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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

DIANE HÉBERT AND SOPHIE DUMESNIL

Grievor and Complainants

and

**TREASURY BOARD
(Canada Border Services Agency)**

Employer and Respondent

Indexed as

Hébert v. Treasury Board (Canada Border Services Agency)

In the matter of complaints made under section 133 of the *Canada Labour Code* and an individual grievance referred to adjudication

Before: Renaud Paquet, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor and Complainants: Kim Patenaude and Marie-Pier Dupont, counsel

For the Employer and Respondent: Patrick Turcot, counsel

Heard by videoconference,
September 20 to 24, 2021, and April 25 and 26, 2022.
[FPSLREB Translation]

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. The grievance and the complaints

[1] As of the grievance and the complaints, Diane Hébert and Sophie Dumesnil (“the grievors”) worked as border services officers (BSOs) for the Canada Border Services Agency (“the employer” or CBSA) at the Saint-Bernard-de-Lacolle (“Lacolle”) commercial border crossing. They each held a position at the FB-03 group and level. The border crossing is part of the CBSA’s Montérégie Border District.

[2] Ms. Hébert has been working for the CBSA since 2003. As of her complaint and grievance, she was the vice president of the Lacolle local. Ms. Dumesnil has been working for the CBSA since 2001. As of her complaints, she was a member of the Occupational Health and Safety Workplace Committee (OHSWC) as an employee representative.

[3] On May 27, 2019, a trailer was escorted to the Lacolle commercial border crossing to be emptied of its contents, which consisted of a large quantity of contraband tobacco covered with wood chips. In total, five people climbed on the open top of the trailer to remove the chip layer. Ms. Hébert saw it as a risk to occupational health and safety. She filmed about a minute of the scene with her personal cell phone, for which the employer suspended her for three days. She filed a grievance after the suspension (file no. 566-02-43274). She asked that the employer rescind the measure and reimburse her lost salary, lost overtime, and premiums. She also sought compensation under s. 53(2)(e) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) for the discrimination suffered. Her grievance was referred to adjudication under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”), which deals with disciplinary measures.

[4] Ms. Hébert also made a complaint under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; “the Code”) because she claimed that the suspension was a retaliatory act for exercising her rights under the Code (file no. 560-02-40863).

[5] On July 9, 2019, the employer granted 30 minutes to 3 members of the OHSWC, including Ms. Dumesnil, to complete an occupational health and safety (OHS) report about the issue of safety devices in situations similar to those that occurred on May 27, 2019. The task took longer than expected; it took 2 hours to complete the

report. After completing it, Ms. Dumesnil and her 2 colleagues met with the superintendent on duty that day. A heated discussion took place, during which the tone clearly raised. The employer investigated it and issued a reprimand letter to Ms. Dumesnil on November 25, 2019. She made a complaint under s. 133 of the *Code* on October 1, 2019, alleging that the conduct of the disciplinary process and the investigation were retaliations for exercising her rights under the *Code* (file no. 560-02-41052).

[6] At an OHSWC meeting held on November 21, 2019, an employer representative and three of the employees' representatives, including Ms. Dumesnil, engaged in a verbal altercation. The employer conducted a disciplinary investigation that lasted several months. In the end, it imposed no disciplinary measure on Ms. Dumesnil. However, on February 5, 2020, she made a complaint under s. 133 of the *Code*, alleging that the conduct, duration, and form of the disciplinary investigation were retaliatory acts for exercising her rights under the *Code* (file no. 560-02-41520).

II. Summary of the parties' evidence

[7] The parties submitted a brief joint statement of certain facts. They also submitted over 600 pages of documents.

[8] The employer called as witnesses Pierre Jamison, Steve McClelland, Serge Grenier, Sébastien-Max Huneault, Lynn Anderson, Luciano Iacovella, Danielle Dubuc, Luc Langlois, Chantal Laurin, and Michel Martineau. As of the facts about which they testified, they were all CBSA employees. Mr. Jamison was a superintendent at the Herdman border crossing, Mr. McClelland was a superintendent on an acting basis at the Lacolle border crossing, Mr. Grenier was a BSO at the Lacolle border crossing, Mr. Huneault was a superintendent at the Lacolle border crossing, Ms. Anderson was a superintendent at the Lacolle border crossing, Mr. Iacovella was a BSO at the Lacolle border crossing, Ms. Dubuc was a BSO at the Lacolle border crossing, Mr. Langlois was the chief of operations at the Lacolle commercial border crossing, Ms. Laurin was the director of the Montérégie Border District, and Mr. Martineau was the chief of operations of the Montérégie East Region.

[9] Both Ms. Hébert and Ms. Dumesnil testified. They also called Benoît Ricard as a witness, who is Ms. Hébert's spouse. As of the facts about which he testified,

Mr. Ricard was a BSO at the Lacolle border crossing. He was also the OHSWC's co-president as part of which he represented the Lacolle border crossing employees.

[10] Overall, each party's evidence was not contradicted by the other party. I will note otherwise, as needed. For reasons of clarity and consistency, I will present the evidence of the three specific incidents on which the grievance and the three complaints were based.

[11] Based on most of the testimonies, I note that in 2019, the work atmosphere at the Lacolle border crossing was unfavourable. For example, Mr. Langlois used the terms "[translation] poor atmosphere" and "[translation] very tense atmosphere". Ms. Laurin testified about significant tension at that time and that the work atmosphere was toxic. Ms. Hébert called the work atmosphere terrible, awful, and demotivating.

A. The May 27, 2019, incident

[12] On May 27, 2019, a truck and its 53-foot trailer were escorted from the Herdman post to the Lacolle commercial border crossing for the trailer to be emptied of its contents, which the CBSA was to seize. The trailer contained a large amount of illegal tobacco covered with wood chips.

[13] In total, five people climbed a ladder to the top of the open trailer to remove the wood chips with snow shovels. Those five people were Mr. Jamison, Mr. McClelland, Mr. Grenier, and two material handlers from EPC, the company hired to unload freight trucks as needed.

[14] Mr. McClelland was in charge of the operation, as he was the superintendent on duty at the Lacolle commercial border crossing at the time. Mr. Jamison was there because the load came from the Herdman border crossing, where he was the superintendent on duty. That same day, Mr. Grenier was working at the Lacolle commercial border crossing and offered to help the two superintendents and the two material handlers unload the chips. The unloading took place in the evening of May 27, 2019. According to the witnesses, it took them around two to three hours to shovel all the chips out of the trailer.

[15] That evening, Ms. Hébert worked the evening shift at the Lacolle commercial border crossing, from 16:00 to midnight. At around 21:00, she went outside, not far

from the trailer, where the 5 people were shovelling chips. They were at a height of more than 2.4 metres and had no harnesses or other safety equipment. According to her, they were breaching the provisions of the *Canada Occupational Health and Safety Regulations* (SOR/86-304) on fall-protection systems (at the time, ss. 12.10(1)(a) and (1.1)). She shouted at them that their activity was unsafe. She testified that her concern was that someone would fall or be injured in the trailer as she was unsure of the solidity of what they were walking on. In her view, it was unthinkable for employees to take such risks. Then, after some time, Ms. Hébert used her personal cell phone to film the 5 people shovelling the chips for a little less than a minute.

[16] At the hearing, Ms. Hébert's short video was played several times. It shows the three CBSA employees and the other two people in the trailer. Neither the load contents nor any markings on the trailer can be seen. In the audio, Ms. Hébert can be heard saying to the people in the trailer, "[translation] For health and safety, we will go back, for health and safety." The employer's witnesses claimed that no discussion was had with Ms. Hébert before she began filming. After her comment heard in the video, Mr. Jamison replied, "[translation] That's it; we'll go back." Then, a few seconds later, the three CBSA employees can be heard laughing. According to them, one of them made a joke about something they did not remember. According to Ms. Hébert, they laughed at her after she made her comment.

[17] The two superintendents on the trailer did not ask or order her to stop filming. Mr. Jamison testified that he did not know that Ms. Hébert was filming, even though he had seen her with her personal cell phone. Then, the three CBSA employees continued shovelling the wood chips. Ms. Hébert and the superintendents had no further exchanges during the few minutes she was there.

[18] According to Mr. Jamison, Ms. Hébert had a sarcastic tone when she spoke to the employees in the trailer. He confessed that he responded to her in the same tone. The three CBSA employees who had been in the trailer admitted that they had no fall-protection equipment at that time. They testified that they did not feel that they were in danger while shovelling.

[19] Ms. Hébert stated that by using her personal cell phone, as an employee and a union representative, she used the necessary means available to her to report an occupational health and safety breach. According to her, the images told the story of

what happened much better than words. She testified that she never posted or shared the video on social media. However, immediately after the incident, she sent it to Mr. Ricard by Messenger because he was not working that evening. He then told her that he could do nothing to stop what was happening on the trailer, given that two of the people in question were bosses. Ms. Hébert also showed the video to Éric Sheperd, the local's president, and to Ms. Dumesnil, who was an OHSWC member. Apparently, the president's reaction was about the same as Mr. Ricard's.

[20] The following day, May 28, 2019, Mr. Ricard emailed the other OHSWC members to add a topic for the next OHSWC meeting since he wanted to discuss the fall-protection equipment after the tobacco seizure of the day before.

[21] Mr. Jamison testified that he knew of the safety equipment for working at heights, but he never thought to use it on May 27, 2019, while he was on the trailer. Mr. Jamison and Mr. McClelland testified that they did not know that they did not comply with health and safety standards while shovelling on the trailer top. No disciplinary measures were imposed on the three employees for breaching occupational health and safety standards. However, the employer later sent reminders to employees about the obligation to comply with the standards in question.

[22] Mr. Jamison and Mr. McClelland acknowledged that they also breached the CBSA's *Offload Policy for Highway Examinations* by unloading the trailer on May 27, 2019. Among other things, the policy provides as follows:

...
... **At no time** will a CBSA employee at a designated commercial office operate forklifts or tow motors, open containers or engage in the offload or reload process....
...

[Emphasis in the original]

[23] The words "at no time" are in bold in that policy. No disciplinary measure was imposed on the three employees who shovelled the chips. However, the employer later sent reminders to employees about the obligation to comply with that policy.

[24] The employer adduced into evidence its *Policy on the Use of Personal Electronic Communication Devices in the Workplace*. It prohibits using personal cell phones while at work. The following excerpts from it are of particular interest in this case:

[Translation]

1. Policy

The Canada Border Services Agency's (CBSA) policy is to prohibit all CBSA employees working at ports of entry, tactical operations centres, and CBSA offices providing client service from using personal electronic communication devices while performing their duties as CBSA employees.

...

5.2 Areas subject to this policy include among others primary inspection lines, secondary inspection lines, general office areas, warehouses, and all other operational areas at CBSA ports of entry, regardless of whether client service is provided in those areas.

...

6.2 All CBSA employees working at ports of entry, tactical operations centres, and CBSA offices providing client service are not authorized to use personal electronic communication devices while performing their duties.

...

7.2 CBSA employees working in areas subject to this prohibition will turn off their personal electronic communication devices or those provided by a third party, as defined in the Definitions section, while performing their duties.

7.3 Employees will ensure that those who require emergency information are provided with their workplace's telephone number, in case of emergency.

...

8.1 CBSA employees working at CBSA ports of entry, tactical operations centres, and CBSA offices providing client service are responsible for complying with this policy.

8.2 Management teams are responsible for monitoring and ensuring compliance with this policy and for taking appropriate disciplinary measures when employees do not comply with these procedures.

...

[25] All the BSOs and superintendents testified that while at work, they keep their personal cell phones in their pants pockets. Their phones are on with the ringers off and are in the vibration mode. Mr. McClelland added that the BSOs keep their phones in their pockets with the ringers off and in the vibration mode. Mr. Jamison testified that he had already given employees at the Herdman border crossing oral or written warnings about failing to comply with the noted CBSA policy. Mr. McClelland testified

that some managers are stricter than others when it comes to personal cell phones. In his view, employees using their personal cell phones briefly and discreetly is tolerated. On that basis, he has used his personal cell phone while at work. Mr. Grenier testified that when he has the time, he discreetly reads the received messages on his personal cell phone while at work.

[26] Mr. Huneault testified that there are frequent reminders about the *Policy on the Use of Personal Electronic Communication Devices in the Workplace*. It is not always strictly enforced. According to him, it may be acceptable to use a personal cell phone if the employee is not in front of clients and using it is not distracting. According to Mr. Langlois, employees may use their personal cell phones while on break but not within clients' view.

[27] The employer adduced into evidence a newspaper article with information about a former BSO who had been involved as an accomplice in an illegal drug importation in 2014. The BSO supposedly then used a personal cell phone to facilitate the work of the BSO's partners. Ms. Hébert's representative objected to adducing this item into evidence on the basis that Ms. Hébert's situation had nothing in common with that of the BSO. Even though I agree that the two situations have nothing in common, I still accepted the document as adduced into evidence as it illustrates well how risky it is for the CBSA to agree to let its employees use their personal cell phones while at work.

[28] According to Mr. Huneault and Mr. Langlois, there is a significant difference between reading urgent family messages with a personal cell phone and filming a seizure operation following a criminal investigation.

[29] On July 18, 2019, Mr. Huneault asked Ms. Hébert to destroy what she had filmed on May 27, 2019. She agreed, did so shortly after that, and informed him of it in writing.

[30] Mr. Grenier testified that he has known Ms. Hébert for several years and that they have always had a good relationship. He testified with supporting documents that she sent him what she filmed the day before by Messenger on May 28, 2019, at 21:46. He said that he did not share the information with anyone, except in 2021 with the employer's counsel, when preparing to testify at the hearing. He also testified that it is possible that Ms. Hébert spoke to him before sending him what she had filmed. He did

not remember. For her part, she testified that Mr. Grenier asked her if he could see what she had filmed and that she sent him the video in question at his request.

[31] Mr. Langlois did not work the evening of May 27, 2019. After being told of Ms. Hébert's alleged misconduct of using her personal cell phone to film colleagues, he completed the CBSA's "[translation] Misconduct Reporting Form" on behalf of Ms. Laurin on May 29, 2019. Afterwards, the task of conducting the investigation was assigned to Mr. Huneault.

[32] Mr. Huneault summoned Ms. Hébert to a disciplinary meeting that was held on June 26, 2019. Another superintendent accompanied him. The local's president accompanied Ms. Hébert. At the disciplinary meeting, she read a text outlining her version of what happened on May 27, 2019. Mr. Huneault took notes, but neither he nor the other superintendent asked questions. No discussion ensued.

[33] Mr. Huneault testified that the fact that Ms. Hébert was a union representative had no impact on his decision to suspend her without pay for three days. According to him, on May 27, 2019, she acted not within the scope of her union duties but in a personal capacity. Important to Mr. Huneault was that Ms. Hébert did not comply with the *Policy on the Use of Personal Electronic Communication Devices in the Workplace* when she filmed a seizure operation. By doing so, she also breached the *Values and Ethics Code for the Public Sector* and the CBSA's *Code of Conduct*. According to Mr. Huneault, Ms. Hébert could have done something other than film the incident had she wanted to report a breach of occupational health and safety.

[34] Mr. Huneault testified that in his investigation, he never saw what Ms. Hébert filmed with her personal cell phone. Instead, he relied on the CBSA's footage that shows her recording with her personal cell phone. Those videos have no audio. He did not share or show them to her; nor did the employer adduce them into evidence at the hearing. Finally, Mr. Huneault testified that he met with Ms. Hébert only as part of his investigation. At the June 26, 2019, meeting, she had the opportunity to provide her version of the facts.

[35] On August 8, 2019, on arriving at work at 16:00, Ms. Hébert was informed of the CBSA's decision to suspend her without pay for three days, August 8, 9, and 10, 2019, for her alleged misconduct on May 27, 2019. The following excerpt from the disciplinary letter details the reasons for the three-day suspension:

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

[Translation]

...

On May 27, 2019, you used a personal cell phone, while carrying out your duties, to film CBSA employees and material handlers unloading a truck as part of a customs seizure.

On June 26, 2019, you were summoned to a disciplinary hearing to provide your comments.

After a detailed analysis of the event, and after the disciplinary hearing, I conclude that you made an unauthorized use of a personal electronic device to film an enforcement action under the Act (a customs seizure) as part of your duties. By doing so, you breached the Policy on the Use of Personal Electronic Communication Devices in the Workplace, the Values and Ethics Code for the Public Sector, and the CBSA's Code of Conduct. As a border services officer, your employer has the right to expect you to comply with these policies.

...

[36] Ms. Hébert returned home on August 8, 2019, shortly after 16:00, to start her suspension. Then, on August 15, 2019, she filed a grievance to challenge the three-day suspension (file no. 566-02-43274). She also made a complaint under s. 133 of the *Code*, alleging that the suspension was retaliation for exercising rights conferred on her under the *Code*.

B. The July 9, 2019, incident

[37] On May 28, 2019, Mr. Ricard emailed the other OHSWC members, indicating that the issue of fall-protection equipment would be discussed at the next meeting, given the tobacco seizure on May 27, 2019. On June 20, 2019, Mr. Huneault, who is the OHSWC's co-president, called an OHSWC meeting to discuss the approach that would be taken to address the issue. At the meeting, held on June 25, 2019, the OHSWC members agreed that both the employer and employee representatives should complete a Hazardous Occurrence Investigation Report (a LAB 1070 report).

[38] On July 9, 2019, Ms. Dumesnil, Mr. Ricard, and Mr. Sheperd met to complete their section of the LAB 1070 report. The meeting took place during working hours. The schedule that Mr. Huneault prepared provided that the three BSOs would meet from 22:00 to 22:30 to complete the report. Mr. Huneault thought that 30 minutes would be enough. Ms. Dumesnil had expressed doubts and felt that more time would be needed, which she shared with Mr. Huneault and Ms. Anderson, who was the

superintendent on duty that evening. Ms. Dumesnil testified that apparently, Ms. Anderson replied to her that she would adjust the time as necessary. Ms. Anderson said that she remembered that Ms. Dumesnil raised a concern about the allotted time.

[39] Instead of the 30 minutes that Mr. Huneault allocated at the start, the 3 BSOs took 2 hours to complete the report near the end of their shift at 00:05. During that time and at any time, Ms. Anderson could have contacted the 3 BSOs as needed, had their services been required for operational purposes, because they had a radio. However, she did not need to contact them, as it was relatively quiet at the secondary inspection area of the Lacolle commercial border crossing, where they had been posted that evening.

[40] Once the LAB 1070 report was completed at about 00:05, the 3 BSOs passed by Ms. Anderson's workstation. Mr. Ricard then thanked her for the time allotted to prepare the report. She testified that she then spoke to them in a calm tone. She told them that she felt that they had disrespected her by not returning at the scheduled time, 22:30, and by not checking with her as to whether they could take longer than the 30 minutes originally planned. Ms. Dumesnil testified that Ms. Anderson also apparently said that they had betrayed her trust and had disappeared for 2 hours.

[41] According to Ms. Anderson, the three BSOs reacted very aggressively. She testified that Ms. Dumesnil stood in front of her, that she had much to say, that she "[translation] shouted at her" while pointing her finger at her, and that Ms. Dumesnil's body language was aggressive. Ms. Anderson said that she remained seated and professional during the incident. For her part, Ms. Dumesnil testified that she had felt some anger and that Ms. Anderson's comments had "[translation] upset" her. She testified that she did not behave aggressively even though she was angry. She added that her gestures had been normal and that she usually speaks loudly but that that time, she spoke louder than usual. Mr. Ricard confirmed Ms. Dumesnil's testimony. He testified that Ms. Dumesnil already speaks loudly naturally but that in the incident, Ms. Dumesnil's voice was louder than during a normal conversation. According to Mr. Ricard, Ms. Dumesnil was intense, but she did not scream; nor was she aggressive.

[42] Mr. Iacovella and Ms. Dubuc saw and heard what happened around midnight that evening as they were in the workspace right next to Ms. Anderson's.

[43] Mr. Iacovella testified that Mr. Ricard thanked Ms. Anderson for the time allotted. Then, Ms. Anderson supposedly said that in the future, if they needed to exceed the allotted time, she would like to be notified. From there, things turned south. According to Mr. Iacovella, Ms. Dumesnil was angry, spoke very loudly, was aggressive, and gesticulated. According to him, Ms. Anderson remained calm. However, after the incident, she seemed shaken. When she left work a little later, Mr. Iacovella and Ms. Dubuc asked her to call them when she reached home to ensure that she arrived safely.

[44] Ms. Dubuc's testimony was similar to that of Mr. Iacovella. She witnessed the altercation and heard the three BSOs raise their voices. She testified that Ms. Dumesnil's tone was very intense and aggressive.

[45] Mr. Langlois conducted an investigation into the July 9, 2019, incident. He requested written reports from Ms. Anderson, Mr. Iacovella, Ms. Dubuc, Ms. Dumesnil, Mr. Picard, and Mr. Sheperd. Then, Mr. Langlois met with Ms. Dumesnil for a disciplinary hearing on August 1, 2019. He did not recall whether at that time he shared the reports with her that he had on hand.

[46] On November 25, 2019, Mr. Langlois issued a written reprimand to Ms. Dumesnil for speaking to Ms. Anderson in an inappropriate tone and behaving unprofessionally on July 9, 2019, which constituted a lack of respect and was contrary to the *Values and Ethics Code for the Public Sector* and the CBSA's *Code of Conduct*. Mr. Langlois could not remember why almost four months passed from the disciplinary hearing to the disciplinary measure being imposed.

[47] Earlier, on October 1, 2019, Ms. Dumesnil made a complaint under s. 133 of the *Code*, alleging that the investigation that Mr. Langlois conducted and the fact that he summoned her to a disciplinary meeting on August 1, 2019, breached s. 147 of the *Code*. She asked the Board to acknowledge that the CBSA breached s. 147 and to apologize for the stress and loss of enjoyment experienced since July 9, 2019. Ms. Dumesnil also filed a grievance challenging the reprimand letter dated November 25, 2019. According to her, the employer allowed the grievance at the second level of the grievance process in November 2021 based on the overly long delays responding to the grievance.

C. The November 21, 2019, incident

[48] At an OHSWC meeting in October 2019, at Mr. Ricard's request, it was agreed that in a later meeting, the charter would be reopened that governed the OHSWC's general functioning and composition. The employees' representatives were particularly interested in removing the requirement that an employee from the administrative services office had to attend meetings, to ensure a quorum.

[49] The meeting to reopen the charter took place on November 21, 2019. The amendment about the office employee was accepted. Then, on the employer's behalf, Mr. Huneault suggested that Mr. Langlois attend the next meeting. The employees' representatives concluded that the employer wanted to reduce the number of employee representatives at the OHSWC because it felt that there were too many of them, given the number of employees at the Lacolle border crossing.

[50] The employee representatives, particularly Mr. Sheperd, Mr. Ricard, and Ms. Dumesnil, reacted very badly. According to Mr. Huneault, Mr. Sheperd and Mr. Ricard then insulted him. Ms. Dumesnil also spoke very loudly to Mr. Huneault, but Mr. Huneault did not understand what she said. He said that he remained calm, asked for an apology, and then ended the meeting, which he felt was going nowhere. Ms. Dumesnil acknowledged that she had been angry and that she had spoken loudly. She testified that she spoke to as much to one co-president (Mr. Huneault) as to the other (Mr. Ricard).

[51] Mr. Huneault testified that it was the first time that such a thing had happened to him since the beginning of his career. He then said that he was intimidated and that he condemned the behaviours, which he considered unacceptable. Shortly after the incident, he informed Mr. Langlois of what happened and submitted a written report to him on December 2, 2019.

[52] Mr. Langlois completed the misconduct report form (BSF773) on Ms. Laurin's behalf on December 12, 2019. Mr. Martineau then conducted a disciplinary investigation, given that Mr. Langlois knew that he would leave the Lacolle border crossing in January 2020. In addition, Ms. Laurin preferred that someone from outside the Lacolle border crossing conduct the investigation as the work atmosphere was very tense at that point.

[53] Mr. Martineau conducted his investigation and met with the people involved in January 2020. He met with Ms. Dumesnil on January 22, 2020, but did not share with her any information already gathered before the meeting. She said that she was convinced that Mr. Martineau possessed such information, given that his questions were very precise and were about comments made at the November 21, 2019, meeting.

[54] Mr. Martineau submitted his report to Ms. Laurin on February 7, 2020, in which he concludes that at the November 21, 2019, meeting, Ms. Dumesnil “[translation] did not display any loss of self-control” and did not “[translation] verbally insult a superintendent”. On April 23, 2020, 11 weeks after Mr. Martineau’s report, Ms. Anderson informed Ms. Dumesnil that no disciplinary measure would be taken against her for the November 21, 2019, incidents. Ms. Laurin explained that the long delay occurred because the three employees involved had to be informed at the same time, that she had to wait for the recommendation from the CBSA’s Labour Relations section, and that the COVID-19 pandemic had to be managed at the same time.

[55] On March 2, 2020, Ms. Dumesnil made a complaint under s. 133 of the *Code*, alleging that possible disciplinary measures from the OHSWC meeting on November 21, 2019, constituted breaches of s. 147 of the *Code*. She asked the Board to acknowledge that the CBSA breached s. 147 and that the CBSA cease its intimidation activities against employees who dare speak at OHSWC meetings.

III. Summary of the parties’ arguments

A. For the employer

[56] According to the employer, the disciplinary measure imposed on Ms. Hébert was fully justified. She used her personal cell phone to take a video of CBSA employees and external material handlers who were on a trailer, to search it for a seizure. She had no right to do what she did. The employer has a policy that makes it illegal to use personal cell phones while at work. All employees know the policy well and are reminded of it regularly.

[57] After filming the search in question, Ms. Hébert sent the video via Messenger to Mr. Ricard and Mr. Grenier. She could not send that CBSA internal information outside. In addition, she could have used means other than filming the scene to report the occupational safety risk that searching the trailer top posed.

[58] Therefore, there was a factual basis for imposing disciplinary measures. Answering the phone for a personal matter and taking a video of a CBSA seizure operation and sending it to a colleague differ enormously.

[59] According to the employer, Ms. Hébert's mistakes could have justified a suspension of 10 to 20 days without pay under its discipline policy. After weighing the aggravating and mitigating factors, instead, the employer chose to suspend her for 3 days without pay, which was an appropriate and not excessive penalty.

[60] The employer objected to Ms. Hébert's discrimination allegation and her compensation claim under the *CHRA*. She never notified the Canadian Human Rights Commission (CHRC) that she would raise an issue under the *CHRA* as part of her referral to adjudication as required by s. 210 of the *Act*. In addition, her grievance was referred to adjudication only under s. 209(1)(b), which deals with referring grievances to adjudication that challenge disciplinary measures. It was not referred under s. 209(1)(a), which deals with referrals to adjudication of grievances relating to collective agreement breaches, in this case the no-discrimination clause.

[61] With respect to the three complaints under s. 133(1) of the *Code*, the employer claimed that neither Ms. Hébert nor Ms. Dumesnil met her burden of proof. Each would have had to demonstrate that due to exercising her rights under the *Code*, she suffered disciplinary retaliation, and that there was a direct link between exercising her rights and the measures suffered.

[62] The employer imposed disciplinary measures on Ms. Hébert, but there is no link between her exercising her rights under the *Code* and the discipline imposed. An employee's exercise of his or her rights under the *Code* does not entitle him or her to breach the employer's other policies. However, Ms. Hébert did so, which is why the employer stated that it imposed a disciplinary measure on her.

[63] According to the employer, Ms. Dumesnil's two complaints should also be dismissed. She suffered no retaliatory measures from exercising her rights under the *Code*.

[64] The employer reprimanded Ms. Dumesnil for her aggressive behaviour and disrespect toward Ms. Anderson on July 9, 2019. The testimonies of Mr. Iacovella and Ms. Dubuc must be considered. According to Mr. Iacovella, Ms. Dumesnil was angry,

spoke very loudly, was aggressive, and gesticulated. Ms. Dubuc testified along the same lines. She testified that Ms. Dumesnil's tone was very intense and aggressive. Those two witnesses are credible, and their versions of what happened on July 9 must be accepted, rather than the versions of Ms. Dumesnil and Mr. Richard, who have a direct interest in this case.

[65] The employer reiterated that it imposed no disciplinary measures on Ms. Dumesnil for the November 21, 2019, incidents. A disciplinary investigation is an administrative action, not a disciplinary one.

[66] To support its arguments, the employer referred me to the following decisions: *William Scott & Co. (Re)*, [1976] B.C.L.R.B.D. No. 98 (QL); *Michaud v. Canada Revenue Agency*, 2018 FPSLREB 87; *Phillips v. Deputy Head (Canada Border Services Agency)*, 2013 PSLRB 67; *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52; *Leary v. Treasury Board (Department of National Defence)*, 2005 PSLRB 35; *Paquet v. Air Canada*, 2013 CIRB 691; *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4; *Sousa-Dias v. Treasury Board (Canada Border Services Agency)*, 2017 PSLREB 62; *Vanegas v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 60; *Pezze v. Treasury Board (Department of Natural Resources)*, 2020 FPSLREB 37; *Lueck v. Department of Foreign Affairs, Trade and Development*, 2021 FPSLREB 87; *Canada (Attorney General) v. Frazee*, 2007 FC 1176; *Canada (Attorney General) v. Penner*, [1989] 3 FC 429 (C.A.); *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63; *Alexis v. Deputy Head (Royal Canadian Mounted Police)*, 2020 FPSLREB 9; *Quindiagan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 769; and *McEwan v. Deputy Head (Immigration and Refugee Board)*, 2015 PSLREB 53.

B. For Ms. Hébert and Ms. Dumesnil

[67] According to Ms. Hébert and Ms. Dumesnil, the parties had a climate of distrust in 2019, which led the employer to take retaliatory action against them.

[68] In March 2019, all OHSWC members representing employees were new. At the time, the workplace had several contentious situations. The situation was unhealthy, and union-management relations were tense, as were relationships between the parties in the OHSWC.

[69] Before filming with her personal cell phone, Ms. Hébert told the employees on the trailer that their activity was dangerous without security equipment and that they were not following the policies in place. By acting that way, she exercised her rights and met the obligations set out at s. 126(1) of the *Code* with respect to occupational health and safety.

[70] The employer claimed that it suspended Ms. Hébert for breaching its *Policy on the Use of Personal Electronic Communication Devices in the Workplace* on May 25, 2019. However, the evidence pointed out a significant gap between what the policy states and its application. According to the witnesses, the employer tolerates employees using their personal cell phones while at work as long as it is not done in front of clients.

[71] The employer conducted no investigation after the May 25, 2019, incident. It did not even use or view Ms. Hébert's video before imposing a disciplinary measure on her. Therefore, it did not know what she filmed or what she said while filming. Instead, it used its video recordings. According to the employer, they show, without sound, Ms. Hébert filming the employees on the trailer. In addition, the employer did not know that she sent the video recording to Mr. Grenier or Mr. Ricard. The employer learned of it only while preparing for the hearing.

[72] The employer did not dispute that on May 25, 2019, while the trailer was being unloaded, the occupational safety rules were breached. However, it ordered Ms. Hébert to destroy her video, which thus prevented her from carrying out her union representative role in full.

[73] There was no need to impose a disciplinary measure on Ms. Hébert. If there was such a need, clearly, the three-day suspension was exaggerated. The employer did not consider mitigating factors, such as her personal file, her concerns about employee health and safety, and the employer's tolerance toward using personal cell phones while at work.

[74] Ms. Hébert requested the reimbursement of the salary lost during the three-day suspension without pay but waived her claim for overtime and premiums. She maintained that the employer discriminated against her based on her status as a bargaining agent member, but she no longer seeks compensation under s. 53(2)(e) of the *CHRA*.

[75] The July 9 and November 21, 2019, events involving Ms. Dumesnil are part of the same sequence of facts and context of tension in the workplace. In effect, everything began with the May 25, 2019, incident, after which members representing employees on the OHSWC required an investigation that the employer refused.

[76] On July 9, 2019, when Ms. Dumesnil and two of her colleagues completed a report, they exercised their rights under the *Code*. By acting as it did, the employer interfered with exercising that right by attempting to limit the time to prepare the report. It then started a disciplinary investigation into Ms. Dumesnil's actions, who was an OHSWC member, and it took it five months to complete its investigation, which led to a reprimand letter.

[77] On November 21, 2019, at the OHSWC meeting in which Ms. Dumesnil participated, a heated discussion erupted. After the meeting, the employer initiated a disciplinary investigation against Ms. Dumesnil and other employees. Only in mid-April 2020 did it inform her that no disciplinary sanction would be imposed on her. The mere fact of conducting the investigation and its time limit constituted retaliation against her.

[78] After the employer's alleged violations of s. 147 of the *Code*, Ms. Hébert and Ms. Dumesnil asked that the Board declare that the *Code* was breached, that the declaration and the Board's decision be posted in the workplace, and that the Board order an inquiry into the May 27, 2019, events.

[79] To support their arguments, Ms. Hébert and Ms. Dumesnil referred me to the following decisions: *Vallée; Stiermann v. Treasury Board (Department of Industry)*, 2019 FPSLRB 52; *Martin-Ivie v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 40; *Babb v. Canada Revenue Agency*, 2008 PSLRB 38; *King v. Canada Customs and Revenue Agency*, 2005 PSLRB 3; *Tanguay v. Statistical Survey Operations*, 2005 PSLRB 43; *Walker v. Canada (Attorney General)*, 2020 FCA 44; and *Professional Institute of the Public Service of Canada v. Treasury Board*, 2000 PSSRB 5.

IV. Analysis and reasons

A. The disciplinary measure imposed on Ms. Hébert

[80] The employer suspended Ms. Hébert for three days without pay. Its reasons stated in the disciplinary letter are summarized as making an unauthorized use of a

personal cell phone to film a customs seizure in the course of her duties. By doing so, she allegedly breached the *Policy on the Use of Personal Electronic Communications Devices in the Workplace*, the *Values and Ethics Code for the Public Sector*, and the CBSA's *Code of Conduct*.

[81] The tests for assessing a disciplinary measure are well known. Did the employee's behaviour warrant the employer imposing a disciplinary measure? If so, was the disciplinary measure excessive? In other words, did the employer have good and sufficient cause to impose a three-day unpaid suspension on Ms. Hébert?

[82] Ms. Hébert did not contest the allegations. She admitted that she used her personal cell phone on May 25, 2019, to film five people, including three employees, on top of a trailer, shovelling wood chips. She also admitted that she was aware of the employer's policy that prohibited using personal cell phones while at work.

[83] According to Mr. Huneault and Mr. Langlois, Ms. Hébert used her personal cell phone to film a seizure operation that followed a criminal investigation. She stated that instead, she acted to document an incident involving a risk to the physical safety of CBSA employees. That is an important nuance in interpreting her action, which cannot be ignored when determining whether the employer had good and sufficient cause to impose a disciplinary measure on her.

[84] Ms. Hébert's testimony seemed very credible to me as to her intention on May 25, 2019. She said that she witnessed a situation in which she felt that the safety of three CBSA employees was at risk; they were working on a trailer top several metres above the ground, without any safety equipment to prevent falls. Ms. Hébert testified that she shouted to them that their activity was not safe. They said that they did not hear her. Then, after a while, she filmed the scene, for a little less than a minute. The footage shows the three CBSA employees on top of the trailer, but the contents of the load cannot be seen. Ms. Hébert can be heard telling them, "[translation] For health and safety, we will go back, for health and safety." The two superintendents on the trailer never asked her to stop using her personal cell phone. Ms. Hébert then said that by filming the scene, she took the necessary steps available to her to report an occupational health and safety breach.

[85] Based on that summary of what happened on May 25, 2019, I see nothing wrong with Ms. Hébert's behaviour, except that a policy in place did not allow using personal cell phones while at work.

[86] The evidence presented at the hearing demonstrated a significant gap between the policy in place and the practice with respect to using personal cell phones in the workplace.

[87] On one hand, the policy is clear. Employees working at CBSA ports of entry are prohibited from using electronic communication devices. In addition, management teams are responsible for ensuring compliance with the policy and for taking disciplinary measures when employees fail to comply with it.

[88] On the other hand, the practice is very different. Using personal cell phones while at work is tolerated. According to Mr. McClelland, BSOs have their personal cell phones in their pockets, but the ringers are off, and their phones are in the vibration mode. According to him, employees using their personal cell phones briefly and discreetly is tolerated. Furthermore, sometimes, he uses his personal cell phone while at work. Mr. Grenier testified that when he has the time, he discreetly reads the messages received on his personal cell phone while at work. Mr. Huneault testified that the policy is not always strictly enforced. In his view, it may be acceptable to use a personal cell phone while at work if the employee is not in front of clients and using the phone is not distracting. Mr. Langlois testified that employees may use their personal cell phones on their breaks but not within the clients' view.

[89] On May 25, 2019, Ms. Hébert was not at her workstation when she used her personal cell phone, so it could not have distracted her. No evidence was adduced to demonstrate that she used it in the presence of clients. I would add that Mr. Jamison and Mr. McClelland, both CBSA managers, saw Ms. Hébert pointing her personal cell phone at them. Nothing in the evidence indicated that they intervened, to order her to put it away. However, they were responsible for doing so, according to the policy in place. I infer from this that if they did not see fit to, they felt without doubt that there was no need to intervene.

[90] Given the existing practices at the Lacolle border crossing with respect to using personal cell phones, the employer's leniency applying its policy, and the perfectly legitimate purpose of Ms. Hébert's behaviour on May 25, 2019, I find that the employer

did not have good and sufficient cause to impose a disciplinary measure on her. Of course, the employer was right to be concerned about an employee's use of a personal cell phone to film other employees. It seems to me that a simple discussion between Ms. Hébert and management would have been sufficient to clarify what happened, to establish what was acceptable and what was not, and to determine what would happen to the short video in question.

[91] I will not consider that Ms. Hébert shared the video by Messenger with Mr. Grenier and Mr. Ricard because the employer did not know that when it imposed the disciplinary measure. Clearly, it had been unable to consider the video. I will also not consider the fact that the employer did not adduce in evidence its video recording, which it used to discipline Ms. Hébert. In fact, I do not know exactly what the employer saw, and did not see, to discipline her.

[92] Ms. Hébert claimed that the employer discriminated against her, but she no longer seeks compensation under s. 53(2)(e) of the *CHRA*. The employer objected to my jurisdiction to deal with this allegation on the basis that the grievance was not referred to adjudication under s. 209(1)(a) of the *Act* and that the notice under s. 210(1) of the *Act* was not given to the CHRC.

[93] The employer was wrong to say that I cannot deal with this allegation. According to s. 226(2)(a) of the *Act*, the Board may, to decide "any matter" before it, interpret and apply the *CHRA*.

[94] But the alleged discrimination ground in this case is not among those listed in the *CHRA*. Ms. Hébert did not specify it in her grievance, but it appears that it is her status as a bargaining agent representative. That ground is found not in the *CHRA* but only in the collective agreement. Thus, the question of whether a notice should have been sent to the CHRC is irrelevant.

[95] That said, there is no doubt that the Board is properly seized of the grievance as it concerns a disciplinary measure that led to a suspension. Surely, the discrimination allegation about Ms. Hébert's union involvement was raised with the employer during the levels of the grievance process as the employer mentioned it in its final-level reply. Therefore, the issue is properly before me.

[96] But nothing in the evidence before me would lead me to conclude that Ms. Hébert's status as a bargaining agent representative was a factor in her treatment and that the employer discriminated against her.

B. The complaints made under s. 133 of the Code

[97] Section 133(1) of the Code provides that an employee may make a written complaint on the ground that the employer took measures against the employee contrary to s. 147, which reads as follows:

147 No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

(a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

[98] The question raised by the three complaints made under s. 133(1) of the Code is determining whether Ms. Hébert and Ms. Dumesnil were victims of retaliation because they exercised their rights under Part II of the Code, which deals with occupational health and safety.

[99] The employer rightly referred me to paragraph 64 of Vallée, as follows, with respect to the criteria to consider when determining whether an employee suffered retaliation from exercising rights under the Code:

[64] Thus, the complainant would have to demonstrate that:

a) he exercised his rights under Part II of the CLC (section 147);

b) he suffered reprisals (sections 133 and 147 of the CLC);

c) these reprisals are of a disciplinary nature, as defined in the CLC (section 147); and

d) there is a direct link between his exercising of his rights and the actions taken against him.

[100] As indicated at paragraph 65 of *Vallée*, Ms. Hébert and Ms. Dumesnil did not exercise a right of refusal under s. 128(1) of the *Code*, so they did not benefit from the presumption in their favour under s. 133(6). The burden of proof was entirely on them.

[101] Both Ms. Hébert and Ms. Dumesnil exercised their rights under the *Code* during the events referred to in this decision. On May 25, 2019, Ms. Hébert filmed an incident involving safety risks to colleagues. On July 9, 2019, Ms. Dumesnil participated in preparing a report on the same incident, and on November 21, 2019, she participated in an OHSWC meeting.

[102] The employer imposed a disciplinary measure on Ms. Hébert for the video she recorded on May 25, 2019. It also issued a disciplinary letter to Ms. Dumesnil for her behaviour after the July 9, 2019, meeting.

[103] However, the employer did not impose a disciplinary measure on Ms. Dumesnil after the November 21, 2019, OHSWC meeting. According to her, the mere fact that the employer then conducted a disciplinary investigation was, in itself, a retaliatory act.

[104] On that last point, I agree with the employer. The fact that it conducted a disciplinary investigation into behaviours that could have been inappropriate did not in itself constitute a retaliatory act within the meaning of s. 147 of the *Code*. As the Board noted in *Lueck*, the fact that an employer conducts an investigation that may eventually lead to a disciplinary measure does not in itself constitute retaliation. The resulting action could constitute retaliation within the meaning of s. 147. At paragraph 284 of *Lueck*, the Board wrote the following:

*[284] When Parliament used words such as "... shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee ..." in s. 147 of the Code, I believe that it identified real actions, not contingencies. Raising the possibility of termination for incapacity, even if characterized as a threat of dismissal, is not an action that falls under s. 147. Similarly, I am unable to accept that the wording of s. 147 encompasses the contingency that the complainant **might** experience a financial or other penalty or **might** be subject to a threat of such a penalty. I am more persuaded that there would have to be proof that a financial or other penalty — a loss or disadvantage — was actually imposed, or would necessarily eventuate, to answer in the affirmative the question, "Did the respondent's action fall within the scope of s. 147 of the Code?"*

[Emphasis in the original]

[105] Therefore, on that basis, I dismiss Ms. Dumesnil's complaint about the November 21, 2019 (file no. 560-02-41520), incidents, as she did not suffer retaliation within the meaning of s. 147 of the *Code*.

[106] I must still determine whether a direct link exists between Ms. Hébert exercising her rights on May 25, 2019, and the employer imposing the three-day suspension on her. I must also determine whether a direct link exists between Ms. Dumesnil exercising her rights on July 9, 2019, and the employer issuing her a reprimand letter.

[107] I agree with the employer's argument that it imposed a disciplinary measure on Ms. Hébert because she used her personal cell phone to film employees unloading a truck as part of a customs seizure. That is the primary reason cited in the suspension letter. Based on the adduced evidence, nothing leads me to believe that that reason was a subterfuge to camouflage retaliation against Ms. Hébert for wanting to report an occupational safety incident. That does not mean that the employer acted properly when it took the disciplinary measure, but I do not believe that it did so in response to the exercise of a right under the *Code*. The adduced evidence does not support a direct link between the disciplinary measure and Ms. Hébert exercising her rights. Instead, the disciplinary measure was imposed, rightly or wrongly, because Ms. Hébert breached an employer policy.

[108] The adduced evidence also does not support a direct link between the reprimand letter issued to Ms. Dumesnil and the exercise of her rights under the *Code*. I accept Ms. Anderson's testimony that on July 9, 2019, Ms. Dumesnil "[translation] shouted at her" while pointing a finger at her and that Ms. Dumesnil's body language was aggressive. I also accept Mr. Iacovella's testimony that Ms. Dumesnil was angry then and that she spoke very loudly, was aggressive, and gesticulated. Finally, I accept Ms. Dubuc's testimony when she said that Ms. Dumesnil had a very intense and aggressive tone at that time. I place more weight on the testimonies of Mr. Iacovella and Ms. Dubuc than on those of Mr. Ricard and Ms. Dumesnil, who were directly involved in the confrontation that took place at the end of the shift on July 9, 2019. Mr. Iacovella and Ms. Dubuc had nothing to gain from their testimonies. I would add that Ms. Dumesnil testified that she felt anger and that she was "[translation] upset" by Ms. Anderson's comments. She admitted that that time, she spoke louder than usual.

Mr. Ricard testified that in the incident, Ms. Dumesnil's voice was louder than in a normal conversation.

[109] I conclude from the evidence that the employer gave Ms. Dumesnil a written reprimand not because, on July 9, 2019, she wrote a report on an occupational safety incident or because she took too long to write it but because she disrespected a supervisor, in this case Ms. Anderson.

[110] I do not think it necessary to comment on the case law that the grievors provided. I do not want to diminish the significance, scope, and relevance of those occupational health and safety decisions, but the facts on which they rely differ greatly from those before me in this case.

[111] Finally, there is no doubt that employees should be able to raise, without fear of retaliation, any situation involving occupational health and safety. They must also be able to sit on an occupational health and safety committee and to speak freely at its meetings. However, exercising those rights must always be done in a way that is respectful to individuals, codes of conduct, and legitimate policies in place.

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

(The Order appears on the next page)

V. Order

[113] I revoke the three-day suspension without pay imposed on Ms. Hébert.

[114] I order the employer to reimburse Ms. Hébert the salary and benefits lost during the three-day suspension, with interest at the applicable rate.

[115] I dismiss Ms. Hébert's complaint about the May 25, 2019 (file no. 560-02-40863), incident.

[116] I dismiss Ms. Dumesnil's complaint about the July 9, 2019 (file no. 560-02-41052), incident.

[117] I dismiss Ms. Dumesnil's complaint about the November 21, 2019 (file no. 560-02-41520), incident.

June 9, 2022.

FPSLREB Translation

**Renaud Paquet,
a panel of the Federal Public Sector
Labour Relations and Employment Board**