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File: 566-02-42011

Citation: 2025 FPSLREB 48

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

ADELINA MIRABELLI

Grievor

and

DEPUTY HEAD
(Department of Employment and Social Development)

Respondent

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

In the matter of an individual grievance referred to adjudication

Before: Caroline Engmann, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Geoff Dunlop, counsel

For the Employer: David Labelle, counsel

Heard at Toronto, Ontario,
October 31 to November 3, 2023.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Adelina Mirabelli, worked at the Department of Employment and Social Development Canada and its predecessors (for the purpose of this decision, referred to as "the employer" or ESDC) from 1980 to July 17, 2019, when the employer terminated her employment for disciplinary reasons. She filed a grievance against the termination and referred it to adjudication before the Federal Public Sector Labour Relations and Employment Board ("the Board") under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c.22, s. 2; "the *Act*").

[2] In this decision, "the Board" refers to the Board in its present iteration and to all its predecessors.

[3] This is a straight penalty case. The grievor admitted that she accessed her family members' ESDC accounts without authorization, but she argued that the penalty of discharge was excessive, given the circumstances. The employer, on the other hand, argued that she showed no remorse and that it could not trust her to not engage in the same behaviour in the future.

[4] Since a hearing before the Board is a *de novo* hearing, I have assessed all aspects of the case in accordance with the appropriate legal framework. I have determined that there were sufficient extenuating circumstances to warrant a lesser penalty. Therefore, I allow the grievance and reinstate the grievor to her position at the PM-02 group and level as of July 17, 2019. I substitute a penalty of 30 days' suspension without pay

[5] I note that the grievor has since taken her pension, ostensibly as a form of mitigation, given her age and years of service. In view of that, I would encourage the parties to discuss a mutually acceptable resolution should reinstatement prove impracticable. The Board will remain seized for a period of 90 days should the parties encounter any difficulties in implementing the order.

II. Summary of the evidence

A. For the employer

[6] The employer called the following witnesses: Cathy Carlini, Senior Integrity Information Technology Analyst, Special Investigations Unit, Integrity Services Branch;

Eric Bossé, Senior Investigator, Special Investigations Unit, Integrity Services Branch; Olivero Rendace, Director, Benefits Delivery Services Branch, Ontario Region; and Geoff Anderton, Director General, Ontario Region.

[7] In March 2018, the employer received an internal complaint at its Service Canada Centre in Richmond Hill, Ontario, where the grievor worked, stating that she had accessed her son's Employment Insurance claim information without a work-related reason and that she might also have adjudicated his claim.

[8] The grievor admitted that she made the accesses identified in the report that followed the investigation into the complaint. Given her admission, I need not outline the detailed evidence that I heard about the actual accesses. I will outline only those parts of the evidence related to how the amount of discipline was determined.

[9] The exhibits filed at the hearing contained sensitive third-party information and the grievor's personal information. The employer requested a sealing order, to protect the sensitive information; however, it did not identify the specific items to be protected. I am not prepared to seal the entirety of Exhibit 1. I order the employer to redact from exhibit 1 any information that would identify the grievor's family members and to remit the redacted version to the Board. I also order that the grievor's personal and tax information in exhibit 2 be sealed.

1. Ms. Carlini

[10] Ms. Carlini received an information technology service request to identify all files that the grievor processed in which the client surname was "Mirabelli". She fulfilled the request by conducting searches on the "Full Text Screen" (FTS) and "Social Insurance Registry" (SIR) databases using the grievor's unique user codes.

[11] Ms. Carlini explained that to access the SIR and the FTS, an employee must have permission from their manager; they also require a unique user code and a password. Both databases contain cautions about employee accesses.

[12] The SIR contains the following caution:

> *Important: Personal information contained in the SIN Register is confidential and should not be disclosed to third parties. The use of SIN information is governed by the Department of Employment and Social Development Act and the Employment Insurance Act. Access to SIR Online is*

> *controlled to protect the integrity of the data. Employees, who improperly use, collect or disclose information from the Register can be subject to disciplinary measures that range from [sic] verbal and written reprimand, suspension, demotion and can result in termination of employment or a maximum penalty fine of $10,000 and/or a jail term of six months.*

[13] Employee certification for the FTS is required every three months, as follows:

> *Full Text Screens*
>
> *Employment Insurance information is confidential and must not be disclosed to unauthorized third parties. The use of this information is governed by the Privacy Act and the Employment Insurance Act.*
>
> *I agree and certify that I only access and utilize Employment Insurance information related to claimants for the performance of my regular job duties.*
>
> *I understand that the improper collection or disclosure of Employment Insurance claimant information to an unauthorized third party could subject me to disciplinary action up to and including dismissal.*
>
> ***I also certify that I have not changed jobs within the last three (3) months.***
>
> *I agree with the above attestation.*
>
> *I agree with the above attestation; however, I have changed jobs in the last three (3) months.*
>
> [Emphasis in the original]

[14] She explained that each morning, when employees log on to the system, before they can access anything, a reminder appears about using the employer's electronic systems, which reads as follows:

> *Individuals authorized to use the Employment and Social Development Canada (ESDC) computer system must do so in keeping with the Network Use Directive.* ***Administrative, criminal and/or disciplinary measures will be taken should an individual use it in a way that violates ESDC or TBS policies.***
>
> *All information transmitted and stored on ESDC networks and devices, whether professional or personal in nature, may be accessible under the Access to Information Act and the Privacy Act. ESDC network activity is regularly monitored for the purposes of identifying unauthorized use and security threats by collecting and analyzing information.*
>
> [Emphasis added]

[15] Preliminary results from her fact-finding exercise disclosed that the grievor carried out these activities:

1) From 2014 to 2017, she accessed her son's file 33 times on the FTS, but she made no inputs.
2) Between 2001 and 2017, she accessed her son's social insurance number ("SIN") in the SIR 11 times.
3) From 2013 to 2018, she accessed her daughter-in-law's file on the FTS 21 times; she made 2 transactions on the file, 1 for a direct deposit, and the other for a renewal or revision of special benefits. She did not access the SIR for her daughter-in-law.
4) From 2015 to 2017, she accessed her own claim file 13 times but made no inputs.
5) From 2001 to 2016, she accessed her SIN 9 times on the SIR.
6) From 2004 to 2015, she accessed her husband's SIN 7 times on the SIR.
7) From 2006 to 2017, she accessed her daughter's SIN 15 times on the SIR. She also accessed the FTS for her daughter, to verify if a claim had been registered.
8) From 2015 to 2017, she accessed the file of her daughter-in-law's mother 11 times on the FTS. She performed 1 transaction, to ascertain if a payment had been issued.

[16] Based on that, Ms. Carlini believed there were grounds for an administrative investigation as well as a claim review on the grievor's daughter-in-law's file by a business expertise consultant ("BEC").

[17] In cross-examination, she clarified that before May 2018, fact-finding and administrative investigations into unauthorized accesses were triggered by complaints. The ESDC now has a built-in alert system that can also trigger a review of unauthorized accesses by employees.

2. Mr. Bossé

[18] At all relevant times, Mr. Bossé was a senior investigator for the ESDC's internal investigation unit. He had been in that position for five years as of the investigation at issue in this decision. He described the investigative process, from the time he receives a mandate from senior management to the conclusion of his investigation.

[19] The departmental security officer ("DSO") authorized the investigation mandate for the grievor's accesses on June 22, 2018. On June 26, 2018, Mr. Bossé's manager assigned the investigation to him.

[20] His first step when he receives a mandate is to inform the employee's director and to ask that the information be provided to the employee. He then reviews the file and the fact-finding results and develops his investigation plan.

[21] Consistent with that approach, on July 4, 2018, he sent a letter to the grievor via her director, as follows:

> …
>
> *The purpose of this letter is to inform you that an administrative investigation is being conducted in relation to, but not limited to, allegations that you may have acted in contravention of the* Employment and Social Development Canada (ESDC) Code of Conduct *by accessing departmental databases without authorization for personal reasons and by providing preferential treatment.*
>
> *The administrative investigation is being conducted by Eric Bossé, Senior Investigator, Special Investigations Unit of ESDC. The mandate is to ascertain the facts surrounding the allegation against you and to inform senior management of ESDC of the findings for any action they may deem appropriate on the basis of the information received.*
>
> *You will receive further correspondence requesting your presence at an interview.*
>
> *Once the administrative investigation is completed you will be afforded an opportunity to present any clarifications or extenuating circumstances that you feel have not been addressed in the course of the investigation. Should it be determined that the allegation against you is founded, disciplinary measures up to and including termination of employment may be imposed.*
>
> *Your reliability status or security clearance may also be reviewed should adverse information come to light during the course of the investigation.*
>
> *You are encouraged to cooperate fully in the administrative investigation.*
>
> …

[22] On October 2, 2018, he sent a second letter to the grievor, inviting her to an interview scheduled for October 17, 2018. The letter stated in part as follows:

> …
>
> *The purpose of this interview is to give you the opportunity to respond to the allegations. While your attendance at this interview is mandatory, the provision of information is voluntary. During the interview, you may be accompanied by someone of your choosing to provide advice, counsel and/or representation.*

> *Once the administrative investigation is completed you will be afforded an opportunity to present any clarifications or extenuating circumstances that you feel have not been addressed during the course of the investigation.*
>
> ***Your reliability status or security clearance may also be reviewed should adverse information come to light during the course of the investigation. The information gathered in the course of this investigation and the coming interview could be used to conduct a review of your reliability status or security clearance.***
>
> *You are encouraged to cooperate fully in the administrative investigation.*
>
> …
>
> [Emphasis in the original]

[23] Based on the nature of the allegations, he discussed risk-mitigation measures with senior management, and it was determined that the grievor would be reassigned to other duties with no access to the databases. She was reassigned to duties that did not require access to the employer's electronic system.

[24] The interview took place as scheduled. He started by going through the relevant portions of the ESDC's *Code of Conduct* with the grievor. Her responses to specific questions on her knowledge of it and the *Values and Ethics Code for the Public Service* ("the *Values and Ethics Code*") were as follows:

> …
>
> *6. Are you familiar with the* ESDC Code of Conduct? She understands more now. She acknowledges but understand more the scope now since the investigation.
>
> *7. What kind of training have you received?* She doesn't remember. She recalled done the Value and Ethics, but doesn't recalled having seen example of misconduct.
>
> *8. Could you define what a preferential treatment is? Can you give me an example?* If someone ask her to give him the hours in order to qualify for EI.
>
> …
>
> [*Sic* throughout]

[25] According to Mr. Bossé, the grievor's responses to the questions were straightforward. She could not remember the details of most of the transactions, but that was not unusual, given the lapse of time. She did not challenge the evidence presented to her. She explained that she did not believe that she was providing

preferential treatment since she did not help get the files processed faster; nor did she provide any benefits.

[26] From her review, the BEC concluded that five of the seven inputs that the grievor made were actual transactions, meaning that she made an addition or a change to a file. The BEC reported that those transactions were in order and that she detected no fraudulent activity.

[27] Although he did not carry out the review for cause of the grievor's reliability status, his report was used for it. He testified that he was not surprised that she maintained her security clearance. In a letter dated April 10, 2019, the DSO informed the grievor that her reliability status was maintained based on the facts included in Mr. Bossé's report, including that she had been honest and transparent during the investigation.

[28] Mr. Bossé concluded that the grievor contravened the ESDC's *Code of Conduct* by accessing departmental databases without authorization for personal use and by providing preferential treatment to her family members. He found that the transactions that she concluded were in order and that there was no fraud. He also concluded as follows:

> …
>
> *During the interview, she couldn't recall why she did access all of her relative files. However,* ***she was honest, transparent and displayed remorse and accepted responsibility of her wrongdoing. Ms. Mirabelli had a misconception of what a preferential treatment was and by the end of the interview process she now fully understands the concept.***
>
> …
>
> [*Sic* throughout]
>
> [Emphasis added]

[29] In cross-examination, Mr. Bossé confirmed that the grievor was truthful during the interview and that she was honest, forthright, and remorseful.

3. Mr. Rendace

[30] Mr. Rendace testified that he worked for the ESDC for 25 years in several capacities. He became the director of the Benefits Delivery Services Branch in December 2014.

[31] He emphasized that for ESDC employees, there is a focus on the principles of loyalty, integrity, and stewardship due to the nature of their work. Employees are reminded about those principles constantly. There was mandatory values and ethics training in 2014 that was held again through a refresher in 2016. He noted that the grievor successfully completed both the initial training and the refresher.

[32] During his testimony, Mr. Rendace reviewed the ESDC's *Code of Conduct* extensively. He pointed out that all ESDC employees must agree to follow the letter and spirit of that code and that they are expected to conduct themselves in accordance with public sector values and expected behaviours. He explained that that commitment is set out in the letter of offer that every employee must sign. He reviewed the grievor's letter of offer dated May 13, 2009, and pointed out the commitments that she signed off when she accepted the offer.

[33] When reviewing the ESDC's *Code of Conduct*, Mr. Rendace specifically referred to the section dealing with safeguarding information and the confidentiality of information. He drew the Board's attention to the following provisions:

> …
>
> *Confidentiality of Information*
>
> *You are not permitted to access information that is not necessary for you to do your work. For example, you are not permitted to:*
>
> *1. verify that your son's Employment Insurance claim has been approved;*
>
> *2. search the client database to look for the telephone number of an old friend;*
>
> *3. search the client database to provide information to a colleague from another department who calls you within the context of his/her work, but is not using the official channels; your colleague wants information on a client;*
>
> *4. search the client database to obtain information on potential tenants that are interested in renting your property; this is not permissible, even if you have obtained consent from the tenants.*
>
> *Using your position to access information that is not needed for your job — whether out of curiosity or because you are asked a favour by a colleague, friend or relative — is a breach of the* ESDC Code of Conduct. *Official information is for government business, never for personal benefit to you or someone else.*
>
> …

[34] He also pointed out the following section on avoiding preferential treatment:

…

viii) Avoidance of Preferential Treatment

You are responsible for demonstrating objectivity and impartiality in the exercise of your duties and in your decision making, whether related to staffing, financial awards or penalties to external parties, transfer payments, program operations or any other exercise of responsibility.

This means that you are prohibited from granting preferential treatment or advantages to family, friends or any other person or entity. You are not to offer extraordinary assistance to any entity or persons already dealing with the government without the knowledge and support of your supervisor. You also are not to disadvantage any entity or persons dealing with the government because of personal antagonism or bias.

Providing information that is publicly accessible is not considered preferential treatment (e.g. an information brochure that is posted on the departmental Web site).

Avoid what appears to be a bias in favour of any party (a group or individual).

You must avoid processing or handling any application, file or account for yourself, co-workers, relatives by blood or marriage (including common-law relations) or friends. For more information, consult ***Applications, Files and Accounts of ESDC Employees and Relatives and Friends of ESDC Employees****.*

…

[Emphasis in the original]

[35] According to him, the grievor read the ESDC's *Code of Conduct*, received the training, and therefore knew the concepts of preferential treatment and safeguarding information. He testified that she was an outgoing person, very welcoming and very friendly. He had no knowledge of her work performance; he would have heard had her performance been excellent or if she had not met expectations. He was not aware of any disciplinary history for her.

[36] He became involved in the grievor's file when the service manager and team leader met with him in his office and informed him of the allegation that she might have accessed family members' files and might have been involved in processing her son's claim. After the meeting, he contacted his supervisor, Mr. Anderton. They decided to contact the regional security office to engage the next steps.

[37] After he received the investigation report, he worked closely with his labour relations advisor to set up a disciplinary hearing, which he held with the grievor. He

testified that he was surprised that someone with her experience and role as a Service Canada benefits officer ("SCBO") would show such poor judgement, especially given the number of accesses and the span of time during which they were made. He believed that she knew that what she did was wrong. He acknowledged the absence of fraud, theft, criminal intent, or personal gain on her part. He considered the misconduct a pure misuse of the employer's databases, preferential treatment, and a conflict of interest.

[38] The employer's notes from the disciplinary hearing documented the following exchange with the grievor:

> …
>
> *2. Are you aware that accessing the files of family member is considered a conflict of interest and may be a breach of the* ESDC Code of Conduct, *the* Values and Ethics Code for the Public Sector *and a breach of privacy?*
>
> *Addy - Now I understand by asking someone to do my son's claim, changing an ROE.*
>
> *Oliver - Therefore, making reference back to the mother-in-law and her indicating she didn't get something in the mail. Do you understand how this can be a conflict now.*
>
> *Addy - Now I understand that now Oliver. I know I can help a neighbour on my street. I know now I can do these things anymore. I would have never done this if I knew. I've always been client focused. I never looked at if I was giving one person better treatment than another.*
>
> *Oliver – spoke to checks and controls and explained conflict of interest in greater detail.*
>
> *3. Do you feel you have placed yourself in a conflict of interest at any time during your employment with ESDC?*
>
> *Answer: I honestly did not know I was, ever! Now I do.*
>
> *4. How do you personally define* "preferential treatment"*? Do you feel you provided preferential treatment when you accessed the records of yourself and family members and when you made inputs at their requests, at any time in your employment with ESDC?*
>
> *Answer: I understand it better now but I never thought I was giving someone preferential treatment like someone who came in a wheelchair and I pulled them aside. But I never realized what I was doing wrong.*
>
> …
>
> [*Sic* throughout]

[39] The notes further documented that the grievor became emotional during the meeting and that several times, she stated that she never realized that what she was doing was wrong.

[40] Mr. Rendace testified that the grievor had received training and that she ought to have known better. In fact, he was convinced that she knew that what she was doing was wrong. He did not believe her when she said that she did not know that she was providing preferential treatment. It is ingrained in all the SCBOs as part of their training that one cannot look up one's file. According to him, if numerous years of training and conversations were not enough to drive it home, then the bond of trust was irretrievably broken.

[41] In arriving at the appropriate disciplinary measure, he considered the grievor's discipline-free record and the fact that she was a good performer. In his view, the fact that she was a good performer and was client-focused were aggravating factors because given her 30-plus years of service, having grown with the employer, she ought to have known better. He believed that the only appropriate disciplinary measure was discharge.

[42] On cross-examination, he testified that although he was at the ESDC's Richmond Hill office one or two full days every week, he did not often see or interact with the grievor with respect to her job duties. He could not recall any specific conversation with her on work-related topics. She was a senior employee in that office, and she was an outgoing, a friendly, and a positive presence there.

[43] He did not rule out a suspension; it was a question as to whether the bond of trust was irretrievably broken, and for him, it was. He did not believe that she was completely truthful during the investigation and during the disciplinary hearing. He felt that she knew or ought to have known that what she was doing was preferential treatment. By insisting that she did not know, she demonstrated an unwillingness to understand the rules and to abide by them.

[44] Mr. Rendace's involvement ended with the disciplinary hearing and his recommendation on the appropriate disciplinary measure.

4. Mr. Anderton

[45] Mr. Anderton was retired as of the hearing. At all relevant times, he was the director general for the ESDC's Benefit Delivery Services Branch in its Ontario Region.

[46] During his testimony, he reviewed the policy documents, particularly the ESDC's *Code of Conduct* and the *Values and Ethics Code*. He emphasized that ESDC employees are expected to comply with the requirements.

[47] He testified that he found it very hard to believe that the grievor did not know that what she was doing was wrong.

[48] The decision to terminate the grievor's employment was effectively his; however, he did not have the human resources delegation for termination. Only the assistant deputy minister ("ADM") had the delegation, which is why Ms. Mary Ann Triggs, the ADM, signed the termination letter.

[49] He had extensive discussions with Mr. Rendace and human resources advisors. He also relied heavily on the investigation report and the additional information received through the disciplinary hearing.

[50] On cross-examination, he could not recall if Mr. Rendace had specifically mentioned that the grievor had been honest, truthful, and genuine during the disciplinary hearing. Although he was aware that the DSO had maintained the grievor's reliability status, this factor alone was insufficient to impact the decision to terminate the grievor.

B. For the grievor

[51] The grievor testified that she started working in the public service in 1980 and that she occupied several positions over the years. She was an SCBO at the PM-02 group and level when her employment was terminated. She worked in the ESDC's Richmond Hill office. She enjoyed her work and worked collaboratively with her colleagues.

[52] She had no disciplinary record; nor did she have any performance or productivity issues. At any given time, she was responsible for about 20 files. She was one of the most experienced workers in the office and was often selected for special

projects. She prepared a reference binder that her colleagues were free to consult. She described the different actions that are performed on the screens.

[53] She could not remember why she accessed the SIR and queried herself 9 times between 2001 and 2016. Between 2015 and 2017, she made 13 queries on her name in the FTS, but she could not remember why she made them.

[54] She felt stupid and embarrassed when the investigator explained to her the gravity of her actions. She did not understand that by her actions, she provided preferential treatment to her family members. From her perspective, she had been efficient, as it took only two or three minutes to carry out the check; that way, her family members did not have to wait on the telephone lines. She now understands that answering requests from family members constitutes preferential treatment.

[55] She testified that accessing and checking information for family members was a common practice in the office; according to her, it was not a "big deal" to look at family members' files, but she knew that she could not adjudicate family members' claims. Team leaders were aware of this practice in the office. It was the office culture. That culture shifted when new management came in.

[56] Given the office culture at the time, she never felt that she was putting her job in jeopardy. She felt humiliated when she was reassigned to perform archiving duties and her access to the system was removed. Everyone knew she was being investigated.

[57] During the disciplinary meeting, she apologized and explained that she did not know that what she was doing was preferential treatment. Once the concept of preferential treatment was explained to her, she understood, and she would not engage in that conduct again.

[58] She was truthful during the investigation and throughout the disciplinary process. When asked what she would do to demonstrate her trustworthiness in the future, she stated that the employer could monitor her computer and everything and that she would no longer engage in that conduct because she now knows better.

[59] She never asked her team leader for help with her workload or about ethical issues. She did not observe any of her colleagues going to their team leaders for advice on ethical issues. Neither her team leader nor her manager discussed ethical issues with the team.

[60] She recalled the mandatory training on the *Values and Ethics Code* and the *Stewardship of Information and Workplace Behaviours*. During the training, she and her colleagues cheated by sharing answers to the questions. She saw the training as something that just had to be done and gotten out of the way. She did not recall reading the entire training documents.

[61] She was aware of two colleagues who were disciplined for accessing the files of their family members. She was the union representative, so these individuals informed her directly of their situation. One of them received a three-day suspension in 2018 for inputting the report cards for three family members and a change of address. She was also aware that another person received a 15-day suspension. She also heard that most of the people who were investigated received three-day suspensions. She was not aware of anyone being discharged at that time. She never thought that she would lose her job because of the investigation.

[62] On cross-examination, she agreed that had she taken the training seriously and not cheated, she would have had a better understanding of the concepts of preferential treatment and conflict of interest. She also explained that she is more of a verbal person and that she learns and retains information better through in-class training.

III. Summary of the arguments

A. For the employer

[63] The employer referred me to the following cases: *Bahniuk v. Canada Revenue Agency*, 2012 PSLRB 107, *Bétournay v. Canada Revenue Agency*, 2017 FPSLREB 37, *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62, *Campbell v. Canada Revenue Agency*, 2016 PSLREB 66, *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119, *Chopra v. Canada (Attorney General)*, 2014 FC 246, *Gauthier v. Canada Revenue Agency*, 2017 PSLREB 57, *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43, *Ward v. Treasury Board (Revenue Canada - Taxation)*, [1986] C.P.S.S.R.B. No. 335 (QL), *William Scott & Co v. Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98 (QL)("*Wm. Scott*"), and *Woodcock v. Canada Revenue Agency*, 2020 FPSLREB 73.

[64] The grievor had 34 years of service with the ESDC. She has been in a PM-02 position from 2008 to the date of her discharge. In her role, she had to understand the

Code of Conduct to carry out her duties. She committed 42 unauthorized accesses to the SIR and 79 unauthorized access to the FTS between 2001 and 2018. Five of those transactions occurred between 2013 and 2018, after she had received specific training on the *Code of Conduct*. The investigation concluded that her activities constituted preferential treatment.

[65] Preferential treatment goes against the bedrock of the ESDC's core mandate and its values of integrity, stewardship, and fair treatment. While ordinary Canadians take time to go in person or wait on hold on the phone for services, the grievor and her family members just bypassed that process because she had access to the employer systems. The *Values and Ethics Code* and the *Code of Conduct* are conditions of employment, to allow employees to perform their duties with fairness and integrity and to uphold the employer's reputation.

[66] The position of the grievor's bargaining agent was that although the investigation and findings were not contested, it would challenge the amount of discipline. The employer's witnesses explained the importance of putting these policies in place and the steps taken to train employees, so that they have a good understanding and grasp of their obligations.

[67] As an SCBO, the grievor handled contentious claims that required a solid knowledge of the *Code of Conduct* and the *Values and Ethics Code*. The need to avoid conflicts of interest and preferential treatment was constantly communicated to staff members through the managers and team leaders. It was clear or ought to have been clear to employees that they were not to access the information of individuals outside their assigned workloads.

[68] The grievor's misconduct could potentially negatively affect the employer's reputation. It is not just a matter of a client calling; employers also have an interest. Claims could be contested were it known that employees engage in unauthorized accesses of ESDC information.

[69] The grievor testified that she did not read the *Code of Conduct* or the *Values and Ethics Code*; she said that she "skimmed" through the documents. She also did not read the contents of the training, as she felt pressured to get the training out of the way. Throughout the investigation process, she was clear on one thing: she did not know that what she was doing was wrong. She did not know that accessing her

information and that of her family members was not permitted. She understood that she could not access files that were not part of her official duties. She was either wilfully blind to the policies when it came to her family members, or she was untruthful in her testimony about what she knew to be acceptable and unacceptable conduct. Her evidence was just not credible.

[70] She conceded that had she gone through the training as required, she would have had the knowledge and understanding to make better decisions. She would also have known that there were potential disciplinary consequences for violating the policies. Contrary to her assertion that no one from the employer checked with her, to see if she understood the training materials, it was up to her to raise any issues about the training and to bring them to the employer's attention. She passed the initial examination and the refresher, achieving a 90% score on the test both times. Effectively, she was telling the employer that she understood the content of the training. She took it in 2014, and the unauthorized accesses persisted. She took the refresher training in 2016, yet the illegal activity persisted in 2017 and 2018.

[71] The employer properly took all the relevant mitigation factors into account when it reached the amount of discipline. The grievor's unauthorized accesses were numerous, repetitive, and spanned a period of 17 years, even after she received specific training. She was asked to provide additional information, but she never raised the issue about her difficulty with the training mode.

[72] Counsel for the employer submitted that an adjudicator must intervene only if the amount of discipline was clearly unreasonable or wrong (see *Cooper*, at para. 13). In this case, termination was reasonable and appropriate because the bond of trust was irretrievably broken.

[73] In terms of remedy, the presumption is in favour of reinstatement; the discretion to award compensation in lieu of reinstatement must be based on exceptional circumstances (see *Bahniuk*, at paras. 349 to 359). There are no exceptional circumstances in this case.

[74] Relying on *Bétournay*, counsel for the employer argued that the grievor's lack of recognition of the seriousness of her misconduct means that the employer cannot trust her to not engage in the same behaviour in the future. In this case, although the absence of a disciplinary record was a mitigating factor, her length of service with the

ESDC was more of an aggravating factor. With so many years of service, she ought to have known the seriousness of her misconduct (see *Bétournay*, at paras. 105 to 108).

[75] Furthermore, when considering reinstatement, one must consider the employee's rehabilitative potential. In this case, the evidence demonstrated that there was no rehabilitative potential, for several reasons. The grievor deliberately chose not to review the policy documents but rather cheated on the training, to pass the test. She continued to refer to how things were done in the "old days", indicating a reluctance to change. She also referred to the new management as engaging in a "witch hunt", which again was an indication of a reluctance to change. She is not a good candidate for rehabilitation (see *Brazeau*, at para. 180).

[76] The employer argued that the facts of this case as well as the grievor's attitude mirrored those in the *Campbell* case, in which the Board upheld the termination. In *Campbell*, the grievor had over 33 years of service and a clean disciplinary record. He made 93 unauthorized accesses, engaged in 14 preferential treatments, did not benefit financially, and there was no fraud. However, he felt that he would have done the same thing in the course of his duties. While the grievor's long record of good service could be a mitigating factor, the gravity of the offence as an aggravating factor outweighs her long service (see *Campbell*, at para. 49, and *Gauthier*, at para. 87).

[77] Counsel for the employer submitted that progressive discipline does not apply in all cases. In this case, the employer lost complete trust in the grievor, and the gravity of her misconduct was such that discharge was the only reasonable and appropriate penalty (see *Shaver*, at para. 122, and *Woodcock*, at paras. 63 and 64).

[78] Counsel for the employer distinguished the cases cited by the grievor's bargaining agent in its book of authorities. In *Michaud v. Canada Revenue Agency*, 2018 FPSLREB 87, the Board substituted a 5-day suspension for a 30-day suspension for unauthorized accesses because in that case, the grievor was remorseful and acknowledged his mistakes, and the conduct had stopped. The Board found that the grievor acted honestly. *Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151, is also distinguishable because of issues with the investigation. In the *Nova Scotia (Public Service Commission) v. NSGEU* (2013), 238 L.A.C. (4th) 62 ("*Hillier*"), case, there were exceptional mitigating circumstances, and the grievor was candid throughout the employer's investigation and at the hearing.

[79] In this case, the grievor was either untruthful or willfully blind to the employer's policies and guidelines.

[80] With respect to the *Mercer v. Deputy Head (Department of Human Resources and Skills Development)*, 2016 PSLREB 11, case, counsel for the employer argued that the Board should adopt a similar approach because the facts are similar. There is no reason for the Board to intervene in the discipline.

B. For the grievor

[81] The grievor referred me to the following cases: *Wm. Scott*, *Mercer*, *Michaud*, *Hillis*, *Hillier*, *Alberta v. Alberta Union of Provincial Employees (AUPE)*, 2017 CanLII 149114 (AB GAA), *Nova Scotia Government and General Employees Union v. Province of Nova Scotia* (unreported; July 10, 2012), and *Basra v. Canada (Attorney General)*, 2010 FCA 24.

[82] Counsel for the grievor argued that the termination was excessive. The employer failed to consider the very significant mitigating factors, namely, 34 years of discipline-free service, immediate remorse, lack of premeditation, and absence of any personal or financial gain. On the other end of the scale, there were no aggravating factors, such as fraud, an ulterior motive, an embarrassing public complaint, disclosure, or a privacy breach.

[83] In addition to its failure to fairly assess the mitigating and aggravating factors, the employer focused almost exclusively on the number of accesses and refused to accept that there might have been a need for training. The decision makers reacted with disbelief and concluded that the grievor lied. They failed to ascertain whether the messaging through the managers and team leaders made its way to employees such as the grievor. They had no rational basis to doubt her sincerity about her understanding of the concepts of preferential treatment and conflict of interest.

[84] Once the concepts were explained to her, the grievor did not dispute that her actions were serious ethical breaches. She was honest and demonstrated remorse.

[85] The employer could not demonstrate how much of the senior-management-level messaging filtered down to employees in the offices. The grievor's uncontradicted testimony was that the team leaders and managers did not discuss ethical issues with employees before the investigation.

[86] The grievor spent her entire career at the ESDC, in several positions. She was loyal and dedicated to serving the public. Despite the ups and downs in her personal life, her testimony was clear and uncontradicted that she cared about her work and her colleagues. When she arrived at the ESDC's Richmond Hill office, the morale there was low; she immediately went to work to establish a social committee, made her binder available to colleagues, and effectively became the mother hen in the office. She helped everyone, took pride in her work, and treated her clients with similar care.

[87] Contrary to the employer's position about the lack of rehabilitative potential, the grievor has a proven track record of responsibility and responsiveness. She has adjusted in the past and can do it again. Discipline must be corrective, not punitive.

[88] Hers was not premeditated misconduct. The grievor did not understand the seriousness of what she was doing. She clearly testified to her understanding at the time that she could not work on family members' and friends' files; she could not change whether they received benefits, and she could not work on her own files. She was sincere in her testimony about looking up information for her son; she said that it was a two-second thing, and for her, it was so insignificant that she could not remember doing it.

[89] She testified that she learned better through in-person and classroom training as opposed to online training. The stewardship training was online, and there was no follow up as to whether employees understood the concepts. She was candid about exchanging answers with her colleagues, to get the training out of the way.

[90] There was no evidence that she received any specific training on the *Values and Ethics Code*.

[91] With respect to the employer's scepticism about how an employee with her years of service and breadth of experience failed to understand the concepts at issue, the employer did not present any evidence as to what had been discussed directly with the grievor. No team leader from her office testified. Her evidence was that the high-level ethical discussions did not trickle down to her level.

[92] Counsel for the grievor argued that the discharge was excessive and pointed to the *Mercer* case, which involved a similar situation in which this employer imposed a two-day suspension.

IV. Reasons

[93] Section 228(2) of the *Act* specifies that after considering a grievance, the Board must render a decision that it considers appropriate in the circumstances.

[94] Arbitral jurisprudence has long established that an adjudicator in a disciplinary grievance case must pose three distinct questions. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's disciplinary action an excessive response in all the circumstances of the case? Finally, if the adjudicator does consider the disciplinary action excessive, what alternative measure should be substituted as just and equitable? This is known as the "*Wm. Scott*" test. The Board has adopted and applied it consistently (see *Basra*, at paras. 24 to 29, and *Wm. Scott*, at para. 13).

[95] Both parties agree that that is the test to apply.

[96] Contrary to the employer's position, the adjudication of a disciplinary grievance under s. 209(1)(b) of the *Act* is a hearing *de novo*; it is not a reasonableness review of the employer's decision on all aspects of its decision, including the amount of discipline. The employer has the burden of proving all aspects of its disciplinary decision, on a balance of probabilities.

A. Was there misconduct by the grievor?

[97] This first question involves a factual inquiry. Although the parties agree that misconduct occurred, I must still engage in this inquiry, given that a hearing before the Board is a *de novo* hearing.

[98] The parties led extensive evidence as to the employer's mandate, its electronic systems, and the training and refreshers provided to employees. I also heard from the investigator who conducted the internal administrative investigation.

[99] Based on the documentary and testimonial evidence, I find that on the balance of probabilities, the grievor accessed the employer's systems as alleged.

[100] Indeed, the grievor admitted before the internal investigator and before the Board that she accessed the systems and that she provided services to her family members. She testified that she did not know that she was doing anything wrong, as she had done so in the past with no repercussions.

[101] Regardless of the grievor's state of knowledge about the employer's policies, I conclude that there was misconduct that warranted a disciplinary response from the employer. She violated the ESDC's *Code of Conduct* and the *Values and Ethics Code* by conducting unauthorized accesses of the ESDC's databases, to provide preferential treatment to her family members.

B. Did the misconduct warrant discharge?

[102] Having established misconduct, I must now assess whether the disciplinary measure imposed was excessive in the circumstances. This exercise entails a wide-ranging review of the employee's circumstances, the employer, and the nature of the misconduct (see Brown and Beatty, *Canadian Labour Arbitration*, 5th Edition, at paragraphs 7:62 and 7:68).

[103] In *McKinley v. BC Tel*, 2001 SCC 38, the Supreme Court of Canada instructed that decision makers must strike an effective balance between the severity of the employee's misconduct and the sanction imposed. The Court explained as follows:

> …
>
> *53 …**An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment,** a concept that was explored in* Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:*
>
> > ***Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.***
>
> *This passage was subsequently cited with approval by this Court in* Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at p. 1002, and in* Wallace*,* supra*, at para. 95. In* Wallace*, the majority added to this notion by stating that not only is work itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important".*
>
> *54 Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in*

> *fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In* Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position* vis-à-vis *their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.*
>
> …
>
> [Emphasis added]

[104] When assessing whether an employer's disciplinary action is excessive, an arbitrator or adjudicator must consider several factors, including the following (from *Wm. Scott*, at para. 14):

> …
>
> *(i) How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?*
>
> *(ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?*
>
> *(iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?*
>
> *(iv)* [H]*as the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?*
>
> *(v) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?*

[105] I am guided by the foregoing principles in my deliberations.

[106] The grievor argued that the employer failed to sufficiently consider mitigating factors when it reached the appropriate disciplinary action; for its part, it argued that the bond of trust was irretrievably broken and that there was no rehabilitative potential to restore the employment relationship.

[107] The employer's notes from the disciplinary hearing stipulated that the grievor became emotional and stated that she never realized that what she was doing was wrong. It is noted that Mr. Rendace explained to her the notion of conflict of interest in detail. When asked if she was aware that accessing family members' files was a conflict of interest and that doing so could be a breach of the ESDC's *Code of Conduct*, she responded that she knows now and that she "would have never done this if [she] knew." She said that she had always been client-focused and that she did not consider what she did for her family members as "giving one person better treatment than another."

[108] Both the director, Mr. Rendace, and the director general, Mr. Anderton, who recommended to the ADM that discharge was warranted, testified that they relied on the investigation report and the grievor's responses at the disciplinary hearing.

[109] The only two people who spoke directly to the grievor and therefore were able to assess her sincerity, trustworthiness, and rehabilitative potential were Mr. Bossé, the investigator, and Mr. Rendace, the director who held the disciplinary hearing. There is a distinct and significant divergence of views between them.

[110] The investigator's analysis and conclusion state in part as follows:

> …
>
> *The administrative investigation established that Ms. Mirabelli did contravene the* ESDC Code of Conduct *by accessing, without authorization, departmental databases (FTS and SIR) for personal use and by providing preferential treatment to her husband, daughter, son, daughter-in-law and son's mother-in-law.*
>
> *The BEC's review indicated she completed five transactions. All transactions were in order.*
>
> ***During the interview, she couldn't recall why she did access all of her relative files. However, she was honest, transparent and displayed remorse and accepted responsibility of her wrongdoing. Ms. Mirabelli had a misconception of what a preferential treatment was and by the end of the interview process she now fully understands the concept.***
>
> [*Sic* throughout]
>
> [Emphasis added]

[111] Mr. Bossé's testimony before the Board was consistent with his conclusion that the grievor was "… honest, transparent and displayed remorse and accepted

responsibility of [*sic*] her wrongdoing." He also confirmed that she had a misconception of preferential treatment and that at the end of the interview process, she fully understood the concept.

[112] On the other hand, Mr. Rendace testified that he did not believe that the grievor was being truthful when she said that before the investigation and interview process, she did not know or understand the concept of preferential treatment. Consequently, he concluded that she was not trustworthy. He supported his conclusion and opinion on the fact that all employees, including her, received training on values and ethics and had certified that they had received it.

[113] I do not find Mr. Rendace's conclusion persuasive. During the disciplinary interview, he explained in detail the concepts of conflict of interest and preferential treatment to the grievor, which she acknowledged that she did not know before but that she now understood based on the interview with Mr. Bossé and Mr. Rendace's explanations. There was no clear and cogent evidence to support the employer's position that she received specific training on the *ESDC Code of Conduct*, and that the team leaders regularly discussed ethical issues with employees. The grievor's training summary tendered as evidence only showed that she completed the training on *Stewardship of Information and Workplace Behaviours*. There was no entry for training on the *ESDC Code of Conduct*.

[114] The employer relied on the online course and argued that by passing it, the grievor represented that she understood the course material. This assumption is directly contradicted by her unchallenged testimony that she and her colleagues cheated and that she did not absorb or understand all the course content.

[115] I found that the grievor was candid and credible in her testimony. She testified that she did not understand that accessing family members' files in the manner she did was preferential treatment. This testimony was consistent with statements she made during the investigation and at the disciplinary hearing. She explained that that was the office culture. I also find credible her testimony that when they took the training, she and her colleagues copied each others' answers and that she did not pay close attention to the training material. Her explanation that she retained information better in a classroom and in-person training setting was unchallenged.

[116] Overall, I prefer Mr. Bossé's conclusion that the grievor was "honest [and] transparent" over Mr. Rendace's view that she was untruthful and untrustworthy. My view is also buttressed by the fact that on April 10, 2019, the DSO recommended that her reliability status be maintained because she was honest and transparent. The DSO further recommended that she receive a security briefing to remind her of her personal responsibilities.

[117] While the employer was adamant that the bond of trust was irretrievably broken and that the employment relationship is unsalvageable, it did not point to any cogent or concrete basis for that conclusion. The employer also argued that the grievor's misconduct could potentially negatively affect its reputation and that claims could be contested. I disagree. While she committed unauthorized accesses of the ESDC's databases to provide preferential treatment to her family members, the evidence established that the transactions were in order and that there was no fraudulent activity.

[118] On the other hand, the grievor's evidence demonstrated that she had rehabilitative potential and that she genuinely did not know that what she was doing was wrong and that it could have cost her job. She was honest and transparent during the investigation and before the Board. In some quirky way, she believed that she was being efficient because it took only two to three minutes to check the information. She also testified that it was the office culture at that time to engage in that type of behaviour. She testified that she learns and retains information better through in-class, instructor-led training. She explained that the delivery format of the training, web-based and self-directed, did not suit her learning style.

[119] I find that the discharge in this case was excessive. I did not reach this conclusion lightly. I based my conclusion on the evidence and the circumstances of this case.

C. What is an appropriate disciplinary measure?

[120] Both parties referred me to several cases that dealt with unauthorized accesses of employers' databases. Most of the employer's cases dealt with the Canada Revenue Agency and illegal accesses and use of taxpayer information. The grievor's cases included two of unauthorized accesses involving the ESDC. I reviewed those cases, and I considered them when reaching my conclusion.

[121] In the cases involving the Canada Revenue Agency, there was evidence of the regular reminders to employees of the employer's expectations of complying with its policies on unauthorized access to taxpayer information by way of town-hall discussions and regular emails from its commissioner or Human Resources. Also, that employer led evidence in those cases that policies and explanatory notes were posted on local area networks (see *Woodcock*, at paras. 45 and 46). There was no such evidence in this case. Apart from the reminder that appears when employees log on to the electronic system, the only evidence of reminders was an email broadcast sent by the DSO in 2012. The employee certification for the FTS was required every three months. The employer emphasized that managers and team leaders discussed ethical issues regularly with staff; however, the grievor's testimony that before the investigation, team leaders and managers did not discuss ethical issues with staff, was unchallenged.

[122] I find that the reminder systems in place at the time were inadequate. Workplace rules that attract disciplinary consequences for employees must not only be clear, but they must also be clearly communicated to employees (see *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co. Ltd.*, (1965), 16 L.A.C. 73 (Ont. Arb.), commonly referred to as *KVP*).

[123] Relying on *Cooper*, the employer argued that the Board must not interfere with the disciplinary action unless it is clearly unreasonable or wrong.

[124] As previously stated, the Board's role in disciplinary cases under s. 209(1)(b) of the *Act* is not to engage in a reasonableness review of the employer's decision. In *Viner v. Deputy Head (Department of Health)*, 2022 FPSLREB 74, the Board expressed its views about the "clearly unreasonable or wrong" approach and stated that it was "not appropriate for termination grievances." The Board explained as follows:

> *[326] The employer submitted that in assessing the amount of discipline, the Board should reduce a disciplinary penalty imposed by management only if it is "clearly unreasonable or wrong" (see* Legere *at para. 177). I note that the quote is from the employer's submissions in that decision, not from the adjudicator's reasons. The statement that decision-makers in the federal public sector should interfere only if the penalty was "clearly unreasonable or wrong" is from an earlier decision; see* Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119.*

> *[327]* ***Cooper involved a financial penalty, not a termination of employment. In my view, the "clearly unreasonable or wrong" approach is not appropriate for disciplinary actions. An early use of this phrase is in a decision of the Public Service Staff Relations Board in*** **Hogarth v. Treasury Board (Supply and Services)*****, PSSRB File No. 166-02-15583 (19870331), in which an adjudicator said that an adjudicator should not intervene just because he or she feels that a slightly less-severe penalty might have been sufficient, adding "… the determination of an appropriate disciplinary measure is an art, not a science." The cases that have used this approach have all involved suspensions. In a case of a termination of employment, a "slightly less severe" penalty would necessarily involve reinstatement, including a possibility of a suspension or demotion. This is not a case involving a difference of 5 or 10 days of suspension. Accordingly, the "clearly unreasonable or wrong" approach is not appropriate for termination grievances.***
>
> *[328] As mentioned earlier, the Board's role in deciding a disciplinary-action grievance is to determine whether the deputy head has shown cause for imposing a disciplinary action and then to determine if the disciplinary action imposed was excessive, having regard to the seriousness of the conduct and to mitigating and aggravating factors (see* Wm. Scott and Basra*).*
>
> [Emphasis added]

[125] I adopt the approach in *Viner*.

[126] In my view, the disciplinary action in this case was clearly excessive in the circumstances and warrants my intervention.

[127] I reject the employer's argument that the grievor's 34 years of service was an aggravating factor that outweighed other factors such as her discipline-free record. In my view, the grievor's long years of service should be an important mitigating factor when viewed in the context of other facts, such as a discipline-free record over the course of her 34 years of service. A long and unblemished employment record is a factor that frequently works in a grievor's favour when assessing whether a disciplinary penalty should be modified (see *Brown* and *Beatty*, *Canadian Labour Arbitration*, 5th Edition, at paragraph 7:76).

[128] In this case, the employer did not adequately consider relevant mitigating factors, including the grievor's years of service, discipline-free record, honesty, candour, and remorse.

[129] It also failed to apply the principle of proportionality. She testified that her colleagues who had engaged in similar behaviour received 3 and 15-day suspensions. This evidence was not challenged. I also note that in *Mercer*, the employer suspended the grievor for two days in similar circumstances.

[130] The employer urged me to adopt the approach in *Campbell* because the facts are similar.

[131] I disagree.

[132] In *Campbell*, the grievor committed 93 separate unauthorized accesses and provided 14 preferential treatments to family and friends. The circle of taxpayers who benefitted from that grievor's preferential treatment was far broader than that of the persons whom Ms. Mirabelli treated preferentially. It is true that in both cases, there was no personal financial gain; nor did the employer suffer any losses.

[133] Two key facts distinguish the *Campbell* case from Ms. Mirabelli's situation. First, Mr. Campbell admitted that he knew that what he was doing was wrong. In that case, there was clear evidence of how the employer consistently impressed on employees the repercussions of engaging in unauthorized accesses to taxpayer information (see *Campbell*, at paras. 28 and 29).

[134] Two factors persuaded the Board in *Campbell* to uphold the termination. First, it found troubling the grievor's statement that he understood that what he was doing was wrong. The second was the absence of any remorse on his part. Those factors are absent in this case.

[135] By contrast, the evidence before me supports the grievor's testimony that she did not know that what she was doing was not allowed. This evidence was consistent with the assessment and conclusion by the employer's investigator that she did not understand that was she was doing was wrong. I reject the employer's argument that because she continually referred to "the old days" that she lacks rehabilitative potential; rather, I believe that that reference indicated that in the past, the employer overlooked this type of behaviour. Its evidence was that at some point, it brought in technology that would trigger a review — the new automated detection method.

[136] In *Shaver*, the termination was upheld. The facts in *Shaver* can be distinguished from the facts before me. In it, the adjudicator found that the grievor's conduct was

deliberate and repeated and that he divulged information to third parties. He was not forthright in the employer's internal investigation or in his evidence before the adjudicator.

[137] In *Ward*, the adjudicator found that the employer repeatedly brought to the attention of the grievor and her colleagues the prohibition against accessing computers for other than official use and the seriousness of divulging to unauthorized persons any information learned from accessing taxpayers' files. The grievor in that case had divulged taxpayer information to third parties.

[138] In *Woodcock*, the grievor conducted transactions on the accounts that he accessed. Initially, he denied his activities, and he was not forthright during the investigation. The Board found a serious issue with his credibility and found that his lack of candour was the most important aggravating factor that led it to uphold the discharge.

[139] In this case, I found that the grievor was credible throughout the process. I was satisfied that she had an initial misconception of what constituted preferential treatment, and she was candid in admitting her ignorance. The employer did not submit any evidence to rebut her testimony that she learned better by direct and classroom interaction and therefore overlooked or simply skimmed over the training materials.

[140] In *Michaud*, the Board substituted a 5- for a 30-day suspension for unauthorized access. It found that the grievor was remorseful, acknowledged his mistakes, completely ceased the impugned conduct, and acted honestly throughout the process.

[141] *Mercer* is a case involving the same department, and the allegations in that case were like those in this case. The grievor provided preferential treatment to his family members. There was evidence that the employees in that office had not received any specific training on the *Code of Conduct* and the *Values and Ethics Code*, although they had received copies of both documents. Mr. Mercer claimed that he was not aware that what he had done was inappropriate and since he now knows, he would not access family members' records again. He also argued that everyone else in the office did the same thing. The employer imposed a two-day suspension, which the Board upheld. In that case, the Board found that the grievor had not yet accepted responsibility for his actions, which was an important aggravating factor.

[142] Both parties referred to *Mercer*. The employer urged me to adopt the approach in that case and deny the grievance. On the other hand, the grievor urged me to consider the amount of discipline that the employer imposed in that case as a guide for substituting for the discipline that she received. Remarkably, the employer did not address the amount of discipline imposed in that case; nor in this case did it address the grievor's testimony that her colleagues had received lesser discipline for the same behaviour.

[143] I find *Mercer* persuasive in the sense that the employer's approach to discipline in that case reflected the level of seriousness or tolerance with which it viewed this type of employee behaviour at that time.

[144] In this case, I do not intend to downplay the seriousness of the grievor's misconduct. Public servants who engage in such behaviour reflect poorly on the integrity of the service that they provide to Canadians. Both public service managers and employees must strive to foster a culture of integrity, to attract and ensure the confidence and trust of Canadians.

[145] I have closely reviewed the cases submitted by the parties. I have also considered the grievor's testimony that two of her colleagues who were investigated received 3-day and 15-day suspensions. She also testified that most people received a three-day suspension. In three of the cases submitted by the grievor, the arbitrators substituted 12-months, 9-month and 6-month suspensions for termination. I have already distinguished the cases submitted by the employer where terminations were upheld. I note that this employer's disciplinary response to similar behaviour has been attenuated. In *Hillis*, a 10-day suspension was imposed on the grievor for disclosing confidential information to an unauthorized third party. In *Mercer*, the employer imposed a two-day suspension without pay on the grievor for providing preferential treatment to family members. I also note that in *Michaud*, the Board reduced a 30-day suspension for unauthorized accesses to a five-day suspension. There does not appear to be any yardstick by which to land on the appropriate number of suspension days.

[146] The employer did not put into evidence any discipline policy that is used to guide managers when imposing disciplinary penalties; therefore, I have no point of reference except the jurisprudence and the evidence before me. Mr. Rendace based his recommendation of discharge on his subjective view about the grievor's truthfulness,

yet he also testified that he did not rule out a suspension. The DSO concluded that the grievor could maintain her reliability status and that she needed a security briefing. This suggests to me that the two purposes of disciplinary penalties are at play here, namely, correction and rehabilitation. The DSO believed that the grievor could be rehabilitated through a security briefing. Mr. Rendace did not rule out suspension, which would be a corrective measure. A third purpose of disciplinary action is deterrence.

[147] I have considered these three purposes of disciplinary actions; correction, rehabilitation and deterrence, and I have concluded that an appropriate penalty must reflect all three purposes. I find that a 30-day suspension without pay appropriately reflects all three objectives. I also find that reinstatement is appropriate in this case. For the reasons set out above, I have found that the grievor has the potential to be rehabilitated. Accordingly, the grievor is reinstated to her position at the PM-02 group and level. While a 30-day suspension without pay may seem excessive for a grievor's first act of misconduct, in the context of this case, it drives home the imperative that public servants must not engage in preferential treatment, and that Canadians are entitled to equal access to government services and programs.

[148] I allow the grievance and substitute a 30-day suspension without pay for the termination.

V. Confidentiality Orders

[149] The employer submitted a book of documents containing 47 tabs that was marked as exhibit 1. The grievor submitted a book of documents containing 6 tabs that was marked as exhibit 2. At the outset of the hearing, the parties asked that the third-party information in the exhibits be sealed.

[150] I note that information such as SINs and addresses have already been redacted from exhibit 1, ostensibly in accordance with the Board's *Policy on Openness and Privacy*. However, I note that the investigation reports contain details of third parties who were not employees. Similarly, exhibit 2 contains the grievor's personal information, such as her home address and details of her income tax returns.

[151] In *Sherman Estate v. Donovan*, 2021 SCC 25, the Supreme Court of Canada outlined a three-part test for granting confidentiality orders, thereby limiting the open court principle. The party seeking a confidentiality order

> *[38] …"must 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."*
>
> …

(See *Sherman Estate* at para. 38)

[152] The Stewardship of Information and Workplace Behaviours training material states that:

> …
>
> *"Given the volume of personal information under the control of the Department and the importance of managing this information with care, Part 4 of the* Department of Employment and Social Development Act *includes specific privacy provisions commonly referred to as the departmental Privacy Code that imposes rules for the use and making available personal information."*
>
> …

[153] In addition to the statutory privacy code, individuals accessing social benefits trust that the government will protect their personal data and use it only for legitimate purposes of the programs it administers.

[154] In this case, the investigation reports contain personal information of the grievor's family members. They provided this information to the ESDC for the purposes of the delivery of its programs under its statutory mandate. The public interest in safeguarding personal information provided to government departments for program delivery is important. Court openness in the context of grievance adjudication poses a serious risk to this important public interest.

[155] The second step of the *Sherman Estate* test is to assess whether there are reasonable alternative measures to prevent the risk short of a confidentiality order. In the context of a grievance adjudication and the Board's open court policy, I cannot conceive of any alternative measures that would prevent this risk short of a confidentiality order. Under the Board's open court policy, members of the public may request and gain access to exhibits that are part of the case file. The Board has no control over when and by whom such requests are made or the purpose of the request. Without a confidentiality order, personal data of individuals would be disclosed to anyone requesting such access.

[156] In applying the principles in *Sherman Estate*, I am prepared to limit the open court principle by protecting the personal data of the grievor's family members contained in exhibit 1.

[157] Exhibit 2 contains the grievor's personal information as well as her tax returns. Although the grievor provided her tax information voluntarily in support of her case, that is irrelevant to the *Sherman Estate* analysis. An important underpinning of Canada's tax system is the protection of the information that Canadians provide to the revenue authority. Much like the ESDC's privacy code, Parliament has enshrined this protection in s. 241 of the *Income Tax Act*, (R.S.C., 1985, c. 1(5th Supp.)). This Board routinely protects the tax information of individuals. In *Walker v. Deputy Head (Department of the Environment)*, 2024 FPSLREB 18, the Board explained as follows:

> *[9] Protecting Canadian taxpayers' information is an important public interest. Section 241 of the* Income Tax Act *(R.S.C., 1985, c. 1 (5th Supp.)) provides among other things that no official or other representative of a government entity shall "… knowingly provide, or knowingly allow to be provided, to any person any taxpayer information …" (s. 241(1)(a)), "… knowingly allow any person to have access to any taxpayer information …" (s. 241(1)(b)), or "… knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act …" (s. 241(1)(c)). The* Income Tax Act *defines a government entity to include "a board or commission … that performs an administrative or regulatory function of government…": s. 241(10).*
>
> *[10] There is no alternative to a sealing order in this case that would be practicable. Most of the information in the tax documents is personal information, so redaction would not be appropriate.*
>
> *[11] I also find that as a matter of proportionality, the benefits of protecting taxpayer information outweighs any drawbacks. The relevant portions of the income tax returns are summarized in this*

> *decision (gross and taxable income), and no other information in the tax returns is relevant to this grievance.*

[158] I adopt the Board's approach in *Walker*. I order the grievor's personal information and tax returns sealed (exhibit 2, tabs 2 to 6).

[159] In making these confidentiality orders, I have struck a balance between the open court principle and the risk of the unnecessary disclosure of personal data.

[160] I order the employer to redact from exhibit 1 any information that would identify the grievor's family members and to remit the redacted versions of the documents to the Board within 45 days from the date of this decision.

[161] Exhibit 1 contains the material for the Stewardship of Information and Workplace Behaviours course (see tabs 8 and 12). I did not receive any information from the employer as to whether the course content is proprietary. The Board is prepared to receive submissions from the parties on whether the course contents must be protected.

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

(The Order appears on the next page)

VI. Order

[163] The grievance is allowed.

[164] The grievor is reinstated to her position at the PM-02 group and level as of July 17, 2019.

[165] A 30-day suspension without pay is substituted for the grievor's termination.

[166] Tabs 2, 3, 4, 5, and 6 of exhibit 2 are ordered sealed.

[167] The employer is ordered to redact from exhibit 1 any information that would identify the grievor's family members and to remit the redacted versions of the documents to the Board within 45 days from the date of this decision.

[168] Exhibit 1 is ordered sealed until the redaction and replacement exercise is complete. Upon completion, the Administrative Tribunals Support Service of Canada is ordered to return the unredacted version of exhibit 1 to the employer and expunge it from the Board's record of the proceedings held on October 31 to November 3, 2023.

[169] The Board will remain seized of this matter for 90 days, should the parties encounter any implementation issues with any of these orders.

May 01, 2025.

Caroline Engmann,
a panel of the Federal Public Sector
Labour Relations and Employment Board