Federal Court of Appeal | Cour d'appel fédérale

Date: 20220714

Docket: A-29-21

Citation: 2022 FCA 127

CORAM: **DE MONTIGNY J.A.**
LOCKE J.A.
ROUSSEL J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

MARY LLOYD

Respondent

Heard at Ottawa, Ontario, on June 6, 2022.

Judgment delivered at Ottawa, Ontario, on July 14, 2022.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: LOCKE J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The appellant, the Attorney General of Canada (the Attorney General), seeks this Court's intervention regarding a decision of the Federal Court that allowed an application for judicial review from a grievance denied at the final level by the Canada Revenue Agency (the Agency or the CRA). The respondent, Ms. Lloyd, grieved the CRA's decision to transfer her from the Criminal Investigation Division (the CID) because an instance of misconduct – for which she

was disciplined – could compromise her credibility as a witness in prosecutions, which is one of the key activities of an investigator. The Federal Court found that the Agency placed undue weight on legal opinions from the Public Prosecution Service of Canada (PPSC) regarding the respondent's suitability as an investigator, without adequately considering all available and relevant factors and justifying its decision.

[2] For the reasons that follow, I would dismiss the appeal.

I. Background

[3] This appeal is the culmination of a long and protracted labour dispute between the appellant and the respondent, in the course of which Ms. Lloyd filed a number of grievances against the Agency. Only the most relevant of these grievances will be referred to in these reasons.

[4] The respondent began her employment with the Agency in 1997. By 2004, she had assumed the role of a Senior Investigator with the CID. Diagnosed with fibromyalgia in 2005, Ms. Lloyd went on extended sick leave in January of 2006, and from June to October of the same year, was on long-term disability leave. In February 2006, she filed a grievance alleging that her employer had failed to provide timely and adequate accommodation for her condition (the first discrimination grievance).

[5] While on leave, the respondent sought to obtain certain personal information from her work computer in preparation for her grievance. She was directed to the Agency's Information

Technology Branch, which copied and provided her with the entire computer hard drive contents on approximately 16 unencrypted compact discs (CDs). These contained both confidential taxpayer information and personal files.

[6] On August 7, 2007, the respondent was involved in a bicycling accident causing her serious bodily injury, including a traumatic brain injury. As a result, she was once again placed on long-term disability, from August 2007 to November 2009.

[7] Adjudication of the first discrimination grievance occurred in mid-September 2008 before the then Public Service Labour Relations and Employment Board (now the Federal Public Sector Labour Relations and Employment Board, or the Board). Among the issues before the Board was whether Ms. Lloyd had sent an email requesting accommodation to her Assistant Director on June 30, 2005. Because counsel for the CRA objected to the admissibility of the paper copy of that email tendered by Ms. Lloyd and demanded production of the CD in order to prove the existence of the email, Ms. Lloyd produced all 16 of the CDs and indicated that she had made two copies of the CD containing the aforementioned email using a friend's personal computer. They were immediately seized by the CRA. Ms. Lloyd's admission also triggered an investigation into her conduct relating to confidential taxpayer information by the Agency's Internal Affairs and Fraud Prevention Division (IAFPD).

[8] On February 6, 2009, the Board found that the Agency had failed to accommodate Ms. Lloyd's medical condition and had engaged in discrimination (*Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15).

[9] On November 3, 2009, Ms. Lloyd informed the Agency that she was ready to return to work on a part-time basis by the end of the month. However, the employer suspended her indefinitely on November 6, 2009, pending the outcome of the IAFPD investigation. Ms. Lloyd grieved this suspension, claiming that it was a disciplinary measure and constituted harassment, that it was imposed in retaliation for her successful accommodation claim, and that it was used to block her return to work. The IAFPD Investigation Report, released on December 22, 2010, found that Ms. Lloyd breached the Agency's policy regarding the security and protection of confidential taxpayer information, in addition to section 241 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA). The Agency imposed a 40-day suspension on March 17, 2011, which Ms. Lloyd grieved (the discipline grievance).

[10] When the respondent returned to work on June 13, 2011, she was reassigned temporarily to the Special Enforcement Program, where she would not be required to conduct investigations. Her employer informed her on January 17, 2012, that she would be transferred to the Small and Medium Enterprises (SME) Division and she would be precluded from participating in criminal investigations because of the concerns that resulted from her misconduct.

[11] These concerns stem from the Supreme Court of Canada's decision in *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66 [*McNeil*], which held that Crown prosecutors must disclose to defence counsel any "serious misconduct" by individuals involved in an investigation that either relates to the investigation or that could reasonably impact the case against the accused. This extends to Agency investigators, who conduct investigations for cases of tax evasion and fraud. Thus, the Agency must report all findings of serious misconduct to the PPSC, which assesses the

potential impact of *McNeil* concerns on an investigation and whether they should be disclosed to defence counsel.

[12] Ms. Lloyd grieved her transfer to the SME Division (the transfer grievance), and also claimed that she was discriminated against on the basis of disability, contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the second discrimination grievance). The Commissioner of the CRA allowed the grievance and overturned the transfer on August 2, 2012, returning her to the CID. However, the Agency continued to refuse to assign her investigative duties due to the existing *McNeil* concerns.

[13] On July 23, 2015, the Board ruled on the multiple grievances filed by the respondent (*Lloyd v. Canada Revenue Agency*, 2015 PSLREB 67). In particular, the adjudicator dismissed the grievance against her indefinite suspension filed in November 2009, finding that the suspension was not harassment nor retribution for the accommodation claim, but was based on the Agency's operational needs and its concern that confidential taxpayer information needed to be protected. The Board similarly found that the evidence supported the Agency's reasons for imposing the 40-day disciplinary suspension and that it considered all mitigating factors. However, the Board upheld the transfer grievance and awarded Ms. Lloyd $7000 for pain and suffering, finding that the Agency had "failed to meet its duty to accommodate [the respondent's] disability … [and] engaged in a discriminatory practice" when it transferred her to the SME Division without her consent.

[14] On judicial review, this Court set aside the Board's 2015 decision: *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051 [*Lloyd 2016*]. It held that the Board had either dismissed as irrelevant or made no findings on the allegations that Ms. Lloyd had breached Agency policy and section 241 of the ITA by accessing the CDs on her friend's computer (at paras. 15-16, 23). It also found no basis upon which the Board could conclude that Ms. Lloyd had breached the ITA (at paras. 16-17).

[15] The matter was referred back to the Board, which reconsidered the suspension grievance and issued a new decision on August 28, 2017: *Lloyd v. Canada Revenue Agency*, 2017 FPSLREB 22 (the Reconsideration Decision). It found no evidence of an ongoing risk of the disclosure of taxpayer information, nor any support for the allegation that Ms. Lloyd knowingly disclosed taxpayer information contrary to the *ITA*. It concluded that she had not committed "serious acts of misconduct constituting group 5 offences" under the employer's Discipline Policy, but that her misconduct was comparable to group 3 offences such as the unauthorized use of CRA vehicles, stores or equipment (at paras. 149, 166). The Board reduced her suspension to six days (at para. 168).

[16] It bears noting that the Agency sought opinions from the PPSC regarding Ms. Lloyd's *McNeil* concerns on four separate occasions. The first two opinions, obtained in March 2011 and May 2015, found that the respondent was not suited for her position within the CID because her accessing and copying of confidential taxpayer information constituted serious misconduct, which could jeopardize a PPSC prosecution if she were involved. These two opinions are not in the record. The PPSC's third opinion came after the Board's 2017 decision, finding that Ms.

Lloyd's reduced suspension did not change its prior advice from 2015. Finally, the PPSC provided a fourth opinion in February 2018 reiterating that the initial concerns about Ms. Lloyd remained, but that her credibility could possibly be restored with time, together with a carefully supervised work plan incorporating increased responsibility.

[17] The Agency determined that attempting to rehabilitate the respondent's credibility would not be practically possible, as it would involve having a supervisor dedicated to the respondent in order to verify every aspect of her work. Accordingly, the Agency notified Ms. Lloyd by letter dated September 20, 2018, that she could not remain a Senior Investigator with the CID. It offered 11 alternative positions at an equivalent level that could accommodate her medical needs, noting that a refusal to accept the offer might result in her termination for non-disciplinary reasons. Ms. Lloyd grieved this decision on November 13, 2018.

[18] The Agency denied her grievance at the second level on January 28, 2019 (the Second Level Grievance Reply). It found that credibility concerns remained relevant despite the passage of time. Moreover, it found that while the Board had reduced her suspension to well below the 29-day threshold of what constitutes serious misconduct under its *McNeil* Policy and Procedures, the PPSC's legal opinion indicated that Ms. Lloyd had been involved in serious misconduct when she copied the confidential CDs. Thus, it held, her misconduct would still likely require disclosure and could jeopardize a future prosecution.

[19] On July 22, 2019, Mr. Dan Couture, Assistant Commissioner of the Agency's Human Resources Branch (the Assistant Commissioner), denied the grievance at the final level. He held

that the Agency could not assign Ms. Lloyd the key activities of a CID investigator for the reasons set out in the Second Level Grievance Reply. Ms. Lloyd challenged the Assistant Commissioner's decision on judicial review in the Federal Court.

[20] On December 27, 2019, Ms. Lloyd accepted a position with the Agency as an Excise Tax Auditor, effective January 6, 2020, on a without-prejudice basis.

II. Decision under review

[21] On January 7, 2021, the Federal Court (*per* Justice Ahmed) allowed the application for judicial review: *Lloyd v. Canada (Attorney General)*, 2021 FC 29, [2021] 6 C.T.C. 174 [*FC Reasons*]. The Court first ruled to admit the affidavit of Ms. Kalyn Lord, dated October 7, 2019, and nine accompanying documentary exhibits. While these documents were not before the Assistant Commissioner at the time he rendered his decision, they fell within an exception to the general bar on new evidence in judicial review because they provided relevant, general evidence of background nature (citing *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297). Specifically, the first two exhibits contained Agency work descriptions and policies that were readily available to the Assistant Commissioner prior to his decision. The remaining exhibits contained information going to the merits of the decision, which the Assistant Commissioner was expected to have considered.

[22] Next, the Court rejected the Attorney General's argument that the dispute between the parties was moot. It found the dispute remained tangible and concrete because the CID position

still existed, and Ms. Lloyd intended to return to it if successful in her legal proceedings (citing *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R.(4th) 231). The Court disagreed that Ms. Lloyd had voluntarily transferred out of the CID, finding that the transfer had occurred under threat of termination.

[23] Going to the substance of the matter, the Federal Court found that the Assistant Commissioner bore a heightened responsibility to provide reasons that demonstrated he considered the consequences of his decision and to justify those consequences considering the relevant facts and law. This was so, it explained, because the Agency had twice discriminated against Ms. Lloyd and twice transferred her from the CID against her will. Moreover, the Court noted that both the Assistant Commissioner's reasons and the record failed to address how *Lloyd 2016*, the Board's Reconsideration Decision and the Agency's *McNeil* Policy all seemed to contradict the finding that Ms. Lloyd's misconduct was "serious". While the Agency's Second Level Grievance Reply noted that the quantum of discipline Ms. Lloyd faced fell below the threshold for serious misconduct under the *McNeil* Policy, the Court held that the Assistant Commissioner failed to grapple with why the misconduct would still bar her from her CID position.

[24] Instead, it explained, the Assistant Commissioner relied entirely on the PPSC's legal opinions according to which *McNeil* concerns remained because Ms. Lloyd had demonstrated a severe lack of judgment. While it was reasonable for him to consider the PPSC's opinions at face value, he could not do so without considering all other relevant factors, unless adequately justified and explained. In short, the Court found that he failed to rationalize his reliance on those

legal opinions in light of the fact that Ms. Lloyd's actions were significantly different from the examples of serious misconduct found in the CRA's *McNeil* Policy. The resulting decision was therefore unreasonable, as it lacked justification, transparency and intelligibility.

[25] Finally, the Court accepted that the presence of a sunset clause in Ms. Lloyd's collective agreement did not preclude the need to disclose her misconduct to the PPSC. The Court also rejected the appellant's argument that the Board had found Ms. Lloyd's misconduct to be "serious" in its 2017 decision, specifying that the Board had actually found that the misconduct was analogous to a group 3 offence.

III. Issues

[26] In my view, the only issue in this appeal is whether the Assistant Commissioner's decision to dismiss Ms. Lloyd's grievance at the final level was reasonable.

[27] It is agreed between the parties that an appeal from the Federal Court on an application for judicial review requires this Court to determine whether the judge in the first instance identified the appropriate standard of review for each issue and applied it correctly. This is consistent with the jurisprudence of the Supreme Court of Canada on the subject: see *Northern Regional Health Authority v. Horrocks,* 2021 SCC 42, 462 D.L.R. (4th) 585 at para. 12 [*Horrocks*]; *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 46. This approach accords no deference to the reviewing judge's application of the standard of review. In other words, the appeal court must "step into the shoes" of the lower court, and perform a *de novo* review of the administrative decision (*Horrocks* at

para. 10). That being said, where the Federal Court appears to have given a complete answer to an argument advanced on judicial review, an appellant bears a tactical burden to show a flaw in the Federal Court's reasoning: *Canada RNA Biochemical Inc. v. Canada (Health)*, 2021 FCA 213, 2021 CarswellNat 4834 (WL Can) at para. 7; *Bank of Montreal v. Canada (Attorney General)*, 2021 FCA 189, 2021 D.T.C. 5111 at para. 4.

[28] In the case at bar, the parties agree that the Federal Court correctly identified the reasonableness standard. Their dispute relates to the application of that standard.

IV. Analysis

[29] The Attorney General submits that the Federal Court erred in finding that the Assistant Commissioner failed to consider the apparent contradiction between his finding that Ms. Lloyd's misconduct was serious, on the one hand, and *Lloyd 2016*, the Reconsideration Decision of the Board and the CRA's own *McNeil* Policy on the other. Indeed, the Attorney General points out that the Assistant Commissioner never found her misconduct to be serious for *McNeil* disclosure purposes. As it is the PPSC's purview to determine whether an investigator's misconduct must be disclosed to defence counsel, it does not matter that the Assistant Commissioner did not qualify the misconduct for himself. Thus, it is argued, the Federal Court unreasonably set aside the decision based on something the decision maker had no authority to assess.

[30] The Attorney General also submits that the PPSC's legal opinions themselves considered *Lloyd 2016* and the Board's Reconsideration Decision, finding that Ms. Lloyd had still shown a severe lack of judgment that could affect her credibility. PPSC considered that even if the Board

eventually substituted a six-day suspension for the original 40-day suspension, there was still a "severe lack of judgment" that could negatively impact on the credibility of the investigator, and therefore that "it would be better not to expose a potential prosecution to the risks associated with a CID employee who had been found to have engaged in misconduct involving a severe lack of judgment, particularly where that lack of judgment was in relation to a core investigative function, the safeguarding of taxpayer information" (PPSC legal opinion, September 20, 2017; Appeal Book, Tab 19, p.154). The Attorney General also notes that neither this Court nor the Board found that Ms. Lloyd's misconduct was not serious.

[31] Finally, the Attorney General submits that the Assistant Commissioner did indeed consider and explain the impact of the *McNeil* Policy by noting that it was not exhaustive and that what constitutes serious misconduct is a judgment call by the PPSC.

[32] In my view, these arguments must fail. In a nutshell, the core thesis of the Attorney General is that the Assistant Commissioner was bound to follow the PPSC's opinions and was precluded from taking into consideration any other factors in determining whether Ms. Lloyd should be allowed to continue to work in her substantive position as a CID Investigator. Yet, a careful reading of these opinions reveals that they were not as categorical as counsel for the Attorney General would have us believe. Moreover, as noted by the Federal Court, the Assistant Commissioner did not explain why these opinions supersede every other consideration that bore on his decision, including the characterization of Ms. Lloyd's misconduct in *Lloyd 2016*, the Board's Reconsideration Decision and the CRA's own *McNeil* Policy. In light of the Supreme Court's guidance in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65,

[2019] 4 S.C.R. 653 at paras. 96-98 [*Vavilov*], pursuant to which a decision will not meet the requisite standard of justification, transparency and intelligibility when "a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record", the Federal Court could find that the Assistant Commissioner's decision was unreasonable.

[33] It is agreed by the parties, and rightly so, that PPSC's legal opinions cannot be second-guessed by the Assistant Commissioner, and the Federal Court agreed that it was reasonable for him to rely on those opinions "at face value" (*FC Reasons* at para. 57). It is clearly for PPSC to determine, in any given case, whether any serious misconduct by individuals involved in an investigation must be disclosed to defence counsel. That being said, these opinions cannot insulate CRA's management decision entirely from judicial review. As stated by the Federal Court, the Assistant Commissioner had an obligation to consider and grapple with other considerations before coming to its decision. Indeed, the legal opinions themselves state as much and acknowledge quite clearly that the final decision rests with the CRA.

[34] When asked to update its previous advice from 2015 as a result of the *Lloyd 2016* decision of this Court and the Board's ensuing Reconsideration Decision, the PPSC opined that the reduction of the discipline sanction did not change its view and that "[a]ll things being equal it would be better not to expose a potential prosecution to the risks associated with a CID employee who had been found to have engaged in misconduct involving a severe lack of judgment" (Appeal Book, Tab 19, p. 154). It goes on to state that such issues must be dealt with on a case-by-case basis, and adds that this calculation is complicated by the time pressures

imposed by the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. As the author of the PPSC opinion writes, "[f]iles should be streamlined, not made more complicated. Distracting and time consuming side issues should be avoided if possible" (Appeal Book, Tab 19, p. 154).

[35] This caution from PPSC is understandable and makes perfect sense. It is a far cry, however, from a definitive bar to reinstating Ms. Lloyd in her CID position. In fact, the opinion subsequently provides a number of recommendations to mitigate the risk on future prosecutions, and hints that employee rehabilitation could be achieved over time by assigning the investigator increasing responsibilities with strict supervision. Moreover, the last two sentences of the opinion read as follows: "… the PPSC position does not purport to provide human resources or labour management advice to the CRA. The CRA will have to navigate these issues itself" (Appeal Book, Tab 19, p. 155).

[36] In its latest more succinct 2018 opinion, PPSC clarified that Ms. Lloyd's credibility could not be restored based solely on the passage of time and on her own view of the matter, and reiterated that increasing responsibility with strict supervision could prove fruitful for rehabilitation purposes. Once again, this one-page opinion, based on an email request from the Assistant Director of the CRA, cannot be interpreted, without more, as a sufficient justification for the decision by the CRA to force Ms. Lloyd out of her CID position. This is especially so in light of the fact that we do not know what was communicated to the PPSC.

[37] These opinions, therefore, were not sufficient to explain and justify the decision of the Assistant Commissioner to dismiss Ms. Lloyd's grievance. Not only were they not as categorical as the CRA indicated in the Second Level Grievance Reply, but they were only one of the considerations to be taken into account by the CRA before coming to a decision.

[38] The Attorney General contends that, in any event, the PPSC's opinions upon which the CRA relied to prevent Ms. Lloyd from returning to her CID position were consistent with *Lloyd 2016* and the Board's Reconsideration Decision, neither of which concluded that the respondent's misconduct was not serious. In my view, this is not an entirely accurate characterization of these decisions.

[39] In *Lloyd 2016*, this Court held that the evidence on record did not support Ms. Lloyd's initial 40-day disciplinary sentence. At paragraph 22, this Court wrote that the suspension flowed from two factors, namely: 1) a "continued and ongoing risk of disclosure of sensitive taxpayer information" from the downloading of the CDs onto personal computers, and 2) an allegation that Ms. Lloyd had breached section 241 of the *ITA*. However, this Court found that the Board either dismissed these allegations as irrelevant, or made no findings on them. This Court further found that the Board failed to consider the appropriateness of the 40-day suspension in light of the two acts of misconduct that had been established, namely removing taxpayer information without express authority and copying the CDs onto non-CRA computers (at para. 23). Indeed, "the basis upon which the 40-day suspension was justified cannot be discerned without engaging in speculation and rationalization" (at para. 24). It is true that the Court did not expressly state that the respondent's misconduct was not serious, but it certainly casts doubt on such a finding.

[40] Such a reading of *Lloyd 2016* is indeed consistent with the CRA's own assessment of the 2008 incident that prompted Ms. Lloyd's removal from her CID position. Replying to an inquiry from a Senior Investigator with the Office of the Privacy Commissioner regarding privacy concerns arising from that incident, the CRA noted, "there was little risk of injury to taxpayers as a result of this incident". It went on to state that "the investigation concluded that the only information viewed and accessed from the CD was one email for the purpose of a labour relations trial" (Appeal Book, Tab 12, p. 116). Again, one should not infer from that letter, written in the context of a privacy inquiry, that the respondent's conduct does not amount to a lack of judgment. However, it does not smack of serious misconduct requiring, without any further explanation, the permanent reassignment of the respondent by her employer.

[41] In its Reconsideration Decision, the Board reduced the 40-day suspension to six days, finding the initial quantum "excessive in all the circumstances". In doing so, it considered a variety of mitigating factors, including Ms. Lloyd's 14 years of clear service with the Agency, that she had been forthcoming about the incident during the Board hearing, and that she cooperated during the investigation. While the Board did not agree with the respondent that the employer had condoned her misconduct and found instead that it was her responsibility to advise management when she was given the 16 CDs, it nevertheless held at paragraph 162 of its reasons that Ms. Lloyd never intended to access or divulge taxpayer information, and that offences characterized as group 2 offences in the CRA Discipline Policy, such as unauthorized access to or disclosure of taxpayer or other sensitive or confidential information, "appear[ed] … to pertain to more serious misconduct than that which has been established in this case". The Board then explained at paragraphs 164-166 that Ms. Lloyd's misconduct was more serious than another

group of offences (e.g., improper or careless use of neglect of CRA property, equipment or cards), and analogous to group 3 offences (e.g., misuse of CRA facilities, property or information, and the unauthorized use of CRA vehicles, stores, or equipment). Group 3 offences warrant suspension of 1 to 30 days, depending on the aggravating and mitigating factors in play.

[42] Further at odds with the serious misconduct characterization of the respondent's actions is the appellant's own *McNeil* Policy. Among the listed examples of serious misconduct that must be included in a *McNeil* Report to the PPSC are: falsification of expense accounts, use of the CRA's electronic networks for unlawful activities, forgery, obstructing an investigation, embezzlement, misrepresentation for personal gain, soliciting or accepting a bribe, theft, violation of legislation enforced by the CRA, obtaining leave fraudulently, unauthorized disclosure of taxpayer or other sensitive confidential information, and misconduct for which a suspension in excess of 29 days was received. While admittedly not an exhaustive list, as pointed out in the Second Level Grievance Reply upon which the Assistant Commissioner relied in his final decision, it is clearly indicative of the type of misconduct that the appellant deems serious for *McNeil* purposes. At first sight, Ms. Lloyd's misconduct – though still improper and contrary to Agency policy – differs vastly from the examples of serious misconduct listed in the Agency's policy.

[43] Also of relevance in examining the seriousness of Ms. Lloyd's misconduct were the truly unique facts of this case. This is not a case where an individual has surreptitiously copied taxpayer information and then used it for personal gain. The only reason Ms. Lloyd requested access to personal information from her work computer was to prepare for the hearing of her first

discrimination grievance. The email she sought to access was proof that she had requested accommodation measures for her fibromyalgia, which the Agency contested before the Board. Ultimately, the Board found in her favour in that grievance. It is likely that Ms. Lloyd would never have improperly accessed and copied contents from the CD had the Agency not discriminated against her in the first place. Moreover, had Ms. Lloyd been working as she prepared for the hearing, and not been on leave, she would most probably have had access to the relevant information from her work computer and would not have resorted to using a non-Agency device. It is far from clear on the record that the Assistant Commissioner considered these factors in coming to his conclusion, nor that these facts were shared with PPSC.

[44] In light of this context and of the apparent contradictions between the PPSC's legal opinions and this Court's 2016 decision, the Board's Reconsideration Decision and the CRA's *McNeil* Policy, it was incumbent on the Assistant Commissioner to explain why he chose to give precedence to, and indeed felt bound by, the legal opinions. In the absence of any such explanation, the decision cannot be considered justified, transparent and intelligible. This is not to say that PPSC was not entitled to its own judgment call, nor that the Assistant Commissioner should have disregarded or questioned the PPSC's legal opinions; but there was more to his management decision than PPSC's opinions, as important as they were. The CRA could not simply ignore every other consideration, and Ms. Lloyd was entitled to a principled explanation as to why they did not trump CRA's finding that her misconduct was serious enough to prevent her from rehabilitating her credibility over time and from exercising her investigatory functions with the CID.

[45] I agree with the Federal Court that the history of Ms. Lloyd's tumultuous relationship with the Agency imposed on the Assistant Commissioner a heightened responsibility to provide reasons covering all relevant considerations, including the consequences of his decision. The Federal Court's analysis on this point is entirely consistent with the guidance from the Supreme Court in *Vavilov* (at para. 106), where it explained that the "potential impact of the decision on the individual to whom it applies" is a relevant consideration when determining the reasonableness of a decision (see also para. 135).

[46] Finally, the Attorney General's submission that the PPSC's legal opinions and the Second Level Grievance Reply do provide an explanation for the decision and account for the various considerations raised by the respondent cannot be sustained. PPSC's legal opinions do not form part of the reasons, and cannot be relied upon to supplement any insufficiencies in the actual decision. Moreover, the respondent never had access to these opinions and was unaware of their contents until the appellant chose to waive solicitor-client privilege much later and disclose some of them as part of the judicial review proceedings. In any event, the passing references to *Lloyd 2016* and to the Board's Reconsideration Decision in the PPSC's legal opinions do not amount to a meaningful explanation or justification as to why the PPSC's position is consistent with these decisions. As for the Second Level Grievance Reply, the bare mention that "the list of examples of misconduct is not meant to be exhaustive" hardly provides a rational explanation as to why the Board's decision to lower the respondent's suspension to six days is consistent with what amounts to a permanent bar from her investigative duties with the CID.

[47] It is therefore no answer for the Attorney General to claim, as he did, that the Assistant Commissioner's decision was justified because the respondent's misconduct posed a risk to the CRA's role and jeopardized its criminal investigations. Such a statement merely assumes what ought to be demonstrated, and once again relies solely on PPSC's legal opinions without any attempt to balance it against any other considerations.

[48] Nor is it helpful for the Attorney General to support the reasonableness of the CRA's decision on the basis of its managerial authority to assign duties to its employees. The Attorney General contends that the *Canada Revenue Agency Act*, S.C. 1999, c. 17 (the CRA Act) gives the Agency authority over all matters of organization and human resources, including terms and conditions of employment, and section 7 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 preserves the Agency's right to assign duties to its employees. Indeed, Ms. Lloyd's collective agreement contains a management rights clause according to which the Agency retains the "functions, rights, powers and authority" not specifically "abridged, delegated or modified" by the agreement.

[49] I am unpersuaded by this argument, which is nowhere to be found in the Assistant Commissioner's reasons or in the Second Level Grievance Reply. Of course, a decision maker is not bound to identify the precise source of its authority (see *British Columbia (Mild Board) v. Grisnich*, [1995] 2 S.C.R. 895, 126 D.L.R.(4th) 191 at paras. 2, 4, 5 and 19-20; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610 at paras. 31-32). Yet I find it disingenuous for the Attorney General to claim both that the Agency

could reasonably rely on the PPSC's opinions alone, and that it has the power to do as it pleases under the CRA Act.

[50] More importantly, residual management rights are not unlimited. As recognized by the Supreme Court in *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, [2017] 2 S.C.R. 456 at para. 20, "[m]anagement rights must be exercised reasonably and consistently with the collective agreement". See also: *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73, [1965] O.L.A.A. No. 2 (Ont. Arb.); *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at para. 24; Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, 4th ed. (Toronto: Carswell, 2014) (loose-leaf), vol. 1 at topic 4:1520). Accordingly, even assuming that the Agency could transfer Ms. Lloyd from her substantive position against her will, it was still required to exercise that discretion reasonably, and that obligation was heightened as a result of its duty to accommodate the respondent's disabilities. The Attorney General's reliance on the CRA's management rights therefore begs the issue.

[51] The two cases relied upon by counsel for the appellant in support of its thesis are not particularly helpful. In the first case (*Toy v. Edmonton (Police Services)*, 2018 ABCA 37, 66 Alta. L.R. (6th) 205), the Alberta Court of Appeal found that it was not unreasonable for a disciplinary body to confirm the dismissal of a police officer who had lied in a sworn statement and testimony. The Court concluded that the Edmonton Police Service's ability to provide effective policing would be hindered if the police officer's credibility could be successfully

challenged when testifying, based on *McNeil* credibility concerns. I agree with the respondent that the relevance of this case is dubious, as the misconduct involved appears to be much more serious than that of Ms. Lloyd and certainly more susceptible to undermine the police officer's credibility.

[52] In the second case (*Municipal Association of Police Personnel v. Halifax (Municipality),* 2012 CanLII 97776 (N.S. L.A.) [*Halifax*], a police officer had grieved the decision of his employer to deny a transfer to the Criminal Investigation Division of the Halifax Regional Police because he had forged and used a fake parking pass four years earlier. It is interesting to note that the Arbitrator framed the issue as whether "an expunged disciplinary record, for what was 'a minor career transgression' … and in the absence of any further misconducts, poses a real risk to criminal prosecutions …" (at para. 45). Ultimately, the Arbitrator found that the employer made a sensible decision in consulting the Public Prosecution Service on the *McNeil* concerns, but took an inflexible approach to evaluating the grievor's individual circumstances and their evolution as time went on.

[53] Quite apart from the notion that each case turns on its own facts (and that the police officer's misconduct in that case was arguably more serious than Ms. Lloyd's), and that a provincial arbitral award is not binding on this Court, I fail to see how this case supports the Attorney General's argument. I appreciate that in the case at bar, the CRA repeatedly sought the PPSC's views following the reduced suspension and passage of time. The fact remains, however, that the CRA does not appear to have considered any other factors in coming to its decision, including Ms. Lloyd's personal circumstances, the particular context into which her misconduct

took place, the absence of any prior or subsequent misconduct, and the 2016 decision of this Court as well as the 2017 Reconsideration Decision of the Board. As the Federal Court stated, the Assistant Commissioner did not address, either explicitly or by inference, any of these factors. Instead, he relied exclusively on PPSC's legal opinions. In my view, just as in *Halifax*, this is the hallmark of an inflexible approach detached from and impervious to the respondent's particular circumstances and the overall context and evolution of her misconduct file.

V. Conclusion

[54] For all of the above reasons, I would dismiss the appeal and fix the costs in the amount of $4000.00 as *per* the agreement of the parties.

"Yves de Montigny"
J.A.

"I agree
George R. Locke J.A."

"I agree
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 6, 2022
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	LOCKE J.A. ROUSSEL J.A.
DATED:	JULY 14, 2022

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