Federal Court of Appeal  Cour d'appel fédérale

Date: 20170210

Docket: A-283-15

Citation: 2017 FCA 30

CORAM: **NADON J.A.**
GAUTHIER J.A.
GLEASON J.A.

BETWEEN:

VALERIE BERGEY

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 13, 2016.

Judgment delivered at Ottawa, Ontario, on February 10, 2017.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: NADON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] This appeal concerns the breadth of protection from termination without cause provided to employees under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the *PSLRA*) and the ability of public service employers to choose to terminate employees for security-related reasons and thereby shield their termination decisions from review for cause.

[2] The appellant, Valerie Bergey, was a federal public servant with over ten years' service, whose last assignment involved working as a civilian clerk at an RCMP district office in Prince George, British Columbia. While so employed, she was a member of a bargaining unit represented by a component of the Public Service Alliance of Canada and at certain points during her tenure was the local union president. As a civilian clerk, Ms. Bergey's duties included entering data into the Central Police Information Center (CPIC) system, updating files and providing detachment personnel notice of scheduled court appearances. As a condition of her employment, Ms. Bergey was required to possess reliability status, the lowest level of security status required of federal government employees.

[3] Over the period from 2001 to 2004, RCMP management noted deficiencies in Ms. Bergey's performance and attitude toward co-workers. More specifically, Ms. Bergey was insubordinate and rude toward her managers and others with whom she worked. She also developed the habit of sending lengthy e-mails to other employees and RCMP members in which she re-hashed workplace events, oftentimes insulting her managers in them. In addition, Ms. Bergey was believed to have temporarily removed documents from RCMP files and to have failed to perform important tasks. As a consequence, an improper arrest was made and officers missed scheduled court appearances. Ms. Bergey was also believed to have lied to co-workers and supervisors, including during investigations into her conduct. She made harassment complaints, which were investigated and found to be without merit. A co-worker filed a harassment complaint against Ms. Bergey, which was found to be substantiated. As matters in the workplace deteriorated, Ms. Bergey began surreptitiously tape-recording her conversations with management.

[4] RCMP management initially spoke to Ms. Bergey about several of these issues, and when that did not lead to improvement in her performance and behaviour, levied a three and then a 10-day suspension. As matters came to a head, Ms. Bergey left work on sick leave, and while she was away, one of her managers initiated the process to have Ms. Bergey's reliability status revoked so she could be terminated. RCMP management elected to follow this course as opposed to waiting until Ms. Bergey returned to work from her sick leave and then terminating her employment for disciplinary reasons in the event her behaviour did not improve.

[5] The security review process culminated in the revocation of Ms. Bergey's reliability status. Termination followed as Ms. Bergey's position – like that of many federal public servants – required that she possess a valid reliability status. The grounds invoked by the RCMP for stripping Ms. Bergey of her reliability status were principally workplace incidents for which management had either already disciplined Ms. Bergey or had elected to not make the subject of discipline. Some of these incidents were several years old.

[6] Ms. Bergey filed a number of grievances under the *PSLRA*, seven of which were referred to adjudication and heard by the predecessor to the Public Service Labour Relations and Employment Board (the PSLREB or the Board). The adjudicator who heard the grievances conducted a multi-day hearing over the period from 2008 to 2010, during which 12 witnesses testified. The adjudicator issued her decision only in July 2013, over two and one half years after the completion of the hearing: *Bergey v. Treasury Board of Canada (Royal Canadian Mounted Police) and Deputy Head (Royal Canadian Mounted Police)*, 2013 PSLRB 80 (available on CanLII).

[7] In her decision, the adjudicator dismissed all seven grievances, finding that cause existed for the 10-day suspension, that she lacked jurisdiction to hear the grievances challenging Ms. Bergey's suspension from employment and the suspension and revocation of Ms. Bergey's reliability status, that there had been no violation of Ms. Bergey's rights to union representation under the applicable collective agreement and that the employer possessed cause to terminate Ms. Bergey's employment because she had lost the reliability status she needed to work for the RCMP. In reviewing these issues, the adjudicator determined that management's decision to review Ms. Bergey's eligibility for reliability status and the decision to revoke that status did not constitute acts of disguised discipline and had not been made in bad faith or in violation of Ms. Bergey's rights to procedural fairness. In consequence, the adjudicator held that the merits of the revocation could not be the subject of a grievance referred to the Board as the adjudicator found that she would possess jurisdiction to review the merits of the revocation only if it were an act of disguised discipline, had been made in bad faith or if there had been a violation of Ms. Bergey's procedural fairness rights. The adjudicator therefore determined she could not look into the merits of why the reliability status was revoked and found that the mere fact of its revocation was sufficient to justify Ms. Bergey's termination.

[8] Ms. Bergey made an application for judicial review of the adjudicator's decision to the Federal Court. In a decision dated May 12, 2015, the Federal Court dismissed her application: *Bergey v. Canada (Attorney General)*, 2015 FC 617, 481 F.T.R. 19 [*Bergey*]. Ms. Bergey has appealed that decision to this Court.

[9] For the reasons that follow, I have concluded that Ms. Bergey's appeal should be allowed as the adjudicator's determination that Ms. Bergey was not the subject of disguised discipline is unreasonable. While I recognize that PSLREB adjudicators are entitled to significant deference in respect of decisions like this, which are within the heartland of the Board's expertise and turn in substantial part on factual determinations, I believe that the decision in the present case cannot stand as it is premised on a fundamental misunderstanding of what constitutes a disciplinary decision. In this case, the security review process was used as means to terminate Ms. Bergey's employment because her supervisors were dissatisfied with her workplace performance and behaviour. While these concerns might well have impacted Ms. Bergey's reliability as an employee (and therefore her entitlement to reliability status under the employer's policies), they were also disciplinary in nature. Ms. Bergey should therefore have been accorded the right to have the reasons for her termination reviewed under the cause standard. The interpretation of the *PSLRA* adopted by the adjudicator deprived Ms. Bergey of this right and, if allowed to stand, would largely hollow out the protection from dismissal without cause afforded to employees under the *PSLRA.* I would therefore allow this appeal and remit several of Ms. Bergey's grievances to the PSLREB for re-determination in accordance with the directions set out below.

I. Background

[10] To place these issues in context, it is helpful to review the applicable statutory and employer policy provisions as well as the case law of the PSLREB (or predecessor iterations of that Board) and of the courts on issues such as these. It is also necessary to set out in some detail the relevant facts as found by the adjudicator and to review the reasoning of the adjudicator.

A. *The Relevant Statutory and Policy Provisions*

[11] Turning to the statutory provisions, it is important to note that the relevant provisions in the *PSLRA* (or predecessor versions of the statute) have been the subject of significant amendment. Care therefore must be taken in reading the older case law decided under predecessor versions of the statute.

[12] The current provisions in the *PSLRA* provide the PSLREB jurisdiction to adjudicate challenges to terminations of indeterminate (i.e. non-probationary) employees of the federal government or of organizations like the RCMP that are part of the core public administration as defined in the *PSLRA*. These include both terminations for disciplinary reasons and, in most instances, those that are non-disciplinary in nature. By virtue of the combined effect of provisions in the *PSLRA*, the *Financial Administration Act*, R.S.C. 1985, c. F-11 (the *FAA*) and the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA 2003*), all terminations of indeterminate employees may only be made for cause.

[13] Prior to 1993, the jurisdiction of the Board (then called the Public Service Staff Relations Board or PSSRB) was much more circumscribed; the Board was then limited to adjudicating disciplinary dismissals and could not adjudicate terminations made for non-disciplinary reasons. Terminations for non-disciplinary reasons – such as those levied by reason of an employee's incompetence or incapacity to perform his or her job – were made by the Public Service Commission (the PSC) under section 31 of the former *Public Service Employment Act*, R.S.C. 1985, c. P-33 (the *PSEA*). The PSC's decisions were subject to appeal to an internal Appeal

Board, and the decisions of the Appeal Board were subject to judicial review before the Federal Courts. As is more fully discussed below, terminations for incompetence or incapacity made under section 31 of the *PSEA* included decisions to terminate an employee due to his or her loss of a security status required by the employer.

[14] Section 31 of the *PSEA* was abrogated in 1993 and the PSSRB was provided jurisdiction over challenges to terminations for incapacity or incompetence of indeterminate employees in what is now termed the core public service. At the same time, the *FAA* was amended to provide deputy heads of governmental institutions authority to release employees for incapacity or incompetence. In addition, the *FAA* was amended to provide that the authority of the employer to release indeterminate employees for incapacity or incompetence was limited to situations of cause.

[15] In 2005, the provisions in the *PSLRA* and *FAA* were further amended to clarify the breadth of the jurisdiction of the Board over non-disciplinary terminations of indeterminate employees and to underscore that terminations of such employees for any reason could only be made for cause. At the same time, a provision was added to the *PSLRA* that excepted from the matters that could be grieved by an employee (and therefore that could be referred to adjudication before the Board), employer actions taken "under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada" (*PSLRA*, subsection 208(6)).

[16] Releases of probationary employees are not – and never have been – subject to review by the Board on their merits under a cause standard. Rather, as in the private sector, the employer in the federal public service is afforded a broader ability to release employees during their probationary periods if they are deemed to be unsatisfactory.

[17] All the relevant predecessor and current statutory provisions are set out in the Appendix to these Reasons. It is sufficient for me to detail below only the key provisions that are currently in force (which were likewise in force at the time of Ms. Bergey's termination).

[18] The key provisions in the *PSLRA* are sections 208, 209 and 211, which provide in relevant part as follows:

Individual Grievances	**Griefs individuels**
Presentation	**Présentation**
Right of employee	**Droit du fonctionnaire**
208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	208 (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(*a*) by the interpretation or application, in respect of the employee, of	*a*) par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
[…]	[…]
(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	*b*) par suite de tout fait portant atteinte à ses conditions d'emploi.

[…]

Limitation

(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

[…]

Reference to adjudication

209 (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

[…]

(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(*c*) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

[…]

Réserve

(6) Le fonctionnaire ne peut présenter de grief individuel portant sur une mesure prise en vertu d'une instruction, d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

[…]

Renvoi d'un grief à l'arbitrage

209 (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :

[…]

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)*d*) de la *Loi sur la gestion des finances publiques* pour rendement insuffisant, soit de l'alinéa 12(1)*e*) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

[…]	[…]
Exception	**Exclusion**
211 Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to	211 L'article 209 n'a pas pour effet de permettre le renvoi à l'arbitrage d'un grief individuel portant sur :
(*a*) any termination of employment under the *Public Service Employment Act*; or	*a*) soit tout licenciement prévu sous le régime de la *Loi sur l'emploi dans la fonction publique*;
(*b*) any deployment under the *Public Service Employment Act*, other than the deployment of the employee who presented the grievance.	*b*) soit toute mutation effectuée sous le régime de cette loi, sauf celle du fonctionnaire qui a présenté le grief.

[19] Subparagraph 209(1)(*c*)(i) of the *PSLRA* incorporates by reference paragraphs 12(1)(*d*) and 12(1)(*e*) of the *FAA*. The cause requirement is provided in subsection 12(3) of the *FAA*. These provisions state in relevant part:

Powers of deputy heads in core public administration	**Pouvoirs des administrateurs généraux de l'administration publique centrale**
12 (1) Subject to paragraphs 11.1(1)(*f*) and (*g*), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,	12 (1) Sous réserve des alinéas 11.1(1)*f*) et *g*), chaque administrateur général peut, à l'égard du secteur de l'administration publique centrale dont il est responsable :
[…]	[…]
(*d*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory;	*d*) prévoir le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur de toute personne employée dans la fonction publique dans les cas où il est d'avis que son rendement est insuffisant;
(*e*) provide for the termination of	*e*) prévoir, pour des raisons autres

employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct; and	qu'un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur d'une personne employée dans la fonction publique;
[…]	[…]
For cause	**Motifs nécessaires**
(3) Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(*c*), (*d*) or (*e*) or (2)(*c*) or (*d*) may only be for cause.	(3) Les mesures disciplinaires, le licenciement ou la rétrogradation découlant de l'application des alinéas (1)*c*), *d*) ou *e*) ou (2)*c*) ou *d*) doivent être motivés.

[20] Finally, the "core public administration" is defined in subsection 2(1) of the *PSLRA* and subsection 11(1) of the *FAA* as follows:

PSLRA	***Loi sur les relations de travail dans la fonction publique***
2 (1) The following definitions apply in this Act.	2 (1) Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
core public administration has the same meaning as in subsection 11(1) of the *Financial Administration Act*. (administration publique centrale)	***administration publique centrale*** S'entend au sens du paragraphe 11(1) de la *Loi sur la gestion des finances publiques*. (core public administration)
FAA	***Loi sur la gestion des finances publiques***
11 (1) The following definitions apply in this section and sections 11.1 to 13.	11 (1) Les définitions qui suivent s'appliquent au présent article et aux articles 11.1 à 13.
	[…]
core public administration means the departments named in Schedule I and the other portions of the federal public	***administration publique centrale*** Les ministères figurant à l'annexe I et les autres secteurs de l'administration

administration named in Schedule IV. (*administration publique centrale*).	publique fédérale figurant à l'annexe IV. (*core public administration*).

[21] The RCMP is listed in Schedule IV of the *FAA*.

[22] Turning now to the relevant policies, both the federal government (through Treasury Board as the employer of public servants) and the RCMP have promulgated policies governing the security clearance or security status that employees are required to possess. These policies are enacted pursuant to the authority set out in its current iteration in sections 7, 11 and 11.1 of the *FAA*. At the times relevant to Ms. Bergey's employment, the Treasury Board policies governing security status were entitled *Personnel Security Standard* (introduced in June 1994) and the *Government Security Policy* (introduced in February 2002). In addition, Ms. Bergey's status was subject to the RCMP's own *Personnel Security Guidelines*, which track the Treasury Board policies identified above. The key difference between the policies is that the RCMP provided for its own "RCMP Reliability Status" as of May 2004; in all other pertinent respects, the RCMP policy simply applies the Treasury Board's requirements.

[23] Reliability status refers to an employee's reliability, trustworthiness and loyalty insofar that the employee can be trusted to deal with confidential matters and government property. It is the lowest level of security status. Currently (and under policies in place at the relevant times) all RCMP employees and all federal public servants in long-term positions are required to hold at least a reliability status. Under the RCMP's *Personnel Security Guidelines*, designated officials within the RCMP are empowered to grant and revoke an employee's reliability status. In the case

of employees in federal departments, reliability status may be granted and revoked by a departmental security officer.

[24] A security clearance at the Secret or Top Secret level, on the other hand, is a higher level clearance that is required of employees who deal with classified information in the course of their work. Only the RCMP Commissioner (or the Deputy Head in the case of other federal departments) can grant or revoke an employee's security clearance.

[25] The RCMP policy and the *Personnel Security Standard* (and its replacement *Standard on Security Screenin*g) both provide that an employee whose reliability status is suspended or revoked can pursue redress via statutory grievance procedures under the *PSLRA* and judicial review by the Federal Court. By contrast, an employee whose security clearance is revoked can seek third-party review by the Security Intelligence Review Committee (SIRC) under section 42 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23. SIRC review is not open to employees who lose their reliability status.

B. *The Relevant Case Law Generally*

[26] As noted, prior to 1993, decisions to release for non-disciplinary reasons of incapacity or incompetence under section 31 of the *PSEA* could not be adjudicated under the predecessor version of the *PSLRA*, the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (the *PSSRA*).

[27] Prior to its repeal, section 31 of the former *PSEA* was considered by this Court in a long series of cases that culminated in *Kampman v. Canada (Treasury Board)*, [1996] 2 F.C. 798,

134 D.L.R. (4th) 672 (C.A.) [*Kampman*], a reliability status revocation case. These cases established the following five-point framework that was applicable to decisions under section 31 of the *PSEA*.

[28] First, because section 31 of the *PSEA* provided its own administrative redress scheme, decisions made pursuant to that section were not grievable as subsection 91(1) of the *PSSRA* prohibited grievances for matters where an alternative mode of redress was available as was confirmed in *(Re) Cooper v. the Queen* [1974] 2 F.C. 407 at paras. 15-16, 50 D.L.R. (3d) 294 (C.A.).

[29] Second, determinations made pursuant to section 31 of the *PSEA* were valid if they were "honestly formed". In *Ahmad v. Canada (Public Service Commission Appeal Board)*, [1974] 2 F.C. 644 at paras. 3-5, 51 D.L.R. (3d) 470 (C.A.), this Court noted that a decision that was not "honestly formed" may be indicated by: (1) the decision-maker's failure to apply statutory or legal direction, (2) proof of bad faith on the part of the decision-maker or (3) evidence that the decision-maker was wrong because the decision was based on incorrect factual information provided to the PSC by the employee's managers.

[30] Third, the burden to prove bad faith was held to be high. In *Dansereau v. Canada (Public Service Appeal Board)*, [1991] 1 F.C. 444 at 9-10, 122 N.R. 122 (C.A.) [*Dansereau*], this Court determined that bad faith could be shown where no warning was provided to the targeted employee, assuming no unusual or urgent circumstances precluded such a warning. Thus, section 31 of the *PSEA* was interpreted as including an implied duty to warn long-term

employees about their incapacities/incompetence in order to provide them with an opportunity for correction (*Dansereau* at 9-10; *Clare v. Canada (Attorney General)*, [1993] 1 F.C. 641 at 26, 100 D.L.R. (4th) 400 (C.A.) [*Clare*]).

[31] Fourth, this Court held that an employer's failure to apply the law included breaches of an implied duty to refer employees to assistance programs (in the case of employees suffering from addictions) where those programs were established by the employer (*Clare* at 22). This Court clarified that this duty arose in situations where the duty to warn had also arisen (*Clare* at 22).

[32] Lastly, this Court held that the key consideration for deeming someone "incapable" or "incompetent" was permanence. If the debilitation was temporary, a termination under section 31 of the *PSEA* was likely inappropriate. Permanent incapacity or incompetence, on the other hand, likely merited termination (*Clare* at 14-15).

[33] As mentioned, this Court considered reliability status revocation in *Kampman* and there confirmed that reliability status revocation decisions fell under the umbrella of section 31 of the *PSEA*. Because section 31 terminations fell outside the jurisdiction of the Board given subsection 91(1) of the *PSSRA* (alternative administrative proceedings preclude grievances), this Court in *Kampman* held that an employee who loses her or his status must follow the section 31 administrative process, which was animated by the principles highlighted in the preceding paragraphs.

[34] At the same time as these principles were being developed, the Board developed the notion of disguised discipline, under which the Board characterizes certain decisions that the employer claims are non-disciplinary – and therefore non-adjudicable – as being in fact disciplinary in nature, which then clothes the Board with jurisdiction over such decisions and permits it to review them for cause. This Court and the Federal Court have both recognized the legitimacy of this approach: *Basra v. Canada (Attorney General)*, 2010 FCA 24, 398 N.R. 308 [*Basra*]; *Canada (Attorney General) v. Frazee*, 2007 FC 1176, 319 F.T.R. 192 [*Frazee*]; *Chamberlain v. Canada (Attorney General)*, 2012 FC 1027, 417 F.T.R. 225 [*Chamberlain*].

[35] Thus, through the doctrine of disguised discipline, the PSLREB (and prior iterations of the Board) were and are able to review employer decisions that the employer claims are shielded from review by the Board. For example, the Board has jurisdiction to review demotions if it determines that what in fact transpired was a disciplinary decision to demote the employee as, for example, occurred in *Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70 at paras. 228-230, 103 C.L.A.S. 9 (affirmed on this question in *Canada (Attorney General) v. Robitaille*, 2011 FC 1218 at para. 34, 219 A.C.W.S. (3d) 202 and appealed on unrelated grounds in *Canada (Attorney General) v. Robitaille*, 2012 FCA 270, 230 A.C.W.S. (3d) 348). Similarly, the Board, both previously and currently, has jurisdiction to review decisions that result in termination, suspension or financial penalty claimed to be of an administrative nature if the Board finds that such decisions are in fact disciplinary in nature as occurred, for example, in *Grover v. National Research Council of Canada*, 2005 PSLRB 150, 85 C.L.A.S. 57 (affirmed by this Court in *Canada (Attorney General) v. Grover*, 2008 FCA 97, 377 N.R. 239), *Salter v.*

Deputy Head (Correctional Service of Canada), 2013 PSLRB 117, 116 C.L.A.S. 221 and *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64, 115 C.L.A.S. 65.

[36] Where the Board determines that the employer's actions constitute a disguised act of discipline, as this Court noted in *Basra* at paragraphs 24 to 29, the PSLREB is tasked with reviewing what occurred and deciding whether the employer possessed cause to impose the sanction or take the measure in question. If so, then the grievance will be dismissed; if not, the PSLREB will fashion a remedy, which, in the case of a termination, is usually reinstatement with back pay and reinstatement of benefits, but may also be monetary compensation in lieu of reinstatement. (See the decision of this Court in *Bahniuk v. Canada (Revenue Agency)*, 2016 FCA 127, 484 N.R. 10 [*Bahniuk*] for a discussion of the remedial approach of the PSLREB.)

[37] The case law recognizes that distinguishing between a disciplinary and a non-disciplinary employer action requires consideration of *both* the employer's actual (as opposed to stated) intentions in taking the action and of the impact of the action on the employee's career. As I noted in *Chamberlain* at paras. 56-57:

> Determination of whether an act is disciplinary is a fact-driven inquiry and may involve consideration of matters such as the nature of the employee's conduct that gave rise to the action in question, the nature of the action taken by the employer, the employer's stated intent and the impact of the action on the employee. Where the employee's behaviour is culpable or where the employer's intent is to correct or punish misconduct, an action generally will be viewed as disciplinary. Conversely, where there is no culpable conduct and the intent to punish or correct is absent, the situation will generally be viewed as non-disciplinary ([*Lindsay v. Canada (Attorney General)*, 2010 FC 389 at para. 48, 369 F.T.R. 64]; [*Frazee* at paras. 23-25]; *Basra v Canada (Deputy Head - Correctional Service)*, 2008 FC 606 at para 19, [2008] FCJ No 777).
>
> Some situations are obviously disciplinary; these would include, for example, situations where the employer overtly imposes a sanction (like a suspension or termination) in response to an employee's misconduct. Others are more nuanced

and require assessment of the foregoing factors to determine whether the employer's intent actually was to discipline the employee even though it may assert it had no such motive. Justice Barnes explained the requisite inquiry in the following terms in *Frazee* at paragraphs 21-25:

> [T]he issue is not whether an employer's action is ill-conceived or badly executed but, rather, whether it amounts to a form of discipline […] an employee's feelings about being unfairly treated do not convert administrative action into discipline […]
>
> The question to be asked is whether the employer intended to impose discipline and whether its impugned decision was likely to be relied upon in the imposition of future discipline […]
>
> It is accepted, nonetheless, that how the employer chooses to characterize its decision cannot be by itself a determinative factor. The concept of disguised discipline is a well known and a necessary controlling consideration which allows an adjudicator to look behind the employer's stated motivation to determine what was actually intended. […]
>
> The problem of disguised discipline can also be addressed by examining the effects of the employer's action on the employee. Where the impact of the employer's decision is significantly disproportionate to the administrative rationale being served, the decision may be viewed as disciplinary […] However, that threshold will not be reached where the employer's action is seen to be a reasonable response (but not necessarily the best response) to honestly held operational considerations.
>
> Other considerations for defining discipline in the employment context include the impact of the decision upon the employee's career prospects, whether the subject incident or the employer's view of it could be seen to involve culpable or corrigible behaviour by the employee, whether the decision taken was intended to be corrective and whether the employer's action had an immediate adverse effect on the employee […]
>
> [citations omitted]

[38] Donald J.M. Brown and David M. Beatty, in their leading work on labour arbitration, *Canadian Labour Arbitration* (4th ed.) (Toronto: Thomson Reuters, 2006) [*Brown & Beatty*],

similarly recognize the foregoing as the requisite inquiry in distinguishing disciplinary from non-disciplinary actions, stating at paragraph 7:4210:

> In deciding whether an employee has been disciplined or not, arbitrators look at both the purpose and effect of the employer's action. The essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part by punishing the employee in some way. An employer's assurance that it did not intend its action to be disciplinary often, but not always, settles the question.
>
> Where an employee's behaviour is not culpable and/or the employer's purpose is not to punish, whatever action is taken will generally be characterized as non-disciplinary.

[39] In terms of non-disciplinary terminations, subsequent to 1993 the Board has exercised its expanded jurisdiction and reviewed on their merits employer releases for incapacity or incompetence. For example, the Federal Court in *McCormick v. Canada (Attorney General)* (1998), 161 F.T.R. 82 at paras. 10, 19, 24, 85 A.C.W.S. (3d) 583 upheld a decision of the Board in which it determined that the employer had cause for termination under paragraph 92(1)(*b*) of the *PSSRA* and the relevant provisions of the *FAA* where medical issues had rendered an employee incapable of fulfilling his job duties for the foreseeable future. The Federal Court came to the same conclusion in *Scheuneman v. Canada (Attorney General)*, [2000] 2 F.C. 365 at para. 59, 176 F.T.R. 59 (affirmed in *Scheuneman v. Canada (Attorney General)*, 266 N.R. 154, 102 A.C.W.S. (3d) 118), upholding the Board's decision to deny the grievor's disability-driven discrimination claim on the basis that the employer had cause for termination where the grievor refused to accept the employer's reasonable strategies for accommodation.

[40] In a somewhat similar vein, in *Jamieson v. Canada (Attorney General)*, 2005 FC 410 at para. 37, 271 F.T.R. 248, the Federal Court upheld a decision of the Board that found the employer had cause to terminate a pipefitter who lacked a newly-imposed licensing requirement

for steam pipefitting because the Board considered whether the employer had cause to establish the requirement in question. In upholding the Board's decision, the Federal Court held that it would have been insufficient for the Board to focus solely on whether the employee met as a technical matter the newly-imposed licensing requirement without considering whether the requirement was valid. In other words, the Court held that the Board was required to review the merits of the employer's decision to require employees to possess the steam pipefitting certification.

C. *The Case Law Regarding Terminations following the Loss of Security Status*

[41] Turning now, more specifically, to the Board's treatment of issues like those that arise in the present case, the case law of the Board concerning its jurisdiction to inquire into terminations for loss of a required security status is mixed.

[42] In several cases, where the employee was terminated by reason of the loss of the requisite reliability status (as opposed to a security clearance) the Board held that it possessed jurisdiction to inquire into the merits of the revocation decision to determine if the employer possessed cause, and, if not, to order reinstatement. In these cases, the Board held that the 1993 amendments to the *PSSRA* that provided it jurisdiction over non-disciplinary terminations likewise afforded it the authority to consider whether the employer had a valid reason to revoke the grievor's reliability status and thereby terminate his or her employment.

[43] More specifically, in *Treasury Board (Revenue Canada-Customs and Excise) and Gunderson, Re*, 40 C.L.A.S. 384, 1995 CarswellNat 3359, the first of these cases, Adjudicator Chodos stated at paragraphs 43 and 48 as follows:

> […] in my view section 92 of the *Public Service Staff Relations Act*, as amended, makes no qualification or distinction between the adjudicator's authority to review and provide redress in respect of a disciplinary discharge (that is, under paragraph 11(2)(f) of the *Financial Administration Act*), and a termination on the grounds of, for example incapacity (that is, under paragraph 11(2)(g)). Accordingly, I believe that it is incumbent upon me to review the reasons for the employer's decision to terminate the employee for incapacity, and to determine whether that decision was fair and reasonable in all of the circumstances, and if necessary, to fashion an appropriate remedy.
>
> […]
>
> The question of [the employee's] termination in November, however, raises some different issues. It need hardly be said that termination of employment, in the context of labour relations, is the ultimate penalty that can be imposed on an employee. Accordingly, it is universally recognized that with some exceptions, an employer is obliged to fully and clearly inform an employee of any concerns that it has about the employee's performance or conduct and to provide a sufficient time frame to allow the employee to take corrective measures. These principles apply, whether the conduct of the employee is willful, that is, of a disciplinary nature, or is as a result of perceived incompetence or incapacity.

As Mr. Gunderson had not been provided the requisite warning, Adjudicator Chodos set aside the termination decision that had been made due to Mr. Gunderson's loss of reliability status.

[44] A similar tack was taken by the Board in *Heyser v. Deputy Head (Department of Employment and Social Development)*, 2015 PSLREB 70, 124 C.L.A.S. 162 [*Heyser*], *Féthière v. Deputy Head (Royal Canadian Mounted Police)*, 2016 PSLREB 16, 126 C.L.A.S. 246 [*Féthière*] and *Grant v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 37, 2016 CarswellNat 2268 [*Grant*], where the Board found that it possessed jurisdiction to inquire into the merits of the employer's decision to revoke a grievor's reliability status by virtue of the

provisions in paragraph 209(1)(*c*) of the *PSLRA*. I note, however, that the decisions in *Heyser* and *Féthière* are the subject of judicial review applications that are pending before this Court and the application for judicial review in *Grant* was recently dismissed on grounds unrelated to the jurisdictional issue.

[45] Standing in contrast to these cases, the Board has stated in several other instances that it does not possess jurisdiction to inquire into the merits of an employer's decision to revoke a reliability status or security clearance unless these decisions are acts of disguised discipline or were taken in bad faith or in violation of an employee's rights to procedural fairness: *Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151, 79 C.L.A.S. 272 [*Hillis*]; *Zhang v. Treasury Board (Privy Council Office)*, 2005 PSLRB 173, 85 C.L.A.S. 24 [*Zhang*]; *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2009 PSLRB 19, 97 C.L.A.S. 173 [*Gill*]; *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63, 102 C.L.A.S. 67 [*Braun*]; *Nasrallah v. Deputy Head (Department of Human Resources and Skills Development)*, 2012 PSLRB 12, 109 C.L.A.S. 326 [*Nasrallah*]. In two other cases, the employer proceeded on a disciplinary basis in addition to terminating by reason of the loss of the employee's security status and the Board found there to be cause for the termination. The inquiry into the reasons behind the decision to also revoke the employee's reliability status was therefore superfluous: *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43, 106 C.L.A.S. 6 [*Shaver*]; *Gravelle v. Deputy Head (Department of Justice)*, 2014 PSLRB 61, 119 C.L.A.S. 199 [*Gravelle*].

[46] In many of these cases where the Board applied the doctrine of disguised discipline and found there to be none in relation to the decision to revoke the grievor's security clearance or reliability status, the fact patterns were markedly different from that in this case and involved off-duty conduct or concerns about a security risk raised by a third party, like the Canadian Security Intelligence Service: see, for example, *Zhang*, *Gill*, *Braun* and *Nasrallah*. Conversely, in at least two cases where, like here, the concerns that motivated the decision to revoke an employee's reliability status were tied to workplace behaviours that the employer found objectionable, the Board held that the decision to revoke the status and bring about the employee's termination were acts of disguised discipline: see, for example, *Féthière* and *Grant*.

[47] As counsel for the respondent fairly conceded during the argument of this appeal, the present case is unique in that it involves a fact pattern where the employer initially commenced taking a disciplinary response to the behaviours in question and then mid-way through the disciplinary process changed tack and decided to instead terminate Ms. Bergey for non-disciplinary reasons related to concerns about her lack of reliability. As is more fully discussed below, this is highly relevant when considering whether the decision to revoke Ms. Bergey's reliability status was an act of disguised discipline.

II. The Adjudicator's Decision

[48] With this background in mind, I turn now to the adjudicator's decision in the present case. While the adjudicator recounts at length in her decision the testimony of each witness and the contents of several documentary exhibits, it is only necessary to review the key findings she made that are germane to this appeal.

[49] As noted, the adjudicator had before her seven grievances:

- one contesting the 10-day suspension Ms. Bergey received on November 4, 2004, alleging it was an unjust and unwarranted disciplinary measure;

- two alleging that Ms. Bergey had been denied union representation during the process leading to the revocation of her reliability status in violation of the collective agreement provisions providing the right to union representation in disciplinary meetings;

- one contesting the suspension of the Ms. Bergey's reliability status, alleging that it constituted an act of disguised discipline;

- another contesting two periods of suspension from work consequent to the suspension and then revocation of Ms. Bergey's reliability status, alleging they were acts of disguised discipline, taken in bad faith and without cause;

- another contesting the revocation of Ms. Bergey's reliability status as disguised discipline and claiming that the decision was made in bad faith and without cause; and

- finally, a grievance contesting the termination of Ms. Bergey's employment as disguised discipline and a decision made in bad faith and without cause.

[50] The adjudicator found that the following key events occurred during the period of Ms. Bergey's employment at the RCMP district office in Prince George, British Columbia:

- Ms. Bergey transferred there in April 2001 and was then president of the local union.
- In October 2001, Ms. Bergey was told by Constable Wolney, who was responsible for records management, that she should not create her own operational files as this had led to errors. She was given direction on how to maintain files in the central filing room. Ms. Bergey perceived this as harassment and an attempt to reduce her job functions and complained to her union.

- In May 2002, Ms. Bergey, as the union human rights and anti-discrimination advisor, and Ms. Bailey, the administration manager in the Prince George office, were charged with facilitating anti-harassment training workshops together. Ms. Bailey was critical of Ms. Bergey's presentation style and friction between the two developed.

- On September 25, 2002 Ms. Bailey was awarded a Queen's Jubilee Commemorative Medal in recognition of her work with the RCMP.

- At a union-management meeting held on January 22, 2003, Ms. Bergey intimated that Ms. Bailey had neglected to forward Ms. Bergey's own nominations for the award to the RCMP selection committee. Superintendent Morris, the RCMP manager to whom Ms. Bergey's immediate supervisor reported, investigated Ms. Bergey's allegation that she had forwarded nominations for the Queen's Jubilee Commemorative Medal to Ms. Bailey and determined that Ms. Bergey was lying.

- On January 27, 2003, Ms. Bergey sent Ms. Bailey an email in which she indicated they were supposed to complete the joint harassment training by March 31, 2003. Ms. Bailey had no knowledge of this deadline and did not believe Ms. Bergey due to the increasing friction between them.

- On March 27, 2003, Superintendent Morris held a meeting with Ms. Bergey during which he reprimanded her for her deceit in the matter of the Queen's Jubilee Commemorative Medal and required she apologize for her behaviour.

- Also in March 2003, friction began to develop between Ms. Bergey and Mr. Stephenson, a contract employee at the detachment.

- In September 2003, Ms. Bergey advised Superintendent Morris that she had been harassed by Mr. Stephenson and Constable Wolney, claiming to have documentation to support her claims. Superintendent Morris was skeptical about her allegations as he believed that Ms. Bergey had lied about his own alleged participation in the events and took considerable time to produce the corroborating documents, which appeared to Superintendent Morris to have been concocted by Ms. Bergey after she made the allegations.

- A heated meeting occurred on September 29, 2003 between Superintendent Morris, Ms. Bergey and others during which Ms. Bergey was critical of Superintendent Morris. Shortly thereafter she sent lengthy emails to several other employees in which she claimed she was being harassed. In her emails she was critical of Superintendent Morris and other managers, including Ms. Bailey.

- At about this time, Superintendent Morris began to suspect that Ms. Bergey might be experiencing medical problems that might explain some of her behaviours.

- Ms. Bergey filed formal harassment complaints on September 26, 2003 and October 29, 2003. They were investigated by an RCMP investigator who was unconnected with the events. The investigation was completed in July 2004, and the investigator concluded that the complaints were without merit.

- On November 14, 2003, an individual was wrongly arrested as a result of errors Ms. Bergey made in entering data into the CPIC system. An audit revealed other errors in file maintenance for which Ms. Bergey was responsible. She was coached as to how to properly perform her functions and annotations were placed on the nine files where mistakes were found.

- On December 2, 2003, Ms. Bailey filed a harassment complaint in which she alleged that she had been harassed by Ms. Bergey. The complaint centred principally on statements made by Ms. Bergey in some of her emails. This complaint was likewise investigated and the investigator found it to be substantiated. The investigation results were communicated to RCMP management in August 2004, and on September 16, 2004 Superintendent Morris imposed a three-day suspension on Ms. Bergey as a result of Ms. Bailey's substantiated harassment complaint.

- On January 30, 2004, another heated meeting occurred between Superintendent Morris, Ms. Bergey and several others. Several witnesses testified that Ms. Bergey

swore at another individual during the meeting and that she was insubordinate to Superintendent Morris. Once again, Ms. Bergey sent several emails following this meeting to others in the workplace and RCMP officials. In them, she made several comments management found offensive, including the accusation that Superintendent Morris lacked integrity and impartiality.

- On February 18, 2004, Superintendent Morris contacted the RCMP's human resources department for advice on how to require Ms. Bergey to undergo a medical assessment. He testified that he thought she might be suffering from a medical problem and did not want to discipline her if such a problem was causing her behaviour.

- At the beginning of March 2004, Ms. Bergey's supervisor noted that the annotations that had been placed on the nine files where Ms. Bergey had made mistakes were missing. He re-wrote the annotation reports and then found that the originals had been replaced on the files on March 25, 2004. In response, he filed a departmental security complaint. That complaint was investigated by the RCMP's security department, which concluded in a report filed on October 13, 2004 that there had been no security breach but, rather, a violation of RCMP internal policies by Ms. Bergey. In the report, the investigator noted what he perceived to be Ms. Bergey's lack of candour in the investigation.

- Ms. Bergey was on sick leave from March 31 to May 7, 2004. During the first week of her absence, several RCMP members failed to show up for their

scheduled court dates. The notices advising them of the appearances had not been distributed and were found lying on Ms. Bergey's desk.

- After Ms. Bergey returned to work, management determined that she continued to make errors in entering data into the CPIC system.

- Ms. Bergey again went off on sick leave between June 9 and August 5, 2004.

- On June 30, 2004, Superintendent Morris once again contacted the RCMP's human resources department to express his concern that Ms. Bergey's health was contributing to her conduct at work. He testified that he told the human resources department that he believed her conduct would normally be subject to discipline, but that he was reticent to take disciplinary action in case her health was the root cause. Arrangements were made to have Ms. Bergey's fitness for work evaluated by a doctor at Health Canada.

- Dr. Prendergast of Health Canada conducted a fitness-to-work assessment via telephone with Ms. Bergey and reported his findings on July 22, 2004. He concluded that Ms. Bergey did not suffer from any medical condition that would render her unable to work.

- Ms. Bergey returned to work on August 5, 2004. She testified that at that time she began to record her workplace interactions given the high degree of mistrust that had developed.

- Superintendent Morris testified that in response to Dr. Prendergast's report he determined it would be appropriate to address Ms. Bergey's workplace misconduct with disciplinary action.

- Superintendent Morris, Ms. Bailey and Ms. Bergey's immediate supervisor worked with human resources to draft a "letter of expectation" for Ms. Bergey outlining her expected work duties and workplace conduct. This letter of expectation was provided and read to Ms. Bergey by Superintendent Morris when she returned to work in early August 2004.

- Continued work deficiencies were noted and Ms. Bergey claimed that she felt she was being micromanaged and harassed.

- On August 23, 2004, Ms. Bergey's immediate supervisor informed the RCMP's human resources department that Ms. Bergey had refused to complete assigned work tasks and that he had told Ms. Bergey that he would recommend discipline as a result.

- On September 9 and 17, 2004, Ms. Bergey sent e-mails to the RCMP's harassment investigator and her supervisor, stating that the micromanagement of her work amounted to harassment. Once again the emails were intemperate in tone and her managers found them insubordinate and insulting.

- Superintendent Morris reprimanded Ms. Bergey and told her that he would no longer entertain her unfounded workplace allegations against management and

colleagues and that she was not to use the RCMP email system to communicate such allegations.

- Ms. Bergey continued to make data entry mistakes in the CPIC system despite participating in a CPIC training course in August 2004. She blamed the mistakes on advice she received from a file clerk who denied ever having provided such advice.

- On September 27, 2004, Ms. Bergey's immediate supervisor met with Ms. Bergey to deliver and discuss her performance evaluation. Later that day, Ms. Bergey provided him with a copy of the evaluation on which she had written a rebuttal that included statements about his lack of leadership skills. Superintendent Morris was provided with a copy of Ms. Bergey's performance evaluation (including her annotated comments). He testified that he found her comments inappropriate insofar that they represented a personal attack against her supervisor and contravened the expectations laid out in the letter she was given when she returned to work a few months earlier.

- On October 28, 2004, Superintendent Morris went to Ms. Bergey's workstation to discuss the performance evaluation with her; she was not there. When she returned, Ms. Bergey's supervisor told her that Superintendent Morris wanted to meet with her. Ms. Bergey refused to meet with Superintendent Morris without her union representative present. In response to this refusal, Superintendent Morris returned to Ms. Bergey's workstation. When he arrived, Ms. Bergey went to the washroom and then went on a coffee break. She did not contact

Superintendent Morris upon her return because she believed she was entitled to 24 hours' notice and the presence of her union representative at the meeting.

- Superintendent Morris encountered Ms. Bergey later in the day and explained that he wanted to speak to her about her performance evaluation. She continued to refuse to do so, insisting she was entitled to 24 hours' notice and the presence of a union representative. Superintendent Morris testified that Ms. Bergey walked away and uttered a profanity. While Ms. Bergey denies this occurred, the adjudicator disagreed. The adjudicator based her conclusion on her assessment of the witnesses' credibility and on evidence from Ms. Bailey that corroborated Superintendent Morris' version of events.

- Superintendent Morris followed Ms. Bergey to her workstation and told her that he found the comments she added to her performance evaluation to be inappropriate. The discussion deteriorated and Ms. Bergey responded by levying accusations at Superintendent Morris and yelling at him. According to Superintendent Morris, he ended the interaction by saying that he would send Ms. Bergey home if she did not adjust her behaviour.

- The next day, Ms. Bergey took an email drafted and printed by her supervisor off the printer. The email had been sent to human resources by her supervisor to solicit advice on how to manage Ms. Bergey. Ms. Bergey testified that she took the email because she believed her supervisor had intentionally left it on the printer for days in an attempt to humiliate her. He denied this.

- On November 4, 2004, Superintendent Morris levied a 10-day suspension on Ms. Bergey for her conduct on October 28th. The suspension letter stated that "any recurrence of this or any other acts of misconduct will result in more severe disciplinary action up to and including termination". The suspension was set to end on November 23, 2004.

- During the period of the suspension, Superintendent Morris determined that he was going to levy a further 10-day suspension on Ms. Bergey for her behaviour in connection with the October 29th printer incident and deceitful behaviour in connection with that incident. This second suspension was never levied as Ms. Bergey did not return to work after serving the first 10-day suspension.

- Dr. Prendergast conducted a second fitness-to-work assessment for Ms. Bergey and advised the RCMP on December 13, 2004 that he had determined that Ms. Bergey might be suffering from a medical disorder and therefore should see a psychiatrist. Ms. Bergey's status was changed to being on authorized sick leave with pay as of November 24, 2004. She retained that status until she was again suspended as part of the process to revoke her reliability status.

- On November 4, 2004, Inspector Barry Clark (who was acting in Superintendent Morris' absence) contacted human resources to seek advice on possible disciplinary action that could be taken against Ms. Bergey in response to Ms. Bergey's having lied during the investigation into the missing documents in the operational files.

- Superintendent Morris wrote to human resources on November 10, 2004 to detail his concerns about Ms. Bergey and indicated that he intended to tell her that she was no longer welcome in the RCMP's district office when she returned to work after her suspension. At about the same time, he learned that Ms. Bergey had been surreptitiously taping office conversations, which he found to be objectionable.

- On November 19, 2004, Superintendent Morris contacted individuals in the RCMP's security department to seek advice about reviewing Ms. Bergey's security status. Based on feedback from the security section, Superintendent Morris completed a detailed memo, outlining many of the above problems with Ms. Bergey's workplace behaviour. He sent this memo to the departmental security section on November 29, 2004 and requested a review of Ms. Bergey's reliability status.

- On January 6, 2005, the departmental security section assigned Ms. Bergey's file to Mr. Briske, a retired RCMP officer. Mr. Briske testified that his role was to review relevant RCMP policies and previously compiled information (for example, management reports, emails and previous security review reports) to assess whether Ms. Bergey posed a security risk. He concluded that Ms. Bergey was insubordinate and dishonest, lacked integrity, wasted police resource hours and was therefore not reliable. He recommended that Ms. Bergey's reliability status be revoked.

- Mr. Briske's report was reviewed by Chief Superintendent Lanthier, Director General of the RCMP's security branch, who determined that Mr. Briske's

recommendation was well-founded. He consequently issued a letter of reliability status suspension to Ms. Bergey dated March 22, 2005. The grounds for the reliability status suspension identified in the letter were Ms. Bergey's conduct and deceit in relation to: the Queen's Golden Jubilee Medal process, the harassment awareness workshops, taking documents not belonging to her off the printer, her problems with CPIC record maintenance and her unfounded harassment allegations.

- The letter advised Ms. Bergey that she had fourteen days to respond, which she did on April 6, 2005. She addressed the specific events enumerated in the letter and attached multiple documents.

- Chief Superintendent Lanthier testified that he reviewed the reply letter but not all of Ms. Bergey's attachments. He determined that Ms. Bergey was unreliable and decided to revoke her reliability status. Ms. Bergey was informed of this decision in a letter dated July 27, 2005. The revocation letter stated that Ms. Bergey could no longer be relied upon not to abuse the trust placed in her as she had been untruthful or deceitful on numerous occasions. Particulars of such occasions were set out in the letter and included the fact that there was no proof to corroborate Ms. Bergey's claim that there was an end date established for the harassment training, as she had claimed in her January 2003 email to Ms. Bailey, her deceitfulness in the Queen's Golden Jubilee Medal process, the unsubstantiated nature of Ms. Bergey's harassment claims, the fact that Ms. Bailey's harassment claim was upheld and deceit by Ms. Bergey in respect of the first security

investigation involving the documents missing from the CPIC operational files. The letter also noted Ms. Bergey's continuing problems with entering data accurately in the CPIC files, despite having received remedial training.

- Following suspension of her reliability status, Ms. Bergey was suspended without pay on March 24, 2005. The suspension was continued after her security status was revoked, and Ms. Bergey's employment was terminated for cause on January 3, 2006, pursuant to paragraph 12(1)(*e*) of the *FAA*, as she no longer met the reliability status requirement for her position.

[51] The adjudicator dealt with the grievance challenging the 10-day suspension separately from the other grievances. She analysed the remaining six grievances together as they involved the same issues, namely, whether the Board possessed jurisdiction to review the impugned decisions on their merits and whether they constituted acts of disguised discipline.

[52] In terms of the 10-day suspension, the adjudicator found that Ms. Bergey was insubordinate in failing to come to meet with Superintendent Morris when requested to do so on October 28, 2004 and that she instead ought to have filed a grievance if she believed that her representational rights under the collective agreement were being denied. The adjudicator noted that, as a former union president, Ms. Bergey was aware of the "obey now, grieve later" principle, under which employees are obliged to follow most management directions and file grievances if they disagree with them and thus, in most instances, cannot simply choose to disobey directions from their superiors. The adjudicator likewise found that Ms. Bergey uttered the profanity she was accused of having uttered and was otherwise disrespectful to

Superintendent Morris in her interactions with him. The adjudicator considered but gave no weight to a transcript Ms. Bergey made from her surreptitious taping of the conversations on October 28, 2004 as she found the transcript unreliable due to the possibility that the tape recorder may not have picked up all of the interactions. The adjudicator therefore found that Ms. Bergey had engaged in conduct warranting discipline.

[53] The adjudicator next went on to consider whether a 10-day suspension was excessive in the circumstances and found that it was not, given Ms. Bergey's prior disciplinary record and the nature of her defiant behaviour. The adjudicator therefore dismissed the grievance challenging the 10-day suspension.

[54] Insofar as concerns the jurisdictional issue, the adjudicator followed and applied the case law of the Board, discussed above, to the effect that it possesses no jurisdiction to inquire into the merits of an employer's decision to suspend or revoke a reliability status unless these decisions are acts of disguised discipline or were taken in bad faith or in violation of an employee's rights to procedural fairness. The adjudicator found that there was no bad faith on the employer's part and that Ms. Bergey's procedural fairness rights had been respected as she was given a chance to respond to the allegations against her in the security review process.

[55] On the issue of disguised discipline, the adjudicator quoted from the Federal Court's decision in *Frazee* as setting out the principles applicable to determining whether an impugned employer act amounts to disguised discipline. However, in applying these principles, the adjudicator focussed solely on the employer's intent and did not consider the impact of the

decision on Ms. Bergey, as the case law instructs. In addition, in finding that a disciplinary intent was absent, the adjudicator focussed on the subjective intent of the members of the RCMP who made the decisions that impacted Ms. Bergey and accepted the employer's argument that it was open to it to decide to terminate for either disciplinary or security related reasons in any given case where employee misconduct could give rise to both a disciplinary and a non-disciplinary response. The adjudicator outlined the relevant considerations to be applied in determining whether the RCMP's actions constituted disguised discipline at paragraph 838 of her decision in the following manner:

> […] The employer could not use the security review process to simply avoid adjudication for disciplining an employee. If there is no valid concern with an employee's RCMP reliability status, then revoking it would be improper.

[56] In finding there to be no subjective intent to discipline Ms. Bergey, the adjudicator focussed on the fact that the revocation decision was made by Chief Superintendent Lanthier, who did not know Ms. Bergey and did not supervise her. She also noted that Chief Superintendent Lanthier was not influenced or duped by Superintendent Morris and that the latter had a good faith belief that the RCMP had valid security concerns that warranted Ms. Bergey's termination. In consequence, the adjudicator found there to be no disguised discipline and dismissed the grievances.

III. Ms. Bergey's Arguments

[57] Ms. Bergey, who represented herself before this Court and the Federal Court, essentially makes the following six arguments on appeal to this Court.

[58] First, she says that the adjudicator's decision to dismiss the grievance challenging the 10-day suspension is unreasonable as she did not utter the profanity she was believed to have said and had reasonable grounds for refusing to meet with Superintendent Morris on October 28, 2004.

[59] Second, she says that the Board's decision to refuse jurisdiction with respect to the reliability status suspension and revocation was unreasonable because the adjudicator ignored evidence revealing disguised discipline and bad faith on the part of the employer.

[60] Third, Ms. Bergey argues that the adjudicator's appreciation of the evidence reveals bias. In this vein, Ms. Bergey submits that the adjudicator placed undue weight on the testimonies of Superintendent Morris and Chief Superintendent Lanthier because of their ranks.

[61] Fourth, Ms. Bergey argues that the adjudicator's management of the proceeding reveals bias, incompetence and "judicial misconduct". She argues that the adjudicator inappropriately interrupted Ms. Bergey's counsel during the hearing without acting in a similar manner towards employer counsel and showed other instances of favouritism. She also claims that the adjudicator engaged in inappropriate discussions with counsel for the employer during lunch breaks and argues that the adjudicator prejudiced Ms. Bergey by taking more than two years to issue the Board's decision.

[62] Fifth, Ms. Bergey submits that the Federal Court on judicial review erred in denying the application because the reviewing judge failed to intervene and consider all of Ms. Bergey's evidence.

[63] Finally, Ms. Bergey submits that the reviewing Federal Court judge erred by not finding that the adjudicator exhibited bias and in doing so exacerbated the lack of procedural fairness Ms. Bergey experienced during the original adjudication.

IV. Analysis

[64] I would note at the outset that there is no evidentiary basis for Ms. Bergey's allegations regarding improper conversations between the adjudicator and counsel for the respondent or regarding the adjudicator's alleged favouritism to counsel for the employer. These allegations must accordingly be dismissed, essentially for the reasons given by the Federal Court at paragraphs 46 to 51 of *Bergey*.

[65] As for Ms. Bergey's other bias allegations, they are for the most part not claims of bias but, rather, are merely disagreements with the way in which the adjudicator and the Federal Court assessed Ms. Bergey's arguments. Such disagreements do not give rise to a valid claim for bias, which necessitates cogent evidence of a closed mind or of a predisposition against a party such that a reasonable person would conclude that the decision-maker would likely not decide fairly as outlined by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394, 68 D.L.R. (3d) 716 and recently reiterated by this Court in *Hennessey v. Canada*, 2016 FCA 180 at paras. 15-18, 484 N.R. 77.

[66] Finally, as concerns the two plus year delay of the adjudicator in issuing her award, I am not convinced that the delay was so extreme as to affect Ms. Bergey's procedural fairness rights, although it does give rise to complexities concerning the appropriate remedy as is more fully discussed below. The Supreme Court of Canada noted in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras. 121-122, [2000] 2 S.C.R. 307 [*Blencoe*] that, in administrative matters, a delay only constitutes a breach of an individual's procedural fairness rights where it is "unacceptable to the point of being so oppressive as to taint the proceedings" and that such a determination is contextual and not informed by the length of the delay alone. In *Moodie v. Canada (Attorney General)*, 2015 FCA 87 at paras. 75-76, 472 N.R. 158, this Court held that even where delays may interfere with legal proceedings – for example, where witnesses' capacity for recollection may be undermined due to the passage of time – this is not, without evidence of actual oppression and tainting, adequate for establishing a breach of procedural fairness rights under *Blencoe*. Ms. Bergey has adduced no evidence to satisfy this threshold.

[67] Thus, there is no merit in any of Ms. Bergey's bias allegations. Likewise, the Board's delay in rendering its decision does not amount to a violation of Ms. Bergey's procedural fairness rights.

[68] Turning to the other issues that arise, there is no need to determine whether the adjudicator's decision was unreasonable in concluding that the Board had no jurisdiction to inquire into the merits of the decision to revoke Ms. Bergey's reliability status as Ms. Bergey has

not raised this issue, even though such an argument might well be a good basis for setting the adjudicator's decision aside.

[69] As noted above, by reason of the 1993 and subsequent amendments to the *PSLRA*, *PSEA* and *FAA*, the Board has been given jurisdiction to determine whether the employer possesses cause for disciplinary and non-disciplinary terminations of indeterminate employees in the core public service. A potential exception to this is set out in subsection 208(6) of the *PSLRA*, which prevents an employee from filing a grievance if it relates to "action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada."

[70] Reliability status revocation likely cannot be said to be such an action and, indeed, the employer did not suggest it was in the course of the grievance procedure in Ms. Bergey's case. Reliability status, as noted, deals with an employee's trustworthiness, loyalty and reliability as opposed to the safety and security of Canada and her allies. Conversely, a secret or top secret security clearance might well be said to relate to the safety and security of Canada or her allies as it is required for access to classified information. Moreover, Parliament has provided an alternate redress process overseen by SIRC for those whose security clearances are revoked.

[71] Thus, there appears to be a strong argument in favour of the Board's jurisdiction to hear a termination grievance like Ms. Bergey's under paragraph 209(1)(*c*) of the *PSLRA* and, consequently, to examine under that provision whether there were grounds for revoking the employee's reliability status as part of its assessment of whether the employer possessed cause

for the termination when the termination is based on the loss of the requisite reliability status. However, the same conclusion may well not obtain in the case of a termination that follows the revocation of a secret or top secret clearance by virtue of subsection 208(6) of the *PSLRA* and the fact that Parliament has provided SIRC – an expert security tribunal – with jurisdiction to determine whether revocation of a security clearance is warranted.

[72] I note that the case law of the Board that has reached an opposite conclusion relies in part on *Kampman*, decisions regarding releases of probationary employees or case law from before 1993. However, none of these precedents applies to the interpretation of the current provisions in the *PSLRA*, *PSEA 2003* and *FAA*. Thus, the adjudicator in this case may well have erred in declining to address whether the employer had cause to revoke Ms. Bergey's reliability status in her examination of the merits of the termination grievance under paragraph 209(1)(*c*) of the *PSLRA*. But, this argument was not raised by Ms. Bergey so I need proceed no further.

[73] I turn now to the arguments that were raised by Ms. Bergey and begin by noting that in evaluating them this Court is required to step into the shoes of the Federal Court and thus must in effect re-conduct the judicial review analysis: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559 [*Agraira*]; *Bahniuk* at para. 13; *Canada (Attorney General) v. Gatien*, 2016 FCA 3 at para. 30, 479 N.R. 382 [*Gatien*].

[74] The first step in the required analysis involves the identification of the applicable standard of review, which in this case is the reasonableness standard: *Agraira* at para. 47; *Bahniuk* at para. 14; *Gatien* at para. 31; *MacFarlane v. Day & Ross Inc.*, 2014 FCA 199 at para. 3, 466 N.R.

53. This standard is a deferential one and requires a reviewing court to assess whether the administrative decision-maker's decision is transparent, justified and intelligible and whether the result reached by the decision-maker falls within the range of acceptable alternatives in light of the facts and applicable law: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190. The case law further recognizes that decisions like the ones impugned by Ms. Bergey, which are heavily fact-infused and within the heartland of the specialized expertise of a labour board, are to be afforded a wide margin of appreciation: *Bahniuk* at para. 14; *Gatien* at para. 39.

[75] Applying these principles to the adjudicator's decision in the present case, I believe there is no basis to set aside the adjudicator's dismissal of the grievance challenging the 10-day suspension as there was a factual basis for the adjudicator's assessment that Ms. Bergey had engaged in the conduct for which she was reproached and the adjudicator considered the factors typically assessed by adjudicators and labour arbitrators in determining whether a disciplinary penalty was appropriate. Among other things, the adjudicator looked at Ms. Bergey's seniority, disciplinary record and the mitigating factors that Ms. Bergey advanced in defence of her conduct, in alignment with the arbitral jurisprudence as summarized, for example, in *Brown & Beatty* at paragraphs 7:4400 to 7:4428. I therefore do not find any basis to interfere with the adjudicator's dismissal of this grievance.

[76] The same cannot be said for the adjudicator's treatment of the issue of disguised discipline. Fully cognizant of the wide margin of appreciation that I am required to give to the adjudicator's decision, I nonetheless believe that her assessment of the disguised discipline issue

must be set aside because the adjudicator fundamentally misapplied the relevant case law on the issue and her conclusion is unsupportable.

[77] In terms of the former point, the adjudicator first failed to address one of the factors that the case law indicates is a relevant consideration, namely, the impact of the decision on the employee. This failure is particularly significant where, as here, what is at issue is the cessation of an employee's relatively lengthy career in the public service.

[78] In addition, the adjudicator unreasonably focussed her assessment of the disguised discipline issue almost exclusively on the employer's lack of bad faith in deciding to initiate the security review process and to eventually revoke Ms. Bergey's reliability status. However, the case law discussed above teaches that an employer's subjective intent is not determinative of whether it has engaged in disguised discipline. Thus, an employer's good faith but mistaken belief that it is not making a disciplinary determination is not conclusive. Rather, what is required is an objective assessment by the adjudicator of what actually occurred. Relevant to this inquiry are several factors in addition to the employer's good faith. In the present case, principal among them are the fact that discipline is the typical employer response to the sorts of workplace behaviours that the RCMP objected to and the fact that the RCMP had already been dealing with these behaviours through progressive discipline up to the point of Ms. Bergey's departure on sick leave. Dismissal is the final step in the progressive discipline process, and the nature of this sanction and its impact on the employee is also relevant, as already stated. In *Brown & Beatty*, the discipline chapter (7) contains entire sections devoted to the treatment of insubordination and various types of dishonesty as bases for the imposition of discipline.

[79] Moreover, almost every disciplinable behaviour that warrants termination necessarily gives rise to valid employer concerns about the employee's trustworthiness, integrity or honesty. The fact that these concerns might also impact an employee's eligibility for reliability status under the employer policies in the public service or the RCMP does not transform a disciplinary act into a non-disciplinary one. Thus, an employer's election to effect a termination by having an employee's reliability status revoked does not make its termination decision non-disciplinary if the revocation is imposed as a vehicle to remove the employee from the workplace for workplace misconduct, as occurred in this case. That is especially so in situations like the present, where the RCMP had already embarked on the process of progressive discipline in an attempt to correct the same behaviours upon which it relied to ultimately revoke Ms. Bergey's reliability status.

[80] In short, while employer bad faith may well be indicative of the employer's motives being disciplinary, the absence of bad faith does not necessarily lead to an opposite conclusion. A much more nuanced inquiry than that undertaken by the adjudicator in the present case is required to assess whether an employer has engaged in an act of disguised discipline.

[81] When these principles are applied, it seems to me that there is only one reasonable conclusion in Ms. Bergey's case, namely that the revocation of her reliability status and termination were acts of disguised discipline as the reasons her reliability status was revoked are normally grounds for discipline, the RCMP had already embarked on the process of levying discipline for many of the behaviours that led to the revocation of Ms. Bergey's reliability status and the revocation was selected as a means to the end the RCMP desired of removing Ms. Bergey from the workplace. Holding otherwise would lead to the unreasonable result that the

employer could evade the protection provided to employees against termination without cause merely because it had a good faith belief that an employee was no longer loyal, reliable or trustworthy. However, these conclusions are reached in many – if not most – terminations. Thus, upholding the adjudicator's decision in this case would lead to a hollowing out of the cause protection enshrined in the *PSLRA*.

[82] It therefore follows that the adjudicator's dismissal of the six grievances related to the suspension and revocation of Ms. Bergey's reliability status, the alleged lack of union representation and the suspension from and termination of Ms. Bergey's employment cannot stand.

V. Proposed Disposition

[83] In light of the foregoing, I would allow the appeal, set aside the May 12, 2015 decision of the Federal Court and, making the decision that it ought to have made, would allow Ms. Bergey's judicial review application only in respect of the six grievances numbered 566 02 173, 566 02 174, 566 02 175, 566 02 176, 566 02 395, 566 02 1298 and would remit those grievances to the PSLREB for re-determination in accordance with these reasons. I would leave its decision in respect of the grievance numbered 166 02 37094 undisturbed. Given the above finding, in its re-determination the Board need not address the issue of disguised discipline, as I have concluded that the acts of suspending and revoking Ms. Bergey's reliability status were acts of disguised discipline as were the suspension and termination of her employment. That said, it will be necessary for the Board in its re-determination to assess the issue of whether the RCMP had cause to suspend and revoke Ms. Bergey's reliability status and therefore to impose the

suspension and termination of her employment. Further, if it finds no cause, the Board must consider the appropriate remedy.

[84] I would leave it open to the Board to assess whether it is possible to fairly conduct the inquiry into at least some of these issues on the basis of its record and the factual findings of the adjudicator on points other than her determination that there was no disguised discipline. Given the passage of time since Ms. Bergey was last in the workplace, it might be preferable to so proceed to ensure a conclusion to these inquiries as quickly as possible, but that is a matter for the Board and not this Court to determine.

[85] Finally, in terms of costs, as none were ordered by the Federal Court and as success was divided before this Court, I would award none either in this Court or in the Federal Court.

"Mary J.L. Gleason"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Johanne Gauthier J.A."

APPENDIX

A. Prior to 1993

(1) *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35

Right of employee	**Droit du fonctionnaire**
91(1) Where any employee feels aggrieved	91(1) Sous réserve du paragraphe (2) et si aucun autre recours administratif de réparation ne lui est ouvert sous le régime d'une loi fédérale, le fonctionnaire a le droit de présenter un grief à tous les paliers de la procédure prévue à cette fin par la présente loi, lorsqu'il s'estime lésé :
(*a*) by the interpretation or application, in respect of the employee, of	*a*) par l'interprétation ou l'application à son égard :
(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or	(i) soit d'une disposition législative, d'un règlement — administratif ou autre —, d'une instruction ou d'un autre acte pris par l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award, or	(ii) soit d'une disposition d'une convention collective ou d'une décision arbitrale;
(*b*) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (*a*)(i) or (ii)	*b*) par suite de tout fait autre que ceux mentionnés aux sous-alinéas *a*)(i) ou (ii) et portant atteinte à ses conditions d'emploi.
in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2) to present the grievance at each of the levels, up to and including the final level, in the	

grievance process provided for by this Act.

Limitation

(2) An employee is not entitled to present any grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies, or any grievance relating to any action taken pursuant to an instruction, direction or regulation given or made as described in section 113.

Restrictions

(2) Le fonctionnaire n'est pas admis à présenter de grief portant sur une mesure prise en vertu d'une directive, d'une instruction ou d'un règlement conforme à l'article 113. Par ailleurs, il ne peut déposer de grief touchant à l'interprétation ou à l'application à son égard d'une disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

Right to be represented by employee organization

91(3) An employee who is not included in a bargaining unit for which an employee organization has been certified as bargaining agent may seek the assistance of and, if the employee chooses, may be represented by any employee organization in the presentation or reference to adjudication of a grievance.

Droit d'être représenté par une organisation syndicale

91(3) Le fonctionnaire ne faisant pas partie d'une unité de négociation pour laquelle une organisation syndicale a été accréditée peut demander l'aide de n'importe quelle organisation syndicale et, s'il le désire, être représenté par celle-ci à l'occasion du dépôt d'un grief ou de son renvoi à l'arbitrage.

Idem

91(4) No employee who is included in a bargaining unit for which an employee organization has been certified as bargaining agent may be represented by any employee organization, other than the employee organization certified as bargaining agent, in the presentation or reference

Idem

91(4) Le fonctionnaire faisant partie d'une unité de négociation pour laquelle une organisation syndicale a été accréditée ne peut être représenté par une autre organisation syndicale à l'occasion du dépôt d'un grief ou de son renvoi à l'arbitrage.

to adjudication of a grievance.

Reference to adjudication

92(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award, or

(*b*) disciplinary action resulting in discharge, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

Renvoi à l'arbitrage

92(1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur :

a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale ;

b) une mesure disciplinaire entraînant le congédiement, la suspension ou une sanction pécuniaire

Approval of bargaining agent

(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(*a*), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.

Approbation de l'agent négociateur

92(2) Pour pouvoir renvoyer à l'arbitrage un grief du type visé à l'alinéa (1)*a*), le fonctionnaire doit obtenir, dans les formes réglementaires, l'approbation de son agent négociateur et son acceptation de le représenter dans la procédure d'arbitrage.

(2) *Public Service Employment Act*, R.S.C. 1985, c. P-33

Incompetence and Incapacity	**Incompétence et incapacité**
31(1) Where an employee, in the opinion of the deputy head, is incompetent in performing the duties of the position the employee occupies or is incapable of performing those duties and should be appointed to a position at a lower maximum rate of pay, or released, the deputy head may recommend to the Commission that the employee be so appointed or released, in which case the deputy head shall give notice in writing to the employee of the recommendation.	31(1) L'administrateur général qui juge un fonctionnaire incompétent dans l'exercice des fonctions de son poste ou incapable de remplir ces fonctions peut recommander à la Commission soit le renvoi de ce fonctionnaire, soit sa rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur. Dans les deux cas, il en avise par écrit le fonctionnaire.
(2) Within such period after receiving a notice under subsection (1) as the Commission prescribes, the employee may appeal against the recommendation of the deputy head to a board established by the Commission to conduct an inquiry at which the employee and the deputy head, or their representatives, shall be given an opportunity to be heard.	(2) Dans le délai imparti par la Commission après réception de l'avis mentionné au paragraphe (1), le fonctionnaire peut faire appel de la recommandation de l'administrateur général devant un comité chargé par la Commission de faire une enquête, au cours de laquelle les parties, ou leurs représentants, ont l'occasion de se faire entendre.
[…]	[…]
(4) If no appeal is made against a recommendation of a deputy head under subsection (1), the Commission may take such action with regard to the recommendation as the Commission sees fit.	(4) En l'absence d'appel, la Commission peut prendre, à l'égard de la recommandation, toute mesure qu'elle estime opportune.
(5) The Commission may release an employee pursuant to a recommendation under this section and the employee thereupon ceases to be an employee.	(5) La Commission peut renvoyer un fonctionnaire en application d'une recommandation fondée sur le présent article; le fonctionnaire per dès lors sa qualité de fonctionnaire.

B. 1993 amendments

Amendments to the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, *Public Service Employment Act*, R.S.C. 1985, c. P-33 and *Financial Administration Act*, R.S.C. 1985, c. F-11 were made in 1993 pursuant to the *Public Service Reform Act*, S.C. 1992, c. 54.

(1) *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35

Right of employee	**Droit du fonctionnaire**
91(1) Where any employee feels aggrieved	91(1) Sous réserve du paragraphe (2) et si aucun autre recours administratif de réparation ne lui est ouvert sous le régime d'une loi fédérale, le fonctionnaire a le droit de présenter un grief à tous les paliers de la procédure prévue à cette fin par la présente loi, lorsqu'il s'estime lésé :
(*a*) by the interpretation or application, in respect of the employee, of	*a*) par l'interprétation ou l'application à son égard :
(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or	(i) soit d'une disposition législative, d'un règlement — administratif ou autre —, d'une instruction ou d'un autre acte pris par l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award, or	(ii) soit d'une disposition d'une convention collective ou d'une décision arbitrale;
(*b*) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (*a*)(i) or (ii)	*b*) par suite de tout fait autre que ceux mentionnés aux sous-alinéas *a*)(i) ou (ii) et portant atteinte à ses conditions d'emploi.
in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2) to present the grievance	

at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

Limitation

(2) An employee is not entitled to present any grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies, or any grievance relating to any action taken pursuant to an instruction, direction or regulation given or made as described in section 113.

Restrictions

(2) Le fonctionnaire n'est pas admis à présenter de grief portant sur une mesure prise en vertu d'une directive, d'une instruction ou d'un règlement conforme à l'article 113. Par ailleurs, il ne peut déposer de grief touchant à l'interprétation ou à l'application à son égard d'une disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

Right to be represented by employee organization

91(3) An employee who is not included in a bargaining unit for which an employee organization has been certified as bargaining agent may seek the assistance of and, if the employee chooses, may be represented by any employee organization in the presentation or reference to adjudication of a grievance.

Droit d'être représenté par une organisation syndicale

91(3) Le fonctionnaire ne faisant pas partie d'une unité de négociation pour laquelle une organisation syndicale a été accréditée peut demander l'aide de n'importe quelle organisation syndicale et, s'il le désire, être représenté par celle-ci à l'occasion du dépôt d'un grief ou de son renvoi à l'arbitrage.

Idem

91(4) No employee who is included in a bargaining unit for which an employee organization has been certified as bargaining agent may be represented by any employee organization, other than the employee organization certified as bargaining

Idem

91(4) Le fonctionnaire faisant partie d'une unité de négociation pour laquelle une organisation syndicale a été accréditée ne peut être représenté par une autre organisation syndicale à l'occasion du dépôt d'un grief ou de

agent, in the presentation or reference to adjudication of a grievance.

son renvoi à l'arbitrage.

Reference of grievance to adjudication

92(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

(*b*) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or

(ii) termination of employment or demotion pursuant to paragraph 11(2)(*f*) or (*g*) of the *Financial Administration Act*, or

(*c*) in the case of an employee not described in paragraph (*b*), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

Renvoi d'un grief à l'arbitrage

92(1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur :

a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale;

b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)*f*) ou *g*) de la Loi sur la gestion des finances publiques;

c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.

Approval of bargaining agent

(2) Where a grievance that may be presented by an employee to

Approbation de l'agent négociateur

(2) Pour pouvoir renvoyer à l'arbitrage un grief du type visé à

adjudication is a grievance described in paragraph (1)(*a*), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.

l'alinéa (1)*a*), le fonctionnaire doit obtenir, dans les formes réglementaires, l'approbation de son agent négociateur et son acceptation de le représenter dans la procédure d'arbitrage.

Termination under P.S.E.A. not grievable

(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the *Public Service Employment Act*.

Exclusion

(3) Le paragraphe (1) n'a pas pour effet de permettre le renvoi à l'arbitrage d'un grief portant sur le licenciement prévu sous le régime de la *Loi sur l'emploi dans la fonction publique*.

Order

(4) The Governor in Council may, by order, designate for the purposes of paragraph (1)(*b*) any portion of the public service of Canada specified in Part II of Schedule I.

Décret

(4) Le gouverneur en conseil peut, par décret, désigner, pour l'application de l'alinéa (1)*b*), tout secteur de l'administration publique fédérale spécifié à la partie II de l'annexe I.

(2) *Public Service Employment Act*, R.S.C. 1985, c. P-33

Section 31 was repealed.

L'article 31 a été abrogé.

(3) *Financial Administration Act*, R.S.C. 1985, c. F-11

11(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to

11(2) Sous réserve des seules dispositions de tout texte législatif concernant les pouvoirs et fonctions d'un employeur distinct, le Conseil du Trésor peut, dans l'exercice de ses attributions en matière de gestion du personnel, notamment de relations

personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,

entre employeur et employés dans la fonction publique :

[…]

[…]

(*f*) establish standards of discipline in the public service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct, and the circumstances and manner in which and the authority by which or whom those penalties may be applied or may be varied or rescinded in whole or in part;

f) établir des normes de discipline dans la fonction publique et prescrire les sanctions pécuniaires et autres y compris le licenciement et la suspension, susceptibles d'être appliquées pour manquement à la discipline ou pour inconduite et indiquer dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces sanctions peuvent être appliquées, modifiées ou annulées, en tout ou en partie;

(*g*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;

g) prévoir, pour des raisons autres qu'un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur des personnes employées dans la fonction publique et indiquer dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces mesures peuvent être appliquées, modifiées ou annulées, en tout ou en partie;

[…]

[…]

(4) Disciplinary action against, and termination of employment or demotion of, any person pursuant to paragraph (2)(*f*) or (*g*) shall be for cause.

(4) Les mesures disciplinaires, le licenciement ou la rétrogradation effectuée en application des alinéas (2)*f*) ou *g*) doivent être motivés.

C. Introduction of the Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2

Pursuant to the *Public Service Modernization Act*, S.C. 2003, c. 22, the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 was replaced by the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 and the *Financial Administration Act*, R.S.C. 1985, c. F-11 was amended.

(1) *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2

Right of Employee	**Droit du fonctionnaire**
208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	208 (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(*a*) by the interpretation or application, in respect of the employee, of	*a*) par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award; or	(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	*b*) par suite de tout fait portant atteinte à ses conditions d'emploi.
Limitation	**Réserve**
(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*.	(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la *Loi canadienne sur les droits de la personne*.

Limitation

(3) Despite subsection (2), an employee may not present an individual grievance in respect of the right to equal pay for work of equal value.

Réserve

(3) Par dérogation au paragraphe (2), le fonctionnaire ne peut présenter de grief individuel relativement au droit à la parité salariale pour l'exécution de fonctions équivalentes.

Limitation

(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

Réserve

(4) Le fonctionnaire ne peut présenter de grief individuel portant sur l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

Limitation

(5) An employee who, in respect of any matter, avails himself or herself of a complaint procedure established by a policy of the employer may not present an individual grievance in respect of that matter if the policy expressly provides that an employee who avails himself or herself of the complaint procedure is precluded from presenting an individual grievance under this Act.

Réserve

(5) Le fonctionnaire qui choisit, pour une question donnée, de se prévaloir de la procédure de plainte instituée par une ligne directrice de l'employeur ne peut présenter de grief individuel à l'égard de cette question sous le régime de la présente loi si la ligne directrice prévoit expressément cette impossibilité.

(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

(6) Le fonctionnaire ne peut présenter de grief individuel portant sur une mesure prise en vertu d'une instruction, d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Order to be conclusive proof

(7) For the purposes of subsection (6), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, a direction or a regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Force probante absolue du décret

(7) Pour l'application du paragraphe (6), tout décret du gouverneur en conseil constitue une preuve concluante de ce qui y est énoncé au sujet des instructions, directives ou règlements établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Reference to adjudication

209 (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

Renvoi d'un grief à l'arbitrage

209 (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

(*c*) in the case of an employee in the core public administration,

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)*d*) de la *Loi sur la gestion des finances publiques* pour rendement insuffisant, soit de l'alinéa 12(1)*e*) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) deployment under the *Public*

(ii) la mutation sous le régime de la

Service Employment Act without the employee's consent where consent is required; or

(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;

d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

Application of paragraph (1)(*a*)

(2) Before referring an individual grievance related to matters referred to in paragraph (1)(*a*), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

Application de l'alinéa (1)*a*)

(2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)*a*), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.

Designation

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(*d*).

Désignation

(3) Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)*d*), tout organisme distinct.

[…]

[…]

Exception

211 Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to

(*a*) any termination of employment under the *Public Service Employment Act*; or

(*b*) any deployment under the *Public Service Employment Act*, other than the deployment of the employee who presented the grievance.

Exclusion

211 L'article 209 n'a pas pour effet de permettre le renvoi à l'arbitrage d'un grief individuel portant sur :

a) soit tout licenciement prévu sous le régime de la *Loi sur l'emploi dans la fonction publique*;

b) soit toute mutation effectuée sous le régime de cette loi, sauf celle du fonctionnaire qui a présenté le grief.

(2) *Financial Administration Act*, R.S.C. 1985, c. F-11

Responsibilities of Treasury Board	**Attributions du Conseil du Trésor**
7 (1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to	7 (1) Le Conseil du Trésor peut agir au nom du Conseil privé de la Reine pour le Canada à l'égard des questions suivantes :
[…]	[…]
(*e*) human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it;	*e*) la gestion des ressources humaines de l'administration publique fédérale, notamment la détermination des conditions d'emploi;
[…]	[…]
11 (1) The following definitions apply in this section and sections 11.1 to 13.	11 (1) Les définitions qui suivent s'appliquent au présent article et aux articles 11.1 à 13.
	[…]
core public administration means the departments named in Schedule I and the other portions of the federal public administration named in Schedule IV. (*administration publique centrale*).	***administration publique centrale*** Les ministères figurant à l'annexe I et les autres secteurs de l'administration publique fédérale figurant à l'annexe IV. (*core public administration*).
[…]	[…]
Powers of the Treasury Board	**Pouvoirs du Conseil du Trésor**
11.1 (1) In the exercise of its human resources management responsibilities under paragraph 7(1)(*e*), the Treasury Board may	11.1 (1) Le Conseil du Trésor peut, dans l'exercice des attributions en matière de gestion des ressources humaines que lui confère l'alinéa 7(1)*e*) :
(*a*) determine the human resources requirements of the public service and provide for the allocation and effective utilization of human resources in the public service;	*a*) déterminer les effectifs nécessaires à la fonction publique et assurer leur répartition et leur bonne utilisation;

(*b*) provide for the classification of positions and persons employed in the public service;

b) pourvoir à la classification des postes et des personnes employées dans la fonction publique;

[…]

[…]

(*f*) establish policies or issue directives respecting the exercise of the powers granted by this Act to deputy heads in the core public administration and the reporting by those deputy heads in respect of the exercise of those powers;

f) élaborer des lignes directrices ou des directives sur l'exercice des pouvoirs conférés par la présente loi aux administrateurs généraux de l'administration publique centrale, ainsi que les rapports que ceux-ci doivent préparer sur l'exercice de ces pouvoirs;

(*g*) establish policies or issue directives respecting

g) élaborer des lignes directrices ou des directives :

(i) the manner in which deputy heads in the core public administration may deal with grievances under the *Public Service Labour Relations Act* to which they are a party, and the manner in which they may deal with them if the grievances are referred to adjudication under subsection 209(1) of that Act, and

(i) d'une part, sur la façon dont les administrateurs généraux de l'administration publique centrale peuvent s'occuper des griefs présentés sous le régime de la *Loi sur les relations de travail dans la fonction publique* auxquels ils sont parties et plus particulièrement de ceux de ces griefs qui sont renvoyés à l'arbitrage en vertu du paragraphe 209(1) de cette loi,

(ii) the reporting by those deputy heads in respect of those grievances;

(ii) d'autre part, sur les rapports que ces administrateurs doivent préparer sur ces griefs;

[…]

[…]

(*j*) provide for any other matters, including terms and conditions of employment not otherwise specifically provided for in this section, that it considers necessary for effective human resources management in the public service.

j) régir toute autre question, notamment les conditions de travail non prévues de façon expresse par le présent article, dans la mesure où il l'estime nécessaire à la bonne gestion des ressources humaines de la fonction publique.

12(1) Subject to paragraphs 11.1(1)(*f*) and (*g*), every deputy head in the core public administration may, with

12(1) Sous réserve des alinéas 11.1(1)*f*) et *g*), chaque administrateur général peut, à l'égard

respect to the portion for which he or she is deputy head,

du secteur de l’administration publique centrale dont il est responsable :

[…]

[…]

(*d*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory;

d) prévoir le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur de toute personne employée dans la fonction publique dans les cas où il est d’avis que son rendement est insuffisant;

(*e*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct; and

e) prévoir, pour des raisons autres qu’un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur d’une personne employée dans la fonction publique;

[…]

[…]

12(3) Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(*c*), (*d*) or (*e*) or (2)(*c*) or (*d*) may only be for cause.

12(3) Les mesures disciplinaires, le licenciement ou la rétrogradation découlant de l’application des alinéas (1)*c*), *d*) ou *e*) ou (2)*c*) ou *d*) doivent être motivés.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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