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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

THIERRY N'KOMBE

Grievor

and

DEPUTY HEAD
(Department of Citizenship and Immigration)

Respondent

and

TREASURY BOARD
(Department of Citizenship and Immigration)

Employer

Indexed as
N'Kombe v. Deputy Head (Department of Citizenship and Immigration)

In the matter of individual grievances referred to adjudication

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Raphaëlle Laframboise-Carignan, counsel

For the Respondent and the Employer: Patrick Turcot, counsel

Heard at Toronto, Ontario,
May 16 to 18, 2023.

[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievances referred to adjudication

[1] Thierry N'Kombe ("the grievor") held a position as a senior immigration officer with Immigration, Refugees and Citizenship Canada (IRCC or "the employer"). In 2017, he was investigated and suspended without pay for the duration of the investigation. In December 2018, he was terminated.

[2] The grievor filed a grievance challenging his suspension and termination and alleging violations of a collective agreement clause about the elimination of discrimination and the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). He referred his grievance to adjudication under ss. 209(1)(a) and (b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*).

[3] The grievor gave notice to the Canadian Human Rights Commission (CHRC) under s. 210 of the *FPSLRA*. However, the CHRC did not notify the Federal Public Sector Labour Relations and Employment Board ("the Board") as to whether it intended to make submissions on issues of the interpretation or application of the *CHRA* in the adjudication of the grievor's grievance.

[4] The grievor acknowledges that he committed the misconduct that IRCC accused him of, including giving preferential treatment to certain applicants, accessing the files of applicants with whom he had a personal connection, and using IRCC information and electronic network systems inappropriately for purposes other than those approved for his position. He argues that he would have been motivated to act that way by his Christian values and by a desire to support and help others.

[5] The grievor admits that his misconduct was serious and that the disciplinary action taken against him was justified. However, he argues that the termination was an excessive disciplinary action in the circumstances and that a six-month suspension without pay would be an appropriate disciplinary action.

[6] The grievor also argues that the employer discriminated against him and that he should be entitled to the compensation set out in ss. 53(2)(e) and 53(3) of the *CHRA*. The grievor is Black. According to him, racial bias ensured that his social interactions with other Black people were under increased scrutiny and were questioned. He states that his manager's attention to his social interactions led the employer to make

preliminary verifications, which uncovered signs suggesting that he had engaged in misconduct. Those signs were the subject of an investigation that uncovered the misconduct for which the grievor was suspended without pay and terminated. The grievor asks that the Board denounce that fact situation and award damages under the *CHRA* and that the parties be left to agree to the appropriate amount. However, I must specify that the grievor does not cite discrimination as a ground for challenging his termination. He did not argue that his termination was tainted by discrimination. Instead, at the hearing, he confirmed several times that the Board should treat the discrimination allegation as distinct from the issue of the disciplinary action imposed on him.

[7] I find that the grievor's discrimination allegation is unfounded. The evidence on record sets out that the grievor's insistence on meeting IRCC clients in person, despite warnings from the employer that him doing so was inappropriate, and not his race, led his manager to scrutinize the grievor's social interactions and actions more closely and his employer to make the preliminary verifications that led to the allegations against him.

[8] The grievor asks to be given another chance. He states that he has learned from his mistakes and argues that were he reinstated to his position, he would not repeat those mistakes. I accept that the remorse that he expressed at the hearing was sincere and that he has learned from his mistakes. However, the breaches alleged against him, which he admits to having committed, are so serious — in both nature and number — that I find that the bond of trust between the employer and the grievor was irreparably broken. Despite the presence of numerous mitigating factors, I find that the termination was not excessive in the circumstances.

[9] Therefore, I am of the opinion that the grievance must be denied.

II. Summary of the evidence

[10] The grievor had been an IRCC employee since 2001. He rose through the ranks to ultimately become a senior immigration officer (PM-04) within IRCC's Domestic Network. He held that position from April 2009 until his termination in December 2018. He worked in Etobicoke, Ontario.

[11] As part of his duties, the grievor processed pre-removal risk assessment (PRRA) applications and applications for humanitarian and compassionate considerations. A PRRA application allows persons who must be removed from Canada to apply for protection; that is, to claim refugee status. The applicants must describe, in writing, the risks that they may be subjected to if they are removed. As a senior immigration officer, the grievor decided those applications at stage 1 of the review process. If he decided to approve an application and grant refugee status, and the decision was upheld at stage 2 of the review process, the applicant would then be able to make an application for permanent residency. However, if the grievor denied the application, the applicant would be removed from the country.

[12] The grievor also processed applications for humanitarian and compassionate considerations. A foreign national who wants to live in Canada permanently must, in normal circumstances, make their permanent residence application while outside Canada. As part of applications for humanitarian and compassionate considerations, the grievor had to decide whether humanitarian and compassionate considerations warranted an exemption from the requirements of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27), namely, an exemption allowing the applicant to make a permanent residence application while in Canada. Applicants must describe, in writing, the factors that justify an exemption, with supporting evidence. Those factors include, among other things, the person's family ties to Canada, what might happen to the person were the application rejected, the degree to which the person is established in Canada, and the best interests of a child.

[13] As of the facts that gave rise to the grievance, PRRA applications and applications for humanitarian and compassionate considerations were received by mail and were supported by evidence and paper documents. Then, as now, it is up to the applicant to file a complete application that makes all the arguments and that presents all the relevant evidence supporting the application. The applicant has the burden. The senior immigration officer's role is not to seek information or arguments that may further support an application.

[14] Every two weeks, the grievor received the files that he had to process in the coming weeks. Among other things, he had to analyze complex files, review the information and evidence on record, analyze and examine the reliability of the

information provided by an applicant, assess applications that raised issues of credibility and integrity, and make recommendations or decisions.

[15] The senior immigration officers' usual practice was to deal with applicants and their representatives in writing, either by letter or email. Ana Miguel, the grievor's manager from 2011 until his termination ("the manager"), testified that senior immigration officers deal with applicants in writing to ensure that IRCC has evidence on file of all the exchanges that take place with respect to an application. Communications with applicants could also be in writing due to the officers' need to keep their distance — both emotional and personal — from their clients. For these reasons, it was rare for a senior immigration officer to communicate with an applicant or his or her representative by telephone. According to the manager, it was rarer still for a senior immigration officer to meet an applicant in person on IRCC premises. However, she acknowledged that an officer might have to meet with an applicant in person in certain circumstances, namely, when credibility or integrity issues arise with the documents submitted to support an application. According to her, under no circumstances was it acceptable for senior immigration officers to communicate with applicants whose files were not assigned to them.

[16] The grievor described his practice of processing files differently. He sorted the files assigned to him to distinguish those that could be processed based on the applicant's presented information from files that he believed required more information to make a decision. He testified that he could not resign himself to making a negative decision without giving an applicant an opportunity to explain further or to convince him of the merits of the application. The grievor communicated with this second category of applicants by telephone. He would meet some of them in person. The meetings took place in interview rooms located in a tower other than the one he worked in.

[17] The building in which the grievor worked had three towers that were linked on the ground floor by a common lobby. The grievor worked in one of the towers. The interview spaces that he used were those of IRCC's refugee status claim processing unit, located in another tower. In addition to IRCC, the building housed a Service Canada office and several private companies.

A. The event of July 24, 2017

[18] In her testimony, the manager described an event that took place on July 24, 2017. She stated that while on the way to a café located in the building's main-floor lobby, she saw the grievor in the lobby with a woman in her late 20s or early 30s ("the woman"). The woman had light brown skin and an Afro hairstyle. The manager described the woman's appearance that way in the days after the July 24, 2017, event and at the hearing.

[19] After she saw the grievor and the woman, the manager went to the café, where she met with a colleague for coffee. From where she was seated in the café, the manager saw the grievor seated on a bench outside the building, a few metres from the café's outside windows. The woman was seated next to the grievor. They talked for the entire time that the manager was seated in the café. The woman held a large, yellow paper envelope in her hands.

[20] The manager was not alone when she saw the grievor and the woman. She was accompanied by another IRCC manager ("the other manager") who, according to the manager, apparently also saw the grievor and the woman. The other manager did not testify.

[21] After drinking her coffee, the manager returned to her office. Around 10 minutes later, the grievor came to ask her if he could take the rest of the day off. She said, "Yes." However, around 15 minutes later, the grievor returned to tell her that his plans had changed and that he no longer needed to take time off. The manager testified that she did not ask the grievor any questions about the woman. She did not ask him if the woman was an IRCC client.

[22] At the end of their workday, the grievor and the manager left the office at the same time. They took the elevator together. When she exited the elevator on the ground floor, the manager saw the woman whom she had seen with the grievor earlier in the day. The manager did not ask the grievor about the woman. Instead, she left the building and went to a parking lot close to the building. While sitting in her car and checking her phone before driving home, the manager saw the grievor and the woman again. They were crossing the parking lot, going to the grievor's car. They both got into the grievor's car. At that point, the manager left the parking lot.

[23] At the hearing, the manager was questioned and cross-examined about the appearance of the woman whom she saw in July 2017 and specifically whether the woman could have been the grievor's daughter, who would have been in her early 20s at the time. A photograph of the grievor's family, taken in summer 2018, 1 year after the event, was presented to her at the hearing. The manager stated that she was 95% certain that the woman she saw in July 2017 was not the grievor's daughter in the photo. According to the manager, the woman whom she saw in July 2017 had a less rounded figure than the grievor's daughter in the photo presented to her. The woman whom the manager saw in July 2017 had been also almost as tall as the grievor, while the grievor's daughter in the photo that was presented to her at the hearing was shorter than the grievor.

[24] The manager testified that she believed that the woman was an IRCC client who was on the premises for an interview at the office of the IRCC refugee status claim processing unit or at Service Canada. She stated that she believed it because IRCC clients often waited on the building's main floor before or after an interview with departmental representatives or Service Canada. The manager also testified that IRCC clients very often used large yellow envelopes to carry documents related to their applications.

[25] The manager also testified that the overwhelming majority of IRCC clients are members of visible minorities. She estimated that in July 2017, around 70% of IRCC clients were members of visible minorities.

[26] The manager testified that she had presumed that the grievor already knew the woman and specifically that he knew her as an IRCC client. She said that she suspected that the grievor was somehow connected to the woman's file. The manager was concerned about appearances, including the perception that a senior immigration officer could speak in public with an IRCC client.

[27] The manager stated that she had previous situations in mind in which third parties had informed her that the grievor had been seen in conversation with clients in the waiting room of the refugee status claim processing unit. Those previous situations will be described later in this decision.

[28] In the days following the July 24, 2017, event, the manager conveyed her suspicions to her assistant director. She recorded her observations in writing a few

days later in an email to an IRCC human resources advisor (“the human resources advisor”). It must be noted that the manager’s responsibilities did not include any involvement in the disciplinary process with respect to employees under her supervision. When a disciplinary issue arose, her role was limited to gathering information and sending it to her director. The assistant director did not testify.

[29] The grievor was unaware that he had been seen with a woman believed to be an IRCC client. He was also unaware that the event had been reported to management. He did not learn about the news until August 2018, when he received the final investigation report that the employer eventually relied on to impose the disciplinary action at issue in this case. At the hearing, the grievor indicated that he did not remember the day of July 24, 2017. However, he insisted that a client would never have entered his car and that the woman with whom he was seen was in all likelihood his daughter. His daughter sometimes came to see him at work because she needed him to take her home. He described his daughter’s appearance in 2017 as follows: a 23-year-old young woman whose skin was lighter than the grievor’s, who was medium-sized and rather slender, and who frequently changed her hairstyle.

[30] After the manager’s report, preliminary verifications were made without the grievor’s knowledge.

[31] First, the other manager verified some things; it was the manager’s colleague who was with her in the café on July 24, 2017. The other manager reportedly consulted the files of women who had appointments or interviews at the refugee status claim processing unit’s office in the hours before the July 24, 2017, event and whose appearance could match that of the woman seen with the grievor. Each IRCC file contains a photo of the applicant. The manager said that the other manager reviewed the photos in the files of clients who had an appointment that day, to confirm whether the woman was an IRCC client. It is unclear whether the other manager carried out the verifications on their own initiative or at the manager’s request.

[32] According to the manager, the verifications enabled the other manager to identify an IRCC client whose appearance — according to the other manager — matched the woman whom he had seen with the grievor in July 2017. The manager did not see the photo. So, she did not confirm the woman’s identity. Although she had not seen the photo, the manager still provided the human resources advisor with the name

and client identification number that the other manager had identified, along with the grievor's access number to IRCC's Global Case Management System (GCMS). It would appear that the manager provided that information to IRCC's Labour Relations branch after a conversation with the human resources advisor. IRCC's Labour Relations branch took steps to obtain a report on the files that the grievor had allegedly consulted in the GCMS.

[33] The manager also requested from IRCC security services a copy of the video recording of IRCC's reception and waiting room for a period of two hours before the time when the grievor and the woman had been seen together. The email stated that the request came from management. According to the manager, the video recording request targeted the two hours before the July 24, 2017, event because of her suspicion that the woman would have been an IRCC client who was on the premises for an interview that might have taken place before she was seen with the grievor.

[34] After being informed that a request of the type described in the last paragraph had to come from Labour Relations, the manager asked the human resources advisor to make the request for the video recording, which the human resources advisor did.

[35] The human resources advisor also drafted an email to support the request for the GCMS access report. The email also stated that the grievor had been seen several times with an IRCC refugee office client and that there was a history of similar incidents that might suggest that the grievor had been helping refugee protection claimants with their claims, although there was no specific evidence of misconduct. The email also indicated that the manager had recently observed the grievor talking — twice — to a refugee protection claimant and while leaving the office with that refugee protection claimant. The email stated that the purpose of the GCMS access report request was to confirm whether the grievor had accessed that claimant's file, which the grievor was not authorized to consult as part of his duties.

[36] No evidence was adduced at the hearing that could serve to confirm or deny the theory that the woman was an IRCC client. Neither the GCMS access report nor the video recording were entered into evidence. No witness testified as to the conclusions that the employer made after it received the GCMS access report and the video recording.

B. Prior incidents

[37] As I mentioned earlier, when she saw the grievor meeting with the woman and leaving work with her, the manager had similar prior incidents in mind. She testified that six or seven times in the past, she had received telephone calls from a manager at IRCC's refugee status claim processing unit located in another tower of the building. The purpose of the calls was to inform the manager of the grievor's presence in the waiting room of the refugee status claim processing unit when, according to the manager, he had had no reason to be there. The manager testified that on least four of those six or seven times, she spoke with the grievor about his presence in the refugee status claim processing unit's waiting room. Each time, the grievor allegedly told her that he was in the waiting room because he was waiting for applicants who were to bring him documents that he had requested, to support their applications. The manager testified that each time, she explained to the grievor that it was not appropriate for him to meet with applicants in person and that any document related to an application had to be received by mail so that it could be entered into the GCMS before being sent to a senior immigration officer for processing.

[38] The grievor acknowledged that sometimes, he met with clients in the refugee status claim processing unit's waiting room. It was the only waiting room to which senior immigration officers processing PRRA applications and applications for humanitarian and compassionate considerations had access. The grievor would meet clients in the waiting room or in adjoining interview rooms when he wanted to consult an applicant's original documents and make copies or to compare originals with copies provided to support an application.

[39] The grievor's performance evaluations for 2015-2016 and 2016-2017 both contain a note that the manager added at the fiscal year-end that the grievor had to comply better with operational policies and procedures when performing his duties. According to the manager, this portion of the assessment refers to the fact that the grievor persisted in meeting applicants in person, even though he had been informed that doing so was inappropriate and contrary to IRCC practices.

C. Investigation, and disciplinary action imposed

[40] As mentioned, no evidence was adduced at the hearing as to the outcome of the preliminary verifications that the other manager and the employer carried out after the

July 24, 2017, event. Nothing explains how or why the allegations and initial verifications focusing on the grievor's interaction with the woman led to a formal investigation. The grievor was terminated after the investigation.

[41] The evidence sets out that in September 2017, the Director General of IRCC's Domestic Network signed an investigation mandate for three allegations made against the grievor. The allegations were as follows:

> [Translation]
>
> - *Giving preferential treatment to certain applicants.*
> - *Accessing one or more files with which you have a personal connection.*
> - *Inappropriately using any property or equipment, including electronic network systems and government information, for purposes other than those officially approved.*

[42] According to Heidi Jurisic, Director of the Domestic Network, the misconduct allegations were serious. They went to the heart of a senior immigration officer's duty of impartiality and involved inappropriate access to IRCC information and computer systems. For those reasons, her opinion was that the grievor could not be maintained in his duties during the investigation. She recommended that the grievor be suspended without pay during the investigation. The Director General of the Domestic Network endorsed the recommendation.

[43] Although the investigation mandate described in paragraph 41 was signed in September 2017, the investigation did not begin until December 2017. Only on December 14, 2017, was the grievor informed of the misconduct allegations against him and his suspension without pay during the investigation.

[44] In mid-January 2018, the grievor met with the investigators. The transcript of the interview was adduced into evidence. There is no dispute that the grievor cooperated during the interview and that he admitted to committing the misconduct alleged against him.

[45] In late April 2018, the grievor received a copy of the preliminary investigation report. He had the opportunity to provide his comments, which he did. He provided a handwritten letter to the investigators and an email that he had received from an applicant with whom he had developed a spiritual relationship.

[46] On August 13, 2018, the final investigation report was provided to the grievor. The report described the factual basis for the investigators' conclusion that the three allegations made against the grievor were substantiated. Among other things, the report includes a transcript of the grievor's interview, copies of the grievor's email exchanges with different IRCC clients, and tables that list the number and types of unauthorized GCMS accesses alleged against the grievor.

[47] During a preliminary disciplinary meeting in late August 2018, and in an email that he sent to Ms. Jurisic after that meeting, the grievor stated that he accepted the final investigation report's findings. He asked management to consider his motivations for the misconduct alleged against him, namely, the misconduct was committed in good faith out of a desire to help applicants and not to profit in any way. He also asked the employer to consider his years of service, his performance, and the impact that his suspension without pay had on him and his family.

[48] After that meeting, Ms. Jurisic recommended the grievor's termination to the Director General of the Domestic Network who in turn recommended to Assistant Deputy Minister of Operations Dr. Harpreet Kochhar that the grievor be terminated. Dr. Kochhar had the authority to impose disciplinary action on the grievor. According to Dr. Kochhar, the bond of trust between the employer and the grievor had been irreparably broken.

[49] On December 11, 2018, and nearly one year after being informed of his suspension without pay, the grievor was terminated.

[50] The grounds for termination include, notably, the fact that the grievor allegedly did the following: acted contrary to the *IRCC Code of Conduct*, demonstrated a lack of judgment when he offered preferential treatment to applicants with whom he had personal ties, accessed their GCMS files without a need related to his duties, and sent applicants GCMS screenshots and the rationales behind the decisions made in their files. The grounds for termination also include the fact that the grievor provided advice to applicants so that IRCC decision makers could positively review their applications and that he made a favourable decision in the case of a refugee protection claimant with whom he had a spiritual relationship and whose claim was supported by a document that the grievor knew was fraudulent. According to the employer, the

grievor allegedly failed to report a fraudulent document and failed to ask for the applicant's file to be assigned to another decision maker.

[51] The termination date was retroactive to the date of the suspension without pay, or December 14, 2017.

[52] On December 17, 2018, the grievor filed a grievance challenging his suspension without pay and his termination.

D. Misconduct that the grievor acknowledged

[53] The grievor acknowledged that he had committed all the misconduct described in the final investigation report. He did not dispute the documentary evidence attached to the report, which includes copies of his email exchanges with applicants and lists that set out the grievor's unauthorized GCMS accesses.

[54] Among other things, the grievor acknowledged the following:

- offering coaching and advice to applicants and future applicants about the permanent resident or temporary resident application processes;
- revising and correcting written texts that applicants used to support their applications;
- making recommendations about the information and arguments that the applicants should include in their applications;
- developing a spiritual relationship with a refugee protection claimant whose application for humanitarian and compassionate considerations was assigned to him. He advised her about her application, reviewed and translated texts to support her application, and eventually allowed the application for humanitarian and compassionate considerations despite the fact that he knew that a letter that the applicant had presented to support her application was fraudulent;
- sharing notes from other senior immigration officers with applicants whose files were not assigned to him that were taken from the GCMS and that revealed the reasons for rejecting applications. He did this more than once;
- sharing with an applicant a letter rejecting an application for a temporary resident visa before the official letter was sent;
- consulting the files of several applicants whose files were not assigned to him or were no longer assigned to him; and
- offering spiritual counselling to an applicant during working hours using the IRCC computer network.

[55] The grievor's breaches involved the use of the IRCC computer network, namely, the GCMS. The grievor accessed files for PRRA, humanitarian and compassionate considerations, and permanent residence applications, all without authorization. Reviewing the different lists that detail the grievor's unauthorized accesses and that are attached to the investigation report, I count more than 500 unauthorized accesses that the grievor reportedly made.

[56] The grievor offered coaching and advice to applicants and future applicants. The investigation report includes copies of emails that the grievor sent to at least six applicants. The majority of the grievor's email exchanges with applicants were done using the grievor's IRCC business email address. Several of the grievor's emails contain his signature block as a senior immigration officer. The grievor also used his private email address to communicate with a refugee protection claimant, specifically to receive her drafts of a text to support her application, which he revised or corrected before sending them back to her.

E. Additional evidence on the allegations of collective agreement and *CHRA* violations

[57] In addition to challenging the termination, the grievor's grievance included allegations of violations of the collective agreement's clause on the elimination of discrimination and the *CHRA* related to discrimination on the basis of race.

[58] As indicated earlier, the grievor was informed of the employer's suspicions about the July 24, 2017, event when he received the final version of the investigation report in August 2018.

[59] A portion of the investigation report entitled "[translation] Administrative Details" specifies the allegations made against the grievor and describes the investigation mandate that the employer issued. In that same part of the report, it is noted that the Workplace Investigations and Ethics Unit had received information from some of the grievor's co-workers, who allegedly saw him speaking with clients in the building's public spaces. The report also states that these "[translation] suspicions" were brought to management's attention.

[60] Before reading the final version of the investigation report, the grievor was unaware that he had been seen with a Black woman believed to be an IRCC client. He was also unaware that that event had been reported to management.

[61] In his testimony, the grievor argued that after being informed of the employer's suspicions about the July 24, 2017, event, he believed that race was a factor that allegedly led to the preliminary verifications and the investigation.

[62] The grievor testified about two previous situations in which the manager allegedly questioned him about conversations that he had with Black people in the IRCC building's public areas. According to him, the manager interviewed him after some of his co-workers had told the manager that they had seen the grievor speaking in public with Black people whom they suspected were IRCC clients. During his testimony, he identified one of those co-workers by name. The individual did not testify.

[63] According to the grievor, the first such incident occurred in November or December 2016. The manager allegedly asked him about a conversation that he reportedly had with two Black people in the building lobby. She then would have informed the grievor that a co-worker, whom she named, had seen him speaking with Black people a few days earlier and had reported the incident. The grievor later reportedly informed the manager that the Black people with whom he had spoken were a colleague who also worked for IRCC and a commissionaire who worked in the building. During that conversation, he allegedly asked the manager if he was prohibited from talking to Black people, given that he is also Black. He allegedly also asked the manager if it was necessary for his colleagues to inform the manager whenever he talked to Black people. According to him, the manager apparently replied that he was not prohibited from speaking with Black people but that as a manager, she had to ensure that the grievor was not speaking with IRCC clients in public.

[64] The grievor testified that in early 2017, the manager allegedly questioned him again after one of the grievor's co-workers reported something. According to the grievor, the manager allegedly asked questions about a conversation that the grievor had with Black people in the café located on the building's ground floor. The grievor then allegedly explained to the manager that by chance, he had met people he knew while buying a coffee. He testified that he then told the manager that it was the second

time she had questioned him about his conversations with Black people. According to him, the discussion with the manager was "[translation] heated".

[65] The grievor testified that because of these incidents, he felt targeted and treated differently because of his race. He also testified that those past incidents had led him to believe that the suspicions and preliminary verifications about the July 24, 2017, event were tainted by discrimination and racial prejudice.

[66] The manager did not remember the incidents that the grievor described. She testified that she did not recall having those conversations with the grievor about his chats with Black people. She stated that she believed that she was absent from work for a period that coincided with the first of the two incidents that the grievor described.

[67] The grievor's co-worker, who allegedly reported to the manager that he had seen the grievor speaking with Black people in the building's public areas, did not testify.

III. Summary of the arguments

A. For the employer

[68] Since the grievor admitted to his breaches, and disciplinary action was warranted, the employer submits that only the last two steps of the test set out in *Canadian Food and Allied Workers Union, Local P-162 v. Wm. Scott & Company Ltd.* (1976), [1977] 1 Can. L.R.B.R. 1 (B.C.L.R.B.) at para. 13 ("*Wm. Scott*"), are relevant to this case. It argues that its decision to terminate the grievor's employment was not excessive in light of the seriousness of the grievor's admitted breaches. His breaches were of such a number and scale that the bond of trust between the employer and the grievor was irreparably broken.

[69] The employer argues that the grievor repeatedly exhibited a lack of integrity, impartiality, and judgment. He acted in a way that could have reasonably affected public confidence in the integrity and impartiality of IRCC's services. The breaches resulted in significant reputational risks to the employer and were violations of privacy rights. After 17 years of service, the grievor should have known that those actions were serious breaches. The grievor's years of service can be an aggravating factor (see *McEwan v. Deputy Head (Immigration and Refugee Board)*, 2015 PSLREB 53 at para.

129, and *Pagé v. Canada (Attorney General)*, 2009 FC 1299 at paras. 33 to 35). The employer had every right to expect better from an experienced employee.

[70] In light of the evidence on record, the employer was entitled to conclude that the grievor did not express true remorse in the disciplinary process. Instead, the grievor tried to justify his actions by insisting on his motivations, namely, a desire to help people in need, as well as the lack of profit or personal gain. The employer states that the reasons for the grievor's conduct do not diminish the scale and significance of his breaches.

[71] The employer argues that in *Woodcock v. Canada Revenue Agency*, 2020 FPSLREB 73, and *Campbell v. Canada Revenue Agency*, 2016 PSLREB 66, the Board acknowledged that termination of employment is an appropriate disciplinary action in situations in which long-term public-service employees in positions requiring a high level of integrity have repeatedly accessed the records of others without authorization and for the purpose of rendering assistance and offering unauthorized advice. *Woodcock* also serves to illustrate that an employer can proceed directly to the termination of a public-service employee who engaged in serious misconduct, such as the grievor committed in this case. Progressive discipline is not required when the breaches are as significant and numerous as those in this case.

[72] The employer acknowledges that the grievor has a characteristic protected by the *CHRA*. However, it argues that the grievor did not discharge his burden of demonstrating *prima facie* discrimination (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33), namely, establishing *prima facie* evidence that race was a factor in the differential treatment that he experienced (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 52 ("*Bombardier Inc. (Bombardier Aerospace Training Center)*")).

[73] The employer argues that the preliminary verifications and investigation were initiated not because of racial prejudice or stereotypes. They were initiated due to the grievor's work history, namely, incidents in which the manager had to explain to the grievor that it was not appropriate for him to meet with applicants in person, and due to the fact that the person with whom the grievor was seen had an envelope in her hands that was similar to those that IRCC clients used. In the circumstances, it was

reasonable for the manager to report what she had seen, especially since the *IRCC Code of Conduct* imposed a duty on her to report possible breaches by IRCC employees.

[74] The only evidence related to the past incidents that the grievor cited to support his discrimination allegation is his testimony. The manager had no memory of such incidents. The employer argues that if the incidents did in fact occur, it would have been reasonable for the manager to have discussions with the grievor, given that as described at paragraph 37 of this decision, she had already reminded him that it was not appropriate for him to meet with applicants in person. The fact that the grievor believed that he was subject to preliminary verifications and a formal investigation because of his race is insufficient to constitute *prima facie* evidence of discrimination (see *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32 at para. 41).

B. For the grievor

[75] The grievor admits to his misconduct and acknowledges that it deserved disciplinary action. He never denied the allegations against him. However, he states that the employer reviewed only his misconduct and that it did not consider numerous mitigating factors that demonstrated that he had a clear rehabilitative potential and that the bond of trust between the employer and grievor had not been irreparably broken. The grievor argues that therefore, the employer failed to respect the principle of progressive discipline, in which an employee at fault must be given a chance to correct his or her behaviour. The termination of his employment was excessive.

[76] The grievor argues that he had 17 years of service with IRCC, with good performance. He had no discipline history on his record at the time. He immediately admitted to his breaches and accepted responsibility for his actions. He cooperated with the formal investigation and expressed remorse. The employer had to consider those several mitigating factors (see *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 28, *Touchette v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 72, *Viner v. Deputy Head (Department of Health)*, 2022 FPSLREB 74; *Hughes v. Parks Canada Agency*, 2015 PSLREB 75, *Roberts v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 28, and *Matthews v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 38).

[77] According to the grievor, the employer was wrong to consider his years of service as an aggravating factor and to consider the lack of disciplinary history as a neutral factor. In addition, the employer wrongly treated the grievor's remarks about his motivation not as an attempt to explain his remorse but as an aggravating factor, namely, as an indication that he did not accept responsibility for his actions.

[78] The grievor asks that his termination be replaced with a six-month suspension without pay, as an adjudicator did in *Nadeau*. Such disciplinary action would have a significant deterrent effect and according to the grievor would be consistent with the purpose of discipline, which is to correct and not punish wrongdoing.

[79] In addition to his arguments about his termination, the grievor's opinion is that he was discriminated against based on race. He argues that the employer launched an investigation based on information tainted by racial bias, namely, suspicions of misconduct when the grievor, a Black man, met with Black people in the IRCC building's public areas. The grievor was suspended without pay for the duration of the investigation.

[80] The grievor states that racial discrimination is sometimes exemplified by subtle and unconscious biases. The case law instructs that direct evidence of discrimination is not required. In addition, there is no need to establish an intention to discriminate (see *Grant v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 59, and *Davis v. Canada Border Services Agency*, 2014 CHRT 34).

[81] According to the grievor, the employer allegedly assumed that he met with an IRCC client, which was inconsistent with the *IRCC Code of Conduct* simply because he, a Black man, spoke with a Black woman near IRCC's premises. Instead of asking the grievor to explain himself or asking him questions to better understand the situation, the employer carried out preliminary verifications and, then, a formal investigation. It did that because of stereotypes and prejudice. The employer did not adduce any evidence to demonstrate that misconduct occurred on July 24, 2017, or that the woman seen with the grievor on that day was a client. According to him, this absence of any evidence supports the theory that the employer's suspicions were based on racial prejudice.

[82] The grievor argues that the situation he experienced constitutes unconscious racial profiling (see *Bageya v. Dyadem International*, 2010 HRTO 1589). Twice before

the July 24, 2017, event, the manager had questioned him after he spoke with Black people. The employer assumed that the Black people were clients and assumed that the grievor misconducted himself when he was seen with Black people in the building's public areas. Were it not for the racial stereotypes and bias, the employer would not have assumed that the grievor had engaged in wrongdoing on July 24, 2017, and therefore would not have made the preliminary verifications that led to an investigation and his termination.

[83] More than once at the hearing, the grievor stated that he agreed that disciplinary action was justified and that his discrimination allegation with respect to the employer's investigation was not intended to invalidate the investigation report or his termination. This request is separate from his request seeking to substitute a six-month suspension without pay for his termination. Rather, the grievor asks the Board to recognize that discrimination occurred, which violated his collective agreement, and that he is entitled to the compensation set out in ss. 53(2)(e) and 53(3) of the *CHRA*.

IV. Analysis

[84] The grievor's grievance contains five separate statements. The grievor contests his termination and his suspension without pay. He alleges that the employer violated a collective agreement clause on the elimination of discrimination, as well as the grievor's rights under the *CHRA*. The grievance also cites the application of any other collective agreement clause that may be applicable to the facts in this case.

[85] The wording of the grievance is consistent with the grievor's position expressed at the hearing that his allegations of discrimination and excessive disciplinary action are separate; that is, the Board may find that the employer's decision to launch an investigation of the grievor was tainted by discrimination and that his termination was still not excessive.

[86] As noted, the grievor does not argue that the employer's formal investigation or decision to terminate his employment were tainted by discrimination. He admitted to his misconduct. He accepts that disciplinary action was justified. Since the grievor presented his discrimination allegation to me as being separate from his allegation that his termination was excessive disciplinary action, I will address the two allegations separately.

A. The discrimination allegation

[87] The grievor argues that the employer engaged in a discriminatory practice against him, in breach of the employer's obligations under the collective agreement and the *CHRA*. He submits that he was investigated because of racial stereotyping and prejudice. According to him, launching the investigation was part of a factual framework in which, because of his race, his social interactions with people of the same race were called into question.

[88] For the Board to conclude that racial discrimination was present, the grievor must first establish *prima facie* evidence of his allegations. In *Moore*, the Supreme Court of Canada set out a three-step test. First, the grievor must demonstrate that he has a characteristic protected from discrimination, which he did; he has the protected characteristic of race. Second, the grievor must demonstrate that he experienced an adverse impact — he experienced an adverse impact related to his employment when he underwent preliminary verifications that led to a formal investigation. The last part of the *Moore* test requires evidence that the protected characteristic — in this case, race — was a factor in the adverse impact.

[89] To meet his burden of proof, the grievor is not required to prove that race was the only factor that led the employer to launch a formal investigation of him. Instead, he must present a preponderance of evidence that discrimination was one of the factors at issue when the employer decided to conduct the formal investigation (see *Morin v. Canada (Attorney General)*, 2005 CHRT 41 at para. 191). Direct evidence is not necessary. It is in fact possible to demonstrate discrimination by inference through the use of circumstantial evidence (see *Brown v. Commissioner of Correctional Service of Canada*, 2012 PSST 17 at para. 72). Therefore, the Board must consider all the circumstances to determine whether there is a "subtle scent of discrimination" (see *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT)).

[90] In the workplace, subtle scents of discrimination can, in my view, manifest themselves through increased attention to an employee's social or professional interactions because of their race. They can also manifest themselves through increased attention to a Black employee's interactions with people who are also Black. I accept the grievor's argument that the race of the people he interacted with in the IRCC building's public areas is relevant to the analysis that I must conduct.

[91] I accept the grievor's evidence that the manager questioned him about his social interactions with Black people in the building's public areas twice before the July 24, 2017, event. At the hearing, the grievor's description of the incidents was consistent with a description of the incidents written in September 2019 and presented at the third level of the individual grievance process. At the hearing before the Board, his testimony on this matter was brief but clear and precise. He identified the periods during which the incidents allegedly occurred and the name of a co-worker who allegedly reported at least one of the social interactions to the manager. He described — in general terms — the words that he and the manager allegedly spoke during those conversations.

[92] As for the manager, she did not remember the incidents that the grievor described. She indicated that she believed that she was absent from work for a period that could coincide with the first of the two incidents that the grievor described.

[93] I give precedence to the grievor's testimony. Being questioned by his manager about trivial conversations with co-workers or acquaintances would, in my view, be a landmark event in an employee's professional life. It is reasonable to expect the grievor to remember such incidents very clearly. I find that on the preponderance of the probabilities, the incidents he described took place. I also accept as truthful the grievor's testimony that he felt watched when interacting with Black people due to the two incidents described earlier. I also accept that the July 24, 2017, event heightened that feeling.

[94] The grievor argued that the situation he experienced constitutes unconscious racial profiling. In *Bombardier Inc. (Bombardier Aerospace Training Center)*, the Supreme Court of Canada endorsed the following concept of racial profiling (at paragraph 33) :

> *[33]* …
>
> *Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.*
>
> *Racial profiling includes any action by a person in a situation of authority who applies a measure in a disproportionate*

> *way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed.…*
>
> *(Commission des droits de la personne et des droits de la jeunesse*, Racial Profiling: Context and Definition *(2005) (online), at p. 13; see also Ontario Human Rights Commission*, Policy and guidelines on racism and racial discrimination *(2005) (online), at p. 19.)*

[95] The grievor also referred me to the Human Rights Tribunal of Ontario's decision in *Bageya*. In that decision, the tribunal found that a manager had sent a warning letter to Mr. Bageya due in part to racial stereotypes that Black men are threatening and violent. Referring to *Sinclair v. London (City)*, 2008 HRTO 48, the Human Rights Tribunal of Ontario indicated that anti-Black racism and its subtle manifestations are well recognized in Canadian law. That tribunal also indicated that racialization affects Black men in particular, often without the conscious involvement of those making decisions, through stereotypes of them as physical, violent, and more likely to be criminal (see *Bageya*, at para. 131).

[96] For the reasons that follow, I am of the opinion that the grievor did not meet the third step of the *Moore* test, which is to present a preponderance of evidence that discrimination was one of the factors at issue when the employer decided to conduct the preliminary verifications that led to the formal investigation. The evidence that the grievor adduced to support his discrimination allegation does not support a finding that discrimination being a factor at issue was "… more probable than the other possible inference or hypothesis …" (see *Morin*, at para. 191).

[97] In addition, in light of all the evidence before me, I am of the opinion that although the grievor was right to believe that his social interactions were subjected to increased attention from his manager, the increased attention was based on legitimate concerns that arose from the grievor's past practice of meeting applicants in person rather than because of the grievor's race.

[98] There is no dispute that the grievor's past practice was to meet applicants in person, despite the fact that he had been warned that doing so was unacceptable. The manager had told him at least four times that he had to stop doing it. Two of the grievor's performance evaluations mention it. When the manager saw the grievor with the woman in the building's public areas and outside it, the manager suspected that the grievor was continuing his past practice and meeting an IRCC client in person.

Given the history of reminders given to the grievor, I accept that an employer would be alert to signs that the grievor was persisting in meeting clients in person, contrary to the expectations that had clearly been expressed to him.

[99] The grievor had a clean disciplinary record as of the facts relevant to this grievance. Due to a collective agreement clause that provides for the removal of disciplinary action from an employee's record after a determined period, past disciplinary action was no longer on the grievor's record as of the time to which the relevant facts in this grievance date. However, the existence of that past disciplinary action was revealed during the grievor's cross-examination to contradict his testimony when he stated that he had not been disciplined for similar misconduct in the past. A few years earlier, the employer had imposed disciplinary action on him for misconduct that was described at the hearing as coaching an IRCC client while preparing an application filed with the department. The coaching took place in the IRCC building during working hours.

[100] Although the employer could not take the prior disciplinary action into account in choosing the disciplinary action at issue in this grievance, the grievor's past misconduct was still part of the factual context of the interactions between the grievor and the manager when the grievor was seen meeting with people who might have been IRCC clients in the building's public areas during working hours.

[101] When the manager saw the grievor with the woman in the building's public areas on July 24, 2017, she assumed that the grievor already knew the woman, specifically that he knew her as an IRCC client. The manager testified that she had suspected that the grievor had misconducted himself because the woman held an envelope similar to those often used by IRCC clients and because the grievor had continued to meet with applicants in person despite being warned several times that doing so was unacceptable. She also testified that she had suspected that the woman could be a client because, according to her, most IRCC clients were members of visible minorities.

[102] These three factors, taken together, led the manager to report the July 24, 2017, event to her assistant director. That report led to the preliminary verifications into the grievor's GCMS accesses. The evidence reveals that the Director General of the IRCC's Domestic Network mandated the formal investigation due to signs of probable

misconduct that were revealed during the preliminary verifications. The formal investigation confirmed the grievor's misconduct.

[103] I have a concern about a presumption about IRCC clients that was brought to light in this case. The evidence reveals that employer representatives assumed that Black people in the IRCC building's public areas or near the building were departmental clients.

[104] As indicated, before the July 24, 2017, event, the grievor had been questioned twice following conversations with Black acquaintances. I must note that there is no indication that the grievor was questioned in that way when he had meetings in the building's public areas with people who were not Black.

[105] On July 24, 2017, and in the days that followed, employer representatives presumed that the woman was an IRCC client on site for an appointment because she was Black, was in the IRCC building or near it, and held a large yellow envelope. However, the envelope was of a very common colour and size. The general public would recognize that they are sold in many businesses and that they are used in countless work environments. Nothing indicates that the envelope that the woman held bore the IRCC brand or address. In addition, IRCC was not the only building occupant. Service Canada and private businesses were also tenants. The woman could have been in the building for a number of reasons that would have had nothing to do with IRCC.

[106] The manager's testimony that the majority of IRCC clients are members of visible minorities cannot explain the presumption by the employer's representatives that Black people in the building's public areas are IRCC clients. In the circumstances of this case, I can infer only that the employer's representatives also suspected that those people — when they were seen conversing with the grievor — were seeking advice or coaching to improve their IRCC claims.

[107] Racial discrimination can be illustrated by subtle and unconscious prejudices. Circumstantial evidence may be sufficient to merit a finding that discrimination took place. The grievor asked me to find that he was discriminated against due to the fact that the employer assumed that misconduct occurred when the grievor — a Black man — interacted with Black people in the IRCC building's public areas. I agree with the grievor when he stated that the Board must not examine the evidence about him while

disregarding the evidence of the broader context; that is, the evidence about the people with whom he interacted in the IRCC building's public areas when he was suspected of misconduct.

[108] However, a careful review of all the evidence presented to me at the hearing does not allow me to conclude that the grievor was subjected to preliminary verifications and a formal investigation due to racial stereotypes or prejudice toward him. On reviewing the circumstances that led to the grievor's interactions being reported and to the preliminary verifications, I find that the grievor did not establish that racial profiling involving him was a factor that led the employer to conduct preliminary verifications after the manager's observations and to launch a formal investigation. The evidence as a whole does not indicate that these actions were taken "without factual grounds or reasonable suspicion" (see *Bombardier Inc. (Bombardier Aerospace Training Center)*, at para. 33). As previously indicated, the grievor's interactions were reported due to the grievor's history and the verifications that were conducted. In this case, the preliminary verifications that the employer conducted were not a disproportionate action taken, either in whole or in part, due to the grievor's race (see *Bombardier Inc. (Bombardier Aerospace Training Center)*, at para. 33).

[109] This case also differs from *Bageya*. Although the employer's representatives assumed that Black people in the IRCC building were clients, contrary to *Bageya*, no evidence was presented to me that suggested that this presumption rested on stereotypes about them because of their race. Whether consciously or not, if the employer's representatives suspected that the Black people interacting with the grievor in the building's public areas were clients seeking advice or coaching, the evidence shows that this presumption was made because they were seen in conversation with an employee who continued to meet clients in person, contrary to the expectations that had been clearly expressed to him.

[110] Although the grievor felt watched because of his race, the preponderance of the evidence does not allow me to conclude that his race was in fact one of the factors that led the employer to conduct preliminary verifications after the manager's observations and to launch a formal investigation. The whole of the evidence before me does not support the conclusion that the grievor's race was, in reality, one of the reasons that the employer was concerned by the grievor's behaviour. I find that the grievor was subject to preliminary verifications and a formal investigation because he was a senior

immigration officer who continued to meet clients in person after receiving several reminders that doing so was inappropriate and who had already been subject to disciplinary action for offering coaching to applicants.

[111] Despite the concerns expressed earlier about the presumption by some of the employer's representatives about Black people in the IRCC building's public areas, all the evidence still demonstrates that on the preponderance of probabilities, the grievor's race was not a factor that led the employer to conduct preliminary verifications and a formal investigation. The grievor was subject to those actions because the employer had legitimate concerns that the grievor was continuing to meet with clients in person, contrary to the expectations that had been clearly expressed to him.

[112] Ultimately, the preponderance of the probabilities does not demonstrate that the employer assumed that due to racial prejudices or stereotypes, misconduct occurred when the grievor — a Black man — interacted with Black people in the IRCC building's public areas.

[113] I find that the grievor's discrimination allegation is unsubstantiated. Therefore, I deny that part of the grievor's grievance.

B. The disciplinary action

[114] The other part of the grievor's grievance challenges his suspension and termination.

[115] In this case, it is essential to recall that the grievor does not dispute the behaviour for which the employer blamed him. As early as the preparatory disciplinary meeting in late August 2018 and at the hearing before me, he admitted to engaging in the misconduct described earlier in the section entitled "Misconduct that the grievor acknowledged". Thus, he admitted that the allegations that led the employer to impose disciplinary action are substantiated. He also admitted that his conduct was wrong.

[116] It is also important to remember that the grievor does not dispute that his actions constituted a violation of the *IRCC Code of Conduct* and the Treasury Board's *Values and Ethics Code for the Public Sector*. In fact, he testified that he was aware of those codes' requirements. He had also received values-and-ethics training, including training on ethics for employees with decision-making powers, such as the grievor.

[117] In my view, it is clear that the grievor's actions warranted imposing disciplinary action, which the grievor himself admits. Therefore, the first part of the *Wm. Scott* test is met. In addition, as mentioned, the grievor did not make any discrimination allegations with respect to the imposition of disciplinary action and requested several times during the hearing that his discrimination allegation be dealt with separately from the issue of the severity of the disciplinary measure imposed on him. I have already dealt with the grievor's discrimination allegation, and I found that the evidence on record did not support it. As the grievor requests, I will not consider this discrimination allegation in my assessment of the disciplinary action that the employer imposed on the grievor.

[118] The second element of the *Wm. Scott* test requires examining the severity of the imposed disciplinary action, namely, whether the imposed action — in this case, the termination — was excessive in the circumstances of the case. If negative, the grievance must be denied. However, if the imposed action is excessive, the Board must continue its analysis, to identify disciplinary action that is more appropriate in the circumstances. The burden is on the employer to justify its choice of disciplinary action to impose. Therefore, those are the only issues that remain to be decided in this case.

[119] According to the grievor, the employer did not consider mitigating factors when choosing the disciplinary action, particularly his years of service, his clean disciplinary record, his cooperation with the formal investigation, and the remorse that he expressed. Therefore, the termination was excessive disciplinary action when it is assessed in light of his rehabilitative potential. He argues that the employer did not give him a chance to correct himself, contrary to what the principle of progressive discipline requires. The grievor requests the opportunity to do better and to correct the mistakes of the past.

[120] The grievor acknowledged that his actions were incompatible with the duties of the position that he held. He admitted his fault at the formal investigation stage. According to him, with time, his perception of his actions has changed. While at the time, he was guided by compassion and a desire to help, which were rooted in his religious beliefs, he recognizes now that an employee must respect the *IRCC Code of Conduct* and that compassion must not lead an employee to violate the *Code*.

[121] I accept without hesitation the remorse that the grievor expressed at the hearing. Thus, I accept that he now sincerely regrets his actions and that today, he understands the seriousness of his misconduct. I am also satisfied that because of the years that have passed and the lessons learned from this incident, he will not repeat the mistakes of the past. However, the severity of a disciplinary action must not be assessed only in light of the grievor's conclusions made with several years of hindsight. The severity of the action imposed must be assessed in light of all the circumstances of the case.

[122] The parties do not have the same assessment of the seriousness of the grievor's breaches. They disagree about the issue of knowing whether the bond of trust between the employer and the grievor was irreparably broken.

[123] I accept that the grievor acted as he did because he was motivated by a desire to help others, which arose from the religious beliefs that figured prominently in his life. His actions were not intended for personal gain or benefit. To me, the grievor seems to be a very compassionate person. Unfortunately, this compassion and its good intentions caused the grievor to prioritize his desire to help others over his duty to act with integrity and impartiality as a senior immigration officer.

[124] The grievor's misconduct affected the heart of IRCC's mandate, which is the impartial processing of claims under the *Immigration and Refugee Protection Act*. His misconduct occurred numerous times. It was described earlier. I will not repeat everything. However, I must point out a few that in my view, illustrate the seriousness of the misconduct, the lack of integrity, and the grievor's repeated lack of judgment.

[125] The grievor gave preferential treatment to applicants with whom he had personal ties and whose files were not assigned to him. He gave them advice and feedback to improve their IRCC applications. He revised, corrected, and translated texts to support IRCC applications. The purpose of his actions was to improve the chances of a positive decision in those applications.

[126] The evidence also demonstrates that the grievor developed a spiritual relationship with an IRCC client whose application for humanitarian and compassionate considerations was assigned to him. He communicated with her using his professional IRCC and private email addresses to provide her with moral and spiritual support. He also gave her preferential treatment by actively involving himself

in preparing applications that she presented and that he himself had to assess. In this situation, as in those described in the last paragraph, the grievor did not respect the line that separated his senior immigration officer role and his personal and spiritual life. In addition, he showed a significant lack of integrity when he allowed this applicant's application for humanitarian and compassionate considerations when he knew that the application was supported in part by a fraudulent document.

[127] The grievor also used the IRCC's computer networks to consult the files of applicants for which he was not responsible and without any operational need. He provided some applicants with screenshots or cut-and-pasted notes from the GCMS, thus revealing to them the notes that other senior immigration officers had written and the written rationale for the decisions made in their files.

[128] The grievor accessed files for PRRA applications, applications for humanitarian and compassionate considerations, and permanent residence applications, all without authorization. It is important not to lose sight of the fact that files of that nature include extensive personal information about applicants and their family members, including information about their employment, financial situation, health, criminal records, and education. In some circumstances, unauthorized access to such information could jeopardize the applicant's well-being and safety — or that of their family abroad.

[129] This case is not the first time the Board has been called on to review disciplinary action imposed on a public-service employee who accessed others' records without authorization and to provide help and offer unauthorized advice. *Woodcock* and *Campbell* are two in which the facts are similar to this case.

[130] Both *Woodcock* and *Campbell* involved the Canada Revenue Agency (CRA) and allegations of unauthorized and repeated access by public-service employees to Canadian taxpayers' files. In both cases, the Board concluded that the employees in question had given preferential treatment to taxpayers, even though they had not derived any financial benefit from it.

[131] In *Woodcock*, Mr. Woodcock had accessed files associated with loved ones, friends, and the loved ones of his friends to prepare their income tax returns or help them resolve their CRA tax matters. In *Campbell*, Mr. Campbell had made unauthorized accesses to the files of family members and acquaintances 93 times and had given

preferential treatment to taxpayers 14 times. Motivated by a desire to help others, among other things, Mr. Campbell had made minor changes to their files, informed family members about the statuses of their income tax returns, and saved the will of an extended family member when the person died. The Board found that Mr. Campbell had also disclosed, without authorization, tax information to a third party.

[132] Mr. Woodcock and Mr. Campbell were long-time public-service employees; Mr. Campbell had 33 years of service, and Mr. Woodcock had 31 years. Both Mr. Woodcock and Mr. Campbell were terminated. In both cases, the Board found that termination was not an excessive disciplinary measure and rejected an argument that progressive discipline was required. In both cases, the Board found that the bond of trust between the employer and the public-service employee had been irreparably broken.

[133] At the hearing, the grievor argued that *Woodcock* could be distinguished due to a discrepancy in the number of unauthorized accesses alleged against the grievor in this case compared to the number of unauthorized accesses in *Woodcock*. Mr. Woodcock had made 621 unauthorized accesses to the files, involving 15 different taxpayers. Reviewing the different lists that enumerate the grievor's unauthorized accesses, which are attached to the investigation report, I count more than 500 unauthorized accesses that the grievor allegedly made. That is a high number. It is sufficiently similar to the number of unauthorized accesses in *Woodcock* to make *Woodcock* a relevant decision in this case. In addition, the evidence on record indicates that the grievor communicated by email with at least 6 applicants about their applications. He provided advice to at least 3 of them.

[134] As the grievor argues, it is true that generally, an employer is required to impose disciplinary measures progressively. However, in some circumstances, applying the principle of progressive discipline is not appropriate. When the misconduct is serious enough, termination can be justified, even from the first incident of misconduct (see *Woodcock*, at para. 63). In this case, the grievor argues that the principle of progressive discipline should have been applied, given the mitigating factors in this case.

[135] The grievor was a long-time employee who rose through IRCC's ranks to a senior immigration officer position. He cooperated with the investigators and admitted to his misconduct. I find that the evidence demonstrates that the grievor expressed

some remorse during the investigation and disciplinary process. However, this remorse was mainly for the impact of the misconduct on the grievor and his family and left some doubt as to whether the grievor instead sought to justify his actions. Even if the issue of whether the grievor attempted to justify his misconduct instead of express genuine remorse is set aside, I have a concern about the grievor's lack of introspection and reflection — both during the disciplinary process and at the hearing — with respect to the possible consequences of his actions for IRCC and the applicants.

[136] Given all the circumstances on record, I find that the mitigating factors described earlier do not make the disciplinary action imposed by the employer excessive.

[137] As mentioned, the grievor admits to acting in ways that were prohibited under the *IRCC Code of Conduct* and the *Values and Ethics Code for the Public Sector*. I agree with the employer to state that those actions constituted a significant risk to IRCC's reputation and that they demonstrated a serious lack of judgment on the grievor's part. The grievor's actions could in fact have undermined public confidence in the integrity of IRCC programs.

[138] The grievor knew the ethical rules specific to his position. He knew the expected behaviour and values described in the *IRCC Code of Conduct* and the *Ethics and Values Code for the Public Sector*. He admits that his actions violated the *Values and Ethics Code for the Public Sector* and the *IRCC Code of Conduct*. The grievor knew and understood his duty to never use his official role to unduly favour others. Despite that, he used his role and GCMS access to favour applicants with whom he had personal ties or a spiritual relationship.

[139] The grievor knew that he had to maintain his professional and decision-making impartiality and integrity at all times. Despite that — whether unconsciously or not — he favoured his values of compassion over adhering to the standards of integrity and impartiality. The lack of judgment that the grievor displayed was significant and repeated. His misconduct, which spanned approximately three years, was incompatible with the nature of the position that he occupied.

[140] However pure the grievor's personal reasons might have been, they did not offset his significant and repeated professional breaches. Although it is true that each employee brings his or her values and beliefs to work, they cannot justify failing to

respect the code of conduct and professional obligations that are incumbent on the employee. Every employee must comply with the standards of professional conduct and perform his or her duties with impartiality, honesty, and integrity, regardless of their personal values or religious beliefs.

[141] According to the grievor, the employer cannot reasonably claim that the bond of trust between the employer and the grievor was broken, because the employer allowed him to continue to perform his duties — without any changes to tasks or restricted access to IRCC computer systems — between July 24, 2017, and December 14, 2017 (the date on which he was suspended without pay). The grievor considers this evidence of the actual trust that the employer had in him.

[142] From July to September 2017, the employer conducted some preliminary verifications on the grievor to determine whether a formal investigation was required. An employer should not modify an employee's tasks or limit his or her access to computer networks based on mere suspicion. A wise employer could in fact choose to conduct some preliminary verifications before deciding whether a proper investigation is required. It could also choose to wait for the outcome of the preliminary verifications before modifying an employee's tasks, limiting access to computer networks, or suspending the employee during a formal investigation. I accept Dr. Kochhar's testimony that it would have been premature for IRCC to suspend or modify the grievor's duties as of the July 24, 2017, event. The employer was required to ensure that it had gathered sufficient information to suggest that breaches in fact had occurred before initiating a formal investigation process and suspending the grievor without pay.

[143] An investigation mandate was signed on September 29, 2017. However, only on December 14, 2017, was the grievor suspended without pay. More than two months passed between the investigation mandate being signed and the grievor's suspension. Although that span may seem lengthy, I find that it is not unusual for an employer to require several weeks to implement a formal investigation process and to complete the steps necessary to suspend the grievor for the duration of the investigation.

[144] Although his intentions were good and he expressed remorse at the hearing, the grievor's misconduct went to the very heart of IRCC's service delivery. His misconduct could have resulted in a significant risk to IRCC's reputation, and it constituted serious

and repeated breaches of judgment, integrity, and impartiality. Given all that and the cited case law, I find that the employer's imposed disciplinary action was not excessive. I find in fact that the bond of trust between the employer and the grievor was broken and that it could not be repaired. Therefore, I also deny this part of the grievor's grievance.

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

(The Order appears on the next page)

V. Order

[146] The grievance is denied.

October 18, 2023.

FPSLREB Translation

Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board