Date: 20210831

File: 566-34-38742

Citation: 2021 FPSLREB 99

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

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

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BETWEEN

SHARON GORDON

Grievor

and

CANADA REVENUE AGENCY

Employer

Gordon v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Aaron Lemkow, counsel

For the Employer: Elizabeth Matheson, counsel

Heard by videoconference, February 15 to 16, 2021.
Written submission filed June 10 and 24, and July 2, 2021

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Sharon Gordon ("the grievor") began working with the Canada Revenue Agency ("CRA" or "the employer") in October 2008 as a call-centre client-service agent. In June 2014, she became a collections officer in the Revenue Collections Division ("the division") of the CRA's Saint John, New Brunswick, Tax Services Office.

[2] On August 13, 2015, the grievor made a courtesy call to a taxpayer to advise her that interest was accruing on an amount owing on her account. She then asked to speak to the taxpayer's husband. When told he was not there, she asked if she could leave a message or be given another number where she could reach him. When the taxpayer challenged the grievor as to her right to ask for an alternate phone number for the husband, the grievor told the taxpayer that she could call anyone for information about any of her clients.

[3] The employer alleged that by doing so, she disclosed confidential information about the taxpayer's husband, specifically that he was a client of hers, and therefore, as the wife already knew that the grievor was a collections officer, that he owed a tax debt to the CRA. On March 15, 2016, the grievor was suspended for eight days for this alleged violation of policy, as well as for several instances of alleged unprofessional communications with taxpayers.

[4] She filed a grievance on April 16, 2016. Her bargaining agent, the Public Service Alliance of Canada, submitted that she had not breached any policy on disclosure and had followed the rules as best she could, although they were not clear. As well, her manner of speaking with taxpayers, while at times curt, could not reasonably be characterized as unprofessional. There was no cause for discipline. In the alternative, if there was any confidentiality breach, it was minor and did not warrant an eight-day suspension.

[5] Christine Babineau was the manager of the collections division at the time. Michel Lafleur was the manager of the Investigation Support and Analysis Section of the Internal Affairs and Fraud Control Division ("IAFCD"). They each gave testimony on behalf of the CRA. The grievor testified on her own behalf.

[6] The grievor's discipline was based on the allegation that she had breached two specific sections of the *Code of Integrity and Professional Conduct*, however, this policy document was not entered into evidence and there was no evidence put before the Board that the grievor had engaged in misconduct that breached this code. The testimony and submissions referred to an earlier policy titled the *Code of Ethics and Conduct* which was entered in evidence. This policy did not contain the sections cited by the employer as the basis for the discipline, although it did require similar standards of conduct albeit expressed in different language.

[7] Accordingly, I find that the employer did not meet its burden to prove the alleged misconduct upon which the discipline was based and grant the grievance on that basis. I also find that, in any event, the grievor's conduct has not been proven to amount to misconduct that breached either code of conduct.

II. Summary of the evidence

A. Christine Babineau, Manager, Revenue Collections Division

[8] Ms. Babineau had been the manager of the division for a year-and-a-half at the time of these events. The grievor's team leader, Roxanne Leblanc, had overheard part of the grievor's August 13, 2015 courtesy call to the taxpayer. Ms. Babineau testified that Ms. Leblanc came to her office to tell her that the grievor had breached confidentiality and had disclosed taxpayer information.

[9] Collections officers must diarize every contact with a taxpayer. The grievor's diary entry with respect to the alleged disclosure incident reads as follows:

> *13 Aug 2015 - SXG071 (9889-COLL) - 3,667.73*
>
> *CLIENT CALLED OFFICE,*
>
> *TAXPAYER called again and stated we must have been disconnected and can she speak with the supervisor. I advised her that I can take her number and have her return her call. She advised me that the phone number is her cell phone and it will be recorded and she wanted to know if she will speak with her. I stated that is up to her to advise you of our policy and procedures. I stated I was calling as a courtesy call to advise you that you had an amount owing and then to get some info on your husband. She thanked me for the courtesy call but stated I had no business asking about her husband. I advised her that I can call anyone to get info regarding any of my clients. She stated she would speak with her lawyer regarding this. I said yes you should do that and that was* [the] *end of the call. I stated have a nice day.*

[*Sic* throughout]

[10] In Ms. Babineau's view, when the grievor said that she could call anyone to get information about any of her clients, it exposed the fact that the taxpayer's husband was also a client. Because the grievor had just spoken to the wife about the interest accruing on her own outstanding balance, the wife knew that the grievor was a collections officer. By conveying the information that her husband was a client as well, the grievor had, therefore, disclosed to the wife the confidential information that her husband had a tax debt outstanding.

[11] Ms. Babineau reported this to the IAFCD on September 11, 2015. On September 29, 2015, the assigned investigations analyst, Ulrich Mercier Kamga, asked for details in order to proceed with a preliminary investigation. Ms. Babineau asked Ms. Leblanc to document the allegation. She then forwarded Ms. Leblanc's account of what had occurred to the IAFCD.

[12] Once the IAFCD had completed its preliminary investigation and decided that management should continue with an investigation, it became Ms. Babineau's responsibility to work with Labour Relations to prepare for a fact-finding interview with the grievor. She had had some experience with investigations, having conducted several, and characterized the scale of this one as small, with medium complexity.

[13] Ms. Babineau prepared questions to ask the grievor and arranged for a fact-finding interview to take place on November 12, 2015. The interview was the first time she discussed the alleged disclosure of confidential information or the allegations of unprofessional communications with the grievor.

[14] The grievor, her bargaining agent representative Angela Campbell, Ms. Babineau, and Ms. Leblanc attended the interview. Both Ms. Babineau and Ms. Leblanc took notes of the grievor's answers. At the end of the interview, she was asked to review and initial each page of their notes, to confirm their accuracy.

[15] At the fact-finding interview, the grievor was asked if she had checked whether the wife was authorized on her husband's account before making the call. If she had been authorized, the grievor could have spoken to her about her husband's tax affairs. The grievor said that she did not know if the wife was authorized on the husband's account. She had not checked because she was not planning to discuss his account

with her. She just asked if she could speak with him, leave a message, or be given an alternate phone number for him.

[16] Asked if she had anything to add at the end of the fact-finding interview, the grievor stated, "I don't feel I did anything wrong - if there is a policy that says I can't ask for [the] husband's number then I need to know. My understanding is we can get information from others to locate a client." Both Ms. Babineau and Ms. Leblanc recorded this statement in their notes.

[17] On November 27, 2015, Ms. Babineau sent her report of the fact-finding interview to the IAFCD. Her report concluded that the grievor had not followed proper procedure to ensure that she was safeguarding taxpayer information. She stated that when associating spousal accounts, the first step is to verify if the spouses are authorized on each other's accounts. The grievor should have done so before contacting the wife. As well, the grievor had not ensured that only the minimum information was disclosed when speaking with an unauthorized person. This could have been accomplished by simply calling, asking to speak to the husband, and if he was not there, leaving a number where he could call the agency back. By speaking to the wife first about her balance, the grievor divulged to an unauthorized individual that the husband owed taxes.

[18] The second part of the fact-finding interview addressed the grievor's conduct while interacting with taxpayers.

[19] Ms. Babineau testified that Ms. Leblanc had discussed three previous instances of unprofessional conduct with the grievor in July 2015. She had provided some coaching, had suggested some training, and had advised the grievor verbally and in writing that as it was the third instance that had had to be addressed, any more could lead to disciplinary measures.

[20] The CRA alleged at the hearing that four more instances of unprofessional conduct occurred, on August 13, September 18, October 20, and October 28, 2015. Ms. Babineau testified that she was aware of them because Ms. Leblanc had either had to respond to supervisor callback requests or had discovered them when she reviewed the grievor's diary entries. Ms. Babineau had no direct knowledge of any of the instances. Ms. Leblanc did not testify.

[21] The *Disciplinary Action Report* refers to three incidents, not four, but does not indicate on which three the discipline is based, nor what the grievor was alleged to have said to the taxpayers.

[22] A disciplinary meeting was held on February 2, 2016, to advise the grievor that the division would address the issues that came out of the investigation. On March 15, 2016, the *Disciplinary Action Report* was issued, advising the grievor that she was suspended for eight days.

[23] To determine the appropriate amount of discipline, Ms. Babineau had consulted the *Table of Disciplinary Measures* set out in the CRA's *Directive on Discipline*. She explained that infractions are grouped by category, with group 1 being the least severe, and group 5 being the most severe.

[24] The grievor's alleged disclosure of taxpayer information was determined to be in the category described as, "Negligence that results in failure to secure taxpayer or similar information or sensitive information" - a group 4 infraction.

[25] The alleged unprofessional conduct was considered to fall in the category described as:

> *Conduct that could negatively affect the CRA's image, or bring the CRA or Public Service into disrepute (for example, commenting on the CRA or disclosing proprietary CRA information on a blog or social networking site, unprofessional behaviour when acting on behalf of the CRA, violations of regulations or legislation including the* Criminal Code*)*

[26] This category has checkmarks in groups 2, 3, 4, and 5, indicating that depending on the severity, it could be considered as anything from a group 2 to a group 5 infraction.

[27] Ms. Babineau testified that when faced with multiple acts of misconduct, management must work within the range provided in the *Table of Disciplinary Measures* for the most serious act of misconduct and treat any additional misconduct as an aggravating factor. As the grievor's disclosure of taxpayer information was the most serious act of misconduct, the instances of unprofessional behaviour were treated as aggravating factors.

[28] Ms. Babineau considered the fact that the grievor had been warned that subsequent instances of unprofessional conduct could be subject to discipline when the team leader brought these issues to her attention in July 2015. She said that Ms. Leblanc had coached the grievor and had recommended courses to help her change her behaviour, but that the unprofessional conduct had continued to occur.

[29] The most important aggravating factor overall, in Ms. Babineau's view, was the lack of remorse and lack of recognition that any misconduct had occurred. She had hoped that the grievor would recognize that she had failed to secure taxpayer information and that her behaviour on the phone with taxpayers was unprofessional, but there was no such recognition on the grievor's part.

[30] Ms. Babineau also considered as mitigating factors that the grievor had a good employment record and that her performance evaluations were mostly positive. As well, her failure to protect taxpayer information had been an isolated incident. It was the result of a momentary aberration and had not been planned.

[31] The suggested discipline for a group 4 infraction is a 5- to 30-day suspension. Ms. Babineau testified that she started with the minimum 5 days for the disclosure, then looked at the aggravating and mitigating factors and concluded that 8 days would be appropriate. The aggravating factors of the grievor's refusal to recognize any wrongdoing, and her continued unprofessional behaviour, warranted imposing the additional 3 days.

[32] On cross-examination, Ms. Babineau acknowledged that all Canadians are clients of the CRA and that there is a difference between a potential and an actual breach of confidentiality. She agreed that the taxpayer had never called to complain about the alleged disclosure and confirmed that the employer had not followed up with the taxpayer. She noted that there is no duty to do so and that following up with the taxpayer is not normal practice. She agreed that given this, the employer just assumed what the taxpayer thought.

[33] Ms. Babineau agreed that the grievor did not tell the wife that she wanted to speak to the husband about a collections matter, but pointed out that she had already revealed herself as a collections officer by speaking to the wife about her outstanding balance. She acknowledged that the grievor did not say that those were her only duties and ultimately acknowledged that she did not know what the taxpayer concluded.

[34] Ms. Babineau agreed that the grievor had followed policy when she joined the accounts of the husband and wife taxpayers. And she confirmed that despite the general rule in the *National Collections Manual* ("the manual") prohibiting leaving messages with unauthorized third parties, there was a specific exception allowing an agent to leave a message with a family member. However, she did not agree with the suggestion that this showed that the CRA was willing to tolerate slightly more information being given to family members. Rather, she said that if an agent calls a taxpayer and the spouse answers, the agent should just leave a name and number and state that the call is from the CRA, but should not mention the agent's division or the reason for the call.

[35] She acknowledged that there was no specific guidance on what an agent is supposed to do when working with spouses with the same contact information who are not authorized on each other's accounts. Ms. Babineau further agreed that the grievor specifically asked for guidance in this matter, as indicated in the fact-finding interview notes as follows: "I don't feel I did anything wrong - if there is a policy that says I can't ask for [the] husband's number then I need to know."

[36] Ms. Babineau stated that although there was nothing specific in policy about how to handle this, other sources of information were available to guide the grievor, such as the technical advisors who act as resources for the agents. Knowing that safeguarding information is paramount, if an employee is aware that anything is not clear in a situation, they should seek guidance from their team leader or a technical advisor. And, had the grievor first checked whether the wife was authorized on her husband's account, she would have been alerted to not make the call until she received advice on how to do it.

[37] As to Ms. Leblanc contacting field support a week after the incident, to ask how to contact a taxpayer in this kind of situation, Ms. Babineau stated that Ms. Leblanc was merely seeking clarification from headquarters to confirm that the employer was interpreting policy and procedure properly.

[38] Ms. Babineau confirmed that the CRA had not updated the manual or otherwise clarified the rules since the issues in this case arose, at least as of 2018 when she left the collections division. She agreed that, in general, an explanatory memo is a better

way to clarify policy than using the disciplinary process, and that when clarification is required the employer should tell employees what to do.

[39] As for the alleged unprofessional comments, Ms. Babineau agreed that the content and tone of conversations can be difficult to judge without listening to them and confirmed that she had never actually listened to the alleged unprofessional conversations. Only Ms. Leblanc had overheard the August call, and no one had listened to the September or October calls. Ms. Babineau had seen only Ms. Leblanc's excerpt of the grievor's September 18 diary entry and did not recall ever having read the whole entry. She further confirmed that she did not speak to the taxpayer who complained about the October 28 incident — only Ms. Leblanc did.

[40] Ms. Babineau acknowledged that she had denied the grievor's request to be transferred to a different team leader in the spring before the August incident. She further confirmed that the grievor had raised a conflict-of-interest concern when Ms. Leblanc attended and took notes at her fact-finding interview and agreed that Ms. Leblanc's presence would have been uncomfortable for the grievor if she felt there was a conflict of interest.

[41] Ms. Babineau was referred to the *Manager's case file checklist*, which she had completed. She agreed that everything she had listed had influenced the choice of an eight-day suspension; therefore, if any of the factors were different, it could influence the appropriate amount of discipline.

[42] In that vein, she agreed that the grievor had had seven years of service at the time, not five, as she had indicated on the checklist.

[43] She also agreed that although she had marked "No" to the checklist question, "Did the employer fail to clearly communicate an instruction to the employee?", that there had been a lack of clarity with respect to how to protect taxpayer information in this particular circumstance.

[44] She further agreed that although she had answered "No" to the checklist question, "Was there an absence of rules pertaining to the behavior [*sic*] when the misconduct occurred?", nothing in the manual specifically addressed this issue.

[45] And although she had answered "No" to the checklist question, "Did the employee misunderstand the nature or intent of the employer's rules or standard of

conduct?", when asked if she would agree that the grievor did not really understand what was expected of her in the situation, Ms. Babineau replied, "She has indicated that she did not."

[46] Finally, Ms. Babineau confirmed that she was not aware that the IAFCD investigations analyst had recommended that the file be closed as unfounded because the rules were not clear.

B. Michel Lafleur, Manager, Investigation Support and Analysis Section, IAFCD

[47] At the time of these events, Mr. Lafleur had recently become the manager of the Investigation Support and Analysis Section within the IAFCD, which investigates employee misconduct.

[48] He explained that, in general, management investigates minor misconduct. For serious misconduct, a higher-end team of IAFCD investigators travels to the site and directly handles the interviews. The Investigation Support and Analysis Section is responsible for a hybrid approach, in which it conducts an investigation and then provides technical support to management to conduct interviews and complete the process.

[49] His job was to provide guidance and direction to the analyst, to reach out to management in the region, and to ensure that any investigation carried out by the section was conducted properly. This file had come in and had been assigned to the analyst just a month before Mr. Lafleur joined the section on October 12, 2015. He was briefed by the analyst four days into the job, on October 16. The section's investigation was only about the alleged disclosure of taxpayer information, it did not concern itself with the alleged unprofessional comments - regional management alone dealt with those.

[50] Analysts carry out a preliminary investigation and then recommend how to proceed. Four possible recommendations can be made: to close the file if there is no foundation for the allegations, to give it back to management to handle on its own, to keep the file within the Investigation Support and Analysis Section and provide support for management (the hybrid approach), or to have an IAFCD investigator carry out a formal investigation.

[51] Mr. Lafleur testified that the analyst recommended that either the file should be closed as unfounded or that interviews should be conducted by an IAFCD investigator. He recommended that it should not be kept within the section, as this would entail management-led interviews, with support from the section, and in his view management had pre-judged the issue and had a closed mind on the subject.

[52] Mr. Lafleur disagreed with the analyst's recommendation because in his words, he felt that the two recommended options were "kind of contradictory". He also said that in his view, there was not a big difference in fairness between a formal investigation and having management do it with the guidance of the section. Accordingly, despite the analyst's recommendation, he decided to keep it in the section and to proceed with a hybrid approach.

[53] He provided direction and guidance to the analyst and was involved in drafting the section's report. He stated that the report's conclusion was based on information provided by management, CRA systems, reports, notes of the management-led interview and by comparing the facts with policy. The report concluded as follows:

> …
>
> *Based on the information gathered during this investigation, it was determined that Sharon Gordon did not follow the confidentiality provisions of the National Collections Manual when she informed* [redacted] *that her spouse was her client without verifying whether she was listed as an authorized representative on his account.*
>
> *The information gathered during this investigation determined that Sharon Gordon breached the CRA Code of Ethics and Conduct when she disclosed protected information to* [redacted]*, who was not listed as an authorized representative on* [redacted] *account.*
>
> …

[54] On cross-examination, Mr. Lafleur initially took issue with the suggestion that management was not clear on the rules. He had read the email chain between Ms. Leblanc and field support, which he viewed as simply indicating that management was not sure about the policy and therefore, did some research and consulted with headquarters. However, he did comment that most of the information in the *National Collections Manual* outlined procedures for contacting a taxpayer at their doorstep - an obsolete approach.

[55] Ultimately, on cross-examination, Mr. Lafleur agreed that there was a lack of clarity in the policy and that there were some outstanding questions about how an agent would make the initial contact with a taxpayer or the taxpayer's spouse to complete an authorization.

[56] Mr. Lafleur was asked about the analyst's recommendation that if the file were not closed, a formal investigation would be needed, because investigators need to have an open mind and management had already prejudged the case and were discussing discipline in advance of an investigation. Mr. Lafleur responded, "Yes that was his position." However, he explained that, in his view, this was based on a misunderstanding of the file. Mr. Lafleur did not elaborate as to why or how he thought that the analyst had misunderstood the file.

[57] These are, in part, the analyst's notes and recommendation, in reverse chronological order:

> …
>
> *2015-11-09: Received a call from Christine Babineau, Manager. Joelle Smith, Assistant Director joined the line.* ***The manager and AD advised me that they have discussed with labour relation and was advised they can rendered discipline.*** *They wanted to know if during the interview they can discuss the issues the employee previously discussed with they team leader so it can be considered aggravating factors when rendering disciplinary measure or should the team leader meet with the employee on a different day to discuss those issues…. (Ulrich K)*
>
> …
>
> *2015-10-26: Received the file from Michel Lafleur, he said we should proceed with management led interview. (Ulrich K)*
>
> *2015-10-16: I met with Michel Lafleur to discuss the file and the next step. He said he will discuss with another manager and get back to me. Below is the summary of the file and my recommendation.*
>
> *On August 13, 2015, Roxanne LeBlanc, Team leader, Revenue Collections, said she overheard Sharon Gordon, Collection Officer, Revenue Collections Trust Compliance, Revenue Collections and Client Services - Saint John, New Brunswick Tax Services Office (TSO), saying to* [redacted] *that* [redacted] *was her client. However, the wife was not authorized on the husband's account. As such, Roxanne considered that to be a privacy breach by Sharon.*

On the email dated August 21, 2015, from Roxanne LeBlanc, to Anna Parker, Field Support Tax Programs and DMCC, Roxanne asked how to proceed to make initial contacts if a Collection Officer is working the RI accounts of a husband and wife, and both are not authorized on each other's accounts. Anna replied that the Collection Officer could move one of the accounts to a different collector and that would separate any potential confidentiality risk. Roxanne replied that she understands this, but policy says to work them together by one Collections Officer because of the household ability to pay. She also question how do you ask for T1013 without breaking confidentiality in such situation.

On the email dated August 13, 2015, Roxanne LeBlanc, informed Christine Babineau, Manager, Revenue Collections that the wife knew her employee was a Collections Officer because earlier in the day, Sharon Gordon had called the wife to ask for an outstanding balance.

As per info zone http://infozone/english/r5041000/tlr/tlr06/cnt31/rcvmngtp-e.html#h_5

"When you receive a new SP-04 or SP-05 inventory, it must be reviewed and organized before you begin working on the accounts. Determine which accounts:
take priority
should be associated
have to be removed from your inventory

Associating accounts improves service allowing the taxpayer, whenever possible, to deal with one collections officer for all their accounts. A national policy for the association of accounts does not exist. Consult with local management to determine your TSO policy."

…

I confirmed with Roxanne Brown, Team Leader that Collection Officers are allowed to contact the taxpayer by phone or letter within the 90 days period of their notice of assessment but they cannot take legal action.

On the email dated September 11, 2015, Joelle Smith, Assistant Director, Revenue Collections, informed France Lepage, Manager, Internal Investigation that their HR folks have consulted with corporate HR and their recommendation is that they should proceed with the disciplinary hearing and that they felt the action may be a category 4 infraction. However, management believes it potentially could even be a category 5.

> *What is seen as breath of confidentiality is the fact that the employee mentioned to the wife that her husband was also her client. However, at the time the employee said to the wife that the husband was her client; the wife already knew that the employee was a Collection Officer since they talked about the wife's account earlier on. According to Info zone, Collections Officers should determine which accounts should be associated and states that a national policy for the association of accounts does not exist and recommends consulting with local management to determine the TSO policy. Roxanne LeBlanc, Team leader, said 'that the policy recommends to work both husband and wife account by one Collection Officer because of the household ability to pay. Moreover, on the email dated August 21, 2015, management was unsure how to proceed to make initial contact when a Collection Officer is working on the wife and husband's accounts but both are not authorized on each other's accounts.*
>
> ***In light of the above, I recommended closing the file with a note to file as unfounded or to proceed with an interview conducted by an investigator and not by management because management has already determined that the misconduct is category 5 and is seeking disciplinary measure prior to any investigation or fact finding. (Ulrich K)***
>
> …
>
> *2015-09-21: Received additional information from Mari-France about the conversation between France Lepage and Joelle Smith on whether management should talk to the taxpayer's wife, which they agreed not to talk to her to avoid further breach of confidentiality.* ***France Lepage advised management that before proceeding with a disciplinary hearing, management will have to conduct a management-led interview to provide the employee with the opportunity to respond to the allegations of misconduct****. (Ulrich K)*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis added]

C. Sharon Gordon, Revenue Collections Officer

[58] The grievor testified that her previous work in the call centre had been very good, as her performance evaluations had consistently stated.

[59] She acknowledged that she was more assertive than the other agents. She said:

> … *I have a no-nonsense quality about myself, so sometimes people complained but most liked it and appreciated being listened to – I listened to them, I gave them info* [information], *I didn't dilly dally or give it too high a level, but some did not appreciate* [the] *no-nonsense* [approach].
>
> [*Sic* throughout]

[60] She testified that her previous team leaders never talked to her about this, apart from noting it in her performance evaluations.

[61] In June 2014, she began in collections in an SP-05 (senior agent) position on an acting basis. Senior agents handle about 85 of the more difficult files. She later lost that position but became a permanent SP-04 (regular agent). She testified that regular agents have over 200 clients and are expected to go through the files faster. No in-depth investigations are conducted.

[62] The collections process typically entails calling clients and working with them to establish a payment plan. She said that most people want to pay but that they often need a budget of some sort. The agent gives them an income and expense sheet to fill out and goes over it with them to verify their expenses against a list of acceptable expenses and amounts. Most agents accept somewhat higher amounts than those indicated on the list, depending on the circumstances, because it is a national list and does not take regional differences into account. After this process, the agent tries to arrange with the client to pay whatever amount is leftover in their budget. If they refuse, the agent can issue a "Requirement to Pay" (RTP). This can take the form of a garnishment of wages or a lien on property.

[63] The grievor described most of the clients as being very good. She got along well with them and used the same tone as she had in the call centre. A few clients were very nasty. With them, she said, the only thing an agent could do was apologize and indicate that they had to end the call. A few would refuse to make payments, which meant starting legal action. At that point, they might call back and say more nasty things. The grievor stressed that collections agents are calling clients to arrange for payment. When a client's money is at issue, it is entirely understandable and natural that they sometimes get upset.

[64] The grievor testified that the focus was on collections but that clients would ask about other matters as well, for example, their audits or their GST returns, almost

anything in fact, similar to the questions that would be raised in the call centre. They wanted to know about whatever was going on with their accounts and would ask to speak to the other agency employees dealing with their accounts.

[65] Ms. Leblanc was on leave when the grievor began in collections in June 2014. Until the fall, the grievor had a team leader with whom she got along well. Then the position was vacant until December, when another team leader arrived, with whom she also got along well. Ms. Leblanc returned to work in February or March of 2015.

[66] In April or May 2015, the grievor asked Ms. Babineau if she could be transferred to a different team leader, as she was having a hard time with Ms. Leblanc. The grievor testified that she found Ms. Leblanc's approach to collections to be very inconsistent. For example, she would strongly indicate that if a debt could not be collected, the client's business should be shut down, but would then refuse to send out the RTP and instead admonish the agent to be kinder and to rethink it. The grievor testified that this left her very confused and not knowing how she was expected to proceed. She would sit at her desk and cry because she felt like she did not know what she was doing.

[67] Ms. Babineau denied her transfer request. The next day, Ms. Leblanc asked her why she had requested it. She told Ms. Leblanc that she had already talked to her about the inconsistencies and that she felt that she needed help. The grievor said that Ms. Leblanc was very upset and that from then on, her (the grievor's) "life became hell."

[68] With respect to the alleged disclosure incident, the grievor testified that she had carried out an extensive investigation with respect to the husband. After a year-and-a-half, she was at the end of what she could do to collect the tax debt and had never been able to reach him at the home number. She decided to see if his wife had a balance. She did, but it was on a 90-day restriction for collection, as it had just been assessed. In these circumstances, an agent can make a courtesy call to advise the client that although they do not have to pay yet, interest is accruing daily on their account. She verified that the two taxpayers had the same address and phone number and decided to call the wife.

[69] She brought the wife's account into her workload because joining spousal accounts gives an agent a better idea of the household's ability to pay. Also, an RTP

sent with respect to only one spouse would be unable to collect from a joint account. Therefore, the policy is to join them.

[70] The grievor thought that she had likely checked on the authorizations earlier when she had joined the accounts, but authorizations can change at any time. She did not check before making the call as she did not intend to discuss anything with the wife about her husband's account. She just thought that she might be able to speak to him as well, or at least leave a message or obtain another phone number for him.

[71] When the grievor asked to speak to the husband, following the courtesy call discussion, the wife said that he was not there. The grievor asked to leave a message and asked if he had another phone number where she could reach him. The wife became upset, demanded to know why the grievor wanted his number, and said that the grievor had no business asking about her husband. The grievor responded, "Ma'am I can call anyone to get information about any of my clients." The wife said that she would speak with her lawyer about that. The grievor encouraged her to do that, to verify the information.

[72] Ms. Leblanc came and stood beside her, put her hand up to her mouth, gasped audibly as though shocked, and said that the grievor had just given out taxpayer information. She then called the grievor into her office, called Human Resources (HR) on speakerphone and relayed what the grievor had said. According to the grievor, HR responded that it was not a breach of confidentiality, that the grievor did not give the wife confidential information, and that it was a grey area. Ms. Leblanc did not agree with HR's assessment and said that she wanted it to go higher.

[73] The grievor testified that after this, no one discussed this matter with her until the fact-finding meeting on November 12, 2015.

[74] She had expected that only Ms. Babineau and Ms. Campbell, her bargaining agent representative, would be at the fact-finding meeting. However, Ms. Leblanc came in as well, and Ms. Babineau indicated that she would take notes of the grievor's answers. The grievor was very upset. She told Ms. Babineau that this was a conflict of interest and that in her view, the whole issue was occurring because of the harassment she had been experiencing from Ms. Leblanc. She was extremely distressed that Ms. Leblanc would be present for the interview and was almost crying. However,

Ms. Babineau simply said that she disagreed that it was a conflict of interest and proceeded with Ms. Leblanc present.

[75] The grievor was very upset to read the *Disciplinary Action Report*. She filed the grievance because she felt that she had done nothing wrong; yet, she received an eight-day suspension. She had never been disciplined before or ever again after this incident. She felt that she had done very good work for the CRA. Her collection rates had been very high, and she had performed well in the job, as her performance evaluations had shown. She felt that she had been treated badly.

[76] After the incident, Ms. Babineau finally approved her request to transfer to a different team leader, so she did not work under Ms. Leblanc again. However, on the day she transferred to her new team, Ms. Leblanc called her into her office, and asked her new team leader to attend as well. She wanted the new team leader to continue with the development plan she had put in place for the grievor. The new team leader did not agree and refused to do this. The grievor stated that Ms. Leblanc berated her terribly in the presence of her new team leader and said that the grievor did not know her job or what she was doing. The grievor testified that that upset her new team leader to the point where he got up and walked out of Ms. Leblanc's office.

[77] The grievor acquired more training and experience working in the new team but changed nothing about how she conducted calls with taxpayers, other than choosing to never work with spouses again. She also mentioned that the CRA was changing from an enforcement-oriented approach to a more service-oriented approach but could not pinpoint when this change occurred.

[78] She got along very well with her new team leader, but this incident ruined her whole outlook on the CRA. She was no longer happy working there, dropped to part-time hours and retired at 60, abandoning her original plan to work until 65 or 70, to obtain a better pension.

III. Employer submissions

[79] The employer submitted that although the grievor believes that her team leader, Ms. Leblanc, was responsible for the discipline imposed on her, in fact, her role was quite limited. She did not write the report that led to the discipline; nor did she attend

the disciplinary hearing. Her involvement was limited to reporting the grievor's misconduct and attending the fact-finding meeting, at which she took notes.

[80] The CRA argued that some of the issues discussed during the hearing did not serve to provide material facts on the issue, especially those about post-discipline events. For example, it acknowledged that it is not acceptable for a team leader to raise their voice to an employee, as Ms. Leblanc is alleged to have done, but noted that the Board did not have the benefit of Ms. Leblanc's testimony on the matter.

[81] The CRA submitted that both of its witnesses provided evidence of the alleged misconduct, that is, both Ms. Babineau and Mr. Lafleur linked the two pieces of information that the grievor had told or otherwise conveyed to the wife (that the grievor was a collections officer and that the husband was her client). They both concluded that, with these two pieces of information, the wife could conclude that the husband had an outstanding tax debt which meant that the grievor had disclosed unauthorized information. They further testified that the grievor's failure to ascertain whether the spouses were authorized on each other's accounts before making the call was negligent and that it led to her failure to secure taxpayer information.

[82] The employer acknowledged that neither of its witnesses heard the conversation; only Ms. Leblanc did, and she did not testify. While this is hearsay evidence, Ms. Babineau did not rely on it alone. She also relied on the grievor's diary entry, which the grievor confirmed was accurate. The grievor also acknowledged that she did not check for authorizations before making the call and she affirmed the accuracy of the fact-finding notes, which confirmed key facts underlying the discipline. This is reliable hearsay evidence, confirmed by the grievor herself.

[83] The grievor confirmed that calling the wife was the only means left to try to contact the husband and that she was thinking about tracking him down when she associated the two accounts. Accordingly, she should have given some forethought as to what she could say if the opportunity came up by checking the authorizations before making the call. Simply saying that she had no intention to discuss his account with the wife ignores the context of the call.

[84] With respect to the amount of discipline, the employer notes that the unprofessional conduct incidents were discussed at the fact-finding meeting and at the discipline hearing but that they were only aggravating factors. It stressed that the

grievor's lack of remorse and failure to recognize her actions as misconduct were the most important aggravating factors for Ms. Babineau. Even at the hearing, the grievor still did not recognize how the two pieces of information she disclosed could have been put together to create a disclosure of taxpayer information and that therefore, the situation required more care than she gave it.

[85] The employer noted that Mr. Lafleur had testified to the primordial importance to the agency of safeguarding taxpayer information and said that even on its own, without the aggravating factor of the unprofessional conduct, negligence with respect to securing taxpayer information is serious misconduct. It does lasting damage to taxpayers' privacy and, therefore, to the reputation of the tax system itself and to Canadians' trust in it.

IV. Bargaining agent submissions

[86] The bargaining agent submitted that 1) an objective person would not perceive the grievor's allegedly unprofessional comments in that light; 2) that Ms. Leblanc did not testify and that certain aspects of the case would have benefited from her explanation; and 3) that at no time before, during, or after these events did the employer explain how to safely contact married tax debtors who are not authorized on each other's accounts. In the bargaining agent's view, the grievor is a victim of sloppy policy making. The rules simply need updating.

[87] That Ms. Leblanc sought field-support advice on how to deal with this situation shows that she did not know how to do it. Nor was field support able to adequately answer her question, as Ms. Leblanc noted in an email. The suggestion to simply have the spouses authorized would not have helped in this situation; contact with a taxpayer would have to be made first, and how to make that first contact is the issue.

[88] At the hearing, it was clear that the CRA still did not know how this should be done. Both of its witnesses acknowledged a lack of clarity in the policy. Ms. Babineau acknowledged that it was unclear and agreed that a memo clarifying an unclear policy is a better approach to this kind of problem than disciplining an employee (see *Smith v. Deputy Head (Canada Border Services Agency)*, 2021 FPSLREB 9 at para. 263). Yet, to her knowledge, no change had ever been made to the manual to clarify the situation, even after the grievor was disciplined.

[89] This also raises the question of how serious the employer perceived the alleged disclosure to be. To this day, the policy promotes joining spousal accounts and allows agents to leave messages with family members.

[90] While a disclosure of taxpayer information is a serious matter, if this was such a disclosure, it was a minor one. As a matter of progressive discipline, the penalty was much too severe for the nature of the offence, especially as the rules were unclear, and the policy did not actually prohibit what the grievor did. Alternatively, if it did, she did not know that and acted with no ill intent. She simply did not know precisely how to navigate the situation as there was no clear policy on it (see *Smith*, at para. 267).

[91] Much of the CRA's evidence with respect to the allegations of unprofessional conduct was based on hearsay, and the bargaining agent was afforded no opportunity to cross-examine anyone who was a party to the impugned conversations. Particularly when people are involved in unhappy tax collection situations, there is a heightened obligation to present oral evidence and allow for cross-examination.

[92] While it is understandable that the CRA does not want to ask taxpayers to testify, nevertheless, it must be considered that this put the grievor at a significant disadvantage, as she was unable to challenge evidence through cross-examination (see *Brewster Transport Co. v. A.T.U. Local 1374,* 1992 26 L.A.C. 4th 240, and *Canadian Merchant Service Guild v. Marine Atlantic Inc.*, 2016 CarswellNat 6766). Although admissible, uncorroborated hearsay evidence should not be preferred to direct, sworn testimony; nor should it be admitted to establish a crucial and central question (see *Peterborough Victoria Northumberland & Clarington Catholic District School Board v. O.E.C.T.A.*, 2011 207 L.A.C. (4th) 335).

[93] The behavioural concerns seem to have been tacked on as an afterthought, and the *Disciplinary Action Report* does not outline the grievor's words that were considered unprofessional (see *Touchette v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 72).

[94] The original allegation with respect to the August 13 incident was only about the disclosure — it included no issue of unprofessional conduct, which was raised only three months later, at the fact-finding interview.

[95] Ms. Leblanc sent only the middle part of the September 18 diary entry; she cut out the beginning and end of the conversation. The grievor told the employer that she felt that her words in the diary entries had been taken out of context, yet Ms. Babineau never read the whole entry or asked the grievor for the context from her perspective. She relied solely on the excerpt presented by Ms. Leblanc. Nor was the whole diary entry presented in evidence.

[96] Neither the taxpayer nor Ms. Leblanc testified about either the October 28 call or Ms. Leblanc's callback with the taxpayer that occurred on November 2, 2015. Therefore, the only reliable evidence with respect to this allegation was provided by the grievor and her diary entry of the call with the taxpayer.

[97] The bargaining agent submitted that at worst, the grievor's impugned comments could be described as curt.

[98] Finally, the bargaining agent noted that the CRA bore the burden of proof to establish that on a balance of probabilities, the conduct for which discipline was imposed did occur, that it warranted discipline, and that the discipline imposed was appropriate and proportionate, given the aggravating and mitigating factors at play (see *Sidorski v. Treasury Board (Canadian Grain Commission)*, 2007 PSLRB 107 at para. 87).

V. No evidence that grievor breached policy cited as basis for discipline

[99] The first ground for discipline was the alleged disclosure of confidential taxpayer information which the *Disciplinary Action Report* states was a breach of the following section of the *Code of Integrity and Professional Conduct*:

> *Taxpayers and benefit recipients must trust that we will protect their private information, and that we carry out our work in the public interest. We must also protect employee information, CRA proprietary information, government property or valuables, and any taxpayer property that is in our possession or control. We all agree to uphold the public trust when we swear or affirm the* ***Oath or affirmation.***
>
> [Emphasis in original]

[100] The second ground for discipline was unprofessional conduct in interactions with agency clients, which the *Disciplinary Action Report* stated was a breach of the following section of the *Code of Integrity and Professional Conduct*:

> *All of our interactions must project professionalism, courtesy, and respect, both with the public, and each other. This includes face-to-face interactions, large or small group meetings, and all written internal and external communications.*

[101] Like the *Disciplinary Action Report*, the grievance replies refer only to the *Code of Integrity and Professional Conduct*. The final grievance reply dated May 31, 2018 states:

> *The acts of misconduct for which you were disciplined are in contravention of the Canada Revenue Agency's Code of Integrity and Professional Conduct. … The Code of Integrity and Professional Conduct also requires that all interactions with taxpayers project professionalism, courtesy and respect.*
>
> …

[102] By contrast, all testimony at the hearing referred to alleged breaches of the *Code of Ethics and Conduct*. The employer's evidence and submissions were to the effect that the grievor's alleged misconduct breached sections 3(c) and (f) of the *Code of Ethics and Conduct*, dated February 25, 2013. This policy document was provided to the Board at Tab 2 of the Joint Book of Documents and was entered in evidence. The *Code of Integrity and Professional Conduct* upon which the discipline was based was not provided to the Board and was not in evidence.

[103] As there was no evidence before the Board with respect to the *Code of Integrity and Professional Conduct* on which the employer relied to identify the grounds for discipline set out in the *Disciplinary Action Report* and the grievance replies, the parties were directed to provide submissions as to whether the Board should consider the evidence presented with respect to grounds for discipline other than those upon which the discipline was based.

[104] In its submission, the employer explained that the *Code of Ethics and Conduct* was in effect until December 2015 and, therefore, applied to this matter. However, it was succeeded by a new version which was called the *Code of Integrity and Professional Conduct*. The employer submitted that the quoted sections of the *Code of Integrity and Professional Conduct* in the *Disciplinary Action Report,* and the references to that code in the grievance replies, were likely administrative errors. It argued that basing the discipline on this later policy document did not affect the substance of the alleged

breaches and the discipline imposed for them. The two versions of the code were substantively the same.

[105] The bargaining agent did not dispute that there was a certain degree of similarity between the earlier *Code of Ethics and Conduct* and the later *Code of Integrity and Professional Conduct* and acknowledged that a flagrant unauthorized disclosure or an egregious act of unprofessionalism would constitute misconduct under either policy. However, it submitted that where, as in this case, the impugned behaviour falls into a grey area, the nuances in the textual and contextual evolution of the codes take on a heightened importance.

[106] The bargaining agent submitted that the *Code of Integrity and Professional Conduct* established a lower threshold for unauthorized disclosure than the previous code. The earlier code presented three scenarios to describe different types of proscribed behaviour, each of which set out a clear-cut example of what constituted unauthorized access or disclosure. The later code provides no examples but simply expressly forbids the disclosure of any CRA information. The bargaining agent argued that a contextual analysis of the earlier code requires that (applying the *ejusdem generis* principle (specified examples limit the category described to like items)), the words “disclose any CRA information” must be read in conjunction with the three example scenarios.

[107] It also submitted that the “you must never” rules expanded significantly and that the later code talks about taking the responsibility to not disclose information “very seriously.” The bargaining agent argued that the evolution of the text on the disclosure rules represented a global shift, a “tightening of the screws” with respect to handling taxpayer information. It suggested that Ms. Babineau must have been influenced by this general shift in her analysis of this file. The only reasonable inference to be drawn from her references to the stricter code is that she applied the standard set out in it, rather than the standard described in the more lenient *Code of Ethics and Conduct*. The result was that she misjudged the seriousness of the grievor’s actions.

[108] Having said that, however, the bargaining agent reiterated its view that the grievor’s conduct did not constitute misconduct under either code.

[109] The bargaining agent also submitted that the later code established a lower threshold for unprofessional conduct, although it acknowledged that these differences were less pronounced. It argued that the earlier code makes a slight allowance for taking a sterner approach with difficult taxpayers by including the following passage which is absent from the later code:

> *If your role requires that you sometimes overcome an obstinate lack of cooperation on the part of a taxpayer (for example - if you act as a tax officer responsible for enforcement), a persistent, yet professional, approach will be necessary.*

[110] It also submitted that changing the heading "Contact with the public - sensitivity and responsiveness" to "Client service excellence" represented the shift to a more client-service model, a shift in policy noted by the grievor in her testimony.

[111] Finally, the bargaining agent submitted that the employer should have included the *Code of Integrity and Professional Conduct* in its Board-mandated pre-hearing exchange of documents list. The bargaining agent accepted that the failure to do so was simply an oversight, but nevertheless argued that this oversight influenced the way it prepared for and presented the grievor's case. Its choice of strategy, including what to ask witnesses and which arguments to make and emphasize, was influenced by this omission. It did not have the opportunity to question Ms. Babineau on her use of the later code, instead of the one that applied at the time.

[112] The bargaining agent acknowledged that the discrepancy between the two codes was there to see before the hearing and could have been spotted, but submitted that nevertheless, it was entitled to rely on the employer's pre-hearing document list, and to assume that it contained all arguably relevant documents.

[113] The employer replied that wording changes between the two versions of the code did not change the type of behaviour they impugn. Both versions state that taxpayer information cannot be disclosed without authorization. The earlier code's example scenarios did not change the meaning of the words that preceded them but merely illustrated the point already made. Their absence from the later version did not change the standard of expected behaviour, which remained constant. Similarly, the different wording about professionalism conveys essentially the same thing and the expected standard of professionalism did not change between the two versions of the code.

[114] The employer disagrees that the only reasonable inference to be drawn is that Ms. Babineau applied the later version of the code, as this ignores the possibility that the references to the later version in the *Disciplinary Action Report* and the grievance replies may have been simply a clerical error that went unnoticed because the two policy documents are substantively the same.

VI. Reasons for decision

[115] The grievor was suspended for eight days for an alleged disclosure of confidential information and three unprofessional comments. *Basra v. Canada (Attorney General)*, 2010 FCA 24, the leading authority in discipline matters, refers to *Wm. Scott & Co.*, [1977] 1 C.L.R.B.R. 1 and outlines the required analysis. The Board must determine whether the employee has given reasonable cause for some sort of discipline by the employer and, if so, whether the employer's response was excessive in all the circumstances of the case. If the discipline was excessive, the Board must determine what alternative measures should be substituted.

A. No evidence re policy cited as the basis for discipline

[116] The expected standard of conduct with respect to safeguarding information and with respect to professional communication with taxpayers is similar in both codes, but not necessarily the same. There were some changes that could be construed as lowering the threshold for misconduct as the bargaining agent argued, or they could simply represent changes in language and style. I make no finding on this other than to note that the required conduct is similar.

[117] Nevertheless, the grievor was disciplined for breaching two specific sections of the *Code of Integrity and Professional Conduct*. These sections were quoted in full in the *Disciplinary Action Report* as the basis for the discipline. They do not exist in the *Code of Ethics and Conduct*. The *Disciplinary Action Report* is the document by which the grievor was disciplined with an eight-day suspension. It is dated March 15, 2016.

[118] That the discipline was based on these two sections in this code was confirmed throughout the grievance procedure right up to the final grievance reply dated May 31, 2018. If this was an administrative error as the employer suggested it might be, it continued for more than two years, and, indeed, right through the hearing.

[119] There was no evidence before the Board in respect of how, in the employer's view, the grievor's conduct breached those sections of that policy document. Indeed, the *Code of Integrity and Professional Conduct* upon which the employer based the discipline, was not entered into evidence at the hearing.

[120] The burden of proof is on the employer to show that the grievor engaged in misconduct that breached the policy that it cited and upon which it based the discipline. It is not open to the employer to simply cite a possible administrative error and say that the two codes are substantively the same. It must prove what it has alleged.

[121] Further, I agree with the bargaining agent that it is entitled to rely on the employer's pre-hearing disclosure of documents. The employer's failure to disclose the *Code of Integrity and Professional Conduct*, while not intentional, was also not inconsequential. It negatively impacted the bargaining agent's ability to thoroughly canvass and challenge the employer's discipline process, and, therefore, negatively impacted the grievor's right to a fair hearing.

[122] For these reasons, I find that the employer did not meet its burden of proving that the grievor breached the *Code of Integrity and Professional Conduct* as alleged, and on that basis I grant the grievance.

[123] However, even were that not the case, I would nevertheless grant the grievance for the following reasons:

B. Alleged disclosure of confidential taxpayer information

[124] The IAFCD Investigation Support and Analysis section considered the policies that bear on this issue and set out the following overview of them:

> …
>
> - *Collection and Verification Branch Communication: Protection of Taxpayer Information (TSDMB-2013-055) states: Care must be exercised to ensure that only the minimum amount of information that is reasonably necessary to administer or enforce the legislation is disclosed when contacting unauthorized persons, including spouses, common-law partners or other family members.*
>
> …

- *National Collection's* [*sic*] *Manual reference to communicating with family members reads as follows:*

  - *When you cannot make contact with the taxpayer at the taxpayer's residence, you can leave a contact number with the taxpayer's family member, and request that they have the taxpayer call you.*

…

- *The Atlantic Regional procedures on working associated accounts are as follows:*

  - *All accounts of the same legal entity will be worked together. In addition, related accounts can be associated if proper rationale is provided in the diaries.*

- *The decision to associate related accounts will be based on the particulars of each case. Related accounts could include:*

…

  - *Spouses*

…

[125] The *National Collections Manual* section that instructs officers how to communicate with family and other unauthorized third parties reads, in full, as follows:

> ***Communicating with family members***
>
> *When you cannot make contact with the taxpayer at the taxpayer's residence,* ***you can leave a contact number with the taxpayer's family member, and request that they have the taxpayer call you.***
>
> ***Communicating with unauthorized third parties***
>
> *You might have to communicate with an* ***unauthorized third party*** *to administer and enforce the ITA and/or the ETA. When contacting unauthorized persons on the following list, only disclose the minimum amount of information that is reasonably necessary to administer or enforce the legislation:*
>
> - ***spouses, common law partners or other family members***
> - *employees of a business*
> - *taxpayers' neighbours*
>
> *When contact with an unauthorized third party is necessary, do not:*
>
> - *disclose the reason for your queries*
> - *discuss your job duties*

- *reveal the reason for your visit or*
- *leave a business card with the neighbour or family member*

Do not ask a third party to:

- *pass on a business card, an envelope or other documents or*
- ***verbally relay a:***
  - ***message to the taxpayer or***
  - ***request to call you***

[Emphasis added]

[126] The policy as written is internally inconsistent. It states that a message can be left with family members. However, it also states that a message cannot be left with unauthorized third parties (which it defines to include spouses and other family members) and that they cannot be asked to verbally relay a message or to have the taxpayer call the officer.

[127] The policy does provide for communicating with unauthorized third parties such as family members, employees of a business and the taxpayer's neighbours in order to contact the taxpayer. This aligns with the grievor's statement in her fact-finding interview that her understanding was that information could be obtained from others to locate a client.

[128] The policy is outdated. Mr. Lafleur noted in his testimony that it largely applies to home visits. It begins, "When you cannot make contact with the taxpayer at the taxpayer's residence …", and everything follows from there. That is not to say that it cannot be applied, with whatever changes are necessary, to the telephone context, but much of it simply does not apply.

[129] The policy also has several gaps that were highlighted by this case. It allows for a message to be left with a spouse but makes no exception for the situation in which both spouses are tax debtors. It promotes joining spousal accounts. It permits spouses to be authorized to receive information about each other's accounts but does not state that they must be so authorized for the agent to leave a message with one for the other. Nor does it provide any guidance as to how an officer can make the initial contact to have spouses authorized on each other's accounts, without disclosing confidential information.

[130] Apparently recognizing these gaps, a week after this incident, the employer attempted to find out how the policy should be applied. On August 21, 2015, Ms. Leblanc emailed Anna Parker, Senior Programs Officer, Field Support Tax Programs, as follows:

> *Hi field support,*
>
> *If a Collection Officer is working the RI accounts of a husband and wife and both are not authorized on each other's accounts, how to* [*sic*] *we proceed to make initial contacts?*
>
> …

[131] Ms. Parker responded as follows:

> *Hi Roxanne, you could move one of the accounts to a different collector, that would separate any potential confidentiality risk. Use of letters, or asking for authorization from each.*

[132] Ms. Leblanc replied with this:

> *I understand this but policy says to work them together by 1 CO because of the household ability to pay. Also, how do you ask for T1013 without breaking confidentiality?*

[133] Ms. Parker responded as follows:

> *Hi Roxanne, The National collections manual does state that whenever possible –* ***NCM – Receiving and managing accounts – Tax programs – Account association****. However based on your question it appears this may not be a good fit for this situation. The two collection officers could work together with the information supplied by each spouse.*
>
> *As for your question about obtaining the T1013 asking a debtor to authorized their spouse for ease of resolving the account is not uncommon. You would be asking the tax debtor, I do not see how that would break confidentiality.*
>
> [Emphasis in original]

[134] Ms. Leblanc then asked, "What if the spouse asks why we want their spouse authorized on the account?"

[135] Ms. Parker replied:

> *Roxanne, Asking* [*sic*] *the debtor to authorize his spouse is a common occurrence, to make things easier for the collection officer*

> *and the debtor. Of course this is only a request to the debtor, and he may choose to have no representative.*
>
> *I have added a couple of links for your reference.*
>
> ***Confidentiality – Tax programs – Communicating with unauthorized third parties***
>
> ***Authorize or cancel a representative***
>
> *For this file, has there been some particular problems that I am not aware of?*
>
> [Emphasis in original]

[136] After which, Ms. Leblanc abandoned the effort to nail down the policy and wrote to Noelle Thomas, labour relations advisor, as follows: "I don't think field support is giving me the best advice here but anyways - here it is. Do you want me to push this further?"

[137] Apart from Ms. Leblanc's lengthy discussion with Ms. Parker, the lack of clarity in the policy was highlighted in several other ways as well. The grievor testified that Ms. Leblanc called Human Resources on speakerphone after calling the grievor into her office immediately after the alleged disclosure took place. The HR Advisor said that the grievor had not improperly disclosed taxpayer information and that it was a grey area. This testimony was unchallenged. Mr. Mercier Kamga, the investigations analyst of the IAFCD's Investigation Support and Analysis section, highlighted the lack of clarity after his preliminary investigation. His recommendation that the file should be closed as unfounded was based on this finding.

[138] Accordingly, not only was the policy unclear, but the employer was aware that it was unclear when it disciplined the grievor. Both CRA witnesses knew that Ms. Leblanc had tried, and failed, to obtain a clear answer from field support. Mr. Lafleur was certainly aware of the analyst's view. Despite that, they both stated in their evidence that there was a policy in place, that it had been breached, and that the grievor was culpable. Only on cross-examination did they acknowledge the lack of clarity in the policy, of which they had both been aware at the time.

[139] Despite this awareness, Ms. Babineau had answered the question, "Did the employer fail to clearly communicate an instruction to the employee?" on the *Manager's case file checklist* as follows: "No. The employee has received all of the necessary training and resources to support them in the execution of their assigned

tasks." I find that the employer did fail to clearly communicate an instruction to the grievor - its policy was unclear.

[140] Further, Ms. Babineau had answered the question, "Was there an absence of rules pertaining to the behavior [*sic*] when the misconduct occurred?" as follows: "No. There are procedures established with respect to confidentiality of taxpayer information and making contact with unauthorized third parties." I find that there was an absence of rules pertaining to the behaviour when the misconduct occurred. While there were established procedures, they were outdated, unclear, and did not tell employees what to do in this situation. Ms. Babineau acknowledged on cross-examination that nothing in the manual addresses this issue.

[141] Finally, Ms. Babineau had answered the question, "Did the employee misunderstand the nature or intent of the employer's rules or standard of conduct?" as follows: "No. The employee indicated that she is aware of and clearly understands the policies and procedure for making contact with tax debtors as well as the confidentiality provision of the Income Tax Act." However, as recorded in both sets of notes taken at the fact-finding interview, the grievor said this: "I don't feel I did anything wrong - if there is a policy that says I can't ask for [the] husband's number then I need to know. My understanding is we can get information from others to locate a client." I find that the grievor did misunderstand the nature or intent of the rules, as interpreted by the employer, and that she expressed that clearly in her fact-finding interview.

[142] Mr. Lafleur's investigation report found the grievor to be at fault for saying what she did on the call without having checked to see if the wife was authorized on the husband's account. Ms. Babineau also said that she should have checked this first. But that is not the policy. Nowhere does the policy say that an officer must check for an authorization before making such a call or explain what to do if a check reveals that there is no authorization. Ms. Babineau understood that just checking for authorizations would not have solved the problem. She simply stated that doing so would have alerted the grievor to the problem and would have caused her to seek advice from her team leader or technical advisors about how to make the call.

[143] That is quite an onus to put on an employee, to have the foresight to realize that there is a gap in the longstanding policy, even though it purports to lay out

exactly what an agent can and cannot do. It is not the job of an SP-04 collections officer to pore over policy minutiae to ensure that it is up to date, internally consistent, and consistent with other policies before making a phone call on one of her 200 collection files. That is management's job.

[144] Nor is it reasonable to say that the grievor should have sought help from her team leader or technical advisors. Firstly, she did not know and cannot have been expected to know that there was a problem for which she needed to seek help. Secondly, the evidence was clear that her team leader did not know what to do either and that she had persistently tried and failed to obtain answers from field support.

[145] Nor did Ms. Babineau herself have any advice to offer other than that the grievor should simply have called the husband another time and left only her name and phone number and a message that she was calling from the CRA. To say that an agent can call the home of two spouses, both of whom owe money to the CRA, and safely leave a message for either of them, as long as the agent does not say that he or she is from collections, is disingenuous. Once the grievor spoke to the wife about her outstanding balance, the wife knew that the grievor was a collections officer. Once given that information, she would always be in a position to put two and two together, whenever the grievor tried to reach the husband at the only contact number she had for him.

[146] There is no magic in these two pieces of information being conveyed to a spouse during the same phone call or, as in this case, during two phone calls, one immediately after the other. The wife could learn that the grievor was a collections agent via her own courtesy call and could hear a voicemail left for her husband by the grievor six months later. In that scenario, she would still be able to draw the same conclusion—that her husband possibly had an outstanding tax balance. Had the grievor done exactly what Ms. Babineau suggested, the result would still have been what the employer defines as an unauthorized disclosure of taxpayer information.

[147] It is understandable that in a large organization like the CRA, its many policies and procedures are sometimes inconsistent, ambiguous, outdated or simply fail to cover every eventuality. These gaps or inconsistencies tend to come to light when something untoward happens. When that occurs, management has a choice: take a disciplinary approach to the employee who inadvertently stumbled into the gap or take a hard look at the policy and fix it.

[148] If the CRA feels that the risk of a confidentiality breach is too great in this situation, then it needs to change or clarify the policy. It could prohibit officers from leaving a message with spouses. It could say that two different officers must work spousal accounts. Different approaches could be implemented. But no such steps were taken before these events, or during the years following them. The CRA was content to allow the unclear and outdated doorstep policy to remain on the books for many years. The only conclusion to be drawn is that it finds the inherent risk to be acceptable.

[149] Ms. Babineau agreed that it is better to address policy issues by clarifying an unclear policy, and I do not think that her misplaced focus on discipline was deliberate or carried out in bad faith. However, I do think that the problem was presented to her quite forcefully as a discipline issue by Ms. Leblanc and that that initial characterization of it was never properly reconsidered or analyzed. I also note that she was never made aware of the analyst's recommendation that the file should be closed as unfounded because the policy was unclear. Perhaps her approach would have been different had she had access to that information.

[150] Mr. Lafleur had the benefit of the analysis that looked beyond the grievor to consider the bigger policy picture. However, for whatever reason, he did not accept the analyst's reasoning and recommendation that the file should be closed. Mr. Lafleur had no reasonable explanation for giving the analyst's view such short shrift. Having raised the valid point that the rules were unclear, it appears that the analyst was simply overruled. If there was any further consideration or discussion about the clarity of the rules, it was not entered in evidence.

[151] Had the IAFCD closed the file as unfounded, and had management followed through and clarified the policy, the problem would have been truly resolved. Instead, a dedicated and hard-working employee was unnecessarily disciplined and demotivated to the point of taking early retirement, to the detriment of her pension benefits. Yet, it appears that the problem remains. The policy was never clarified while Ms. Babineau remained in the division and there was no evidence presented that it was ever clarified after she left in 2018. The employer, by its actions, seems unconcerned that a policy gap remains into which other employees could unwittingly stumble, putting them, the agency, and taxpayers' privacy at risk.

[152] For all the seriousness with which management treated the grievor's alleged disclosure and the presumed damage it could have had on the CRA's reputation as a trustworthy holder of personal information, no steps were taken to ensure that it would not happen again. The agency's microfocus on disciplining one employee for one minor alleged disclosure that no taxpayer had complained about, instead of fixing the problem, belies Mr. Lafleur's testimony that the agency's reputation, and Canadians' trust in it, was of paramount concern.

[153] I find that the grievor simply made a good-faith attempt to do what she reasonably thought she was supposed to do, in the face of outdated and unclear rules. There was no reasonable cause for the employer to discipline the grievor for allegedly disclosing taxpayer information.

C. Alleged unprofessional communications with taxpayers

[154] The evidence led with respect to the alleged unprofessional comments was underwhelming.

[155] Ms. Babineau agreed that the content and tone of conversations can be difficult to judge without hearing them and further confirmed that she had heard none of them. Only Ms. Leblanc had overheard the August call. No one had heard the September or October calls. It was not clear if the calls were recorded but if they were no one who testified had listened to them. As well, Ms. Babineau confirmed that she did not speak to the taxpayer who complained about the October 28 incident — only Ms. Leblanc did.

[156] Ms. Babineau's testimony about these comments was hearsay gleaned from conversations with Ms. Leblanc. The employer pointed out that the grievor's own diary entries largely corroborated the allegations. However, Ms. Babineau had seen only Ms. Leblanc's excerpt of the grievor's September 18 diary entry and did not recall ever having read the whole entry despite the grievor telling her that she felt her diary entries had been taken out of context. Nor did Ms. Babineau ask the grievor what the context was from her perspective. Nor was the whole entry put in evidence.

[157] Further, the *Disciplinary Action Report* did not spell out what the grievor is alleged to have said or provide any information or context for the allegations. It simply said this:

…

> *… It was also determined that you breached the CRA Code of Integrity and Professional Conduct during your interactions with taxpayers on three separate occasions. During these interactions you demonstrated conduct that could negatively affect the CRA's image, or bring the CRA of* [sic] *Public Service into disrepute (unprofessional behavior* [sic] *when acting on behalf of the CRA).*

[158] The only information the *Disciplinary Action Report* offered as to the alleged instances of unprofessional conduct was that there were three separate occasions. However, the employer's evidence at the hearing referred to four instances. As the *Disciplinary Action Report* offered no information about any of the alleged instances it is not clear which three of the four were the instances upon which the discipline was based.

[159] As the Board said in Touchette v. Deputy Head (Canada Border Services Agency), 2019 FPSLREB 72:

…

> *[65] A notice of disciplinary action must clearly spell out the precise nature of the transgression. The disciplinary letter refers to an "incident", an "interaction", and to "unprofessional" actions and "inappropriate" comments towards a traveler. But there is nothing concrete about those comments or actions.*
>
> *[66] "I will haul your ass back to the U.S." is a comment the grievor admitted to making, but he also said words to the effect, "Do you think I am an idiot?"*
>
> *[67] Mr. Borg, a fellow BSO, did not feel it was inappropriate for the grievor to say the latter phrase to a traveler who, for some unknown reason, was seemingly being purposely obtuse or deceptive.*
>
> *[68] Mr. Borg testified to using words to that effect to other travelers, under similar circumstances in the past. I can appreciate this: the job of a BSO is not easy, and in many situations, a blunt approach is probably needed. As long as it is not accompanied by rude or profane language or a raised voice, a blunt approach may be an appropriate mechanism for breaking through stubbornness or an otherwise defiant or belligerent attitude.*
>
> *[69] Was the grievor also being disciplined for saying, "Do you think I am an idiot?" I certainly hope not. I do not feel discipline would be warranted for saying those words under the circumstances set out by the evidence. Unfortunately, the letter is silent on this issue. The unprofessional comments forming the basis for disciplinary action are not spelled out.*

> *[70] There is an unfortunate tendency, in professional discipline cases involving rude, colourful, or profane language, for decision makers to dance daintily around the actual words that were used. This is not helpful. The recipient of the disciplinary action must be brought face-to-face with the precise nature of his or her transgression. That is the only way of assessing whether the accompanying sanction was fair, just, suitable, or reasonable. In the present case, the letter is unclear about what the grievor is being sanctioned for.*

…

[160] The Board is faced with the same problem in this case. Like a border services officer, a tax collector’s job is not easy. As the grievor put it, when you are dealing with people’s money it is natural and understandable that they sometimes get upset.

[161] Some of the grievor’s words as recounted in her own diary entries were certainly blunt. However, given the evidence as presented, the questions remaining as to the tone used, the full context in which they were said, and the uncertainty as to which instances actually formed the basis for the discipline, I find that the employer did not meet its burden of proof to establish that the grievor engaged in unprofessional conduct.

[162] For all these reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[163] The grievance is granted.

[164] The employer is ordered to pay the grievor all wages lost due to her eight-day suspension as well as any applicable premiums, bonuses, pension and benefit adjustments and the like, with interest at the Bank of Canada prime rate from the first day of her suspension to the date of payment.

[165] I will remain seized for a period of 90 days should the parties encounter any difficulty implementing this decision.

August 31, 2021.

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