

PUBLIC SERVICE

LABOUR RELATIONS

Judicial review of Federal Public Sector Labour Relations and Employment Board (Board) decision (2017 FPSLREB 37) allowing first grievance filed by respondent contesting her suspension without pay by Canada Revenue Agency (Agency), dismissing her second grievance regarding her termination — Respondent accessing confidential databases of Agency to obtain information about company owning property respondent wanting to purchase — In particular, respondent discovering very complex corporate structure including numbered companies, company involved in number of cases before Quebec's Autorité des marchés financiers — Respondent disclosing that information to representative of company owning property in trying to negotiate reduced price for sale of property — Company filing complaint, Agency launching investigation — Investigation finding respondent having used Agency's databases for personal gain, having used her employee status to obtain more favourable sale price for house — Respondent suspended without pay by Agency on July 10, 2015, until end of investigation — Respondent filing first grievance — Notified that Agency initiating review for cause of her security clearance — Respondent terminated on October 27, 2015, effective retroactively to July 10, 2015 — Respondent then notified her reliability status revoked — Respondent filing second grievance, contesting Agency's decision to terminate her retroactively as well as revocation of her reliability status — With respect to first grievance, Board finding respondent's suspension disguised discipline — Ruling on termination grievance, Board concluding alleged misconduct proven, warranting discipline — Board concluding, however, Agency could not impose disciplinary action retroactively because Agency not having explained to employee rationale behind such action — Whether Board's decisions to allow grievance on suspension without pay, to not allow suspension start date to be effective date of termination unreasonable — Board erring in allowing grievance relating to suspension without pay, in finding disciplinary action not justified — Board correctly considering administrative or disciplinary nature of suspension — Board also required to decide whether, under *Financial Administration Act*, R.S.C., 1985, c. F-11 (FAA), s. 12(3), suspension imposed for just cause — Board failing to consider whether respondent's misconduct sufficiently serious to justify suspension — Board's only concern arbitrability of grievance — Board could not limit its examination to explanations provided by Agency to show suspension purely administrative measure, or rely on section of Agency's Discipline Policy on administrative suspensions — Once Board deciding that suspension disciplinary action, Board having to go further, having to determine whether such action proportional to gravity of alleged conduct — Board required to focus on reasons having led Agency to take disciplinary action — Board clearly failing to do so even on generous reading of its reasons — Board erring in not taking into account seriousness of impugned conduct of respondent in its evaluation of justifiable nature of suspension — Board's conclusion appearing unreasonable — Choosing to deal with nature, merits of suspension without pay simultaneously, to not consider latter based on same findings as termination — This approach not consistent with spirit of FAA or wording of FAA, s. 12(3) — Board could not rely on FAA, s. 12(3) to find respondent's termination for cause only as of October 27, 2015 — Prevailing arbitral case law suggesting employer can use start date of suspension as effective date of termination — Administrative decision maker may depart from arbitral trend, provided reasons for doing so convincingly explained — Board attempting to justify its decision not to follow arbitral consensus in this matter — Its explanation flawed — Explanation not taking into account much more detailed explanation provided by Board in *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28, regarding employer's authority to impose retroactive termination date — Departure from this rule only possible under legislation or contract, including collective agreement — Only reason provided by Board for finding termination not retroactive resting upon *McManus v. Treasury*

Board (Revenue Canada, Customs and Excise), [1980] CPSSRB No. 14 — Board's error in present case consisting in not considering that suspension without pay, termination two separate disciplinary actions relying on same justification — Board seeming to interpret requirement in FAA, s. 12(3), i.e. that disciplinary action, termination of employment or demotion permissible for cause, as obligation for employer to explain to employee justification invoked in support of disciplinary action — Debatable to claim, on basis of FAA, s. 12(3), disciplinary measure having to be explained to employee before being imposed — This interpretation of FAA, s. 12(3) unreasonable — Primary purpose of FAA, s. 12(3) to dispense with common law principle that employer can terminate employee as employer sees fit on condition of giving employee advance notice, to introduce requirement of justifying any disciplinary action in government operations — If Parliament had intended to require that justification for termination be communicated to employee, it would have made this intention far clearer — Any ambiguity arising from use in French version of FAA, s. 12(3) of "motifs nécessaires" in title, "motivés" in body of text cleared up by single use of expression "for cause" in English version — This well-known expression undeniably referring to technical standard of "just cause," reflecting express intention of excluding possibility of dismissing employee without justification — Employer's reasons for deciding to terminate respondent existing, identifiable as of July 10, 2015, to extent investigation completed — Grievance contesting suspension without pay dismissed, order to reimburse wages, benefits for suspension period set aside — Application allowed.

CANADA (ATTORNEY GENERAL) V. BÉTOURNAY (A-346-17, 2018 FCA 230, de Montigny J.A., reasons for judgment dated December 18, 2018, 30 pp.)