Sample v. Treasury Board (Revenue Canada)*, PSSRB File No. 166-02-27610 (19970604), the disciplinary action was also reduced to a suspension, for eight months in that case. The grievor was an auditor who had purchased a fifth-wheel trailer, which was delivered to his home. To avoid paying the GST, he registered the vehicle to his partner's nephew (who was eligible for registered Indian status). Struck by remorse, he returned to the dealership about a month later and paid the applicable GST. A month after that, he learned that his employer was investigating the trailer purchase. At a meeting, he admitted to buying it. He was later terminated on the grounds that the public had lost confidence in his integrity and that his actions were incompatible with the trust that his employer was entitled to have in him as a Revenue Canada officer.

[186] The adjudicator in *Sample* had received evidence that the grievor's family had exerted a great deal of pressure on him to register the trailer in the name of his partner's nephew. Although that did not justify his actions, the adjudicator accounted for the fact that the grievor had suffered emotionally and financially, that he had voluntarily paid the GST before being caught by his employer, that he had many years

of service, and that he had no disciplinary record. In the circumstances, the adjudicator did not believe that the trust that the grievor's employer was entitled to have in him had been irreparably damaged. Therefore, she deemed that the termination was an excessive disciplinary action, and she substituted an eight-month suspension for it.

[187] The grievor also brought to my attention *Mellon v. Human Resources Development Canada*, 2006 CHRT 3 at para. 101. In that case, the complainant had agreed to take on a new position, which she found was very difficult. Although she enjoyed her work, at one point, it became too much for her and began to affect her health. Her doctor decided to put her on leave for three weeks and prescribed her an antidepressant.

[188] At paragraph 101, the Canadian Human Rights Tribunal noted that the complainant had alerted her superior and her supervisor at that time that her work was not being completed not because she was uninterested in completing it but because of a health issue. For its part, based on information it obtained from her co-workers, her employer decided that it was a performance and not a disability issue. The Canadian Human Rights Tribunal found that the complainant was a victim of discrimination on the basis of a disability, contrary to s. 7 of the *Canadian Human Rights Act*.

[189] The grievor also referred to *Rahmani v. Deputy Head (Department of Transport)*, 2016 PSLREB 10. The employer terminated the grievor in that case for committing a violent act in the workplace. According to him, it did not consider the state of his health as of the incident. The evidence showed that his conduct merited a severe disciplinary action but that his state of mind and the medications he was taking might have influenced his behaviour on that day.

[190] At the termination, the grievor's employer was aware of his medical condition. Nevertheless, it chose to impose discipline without considering his state of health, and it disregarded several mitigating factors. The Board deemed that the termination was unjustified and substituted a suspension. In addition, the Board found that his disability was a factor in the decision to terminate him. Thus, he had established *prima facie* evidence of discrimination. His employer did not demonstrate a professional

requirement that would have justified its decision to terminate him in response to an isolated act. The grievor was reinstated to his position.

[191] Finally, the grievor emphasized that in *Thompson Products Employee's Association v. TRW Canada Ltd.* (2013), 229 L.A.C. (4th) 382 at paras. 15, 16, 23, and 25, the arbitrator considered medical evidence referring to treatment the employee (Mr. Lockhart) underwent after a period of absenteeism. He worked in the private sector. He was absent for a total of 33 consecutive days. Out of those 33 absences, only 11 times did he notify his employer that he would be absent.

[192] The grievor argued that in this case, as in *Thompson Products Employee's Association*, there was no history of unjustified absence or wrongdoing on Mr. Lockhart's part but that his behaviour and compliance with his professional obligations clearly and suddenly declined. She argued that her illness influenced her judgment to the point that she could no longer distinguish right from wrong and that she did not understand that she had made a mistake and had violated the employer's policies and the conflict-of-interest code.

[193] In light of the case law and all the arguments, the grievor stated that the discipline that the employer imposed on her was excessive and that discrimination occurred. On one hand, her state of health was not considered, and on the other hand, the management team did not truly examine whether the employment relationship was repairable. Therefore, she asked that the termination be replaced by a 20- to 30-day suspension.

V. Reasons

A. The grievor's alleged conduct

[194] The grievor did not dispute the fact that she violated some provisions of the ESDC Code, the Public Sector Code, and Appendix B of the Policy. However, she added that the provisions of the *Public Service Employment Act* do not apply to casual employees. Therefore, she claimed that she originally believed that no conflict of interest occurred when she recommended hiring her daughter for a casual position.

[195] Whether or not I give any weight to that argument, it remains that continuously and repeatedly over nine months, clearly, the grievor concealed her relationship to her daughter from the management team and that the ESDC Code provides that an

employee who participates in the decision-making process in a staffing action cannot help members of his or her family who are competing for a job. In this case, by failing to withdraw from the recruitment process and failing to leave the assessment duty to a third party, the grievor initiated the hiring of her daughter. She thus helped her daughter obtain first a casual position and then a term position. These facts alone give rise to a conflict of interest.

[196] In addition, the grievor was familiar with the conflict-of-interest rules in the codes. For example, in her Sunday, June 4, 2017, email, she acknowledged that it had been inappropriate to conceal her daughter's identity from the management team. She wrote, "[translation] … the oath made me realize that there could be a problem; it made me think about the Code of Conduct and the conflict-of-interest policy. I told [my daughter] not to worry about me and that I would bear the consequences."

[197] At the adjudication hearing before me, the employer argued that the relevant provisions of the codes and Appendix B of the Policy include the following: 1) the expected behaviour in point ii) of the ESDC Code that prohibits granting preferential treatment to a family member; 2) the behaviour expected at sections 3.2 and 3.3 of the Public Sector Code on integrity and preventing any real, apparent, or potential conflicts of interest; and 3) section 2.5 of Appendix B of the Policy, which sets out how an employee must avoid any preferential treatment.

[198] The evidence showed that the grievor recommended hiring her daughter for a casual position and for a non-advertised term position without revealing their relationship to the management team. Those actions were contrary to the rules in both codes and Appendix B of the Policy.

[199] Therefore, I find that clearly, the grievor violated the provisions in question. Through her conduct of failing to disclose her relationship to her daughter to the management team, she placed herself in a conflict of interest. Even though she explained that she failed to disclose it to ensure that she would obtain assistance quickly, given the scale of the tasks she had to complete, nevertheless, she granted preferential treatment to a family member. Specifically, because of her conduct, a casual and then a term position were granted to her daughter without the management team's knowledge. The grievor's conduct went contrary to basic principles about the integrity of employees and of the federal public sector as a whole.

[200] The grievor's alleged conduct has been established. In addition, she acknowledged committing regrettable acts.

B. Disciplinary action

[201] Normally, I would now have to determine whether, in the circumstances and given the grievor's discrimination allegation, her conduct justified any disciplinary action. In fact, imposing discipline could not be justified if the mere fact of using discipline constituted a discriminatory act.

[202] However, at the adjudication hearing before me, the grievor stated that she recognized that the employer had a valid reason for taking disciplinary action against her for the alleged conduct. Given her admission and the fact that there is no real dispute between the parties on that issue, I find that her conduct justified disciplinary action.

C. The proportionality of the termination

[203] The heart of the dispute between the parties is the proportionality of the discipline that the employer imposed on the grievor. In other words, the issue is whether termination was excessive in the circumstances.

[204] According to the employer, the termination was reasonable, and the Board should not intervene. From the start, I must specify that in no way am I limited by the employer's assessment of the circumstances. The adjudication hearing before me was a *de novo* hearing (see *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)(QL)). That said, my task is to assess the circumstances in light of the evidence presented to me. As mentioned earlier, I must decide whether the termination was excessive in the circumstances.

[205] According to the grievor, the termination was excessive, and furthermore, the failure to consider her medical condition as a mitigating factor was "[translation] discriminatory". She encouraged me to follow an approach similar to the one the Board followed in *Rahmani* and to consider the discriminatory nature of the specific disciplinary action that the employer took against her.

[206] I find it ambiguous to deal with the discrimination allegation at the stage of analyzing the proportionality of the disciplinary action. Surely, it is more useful to consider an employee's medical condition during the assessment of the alleged

conduct rather than at the stage of selecting a disciplinary action proportional to the seriousness of the conduct. For example, an employee's medical condition could give rise to a duty to accommodate that employee. Therefore, how could taking any kind of disciplinary action be justified if the employer failed to accommodate in such circumstances?

[207] In any event, the grievor asked me to find that her medical condition explains her conduct in part and that termination was excessive in the circumstances. Basically, she asked me to consider that her medical condition mitigated the seriousness of her conduct; therefore, the debate is not subject to a classic analytical approach of human rights applying to a discrimination allegation but rather a customary assessment of the mitigating and aggravating factors surrounding the grievor's conduct. For the following reasons, I find that it was not established that the grievor's medical condition mitigated the seriousness of her conduct and that termination was not excessive.

[208] The employer considered these mitigating factors: 1) the grievor's years of service and lack of a disciplinary record, 2) her personal situation, 3) her acknowledgment of her mistakes, and 4) testimony about her serious and professional work. According to her, those factors argued in favour of discipline less severe than termination. She also maintained that I should consider her rehabilitative potential and submitted that the trust that the employer was entitled to have in her has not been irreparably affected.

[209] The grievor also stated that she did not have the opportunity to fully present her version of the facts to the employer at the June 16, 2017, disciplinary hearing. It assigned her the duty of making a strategic budget presentation to Ms. Boisjoly around the same time, on Monday, June 19. As a result, she focused all her efforts on preparing for that task, to the detriment of preparing her defence. Therefore, she argued that the employer's disciplinary process was unfair and unjust because it did not receive all her explanations. She did not feel respected and heard. Her request to postpone the meeting scheduled for June 16 was disregarded, without explanation.

[210] I will first address the circumstances surround the disciplinary hearing. I recognize that the grievor was juggling several responsibilities when she was responsible for presenting her version of the facts to the employer. The disciplinary hearing was important because the employer's findings and recommendations would

serve as the basis of the fate it had in store for her. It would certainly have been useful and advisable then for it to give her the opportunity to fully present her version of the facts.

[211] In fact, the disciplinary hearing was considerably important, and while the employer was responsible for managing the grievor's conduct, she was also entitled to be respected and heard. In my view, the employer was responsible for ensuring that she was able to fairly present her version of the facts. I believe that it was not done when the employer refused to postpone the June 16, 2017, disciplinary hearing without explanation. In addition, the employer considered that her email of Sunday, June 4, 2017, presented a sufficiently complete version of her position and did not consult her in its disciplinary investigation. I note that on the whole, it was a distortion of the disciplinary process.

[212] However, the case law is clear that any procedural flaws surrounding the disciplinary hearing were corrected by the adjudication hearing *de novo* before me (see *Tipple*). In fact, as part of the adjudication hearing before me, the grievor had the opportunity to provide her version of the facts and to present all the evidence she believed was necessary.

[213] The grievor argued that the employer's decision to terminate her was unwarranted because it did not consider her medical condition. According to her, her judgment was affected and she adopted the alleged behaviour due to her medical condition.

[214] My view is that at the stage of the grievance hearing before Ms. Johnson, the grievor was invited to explain how her alleged conduct arose from a behavioural tendency attributable to her medical condition. The employer asked for her authorization to send questions to her doctor so that the doctor could clarify the issue. She refused the authorization and refused to answer any further questions from the employer about her medical condition. Since it received no helpful response from her, the employer did not accept her medical condition as a mitigating factor.

[215] At the adjudication hearing before me, the grievor also had the opportunity to show how her alleged conduct arose from a behavioural tendency attributable to her medical condition. Yet, although I understand that her state of mind and taking the Abilify medication might have altered her behaviour at the time, she failed to provide

me with any independent, clear, and cogent evidence suggesting that her medical condition even partially affected her alleged behaviour. Despite all the empathy I may feel for her because of the difficult circumstances she experienced at the time, nevertheless, I must find that she did not establish that her medical condition affected her judgment with respect to her alleged behaviour.

[216] I also believe that this case and the decisions that the grievor submitted have important distinctions. According to her, she should be reinstated to her position or to an equivalent position, as was the grievor in *Douglas*. However, I note that in *Douglas*, a qualified independent psychiatrist performed a medical assessment, and the witness stated that the grievor's actions with respect to Mr. "S" could be attributed to her illness (see paragraph 46 of *Douglas*). No such evidence was adduced in this case.

[217] And in *Mellon*, I note that evidence of the complainant's disability was presented to her employer and that her doctor confirmed that she was unfit to work until further notice because of her disability (emotional stress related to her work). No such evidence was presented in this case.

[218] Finally, in *Rahmani*, the Board found that the grievor's alleged behaviour was at least partially attributable to his state of health. In that case, the evidence showed his medical condition (his disability). As I have already mentioned, the grievor did not present any independent, clear, and convincing evidence at the adjudication hearing before me that would allow me to find that her medical condition affected her alleged conduct in this case.

[219] At the adjudication hearing before me, the grievor explained that her new doctor was unfamiliar with her medical history. I accept that statement. However, it remains that she had the burden of proving that her alleged medical condition mitigated the seriousness of her alleged behaviour. At the least, she could have discussed the circumstances with her doctor. Because she had the burden of proving the medical condition on which she based her claims and did not, I cannot find that that condition constituted a mitigating factor, in the circumstances.

[220] Similarly, I considered the following factors when I reached the finding that the employer demonstrated that termination was not excessive.

[221] First, I recognize that during the events, the grievor was in a difficult period on a personal level. She was troubled and in distress when she recommended hiring her daughter. Nevertheless, the evidence did not show clearly and convincingly that her medical condition was such that her judgment could have been affected to the point of violating the codes and Appendix B of the Policy or of lacking integrity. She worked effectively and demonstrated reliability. The fact that she used sick leave after informing the employer about her spousal issues, her episodes of depression, and her gambling addiction were insufficient to show a medical condition that affected her judgment as a manager.

[222] Second, the grievor's many years of service and lack of a disciplinary record normally would constitute mitigating factors. However, although these factors are generally considered arguments in favour of a less-severe disciplinary action, I believe that as was noted in *Pagé v. Deputy Head (Service Canada)*, 2009 PSLRB 26, with respect to a breach of trust and a conflict of interest, the length of service can also work against the grievor because it reinforces the finding that she knew at the time in question what would constitute a conflict of interest and that she understood its objective seriousness.

[223] In *Gannon* (2002), I note that the adjudicator considered the aggravating factors, but she noted that she could not ignore significant mitigating circumstances, namely, the grievor's many years of service and professional history. She found that the termination was an excessive disciplinary action in the circumstances. The grievor in this case argued that I should reach the same conclusion. However, I note that although the adjudicator in *Gannon* (2002) found that the grievor's hiring of his former partner was inconsistent with their employer's policy because they continued their personal relationship, the adjudicator also found that the evidence did not confirm his employer's allegation that he had used unacceptable hiring practices. But in this case, the employer showed that the grievor violated the expected behaviours in point ii) of the ESDC Code, among others, which she admitted to.

[224] Third, with respect to the remorse she felt, the grievor acknowledged that concealing her relationship to her daughter from the management team was a mistake. Specifically, in her Sunday, June 4, 2017, email, she acknowledged that it had been inappropriate for her to conceal her daughter's identity from the management team.

[225] However, at the disciplinary hearing, the grievor also acknowledged that had her subordinates not discovered the relationship, she would never have revealed it because she absolutely needed immediate help. Without that immediate help, she felt deprived and powerless. Thus, in my view, she did not truly recognize the seriousness of her alleged conduct. Although I sympathize with her statement that she violated the rules to survive in her manager role in very difficult times, the fact remains that it was an undeniable lack of judgment. Therefore, I cannot conclude that this factor argues in favour of a less-severe disciplinary action.

[226] Fourth, although the grievor made the point that she did not benefit personally from her alleged behaviour, my view is that I cannot accept it as a mitigating factor. In my view, the evidence demonstrated that hiring her daughter was a quick and practical solution for her, so she certainly did benefit personally from it. In addition, she also provided a financial and professional benefit to her daughter.

[227] Fifth, the grievor's alleged conduct cannot be considered an isolated act. She concealed her relationship to her daughter from the management team several times and continually for nine months. Had it not been for the June 2, 2017, incident that brought the relationship to light, it is difficult to conclude that the grievor would have voluntarily revealed it to the employer.

[228] In addition, I believe that this case and the decisions that the grievor submitted have significant distinctions. In *Sample*, the adjudicator deemed that the trust that the grievor's employer was entitled to have in him had not been irreparably affected, since he had voluntarily corrected his error before his employer caught him. I note that that is a significant difference in facts with respect to the case at hand, in which the grievor did not disclose her relationship to her daughter before being caught.

[229] According to the grievor, just as in *Basra*, the employer would have suspended her without pay during the disciplinary process if the trust it was entitled to have in her had deteriorated drastically. However, in this case, she insisted that she had not been suspended and that the employer trusted her by asking her to carry out a strategic budget presentation to Ms. Boisjoly.

[230] I agree that while the management team was debating whether the grievor was still trustworthy, it asked her to continue her work. Ms. Boisjoly explained that it did not have probable grounds to believe that the grievor constituted a risk to workplace

health and safety. But she explained that the management team had meticulously reviewed the grievor's work to ensure its quality, given the disciplinary process under way. I accept that the grievor did not show any signs that suggested the existence of a workplace health or safety risk.

[231] The grievor also argued that if in *Da Cunha*, the trust that the grievor's employer was entitled to have in him was repairable, then the trust that the employer was entitled to have in her is also repairable. However, I note that while in *Da Cunha*, the evidence showed that the grievor's employer did not appear to have lost trust in his abilities, in this case, the evidence is different. In fact, Ms. Boisjoly testified that because the grievor held a management position, the employer expected exemplary conduct from her with respect to conflicts of interest and ethics.

[232] In fact, I believe that this situation is analogous to the one in *McEwan v. Deputy Head (Immigration and Refugee Board)*, 2015 PSLREB 53. In that case, the adjudicator deemed that the grievor's employer had sufficient grounds to justify terminating her. She held a position at the EX-01 group and level. She was terminated after an investigation led by the Public Service Commission and another one after that that her employer led about her conduct in two staffing processes. Both investigations reached the same conclusion. She was terminated for placing herself in a conflict of interest and for contravening the Public Sector Code. She used the staffing authority that had been delegated to her during two appointment processes to benefit individuals with whom she had close personal relationships. The adjudicator found that a conflict of interest constituted a very serious offence in the public service and that it was a clear violation of the Code. She found that the grievor had irreparably lost the trust that the employer was entitled to have in her, despite her lengthy career, especially at a management level. In fact, given her lengthy career, her employer had higher expectations of her with respect to her knowledge of the Code.

[233] I believe that similarly, given the nature of the grievor's duties and the seriousness of her alleged conduct, the employer was justified considering that the trust was irreparably damaged that it was entitled to have in her. Thus, in light of the aggravating and mitigating facts before me, I find that termination was not excessive in this case.

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

(The Order appears on the next page)

VI. Order

[235] The grievance is denied.

April 13, 2021.

FPSLREB Translation

Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board