Federal Court  Cour fédérale

Date: 20150512

Docket: T-1392-13

Citation: 2015 FC 617

Toronto, Ontario, May 12, 2015

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

VALERIE BERGEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of an adjudicator appointed under the provisions of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (*PSLRA*) dated July 19, 2013 wherein the adjudication of the disposition of certain grievances filed by the Applicant (grievor) against her employer, the Royal Canadian Mounted Police (RCMP), were dismissed, and the file respecting two others was closed for lack of jurisdiction. The Applicant seeks to have this decision quashed and referred back to another adjudicator for a new determination together with such other relief as this Court may deem fit.

[2] According to the adjudicator's decision, the Applicant was first employed as a public servant with the Federal Government in 1993 at which time she worked in the Department of National Defence in British Columbia. She was transferred in 1996 to Prince George, B.C., to work with the Traffic Unit of the RCMP there. Early in 2001, she was relocated to another building in Prince George to work with the highway patrol section of the RCMP. She was a civilian RCMP member and employed by the Treasury Board and, as such, her employment came under the purview of a Collective Agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC) for the Program and Administrative Services Group, with an expiry date of June 20, 2007. The Applicant challenges the precise nomenclature with respect to the positions that she held; however that precision is not in the record nor is it material to this judicial review.

[3] As of October 2001, the Applicant's job description included compiling, reviewing and maintaining files and record systems; checking, scoring and concluding files on the Computer Integrated Information Dispatch System; downloading files to the Central Police Information Centre system (CPIC); and making required additions and modifications and concluding files on the CPIC. Witnesses described the CPIC as the RCMP's "Holy Grail" and stressed that accuracy and timeliness of entries were crucial: "*Arrests and releases were based on the information in the Central Police Information Centre system*" (*Bergey v Treasury Board (Royal Canadian Mounted Police)*, 2013 PSLRB 80 at para 167 (*Bergey*)). The Applicant testified "*that it was very important to make accurate entries in the Central Police Information Centre system*" (*Bergey, supra*, at para 168).

[4] The Applicant held several positions with the Union of Solicitor General Employees (USGE), the latter a component of PSAC, and served as a local president from about May 1999 until her resignation from that role on December 13, 2003.

[5] As a condition of her continued employment, the Applicant was required to maintain an RCMP reliability status, the minimum security clearance. This status was renewed annually and updated every five years; further reviews could be conducted at any time. A reliability status could be withdrawn or reinstated as the case may be.

[6] On November 4, 2004, the Applicant was served with a letter suspending her for ten days. Following that, the Applicant was instructed to undergo a fitness-to-work medical examination which was conducted in December 2004. The Applicant never returned to the workplace after November 2004. Her reliability status was revoked in July 27, 2005, the effect of which was that she would be unable to secure employment in many areas of the RCMP or the public service. The Applicant's employment with the RCMP was terminated for cause on January 3, 2006 due to the loss of her reliability status.

[7] The adjudicator, at paragraph 5 of her decision, listed a number of decisions made by the Applicant's employer during the 2004 – 2006 period which were at issue:

- A 10-day suspension without pay imposed on the grievor (Applicant) on November 4, 2004 by Superintendent M.J. (Mike) Morris;
- The suspension of the grievor's RCMP enhanced reliability status (the RCMP reliability status), imposed by Chief Superintendent Robert Lanthier on March 22,

2005, pending a further security review to determine if her RCMP reliability status should remain valid or would be revoked for cause;

- An indefinite continuation of the grievor's employment suspension without pay, imposed by C/Supt. Barry Clark effective March 22, 2005, pending:
  - The revocation of the grievor's RCMP reliability status effective July 22, 2005 by letter from C/Supt. Lanthier;
  - A continuation of the indefinite suspension imposed on August 4, 2005 by C/Supt. Clark until a decision on the grievor's employment with the RCMP could be made, because her RCMP reliability status had been revoked;
  - The termination of the grievor's employment for cause on January 3, 2006 by letter from RCMP Commissioner Giuliano Zaccardelli due to the loss of her RCMP reliability status.

[8] I provide the following Index, by paragraph number, to these Reasons:

I. THE GRIEVANCES

[9] The Applicant filed several grievances with the Public Service Labour Relations Board, eight of which were ultimately referred to the adjudicator. All of the grievances had been denied in the course of the employer's grievance process. This determination was set out in a letter from the RCMP Commissioner dated December 8, 2005.

[10] One of the eight grievances was withdrawn at the hearing before the adjudicator. The seven remaining grievances were set out at paragraph 9 of the adjudicator's decision as follows:

> *a) The first grievance (PSLRB File No. 166-02-37094; Exhibit 110) challenges the employer's decision of November 4, 2004 to impose a 10-day suspension without pay on the grievor. The grievance was dated December 12, 2004 but was not referred to the Board until February 28, 2006. In it, the grievor alleges that the discipline is unjust and unwarranted. The grievance was filed using Board Form 14*

under the PSSRA. She requests, among other things, written apologies for the suspension and for a false accusation of a security breach; the rescinding of the suspension letter and her reinstatement with reimbursement of all pay and benefits lost; financial compensation for pain and suffering, stress and anxiety, humiliation, defamation, and slander; a compassionate transfer to a mutually acceptable location; a guarantee from the employer of job security for the next 20 years regardless of any reorganization in the RCMP; and the permanent removal from the workplace of her immediate supervisor, Staff Sergeant (S/Sgt.) Dave Beach, and North District Office Superintendent Morris.

b) *The second grievance (PSLRB File No. 566-02-1298; Exhibit 138; it replaced PSLRB File No. 166-02-37093) disputes the employer's decision of March 22, 2005 to suspend the grievor's RCMP reliability status pending a further security review. In it, she claims that the decision was disguised disciplinary action. She also disputes the employer's decision of March 24, 2005 to suspend her without pay indefinitely, effective March 22, 2005, because her RCMP reliability status was suspended, which meant that she no longer met a condition of her employment. The grievance was filed on April 15, 2005. In it, the grievor requests that the suspension letter be rescinded, that her RCMP reliability status be reinstated, and that she be reinstated into her position with the full reimbursement of pay and benefits. She also requests detailed general and exemplary damages for, among other things, negligence, breach of contract, pain and suffering, defamation, wilful and reckless behaviour, being subjected to someone acting in an insulting manner under disguised discipline, and the failure of a duty of care. She also requested interest on all damages.*

c) *The third grievance (PSLRB File No. 566-02-175; Exhibit 140) challenges the employer's decision of July 27, 2005 to revoke the grievor's RCMP reliability status. The decision was conveyed to her by letter from C/Supt. Lanthier following a security review. She alleges that the revocation decision was a disguised disciplinary sanction rendered without just cause and in bad faith. The grievance was dated September 27, 2005 and was filed on February 28, 2006. In it, she requests a long list of corrective action, which includes the reinstatement of her RCMP reliability status; her reinstatement to her position with retroactive pay and benefits; the removal of numerous documents from her personnel file; compensation in the millions of dollars*

for hurt feelings, pain and suffering, stress, embarrassment and humiliation, slander, defamation, and assassination of character; general damages in the millions, tax free, for the employer's negligence, its wilful and reckless behaviour, and for acting in an insulting manner to her; and millions of dollars, tax free, for breach of contract.

d) *The fourth grievance (PSLRB File No. 566-02-174; Exhibit 139) challenges the employer's decision of August 4, 2005, conveyed to the grievor by letter of that date from C/Supt. Clark, that she no longer met the conditions of her employment and that she was unable to perform the duties of her position at the North District Office because her RCMP reliability status was revoked on July 2729?, 2005. She also challenges the employer's decision to continue her suspension without pay until she was further advised of her employment status. The grievor alleges that the employer's decisions were disguised discipline, rendered without cause and in bad faith. The grievance is dated September 27, 2005 but was not filed with the Board until February 28, 2006. In it, she lists detailed requested corrective action, including that her RRSRCMP reliability status be reinstated, that she be deemed as meeting a condition of employment, that she be reinstated to her position and that she receive financial relief similar to that requested for the third grievance.*

e) *The fifth and sixth grievances (PSLRB File Nos. 566-02-173 and 176) were introduced in an abbreviated form as Exhibit 209, but complete copies are in the Board's file. The grievor signed both of them on September 27, 2005. They were filed with the Board on February 28, 2006. They are identically worded with respect to both the grievance description and the corrective action sought. They challenge the employer's action of not allowing union representation or access to union representation on the serving of the RCMP reliability status revocation and accompanying letter and documentation on the grievor. No date is specified for the challenged employer's action. I note on the evidence that the employer served a suspension of RCMP reliability status letter on the grievor on March 22, 2005 and an RCMP reliability status revocation letter on her on July 22, 2005. The grievor claimed that the employer's decisions and actions were disguised discipline rendered without just cause and in bad faith and that they were not warranted. She detailed a lengthy list of corrective action and damages sought for the employer's failure to allow union representation.*

> *f) In her seventh grievance (PSLRB File No. 566-02-395; Exhibit 144), the grievor disputed the employer's decision of January 3, 2006 to terminate her employment, conveyed by a letter from Commr. Zaccardelli, pursuant to paragraph 12(1)(e) of the Financial Administration Act, R.S.C. 1985, c. F-11 (FAA). The grievor alleged that the termination was disguised discipline without just cause, that it was done in bad faith and that it was unwarranted. The grievance was filed January 24, 2006. She requested corrective action that included reinstating her RCMP reliability status, reinstating her to her position with all pay and benefits, and reimbursing her for sick leave and annual leave, and compensatory and other damages amounting to $50 million tax-free forever, additional damages for non-pecuniary losses, including 40 years' salary, tax free, and tax-free interest on all damages.*

[11] The parties did not dispute that the fifth and sixth grievances were duplicates, and thus they were considered together by the adjudicator.

[12] The hearing of these grievances was described by the adjudicator as long, arduous and complex, lasting 38 days spanning the period from September 2008 to September 2010. Written submissions were subsequently filed by the parties in September, October and November of 2010.

[13] On July 19, 2013, some two and a half years following the provision of written submissions by the parties, the adjudicator delivered her 247 page decision reviewing in great detail the evidence and issues and considering the jurisprudence. The decision ended with the following Order:

> *[1006] The grievance in PSLRB File No. 166-02-37094 is dismissed.*

> *[1007] The objection to an adjudicator's jurisdiction to hear the grievances in PSLRB File Nos. 566-02-174, 175 and 1298 is upheld and I order those files closed.*
>
> *[1008] The grievances in PSLRB File Nos. 566-02-173 and 176 are dismissed.*
>
> *[1009] The grievance in PSLRB File No. 566-02-395 is dismissed.*

II. THE EVIDENCE BEFORE THE ADJUDICATOR

[14] At the hearing before the adjudicator, the employer called 11 witnesses and submitted evidence of two other persons by affidavit, one of whom was cross-examined. The Applicant was the only witness to give evidence on her behalf. Hundreds of pages of documents were admitted into evidence.

[15] At the hearing, the Applicant was represented by Counsel. In the proceedings before this Court, the Applicant was self-represented.

III. HEARING AND WITNESSES

[16] The adjudicator heard evidence from the following witnesses called on the employer's behalf (*Bergey*, *supra*, at para 28):

a) S/Sgt. Beach was the non-commissioned officer in charge of the Fraser/Fort George Traffic Services Unit, located in the North District Office, from March 10, 2003 to March 17, 2005 and was the grievor's direct supervisor. In March 2004, as a result of his complaint, an investigator was appointed to conduct a review to determine if she breached the RCMP's security policy when she allegedly removed documents from office files. As her direct supervisor for part of the period under review, he

provided performance assessments and workplace guidance and directions to her, some of which she challenged;

b) Supt. Morris: From 1998 until his retirement in December 2004 after almost 32 years of service, he was the Superintendent and District Officer of "E" Division's North District, in charge of the northern part of B.C. His office was located in the North District Office building in Prince George. His responsibilities included more than 1000 employees, 35 detachments where staff were posted, and municipal, court and provincial contract detachments, as well as numerous First Nations communities. He imposed the 10-day disciplinary suspension on the grievor on November 4, 2004. On November 29, 2004, he wrote to "E" Division's North District Departmental Security Section in Vancouver, requesting a security review of the grievor. While he was retired at the time of the hearing, he will be referred to as Supt. Morris;

c) C/Supt. Clark was Commander of "E" Division's North District at the time of the hearing. He was appointed to the position in mid-January 2005 after Supt. Morris retired. C/Supt. Clark had been in "E" Division's North District since June 1999. The operational units reporting to him as an inspector included the Traffic Services Unit in the North District Office in which the grievor worked. Between April 2004 and January 2005, he was an Inspector and the Assistant District Officer replacing Insp. Bob Wheadon, who had been responsible for the non-operational (personnel) side of operations. In October 2004, he, as the Assistant District Officer, requested an administrative review of an alleged departmental security complaint form that the grievor had filed against her direct supervisor, S/Sgt. Beach. In November 2004, he referred the results of an investigation of an alleged security breach by the grievor to the Pacific Region Departmental Security Section. As C/Supt., he sent the grievor the notices of indefinite suspension without pay effective March 22, 2005, after her RCMP reliability status was suspended, and on August 4, 2005, after her RCMP reliability status was revoked for cause. Mr. Clark will be referred to as Insp. Clark regarding the actions he took up to January 2005 when Supt. Morris was in charge of "E" Division's North District and as C/Supt. Clark regarding his testimony at the hearing and the decisions he took, which included indefinitely suspending the

grievor's employment, after he became the Commander of "E" Division's North District in January 2005;

d) Bonnie Bailey was a public-servant employee. She belonged to the same USGE as the grievor. She was "E" Division's North District Administration Manager, located at the North District Office. As such, she was part of Supt. Morris's management team. She was classified AS-04 in 2003. She reported to Supt. Morris. After he retired, she reported to C/Supt. Clark. She was also a co-presenter with the grievor in a workshop on training on sexual harassment awareness in the workplace. She successfully brought a harassment grievance against the grievor in December 2003. As a result, the grievor received a three-day suspension in September 2004. She was the subject of a harassment grievance filed by the grievor in February 2004. After an investigation, that grievance was held unfounded;

e) At the relevant time, Corporal Tom Adair was Harassment and Human Rights Coordinator and Advisor for "E" Division's North District, based in Vancouver. He served in that position for approximately seven years before being promoted in 2009 to the position of Program Manager for the RCMP's National Respectful Workplace Programs. Starting in October 2004, at the request of Supt. Morris, he initiated a number of actions to investigate the grievor's allegation that harassment was rampant in "E" Division's North District, and that Supt. Morris did not take workplace harassment seriously. He appointed a team of two investigators from outside the North District Office to review the grievor's harassment allegations against two co-workers;

f) Debbie Stangrecki was a public servant with 30 years' service with the RCMP. She worked with the grievor at one time in the Prince George Detachment Traffic Services Unit. She was the vice-President and chief shop steward of USGE in Prince George from approximately 2001 to 2003. The grievor was the president at that time, and the grievor filed a number of her own harassment complaints and grievances. Ms. Stangrecki became the president sometime after the grievor resigned in December 2003. The grievor later filed a harassment complaint against her.

g) Staff Sergeant (S/Sgt.) Walter Gordon Flewelling was a corporal in "E" Division's North District Traffic Services Unit in 2004. He served the grievor with an amended

10-day suspension letter on November 8, 2004, and reported to Supt. Morris on his discussion with her at the November 8 meeting about an October 29, 2004 printer incident in the North District Office. He is referred to as Corporal Flewelling in this decision;

h) S/Sgt. Keith Hildebrand was the non-commissioned officer in charge of the Quesnel Detachment, which is under the North District Office's jurisdiction. He retired in April 2008 after 26 years of service with the RCMP, which he spent primarily in positions in Vancouver and the Lower Mainland. He investigated an alleged security policy breach by the grievor after S/Sgt. Beach reported that she had removed documents from North District Office operational files. His report is dated October 13, 2004;

i) Sgt. D.E. Lennox was the non-commissioned officer in charge of "E" Division's North District Border Integrity Program. He was with the RCMP until he retired in April 2005 after 34 years of service. His office was in the North District Office, but he did not report to Supt. Morris. In 2004, he conducted an administrative review of an alleged security breach that the grievor initiated against her direct supervisor, S/Sgt. Beach. His report is dated December 2, 2004.

j) In 2005, C/Supt. Lanthier was Director General, Departmental Security Branch, RCMP, and his office was in Ottawa. As the RCMP's Departmental Security Officer, he had overall responsibility for departmental security for the four RCMP regions across Canada. He made the decisions first in March 2005 to suspend and later in July 2005, to revoke the grievor's RCMP reliability status for cause. He retired in 2007. At the time of the hearing, he was Director, Canadian Nuclear Safety Commission, Nuclear Security Division;

k) R.A. (Bob) Briske was an RCMP member for over 37 years when he retired in 1999. After that, he did contract work for the RCMP. In 2005, he worked as a risk management analyst with the Pacific Region Departmental Security Section. His office was in Vancouver, and his role included reviewing files involving possible security breaches by any RCMP employee within the Pacific Region. It also included reviewing individuals' suitability to be issued or to retain an RCMP reliability status. As the analyst responding to Supt. Morris's memorandum of

November 29, 2004 to the Pacific Region Departmental Security Section, he conducted the review and prepared the security report that was sent to the Departmental Security Officer in Ottawa, C/Supt. Lanthier, on February 12, 2005 recommending revoking the grievor's RCMP reliability status.

l) Mr. C.A. (Art) O'Donnell was the manager of the Personnel Security Section for the Departmental Security Branch. He was based in Ottawa, and he reported to C/Supt. Lanthier. His managerial responsibilities included national security investigations involving alleged breaches of security and issuing RCMP reliability status and security clearances. He supervised the interaction between the four RCMP regional offices and the Departmental Security Branch in Ottawa. He had a supervisory and advisory role with the security review done by Rene Bourgeois, an analyst in the Personnel Security Section, in C/Supt. Lanthier's office before C/Supt. Lanthier made the decision to revoke the grievor's RCMP reliability status, which she challenged in her grievances.

[17] The adjudicator received affidavit evidence from Dana Bouchard, a public servant working for the RCMP at the Quesnel Detachment that received papers via fax from the Applicant.

[18] The Applicant gave evidence on her own behalf; she did not call any other witness.

IV. THE ISSUES

[19] The Applicant has raised the following issues in her Memorandum**:**

i. Does the Adjudicator's decision reflect a reviewable error?

ii. Standard of review is reasonableness. Was the adjudicator's decision reasonable regarding the 10 day

suspension, temporary revocation, revocation to terminating employment and other grievances?

iii. *Is this decision reviewable with dividing questions of reviewable on a correctness standard or reviewable on a reasonableness standard?*

iv. *Did the adjudicator err in her factual findings with respect to real and substantial connections between the rcmp and myself?*

v. *Did the adjudicator err in law and/or in facts on the face of the record?*

vi. *Did the adjudicator err in law and/or facts neglecting to apply the test of bad faith and/or disguised discipline correctly in this decision?*

vii. *Did the adjudicator err in law and ignore the evidence in a capricious and perverse manner?*

viii. *Did the adjudicator fail to consider evidence that she should have, and/or consider evidence which she should not have?*

ix. *Was there a misapprehension of critical evidence because of a standard of unfairness or bias on the part of the adjudicator?*

x. *Did the adjudicator apply the correct test of standard of fairness and proper standard of review?*

xi. *Was this a rational or irrational determination?*

xii. Did the adjudicator improperly do her duty or fail to do her job, to deal with this complaint or refuse to exercise her jurisdiction with this complaint?

xiii. Did the adjudicator apply the correct test for determining her powers and/or jurisdiction over the grievances?

xiv. Did the adjudicator have jurisdiction of decision of revocation and termination?

[20] The Respondent has crystallized these issues to a few in its Memorandum:

19. What is the standard of review?

20. Was the adjudicator's decision reasonable?

21. There is an additional issue raised by the Appendix attached to the Applicant's factum, namely, whether it should be struck and/or disregarded.

[21] I will first deal with issue of the Appendix to the Applicant's Memorandum.

V. THE APPLICANT'S MEMORANDUM

[22] The Applicant's Memorandum filed with this Court comprised of a main body of 34 pages attached to which was an Appendix 24 pages long. The Respondent takes no issue with respect to the main body which exceeds the 30 page limit set by Rule 70(4) of the *Federal Courts Rules*, SOR/98-106 by four pages. The Respondent takes issue with respect to the Appendix.

[23] In the course of filing documents prior to the hearing in this Court, the Applicant sought to file a lengthy affidavit sworn by herself in which she took issue with many of the factual findings, or alleged omissions, by the adjudicator. Prothonotary Tabib, in her Order dated July 29, 2014, disallowed the filing of this affidavit. No appeal was later taken from that Order.

[24] The Appendix to the Applicant's Memorandum which is, as admitted by the Applicant at the hearing before me, essentially a re-casting of the affidavit that was disallowed by Prothonotary Tabib's Order. The Appendix includes, in bullet form, challenges to the findings and alleged omissions in the adjudicator's decision.

[25] This situation is similar to that dealt with by Létourneau JA in *Remo Imports Ltd. v Jaguar Cars Ltd.*, 2006 FCA 416, 358 NR 149, where the Court of Appeal made an Order that certain portions of Memoranda be struck and shorter Memoranda be filed. This Order was essentially ignored by the parties who attempted to file supplementary material. The Court ordered that this material be struck from the record. Létourneau JA wrote at paragraphs 1 to 12:

> *1 He who plays with fire ends up burning himself. In this case, both parties have been playing with fire and shall live with the consequences of it.*
>
> *2 The appellant and the respondents have been engaged in a war as to the contents of their respective Memorandum of Fact and Law (memorandum). The war has been conducted at the expenses of the Court and scarce judicial resources. Both parties have failed to live up to the letter and spirit of the Federal Courts Rules.*
>
> *3 The whole saga started with an Order of Sexton J.A. dismissing the appellant's request to file a memorandum in excess of 30 pages. The Order was issued on August 9, 2006.*
>
> *4 On September 5, 2006, Décary J.A. noted that the appellant, in adding "end notes" to its memorandum, was attempting to circumvent the Order of Sexton J.A. He ordered that*

the memorandum be refused for filing and be sent back to the appellant.

5 On November 9, 2006, Noël J.A. observed in an Order that he issued that "both the appellant and the respondent, by incorporating into their memoranda substantial arguments found elsewhere in the record, are circumventing the prior order of this Court limiting the length of their memorandum to 30 pages". He went on to add:

> *This is the second time that compliance with that order is referred to the Court for adjudication.*

6 Noël J.A.'s Order directed the parties to act as follows:

> *The Registry is directed to send the Memoranda back to the parties. The appellant is given a period of fifteen days to re-file its Memorandum without incorporating by reference the 49 pages Amended Notice of Appeal.*
>
> *The respondents will re-file their Memorandum within ten days from the date of service of the appellant's Memorandum without the inclusion in Appendix C of excerpts from their Trial Memorandum and without the incorporation of Appendix D.*
>
> *The material which the parties wish to incorporate into their memorandum is part of the record and can be referred to in the course of the hearing. However, the purpose of the memorandum is to set out a concise statement of the facts and the submissions (Rule 70).*
>
> *The parties are asked to abide by the letter and the spirit of the prior order of this Court and address the issues on appeal within the 30 page limit.*

7 The respondents have, on December 4, 2006, served and filed a Supplemental Appeal Book that basically contains their memorandum at trial. The appellant who still does not have clean hands, as we shall see, objects to such filing.

8 After reviewing the parties' arguments and this Court's previous Orders, I am satisfied that the respondents are attempting to achieve something that was not authorized by the Orders of Noël J.A., Nadon J.A., Sexton J.A. and Décary J.A. Therefore, the

> *respondents' Supplemental Appeal Book will be struck from the record and sent back to them.*
>
> *9 In addition, Appendix C to the respondents' memorandum will be deleted. If the respondents feel that the references found therein will be useful to the Court, they can incorporate them into their memorandum with the exclusion of any reference to their Supplemental Appeal Book and the material contained therein.*
>
> *10 This brings me to the two memoranda submitted by the appellant and the respondents. Both memoranda are defective and in violation of Rules 65 and 70 of the Federal Courts Rules. Systematically, the pages contain more than 30 lines. The top and bottom margins are not respected. In the end, the memoranda contain more than 30 pages and are in violation of Sexton J.A.' Order: see Merchant v. Her Majesty the Queen, [2001] F.C.J. No. 314, 2001 FCA 19, at paragraphs 10 and 11.*
>
> *11 So far, both parties have been abusing the process of the Court with impunity. The buck stops here.*
>
> *12 The memoranda of both the appellant and the respondents will be struck from the record and returned to them. They both shall serve and file a new memorandum by January 17, 2007 that strictly complies with Rules 65 and 70 of the Federal Courts Rules. Failure by any party to abide by this Court's Order will lead to sanctions ranging from a deemed waiver by the defaulting party of its right to file a memorandum, dismissal of the proceeding without further notice and the imposition of costs to counsel of record, to the issuance of a show cause order as to why the defaulting counsel of record should not be found guilty of contempt.*

[26] I view the Applicant's Appendix in the same way. It is an attempt to circumvent the Order of Prothonotary Tabib. The Applicant conceded at the hearing before me that, given the Respondent's objection, the Appendix could be struck from the record. I order that Appendix be struck from the record.

VI. STANDARD OF REVIEW

[27] The reasonableness standard of review applies to the adjudicator's decision on the merits of the grievances, including the jurisdiction question pursuant to section 209(1) of the *PSLRA*. The correctness standard applies to issues of procedural fairness and bias (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 43).

A. *REASONABLENESS*

(1) Disciplinary Decisions

[28] I agree with the Respondent's citation of Martineau J's decision in *King v Canada (Attorney General)*, 2012 FC 488 at para 100, 409 FTR 216, for the proposition that the jurisprudence established that the reasonableness standard applies to decisions of an adjudicator with respect to disciplinary matters such as the 10-day suspension in this case:

> *100 This is a discipline case where the grievor (the applicant) counterattacks by alleging that he was unjustly disciplined and discriminated by the employer because he was acting as a union representative. The jurisprudence of this Court is clear that an adjudicator's interpretation and application of the collective agreement, as well as the adjudicator's regard for the facts and the material before him, should be subject to the reasonableness standard [sources omitted]. Here, the legal issue of misconduct is of mixed fact and law, and the interpretation of section 194 of the PSLRA cannot be easily separated from the facts.*

(2) Non-Disciplinary Decisions

[29] I also agree with the Respondent that this Court already determined the degree of deference to afford to the PSLRB regarding the interpretation of section 209(1)(b) of the *PSLRA*.

In *Chamberlain v Canada (Attorney General)*, 2012 FC 1027, 417 FTR 225, Gleason J held that the reasonableness standard applies when an adjudicator appointed to the PSLRB interprets and applies his or her home statute, particularly paragraph 209(1)(b) of the *PSLRA*, in order to determine whether the adjudicator has jurisdiction relating to grievances that arise from employer decisions which the Applicant alleges are disciplinary actions resulting in termination, demotion, suspension or financial penalty, such being the issue in this case.

[30] Finally, I agree with the Respondent that in accordance with *Chamberlain*, the reasonableness standard of review applies to the review of the adjudicator's review of the reliability status decision but through a slightly different analysis.

[31] In addition to *Chamberlain*, the Respondent cites two cases of this Court in order to state that the reliability status decision is a discretionary decision and thus attracts the reasonableness standard.

[32] The first is *Myers v Canada (Attorney General)*, 2007 FC 947, 319 FTR 35, wherein Kelen J wrote at paragraph 13:

> *13 With respect to the expertise of the decision-maker, it is clear that a valid reliability status is a term of employment for positions within the federal public service. The decision to revoke an "enhanced reliability status" is therefore one that concerns human resources management in the federal public administration. Paragraph 30(1)(d) of the CRA Act gives the CRA authority over all matters relating to "human resources management, including the determination of the terms and conditions of employment of persons employed by the Agency." As such, in relation to matters of whether an individual is "reliable" in the eyes of the CRA, the decision-maker has special expertise and deference should be afforded.*

[33] The second is *Koulatchenko v Financial Transactions and Reports Analysis Centre of Canada*, 2014 FC 206, wherein Kane J wrote at paragraph 30: *"Decisions regarding the security clearance and reliability status are discretionary in nature and will be reviewed on the reasonableness standard."*

[34] Those cases could be factually distinguishable from the present case. In each of those cases, the Court reviewed the actual decision maker's decision to revoke a security clearance or reliability status at the first instance. It did not involve a review of a PSLRB adjudicator's review of the revocation decisions.

[35] *Myers* dealt with the Court's review of the CRA, while in *Koulatchenko*, Kane J reviewed the Director of Financial Transactions and Reports Analysis Centre of Canada's decision to revoke, amongst others, the Applicant's secret security clearance and reliability status. I note Rennie J's recent decision in *Meyler v Canada (Attorney General)*, 2015 FC 357, where he reviewed the Minister of Transport's revocation of that applicant's Transportation Security Clearance at Pearson International Airport. Since the Court reviewed the actual decision maker that revoked the reliability status or security clearance in those cases, and not that of the PSLRB adjudicator's assessment of those decisions, much of the analysis turned on whether the decision maker accorded the applicant in those cases a requisite amount of procedural fairness.

[36] However, the fact that the Court reviewed questions of procedural fairness related to the revocation decisions in those cases does not determine the standard of review applicable in this case.

[37] Here, the Court is not conducting an appeal nor a *de novo* hearing, nor a judicial review of C/Supt. Lanthier's reliability status decision. Instead, the Court is judicially reviewing the adjudicator's decision to dismiss the Applicant's grievances related to the reliability status decision after concluding she did not possess jurisdiction under section 209(1)(b) of the *PSLRA* to hear those grievances. The adjudicator reached this conclusion by interpreting that provision of her home statute in finding that C/Supt. Lanthier's reliability status decision did not constitute *"a disciplinary action resulting in termination, demotion, suspension or financial penalty."* In assessing the nature of the reliability status decision, the adjudicator recognized she was not conducting a judicial review by assessing the reasonableness of that decision, but rather the jurisprudence required her to look past C/Supt. Lanthier's stated intention for making the reliability status decision, and determine if, in reality, that decision was a disguised disciplinary decision or tainted by bad faith or breaches of procedural fairness. For the reasons provided below, I find that the adjudicator reasonably concluded that C/Supt. Lanthier made his decision based on legitimate security concerns, and not based on a bad faith attempt to discipline the Applicant. Furthermore, the procedural deficiencies related to the process in making the reliability status decision did not taint the entire decision. Finally, the 38-day *de novo* adjudication cured those defects in any event.

[38] Therefore, the Court's review related to the reliability status decision is two-fold:

1) On the reasonableness standard: did the adjudicator reasonably determine that, pursuant to section 209(1)(b), she lacked jurisdiction over that decision after characterizing the decision as administrative rather than a disguised disciplinary decision or tainted by bad faith or procedural fairness issues; and

2) On a correctness standard: did the adjudicator meet her duty of procedural fairness towards this Applicant in conducting the 38-day *de novo* adjudication of those grievances?

[39] Unlike *Myers*, *Koulatchenko* and *Meyler*, the Court here is not asking whether the employer met its duty of procedural fairness toward the Applicant, rather the Court is reviewing the adjudicator's *de novo* assessment of the employer's decisions, and asking whether the adjudicator met her duty of procedural fairness and made a reasonable decision. As Urie JA, for the Federal Court of Appeal, held in *Tipple v Canada (Treasury Board)*, [1985] FCJ No 818, 2 ACWS (3d) 193 (CA):

> *Assuming that there was procedural unfairness in obtaining the statements taken from the Applicant by his superior (an assumption upon which we have considerable doubt) that unfairness was wholly cured by the hearing de novo before the Adjudicator at which the Applicant had full notice of the allegations against him and full opportunity to respond to them. In particular, it was no error of law for the Adjudicator to give such weight as he thought right to statements which were, in our view, properly admitted in evidence by him.*

[40] The Applicant might have argued that the adjudicator erred in law when the adjudicator recognized that the assessment of the several incidents went *"dangerously close to reviewing the reasonableness of the Department Security Officer's [C/Supt. Lanthier]*" reliability status decisions (*Bergey*, *supra*, at para 863). However, a review of the adjudicator's reasons leads to the conclusion that she conducted a *de novo* determination of the facts at issue, and did not accord deference to C/Supt. Lanthier's reasoning. Indeed, the adjudicator made her assessment based on the documents submitted into evidence and comparing the Respondent's witnesses' testimony against the Applicant's own testimony regarding the events, and found the

Respondent's witnesses credible while making an independent finding that the Applicant was not a credible witness on these issues. I will review these determinations on the standard of reasonableness.

B. *TEST FOR BIAS*

[41] In *Public Service Alliance of Canada v Canada (Attorney General)*, 2013 FC 918, 439 FTR 11, Gleason J held at paragraph 84: "*The test for bias is well-established and requires determining whether an informed person, viewing the matter realistically and practically and having thought it through, would conclude that it was more likely than not that the decision-maker would not decide fairly.*"

[42] I agree with the following propositions submitted by the Respondent:

1) A party must support a serious allegation of bias with evidence; he/she cannot make an allegation of bias on mere suspicion or conjecture; and
2) A party must raise the issue of a reasonable apprehension of bias at the earliest practicable opportunity, and a failure to do so will constitute a deemed waiver to the right to object.

[43] In *Arthur v Canada (Attorney General)*, 2001 FCA 223, 283 NR 346, Létourneau JA held for a unanimous Federal Court of Appeal at paragraphs 7 to 9:

> *7 At the hearing, counsel for the applicant submitted that the CRTC had acted with a bias against his client. The respondent's counsel quite rightly expressed surprise at this allegation and objected to this ground of review since it did not appear at all in*

> *the applicant's Memorandum of fact and law, the applicant having unmistakably complained therein that he had not been heard.*
>
> *8 It seems to me that the applicant's counsel has confused the audi alteram partem rule with the right of his client to a hearing by an impartial tribunal.* ***An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard*** *[emphasis added]. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case. That is why such evidence is admissible in derogation of the principle that an application for judicial review must bear on the matter as it came before the court or tribunal.*
>
> *9 In the case at bar, the applicant's counsel attempted unsuccessfully to support his client's allegation by referring us to certain documentary exhibits appearing on the record. I say unsuccessfully since these exhibits do not have the probative value that the applicant would like to have attributed to them. His interpretation of them is unduly subjective, and, on the objective reading that they must be given, has no foundation in the actual content of these exhibits.*
>
> [Emphasis added]

[44] In *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 983, 169 ACWS (3d) 173, Mactavish J held at paragraphs 17 and 20 to 21:

> *17* ***The jurisprudence regarding when objections based upon a reasonable apprehension of bias must be made is very clear. That is, an objection to the jurisdiction of an administrative tribunal based upon a reasonable apprehension of bias must be raised at the earliest practicable opportunity, failing which a party will be deemed to have waived its right to object*** *[emphasis added, sources omitted]*
>
> *...*
>
> *20 Not only did the applicants and their counsel not raise their bias objection at the time that the impugned statements were made,*

> *they continued on with the evidentiary portion of the hearing to its completion, without objection. Indeed, it was not until some two weeks later that the applicants first raised the issue of apprehended bias on the part of the presiding member.*
>
> *21 In such circumstances, it cannot be said that the applicants have raised their bias objection at the first reasonable opportunity. As such, they are deemed to have waived their right to object.*
>
> [Emphasis added]

[45] Finally, in *Palmer v Canada (Attorney General)*, 2013 FC 374, 430 FTR 304, Boivin J held at paragraphs 45 to 46:

> *45 The applicant also raised the issue of the adjudicator apparently stating on two (2) separate occasions that she did not see the need to hold the hearing. The Court notes that since there is no transcript of the hearing, nor the pre-hearing conference, there is no evidence in the record showing that the adjudicator made such remarks, nor the context in which such remarks would have been made. The test for reasonable apprehension of bias was set out by the Supreme Court of Canada in Committee for Justice and Liberty v Canada (National Energy Board), [1978] 1 SCR 369 at 394: "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude". The applicant has led no independent evidence to support this allegation of bias. As indicated by this Court in Armstrong v Canada (Attorney General), 2006 FC 505 at para 74, 291 FTR 49, "[t]he threshold for establishing a claim of reasonable apprehension of bias is high and substantial grounds are necessary to support such a claim". This high threshold could be displaced with cogent evidence, which has not been done here. The Court finds that there is no merit to the serious allegation that the adjudicator was biased or had pre-judged the matter.*
>
> *46 Also, it is worthy of note that the applicant did not raise the issue of bias immediately at the hearing, or at the pre-hearing conference, when the adjudicator allegedly made the impugned comments. It is trite law that a reasonable apprehension of bias must be raised at the earliest practicable opportunity [sources omitted]. The applicant was represented by counsel, and the significance of such comments would have been immediately apparent to the applicant and his counsel.*

VII. ALLEGATIONS OF BIAS

[46] The Applicant alleged that the adjudicator was biased against her. This allegation essentially rests on three grounds. The first is that the adjudicator, in making her decision, ignored evidence favourable to the Applicant and, in weighing evidence, favoured the RCMP in the balance. The second is that the Applicant asserts that she saw the adjudicator lunching with Counsel for the RCMP and must, thereby, have shown favouritism toward or have been influenced by that Counsel. The third is that the adjudicator "*worked for the Justice Department in the past so she would possibly feel that she owed them a loyalty not to rule against them*" (Applicant's Memorandum of Fact and Law, page 298 at para 36).

[47] As to these allegations generally, as stated in *Arthur* and *Gonzalez*, *supra*, there must be material evidence supporting the allegations of bias. The evidence must be clear and an objection raised at the earliest practicable opportunity.

[48] The first ground for alleging bias is not really a ground respecting bias but goes to the reasonableness, completeness and transparency of the reasons. Simply because some evidence is not specifically mentioned in the reasons or that on weighing the evidence a determination was made that was favourable to one party and unfavourable to the other, does not mean that an adjudicator was biased.

[49] As to the second ground, it is common sense that an adjudicator should avoid planned social encounters with Counsel for any party, if at all possible. However, there is nothing on the

record as to this lunch. The Applicant said she observed the lunch from a few tables over. Counsel for the Respondent said that nothing of the kind ever happened. Even if there was an encounter of some sort, there is absolutely nothing on the record to give rise to an apprehension of bias. Further and importantly, neither the Applicant nor her Counsel raised any objection at the time. This allegation as to bias is simply unsustainable.

[50] The same reasoning applies to the third ground. The Applicant brought no evidence to support this serious allegation, nor did the Applicant or her Counsel raise such an objection during the adjudication.

[51] There is no basis for the allegations of bias.

VIII. UNION EXPRESSION

[52] I find the adjudicator's rejection of the Applicant's argument that the employer's actions interfered with the union's activity or union representation, specifically the right as a union official to speak freely and to criticize management, to be reasonable.

[53] The adjudicator relied on Thurlow CJ's unanimous judgment in *Burchill v Canada (AG)*, [1980] FCJ No 97 (CA) for the proposition that the Applicant's failure to raise the issue of union expression until after the grievance process ended is a bar to adjudication under section 209(1) of the *PSLRA*. It was too late at the stage of the proceedings for the Applicant to raise the issue of employer interference with her right to freedom of speech: "*No grievance before me alleges a violation of her rights as union president to speak freely and to criticize management. Neither*

she nor her union representatives raised that issue her in submissions at the final level of the grievance process" (*Bergey, supra,* at para 377).

[54] The adjudicator considered the Applicant's arguments on the merits and concluded if she allowed raising the issue of union expression, she would have dismissed the Applicant's claim that the employer's activities unlawfully interfered with the Applicant's union activity or union representation. The Applicant argued that the employer's use of her emails of September 30, 2003 and October 1, 2003 for the purpose of disciplining her was illegal because these were private, personal conversations between the Applicant and her union colleagues wherein she expressed her fears, frustrations and concerns.

[55] The adjudicator found that the evidence did not establish discipline occurred for expressing criticisms of management when the Applicant was union president or even for her later criticisms expressed after she resigned. The Applicant failed to articulate any illegal use by the employer of the emails cited as examples of private and personal emails. Moreover, the Applicant sent the October 1, 2003 email while being union president, with the salutation "Ladies" and the evidence established she blind copied the email to many individuals including non-union members such as Cpl. Adair and S/Sgt. McCaig (*Bergey, supra,* at para 384). Therefore, the communication was not in the nature of a private, personal conversation with union colleagues, as portrayed.

[56] Finally, no evidence existed that the employer disciplined the Applicant for her October 1, 2003 email. Instead, she received the 10-day suspension for unjustifiably refusing to

meet with management without 24 hours notice to review her performance evaluation on October 28, 2004: "A union official is not immune from discipline for insubordination or other misconduct that falls outside the proper scope of union responsibilities" (*Bergey*, *supra*, at para 382).

IX. THE DISCIPLINARY ISSUE

[57] The adjudicator concluded that the employer adduced sufficient evidence to prove on a balance of probabilities that:

1) The employer had cause to impose discipline because the Applicant displayed disrespectful and insubordinate behaviour on October 28, 2004 when she swore at Superintendent Morris, and refused to meet with him without 24 hours notice for the purpose of arranging for union representation at such a meeting, contrary to the employer's letter of expectation; and
2) Viewing this discipline decision in the context of other interactions between the Applicant and management, a 10-day suspension occurred as a result of progressive discipline arising from the Applicant's unacceptable behaviour. Therefore, the 10-day suspension was not excessive in the circumstances.

[58] The adjudicator reached this decision after a careful analysis of the parties' evidence and arguments, as well as a review of the relevant jurisprudence. I find the Adjudicator's decision on this issue to be reasonable.

[59] First, the Adjudicator found the Applicant was insubordinate, stating at paragraph 464 that "*There is a difference between disagreeing with a management request and not understanding it. The grievor clearly understood from S/Sgt. Beach that Supt. Morris had been to her office to talk to her about her performance evaluation*" but she refused to meet with management without 24 hours' notice. Moreover, the Applicant also clearly understood that Supt. Morris wanted to speak to her about her performance evaluation when he appeared at her desk. The Applicant's insistence in testimony that her actions of avoiding her supervisor S/Sgt. Beach and Superintendent Morris was reasonable because she already informed Superintendent Morris that she wanted 24 hours' notice before meeting with him, and thus she had no reason to seek him, undermined the Applicant's argument that she did not understand the request.

[60] Second, the Adjudicator stated that even if she was wrong that S/Sgt Beach's request was not sufficiently specific to constitute the first element of insubordination, she would still conclude the Applicant was insubordinate. The arbitral jurisprudence recognized that an employee's attitude and behaviour can constitute insubordination even if no specific order was given, so long as the adjudicator concludes that the Applicant was aware of the duties expected and refused to discharge them. At paragraphs 469 to 471, the adjudicator found:

> *469 ... The grievor's refusal to meet with Supt. Morris and her intentional avoidance of him were contemptuous of management's authority.*
>
> *470 The grievor also did not deny that, when she encountered Supt. Morris outside the mailroom later that afternoon, he informed her twice that he wished to meet with her to discuss her performance evaluation. He told her that the meeting was not disciplinary and that she was not entitled to 24 hours' notice. She pushed past him and walked back to her office, refusing to stop to speak with him, which forced him to trail her down the hallway back to her workstation to speak with her.*

> *471 The grievor clearly challenged, and intended to challenge, the employer's authority, real and symbolic, to require her to meet with Supt. Morris, as he wished to on October 28 to discuss her performance assessment. She testified that she was being assertive, not defiant, in insisting on her right to 24 hours' notice. The fact that she had an honest and strongly held belief that she was entitled to 24 hours' notice of a meeting with Supt. Morris does not make her refusal and avoidance of him any less intentional. Her refusal was insolent and defiant of management.*

[61] Third, the adjudicator found no legitimate excuse existed for disobeying the directive of meeting with Superintendent Morris. The Applicant is a former union president and thus understood the obey now and grieve later rule, and could have complied with the request and grieved later if she believed a violation of her representation rights occurred (*King v Canada (Attorney General)*, 2012 FC 488 at para 128, 409 FTR 216 (Martineau J)). Moreover, the adjudicator noted the Applicant did not bring any evidence of an inability to secure adequate redress through the grievance and adjudication process, nor did she bring evidence that complying with the instructions would endanger her health or safety.

[62] Fourth, contrary to the Applicant's denial, the adjudicator determined that the employer adduced sufficient evidence to prove on a balance of probabilities that the Applicant muttered "*This is fucking bullshit*" or "*That is fucking bullshit*" as she walked away from Superintendent Morris when he tried to meet with her in the mailroom, and that "*Muttering profanity was disrespectful conduct in the circumstances*" (*Bergey, supra*, at paras 477, 479). The Adjudicator preferred Superintendent Morris and Ms. Bailey's account on a balance of probabilities that the Applicant muttered a profanity because:

1) Superintendent Morris and Ms. Bailey heard the Applicant utter a comment in the hallway as she walked away from Supt. Morris and by Ms. Bailey's desk on her way back to her workstation;
2) Superintendent Morris had no reason to make it up, and Ms. Bailey made a note of the Applicant's walking by her desk, and heard her mutter the words "*fucking bullshit"* and believed the Applicant directed the comment to Ms. Bailey;
3) That the Applicant's transcript of her surreptitious recording device did not reproduce the profanity "*is not persuasive. The recorder was in her pocket; she was walking angrily away from Supt. Morris, and as shown by a number of her transcripts, the recorder might not have been sensitive enough to pick up her comments*" (*Bergey, supra*, at para 478). Thus, the adjudicator made a finding that the most probable explanation was "*Her comment was not picked up by the recording device*" (*Bergey, supra*, at para 479); and
4) Finally, Supt. Morris's email to the Pacific Region Public Service Human Resources Office on October 28, 2004 states she muttered a profanity.

[63] After finding the Applicant's behaviour was insubordinate, the adjudicator concluded that the employer had just cause to impose a 10-day suspension. The adjudicator distinguished this case from Arbitrator R.B. Blasina's decision in *Nanaimo Collating Inc and Graphic Communications International Union, Local 525-M*, [1998] BCCAAA No 370, LAC (4th) 251. Unlike *Nanaimo*, management here did not discipline the Applicant due to an ongoing perception of her as an irritant at the workplace, but rather,

> *538 ... Her conduct on October 28 justified the discipline. Management dealt with her misconduct decisively and, in a progressive discipline approach, did not overreact.*
>
> *539 The employer chose to impose a 10-day suspension. Although that might be considered unreasonable in isolation, it is not so when viewed in the context of the difficult employment relationship and the grievor's well-documented resistance to even acknowledging any need to change her workplace behaviour.*
>
> *540 Viewing the grievor's conduct in its totality, the employer was not unreasonable in progressing from an oral reprimand to a 3-day suspension to a 10-day suspension, particularly in light of the letter of expectation and of the non-disciplinary steps that it had taken to try to change the grievor's unacceptable behaviour.*

[64] The adjudicator also rejected the Applicant's argument that Superintendent Morris' refraining from disciplining her on January 30, 2004 constituted condonation. Instead, the adjudicator found at paragraph 509 that Superintendent Morris's conduct:

> *509 ...[S]hows that he displayed great restraint in dealing with her office behaviour and her widely disseminated, public accusations about his lack of honesty, integrity and impartiality. His actions support his testimony that he was concerned that the root of her unhappiness at work and her unacceptable behaviour might have been health problems. He believed that it would have been inappropriate to discipline her were that the case. Rather than discipline the grievor for her unacceptable behaviour on January 30, 2004, Supt. Morris wrote to Pacific Region Public Service Human Resources Office on February 14, 2004, seeking advice on how to force a medical appointment on her for her safety and that of other employees.*

[65] Once Superintendent Morris received a report, dated July 22, 2004, from Dr. Prendergast from Health Canada who conducted a detailed telephone interview with the Applicant and found no medical reason existed for the Applicant's behaviour in the workplace, Superintendent Morris personally served the Applicant with a letter of expectation on August 5 or 6, 2004 as soon as

she returned to work from sick leave, and told her that management would no longer tolerate her workplace misconduct. He then began to impose progressive discipline for further misconduct.

[66] Finally, at paragraphs 534 to 536, the adjudicator discussed the significance of the Applicant showing no remorse for her behaviour on October 28, 2004:

> *534 ... That is an important factor in my determination that the penalty imposed was reasonable in the circumstances. She testified that she felt no remorse because she had done nothing wrong and that management should be remorseful. What I find important is that she has not demonstrated that she accepts any responsibility for her misconduct on October 28. In fact, as I understand her evidence, her position is that she was the victim of the event, and she blames Supt. Morris and S/Sgt. Beach completely for the incident on October 28.*
>
> *535 The grievor described what she believed about the October 28, 2004 incident in several emails she later wrote to Pacific Region Departmental Security Section "E" Division's North District Security. She believed that the cause of the 10-day suspension was not her behaviour but management's anger over her request on October 27, 2004 for a deployment on the grounds that S/Sgt. Beach was criminally harassing her (Exhibit 1, Tab 8-U, no. 46 on page 14, and Tab 8-N, at pages 1 and 3). She claimed that her comments about S/Sgt. Beach on her performance evaluation were professional and reasonable and that Supt. Morris and S/Sgt. Beach were at fault for even raising her performance assessment with her on October 28, 2004 because they really just abused their authority and tried to sabotage her. She claimed that the discussion that they wished to have with her on the afternoon of October 28, 2004 was really intended to assault her character, slander and harass her, and provoke her into quitting (Exhibit 1, Tab 8-N, at page 1).*
>
> *536 There is no evidence to support those serious allegations. On the contrary, the evidence clearly shows that Supt. Morris acted in good faith when he dealt with the grievor on October 28. He determined that her actions that afternoon constituted misconduct that could not be tolerated. After making that determination, he acted decisively on it.*

[67] I conclude all of these findings were reasonably open to the adjudicator on the record.

X. THE JURISDICTIONAL ISSUE

[68] The adjudicator recognized she had jurisdiction to hear the Applicant's termination grievance under section 209(1) regardless of whether it was for a disciplinary reason or not, and such termination needed to occur for cause, as specified under section 12(3) of the *Financial Administration Act*, RSC 1985, c F-11 (*FAA*) (*Bergey*, *supra*, at para 812). The employer submitted to the adjudicator that it terminated her employment for cause because she no longer possessed her reliability status. The employer raised an objection to the adjudicator's jurisdiction arguing she could not hear the grievances related to the suspension and revocation of the reliability status under section 209(1)(b) of the *PSLRA* because the employer's decisions were administrative, not disciplinary. This issue arises in grievance File Nos. 566-02-174, 175 and 1298. The adjudicator decided she needed to hear evidence on the merits before rendering a decision on the objection, and thus her decision dealt with the jurisdiction issue and the merits of the grievances over which she had jurisdiction.

[69] For the reasons provided below, the adjudicator concluded she did not possess jurisdiction over those grievances relating to the reliability status decisions.

[70] This issue was stated by the adjudicator at paragraphs 811 and 812 of her reasons:

> *811 Therefore, for me to have jurisdiction over the grievances about the revocation of the grievor's RCMP reliability status and her indefinite suspension from employment because of that revocation, the employer's revocation and suspension decisions must be determined to be "a disciplinary action resulting in" one*

> *of the outcomes listed under paragraph 209(1)(b) of the PSLRA or a "demotion or termination" under paragraph 209(1)(c). If the grievances involve matters that affected the grievor's terms of employment but do not fall within the parameters of section 209, then her recourse for challenging the employer's decision is not the adjudication process but rather alternative forums, such as a judicial review application before the Federal Court.*
>
> *812 A reading of paragraph 209(1)(b) and subparagraph 209(1)(c)(i) of the PSLRA tells me that the employer's decisions to revoke the grievor's RCMP reliability status and to suspend her employment are adjudicable only under paragraph 209(1)(b) as they did not involve a demotion or termination of employment, which is clearly required under subparagraph 209(1)(c)(i). Her termination grievance is adjudicable under subsection 209(1) as it involves a termination of employment. It is referable to adjudication whether the termination was for a disciplinary or a non-disciplinary reason. Furthermore, it had to have been done for cause, as specified in subsection 12(3) of the FAA.*

[71] The matter for determination was whether the suspension and revocation of the Applicant's reliability status was, in fact, a disguised disciplinary action or tainted by bad faith or procedural fairness such that it could not be remedied at a *de novo* adjudication, for if it was, then the adjudicator could assume jurisdiction. The adjudicator addressed this point at paragraph 814 of her reasons:

> *814 Both parties acknowledged that the judicial and arbitral jurisprudence has recognized that adjudicators have very limited jurisdiction when it comes to reviewing the employer's actions in suspending and revoking an employee's security clearance. The case law traditionally suggests that such decisions are administrative and that the Board lacks jurisdiction over them unless there is evidence to establish on a balance of probabilities that such a decision was disguised discipline rather than administrative or that it was tainted by bad faith or procedural unfairness to a point that it cannot be remedied at a de novo (new) hearing before an adjudicator.*

[72] The jurisprudence has been set out by Barnes J of this Court in *Canada (Attorney General v Frazee*, 2007 FC 1176, 319 FTR 192, where he wrote at paragraphs 19 to 25:

> *19 Whether an employer's conduct constitutes discipline has been the subject of a number of arbitral and judicial decisions from which several accepted principles have emerged. A useful summary of the authorities is contained within the following passage from Brown and Beatty, Canadian Labour Arbitration (4th ed.) at para. 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. On the basis of this definition, arbitrators have ruled that suspensions that required an employee to remain off work on account of his or her health, or pending the resolution of criminal charges, were not disciplinary sanctions. Similarly, transfers and demotions for non-culpable reasons, the revocation of a civil servant's "reliability status", financial levies that were compensatory rather than punitive, shift assignments designed to facilitate closer supervision, and deeming an employee to have quit his or her employment, have all been characterized as non-disciplinary. For the same reason, counselling and warning employees about excessive but innocent absenteeism have generally not been regarded as disciplinary. On the other hand, it has been held that even where an employee falls ill during the course of serving a disciplinary suspension and is in receipt of sick pay benefits for part of the time he or she is off work, that hiatus*

> *will not alter the disciplinary character of the employee's suspension.*
>
> *A disciplinary sanction must at least have the potential to prejudicially affect an employee's situation, although immediate economic loss is not required. Suspensions with pay, which have the essential objective of correcting unacceptable behaviour, for example, would still be regarded as disciplinary even though they do not sanction the employee financially.*
>
> *[Footnotes omitted]*

20 The authorities confirm that not every action taken by an employer that adversely affects an employee amounts to discipline. While an employee may well feel aggrieved by decisions that negatively impact on the terms of employment, the vast majority of such workplace adjustments are purely administrative in nature and are not intended to be a form of punishment. This point is made in William Porter v. Treasury Board (Department of Energy, Mines and Resources) (1973) 166-2-752 (PSLRB) in the following passage at page 13:

> *The concept of "disciplinary action" is not sufficiently wide to include any or every action taken by the employer which may be harmful or prejudicial to the interests of the employee. Certainly, every unfavourable assessment of performance or efficiency is harmful both to the immediate interests of the employee and his prospects for advancement. In such cases, it cannot be assumed that the employee is being disciplined. Discipline in the public service must be understood in the context of the statutory provisions relating to discipline.*

21 The case authorities indicate that the issue is not whether an employer's action is ill-conceived or badly executed but, rather, whether it amounts to a form of discipline involving suspension. Similarly, an employee's feelings about being unfairly treated do not convert administrative action into discipline: see Fermin Garcia Marin v. Treasury Board (Department of Public Works and Government Services Canada) 2006 PSLRB 16 at para. 85.

22 It is not surprising that one of the primary factors in determining whether an employee has been disciplined concerns

the intention of the employer. 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: see St. Clair Catholic District School Board and Ontario English Catholic Teachers Association (1999) 86 L.A.C. (4th) 251 (Re St. Clair) at page 255 and Re Civil Service Commission and Nova Scotia Government Employees Union (1989) 6 L.A.C. (4th) 391 (Re Civil Service Commission) at page 400.

23 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. Thus in Gaw v. Treasury Board (National Parole Service) (1978) 166-2-3292 (PSSRB), the employer's attempt to justify the employee's suspension from work as being necessary to facilitate an investigation was rejected in the face of compelling evidence that the employer's actual motivation was disciplinary: also see Re Canada Post Corp. and Canadian Union of Postal Workers (1992) 28 L.A.C. (4th) 336.

24 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: see Re Toronto East General & Orthopaedic Hospital Inc. and Association of Allied Health Professionals Ontario (1989) 8 L.A.C. (4th) 391 (Re Toronto East General). 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.

25 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: see Re St. Clair, above, and Re Civil Service Commission, above.

[73] In *Chamberlain*, *supra*, Gleason J referred to *Frazee*, *supra*, to emphasize that the enquiry under section 209(1)(b) of the *PSLRA* as to whether an action is a disguised disciplinary action, is fact driven. She wrote at paragraphs 55 to 57:

> *55 Dealing with the first, it will be recalled that paragraph 209(1)(b) of the PSLRA requires that an adjudicable grievance relate to a disciplinary action that results in termination, demotion, suspension or financial penalty. On the facts of Ms. Chamberlain's situation, only demotion or financial penalty could pertain. For her situation to come within the scope of paragraph 209(1)(b) of the PSLRA, however, it is not enough for Ms. Chamberlain to have been placed in a lower-rated position or to have suffered a financial loss. Rather, as correctly noted by the Adjudicator, the reason behind any demotion or loss must be also disciplinary.*
>
> *56 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 at para 48 (cited above at para 29); Canada (Attorney General) v. Frazee, 2007 FC 1176 at paras 23-25, [2007] F.C.J. No. 1548 [Frazee]; Basra v. Canada (Deputy Head - Correctional Service), 2008 FC 606 at para 19, [2008] F.C.J. No. 777).*
>
> *57 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. Thus in Gaw v. Treasury Board (National Parole Service) (1978) 166-2-3292 (PSSRB), the employer's attempt to justify the employee's suspension from work as being necessary to facilitate an investigation was rejected in the face of compelling evidence that the employer's actual motivation was disciplinary [...]

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]

[74] The Adjudicator applied these principles to this case beginning with the question of whether the true characterization of the employer's decision to suspend or revoke the reliability status were administrative or if there was a disciplinary component. At paragraph 838, the adjudicator wrote: "*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 reliability status, then revoking it would be improper.*" The question of whether the decision was administrative or disciplinary is a factual determination, and the adjudicator looked at the purpose and effect of the actions to determine the true characterizations.

[75] The adjudicator considered C/Supt. Lanthier's decision to suspend and revoke the Applicant's reliability status, and determined that the employer met its evidentiary burden to establish that the suspension and revocation decisions were administrative. The evidence demonstrated that C/Supt. Lanthier made the decision to revoke the reliability status due to security concerns. He had no jurisdiction to consider discipline nor did he have any authority to impose discipline. Rather, he had to be satisfied that there were sufficient security issues of trust, honesty, reliability and integrity before making a decision to suspend or revoke an RCMP reliability status for cause.

[76] Furthermore, no one disputed that C/Supt. Lanthier was the officer in charge of the Departmental Security Branch, and was the only person who could suspend or revoke an RCMP reliability status for cause. At paragraphs 842 to 845, the adjudicator wrote:

> *842 C/Supt. Lanthier's testimony was straightforward. He had over 30 years of service with the RCMP, he was an experienced Departmental Security Officer, and he had made the suspension and revocation decisions based on the extensive evidence before*

him after reviewing the materials and using the assistance of the experienced security risk analyst on his staff at the Departmental Security Branch in Ottawa. His testimony was that he did not know the grievor, Mr. Briske, S/Sgt. Beach or S/Sgt. Hildebrand, that he knew Supt. Morris only by his position, and that he had no contact with any of them during his decision-making process. His evidence was not contradicted [emphasis added].

843 C/Supt. Lanthier testified that his jurisdiction is only RCMP security. He has to be satisfied that there are sufficient security issues of trust, honesty, reliability and integrity before he makes a decision to suspend or revoke an RCMP reliability status for cause because he understands the consequences of making such a decision. He has no authority to impose discipline. The revocation decision-making process he uses at the Departmental Security Branch is designed to screen out discipline and human resources issues over which he has no jurisdiction or interest.

844 C/Supt. Lanthier testified that, after reviewing the file and discussing it with the security risk analyst on his staff who reviewed it in detail, he was satisfied that the situation warranted suspending the grievor's RCMP reliability status for cause but that further investigation was needed before he could make a final decision. His opinion at that time, as stated in the suspension letter of March 22, 2005, was that the grievor had provided untruthful and deceitful information to Ms. Bailey, Supt. Morris, S/Sgt. Hildebrand and S/Sgt. Beach about five incidents, which raised concerns for him about her reliability, trustworthiness and honesty. He provided her with 14 days to make written submissions.

845 C/Supt. Lanthier testified that, when he decided in July 2005 to revoke the grievor's RCMP reliability status for cause, he had before him all the extensive documentation contained in the binder marked as Exhibit 1. The materials included three lengthy submissions that the grievor had made to explain her side of events. Two of them had been addressed to the Pacific Region Departmental Security Section, dated January 27, 2005 and February 9, 2005 respectively. She included them in her April 2005 reply to C/Supt. Lanthier that she sent in response to the March 22, 2005 suspension letter. In her reply, she attached many other documents, including transcripts that she had made from her surreptitious office recordings.

[77] C/Supt. Lanthier also believed the Applicant's reply did not address the security concerns raised in the suspension letter. Instead, as the adjudicator wrote at paragraph 846: "*general managerial and performance issues that were not his concern.*" Furthermore, C/Supt. Lanthier concluded that the Applicant's behaviour in the six incidents he outlined in his revocation decision "*reflected negatively on her honesty, trustworthiness and integrity*" (the Six Incidents). I discuss the Six Incidents below.

XI. APPLICANT FAILED TO DISCHARGE HER BURDEN

[78] Once the adjudicator decided that the C/Supt. Lanthier made an administrative decision, the burden shifted to the Applicant to prove, on a balance of probabilities, that his decision was disguised discipline or so tainted by bad faith or procedural fairness that they could not be remedied by the *de novo* adjudication process. Therefore, the issue is whether the employer acted with a *bona fide* security-related reason for revoking the Applicant's RCMP reliability status for cause. The adjudicator considered proof of bad faith in order to determine if the stated security related reason for the reliability status decisions masks intent to discipline or other ulterior motive over which the adjudicator would possess jurisdiction under section 209(1)(b) of the *PSLRA*.

[79] The jurisdictional decision turned on reviewing the Six Incidents C/Supt. Lanthier relied on in making the reliability status decisions, and determining whether those decisions established improper motive or disguised disciplinary action. This analysis required an assessment of credibility and conflicting testimony but did not require resolving all of the factual differences raised in the case. At paragraph 863, the adjudicator stated she had to resolve enough of the

factual differences *"to be able to determine whether C/Supt. Lanthier acted in good faith or whether he constructed, or was duped by Supt. Morris into constructing, the security-related rationale to disguise motives that had nothing to do with the grievor's reliability for RCMP employment*."

[80] The adjudicator then conducted a thorough analysis of the Six Incidents C/Supt. Lanthier identified in his suspension and revocation of the Applicant's reliability status decisions; in the suspension decision, found at paragraph 689, they were five incidents, but he split one into two in his revocation decision found at paragraph 703:

1) At a joint union management meeting in Vancouver on January 22, 2003, the Applicant stated that she nominated several public service employees for the Queens Golden Jubilee Medal and submitted the nominations to the office manager, i.e. Bonnie Bailey, but the latter did not process said nominations. This suggested that Ms. Bailey deliberately or negligently did not pass on these nominations. C/Supt. Lanthier concluded the Applicant submitted the nomination after that meeting. The adjudicator reviewed the conflicting evidence on this incident at length, found concerns with the Applicant's credibility, and made several findings against the Applicant from paragraphs 906 to 913, including that the Applicant never made the nominations as claimed in May of 2002;
2) The Applicant sent an email to Ms. Bailey on January 30, 2003 in relation to the completion of the harassment training awareness program stating it should finish by March 31, 2003, notwithstanding that no evidence existed to support that contention. The adjudicator found it concerning that the Applicant did not qualify her statement

until she wrote to Superintendent Morris in April 2005 in her reply to the suspension of her reliability status: "*The introduction in 2005 of a new version of the end date claim that she made in early 2003, a version that presents the situation in a much more favourable light for her, leads me to suspect that she was ready to change her version of the events to serve her interests*" (*Bergey, supra*, at para 895);

3) On September 24, 2004, the Applicant gave contradictory information to S/Sgt. Hildebrand on whether she sent any correspondence out of the office stating that at one point, she did not send any correspondence outside the office but later recanted and advised that she sent continuation reports to Ms. Bouchard for safekeeping, notwithstanding that this occurred prior to S/Sgt. Hildebrand conducting a security investigation. The adjudicator found S/Sgt. Hildebrand a credible witness at the hearing and concluded the Applicant's testimony was not credible and found: "*that she lied or that, at best, she intentionally misled S/Sgt. Hildebrand during the interview on several points and that he had solid grounds for concluding in his report that she had not been credible during the interview*" (*Bergey, supra*, at para 881);

4) For several years, the Applicant correctly entered traffic related entries into the CPIC but for an unknown reason, she subsequently entered inaccurate file numbers in the CPIC, and continued to do so despite extra training that her supervisor provided. The adjudicator concluded this was not simply a performance issue, as the consistency and consequences of the errors compromised the employer's ability to rely on her to perform her duties: "*One documented incident resulted in the illegal arrest of a citizen due to an improper entry that she made*" (*Bergey, supra*, at para 921);

5) The Applicant made unfounded allegations that Superintendent Morris did not take harassment seriously when the evidence established the contrary. Indeed, management fully investigated the Applicant's harassment allegations and found them unfounded or unsubstantiated, and a subsequent review of the complaint upheld those findings. The adjudicator conducted a detailed assessment of this issue and concluded the evidence demonstrated the veracity of Supt. Morris's testimony that he took harassment seriously (*Bergey*, *supra*, at para 518):

    a) He did not delegate his investigation of the Applicant's complaints to a staff member despite his busy schedule as the Division's North District commander;

    b) Although Superintendent Morris found her allegations against Mr. Stephenson, a front desk Commissionaire, unsubstantiated, he reviewed her documentation carefully and had an open-door policy for her; meaning he encouraged her to bring any incidents to his attention immediately if they reoccurred;

    c) When she brought an incident to his attention, he promptly brought the parties together to get both sides of the incident on January 30, 2004; and

    d) He also immediately held a mandatory harassment awareness meeting for all North District Office employees on October 14, 2003 once the Applicant's widely circulated October 1, 2003 email accused him of not taking harassment seriously.

Moreover, the adjudicator concluded: the sincerity or honesty of the Applicant's beliefs that management did not effectively deal with harassment "*does not prevent*

her unsupported allegations from being weighed when determining the reliability of her evidence and from being considered when weighing the reliability of the testimonies of the employer's witnesses who had to deal with her behaviour" (*Bergey, supra*, at para 916).

6) On October 29, 2004, S/Sgt. Beach, the Applicant's direct supervisor, printed an email for his records; the Applicant then removed that message with other printed material and told S/Sgt. Beach the printed material was hers. She later presented a copy of S/Sgt. Beach's email message to Cpl. Flewelling. The adjudicator noted the issue on whether the Applicant lied to her supervisor did not involve assessing a conflict in testimony but rather one of credibility. At the hearing, the Applicant avoided an outright denial that she ever lied to S/Sgt. Beach about taking the email from the printer, and by discussing a different incident with the printer and S/Sgt. Beach the day before. The adjudicator concluded that S/Sgt. Beach's account of the event was essentially accurate; the Applicant took the email from the printer and denied doing so.

[81] After thoroughly discussing these Six Incidents, the adjudicator concluded at paragraphs 962 to 963 and 934 to 935 that the Applicant failed to meet her burden of proving on a balance of probabilities that through C/Supt. Lanthier's suspension and revocation decisions:

> *962 ...the employer acted in bad faith or that the reasons it cited in its revocation letters were a sham or a camouflage of disguised discipline or of other ulterior motives. The incidents described are not just human resources or discipline issues, as she claimed. C/Supt. Lanthier and Supt. Morris were able to assess her reliability only from her behaviour. The evidence shows that the decisions that each made were motivated by serious concerns*

> *about her honesty, trustworthiness and reliability, arising from her behaviour.*
>
> *963 I do not believe that the evidence adduced established that Supt. Morris acted improperly by activating the security review process in November 2004 or that the employer acted in bad faith by assembling as complete a binder of relevant background material as it could for the Departmental Security Officer's review. However, even had I found that Supt. Morris had improperly initiated that process, I would not find on the evidence that C/Supt. Lanthier was so naive and inexperienced as to be duped, manipulated or played by Supt. Morris into making other than a bona fide decision based on his real security concerns, which arose from the grievor's conduct in the six incidents he relied upon. I also would not find that, had Supt. Morris improperly initiated the security review process, his actions would have so tainted the Departmental Security Officer's revocation decisions to an extent that could not be remedied by this adjudication.*
>
> ...
>
> *934 There is no question that the grievor removed documents from the North District Office on more than one occasion, while denying it, and that she lied to management on more than one occasion and was less than candid on others, rather than admit to any wrongdoing. Those are legitimate factors for the Departmental Security Officer [C/Supt. Lanthier] to have considered when he formed his opinion that he could no longer trust her not to abuse her authority as an RCMP employee.*
>
> *935 The incidents described are not just human resources or discipline issues as claimed by the grievor. C/Supt. Lanthier had to assess her reliability from her behaviour. In my opinion, her behaviour in the incidents described gave him ample grounds for forming his subjective opinion in good faith that she could no longer be relied upon not to abuse the trust accorded to her and for exercising his discretion to revoke her RCMP reliability status.*

[82] Therefore, the adjudicator concluded that she did not have jurisdiction to hear the grievances against the decisions to suspend and revoke her reliability status for cause and dismissed them accordingly. I find that this determination is reasonable.

XII. DISMISSAL OF OTHER GRIEVANCES FOLLOWED LOGICALLY

[83] I find that once the adjudicator found she had no jurisdiction over the reliability status decisions which were administrative rather than disciplinary, the dismissal of the Applicant's other grievances followed as a rational outcome:

1) Union Representation Grievance: the finding that the reliability status decisions were administrative and not disciplinary meant the discipline article of the Collective Agreement does not apply; thus, the adjudicator dismissed the union representation grievance.

2) Suspension from Employment: The evidence established that the employer made an administrative decision on March 24, 2005 and August 4, 2005 to suspend the Applicant's employment indefinitely without pay on the sole basis that the loss of reliability status meant she no longer met an essential condition of her employment. At paragraph 994 the adjudicator noted:

> *994 ... [T]he uncontradicted evidence of C/Supt. Clark, who served both suspension letters on the grievor, was that Pacific Region Public Service Human Resources Office, which had prepared the letters for his signature, advised him that there was no choice. An RCMP reliability status is the minimum security clearance, and it is a condition of RCMP employment.*

He testified that without RCMP reliability status, an individual cannot access RCMP records and data, nor can they access RCMP property without an escort at all times. Therefore, the adjudicator dismissed the grievances for lack of jurisdiction.

3) Termination Grievance: Finally, the adjudicator dismissed the Applicant's termination grievance. She noted that she has jurisdiction over termination under section 209(1) of the *PSLRA*, and then found that the termination occurred for cause

> pursuant to section 12(3) of the *FAA*. As with the suspension grievance, the adjudicator found that upon the revocation of said RCMP reliability status, the Applicant no longer met a condition of her employment. The adjudicator concluded that the decision to terminate her employment because of this "*was not tainted by bad faith and that any procedural flaws have been appropriately remedied by this adjudication, I conclude that the employer had cause under subsection 12(3) of the FAA to terminate her employment on January 3, 2006. I dismiss the termination of employment grievance*" (*Bergey, supra,* para 1003).

XIII. FINDINGS OF FACT

[84] The adjudicator made many findings of fact. Some were uncontested; others were contested and required a weighing of evidence. In other respects, the Applicant alleges that facts that favoured her were simply ignored.

[85] Such findings are within the specific expertise of an adjudicator, and should not form the grounds for returning a matter for re-determination on a judicial review so long as they are within the bounds of reasonableness. I repeat the well-known passages from Bastarache J and LeBel JJ's Reasons in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, at paragraphs 46 and 47:

> *46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?*

> *47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*

[86] To this, I add the recent decision of the Supreme Court of Canada in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, where Gascon J, for the majority, wrote at paragraph 46 that deference is in order where a Tribunal acts within it specialized area of expertise.

[87] I also cite as appropriate, the well-known passages from the decision of Evans J (as he then was) in this Court in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No. 1425, 157 FTR 35 (TD), at paragraphs 14 to 17:

> *14 It is well established that section 18.1(4)(d) of the Federal Court Act does not authorize the Court to substitute its view of the facts for that of the Board, which has the benefit not only of seeing and hearing the witnesses, but also of the expertise of its members in assessing evidence relating to facts that are within their area of specialized expertise. In addition, and more generally, considerations of the efficient allocation of decision-making resources between administrative agencies and the courts strongly indicate that the role to be played in fact-finding by the Court on an application for judicial review should be merely residual. Thus, in order to attract judicial intervention under section 18.1(4)(d), the applicant must satisfy the Court, not only that the Board made a palpably erroneous finding of material fact, but also that the*

finding was made "without regard to the evidence": see, for example, Rajapakse v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 649 (F.C.T.D.); Sivasamboo v. Canada (Minister of Employment and Immigration), [1995] 1 F.C. 741 (F.C.T.D.).

15 The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.

16 On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (Medina v. Canada (Minister of Employment and Immigration) (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, Hassan v. Canada (Minister of Employment and Immigration) (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.

17 However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": Bains v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency

> *overlooked the contradictory evidence when making its finding of fact.*

[88] The submissions of the Applicant dwelt, to a large extent, on determinations by the adjudicator that could have been made in the Applicant's favour, in pointing out or emphasizing evidence favouring the Applicant that should have been given more weight, or in evidence favouring the Applicant that was omitted from the reasons; thus, argued the Applicant, deliberately or at least inadvertently, overlooked by the adjudicator. I will not refer to all of such matters raised before me; here are a few, in addition to the Six Incidents discussed above:

- *Pizarro* & the Transcript: The Applicant argued that similar to Phelan J's decision in *Pizarro v Canada (Attorney General)*, 2010 FC 20, the Adjudicator acted unreasonably and breached her duty of procedural fairness by failing to consider the accuracy of the Applicant's transcription of her surreptitious recording, as well as failing to mention Dr. Masters' report. *Pizarro*, *supra*, dealt with the acting Commissioner of the RCMP's decision to deny Pizarro's appeal of an Adjudication Board's decision directing him to resign from the force in fourteen days or be dismissed. In making that decision, the Commissioner concluded that the Board erred for giving no weight to Dr. Aubé's psychological evidence about the causal link between Pizarro's conduct and his emotional state of mind "*but that such evidence would not be accepted nor would it make any difference in the result*" (*Pizarro*, *supra*, at para 41). Phelan J concluded at paragraphs 52 to 53:

  > *52 Dr. Aubé's evidence was an absolutely essential element of Pizarro's case. She was highly qualified and sufficiently proficient to work with the RCMP for 18 years and to the extent that she must have been generally credible to the Force. Her evidence not only went to Pizarro's state of mind but it dealt with how that state would manifest itself by "acting out". Importantly, Dr. Aubé's*

> *opinion pointed to some element of responsibility within RCMP management.*
>
> *53 In the usual course, where there is an error of the magnitude of the Board's, the Commissioner should have sent it back to a new board. As recognized in Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board, [1994] 1 S.C.R. 202, relied on by the Respondent, it is only in the exceptional cases that relief, at least in the form of a re-hearing, would not flow from an error in fairness. This case and this error are not one of those exceptions. On this point alone, this judicial review should be granted.*

I agree with the Respondent's written submissions at paragraph 53 that "*The transcript of Ms. Bergey's surreptitious recording does not come close to the type of evidence which was rejected in Pizzaro.*" Although the Applicant stated at paragraph 21 in her written submissions that "*the recorder picked up everything*", the adjudicator found the transcripts often contained gaps with the word "*inaudible*" (*Bergey, supra,* at paras 37, 265, 526). Furthermore, the adjudicator did not put heavy weight on the recordings because "*as a matter of common sense, the person recording will be very careful about what he or she says and will often try to manipulate the other person to compromise himself or herself*" (*Bergey, supra,* at para 452). This weighing of the evidence, in combination with the adjudicator's discussion of the events of October 28, 2004 above, allowed the adjudicator to reasonably conclude that the Applicant's muttering of the profanity "*was not picked up on her recording device*" that was in her pocket (*Bergey, supra,* at para 479).

- <u>*Pizarro* & Dr. Masters</u>: the Applicant also stated *Pizarro* applies to her argument that the adjudicator's failure to mention that Dr. Masters' report demonstrated that Superintendent Morris fabricated his security concerns which he provided in the form of a memo to the Pacific Region Departmental Security Section on November

29, 2004. This refers to the mandatory fitness-to-work examination of December, 2004 wherein Dr. Prendergast re-assessed the Applicant, including reviewing Superintendent Morris's memorandum, and expressed a concern that the Applicant may be suffering from a mental disorder, one which he is incapable of diagnosing. Thus, Dr. Prendergast contacted Dr. Masters for the purpose of conducting an independent medical examination of the Applicant. Dr. Masters interviewed the Applicant and reviewed documents that discussed the events at issue in the adjudication and found on March 23, 2004: "*There is nothing to suggest that Mrs. Bergey has a condition that requires any specific psychiatric or medical treatment*" (Page 271 of the Application Record). Although the adjudicator did not mention this report, nothing in the same contradicts the adjudicator's reasonable finding that Superintendent Morris acted in good faith in raising security concerns regarding the Applicant in his November 29, 2004 memo. Moreover, it does not contradict the adjudicator's alternative finding that even if Superintendent Morris brought the security concerns in bad faith, this did not negate that C/Supt. Lanthier made the reliability status decisions in good faith based on real security concerns. Furthermore, unlike *Pizarro*, Dr. Masters' report did not provide a psychiatric or medical explanation for the Applicant's behaviour that the adjudicator needed to consider.

- Procedural Unfairness: The Applicant, in her memorandum, often submits that the adjudicator ignored instances where the employer treated her unfairly in its disciplinary process, as well as in making its decisions to suspend and revoke her reliability status. A reading of the reasons demonstrates this is patently false. The

adjudicator explicitly addressed the Applicant's arguments and agreed that procedural deficiencies existed. For example, she found the Applicant "*clearly did not have an opportunity to make any submission on the issue of whether her RCMP reliability status should have been suspended before the Departmental Security Officer [C/Supt. Lanthier] made his interim decision in March 2005 to suspend her reliability status pending further investigation*" (*Bergey, supra*, at para 970). However, the adjudicator found the deficiencies the Applicant identified were insufficient to discharge her onus of establishing on a balance of probabilities that the reliability status decisions were in actuality disciplinary decisions or made in bad faith. Finally, "*I also find that whatever procedural deficiencies existed in the employer's revocation decision-making process were wholly cured by this adjudication process, which involved a 38-day de novo hearing, almost 7½ days of which were devoted to the grievor's testimony, 5 in chief examination*" (*Bergey, supra*, at para 984). The same reasoning applied to the disciplinary hearing process related to the 10-day suspension. Such findings were reasonable (*Tipple*, *supra*).

- The Bathroom: The adjudicator found the Applicant refused to meet with Superintendent Morris on October 28, 2004, pushing past him stating she had to go to the bathroom. Ms. Bailey went into the bathroom and recognized the Applicant, by her footwear, standing in the stall and made a note that the Applicant remained in there for twenty minutes. The Applicant argued that the adjudicator failed to comment on the impropriety of Ms. Bailey making notes of the Applicant's movements in the washroom. I agree that if one viewed Ms. Bailey's behaviour on October 28, 2004 in isolation, then one would find what she did questionable.

However, I agree with the adjudicator's approach of viewing Ms. Bailey's behaviour in the context of her troubled relationship with the Applicant. The adjudicator noted that Ms. Bailey began taking file notes of her interactions with the Applicant because she no longer trusted the Applicant after the above-referenced January 22, 2003 Queens Golden Jubilee Medal incident. I find the adjudicator's contextual approach to the evidence rendered it unnecessary to explain whether she found Ms. Bailey's behaviour inappropriate.

- Terrorist Leader & "Lying Asshole": The Applicant asserts that she never called Superintendent Morris a "*terrorist leader*" but she does admit to saying that he was managing by fear, managing by intimidation, and managing by terror. The Applicant also asserted that Superintendent Morris' claim that she called Mr. Stephenson a "*lying asshole*" was a fabrication; the Applicant testified that, in reality, "*she had called Mr. Stephenson a liar and an asshole, in two consecutive sentences*" (*Bergey, supra*, at para 960). I don't need to comment further on these remarks.

[89] I do not intend to review the many other criticisms raised by the Applicant as to the findings of the adjudicator. I find that the factual determinations made by the adjudicator are reasonable and no relevant factual determinations were omitted.

XIV. ATTEMPTED RE-TRIAL

[90] The Applicant's submissions on both the discipline and reliability status grievances centred on her contention that management developed a conspiracy that would lead to the termination of her employment. For example, she characterized the letter of expectation which

Superintendent Morris served her as a mind game meant to intimidate and bully her into withdrawing her complaints and grievances. The adjudicator found otherwise.

[91] In her Memorandum and in her submissions before me, the Applicant essentially tried to re-argue her case and endeavoured to re-assert the evidence she gave, and the arguments that her Counsel, Mr.Yazbeck, made before the adjudicator.

[92] I reminded the Applicant during the hearing and re-state now that my role in a judicial review is different; it is not to hold a re-trial or re-weigh the evidence. My role is as expressed by Pelletier JA for the Federal Court of Appeal in *Select Brand Distributors Inc. v Canada (Attorney General).*, 2010 FCA 3 at paragraphs 44 to 47, 400 NR 76:

> *44 An application for judicial review of a decision of an administrative tribunal is not a trial de novo, before the reviewing court, of the question which was before the administrative tribunal. The stance adopted by the Judge in this case may well be appropriate where an application for judicial review requires the Court to function as the primary fact finder, such as is the case in an application for prohibition under the Patented Medicines (Notice of Compliance) Regulations SOR/93-133. But where the tribunal is the primary fact finder, and has rendered its decision, the reviewing court cannot retry the question which was before the tribunal on the strength of a record which may not correspond with the record which was before the tribunal itself.*
>
> *45 This is not to say that questions of fact are beyond a reviewing court's reach. A tribunal's factual conclusions are subject to review under paragraph 18.1(4)(d) of the Federal Courts Act where there is no evidence upon which the tribunal could have come to the conclusion it did. But this does not impose on the party seeking uphold the tribunal decision the burden of tendering evidence to show that the facts relied upon by the tribunal, or that the tribunal's own conclusions of fact, are true.*
>
> *46 The duty of fairness requires a tribunal to allow parties to know the case which must be met and to respond to it. Where the duty of disclosure discloses reliance on facts which a party*

> *challenges, the factual dispute should be resolved using the tribunal's process. Where a tribunal has not accorded a party the right to challenge the factual basis of its decision, the party's remedy is not to attempt to prove the error of the tribunal's factual conclusions before the court, but to seek, by way of an application for judicial review, a fresh hearing so that it can know and challenge the evidence relied on by the tribunal. In this case, the approach taken by Gerber persuaded the Judge to adopt the role of primary fact-finder, a role which was not his to assume.*
>
> *47 As a result, the Judge erred in reasoning that the material upon which the Agency relied was unsubstantiated and therefore could not support the Agency's decision. The issue was whether the Agency's decision was reasonable, having regard to the material before it. Since the matter is to be returned to the Agency, I refrain from expressing an opinion on that question as the Agency will be called upon to address its mind to it once again.*

XV. CONCLUSIONS AND COSTS

[93] In conclusion, I find that the determinations made by the adjudicator were within the acceptable bounds of reasonableness and should not be set aside on this judicial review.

[94] As to costs, each of the Applicant and Respondent has suggested that, if successful, they should receive an award of costs fixed in the sum of $2,000.00. I am mindful that the Applicant has been assisted in the assembly, preparations and copying of the several volumes of the record before me, a task normally assumed by an Applicant. I expect that the Applicant is a person of modest means.

[95] I will not award costs to either party.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. This application is dismissed
2. The Appendix to the Applicant's Memorandum is stuck out;
3. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1392-13
STYLE OF CAUSE:	VALERIE BERGEY v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATES OF HEARING:	MAY 4 AND 5, 2015
JUDGMENT AND REASONS:	HUGHES J.
DATED:	MAY 12, 2015

APPEARANCES:

Valerie Bergey	FOR THE APPLICANT ON HER OWN BEHALF
Caroline Engmann	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Self-Represented	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT