Date: 20240816

File: 566-02-38923

Citation: 2024 FPSLREB 115

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

ANNE KLINE

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Kline v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: Edith Bramwell, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Morgan Rowe and Kundera Provost-Yombo, counsel

For the Respondent: Jena Montgomery, counsel

Heard via videoconference,
July 5 to 8, 2022, and January 23 to 26 and February 1 to 3 and 8, 2023.

REASONS FOR DECISION

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] On March 12, 2018, the employment of Anne Kline ("the grievor") was terminated by her employer, the Canada Border Services Agency ("CBSA", "the employer", or "the respondent") for disciplinary reasons. The termination letter cited two grounds, one of which was withdrawn at the outset of the hearing. The remaining ground is as follows:

> …
>
> *… you failed to issue, or cause to be issued, the final verification report relating to the tariff classification of certain products imported by* [the company] *in a timely manner, despite it being your responsibility to do so, resulting in a loss of duties in excess of $25,000,000 as a result of the expiration of statutory time limits on recovery ….*
>
> …

[2] The letter went on to conclude that the grievor's "… gross negligence, serious and significant lack of judgment and insubordination have irreparably breached the bond of trust …". Ms. Kline grieved the termination on March 26, 2018, and that grievance was ultimately referred to the Federal Public Sector Labour Relations and Employment Board ("the Board") for adjudication.

[3] For the reasons that follow, the grievance is allowed.

II. Preliminary issues: the sealing of documents, and anonymization

[4] The employer requested a sealing order for third-party business records, and the anonymization of the third-party's name. The grievor requested a sealing order for her tax records and the redaction of her SIN (social insurance number) and PRI (personal record identifier) numbers. These requests were unopposed.

[5] The "*Dagenais/Mentuck*" test (see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; and *R. v. Mentuck*, 2001 SCC 76) requires that a document be sealed only if the potential harm of disclosure significantly outweighs its benefits (see *Pajic v. Statistical Survey Operations*, 2012 PSLRB 70; and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41). More recently, the Supreme Court of Canada reformulated the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at

paragraph 38, to require the party seeking a confidentiality order to establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[6] In this case, the identification of a business and disclosure of its records may cause it harm. The records contain confidential financial and manufacturing information that could unfairly advantage competitors. The reasoning in this matter does not depend on these records, nor on the identity of the business. Thus, the salutary effect of the sealing and redaction orders requested outweighs the public interest in open proceedings. At an August 17, 2020, pre-hearing conference, I ordered the business records sealed and the third party's name anonymized. It is referenced in this decision as "the company". Similarly, the risk to the grievor from disclosing her PRI, SIN, and tax records outweighs any public interest in disclosure. Her tax records were ordered sealed, and her SIN and PRI have been redacted.

III. Summary of the evidence

A. The witnesses, and the documentary evidence

[7] The events at issue occurred between June 2012 and March 2018, first within the Trade Programs Directorate ("TPD" — not to be confused with the Trade Policy Division ("the Policy Division"), a division within the TPD) and its Functional Guidance Unit ("FGU") and, after a 2014 reorganization merged the TPD with another directorate, within the newly formed Trade and Anti-dumping Programs Directorate ("TAPD"). Much of the evidence about the TPD's and the TAPD's structure and activities, and the organizational changes during the events at issue, was undisputed.

[8] I granted a joint request to exclude witnesses. These were the employer's witnesses:

- Susan Hague (at the time of the events at issue, and to avoid confusion, throughout this decision, referred to as Ms. Leblanc), Director, Policy Division, TPD/TAPD, December 2012 to May 2014, who reported to the grievor.
- Dino Pezoulas, Senior Advisor, FGU, August 2012 to November 2014, and Acting Manager, FGU, Policy Division, TPD/TAPD, January 2013 to January 2014 and May 2014 to November 2014, who reported to Ms. Leblanc while he was a manager on an acting basis.

- Kelly Bartlett, Senior Program Officer (subsequently Senior Program Advisor), Tariff Classification Policy (Food, Plant, and Animal Area), Policy Division, TPD/TAPD, November 2007 to July 2018, who reported to Mr. Pezoulas and then to Mark Grant, a manager.

- Shawn Riel, Special Advisor to the Director General and Executive Director, TAPD, April 2014 to December 2014.

- Brent McRoberts, Director General, TAPD, March 2014 to March 2017.

- John Ossowski, President, CBSA, December 2016 to June 2022.

- Michel Séguin, BMCI Consulting Inc. ("BMCI").

[9] For ease of reference, information about CBSA employees who did not testify but who were frequently referenced is provided in the following table:

Name	Title	Relevant period
Manon Gilbert	Strategic Advisor, Director General's Office, TPD & TAPD	July 2013 to December 2014
Mark Grant	Manager, FGU, Policy Division, TAPD	February 2014 to April 2014 and December 2014 to February 2017
Brad Loynachan	Director, Policy Division, TAPD, who succeeded Ms. Leblanc	June 2014 to August 2018
Catarina Ardito-Toffolo	Director, Trade Compliance Division, TAPD	March 2014 to March 2016
Richard Wex	Associate Vice-President, Programs Branch Vice-President, Programs Branch	February 2013 to December 2013 December 2013 to September 2015
Peter Hill	Associate Vice-President, Programs Branch	December 2013 to July 2018

B. The grievor's work

[10] The termination grounds relate to a file handled at times by a CBSA regional office, the grievor, and multiple TPD/TAPD employees. The file concerned the company's importation of two similar products with the technical names "BF11" and "PC/SS"; both are informally called "plastic cream", as they contain a product that also answers to this description.

[11] In 1992, the grievor was appointed as a PM-01 customs inspector at Revenue Canada. She rose through the CBSA's ranks for over two decades, assuming her first managerial role, in the Prohibited Importations Unit, in 2005. In 2007, she became an EX-01 director. In December 2012, she became the EX-02 director general of the TPD.

[12] Before the TAPD was created, the grievor was responsible for a team of 114 employees, with 6 direct reports: 2 directors (including the FGU's director), 1 manager, and 3 administrative staff. She oversaw a budget of $65 million, as well as the agency's policy, compliance, and quality-assurance work related to trade programs.

[13] The grievor regularly dealt with sensitive files. A file could be sensitive for many reasons, including a high amount of duties, or the potential for media attention, for economic impact, or for litigation. Her approach on these files was to ensure that she had her "ducks in a row", that briefings were properly done, that the CBSA's position was factually supported, and that the CBSA's senior leadership was well engaged on the issues, so that the CBSA was ready to address public, legal, media, or political responses arising from a sensitive file. The grievor reviewed and approved briefing notes when there was a need to make the CBSA's president and others aware of an issue or file. In her testimony, she spoke about her directorate's work knowledgably, with clarity and precision, while acknowledging that she lacked the technical expertise of a subject matter expert.

C. The FGU's work

[14] The FGU provided expert guidance on imported goods classification, which is central to determining the duties payable. When classifying an imported good, its state as it crosses the border is a central consideration. FGU employees have subject-matter expertise for specific goods, and they advise CBSA regional officers.

[15] After importation, CBSA regional offices can conduct tariff compliance verifications ("verifications") to confirm that an importer applied the correct classification. Verification decisions are released by the regional office and can increase or decrease the duties owed if the original classification was incorrect. During the events at issue, the CBSA undertook between 2000 and 3000 verifications annually. Verification decisions can be appealed, but all duties owing must be paid before an appeal is initiated. If a verification decision results in duties owing, the CBSA can

retroactively collect duties for up to 4 years before the decision was rendered. This 4-year rule is critically important for this grievance.

[16] The FGU provided advisory support for regional officers' verification questions. Arriving at a correct classification could involve laboratory ("lab") analysis, research, and reviews of past verification decisions. Ms. Bartlett, an FGU dairy expert, provided technical support on the recurring topic of what constituted a dairy good.

[17] Importers also have the option of requesting an advance ruling to confirm a classification before an importation is made. Unlike verification decisions, advance rulings are released by the FGU and had, at that time, a 120-day service standard. The FGU did not have service standards for its verification support.

[18] The FGU manager (a position sometimes held by Mr. Pezoulas on an acting basis, and then, after February 2014, by Mr. Grant, also on an off-and-on acting basis) reported to the Policy Division director (from December 2012 to May 2014, Ms. Leblanc, and from June 2014 to August 2018, Mr. Loynachan), who reported to the grievor, as the TPD's executive director, and then to the grievor and Mr. McRoberts, as the TAPD executive team.

[19] Ms. Leblanc was forthright about her limited trade policy experience. She candidly admitted that she felt overwhelmed by the work and learning curve in her new role. In contrast to Mr. Pezoulas, Ms. Bartlett, and the grievor, she did not speak with clarity or precision about the company's file or the FGU's work. As just one example of many factual imprecisions, on cross-examination, Ms. Leblanc initially stated that she believed that the company contested an advanced ruling and then reversed herself. In comparison to other witnesses, Ms. Leblanc had little depth of understanding of the issues related to the imported products, although she did recall that Mr. Pezoulas and Ms. Bartlett "had tried to explain plastic cream" to her. Her capacity for recall contrasted sharply with that of the FGU witnesses and the grievor who, despite their differing views of the best course of action in the company's file, had similar recollections of events, with minor inconsistencies that were attributable to the passage of time. Ms. Leblanc's lack of recall appeared to be rooted in her limited understanding of the company's file and the FGU's work rather than in any failure of transparency or honesty on her part.

[20] Ms. LeBlanc's testimony described a sometimes-strained relationship with the grievor, who she felt had cut her out of meetings. She indicated that neither she nor the grievor were involved in day-to-day FGU work, including the work on the company's file. She and Ms. Bartlett confirmed that FGU files were not usually brought to the grievor before or after the merger, unless her intervention was needed. Ms. Leblanc confirmed that when the grievor gave input, it was often on sensitive files.

[21] On sensitive FGU files, the grievor might give the FGU guidance, direct the FGU's next steps, or approve a proposed action plan. Ms. Bartlett acknowledged that her role did not include deciding when a briefing note was ready to be sent. She estimated that she and the grievor worked on about 25 briefing notes during the years in which they worked together.

D. The company's file before the merger

[22] In a June 2012, letter, the CBSA advised the company of a verification of their 2011 plastic cream imports. The company had classified those imports as non-dairy products. The CBSA asked the company to provide product samples; information on how the imported products were manufactured, used, and stored; and information on what processing took place after importation. The company provided more information in August 2012. The CBSA's Greater Toronto Area Region requested functional guidance for the company's verification in September 2012. In October 2012, a lab analysis was also requested. All this occurred before the grievor's involvement in the company's file.

[23] In November 2012, an interim report proposed a dairy product classification for the company's plastic cream imports. This had the potential to increase the duties owed, possibly by tens of millions of dollars, for 2011 and on an ongoing basis. All witnesses testified to the fact that this amount was exceptionally large. The company responded on January 18, 2013, with a report from Dr. Art Hill, Chair of the Department of Food Science at Guelph University (not to be confused with Peter Hill, Associate Vice-President, Programs Branch, CBSA, who will be mentioned later). Dr. Hill pointed to what he called "uncertainties" in the CBSA's analysis, the conclusions of which he disputed.

[24] Mr. Pezoulas and Ms. Leblanc first became involved with the company's file in early 2013, roughly concurrent with their arrivals in the FGU. Further functional

guidance was requested in May 2013. Mr. Pezoulas stressed repeatedly in his testimony that all the necessary work was completed on the company's file, and that the FGU had already given functional guidance, before he arrived as a manager. In his view, the verification officer had done her due diligence and had come to the FGU to confirm her findings. Mr. Pezoulas briefed Ms. Leblanc on the company's file, and during the first half of 2013, they discussed it at meetings. Sometime in 2013, Ms. Leblanc began to include the company's file among the topics of her recurring bilateral meetings ("bilats") with the grievor.

[25] In the spring of 2013, the company requested a meeting with the CBSA. On July 11, 2013, the grievor, Mr. Pezoulas, Ms. Bartlett, and other CBSA employees met with the company president, his legal counsel, and Dr. Hill. Meetings with importers were rare and were usually about large sums of duties. For Mr. Pezoulas, it was his first meeting of this nature with an importer. At the meeting, the company stressed that the proposed classification would have catastrophic impacts on its business and community. It argued that the manufacturing process altered the imports in a way that was relevant to their classification and cited prior verification decisions. In its opinion, Dr. Hill's report confirmed that the imports were not cream or preparations of cream but were food preparations of other fats, derived from milk. As such, in the company's opinion, they were not dairy products.

[26] Ms. Bartlett testified about the disagreements between the CBSA and the company as to plastic cream's proper classification, which included factors such as the product's ingredients and how they could be stored, separated, and used. To simplify some of the technical considerations, the grievor provided an analogy; if bread is made with eggs, it is still classified as bread, because the eggs are mixed indistinguishably into the loaf. But if a festive braided loaf, decorated with hard boiled eggs in their shells, is imported, the loaf will be classified both as bread and as an egg product, because the eggs are distinguishable and separable. For plastic cream, the technical considerations turned in part on whether the dairy products in plastic cream were integral or separable and if separable, at what temperature and in what proportions.

[27] After the meeting, Ms. Bartlett reviewed Dr. Hill's report, to ensure that the CBSA's conclusions were in line with this new information. Both the CBSA lab and the FGU agreed that the new information did not change the proposed classification. However, for the grievor, there were still information gaps that made it impossible to

definitively resolve the differing views of the CBSA and the company. She felt that the FGU was well placed to obtain the information required to close those gaps.

[28] Given the millions of dollars of duties at stake, a briefing note was required before the region could issue a verification decision. As the company had underscored at the July 2013 meeting, the retroactive duties could have wide-ranging impacts, including company bankruptcy, mass layoffs, regional economic slowdowns, political attention, auditor general scrutiny, and possible media attention on which the CBSA might be called to comment. Before being sent to the CBSA's president, briefing notes were thoroughly vetted and then signed off by designated executives. The grievor or, after his arrival, Mr. McRoberts was the ultimate signatory on the briefing note. Work on the briefing note started in the fall of 2013.

[29] In the early fall of 2013, Mr. Pezoulas went to Ms. Leblanc's office. He was concerned that the file was not advancing. He did not believe that there were mistakes in the CBSA's interim report or that there would be problems if the verification decision was issued. Ms. Leblanc suggested that they raise the issue directly with the grievor. On September 26, 2013, Mr. Pezoulas emailed the grievor, copying Ms. Leblanc, Ms. Bartlett, and others, stating that he and Ms. Bartlett had concluded that the company's new information did not change the CBSA's proposed classification. It was unusual for someone at Mr. Pezoulas' level to write directly to a director general, but he was concerned about missing the four-year window for 2011 duties (which would start to close as of January 1, 2015). He recommended that the regional office issue the verification decision, noting that the company had the right to appeal.

[30] The grievor's response was that she "most definitely" did not agree with this proposal. She noted that it was a highly significant verification that would garner attention. She did not feel that the CBSA had its "ducks in a row". Mr. Pezoulas then asked to meet with her, in short order, to discuss next steps. She declined, stating that her presence was not needed, and instead asked that "[y]ou guys" (presumably those copied) formulate a plan for Ms. Leblanc to present to her. Later in the same email exchange, the grievor told Ms. Leblanc this: "These are your files and I expect you and your staff to stay on top of them and handle them appropriately."

[31] The grievor asked the FGU to obtain more information about plastic cream's manufacturing process. In her opinion, there was no definitive answer to outstanding

questions about how plastic cream was made and used. On that basis, she did not understand how the FGU could recommend closing the file. To resolve these concerns, she recommended directly contacting the company and the two United States (U.S.) manufacturers of the imports.

[32] Mr. Pezoulas recalled an informal discussion in fall 2013 with the grievor and Ms. Bartlett about next steps. The grievor said that they could call or visit the U.S. manufacturers, pursuant to North American Free Trade Agreement ("NAFTA") provisions. Ms. Bartlett was clear in her testimony that she considered contacting the U.S. manufacturers to be an atypical option. She doubted that they would willingly assist the CBSA and saw no way to rely on NAFTA provisions, a view which she confirmed with her colleagues at the time. In October 2013, the grievor requested an update and an internal meeting among herself, Mr. Pezoulas, and others, so that the plan could be finalized. Despite Ms. Bartlett's misgivings, on October 30, 2013, letters were sent to the two U.S. manufacturers requesting manufacturing process details.

[33] Ms. Leblanc had the impression throughout this time that the grievor thought that the staff had "to do their homework" and ascribed a highly negative tone to the grievor's comment in an email to her that the staff needed to do "the actual work." Ms. Bartlett recalls that the grievor told her the team had to "dig deeper".

[34] Replies from the U.S. manufacturers came in late 2013. The grievor found these inconclusive. Both manufacturers suggested that the CBSA contact the company for more information. In December 2013, Ms. Leblanc told the grievor that her team was confident that they could finalize and send the briefing note so that the region could issue the verification decision.

[35] The FGU again sought the CBSA lab's opinion in December 2013. By January 2014, the lab and the FGU indicated that nothing that had been received changed their original opinion that plastic cream was a dairy good. Once all this was done, Mr. Pezoulas and Ms. Bartlett felt that there was enough information to move the briefing note forward. The grievor did not share this view.

[36] At some point after replies were received from the U.S. manufacturers, Ms. Bartlett and Mr. Pezoulas dropped by the grievor's office and ended up walking with her on her way to catch a cab. She talked informally with them about the information that was still missing and about ways to obtain it. The manufacturers could be visited

in person, travelling by car, although the process involved in setting this up might take months. The company might be able to arrange an invitation to the manufacturers. The grievor again suggested that it might be possible to use NAFTA provisions, in the spirit of brainstorming ideas. She expected the FGU to figure out how to secure the necessary information. Although the lab already had the ingredients of the imports, it did not have the manufacturing process steps. The grievor considered this to be a central vulnerability identified by the company at the July meeting.

[37] According to the compliance verification officer's record of events, on February 4th and 7th, 2014, the region was notified by emails that the FGU had outstanding questions and was drafting a letter to the company to clarify processing. More work was also done on the briefing note in February 2014. Ms. Bartlett said that working on briefing notes with the grievor was often challenging, as the grievor made multiple edits and stylistic rewrites (a tendency also remarked on by others), but Ms. Bartlett also noted that this was not an issue for the company's briefing note. She confirmed that on the company's file, the grievor simply did not think that the CBSA had all the required information. Ms. Bartlett reviewed the follow-up options with Mr. Pezoulas. She testified that with Eric Trudel, Manager, Verification, they considered a site visit. She did not recall whether the grievor was told that the FGU was not pursuing further follow-up options. The briefing note was put on hold, pending the receipt of more information.

[38] The FGU had already started working on a communications package for the verification decision. In Ms. Bartlett's view, there was no valid explanation for the briefing note not being issued after January 2014. As far as Ms. Leblanc was concerned, when a draft briefing note was sent to the grievor in February of 2014, no outstanding file work remained. This testimony was entirely consistent with several emails entered into evidence. The emails also show that the grievor did not agree with these opinions. But no evidence indicates that Ms. Leblanc or anyone else told the grievor that no further work was being done on the company's file.

E. The creation of the TAPD

[39] As part of a reorganization in 2014, some CBSA directorates were merged and were to be "team managed" by pairs of EX-03 and EX-02 executives. Nine directorates were merged into directorates managed jointly by an EX-02 and an EX-03. In March 2014, Mr. McRoberts was appointed the director general of the newly formed TAPD,

which merged the previous TPD and another directorate. The new directorate included 183 employees. The FGU remained within the TAPD.

[40] The grievor had been the EX-02 director general of the TPD. After the merger, she became the EX-02 executive director of the TAPD, managing the TAPD with Mr. McRoberts. Her performance goals and Mr. McRoberts' were identical. Her former office was given to him. Several witnesses, including the grievor, noted that even though her group and level were unchanged, this effectively diminished her leadership. She no longer signed off on briefing notes; this responsibility was transferred to Mr. McRoberts, who had final sign off on all TAPD files.

[41] Other personnel changes occurred at roughly the same time. In March 2014, Ms. Ardito-Toffolo became the director of the Trade Compliance Division. In this role, she had regular bilats with Mr. McRoberts and the grievor to discuss ongoing files. In June 2014, Ms. Leblanc was replaced by Mr. Loynachan.

[42] Mr. McRoberts stated that "functionally", both he and the grievor reported to Mr. Wex, but he also indicated that the grievor reported to him and that he alone provided the direction for the TAPD. On cross-examination, Mr. McRoberts conceded that the grievor reported to Mr. Wex, for her performance assessment, but continued to stress that he alone was responsible for the TAPD. He said that in his first discussion about the TAPD with Mr. Wex, Mr. Wex told him that the TPD had had "a lot of issues, as far as the ADM's office was concerned." Mr. McRoberts did not know if these issues had ever been discussed with the grievor. He testified that it had been said that the TPD was the "worst performer" at the CBSA, in terms of timely task completion (although he had no firsthand knowledge of the source or basis of this remark), and that the grievor had interpersonal skills gaps and performance challenges. Because of this, Mr. Wex wanted a "checks and balances" system, although Mr. McRoberts did not elaborate on what this entailed.

[43] Mr. McRoberts noted repeatedly in his testimony that the grievor held herself out as a trade expert and that she was recognized by her peers as such. He stressed that he relied on her. His goal was to "leverage" her expertise while addressing her performance deficiencies. As a first example of these deficiencies, Mr. McRoberts said that the grievor insisted on personally reviewing "things such as" ATIP releases, and these ended up piling up on her desk.

[44] The grievor said that the ATIP backlog stemmed from a 2014 spike in ATIP requests. Mr. McRoberts conceded that this in fact had been the case. He went on to say that she had no faith in her directors or reporting managers and that she went through everything they did, page by page. These statements were at odds with emails adduced in evidence and the testimonies of others, which show the grievor delegating and asking others to prepare plans and carry out work. Mr. McRoberts added that he changed how the TAPD worked, which then cleared up the ATIP backlog. No evidence supported this statement; nor were documents introduced to demonstrate the operational changes or positive impacts that Mr. McRoberts described.

[45] As a second example of the grievor's performance deficiencies, Mr. McRoberts stated that routinely, she questioned people about security-form particulars, such as family contact information. In his opinion, this showed poor prioritization and delegation. When it was put to him that she had about 10 security forms to review annually and that she was legally obligated to personally sign off on them, he made vague comments about the Protected B status of the forms "possibly" meaning that they had to go straight to security once completed, instead of being reviewed by the grievor. No other information was provided.

[46] Mr. McRoberts implied repeatedly that the TAPD merger was either exclusively or largely due to problems specific to the grievor. When asked about whether the merger was part of a broader restructuring, he said that he had no recall of that. When his attention was drawn to a quarterly report documenting the broader restructuring, at first, he steadfastly maintained that he had no memory of the other CBSA departmental mergers. When pressed, he reluctantly recalled a few of the changes and then testified on redirect examination that none of the other changes involved mergers, even in the face of documentary references to departmental "consolidations." This was one of several moments, others of which are detailed later in this decision, when Mr. McRoberts' statements lacked consistency and transparency.

F. The company's file within the TAPD

[47] The company's file appeared on several bring-forward ("BF") lists throughout 2014. In early 2014, Ms. Leblanc began reporting to Mr. McRoberts and had bilats with him instead of the grievor. She provided Mr. McRoberts with a full briefing, which she stated likely included the company's file, while the grievor was on vacation; there was a further technical meeting on the company's file after the grievor returned. Because of

the grievor's experience, she continued to give direction, as needed, on the company's and other complex files.

[48] Ms. Leblanc believed that the grievor was upset by the merger and that she felt pushed aside. For Ms. Leblanc, the ongoing delay on the company's briefing note felt like deliberate stalling. Every time the company's file was on a meeting agenda, Ms. Leblanc felt that she and the grievor ended up "in a personal venting session", with the result that "nothing got action".

[49] From April to December 2014, Mr. Riel was the special advisor to the grievor and Mr. McRoberts. He also viewed the company's file as stalled. Working with Ms. Gilbert, whose BF lists for the grievor included the company, he tried to support the completion of the company's file, in part through conversations with the grievor. When Ms. Leblanc left in May 2014, the briefing note remained outstanding.

[50] Mr. Riel testified that in 2014, he attended meetings with the grievor, Ms. Gilbert, and Mr. McRoberts at which the company's file was referenced, and from these meetings, he understood that there was an outstanding question on the manufacturing process. Mr. McRoberts testified that he had no recall of these discussions. This appears highly improbable, for several reasons. The company's file was sufficiently significant for Mr. McRoberts to be briefed on it on his arrival at the TAPD. It was already the subject of a draft briefing note, and a high value of duties was involved. Mr. Riel recalled Mr. McRoberts being concerned about progress on the company's file and further described pressure being brought to bear to advance it. This is inconsistent with Mr. McRoberts's lack of recall of the company's file being discussed at meetings he had with the grievor. At bilats, according to Mr. Riel, when Mr. McRoberts pushed the grievor on the file's progress, she always replied that she was waiting for information. Mr. McRoberts recalled none of this. He had repeated difficulties recalling matters described by other witnesses, in this instance and others.

[51] Mr. McRoberts also either had little recall or displayed little understanding about subjects including whether duties must be paid before a file is appealed, what files were typically handled by the FGU, and whether there was an outstanding question on the company's file at the time of the grievor's eventual departure to work on the CBSA Assessment and Revenue Management Project ("CARM") or on her subsequent departure on paid leave.

[52] Sometime before he left the FGU in the fall of 2014, Mr. Pezoulas took the unusual step of reaching out directly to Mr. McRoberts, to express concerns about the possibility of missing the four-year window for retroactive duties. He bypassed his manager, who at that point was Mr. Loynachan, and the grievor, to whom Mr. Loynachan reported. He indicated to Mr. McRoberts that in his opinion, the file was complete and defensible, and that the briefing note was ready to be sent.

[53] Mr. McRoberts stated in his testimony that he understood that the grievor was both "leading the file with the help of the team" and "stick-handling" (a hockey metaphor connoting control, maneuvering, or hands-on contact) the file by herself. When asked if he could have advanced the file when Mr. Pezoulas came to him with concerns in 2014, Mr. McRoberts said that he was not at all sure when concerns had been raised with him, despite having testified to the timing of Mr. Pezoulas' concerns the day before. When his attention was drawn to the contradiction with his testimony of the previous day, he backtracked and said that he was not sure about the nature of the concerns that had actually been raised.

[54] Mr. McRoberts also testified that for most of 2014, he was unaware of how the four-year rule worked. Although this assertion is consistent with his overall tenuous grasp of many matters, as well as his spotty capacity for recall, this statement strains credulity; he had been briefed on the file, and it was discussed with him at many points by many players. It is improbable that none of these discussions referenced the critical four-year rule until the end of 2014.

[55] There were also inconsistencies in Mr. McRoberts' testimony on his authority to move the briefing note forward. As a further answer to the question of whether he could have advanced the company's file in response to Mr. Pezoulas' concerns in 2014 or indeed at any time, he said that he wanted the grievor's "blessing" before forwarding the briefing note. He then vaguely referenced the file's political importance and sensitivity as the reasons for waiting for the grievor's green light. On cross-examination, he conceded that it was within the scope of his managerial role to be able to consider and make conclusions about those issues. Mr. Riel described Mr. McRoberts as "looking for the grievor's approval" because the file was "her responsibility". Mr. Riel also noted that had Mr. McRoberts moved the briefing note forward, the file would have been resolved sooner.

[56] In his testimony, Mr. McRoberts stressed that part of the reason he did not move the file forward was that the grievor said that she alone had the knowledge required for the file, "because she knew the partners and the players." In his view, although they received the same information about the file (a fact corroborated by other witnesses) she treated the company's file as her own. He trusted her expertise. To him, she was a perfectionist; she delegated reluctantly and liked to control information.

[57] The grievor's testimony, which was consistent with those of Ms. Leblanc, Mr. Pezoulas, and Ms. Bartlett on this issue, was quite the opposite. These witnesses agreed that she did not do any of the substantive work on the file herself, including drafting the briefing note; rather, she guided those doing and overseeing the substantive work, corrected any deficiencies that she identified when called upon, and expected the FGU director, and the FGU managers, to update her as the file progressed.

[58] In October 2014, Mr. McRoberts went on vacation, and the grievor was the director general on an acting basis. Evidence differed on the meaning of an October 10, 2014, email in which the company's file was included in a list consisting of 24 file names. These files were to "be completed" before Mr. McRoberts returned from vacation. No detail whatsoever about the task completion being ordered is provided on the list for any of the files referenced, although the 3-sentence email notes that "Manon [Gilbert] has the context and details for most of the items."

[59] According to Mr. McRoberts, this email meant that the briefing note should have been finalized and ready for his sign off on his return. However, he also indicated that some of the items on the list were ongoing projects that would not have been completed until after he returned from vacation. The grievor testified that she understood that the fact that the company was on the list meant that progress or an update was expected on the file.

[60] On November 14, 2014, the grievor discovered that her file on the company was missing from her desk. She sent a short email to Ms. Gilbert and Mr. Riel with the subject line, "Did we ever close [the company]". In the email, she notes that she had asked for a follow-up with the manufacturers. Mr. Riel replied that neither he nor Ms. Gilbert recalled anything about reaching out to exporters. Mr. Riel committed to following up with Mr. Loynachan. After removing the grievor from the email thread,

Ms. Gilbert asked Mr. Pezoulas when the grievor requested exporter information and whether she did so verbally or by email. Mr. Pezoulas replied that letters had already been sent to the exporters.

[61] As 2014 closed, so did the window for full retroactive duties for the 2011 calendar year. Had the verification decision been issued in 2014, collecting retroactive duties for the full 2011 calendar year would still have been possible. Mr. McRoberts testified that at the end of 2014, the grievor said that the company's file was nearly complete, and they were still working with the lab and waiting for more tests. Nothing in her testimony, or that of any others, suggests that lab results or other tests were expected or sought at that time. Witnesses who might have been able to corroborate Mr. McRoberts' statement, such as Mr. Loynachan and Mr. Grant, were not called to testify. Further, Mr. McRoberts' recall was inconsistent, or inaccurate, at other points, as already noted. As such, I do not find any evidence that meaningfully supports a finding that the grievor told Mr. McRoberts that lab results or tests were still pending at the end of 2014.

[62] Mr. McRoberts testified that the delays in the company's file were due to "something like" sabotage by the grievor, possibly because of the titular downgrade of her position. He felt that he did not receive the full story on files. He alluded to meetings and correspondence of which he was unaware, without providing details. He felt that he had provided the grievor with many chances "to mesh and bond and be on the same page." When that did not work, he had to be become more assertive and go line-by-line on deliverables. Again, no details were provided.

[63] In January of 2015, the grievor was called to a meeting, without prior notice, and was told that she would immediately begin working full-time on CARM. She took no files or workload with her when she started her CARM work; nor was she asked to continue working on TAPD matters, although her communications with Mr. McRoberts continued. In his testimony, Mr. McRoberts painted the grievor's reassignment to CARM as a last chance for her to prove herself, given her performance challenges and gaps. Her involvement with the company's file ended. With each day that passed in 2015, the possibility of collecting retroactive duties for imports before the corresponding date in 2011 was lost.

G. The company's file after the grievor's involvement ended

[64] Just over 10 months after the grievor's assignment to CARM, the company's TAPD file was closed. The verification decision was issued on November 17, 2015, shortly after the briefing note had been forwarded to the CBSA president. The lost duties were calculated at $26 006 621.

[65] Mr. McRoberts testified that Ms. Ardito-Toffolo, who had begun working on the company's file in October 2014, "rebuilt the file" after the grievor left and said that many meetings were held before finalizing the verification decision, "to examine questions and issues". He praised Ms. Ardito-Toffolo highly, in his testimony, for the long hours she worked on the file. She did not testify. He further testified that after the grievor's departure, it took 10 months to issue the decision, because they "had to go through the whole file again", and "the file was such a mess". When asked for specifics, he indicated that they "couldn't find" the legal counsel letters, lab reports, or records of calls and meetings. He also testified that the grievor had also left other files in disarray. The grievor denied this.

[66] The statements about the disarray in the company's file are not consistent with the testimony of other witnesses. Evidence from other CBSA witnesses indicated that the substantive file would have been with the FGU rather than with the grievor, whose "file" would have included her personal notes and emails, many of which would have been to or from either Ms. Leblanc, Mr. Loynachan, or FGU staff. Further, the documents that Mr. McRoberts cited would have existed elsewhere, where they had originated; the lab would have had a copy of its own report, and the FGU, which had the working file, would have had copies of its correspondence, as would have had the region. Mr. McRoberts himself either had access to, or was in possession of, all of the documents the grievor had received. Even if I were to accept that the grievor's file was disorganized and that documents were missing from it, how gathering the documents again would have taken 10 months is entirely unclear. At different points, Mr. McRoberts stated that the $26 million loss occurred because the briefing note was not issued in 2013, when it and the file were fully ready to go forward.

[67] The verification decision was the subject of applications to the Canadian International Trade Tribunal and the Federal Court. They were discontinued before decisions on the merits were rendered. It was not contested that the amount of lost

duties ultimately might have been the subject of settlement discussions between the CBSA and the company.

H. The grievor's performance reviews

[68] Mr. McRoberts confirmed in cross-examination that as far as he knew, the grievor was never told that prioritization and delegation were performance issues for her. These issues are also not reflected in her performance evaluations. The performance review process included an annual performance rating based on a performance management agreement ("PMA") and a mid-year meeting to review progress on annual goals. Performance pay documents (based on performance reviews that were also introduced into evidence) reflected the following performance ratings:

- 2008-2009: "met all"
- 2009-2010: "succeeded"
- 2010-2011: "surpassed"
- 2011-2012: "surpassed"
- 2012-2013: "succeeded"
- 2013-2014: "succeeded minus"

[69] For the 2014-2015 fiscal year, the grievor received a performance rating of "does not meet", which was mailed to her at home while she was on leave with pay.

[70] It was uncontested that the "surpassed" rating is given to less than 5% of executives. In the performance management agreement dated June 17, 2014, beside the question, "Based on this evaluation is a Performance Improvement Plan necessary?" "no" was checked. On the same form, the grievor's individual rating was "succeeded minus", and her corporate rating was "succeeded". The document indicates that a "succeeded minus" can apply to newly appointed executives. The rationale provided for this in the grievor's testimony was that in their first, partially complete year, new executives may not be able to achieve all their goals. But it is also clear from the form that this was not the only possible reason for a "succeeded minus" rating. Such a rating may also apply when performance expectations have not been fully met. Further, the form lists other possibilities in addition to those two. Mr. Wex, who could have resolved this ambiguity, was not called as a witness.

[71] The grievor's 2012-2013 end-of-year feedback indicates that at the mid-year review, people management and openness to trade-program transformation were discussed as growth areas. It further states that she had since demonstrated a willingness to further develop these leadership competencies. She indicated that in the meeting to discuss the 2012-2013 performance management agreement, sometime before the signature in June on the document itself, Mr. Wex gave her positive feedback, and she felt good about what she had accomplished in her first year in her new role.

[72] In a March 31, 2015, performance meeting with Mr. Wex and Mr. Hill, the grievor received positive performance feedback on topics, including her arrival at CARM, for which she had provided her input in advance. Nothing was said about the company's file. Mr. McRoberts confirmed in his testimony that he gave her no formal or informal warnings on the company's file or on any other matter and that there was no discipline or any performance improvement plan of which he was aware for her performance generally or for the company's file. He indicated that those were questions for Mr. Hill or Mr. Wex to answer. Mr. Wex was responsible for the grievor's performance evaluations. Neither of these individuals testified.

I. The disciplinary process

[73] On April 8, 2015, the grievor was convened to a meeting with Mr. Wex and Mr. Hill, which occurred immediately. She was told that her conduct at a meeting in the context of CARM had been unacceptable. Mr. Wex told her to go home immediately and to do the following: "think about what you've done", while the CBSA contemplated the next steps. She was not provided with particulars about her problematic conduct. The company's file was not discussed, and the meeting was limited to CARM issues.

[74] The grievor was stunned by the meeting. She had received no advance notice of the agenda and at first was unclear as to the topic of discussion. She saw Mr. McRoberts immediately after the meeting and was told to distance herself from CBSA employees, which was challenging, because most of her social circle was built around the CBSA. In the days that followed, she had a surgical procedure and went on sick leave. While she was in hospital, Mr. Wex called to tell her to remain at home after her sick leave ended.

[75] On April 27, 2015, Mr. McRoberts attached a "Management issues timeline" to an email ultimately forwarded to CBSA's internal investigation unit. This timeline focused on the grievor's management style and interactions with staff, as well as issues related to CARM. The company was not mentioned in the summary of management issues.

[76] In summer 2015, the grievor received her first ever "does not meet" rating on her performance evaluation, which was for the 2014-2015 fiscal year. No feedback about that rating was provided; nor was any supporting evaluation provided. In August 2015, she retained legal counsel. When the grievor's recovery was complete, she called Mr. Wex and stated that she was ready to go back to work. She was told to await further information, which was promised by October 30, 2015. October came and went, but no new information arrived.

[77] Mr. McRoberts testified that Mr. Wex, who left the CBSA in September 2015, asked him for a report on the grievor's performance issues before his departure. Mr. McRoberts replied that the CBSA "needed to engage an independent third party". According to Mr. McRoberts, Mr. Wex agreed. Mr. McRoberts also referenced consultations with Mr. Hill and the CBSA's Labour Relations branch. In early 2016, Michel Séguin, the president of BMCI and an experienced independent third-party investigator, was engaged to complete a "performance report." Mr. McRoberts described Mr. Séguin as working very autonomously and professionally.

[78] While from the evidence and from his testimony, Mr. Séguin's work appears to have been well organized, precisely documented, and highly professional, how he was independent or autonomous remains unclear. His statement of work does not outline an independent investigation. In a March 21, 2016, initial discussion with Mr. Séguin, Mr. McRoberts told him that because of the grievor's poor performance, tens of millions of dollars had been lost. He also told Mr. Séguin that in March, there had been an internal investigation of the grievor's harassment, bullying, and abuse of authority. Mr. McRoberts also told Mr. Séguin that the grievor's life was her job and that she was financially independent. Her testimony that after the termination, she struggled to afford the counselling support previously covered by her employment benefits, ran directly counter to this assertion and was not challenged by the employer.

[79] According to Mr. Séguin, the scope of his mandated tasks from Mr. McRoberts included reviewing "about an inch" of documents given to him by Mr. McRoberts' assistant, putting them in order, and selecting those relevant to the issues that Mr. McRoberts had identified. These documents did not include the full company file; nor did they include the grievor's file or notes. On that basis, Mr. Séguin provided a chronology of events and interviewed these eight witnesses, who were identified by Mr. McRoberts: Marion Whitford, Janice Jacquard, Mr. Riel, Mr. Pezoulas, Zaina Sovani, Ms. Ardito-Toffolo, Mr. McRoberts, and Ray Bonnell. Mr. Bonnell was an employee in the employer's internal investigation unit, who investigated ultimately unfounded harassment allegations against the grievor. The relevance of his work to the company's file, the CARM allegations, or the performance-related allegations was never explained.

[80] Mr. Séguin testified that his task was not to investigate wrongdoing but rather to compile documents accompanied by witness interview summaries. These summaries were not appended to the final version of the resulting report and were not adduced in evidence. Ultimately, the CBSA's internal legal counsel described BMCI's task as "… to assist with the production of the report."

[81] Much of Mr. Séguin's work related to termination grounds that the employer has since withdrawn. He did not interview the grievor, Ms. Leblanc, Mr. Loynachan, Mr. Hill, or Mr. Grant; nor did he have any information from them about their involvement in the company's file. Despite this, Mr. McRoberts repeatedly described Mr. Séguin as "an independent third party". This description does not match the evidence received at the hearing.

[82] In another instance of Mr. McRoberts' poor powers of recall, he testified that he was entirely unaware that the grievor was never interviewed by Mr. Séguin. Mr. McRoberts conducted no interviews of his own; nor did he ask the grievor for more information or documents or for any witnesses whom she might have considered relevant. He would not confirm Mr. Séguin's statement that Ms. Jacquard, his administrative assistant, had provided documents to Mr. Séguin. Initially, he had no recall whatsoever of his office ever providing any documents. Mr. McRoberts eventually conceded that Ms. Jacquard might have given documents to Mr. Séguin but maintained that he had no memory of instructing her to; nor did he have any idea of who else might have provided these instructions.

[83] Mr. McRoberts acknowledged that Mr. Séguin indicated that he did not feel that his work could be described as an investigation; rather, it was a report based on the documents provided. Despite this, Mr. McRoberts stated in evidence that he stayed "at arm's length" from the entire process and that he took a "firm stance" (implying opposition to this idea, of which there was no evidence) that he would not write the "investigation report." Mr. McRoberts further indicated in evidence that he had not wanted to interfere with Mr. Séguin's "investigation methodology". At other points, he described Mr. Séguin's product as a "fact-finding, performance report" rather than as a misconduct investigation.

[84] Mr. Séguin authored a report ("the McRoberts Report") that he provided to Mr. McRoberts and that he then edited, as directed by Mr. McRoberts, who signed the McRoberts Report. Mr. Séguin's name does not appear on it. The McRoberts Report's preamble states that its objective is "to provide a chronology of events". Mr. McRoberts testified that he was "completely out of the loop" after the McRoberts Report, dated April 14, 2016, was "issued". The McRoberts Report has 3 sections: the company's file (summarized in a 4-page narrative citing 15 attachments), CARM, and timely assignment completion. The termination letter did not cite timely assignment completion. Termination grounds related to CARM were withdrawn at the hearing.

[85] On April 19, 2016, the grievor's counsel received the first details of the allegations against her, including harassment allegations that were ultimately determined unfounded and performance allegations on which the employer did not rely in its termination letter. Included with the letter was the chronology of overdue tasks that were attached to the McRoberts Report. She had never before seen the McRoberts Report allegations, and she had learned of the harassment allegations in her one brief call with Mr. Séguin on March 24, 2016, to the surprise of them both; Mr. Séguin had assumed that the grievor must have known of the harassment allegations against her. She was never interviewed about the harassment allegations or with respect to the McRoberts' Report. Eventually, she received a letter that stated that those allegations were unfounded.

[86] She was also surprised by the performance concerns in the McRoberts Report. She already knew that there was an issue with her CARM assignment because she had been told as much at the April 8, 2015, meeting with Mr. Wex, but this was the first time she heard about issues related to the company's file. She did not believe that she

had mishandled the file, and she did not know what had happened to the file after she left. For her, the McRoberts Report was hurtful and gut-wrenching. She believes that it is fortunate that she already had professional support in place by that time, given the personal impact that she experienced.

[87] Sometime after a July 2016 letter, from the grievor's legal counsel to the CBSA, the grievor met with the CBSA's general counsel and the vice-president of Human Resources at the offices of her legal counsel. At several points before her employment was terminated, she asked to meet with the CBSA's president, a request which was never granted. She testified that even at this late stage, she had hope that if she could tell her side of the story, she would be given a fair hearing, and her statements would be considered.

[88] The grievor was terminated on March 12, 2018, after having been on leave with pay for nearly three years (since April 8, 2015). Mr. Ossowski testified that her failings on the company's file were as follows:

- she was the responsible executive when "$25 million" in duties were lost;
- although there was more than enough evidence to send the "assessment", she persisted in asking more questions;
- many of her files were not properly managed; and
- she did not trust her staff and had poor communications skills.

[89] Mr. Ossowski indicated that the grievor dug in, to "rag the puck" (a hockey metaphor connoting delay). In his view, it was clear to anyone what the imported product was and how it should be classified. She should have relied on the team, given the amount of money owing. Instead, she chose to do nothing. There was a lack of communication with her superiors and gross negligence.

[90] Mr. Ossowski understood that the staff had distrusted and feared the grievor. He felt that it was reasonable to infer that the stalling on the file was deliberate. He cited the reputational impact for the CBSA as well as the impact on the company and the lack of a level playing field within this commercial sector generally. He understood that there was a pattern of non-responsive behaviour that he stated was reflected in her performance assessments. Whether or not the harassment case was founded, as far as he was concerned, it was clear that the grievor did not absorb feedback well on any

of these issues. No examples of feedback on the company's file, or any file, dating from the period before she left the workplace were provided by Mr. Ossowski; nor were such examples provided by any other witness.

[91] According to Mr. Ossowski, there was no possibility of remorse or rehabilitation; the grievor had already been given opportunities to change, including the reorganization of the TPD and the "fresh start" at CARM, but she demonstrated neither self-awareness nor self-reflection, despite "receiving feedback many times." Mr. Ossowski noted that her performance appraisals had dropped when she became an EX-02. Her years of service were considered but given what he described as the insubordination on the CARM file, as well as the bullying and the aggressive leadership style, termination was appropriate.

[92] Mr. Ossowski relied on what he called "the McRoberts Investigation" (which he described as "appropriate and thorough") and the grievor's response when he made the decision to terminate her, as well as briefings from his legal team. He admitted to having no firsthand knowledge of the following:

- why the merger occurred and what, if anything, was said to the grievor about her performance at that time;
- who directed the FGU or the grievor's role in relation to FGU work or whether the FGU had told her that it was not following her directions;
- the veracity of the harassment allegations or whether harassment concerns were shared with the grievor before the harassment report was issued.

[93] Mr. Ossowski was unclear on why the company's file was flagged for verification, what position the FGU had taken, and how or why the grievor had become involved. He offered no comment or explanation about the lack of any disciplinary consequences for Mr. McRoberts and Ms. Ardito-Toffolo, despite the fact that between January and November 2015, they also did not take actions to issue the briefing note, and despite the fact that the majority of the $26 million of lost duties related to periods after the grievor had been transferred to CARM.

[94] Mr. Ossowski admitted that the grievor's termination was based on both the CARM incident and the handling of the company's file and that he considered the other allegations in the McRoberts Report, as well as the harassment allegations. He did not recall whether he was aware when the grievor was terminated that the

harassment allegations had been determined unfounded. He admitted to knowing that she was not subjected to a performance plan but maintained nonetheless that there were performance issues with her.

[95] Mr. Ossowski indicated that he was unaware that the grievor was not interviewed in the McRoberts Investigation. He said that if Mr. McRoberts and the grievor disagreed, he preferred Mr. McRoberts' version, indicating that others agreed with Mr. McRoberts, so he assumed that Mr. McRoberts' opinion must have been correct. He was unaware that Mr. McRoberts had not written the McRoberts Report. He also did not know that the consultant did not have access to the grievor's notes and emails. Mr. Ossowski testified that he never saw the July 15, 2016, letter from the grievor's counsel asking to meet with him and that he remained unaware of that request. He was further unaware that she was told that this request had been denied.

[96] The grievor testified that she felt completely blindsided by the events that occurred during this entire period, starting with being sent home in April 2014. Starting at that time, she sat at home and thought about what she might have done differently, with no contact with former colleagues who had been her friends. She spent a long and very lonely year waiting for the allegations to arrive. She felt isolated and demoralized. As the months and then years of wondering and waiting dragged on, and ultimately lead to her termination, she relied on professional help to get through what became "an extremely dark period" in her life.

[97] Her life had been largely centred on her work, and her CBSA career mattered deeply to her. She continues to experience difficulties with self-confidence. She second-guesses herself and struggles to trust others. The fear that what she experienced may recur remains with her and continues to affect her in the workplace; she described it as an unreasonable level of paranoia.

[98] The grievor has also experienced a sense of loss. She had progressed steadily, had won awards, and had been selected for special programs. She had remaining goals and ambitions that she states she is now unlikely to attain; as she put it, due to the lost years, "the runway is too short". She described all those impacts as cutting deep and lasting long. She has since found new employment in the federal public service. Her job search was impeded by the fact that she was forthright that her CBSA employment had been terminated.

[99] No one other than the grievor was disciplined in relation to the company's file. Mr. McRoberts had what he described as "not the most pleasant meeting of my career" with the CBSA's president and others, in the wake of the completion of the company's file. When asked for details of this meeting, Mr. McRoberts replied with this: "I don't want to get into it because of political issues", and offered only that they talked about ensuring that timelines were met.

IV. Summary of the arguments

A. For the employer

1. Misconduct

[100] The employer has proven serious misconduct warranting the grievor's termination. Alternatively, a lengthy unpaid suspension would be appropriate. There is no basis for aggravated or punitive damages. The benefits flowing from reinstatement will suffice if reinstatement is ordered.

[101] The grievor was not a long-term executive. Her 2013-2014 performance review set out people management and trade transformation as growth areas. The employer's position is that the 2013-2014 "succeeded minus" rating reflected her performance. Mr. McRoberts' testimony was that the new management model came about to reduce her responsibility, in part due to performance problems, such as people management. Her emails to staff were sometimes terse, as seen in her comment that "… staff need to do the actual work …", and in her occasional use of capital letters. Rejecting staff recommendations was part and parcel of these poor communication practices. These performance difficulties contributed to missed deadlines. As emails entered in evidence set out, she was repeatedly reminded about deadlines, starting in 2014.

[102] The entire situation could have been avoided in 2013 after the company was told to provide information about the manufacturing process. It should have been motivated to provide any information that would stop the reclassification, to avoid duties. If evidence existed that could have convinced the CBSA, the company would and should have provided it. The grievor failed to turn her mind to this.

[103] In September 2013, Mr. Pezoulas told the grievor that the company's information did not change the reclassification. He was well aware of the file. He wanted the final verification decision to be issued; he said that the company could always appeal it. The grievor wanted to wait for more complete manufacturing process

information, but the U.S. manufacturers would not voluntarily share that information. At that point, the grievor should have relied on the internal recommendation and accepted it.

[104] From January 2014 onwards, the company appeared on a weekly BF system. Ms. Bartlett, a dairy product specialist, stated that by early 2014, when the new lab results were in, even if Dr. Hill was right about the fat globules separating in manufacturing, it would not have affected the reclassification. At that point, the briefing note should have been sent. There was no reason to wait. This is the second point at which the grievor continued to ask for inconsequential information. The only hope for that information — that a U.S. manufacturer might open its premises to the CBSA — was unrealistic. On February 28, 2014, Ms. Leblanc sent the grievor a draft briefing note. This was yet another chance to issue the verification decision. The decision to chase unneeded information without a follow-up was out of step with the grievor's executive role. Seeking more information was an error in judgment.

[105] The grievor was disingenuous or careless about the information that she gave Mr. McRoberts from January to November 2014. In November 2014, she asked Ms. Gilbert and Mr. Riel if the CBSA had ever closed the company's file, implying that she was unaware of the file's status. Even so, she continued to act as if the file was on track, and she was just awaiting more information. She should have been aware that the four-year deadline was approaching. It should have been clear to her that a decision had to be issued without further delay. A good file that allowed for the full recapture of duties would have been better than a perfect file that missed the deadline for that recapture.

[106] In her testimony, the grievor said that she wanted to test the veracity of the information that had been received. This was a shift from what she said to the FGU at the time of the events in question. It impacts her reliability and judgment; asking for information that one does not have and verifying information that one has are very different things.

[107] By the time the grievor went to CARM, the company's file had been her responsibility for two years. She should have issued the briefing note before she left. She is responsible for all losses up to the verification decision date because her inaction set the stage for the losses that occurred in the months after she left for

CARM. Mr. McRoberts should not have had to pick up the file. He was not a trade expert. He was not part of discussions with Ms. Leblanc or the company. The grievor had the leadership role and therefore is responsible, as noted.

[108] As for why it took about 10 months after the grievor left to issue the verification decision, Mr. McRoberts said that the file had to be rebuilt and that the timelines were impacted because she had left other files in disarray. Although her file was available to others, they could not just pick up where she left off.

[109] The McRoberts Report was not issued until about a year after the grievor left because the verification decision was not completed until November 2015. The employer could not know the scope of the damage until then. Mere months after the company's file was completed in November 2015, contact was made with Mr. Séguin.

[110] The employer can assess conduct in context and against a reasonable standard. In this case, the context and standard were provided by the *Customs Act* (R.S.C., 1985, c. 1 (2nd Supp.)) and the employer's *Reassessment Policy*, which states that an importer's obligation to correct duties for imported goods ends four years after importation. In the absence of a precisely defined service standard, common sense applies. The grievor's lack of accountability and the way she tried to shift the blame to others are both of concern.

[111] Few labour precedents address gross negligence, which is the applicable principle in this case. *Hildebrand v. Fox*, 2008 BCCA 434, a common law action for negligence that arose in an employment context, reminds that when misconduct lacks conscious wrongdoing, gross negligence may still be found in departures from normal standards of conduct. Such departures can include loss of life, serious injuries, or grave damage. *Stevenson v. First Nations University of Canada Inc.*, 2015 SKQB 122, which involved multiple instances of criminality, fraud, and financial impropriety by a person in a position of leadership and trust, reinforces the same concepts. The misconduct in that case raised questions about honesty; the same questions arise in this case. The issue is whether the grievor's actions were a marked departure from the norm.

[112] The concept of careless work is akin to gross negligence. If damage or disruption occurs in an employee's domain, the employee must explain the causes. In

this case, volition, recklessness, and negligence all supported imposing a severe penalty. A profound lack of judgment is the equivalent of gross negligence.

[113] The grievor's failures on the company's file included:

- disregarding the FGU's fall 2013 and winter 2014 recommendations and continuing to attempt to verify the manufacturing process;
- placing too much weight on the company's opinion and accepting the company's arguments when the CBSA's subject matter experts disagreed;
- failing to follow up on her request for more information or to establish next steps; and
- not being accountable, given the sums at stake, and taking no steps to accelerate the process, including while she was at CARM and on leave.

[114] Even if the grievor was not fully responsible, she was sufficiently responsible to warrant her termination. Her testimony shifted to minimize her responsibility, which impacts her credibility. The grievor tried to shift accountability for follow-ups to Mr. Riel. She said that she had faith in her staff but did not accept their recommendations. She did not know if they had closed the company's file, despite telling Mr. McRoberts that it was on track. Mr. Pezoulas, Ms. Bartlett, Ms. Leblanc, Mr. Riel, and Mr. McRoberts all agreed that nothing else had to be done on the file.

[115] Although Mr. McRoberts knew that a deadline was approaching, he did not know that it would not be met, based on the grievor's assurances. He believed that the company's file would be completed in time. She did not provide him with details on the file. She was the respected trade expert. He did not understand the risks until he was fully briefed. He did not warn or counsel her because he believed that she was in control of the work. Her lack of forthrightness, minimization, unacceptable lack of follow-up, and failure to accept responsibility irrevocably broke the bond of trust.

2. Damages

[116] *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paragraph 59, ("*Honda*") notes that aggravated damages apply for foreseeable mental distress due to the manner of the termination. These damages can also serve to punish malicious or egregious conduct, which must stand on its own as an independent actionable wrong for punitive damages to apply (see *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 79, 82, and 83). Punitive damages are awarded to punish unfairness and bad faith and conduct so

malicious and outrageous that it deserves punishment (see *Honda* at paras. 56, 57, and 62; and *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at para. 63).

[117] *Spruce Hollow Heavy Haul Ltd. v. Madil*, 2015 FC 1182 ("*Spruce Hollow*"), sets out the test for aggravated and punitive damages at paragraphs 81, 82 and 119 to 121. Termination is inherently unpleasant. This predictable unpleasantness is not a basis for aggravated or punitive damages. The grievor's distress was within the ambit of what is predictable on termination. Although medical evidence is not a precondition for aggravated damages, more is required than the grievor demonstrated, including an itemization of the harms that she suffered.

[118] An award of punitive damages must contemplate the lowest amount that is rationally required for deterrence. Compensatory damages can also punish an employer. Proportionality links considerations of compensatory, aggravated, and punitive damages (see *Whiten*, at para. 74 and 109 to 119; *Greater Toronto Airports Authority v. Public Service Alliance Canada Local 004*, 2011 ONSC 487 at paras. 125 to 127).

[119] The grievor did not point to any identifiable prejudice. She was on paid leave while she was off work. There are reasons that the disciplinary process took a full year. There is no evidence that her ability to reply to the employer's allegations was impaired and no evidence that it prolonged the investigation. There were lengthy settlement discussions.

[120] The termination closely followed the end of the harassment investigation. The facts in this case are distinguishable from those in other aggravated- and punitive-damages cases. In *Lyons v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 95, at paragraphs 12 to 14, the Board found deliberate intent by the employer to prejudice the grievor by misleading the Board. Employer conduct was the primary cause of severe symptoms of ill health as well as an inability to return to work. None of that applies in this case. *Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70 ("*Robitaille PSLRB*") (upheld in 2011 FC 1218 ("*Robitaille*")); and *Greater Toronto Airports Authority* are similarly distinguishable.

[121] The employer cited the following cases in support of its position: *Alberta Treasury Branches v. Cam Holdings LP*, 2016 ABQB 33; *Bahniuk v. Canada Revenue Agency*, 2012 PSLRB 107; *Basra v. Canada (Attorney General)*, 2010 FCA 24; *Boucher v.*

Wal-Mart Canada Corp., 2014 ONCA 419; *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62; *D'Cunha v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 78; *Fidler*; *Finlay v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 59; *Gannon v. Treasury Board (National Defence)*, 2002 PSSRB 32 (overturned on other grounds in 2004 FCA 417); *Greater Toronto Airports Authority*; *Hildebrand*; *Honda*; *Prinzo v. Baycrest Centre for Geriatric Care*, 2002 CanLII 45005 (ON CA); *Spruce Hollow*; *Robitaille PSLRB*); *Robitaille*; *Stevenson*; *Stokaluk v. Deputy Head (Canada Border Services Agency)*, 2015 PSLREB 24; *Viner v. Deputy Head (Department of Health)*, 2022 FPSLREB 74; *Whiten;* and Brown and Beatty, *Canadian Labour Arbitration*, 5th ed. (2019) at ch. 7, s. 36.

B. For the grievor

1. Misconduct

[122] The employer has not proven misconduct by the grievor, who was never counselled, warned, or disciplined or told that she was mishandling the company's file. The *Touchette v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 72, decision stresses that no deference is owed to an employer's decision or investigation process, even when an investigation occurred. The grievor should be reinstated with all benefits, with aggravated and punitive damages for the employer's callous and egregious behaviour. If the Board finds otherwise, at most, what should apply is a short suspension, given the multiple mitigating factors of long service, no discipline, an isolated incident, and strong performance.

[123] The employer's disciplinary process violated the fundamental principles of just-cause discipline. *Ontario Store Fixtures v. C.J.A., Loc. 1072 (Phinn)*, 1993 CanLII 16809 (ON LA), emphasizes the importance of progressive discipline (at paras. 29 and 30). Timely discipline is essential; lost documents and faded memories may result otherwise, and the corrective function is lost. When other implicated employees receive no penalty for actions attracting discipline, the discriminatory result is inconsistent with just cause.

[124] An employer is held strictly to its disciplinary grounds. The termination letter states that the grievor's failure to act resulted in a "$25 million loss" and cites gross negligence and lack of judgment on her part. Mr. Ossowski testified that the termination was based not just on the company's file but also on the grievor's poor

performance and CARM issues, as well the harassment allegations. Some of these factors were inappropriate for him to even consider.

[125] Because gross negligence requires a marked departure from the norm, it is important to understand the TAPD's normal practices. The grievor's role did not include file work, from which she was two managerial levels removed. She provided leadership and ensured that sensitive files were properly handled. The day-to-day case work was done by Ms. Bartlett, who reported to Mr. Pezoulas or Mr. Grant. When pressed, Ms. Bartlett agreed that certain considerations did not factor into her work, such as a political or an economic impact. These considerations were addressed at the executive level.

[126] In this context, was the grievor's behaviour with respect to the company's file a marked departure from the norm? She was updated and provided guidance, as was typical on high-impact files. She discussed the file at bilats with Ms. Leblanc and told Ms. Leblanc that the file required more work, to ensure due diligence. She asked Ms. Leblanc to direct the staff to carry out that work. This was consistent with her role. She expected the team to carry out her directions and to address her concerns. There was no shift in what she was looking for at any point in the file's history.

[127] Ms. Leblanc had minimal recollection of her conversations in 2014 with the grievor or of the nature of the follow-up directions or what she did with them. Mr. Pezoulas recalled that what he had to do was secure a fuller response from the manufacturers and hold a team meeting. Ms. Bartlett knew that the grievor wanted more information. Ms. Bartlett and Mr. Pezoulas had more meetings; Ms. Bartlett testified that Mr. Pezoulas and Mr. Trudel looked into the possibility of a site visit. Ms. Bartlett did not look into other options for pursuing the manufacturing process.

[128] When it was put to Ms. Bartlett that in February 2014, she understood that she had been told to do more work to close the manufacturing issue, she acknowledged that this was true. Despite all the evidence of follow-ups and bilat meetings variously involving the grievor, Ms. Gilbert, Mr. McRoberts, and Mr. Riel, there is no evidence that the FGU ceased work on the company's file. As importantly, the grievor was never told that the FGU had decided to stop working on the file.

[129] No evidence supports a mishandling of the file or gross negligence. Mr. Grant worked on the file from February 2014 onwards. He was not called as a witness. Mr.

Loynachan replaced Ms. Leblanc in June 2014. He met with the grievor and Mr. McRoberts from that point onwards. He did not testify. Mr. Wex supposedly said that the grievor had been given feedback and opportunities to improve. He did not testify, and her performance ratings do not align with that narrative. Nothing communicated to her orally suggested poor performance; nor does the evidence indicate that Mr. McRoberts performance-tracked her. She was clear; the company's files were never mentioned in these reviews. The employer could have called witnesses with direct knowledge of performance problems or file-management issues but did not.

[130] The grievor testified that she gave Mr. McRoberts a full briefing when he arrived at the TAPD. They met regularly, to discuss the BFs managed by Ms. Gilbert and Mr. Riel. This was a standard practice. The grievor believed that the necessary steps to advance the file were occurring and that Ms. Gilbert and Mr. Riel were promoting its progress. The grievor was waiting for a response, which would have allowed her to recommend that Mr. McRoberts sign the briefing note. The choice of when to sign off always sat with him; he could have signed off at any time. He agreed that the file was highly sensitive and that it had to be fully vetted. Like her, he knew that the verification decision had to be well supported and that the company was likely to litigate. He shied away from signing off on the briefing note without her approval. But that is what a senior executive is supposed to do; they are supposed to gauge risks and make the final call.

[131] Mr. McRoberts had conversations with the grievor throughout 2014. He could not recall the briefings on the company's file, and he had no clear understanding of what she was waiting for, but he did recall directions to the FGU to do more work. This does not support an argument that she misrepresented the file's status. Sometime in the fall of 2014, Mr. McRoberts learned about the four-year rule and then did nothing whatsoever with this critical information. He gave no directions, specific or otherwise, to the grievor; nor is there evidence that he asked her about the deadline. At some point in 2014, Mr. Pezoulas raised concerns with him about finishing the file. Yet, there is no evidence that Mr. McRoberts followed up with the grievor after that. He was content to let things play out.

[132] Although Mr. McRoberts already knew that duties would be lost if the decision was not issued by January 1, 2015, he took almost 10 additional months after the grievor's departure to send the briefing note. Like her, he wanted a complete,

defensible file. He said that Ms. Ardito-Toffolo would know what work was accomplished in those 10 months; the employer chose not to compel her testimony.

[133] Mr. Ossowski said that the lost duties were a major factor in the termination. They almost all resulted from the months during which Mr. McRoberts waited and the grievor was not involved with the file. Employer witnesses were asked if an earlier decision would have resulted in a fuller duties recapture. This question was put to Mr. Pezoulas, Mr. McRoberts, and Ms. Bartlett; they all replied in the affirmative. Mr. McRoberts let the duties slip away. Despite this, the employer attributes responsibility for the lost duties to the grievor alone.

[134] There was little evidence on the disciplinary process. On March 31, 2015, the grievor had a positive performance meeting; the company's file was not mentioned, and at that point, her involvement with the file had already ended. A week later, she was called to a meeting by Mr. Wex, and due to issues related to CARM, she was sent home. Mr. Wex gave her no details, explanation, or additional feedback. She left the meeting in shock. In summer 2015, she received a "does not meet expectations" performance evaluation, with no explanation, and despite the positive March performance meeting that took place just before she was sent home. In September 2015, she received a package vaguely alleging misconduct and performance issues. This was the first time any problem other than CARM was brought to her attention.

[135] Despite securing legal counsel and seeking information, the grievor heard nothing more until April 14, 2016, when she was sent two final reports. The first included multiple harassment allegations that she had never seen before. The second was the McRoberts Report.

[136] The McRoberts Report is not an investigation report. Mr. McRoberts told Mr. Séguin at the outset that the grievor had lost the employer millions of dollars. Mr. Séguin was handed documents selected by Mr. McRoberts and was told to put them in order and to turn them into a narrative. He called employees if their testimony appeared relevant from the documents that he had been handed or if a document was unclear. He did not interview the grievor, Mr. Loynachan, Mr. Hill, Mr. Wex, or Mr. Grant. Mr. Séguin did not look at the whole file; nor did he look at the grievor's file. Both were highly relevant. It was not a fair or investigative process, but nonetheless, Mr. Ossowski relied on it, mistakenly believing that it was an investigation. Basing a

conclusion on an improper process displays callous disregard, which was exacerbated by undue delay. This was a breach of procedural fairness.

[137] When the two reports were dropped on the grievor in April 2016, she was blindsided. She had just spent a long, lonely year speculating, wondering, and worrying. Reading the harassment allegations and the McRoberts Report was gut-wrenching. Her first input was her legal counsel's written response to the completed report. Mr. Ossowski dismissed it out of hand because it did not match the McRoberts Report. When the grievor asked to meet with Mr. Ossowski, her request was refused. She was given one chance to meet with the CBSA's Human Resources branch. Six weeks later, the termination letter cited harassment allegations because Mr. Ossowski said they were "serious", even though they had already been dismissed.

[138] For the grievor, this had huge career, emotional, and financial impacts. The impact of the entire process has cut deep. She now second-guesses everything, has trust issues, and worries that a similar situation might recur. She lacks self-confidence. Given her age, the lost years mean that certain executive opportunities she might once have enjoyed will never be available to her.

[139] Negligence is not typically a labour law concept. In *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2002 PSSRB 62, the grievor was terminated for gross negligence. The grievance was allowed because there was insufficient evidence to substantiate the allegations. In *Manitoba v. Manitoba Government and General Employees' Union*, [2002] M.G.A.D. No. 56 (QL), a 30-year employee was terminated due to a file backlog, delay, and failure to close files. The employer had tried suspensions and performance management before turning to termination. The arbitrator noted that the grievor gave unchallenged evidence that his explanations were not unreasonable and that failing to keep up with the workload alone does not amount to misconduct. The events required for performance-related discipline did not occur in the file.

[140] *Pugh v. Deputy Head (Department of National Defence)*, 2013 PSLRB 123, concerned two suspensions. There was a written document with performance expectations, but the performance expectations were unreasonable. The employer did not consider the grievor's explanation. Concern was expressed in the decision about assumptions and hearsay evidence. In *Saint-Amour v. Treasury Board (Fisheries and*

Oceans), PSSRB File No. 166-02-27502 (19971104), the grievor was suspended due to negligence. The adjudicator noted that errors in judgment do not necessarily warrant disciplinary action. As for negligence, the case discussed an exercise of discretion in a way that the employer did not ultimately prefer. Matters cannot be assessed with 20-20 hindsight; nor should they be subjected to speculation.

[141] Gross negligence requires a marked departure from normal standards, typically including wanton, wilful conduct and an utter lack of care. The standards must be clear and reasonable. Cases referenced by the employer set out how grave the departure from normal standards must be. *Brazeau* involved fraud and concealment. *Stokaluk* involved criminal activity. *Gannon* involved deliberate lies about qualifications. *Stevenson* involved fraud and dishonest conduct. None of this applies in this case. The grievor's conduct was in line with standard CBSA practices and was within the reasonable exercise of her discretion.

[142] Multiple considerations had to be balanced with respect to the company's file. The grievor fulfilled her oversight role and took areas of concern seriously. She was briefed and discussed the file. She gave direction and trusted staff to do the file work. She used the standard follow-up process. She ensured that the briefing note would be ready as soon as new information was received. When her personal file disappeared, she followed up immediately. She was never told that work on the file had stopped and had no way of knowing if her directions were being ignored.

[143] One indicator that her approach was reasonable is the fact that Mr. McRoberts and Ms. Ardito-Toffolo essentially took the same approach after the grievor ceased her involvement with the file. Had it been essential to issue the verification decision immediately and had the file been ready to advance since 2013, as alleged, Mr. McRoberts could have forwarded the briefing note immediately, and the lost duties would have been almost entirely avoided. In this sense, the penalty that the grievor received was discriminatory and inconsistent. This also runs counter to the employer's argument that the grievor's approach was a marked departure from normal procedures. It is more logical to conclude that the file was not yet complete in January of 2015 and that it was more important to be thorough and accurate than to rush it through. No evidence set out that the grievor's actions cost taxpayers millions of dollars, which is essential to the case against her.

[144] Before an employer contemplates discipline based on careless work, it must provide the employee with counseling and warnings. In this case, there were none. The grievor was left to handle the file as she thought best, which is what she did, and she did so transparently. Her actions were consistent with her level of responsibility and were informed by appropriate concerns. The employer knew what she was waiting for and knew what she was telling the team and gave every appearance that it all was acceptable. If it was dissatisfied with her work, it could have counselled her through warnings or directions to handle the file differently. Instead, over multiple rounds of performance reviews, the company's file was never raised. The employer cannot now state that her actions on the company's file constituted misconduct.

2. Damages

[145] Recently, in *Lyons*, the Board canvassed issues related to aggravated and punitive damages. The facts in this case point to a lesser amount of damages than occurred in *Lyons*, but the principles are the same. The principles set out in *Honda* apply, based on the employer's unfair, bad-faith, and unduly insensitive conduct, which denied the grievor's right to natural justice. *Lyons* speaks of jumping to conclusions and relying on serious but ultimately unfounded allegations. It also speaks of impugned motives and intent and months and years of disciplinary process.

[146] *Lyons* also discusses the harm caused by employer actions. In cases without medical evidence, the range of damages is generally in the order of $25 000 to $35 000. These damages cover frustration, hurt feelings, and stress rather than medical issues. Aggravated damages related to physical and psychological exhaustion were assessed at $20 000 in *Mattalah v. Treasury Board (Department of Foreign Affairs, Trade and Development)*, 2018 FPSLREB 13.

[147] The wrongful action in this case was the unfair, insensitive, and bad-faith approach to discipline. Procedural fairness was lacking in the entire process. The employer threw every allegation it could muster at the grievor, without supporting facts, and made personal attacks about bullying and abuse. Only one of those allegations is before the Board. The termination was based on a narrative report, which was driven by a predetermined conclusion. The grievor's feedback was never seriously considered. She was terminated in part based on unfounded harassment allegations and bald assertions that were repeated at the hearing. Without foundation, Mr. Ossowski called her behaviour deliberate; Mr. McRoberts called it sabotage.

[148] The grievor detailed the harms that these actions caused. Are these harms worse than what is predictable in the wake of a typical termination? When she was first sent home, she was devastated; she was blindsided, lonely, and isolated. She resorted to counselling. She is still working to regain trust, as happened in the *Mattalah* case. The $25 000 to $35 000 range for aggravated damages is appropriate in this case.

[149] Had the employer really wanted to understand the company's file, it could have properly investigated the conduct and actions of everyone involved. The only logical inference to be drawn from the employer's course of action is that it already knew the answer it wanted. This is clear from how the McRoberts Report was prepared. Unlike the *Robitaille* case, the grievor in this case was never even interviewed. The failure to undertake an investigation and including harassment allegations — which the employer said were unfounded — among the termination grounds deserves censure. This sophisticated employer knows the procedures for a just-cause termination and chose not to follow them. This cut to the core of the grievor's identity. Therefore, the appropriate amount of punitive damages is $50 000 to $75 000. She requested that the Board remain seized of any award, and she seeks salary, performance pay, interest, vacation and severance, benefits, sick leave, and out-of-pocket expenses for the buyback of pensionable time post-termination.

[150] The grievor relied on these authorities: *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98 (QL); *Touchette*; *Ontario Store Fixtures Inc.*; Brown and Beatty, *Canadian Labour Arbitration*, 5th ed., at paragraphs 7:7 and 7:70; *Aerocide Dispensers Ltd. v. United Steelworkers of America*, [1965] O.L.A.A. No. 1 (QL); *Schenkman*; *Manitoba*; *Pugh*; *Saint-Amour*; *Beaulne v. Treasury Board (Transport Canada)*, [1997] C.P.S.S.R.B. No. 100 (QL); *Lyons*; *Mattalah*; *Robitaille PSLRB*; *Robitaille*; *Saadati v. Moorhead*, [2017] 1 S.C.R. 543; *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 110, *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2010 PSLRB 83; *Knight v. Parrish & Heinbecker, Ltd.*, [2006] C.L.A.D. No. 293 (QL); and *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618.

C. The employer's reply

[151] The allegation of discriminatory discipline as a mitigating factor, giving Mr. McRoberts co-responsibility with regard to the company's file, is unsupported by the evidence. Mr. McRoberts' role was to operationalize the merger. His focus was on

operational issues such as people management, stakeholder relations and financial matters. In this context, he wanted to leverage the grievor's knowledge and expertise. He never said that he was jointly responsible for files. No evidence set out that Mr. McRoberts was as responsible as the grievor was for the losses that occurred. The grievor was the responsible manager on the company's file.

[152] The force with which Mr. McRoberts and Mr. Ossowski stated that the grievor was a bully was overstated. Mr. Ossowski did acknowledge in his testimony that the harassment allegations were ultimately dropped.

[153] The grievor referred in evidence to the company's file being on her to-do list. But at each 2014 BF meeting, the file's status remained the same. It is clear from the November 2014 emails that neither Mr. Riel nor Ms. Gilbert had heard of the request for more manufacturer information, so the grievor then explained to Mr. Riel what she had requested. If she had already told him, why would she have had to explain it again? As for the grievor's assertion that no one made her aware that the information that she sought on the files was not coming, there is insufficient evidence to support it. The Board never heard from Mr. Grant at the hearing, to prove that no one made her aware. The grievor should have relied on Ms. Bartlett and trusted her expertise.

[154] It is beyond the Board's jurisdiction to review matters arising in the disciplinary investigation which were not advanced at the hearing as grounds for discipline.

[155] Progressive discipline is not appropriate in this instance because such discipline should only be considered where the misconduct is insufficient to warrant termination. Here, the termination of employment was warranted.

V. Reasons

[156] Discipline and termination of employment made under the authority of s. 12(1) of the *Financial Administration Act* (R.S.C., 1985, c. F-11) must be for cause. The test consistently applied in disciplinary and termination matters before the Board was established in *Wm. Scott*. When applying that test, I must determine whether, on the balance of probabilities, the employer has proven the misconduct relied on for discipline. If the misconduct is proven, I must decide whether the discipline was excessive and, if so, what penalty is appropriate.

A. Did the grievor's actions constitute misconduct?

[157] The grounds for discipline are that the grievor:

> …
>
> *… failed to issue, or cause to be issued, the final verification report relating to the tariff classification of certain products imported by* [the company] *in a timely manner, despite it being your responsibility to do so, resulting in a loss of duties in excess of $25,000,000 as a result of the expiration of statutory time limits on recovery ….*
>
> …

[158] The termination letter also cites gross negligence, serious and significant lack of judgment and insubordination. At the hearing, the employer clarified that the insubordination grounds related only to the CARM file and were unrelated to the allegations about the company's file. As mentioned, the termination grounds related to CARM were withdrawn at the hearing.

B. Allegations of gross negligence and lack of judgement

[159] Typically, culpable failures to comply with workplace orders are characterized as insubordination (see *Chauvin v. Deputy Head (Offices of the Information and Privacy Commissioners of Canada)*, 2012 PSLRB 66; and *Samson v. Deputy Head (Department of Justice)*, 2019 FPSLREB 40). In this case, the employer argues that the grievor's gross negligence and lack of judgment led to avoidable losses in the company's file.

[160] Concepts of gross negligence and lack of judgment arise infrequently in labour and employment law. As the *Stevenson* case noted, at paragraph 33, negligence "… is not the usual language that would be used to catch the many obligations that exist, and the wide range of breaches which might arise, in an employment relationship …". *Stevenson* considered the term "gross negligence of duty" only because it appeared in the employment contract at issue as a potential ground of dismissal. Both parties' arguments, citing case law, noted that negligence may be found in a marked departure from the norm. *Stevenson* also notes that "the 'marked departure' test" (*Stevenson*, at para. 35) has been referred to with approval in multiple cases. When deciding whether there had been gross negligence in the context of employment, the Court in *Stevenson* stated as follows at paragraph 38:

> *[38] … The relevant considerations would properly include not only the extent to which* [the employee] *failed to comply with the duty at issue, but the potential impact of that failure, which in turns* [*sic*] *affects the standard of performance or conduct that applies to the actions at issue.…*

[161] What little case law exists informs that a finding of employee misconduct based on negligence requires evidence of a marked departure from the normal standards of workplace conduct. This requirement is captured in the first of the three relevant *Stevenson* considerations, "… the extent to which [the employee] failed to comply with the duty at issue …". Many of the cases referencing negligence or related concepts, also involved deceit, dishonesty, fraud, or criminality. For example, in finding that the respondent in *Stevenson* had been negligent, the Court cited fraud, falsification, and unauthorized expenditures that directly benefitted the plaintiff. Similar issues arose in *Beaulne* (which cites negligence and lack of judgement), and in *Gannon* and *Stokaluk* (both of which cite lack of judgment, but not negligence). Other indicators of negligence include a lack of care and wanton, reckless, or willful behaviour.

[162] Workplace standards must be clear and reasonable. An employee's exercise of judgement when following the standards need not be perfect; nor should the reasonable exercise of employee discretion be censured (see *St. Amour,* at pp. 12). As in all discipline cases, even when a calamity or disturbance has occurred on the employee's "watch", the employer still has the burden of proving that the employee did something culpable in the circumstances (see *Pugh,* at para. 171, *Schenkman*, at paras. 57 to 59). Only if this can be established, as noted in the *Canadian Labour Arbitration* passages cited by the employer, may the employee then be called upon to explain why what occurred was not caused by their misconduct. If the employee's explanation is reasonable and unchallenged, negligence will not be proven (see *Manitoba*, at para. 29).

[163] Accordingly, when determining whether the employer established misconduct based on negligence, I must consider these questions:

1) What workplace standards applied to the grievor's responsibilities on the company's file?

2) Did the grievor fail to comply with these standards?

3) If the grievor failed to comply, was the failure such a marked departure from workplace standards of conduct that it constituted misconduct?

1. What workplace standards applied to the grievor's responsibilities on the company's file?

[164] The answer to this question requires a consideration of what the grievor's work on the company's file entailed. The grievor was not responsible for the day-to-day file work on FGU files, including the company's file. The only evidence that suggested otherwise came from Mr. McRoberts. His suggestion that she led or performed the day-to-day work on the company's file does not align with any of the other evidence. She declined a meeting on the file's particulars because she felt that the FGU should have done that work. She was confident that the FGU was carrying out her directions and addressing her concerns. She had been explicit about what she wanted, and she expected her directions to be followed. How they would be followed was up to the FGU's staff members and their supervisors.

[165] The grievor's role with respect to the FGU's work was to advise and guide the managers who oversaw it; two managerial levels stood between her and the FGU's line work. Closest to her in the hierarchy were directors such as Ms. Leblanc, Mr. Loynachan, and Ms. Ardito-Toffolo. At the next level were unit managers, such as Mr. Grant and Mr. Pezoulas. Finally, working within the FGU were subject matter experts, such as Ms. Bartlett.

[166] Although the grievor was not responsible for day-to-day file work, she had considerable discretion over many aspects of the direction of the company's file. Until Mr. McRoberts arrived, this discretion included the ability to do the following:

- decide if changes to the briefing note drafted by the FGU's staff were needed;
- decide if further information was required before finalizing a briefing note;
- decide whether to delay sending a briefing note, pending the receipt of additional information;
- direct others with respect to outstanding tasks or missing information; and
- decide whether to sign a briefing note and forward it to senior CBSA leaders.

[167] Much of this discretion remained after Mr. McRoberts arrived, but after that, the grievor was no longer the ultimate authority within the TAPD. Her discretionary scope and responsibilities became subject to his direction; she was no longer the ultimate

signatory on briefing notes. Although he was not responsible for assessing her performance, multiple emails were adduced in evidence in which he directed her and established expectations that demonstrated their subordinate-superior relationship.

[168] Some of the standards which applied to these responsibilities can be construed based on the PMAs placed in evidence for the grievor's roles in the TPD and TAPD. The grievor was appointed to an EX-02 role in the TPD in December 2012. Among many other performance measures, her PMA for the 2011-2012 fiscal year includes references to high quality and consistent policy advice being provided in a timely fashion. Both the 2011-2012 and the 2012-2013 PMAs reference support being provided to regional officers in respect of complex cases, in a cost-efficient manner. The 2012-2013 PMA also references the need to provide quality and timely advice to the president and executive vice-president.

2. Did the grievor fail to comply with these standards?

a. Alleged failure to cause the verification report to be issued

[169] The employer contends that the grievor's negligent failure to cause the verification report to be issued in a timely way led to significant financial losses. When considering whether this misconduct has been proven, I must determine whether there were standards in the workplace that would have required her to issue the verification decision so that no (or fewer) losses would have occurred, such that a failure to comply with these standards constituted a marked departure from the norm.

[170] As previously mentioned, there was no clearly communicated direction or order to the grievor about the company's file. Despite this, the employer asserts that by looking at BF lists, calendar entries, emails, and the four-year rule, an expectation can be implied that establishes the grievor's responsibility to avoid any lost duties by finalizing the briefing note needed to complete the company's file. I am not persuaded by this argument.

[171] The BF lists and calendar entries reflect standard tracking procedures found in many workplaces. These lists and entries offer little information about what was to be completed or when or by whom. Ms. Gilbert's July 16, 2014, email listed items requiring the grievor's attention and included the company's file. In that email, another briefing note is marked as urgent; the bullet point for the company's file does not contain an urgent tag. Furthermore, there is no clear direction to complete the

company's file or any of the other files listed, by a certain date. Instead, the email vaguely references "items that would need Anne's attention." This cannot be viewed as either an order or an expectation to send the briefing note, which would have triggered the region's issuance of the verification decision.

[172] Mr. McRoberts' October 10, 2014, email does not align with the employer's argument that at that time, the grievor should have clearly understood the urgency with respect to the 4-year rule and the company's file such that her failure to act promptly was negligent in its untimeliness. Nothing in the email reflects any special urgency for the company's file. The attached to-do list included 24 items. Mr. McRoberts testified that some of the files on the list were ongoing projects for which file closure was not expected.

[173] While progress of some sort was clearly expected for each file, and the email provides clear evidence that Mr. McRoberts directed the grievor's work on multiple files, the level of progress and the tasks to be completed were not specified. The email notes that "Manon [Gilbert] has the context and details for most of the items." Clearly, some contextualization was required to understand the work expected on the files listed. This context was not clarified at the hearing. Ms. Gilbert is deceased. It is unclear from the email whether the company's file was expected to be completed in its entirety or whether the email referenced a specific task for the company's file, such as communicating with the FGU, following up on manufacturer contact plans, or the receipt of the long-awaited information about the manufacturing process.

[174] Mr. McRoberts and the grievor differed on the email's direction for the company's file. Mr. McRoberts said that the email indicated a requirement for file completion. The grievor said that she understood it to mean that progress should be made on the file. I find the grievor's testimony about her understanding to be entirely credible. Further I find this to be the most reasonable interpretation of the email's direction on the company's file. This finding is consistent both with Mr. McRoberts' testimony that he believed that the grievor was waiting for more information and his testimony that he trusted her. It is further consistent with the agreed fact that he took no actions on the file after his return, nor did he order the grievor to take any. The October 2014 email is not evidence of an expectation that the grievor was expected to close the file by the date of Mr. McRoberts' return.

b. The four-year rule as an implied deadline

[175] The employer argues that there was an implied obligation to complete the file in a way that respected the four-year deadline. The employer's repeated references to a deadline deserve examination, as this so-called deadline is central to the employer's argument that the grievor failed to resolve the file in a timely way and that this was a marked departure from workplace standards. However, there was little concrete evidence of what timeliness meant in the context of the company's file. It is fair to assume that the CBSA wanted to minimize any duties lost. There was credible evidence from Mr. Riel about "pressure" being brought by Mr. McRoberts to advance the file (although Mr. McRoberts himself did not recall this). But it is also clear that there were multifaceted considerations that might have overridden the loss of some retroactive duties. This is particularly relevant, given that when the grievor's work on the file ended, the lost retroactive duties were still relatively minimal, compared to the losses that ultimately accrued and were attributed to her after her work on the company's file ended.

[176] In her testimony, the grievor stated that there is no statutory deadline for a verification decision, and therefore, there was no statutory deadline for the company's file. The employer characterized this statement as evidence of her failure to handle the file properly. But she was correct. There is no statutory deadline for issuing a verification decision. Rather than imposing a deadline, the *Reassessment Policy*, which cites the statutory limitations for customs corrections, outlines date-based consequences on retroactive duties. No collection of duties is possible for imports made more than four years before the verification decision is issued. This is a consequence. A consequence is not a deadline.

[177] An employer can set a deadline for work even if a statute does not. But there were no service standards for the FGU's advice and support to the regions. Further, as noted above, the employer did not expressly identify a deadline for closing the company's file. From January 1 until November 17, 2015, the retroactive duties that could have been collected decreased incrementally each time the corresponding 2011 date of one of the company's imports passed. There is no evidence of an order or direction that no retroactive duties were to be lost, which would have meant a December 31, 2014, deadline; nor is there evidence of a maximum acceptable amount of lost duties, which would have resulted in a deadline sometime in 2015.

[178] Another difficulty with the employer's argument that an implied norm or standard arose from the four-year rule is that this standard would have applied also to Mr. McRoberts and perhaps would have placed him under an even greater obligation, given his role in the hierarchy and the fact that nearly all the losses occurred after the grievor's role on the company's file ended.

[179] Mr. McRoberts admitted that he knew of the four-year rule by sometime in late 2014. In my view, the evidence strongly suggests that he may well have been aware of the four-year rule before that time. Ms. Leblanc briefed him on the file in early 2014. The file arose repeatedly in conversations with several TAPD staff members, including Ms. Leblanc, who briefed the grievor and Mr. McRoberts on the file simultaneously, and as well with Mr. Riel and Ms. Gilbert, based on the testimonies of several witnesses. Mr. Riel remembered clearly that Mr. McRoberts pushed the grievor for information about when the company's file would be complete when it was discussed in their bilats. It seems highly improbable that the critical four-year rule was never mentioned in these conversations. Further, Mr. McRoberts' memory on multiple aspects of the company's file and the TAPD's structure was vague and selective. Unfortunately, Mr. Grant and Mr. Loynachan, who might have shed more light on discussions of the four-year rule, and McRoberts' awareness of it, were not called as witnesses.

[180] Even if I accept Mr. McRoberts' professed unawareness of the four-year rule until late 2014, it is notable that no actions flow from the awareness that he stated he gained at that time. He did not expressly direct the file closed, to ensure that no duties were lost. Even if I accept the employer's argument that the October email was a direct order to close the file (which I do not), this does not explain why he did not, as all witnesses who addressed this issue indicated that he easily could have, simply sign the briefing note either before the end of 2014 or after the grievor went to CARM, as would have been expected and necessary had a failure to do so truly amounted to a marked departure from normal workplace standards. No evidence set out that he ever even asked the grievor for more details on the company's file or to explain or justify her approach. None of this is consistent with the employer's narrative that she breached a workplace norm or standard, given the undisputed evidence that Mr. McRoberts would have been aware of this breach by, at the very latest, fall 2014.

[181] At the grievor's March 2014 performance meeting with Mr. Wex, the company's file was not even mentioned, although by then, the lost retroactive duties were

accruing, as multiple players in the TAPD, including Mr. McRoberts, were well aware. Nothing in these facts suggests that those in a position to direct the grievor found her actions inconsistent with the prevailing workplace standards. It suggests the opposite — her exercise of discretion was consistent with these standards.

c. Mr. McRoberts' reliance on the grievor

[182] Some of the arguments advanced by the employer amounted to a suggestion that Mr. McRoberts did not issue a direct order on the company's file because he lacked the understanding to do so; his role was to "operationalize" the merger rather than to understand the TAPD's or FGU's work. The employer argues that although Mr. McRoberts could have told the grievor that her approach to the company's file was no longer acceptable and that the briefing note was to be forwarded immediately, he did not, because he believed her when she held herself out as a trade matters expert. The grievor's trade expertise was an agreed fact; her 2013-2014 PMA notes, with regard to the grievor, that "[t]he depth of her trade expertise is regularly relied upon by senior management."

[183] There are two problems with this line of argument. First, it is impossible to reconcile this total reliance with Mr. McRoberts' executive role and the clear evidence of his managerial oversight with respect to the grievor. Managers do not take direction from those who are subordinate to them.

[184] The second problem is more complex. Mr. McRoberts advanced two explanations for his reliance on the grievor. The first was that she encouraged him to rely on her. For example, he said that the reason that he did not move the file forward was that she said that she alone had the knowledge required for the file, "because she knew the partners and the players".

[185] For several reasons, I do not find Mr. McRoberts' testimony on this credible. Nothing in the grievor's testimony, or that of others, suggested that her handling of the file required her to know the "partners or players". Only Mr. McRoberts characterized her approach that way. Furthermore, she wanted the FGU to complete the work, rather than wanting to do it herself. No contemporaneous evidence or testimony at the hearing set out that she held herself out as an expert in dairy science or manufacturing processes — she relied on others for that expertise. And, after she went to CARM, the grievor appeared entirely content to hand off the company's file.

She never suggested that her continued involvement was required. Mr. McRoberts' testimony about her statements appeared to have been made for the purpose of explaining and excusing his failures to take action on the file.

[186] In the same vein, Mr. McRoberts' second explanation for his reliance on the grievor was that she was a trade expert; he was not. This boils down to a contention that he had to rely on her because he did not understand the work. Ample evidence suggests that Mr. McRoberts' grasp of the company's file, the FGU's work, and the structure of the TAPD was so weak that he chose to defer to others, including the grievor. It would be possible to conclude, based on that evidence, he did not order her to close the company's file because his understanding of the file was hazy. It may well be that with 20-20 hindsight, he now wishes that he had taken a different approach. Responsibility his choices does not, as argued by the employer, sit with the grievor.

d. The grievor's alleged disregard for the FGU's recommendations

[187] I am not persuaded by the argument that the grievor should have accepted the advice and recommendations of those one, two, and three levels below her in the chain of command, given that it would have effectively required an inversion of the workplace hierarchy. This argument disregards her mandate to direct subordinates. Her role included providing guidance to others, before and after the merger. Her directions to subordinates to complete additional work that they would have preferred not to have done, even where that preference was based on an honest evaluation and judgement, is not evidence of her negligence or lack of judgement. It is evidence of differing points of view. The grievor, as the manager, had the discretion to resolve these differences in a way that was reasonable and for the purpose of protecting the CBSA's interests. This is what she did.

[188] I might have found differently had the grievor's directions to the FGU or her concerns about the manufacturing process appeared either unreasonable or obstructive. But ample evidence before me pointed to the reasonableness of these directions. Information about the manufacturing process was requested in the CBSA's June 25, 2012, letter to the company initiating the verification, long before the grievor's involvement with the file. In that letter, the CSBA asked, "How is each product manufactured? What is each product used for? How is each sample stored?" These questions all relate, directly or indirectly, to manufacturing. It is clear from the letter that manufacturing process information was important and relevant.

[189] There are other hallmarks of reasonableness in the grievor's continued pursuit of this additional information. Her explanation that she had to ensure the defensibility of the CBSA's ultimate decision is consistent with the undisputed evidence that this sensitive file required cautious, careful treatment. The company did not merely advance an unsupported argument about its imports. It sought the input of Dr. Hill, an acknowledged expert, and cited previous CBSA decisions. The grievor transparently acknowledged in her testimony that she knew that the FGU's position might prevail in the long run. She had no preference for a particular result but had to ensure that the CBSA would have a defensible file if it faced public, legal, or political scrutiny. All the CBSA's witnesses said that this was possible. Making recommendations on matters of this nature was part of her executive role. Taking all of this into account, I cannot conclude that her actions were careless, or for the purpose of stalling the file. The evidence indicates the contrary, that she wished to take a prudent and comprehensive approach.

[190] The employer's argument that the grievor failed to follow her subordinates' directions also sidesteps Mr. McRoberts' managerial responsibility to direct her. The TAPD's staff had differing views on the company's file. The grievor wanted more information; the FGU wanted to go ahead without it. Mr. McRoberts decided to defer completely to the grievor, based on his view that she held herself out as a trade expert. While his deferral to her is consistent with the employer's argument that she should have deferred to those below her in the chain of command, it was consistent neither with his executive role nor with any normal understanding of workplace hierarchies.

[191] As Mr. McRoberts agreed on cross-examination, it was his job as the most senior manager to decide between the opposing views on the company's file. He cannot blame his failure to do so on the grievor. This is especially so given that her actions on the company's file were transparent and within the scope of her role. If the CBSA disagreed with her choices, a direction to handle the file differently would have needed to come from either Mr. Wex or the only TAPD employee more senior than her: Mr. McRoberts. She cannot be faulted for not taking direction from the subordinates to whom she was supposed to provide guidance.

[192] The employer also tried to make much of the idea that there is a difference between asking for information that one does not yet have and verifying the information that one already has, and that the grievor gave inconsistent testimony in

this regard. Evidence from multiple witnesses indicated that the grievor asked for information that she did not have, to verify or confirm the information that was on hand and the position taken by the FGU based on that information. Small changes in phrasing at different moments did not impact her credibility or reliability.

e. The claim that the grievor placed too much weight on the company's opinion

[193] The employer argued that the grievor accepted the company's argument that the CBSA was vulnerable to criticism even though the CBSA's subject matter experts disagreed. It is hard to reconcile this argument with the evidence. Multiple witnesses confirmed that the CBSA could indeed have received multifaceted criticism in the wake of a reclassification with such an enormous financial impact; the undisputed need for a briefing note on the company's file was evidence that everyone wanted to ensure that the CBSA was prepared to face it. I do not find that the grievor's choice to seek further information to ensure that the company's potentially valid arguments were not improperly disregarded was unreasonable.

[194] Again, had the grievor concealed either her course of action or the potential financial impact of missing some or all of the four-year window, my finding might have been different. I saw no evidence that she was not forthright about the file's status or its financial implications. Witnesses who could have testified to her lack of transparency were not called to give evidence.

f. Alleged failure to follow up on requests and to establish the next steps

[195] Overall, the employer casts the grievor simultaneously as a line worker responsible for minutiae and stick-handling the company's file, a middle manager responsible for routine guidance, an executive assistant tracking BFs, and a chief executive responsible for signoff. Before the merger, she was indeed a chief executive, but that role ended early in 2014. After the merger, she held none of those roles.

[196] This argument is not consistent with the evidence. There were two levels of management between the grievor and the FGU subject matter experts, both of whom had a role in actioning her directions. A regular follow-up list was managed by the two executive assistants. The grievor explained why she did not expect rapid results on her requests. She knew that reaching out to the U.S. manufacturers would take time and planning. Further, her direction to subordinates had simply been to obtain the missing information; it was up to the FGU to devise a plan for doing so. Her assumption that

her directions were being actioned does not appear unreasonable, given her role and the tracking that was in place within the TPD and then the TAPD.

g. Allegations concerning accountability, given the amounts at stake, and failure to accelerate the process, while at CARM and on leave

[197] To start with the second half of this argument, it is entirely unclear why the grievor would have been accountable for the company's file after she went to CARM. It was undisputed that at that point, she had no role in the company's file and no longer had carriage of her previous TAPD files. It would have been inappropriate for her to attempt to continue to direct this work. The grievor knew that Mr. McRoberts and others were well aware of the file and the four-year rule. Mr. McRoberts had discussed the file's completion in meetings. It was reasonable for her to take for granted that he, rather than she, would continue to promote the file's closure with whoever took on her previous role or with the FGU. It is difficult to see how any other conclusion could be reached. Most of the lost duties relate to months when she was at CARM or on leave.

[198] As for the first assertion, it would have been open to the CBSA to tell the grievor to stop seeking the additional information and accelerate the process. This did not happen. It was not open to the CBSA, knowing the course of action that she was taking, to allow her to persist in that course of action for months and to expect her to guess that eventually, it would be deemed unacceptable.

[199] The sums at stake function to bolster this conclusion. The grievor's testimony was that one of the reasons she wanted to close the remaining gap on the file was the exceptional amount of retroactive duties, which had the potential to bankrupt the company and cause regional unemployment, with the consequence that the verification decision might attract political and media attention. Litigation was also a distinct possibility. This is consistent with the testimonies of other witnesses, including Mr. McRoberts, who indicated that the file required careful handling. The grievor chose to exercise her discretion to ensure the completeness and defensibility of the CBSA's position. The sums in question, and their potential impact, point to the reasonableness of her approach rather than to negligence, lack of judgement or carelessness.

h. Allegations concerning delays in the company's file after the grievor's departure

[200] The employer alleges that the grievor's file on the company was left in such a state that it required 10 months of work to "rebuild" it after she left and that several of the other files that she left behind had not been handled in a timely way, which delayed the rebuilding exercise. No detail was provided with respect to the other files; nor was untimely file completion raised in any of the grievor's performance assessments or discussions before her departure from the workplace. This reference to untimely work is essentially a repackaging of the "timely completion of assignments" section of the McRoberts Report, which was not included as a termination ground in the termination letter. Since it chose not to rely on the untimely completion of assignments as a ground for termination, the employer cannot raise that ground through what amounts to the back door of the company's file.

[201] It is undisputed that both Mr. McRoberts and Ms. Ardito-Toffolo were aware of the company's file by sometime in the fall of 2014. If after that point they ultimately chose to focus their attention on other files, including files formerly handled by the grievor, the responsibility for that choice does not sit with the grievor.

[202] Further, it is difficult to understand how a file could have been both ready to go forward in the fall of 2013, as the employer contends, but left in such a state by the grievor by January 2015 that 10 additional months of work were required to resolve it in a context in which the grievor had not been the person doing the substantive file work. There are clear statements from all witnesses employed by the CBSA (except Mr. McRoberts) that the FGU did the day-to-day work on the company's file. Several emails reflect this testimony; none are inconsistent with it. The FGU is where the company's substantive verification guidance file resided. How rebuilding the grievor's file could have mattered is a mystery.

i. The grievor's conduct and motivation

[203] At several points, the employer included in evidence and argument references to the grievor's poor communication practices, such as the fact that she "sometimes" used capital letters in emails (infrequently, based on the emails adduced in evidence). The termination was not based on her demeanour or tone, and to this extent, these observations were irrelevant.

[204] The grievor's transparent, consistent approach to the file does not align with the employer's narrative of sabotage or negligence motivated by the downgrading of her authority after the merger, or of a departure from her duties and role with the TAPD's hierarchy. She took the same approach to the file before the merger as she did afterward. That approach was openly disclosed in meetings and multiple emails. It never changed. These facts do not support allegations that her actions constituted sabotage or were motivated by hurt feelings from the merger.

C. Conclusion on misconduct

[205] Nothing before me indicates that the grievor fulfilled her responsibilities on the company's file in a manner that was negligent or lacked judgement. Having found that the grievor did not fail to comply with workplace standards, there is no need for me to consider whether her failures were such a marked departure from these standards that they constituted misconduct. The employer did not prove misconduct on her part. As such, the employer has not established that the termination of her employment was warranted or for cause, and the grievance is allowed.

VI. Remedy

[206] In the event that the grievance was allowed, the parties asked me not to bifurcate the hearing, and to remain seized of any outstanding issues that the parties were unable to resolve.

A. Compensatory damages

[207] The grievor is retroactively reinstated as of the date of her termination, as detailed in the order, to compensate her for the financial losses that flowed from her termination.

[208] The grievor's compensation included performance-based bonuses. For four of the five years before she was sent home, she received two performance ratings of "surpassed", one of "succeeded", and one of "succeeded minus". I accept her explanation for her "succeeded minus" rating; it was a mandatory rating given to new executives, as indicated on the form. In essence, it is the equivalent of a "succeeds" rating. The 2014-2015 "does not meet" rating arose in an overall context of procedural unfairness (described in detail under the heading, "Was the employer's conduct egregious?"). It is not reliable because of this and because of its inconsistency with the preliminary, informal performance review for the same period.

[209] Mr. Wex could have testified to the grievor's 2014-2015 performance; he was not called. The only reliable future performance indicators are the 4 prior annual ratings. It is reasonable to conclude that on a balance of probabilities, she would have continued to achieve "surpassed" ratings 50% of the time and "succeeds" ratings 50% of the time. Her retroactive bonus pay is to be calculated on that basis.

[210] Pursuant to s. 226(2)(c) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), an adjudicator may, in relation to a matter referred to adjudication, award interest in the case of grievances involving termination at a rate and for a period that the Board considers appropriate. In the context of the long period that the grievor was deprived of her previous salary, it is appropriate to award interest on the amounts owed for lost salary and performance pay, after mitigation is deducted. The adequacy of the grievor's mitigation efforts was not contested by the employer.

B. Aggravated and punitive damages: overview

[211] Aggravated and punitive damages are different plants that grow in the same soil — the employer's egregious conduct. Both apply only in exceptional instances (see *Lyons*, at para. 153). For both, care must be taken to ensure that the damages awarded are not inordinately high. These damages must also be proportionate in the circumstances of the case and in the context of the total damages award and the analogous case law (see *Spruce Hollow*, at para. 82 and *Whiten*, at para. 110). However, there are significant differences between these two types of damages.

[212] Aggravated damages return a grievor to the position in which they would have been, but for the employer's egregious conduct, by compensating the intangible harms caused by that conduct. In contrast, punitive damages do not compensate; they punish, denounce, and deter (see *Whiten*, at para. 43). From this point, I will use the term "punishment" to refer to all three of these purposes.

[213] There is no longer a requirement to show an independent actionable wrong when claiming aggravated damages (see *Fidler*, at para. 55, *Honda*, at para. 59 and *Spruce Hollow*, at para. 121). When assessing whether aggravated damages apply, the focus is on the grievor. If the employment contract gave rise to reasonable expectations, which the employer's egregious conduct violated, aggravated damages may apply. The first question to answer is whether the grievor's alleged harms were foreseeably caused by the employer's egregious conduct. The harms must exceed the

foreseeable distress that follows a termination (see *Spruce Hollow*, at para. 79 and *Honda*, at paras. 50 to 57).

[214] The harms that may be compensated by aggravated damages include mental distress, low self-esteem, loss of reputation and morale, hurt feelings, feelings of betrayal, and frustration (see *Spruce Hollow*, at para. 80, *Mattalah*, at para.164). Medical evidence can support an aggravated damages claim but is not required (see *Spruce Hollow*, at para. 109, *Lyons*, at para. 101).

[215] When assessing whether punitive damages apply, the focus shifts to the employer (see *Whiten*, at para. 127). These damages serve to punish the employer's egregious behaviour (see *Spruce Hollow*, at para. 83). If the awarded compensatory and aggravated damages already achieve this goal, then no rational purpose is served by a further award (see *Prinzo*, at para. 74, *Whiten*, at paras. 109, 110 and 123). For this reason, compensatory and aggravated damages are determined before punitive damages are considered. When determining the appropriate amount of punitive damages, I must be mindful of the so called "dimensions" of proportionality, as established in *Whiten* (at paras. 111 to 128), to ensure that any award is rationally proportionate to the goals that punitive damages serve.

[216] For punitive damages, the requirement for an independent, actionable wrong remains (see *Honda*, at para. 68, *Fidler*, at para. 63, and *Spruce Hollow*, at para. 121). The independent actionable wrong is often found in conduct that breaches the expectation of good-faith dealings (see *Honda*, at para. 62). Such conduct, in employment settings and elsewhere, has been described as follows:

- unfair or in bad faith by being, for example, untruthful, misleading, or unduly insensitive (see *Honda*, at para. 57);
- malicious, oppressive, and high-handed (see *Prinzo*, at para. 74, quoting *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130);
- untruthful, defamatory, and misleading (see *Spruce Hollow*, at paras. 80 and 124);
- a marked departure from ordinary standards of decency (see *Fidler*, at para. 63);
- high-handed, malicious, arbitrary, or highly reprehensible (see *Whiten*, at para. 94); and

- malicious, harsh, reprehensible, and harmful (see *Robitaille PSLRB*, at para. 344).

[217] Accordingly, these are the questions to consider when evaluating aggravated damages:

- Was the employer's conduct egregious?
- If so, what, if any, are the foreseeable harms caused by the egregious conduct?
- Are the harms greater than the foreseeable distress of a termination?
- If so, what is an appropriate amount of aggravated damages?

[218] These are the questions to consider when evaluating punitive damages:

- Does an independent actionable wrong warrant punishment?
- Are compensatory and aggravated damages sufficient as punishment?
- If not, what further damages are appropriate?
- Is the overall amount of damages appropriate, reasonable, and rational?

1. Was the employer's conduct egregious?

[219] All employees have a reasonable expectation of fairness and good faith in discipline. This expectation is especially relevant, and would reasonably be heightened, in the context of a large public service employer that has an investigative and adjudicative function. Prior to discipline, a properly conducted disciplinary process would have involved these steps: fairly determining the facts of the incident for which discipline was contemplated, clear and timely misconduct allegations, and a meaningful chance to respond to those allegations. Only after these basic components of due process were completed would the employer have been able to contemplate appropriate discipline, had misconduct occurred. None of these steps were taken.

a. The timeliness of the discipline

[220] The disciplinary process was profoundly untimely, both for the allegation that the employer relies on and for the other allegation cited in the termination letter. While the CARM allegations and the concerns about untimely assignment completion are irrelevant for assessing misconduct, as they were not relied on, they are relevant to

the question of whether bad faith occurred in how the disciplinary process was handled overall.

[221] The explanation provided by Mr. McRoberts for waiting until 2016 to begin the disciplinary process was that this work could not be done until the company's file was closed. This does not align well with the facts. When the grievor was sent home based on events that took place involving CARM, no reference was made to the company's file. At this point, at a minimum, any employer concerns about the disarray in which the grievor had left her file would have already crystalized. It is not at all clear why these concerns were not mentioned before she was sent home and were not investigated promptly. According to Mr. McRoberts' testimony, Mr. Wex, who left the CBSA in September 2015, asked him to prepare a report on the grievor's performance. BMCI was not retained to prepare a report until late January or early February 2016, which was over 10 months after the grievor was sent home and five months after the departure of Mr. Wex.

[222] Any misconduct that the grievor committed on the company's file would have ceased in January 2015, when she went to CARM and left her role on the company's file. By the time she was sent home on leave with pay in April 2015, the employer either would have or could have been aware that more than 3 months' worth of retroactive duties in the company's file could not be collected. Despite this, the company's file was never mentioned at the April 2015 meeting. On the untimely completion of assignments, 26 of the 36 incidents discussed in the chronology of overdue tasks related to the 2013-2014 fiscal year, but the grievor's PMA for the 2013-2014 fiscal year does not mention concerns with overdue tasks. For both the company's file and the 2 withdrawn allegations in the termination letter, the grievor did not receive notice of any allegations until April 19, 2016, over 15 months after her work on the company's file ceased and almost 12 months after the employer first brought to her attention the fact that it had unspecified concerns about a CARM meeting on April 8, 2015. All of this is of concern; it appears that the employer reached back in time to amass multiple allegations, without attention to whether the allegations were timely or fair. This is not consistent with good faith discipline.

[223] No plausible explanation accounts for these delays. The employer promised to share its allegations in the disciplinary process by October 2015 but did not provide them until many months later. The effect of this delay on the grievor was oppressive

and harmful. Nothing in the evidence before me allows me to conclude that the employer had even formulated allegations in October, which was more than six months after the grievor had been sent home. Again, this is of deep concern and suggests reasons other than *bona fide* discipline for removing the grievor from the workplace. It was also callously and reprehensibly insensitive to the grievor, professionally and personally, and represents a departure from the ordinary standards of decency. This was both unfair and high-handed.

b. The failure to investigate, bias, and the lack of procedural fairness

[224] Of even greater concern is the failure to investigate the allegations that eventually were brought forward. The failure is compounded in that the person leading the disciplinary process was directly implicated in the company's file in much the same way as the grievor — as a responsible executive at the time of the events, but whose oversight and override exceeded the grievor's. Further, almost all the losses incurred happened after she had left, and Mr. McRoberts was in charge.

[225] Despite this, Mr. McRoberts selected and briefed Mr. Séguin. This allowed him to outline a foregone conclusion of culpability and to raise the ultimately unfounded bullying and harassment allegations and his bizarre reference to the grievor's financial independence. Mr. McRoberts chose the documents but notably did not include her notes or her purportedly disarrayed file on which he blamed the delays that occurred after she left the workplace. These actions can be characterized as high-handed.

[226] Another concern with the McRoberts Report is the use of Mr. Bonnell (the CBSA employee who investigated the ultimately unfounded harassment allegations against the grievor) as a witness. Mr. Bonnell had no involvement in the company's file, CARM, or the assessment of the grievor's performance. The only issues he could have provided information on were those related to the harassment allegations, the investigation of which was still on going at the time Mr. Séguin was completing the McRoberts Report. In this context, it is difficult to understand what purpose Mr. Bonnell's testimony could have served, or why it was included in the process leading up to the McRoberts Report. The possibility exists, however, that the inclusion of a witness whose only connection to the grievor was through the ultimately unfounded harassment investigation unfairly coloured the assessment of the grievor's performance (even if this was not Mr. Bonnell's intention). Notably, no witness statements were entered into evidence, nor do any appear to have been attached to the

final version of the McRoberts Report. All of the witnesses for the McRoberts Report were proposed by Mr. McRoberts.

[227] At multiple points, the McRoberts Report is misleading, even with respect to the attachments that it references. For example, it quotes Ms. Gilbert's email, which mentioned that Mr. Pezoulas stated that the grievor wanted to avoid the July 2013 meeting with the company. It then quotes the grievor's July 3, 2013, email reply at length but omits her plausible explanation for the appearance of avoidance, as follows:

> …
>
> *I will speak to Glenn* [the company's lawyer] *tomorrow at 4:30 PM, from the SRS, to firm up details of the meeting. Dino misunderstood; I was not trying to avoid the meeting. I did say that I was hopeful that we could just have a phone call but once Glenn indicated that he wanted to involve the owner and a "cheese expert", I agreed that a face-to-face meeting.* [*sic*]
>
> …

[228] The McRoberts Report goes on to state that a face-to-face meeting was requested on July 11, 2013. The email just quoted makes it clear that at least some version of this request must have come earlier.

[229] Another example of a misleading statement in the McRoberts Report is that it vaguely references competing priorities, which leaves it open to the reader to conclude that the grievor was both responsible for, and not properly managing, competing priorities. The attachment to the report makes it clear that the competing priorities referenced occurred at the CBSA's lab.

[230] The fact-finding portion of the McRoberts Report ignored directly relevant evidence and facts, most notably in failing to hear from the grievor or look at her notes. This was unfair. This process was not an investigation; it drove toward a predetermined conclusion, based on a rush to judgment. This is bad faith.

[231] Despite these flaws, many of which are obvious to even a casual reader, Mr. Ossowski relied on the McRoberts Report, which demonstrated little respect for fair process and no discernible interest in the actual causes of the millions of dollars of unrecoverable duties.

[232] Given Mr. McRoberts' testimony that he had "insisted", with Mr. Wex, on hiring an arm's-length, independent third party, it might have been possible to conclude that Mr. Ossowski assumed that based on reports of these conversations, there had indeed been an independent investigation, but for the fact that Mr. McRoberts is named as the sole author. This alone should have been cause for concern, given Mr. McRoberts' role in the company's file. This fact does not appear to have troubled Mr. Ossowski. When asked why he had not a spoken to the grievor before terminating her employment, as requested, Mr. Ossowski candidly, and without hesitation, answered that whatever she might have said, he still would have preferred Mr. McRoberts' version of events to hers. To the extent that he knew that their versions might differ, he said that he preferred Mr. McRoberts' version, even without having heard her version of the events. This is the very definition of bias and prejudgment.

[233] A failure to make reasonable, good faith efforts to ascertain the facts surrounding misconduct allegations would be problematic in any disciplinary process. It is particularly alarming in the context of what the employer describes as a multi-million-dollar liability. While the reasons for the failure to investigate remain unclear, it is clear that the employer's choices were well suited to shielding those other than the grievor and poorly suited to determining the actual reasons for the timeline in the company's file. These reasons remained opaque even after 11 hearing days.

[234] At the hearing, Mr. McRoberts continued to refer to the McRoberts Report as an investigation and to Mr. Séguin as an investigator, even while he acknowledged that he knew this was inaccurate. These references cannot be construed as other than deliberate, if flimsy, camouflages for what truly occurred; they are lies. Mr. Ossowski's testimony reflected the same inaccurate terms, and while their inaccuracy did not originate with him, the careless and negligent way he adopted them, without respect for the reality of the flawed termination process or the impact on the grievor, is of deep concern. The employer deceitfully disguised its failure to conduct a proper investigation, to give it the appearance of due process. This is bad faith.

c. Reliance on unfounded allegations

[235] Further, although not a determining factor, there is a troubling kitchen-sink flavour to the allegations that were initially piled up against the grievor only to later be abandoned or withdrawn. It must be clearly stated that merely withdrawing grounds for discipline is not, by itself, evidence of bad faith in the context of a properly

conducted disciplinary process. But in this case, the unfounded grounds were only nominally abandoned or withdrawn. Mr. Ossowski testified that many of the unfounded grounds factored into the termination decision, even though the harassment allegations were known to be unfounded by the time the decision was made to terminate the grievor.

[236] It is not acceptable to simultaneously set aside an allegation and continue to rely on it through innuendo. At the hearing, Mr. Ossowski characterized the grievor as distrusted, feared, uncooperative, and difficult. Had he stopped there, this would merely have been an opinion. But he did not stop there. He framed these characterizations as ongoing justifications for termination. At that point, the characterizations shifted from opinions to baseless personal attacks. This is bad faith.

[237] The testimonies advanced by both Mr. McRoberts and Mr. Ossowski referenced the grievor making deliberate acts against the employer's interest. Mr. Ossowski said that it would be reasonable to conclude that the lost duties were a deliberate act. Mr. McRoberts said that the grievor had engaged in "something like sabotage". The only support he offered were his vague musings that she was not "on the same page" as him and that she did not "mesh". This is not sufficient support for a sabotage allegation. Ms. Leblanc indicated that she and the grievor often ended up in "personal venting sessions" in their bilats. While I do not doubt her sincerity, this is insufficient as evidence of deliberate lack of care or sabotage. Venting to a subordinate employee may well be inappropriate, depending on the tone and content, but it does not prove intent to harm. The leap from not being on the same page or a failure to mesh to sabotage is considerable and demonstrates a rush to judgment.

[238] In all, the employer's egregious conduct in this matter consisted of bad faith, including its failures to engage in a timely or procedurally fair disciplinary process and to investigate (failures which the employer attempted to conceal), its rush to judgment, its reliance on unfounded allegations and its unsupported allegations of bad faith against the grievor.

2. The grievor's aggravated damages claim

a. What foreseeable harms were caused by the employer's conduct?

[239] The grievor had a reasonable expectation that as a public service employee, her performance would be assessed fairly, and that if the employer contemplated

discipline, it would do so in good faith, transparently and honestly, with respect for due process. None of these expectations were fulfilled. The grievor detailed the impacts of the employer's egregious conduct in her testimony, which include the distress that drove her to seek counselling when she was on leave with pay (which the employer did not challenge) and her continuing difficulties with professional confidence, with second-guessing herself, and with trusting others.

[240] The grievor testified that she felt completely blindsided by the events that occurred during the entire period at issue, starting with being sent home in April 2014. Like many executives, much of her life, including her social circle, had focussed on her work. She felt isolated and demoralized. She needed professional help to get through this extremely dark time. She continues to experience difficulties with self-confidence at her new job. She referenced an unreasonable level of paranoia. I did not understand that she used that word in a clinical sense, but rather, I understood that she referred to a constant and pervasive insecurity and fearfulness.

[241] These deep and long-lasting impacts are directly linked to the lack of fairness in her unreasonably protracted disciplinary process and the baseless accusations, including accusations of bad faith, made against her. She has also experienced a sense of loss. Her CBSA work mattered deeply to her. Again, this is consistent with her executive role. She is now unlikely to be able to attain her long-fostered goals and ambitions because "the runway is too short". Although these impacts were not supported by medical evidence, they also were not challenged.

b. Were the harms greater than the foreseeable distress of a termination?

[242] These impacts were not the normal consequences of a termination. They are connected to the egregious way in which the grievor was treated rather than to what would be expected following a fair disciplinary investigation or a termination. The grievor had a reasonable expectation that any disciplinary action would be conducted fairly and, at a minimum, be conducted in good faith. The employer's breaches of this expectation were marked. The paranoia and lack of trust that the grievor describes was a foreseeable consequence of the breaches of fairness and trust committed by her employer. During the disciplinary process, the employer displayed a callous disregard for the impact of its actions on her. This is particularly true given the startling length of the flawed process. For almost three years, she was left at home, wondering what

would become of her career and reputation. To the end, she held on to a hope that ultimately, the CBSA would act fairly.

[243] The repeated, knowingly incorrect use of misleading terms like “investigator”, “investigation report”, “investigation methodology”, “arm’s length”, and “independent third party” aggravated the wrong done to the grievor through the failure to investigate. The banality conferred by repetition may have made these falsehoods more palatable to those fabricating them, but it did not transform them into truths. However, these repetitions, which began during the disciplinary process and continued at the hearing before the Board many years later, can be reasonably assumed to have exacerbated the continuing harms experienced by the grievor. Again, these harms are consequences of the employer’s callous bad faith, rather than being the foreseeable consequences of a fairly conducted disciplinary process or termination.

c. The appropriate amount of aggravated damages

[244] Because aggravated damages compensate intangible suffering, their calculation is an inexact science. Referring to previous cases is useful when considering the amount of the damages. Among the aggravated-damages cases submitted by the parties, *Mattalah* and *Lyons* are most relevant as they were employment cases in the federal public service. In *Lyons*, the Board noted that recent cases have found that a typical range for these damages, when unsupported by medical evidence, is $25 000 to $35 000, although higher and lower awards have been made (para. 136).

[245] In *Mattalah*, aggravated damages of $20 000 applied in the context of an unfairly imposed performance plan that led to a lack of confidence, hurt feelings, low self-esteem, humiliation, stress, anxiety, and a feeling of betrayal (para. 164). These harms were experienced in the context of a lost posting, rather than a termination. In this case, the elements of bad faith are similar, but the harms are more severe.

[246] In *Lyons*, the grievor received $135 000 in aggravated damages for significant, ongoing psychological harm related in part to a flawed disciplinary process. As in *Lyons*, some of the grievor’s psychological harm in this case relates to the loss of employment for which she had spent years developing specialized skills and knowledge. However, the claim in *Lyons* was supported by medical evidence and involved more extreme harms than what the grievor experienced, including long-term serious harm to both physical and psychological health.

[247] Given the extent of the disregard for fair process in this case, it was foreseeable that the resulting damage would be deep. The grievor's resilience, despite these harms, in finding alternate employment and getting on with her working life does not mean that these harms have disappeared. From her testimony, it was clear that even 8 years after the employer's flawed disciplinary process started, the harms still affect her, personally and professionally. An award at the high end of the typical range is indicated. The appropriate amount of aggravated damages is $35 000.

3. The grievor's punitive damages claim

a. Is there an independent actionable wrong that warrants punishment?

[248] The employer's bad faith in the disciplinary process constitutes an independent actionable wrong. When considering whether punitive damages are necessary to punish the employer, I considered the *Whiten* proportionality "dimensions", as follows:

1) the blameworthiness of the defendant's conduct;

2) the plaintiff's vulnerability;

3) the harm of the conduct to the plaintiff;

4) the need for deterrence;

5) the unjust enrichment for the defendant; and

6) the amount of other damage awards for the same misconduct (see *Whiten*, at paras. 112 to 126, *Spruce Hollow*, at para. 122).

[249] The blameworthiness of the employer's conduct is clear, following the principles in *Whiten*. Bad faith, deceit, and reliance on baseless and withdrawn allegations make a sham of just-cause discipline and expectations of fairness and decency. The employer persisted in this course of conduct over the three years of the disciplinary process, and many elements of its bad faith were evident at the hearing in the continued references to a non-existent investigation process. The grievor's vulnerability is also clear. For the three years during which she was at home, she was completely subject to the employer's continued pretense that it was engaging in an appropriate disciplinary procedure. As a non-unionized public service employee receiving full pay, she had no recourse to the grievance process until she was disciplined. The employer held her working life in its hands and treated it recklessly, without respect for due process or ordinary standards of decency, which caused her

lasting harm. Its behaviour deserves denunciation and punishment, and it should be deterred from repeating that behaviour.

[250] Although the employer received no direct financial benefit from its behaviour, the McRoberts Report omits Mr. McRoberts' role and responsibilities on the company's file, despite his having had "not the most pleasant meeting" of his career in the wake of the file's completion. His potential responsibility or culpability is entirely sidestepped in the McRoberts Report. This is important. Not only was the McRoberts Report a failure of due process, but also, it provided a direct benefit to Mr. McRoberts (and possibly others) by erasing his accountability and diverting attention from his role in the timing of the verification decision. This provided him with a benefit akin to unjust enrichment.

b. Are compensatory and aggravated damages sufficient as punishment?

[251] It is not contested that the grievor fulfilled her duty to mitigate her losses promptly. Her new job is less well paid than her previous role, but the salary gap is not huge. Her new employment is coextensive with most of the reinstatement period; compensatory damages will be much reduced by virtue of her efforts and considerable resilience, despite how the employer's bad-faith dismissal process compromised her job-search abilities. Accordingly, the compensatory damages alone will be relatively modest, given what they might have been, and are unlikely to have a punitive impact. This impact is the rational purpose that punitive damages can serve.

[252] Are the additional $35 000 in aggravated damages, when added to the compensatory damages, sufficient to deter, denounce, and punish the employer? The deterrent purpose of punitive damages has been compared to a fine, (see *Lyons,* at para. 156) and as such, must amount to more than a mere licensing fee for an employer's bad faith. The employer was content to delay starting its disciplinary process until the grievor had been on leave for almost a year, at a cost of over $100 000 in salary. These salary costs continued to accrue and amounted to over $300 000 as the employer made its slow march toward a predetermined conclusion, but they did not deter it in its chosen path of bad faith. Further, no evidence suggests that the possibility that the loss of $26 000 000 of retroactive duties could have been avoided or reduced motivated the employer to properly investigate the overall handling of the company's file. The apparent licensing fee that the CBSA was prepared to pay to engage in an extended bad-faith disciplinary process was very costly.

[253] For these reasons, it is unlikely that the combined compensatory and aggravated damages will be sufficient as deterrence.

c. What is an appropriate amount of punitive damages?

[254] *Robitaille PSLRB* is directly relevant, given the investigation launched without verifying the facts, the reliance on unproven allegations, the employer's attempt to avoid accountability, and the findings of breaches of transparency, diligence, prudence, and impartiality, which are similar in this case. However, the *Robitaille PSLRB* decision is almost 15 years old, and the grievor in that case was disciplined, not terminated. The grievor in this case was placed in more precarious circumstances by the employer's egregious conduct. The value of money has been considerably affected by inflation in the intervening years. This all must be considered when assessing whether the same award ($50 000) could still serve a punitive purpose.

[255] *Lyons* is a more recent decision. As in *Lyons*, in which $75 000 was awarded in punitive damages, the employer's reprehensible approach to the disciplinary process in this case was conscious and deliberate. Its conduct shielded those whose conduct might otherwise have been scrutinized. Most importantly, as in *Lyons*, the employer knew that it was making false statements about the disciplinary process. Although this employer's approach to the disciplinary process was perhaps somewhat less brazen, the flaws in both processes are similar in their falsified nature.

[256] In arriving at the appropriate sum of punitive damages, I also considered the deliberate, callous, sustained, and bad-faith nature of the employer's conduct in terminating the grievor. A punitive award at the higher end of the range is appropriate. The grievor is awarded $75 000 in punitive damages.

[257] The resulting overall amount of damages reasonably reflects the minimum amount necessary to punish, denounce, and deter repetition of the employer's bad faith. Given the grievor's multiyear ordeal, her financial losses, and the lasting impacts on her life and her career, it does not unfairly enrich her.

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

(The Order appears on the next page)

VII. Order

[259] The grievance is allowed.

[260] Tabs 1 to 8, 10, 11, 13, and 14 of the "Employer Book of Documents" (Exhibit E-1) and tabs 14 and 16 of the "Grievor's Book of Documents" (Exhibit G-1) and Exhibits E-3 and G-3, are ordered sealed. Further, in accordance with the sealing and confidentiality order, redactions were made at tabs 12 and 15 of Exhibit E-1 and in Exhibit E-2.

[261] The grievor is retroactively reinstated to her previous occupational group and level as of the date of her termination, with full salary, and with all other employment-related compensation (including vacation and performance-based pay), and all employment benefits, including all dental, vision, and extended health benefits. Her banked sick leave is restored.

[262] Any employment income received from other sources after the date of the grievor's termination will be deducted from the salary owed to her.

[263] Performance-based pay will be based on performance ratings of "surpassed" for 50% of the retroactive period and "succeeds" for 50% of the retroactive period.

[264] The grievor will be compensated for any out-of-pocket expenses for the buyback of pensionable time post-termination, which are not otherwise refunded to her in the process of her reinstatement.

[265] The employer will pay the grievor aggravated damages in the amount of $35 000.

[266] The employer will pay the grievor punitive damages in the amount of $75 000.

[267] Interest on the amounts detailed paragraphs 261 to 264 is to be calculated as set out in the *Federal Courts Act* (R.S.C., 1985, c. F-7) at the pre-judgement rate to the date of these reasons. The post-judgement rate shall apply after that and shall also be awarded on the amounts for aggravated and punitive damages.

[268] The Board remains seized of this matter for 120 days, to deal with issues arising from the issuance of this order.

August 16, 2024.

Edith Bramwell,
a panel of the Federal Public Sector
Labour Relations and Employment Board