

Public Servants
Disclosure Protection
Tribunal Canada



Tribunal de la protection
des fonctionnaires
divulgateurs du Canada

Citation: Dunn v. Indigenous and Northern Affairs Canada and Lecompte, 2017 PSDPT 3

File No.: T-2016 -01

**Issued at: Ottawa, Ontario
October 3, 2017**

**In the Matter of an Application by the Public Sector Integrity Commissioner of Canada to
the Public Servants Disclosure Protection Tribunal**

BETWEEN:

**CHANTAL DUNN
Complainant**

-and-

**OFFICE OF THE PUBLIC SECTOR INTEGRITY COMMISSIONER
Commissioner**

and

**INDIGENOUS AND NORTHERN AFFAIRS AND SYLVIE LECOMPTE
Respondents**

DECISION ON THE MERITS

TABLE OF CONTENT

I. Introduction.....	5
II. Witnesses.....	6
III. Factual Background	9
IV. Legislative Context	19
V. Issues	20
VI. Analysis	21
A. The three-step structure of the Tribunal’s analysis.....	21
B. The constituent elements of a reprisal	27
(1) The Protected Disclosure of Wrongdoing	28
(a) <i>January 18, 2011 Disclosure</i>	32
(b) <i>The 2010 Disclosures</i>	34
(2) The Complainant must have suffered one of the measures listed in the definition of “reprisal” under the PSDPA	35
(3) Nexus issues	36
(a) <i>The nexus between the 2010 protected disclosures and the alleged reprisal measures</i>	36
(b) <i>Intention is required to establish the grounds for an order of a disciplinary measure against Ms. Lecompte</i>	41
(i) Explaining intention.....	41
(ii) Submissions of the Parties	43
(iii) Human rights jurisprudence is of no import to the interpretation of a reprisal under the Act	44
(iv) Textual and Contextual Analysis	50
(v) Conclusion	54
(c) <i>Sufficiency of the causal link</i>	56
C. Was a reprisal taken against Ms Dunn by Ms Lecompte.....	56
(1) Introduction	56
(2) Roadmap of analysis.....	61
(3) Issues of witness credibility or reliability	63
(a) <i>Mr. Egglefield’s animus towards Ms. Lecompte</i>	63
(b) <i>The reliability of Mr. Egglefield’s notes</i>	67
(c) <i>Conclusion on Mr. Egglefield’s credibility</i>	69
(d) <i>Ms. Nadon’s testimony</i>	69
D. The Allegation of Monitoring	75
(1) Ms. Lecompte was mandated to regularize the work absences situation and she wanted to ensure that Ms. Dunn’s leave and late absences were recorded in the PeopleSoft system because they were significantly more numerous than those of any other AISB employee	76

- (2) At the September 12, 2011 meeting Mr. Egglefield was directed to assume Ms. Lecompte's duties to properly implement leave/late absences for Ms. Dunn, as for other employees, as she no longer could manage Ms. Dunn's file given the reprisal complaint, and to ensure they were recorded in the PeopleSoft system78
- (3) There is no evidence of Mr. Egglefield reporting Ms. Dunn's leave/late absences to Ms. Lecompte83
 - (a) *Ms. Dunn copying her leave requests to Ms. Lecompte pursuant to Mr. Egglefield's direction is not evidence of a reprisal*85
 - (b) *Mr. Egglefield breached his duty of loyalty to Ms. Lecompte by disclosing to Ms. Dunn that he was being asked to report her leave directly to Ms. Lecompte, and not that of any other employee, and advising her to record these comments without first raising the issue with Ms. Lecompte*88
 - (i) Mr. Egglefield was reminded by Ms. Lecompte on July 6, 2012 to ensure that Ms. Dunn's leave absences were reported.....88
 - (ii) Mr. Egglefield inappropriately advised Ms. Dunn that she alone was being singled out by Ms. Lecompte for monitoring and that she should keep a record of their discussion90
- (4) Conclusion: no reprisal by Ms. Lecompte concerning any issue of monitoring96

E. The Allegation of Segregation.....97

- (1) Mr. Egglefield's Segregation Evidence that his loyalty was questioned for taking smoke breaks with Ms. Dunn 98
 - (a) *November 17, 2011 – Ms. Dunn has a smoking break with Mr. Egglefield immediately after going on assignment in Ottawa*98
 - (b) The November 18, 2011 Lecompte-Egglefield Meetings.....101
 - (i) The First Meeting of November 18: Mr. Egglefield is rebuked for proactively amending a template.101
 - (I) Analysis.....103
 - (ii) The Second Meeting of November 18: Mr. Egglefield's Loyalty is Questioned105
 - (I) The Evidence105
 - (II) Analysis110
 - 1. Ms. Lecompte was following the instructions of Ms. Scotton, but added the reference to the retaliation complaints111
 - 2. The "Context" Justified Curtailing Ms. Dunn's Smoke Breaks While on Assignment and the Mentioning of the Retaliation Complaints112
 - 3. Ms. Lecompte advised Mr. Egglefield to forget about her concerns about smoke breaks with Ms. Dunn, but simply to reduce his cigarette breaks116
 - (c) *The November 22 Meeting: Questioning Mr. Egglefield's Loyalty*117
 - (i) The Evidence117
 - (ii) Analysis119
 - (I) Reasons 1 and 2: Going on extended sick leave on his first day of work and applying for a position outside of the branch relate to his commitment not his loyalty119
 - (II) Reason 3: Mr. Egglefield considered Ms. Scotton to be the source of questions about his trustworthiness, not Ms. Lecompte120
 - (III) Reason 4: Inquiring as to whether Mr. Egglefield had been interviewed by PSIC.....126
 - (IV) Ms. Lecompte never apologized but pointed out that she herself felt at risk and unable to trust anyone.....127
 - (d) *Mr. Egglefield discloses to Ms. Dunn that his loyalty has been questioned because he is taking smoke breaks with her*.....129
 - (i) The Evidence129
 - (I) First version.....129
 - (II) Second version131
 - (III) Final version132
 - (IV) Analysis132
 - (e) *Conclusions on the allegation of segregation relating to Mr. Egglefield's loyalty being called into question*134
 - (i) No reprisal was taken against Ms. Dunn relating to issues of Mr. Egglefield's loyalty in taking smoke breaks with her134
 - (ii) It was not Ms. Lecompte's intention to prevent Ms. Dunn from having smoke breaks with Mr. Egglefield135

(2) Ms. Nadon's Evidence that Ms. Lecompte segregated Ms. Dunn from her fellow employees	136
(a) <i>Ms. Lecompte did not say to Ms. Nadon during one of their first meetings in April 2011 that Ms. Dunn had a difficult personality, nor did she direct her not to befriend her.</i>	136
(b) <i>Ms. Lecompte did not commit a reprisal of segregation when she advised Ms. Nadon and staff that Ms. Dunn and Ms. Gosselin were not to have access to the workplace in the mezzanine when on voluntary assignment to avoid further acts of retaliation by her.</i>	140
(c) <i>Ms. Lecompte did not commit a reprisal of segregation by directing Ms. Nadon to pull back invitations to Ms. Dunn and Ms. Gosselin for the 2012 year-end party when they had voluntarily segregated themselves from the workplace</i>	141
(d) <i>Ms. Dunn's reprisal complaints had significant negative personal and career repercussions for Ms. Lecompte</i>	144
(3) Other incidents pertaining to the alleged segregation of Ms. Dunn.....	148
(a) <i>Ms. Lecompte instructing Ms. Dunn not to request Ms. Gosselin be in the workplace while she was on assignment.</i>	148
(b) <i>Failure to invite Ms. Dunn, Mr. Egglefield and a Temporary Support Worker to a social event.</i>	149
(4) Conclusion: no reprisal taken by Ms. Lecompte against Ms. Dunn in regard to any issue of her segregating Ms. Dunn from her coworkers	150
F. Additional allegations not in the particulars	150
(1) Ms. Lecompte did not commit a reprisal against Ms. Dunn in advising her staff at a meeting that Ms. Dunn was on assignment because she had made complaints to the PSIC, nor did she celebrate her departure with wine and cheese events	152
(a) <i>Ms. Lecompte disclosing to the Branch staff on October 12, 2012 that Ms. Dunn was on assignment because she had made a reprisal complaint against her.</i>	152
(b) <i>Wine and cheese celebrations of Ms. Dunn's assignments out of the workplace</i>	156
(2) Ms. Lecompte did not advise Mr. Egglefield that she intended to discipline Ms. Dunn for her conduct in meeting Mr. Sterne and her in entering the workplace on September 6, 2012.....	159
(a) <i>Ms. Dunn was rude to Mr. Sterne and Ms. Lecompte by inappropriately looking away and ignoring them when meeting them upon entering the workplace.</i>	159
(b) <i>Ms. Lecompte did not advise Mr. Egglefield that she was considering taking disciplinary action against Ms. Dunn over the incident, yet Mr. Egglefield advised her that she did</i>	166
VII. Conclusion: Ms. Lecompte did not take a reprisal against Ms. Dunn	172
VIII. Remedy.....	172
IX. Conclusion	176
Appendix A	177
Appendix B	179

I. Introduction

[1] This is an application to the Public Servants Disclosure Protection Tribunal [PSDPT, or Tribunal] pursuant to paragraph 20.4(1)(b) of the *Public Servants Disclosure Protection Act*, SC 2005 c 46 [the Act or PSDPA] and Rule 5 of the *Public Servants Disclosure Protection Tribunal Rules of Procedure*, SOR/2011 – 170 [PSDPA Rules] for a determination of whether a reprisal, as defined under subsection 2(1) of the Act, was taken against the Complainant and, if the Tribunal determines that a reprisal was taken, for an Order issuing a remedy in favour of the Complainant and disciplinary action against the person who took the reprisal.

[2] This Application relates to allegations that Ms. Sylvie Lecompte (Ms. Lecompte), Director, Assessment and Investigation Services Branch [AISB] at Indigenous and Northern Affairs Canada [INAC or the Employer] engaged in reprisal actions against Ms. Chantal Dunn [Ms. Dunn or the Complainant] as a result of protected disclosures.

[3] Ms. Dunn and the Commissioner were represented by separate counsel, but for the most part advanced the same submissions to the Tribunal. In the reasons that follow, when I refer to Ms. Dunn or the Complainant, it is intended to include the Commissioner, unless otherwise noted. With respect to the responding parties, only the Employer was represented at the hearing. Ms. Lecompte nevertheless presented written closing submissions, but did not participate in the hearing otherwise than testifying on her own behalf. When I refer to the Employer, it is intended to include submissions on behalf of Ms. Lecompte, unless otherwise indicated.

[4] At the opening of the hearing, it was indicated that Ms. Lecompte, whose mother tongue is French, would testify with the aid of an interpreter for her replies to questions in cross-examination. Otherwise she testified in English. Simultaneous translation into English was provided throughout of her French language testimony. However, the parties agreed at the commencement of the hearing that the matter would be considered to be a unilingual English proceeding, where only the English transcript and submissions would form the official record.

II. Witnesses

[5] Ms. Dunn is an employee of INAC, a public servant as defined under subsection 2(1) of the Act. During the period in question, she was an Investigator at the AISB, Audit and Evaluation Sector. Ms. Dunn started working in investigations as a Loss Prevention Officer for Zellers in 1990. After going back to school to become a paralegal in 2001 and working for two law firms, she joined the public service in September 2006 working for INAC's National Allegations and Complaints Administrator. It was in May 2008, when AISB was launched as a pilot project, that Ms. Dunn was hired as an AS-03. She worked under the direction of two previous Directors before Ms. Lecompte became Director in December 2010. She filed a first reprisal complaint on March 11, 2011 followed by a second one that forms the basis of this proceeding on September 26, 2012. Shortly thereafter she went on assignment to other areas in INAC pending the determination of her complaint.

[6] Ms. Lecompte is a long-time public servant. She began her career in the Public Service in her words "late", first working at the Canadian International Development Agency for 15 years. After that she occupied a series of two-year positions, first at Fisheries and Oceans, then at the

Treasury Board Secretariat, followed by a period at the Public Sector Integrity Commissioner [PSIC]. In 2010, she was successful on the competition for the position of Director of AISB, and commenced work in that capacity in December 2010.

[7] During the relevant period, she reported to Anne Scotton, while directing two managers, Mr. Brian Finn and Mr. Denis Egglefield until they left AISB because of a government-wide workforce adjustment in the spring of 2012. During this period, Ms. Lecompte oversaw a team of 7-9 employees. She occupied the Director position at AISB for five years, after which she was appointed elsewhere in INAC.

[8] Mr. Egglefield was Ms. Dunn's manager for most of the time that is relevant to these proceedings. Prior to joining the public service, he served for over twenty years as a military police officer with the Canadian Forces. He joined the public service in 2007 with the Department of National Defence, working for the Canadian Forces Ombudsman's Office, Director of Investigations. Around 2010, Mr. Egglefield went to work for PSIC prior to becoming a Manager with AISB in April 2011. He was initially off work from AISB for the first twelve weeks due to back surgery, returning in July 2011. During his time at AISB, Mr. Egglefield worked under Ms. Lecompte's direction and supervised two employees, Ms. Nadon and Ms. Dunn. In March 2012, he received notice that his position with AISB was being workforce readjusted and was appointed in October 2012 as a manager for the Internal Disclosure Office of the Canada Border Services Agency.

[9] Mr. Egglefield took daily handwritten notes of meetings and significant events throughout his time with AISB. These were used extensively in establishing a chronology of events that took place from 2011-2012. He also provided the Tribunal with a table dated March 24, 2016. This table was prepared in 2016, prior to an interview Mr. Egglefield had with PSIC. Mr. Egglefield testified that, in preparation for this interview, he had reviewed his handwritten notes and had summarized relevant notes in this new table along with any comments he thought would be relevant to the PSIC's investigation.

[10] Ms. Nadon was Ms. Dunn's colleague at AISB. She was the only other employee to report directly to Mr. Egglefield. Ms. Nadon started working for the public service in January 1991 as a casual employee and then occasionally as a student. Ms. Nadon became an indeterminate employee in February 2000 and has worked in various departments since. Ms. Nadon started working at INAC, with AISB, on April 1, 2011.

[11] Mr. Finn worked alongside Mr. Egglefield as the second Manager working under Ms. Lecompte's direction. Mr. Finn joined the public service with the Canada Pension Plan in 1994 after being a member of the Canadian Armed Forces for seven years. In the early 2000s, he was transferred to the Ombudsman's Office for the Department of National Defence as a Senior Investigator. In December 2010, he joined AISB where he supervised two employees, Donna Young and Sarah Koteles. He left AISB in the fall of 2012 pursuant to the workforce adjustment. He now works as Audit Manager for the Royal Canadian Mounted Police.

III. Factual Background

[12] Ms. Dunn started working as an AS-03 with AISB, a newly created pilot-project in May 2008. She reported to Jacques Beaulieu and then to Jean-Jacques Lemay until September 2010, when he retired. Both Mr. Beaulieu and Mr. Lemay had described Ms. Dunn's work as exceeding expectations in their Employee Performance Management [EPM] reports.

[13] In April or June of 2010, Ms. Dunn made a disclosure to Mr. Lemay of what she believed to be unjust hiring practices. A person had been promoted while on maternity leave in the absence of a competitive process. Additionally, a relationship existed between the hiring manager, Ms. Scotton, and the person being promoted. Two of Ms. Dunn's colleagues at the time, Mr. Kevin Nicholl and Ms. Marylène Gosselin also raised this same issue with Mr. Lemay. Ms. Scotton eventually withdrew this promotion after being contacted by Mr. Lemay.

[14] In July 2010, Ms. Dunn met with the Values and Ethics Division of INAC and made a further disclosure of a perceived conflict of interest. The contract of a temporary help services [THS] consultant, Ms. Lamarre, was being managed by her daughter. In addition, this consultant's role allegedly did not match the statement of work she was hired for.

[15] In October 2010, Ms. Dunn started acting at the AS-05 level.

[16] On December 13, 2010, Ms. Lecompte became Director of AISB. Prior to her arrival, Ms. Lecompte had been told by Ms. Scotton that the AISB team was dysfunctional. Upon

arrival, she quickly noticed that there was significant competition between team members for the unfilled positions which were occupied by staff on an acting basis. She was also told about and noticed attendance issues. There was also a backlog of more than two hundred files at this time. She soon asked team members to work within a set schedule and to ensure that leave requests were inputted into the PeopleSoft reporting system.

[17] Upon arriving at AISB, one of her main priorities was to complete the staffing processes of the positions left unfilled with acting employees, one of which was for an AS-05 position. Ms. Dunn, who had occupied the position on an acting basis, applied for the position. She had succeeded on written exams and was a candidate for the position. Ms. Lecompte brought on two external Directors to support her during the interview phase.

[18] In these first few days of her term as Director, Ms. Lecompte met with each member of the AISB team. She met with Ms. Dunn on January 18, 2011. During this meeting, Ms. Dunn disclosed to Ms. Lecompte the perceived conflict of interest involving Ms. Lamarre that she had previously disclosed to the Values and Ethics Division of INAC, as well as the fact that she had been summoned to an interview with PSIC as part of an investigation into a colleague's complaint. She explained to Ms. Lecompte that she was concerned that these could impact the outcome of the AS-05 competition process given that she understood the process was being run by Ms. Lamarre. Ms. Lecompte testified that many employees had communicated similar complaints and concerns with regards to the hiring processes when she started her work at AISB.

[19] Ms. Lecompte, having heard similar concerns from other employees, assured her team that Ms. Lamarre would not be involved in the competition process. Ultimately, Ms. Dunn was not selected for the AS-05 position. However, Ms. Lamarre was listed as the point of contact for persons who had not been selected and her name and signature appear on the statutory declaration of the selection board. Ms. Lecompte testified that Ms. Lamarre's involvement had been purely administrative and that apart from external personnel who were brought in from outside the Branch to assist in the interviews, she was ultimately the only decision-maker with respect to the staffing of these positions.

[20] On March 30, 2011, Ms. Dunn submitted her first reprisal complaint to PSIC. This complaint is not the subject of this application, nor was it entered into evidence. It is understood to have named both Ms. Scotton and Ms. Lecompte as the perpetrators of the reprisal. It is further understood that the main complaint related to the staffing process that Ms Dunn had not succeeded on. Ms. Lecompte testified that although not formally advised until September 2011, she was aware by events at the office that Ms Dunn had filed a PSIC complaint against her. This complaint was ultimately dismissed as unfounded more than two years later.

[21] Around the same time, Kevin Nicholl and Marylène Gosselin also filed reprisal complaints against Ms Lecompte concerning the staffing processes which they had not succeeded on.

[22] On April 1, 2011, Ms. Nadon started working with AISB. Ms. Nadon testified that, shortly thereafter, Ms. Lecompte told her that Ms. Dunn had a difficult personality and that she

should not befriend her. Ms. Lecompte completely denies this. It is the subject of a detailed analysis below.

[23] On April 19, 2011, Mr. Egglefield was hired as a Manager with AISB. The next day, he informed Ms. Lecompte that he unexpectedly had to take leave for surgery, something Ms. Lecompte was unhappy about given her heavy workload and her understanding that the surgery was not scheduled and would occur in the future.

[24] Until Mr. Egglefield commenced work, Ms. Dunn reported directly to Ms. Lecompte. She had special leave and late arrival issues due to her own and her mother's disabilities which had been worked out with Ms. Lecompte. Ms. Lecompte had no issues concerning the legitimacy of any of Ms. Dunn's leave or other absences.

[25] On July 12, 2011, Mr. Egglefield returned to AISB. At this time, both Ms. Dunn and Ms. Nadon started reporting directly to him.

[26] In or around September 2011, AISB moved to a new workspace in Gatineau. This secured workspace, commonly referred to as "the mezzanine", had an open-concept design which allowed Ms. Lecompte to be generally aware of her employee's attendance.

[27] On September 9, 2011, Ms. Lecompte received notice of the PSIC's investigation into Ms. Dunn's first complaint.

[28] On September 12, 2011, Mr. Egglefield and Ms. Lecompte held a bilateral meeting. Its purpose was to hand over management of Ms Dunn's late/absence file to Mr. Egglefield because of the notice of the reprisal complaint. According to Mr. Egglefield's handwritten notes Ms. Lecompte "want[ed] to be kept up to date on leave/late", which he characterized as singling Ms Dunn out by being required to monitor her work absences when no other employee was subject to a similar request. His evidence forms the crux of one of the two allegations of reprisal brought against Ms Lecompte and is the subject of a detailed analysis below.

[29] In November, Ms. Dunn and Ms. Gosselin refused to sign a team charter intended to reduce staff conflicts claiming that it could be used to take disciplinary measures against them. It was drafted by AISB staff with the assistance of Mr. Sterne, a consultant hired to provide guidance in improving staff relations.

[30] On November 16, 2011, Ms. Dunn left AISB on her first assignment to a position outside of the Gatineau office to a location in Ottawa. She acknowledges that the assignment was at her own request for causes unrelated to any issue of reprisal. On November 17, 2011, she was observed taking a smoking break with Mr. Egglefield outside the AISB offices.

[31] On November 18, 2011, Mr. Egglefield had two meetings with Ms. Lecompte. At the first meeting, an issue arose concerning amendments that Mr. Egglefield had made to a template drafted by AISB for admissibility reports completed by Investigators. Mr. Egglefield testified that Ms. Lecompte was unhappy that he had made these changes without advising her. His notes

indicate that she told him, “when you’re boss, you can decide”. The events of this meeting and subsequent meetings of the day are examined in detail below.

[32] The second meeting arose because Ms. Scotton had seen Mr. Egglefield taking a smoke break with Ms. Dunn while she was on assignment in Ottawa and wanted it to stop. Ms. Lecompte had also found that the two were taking too many smoke breaks. Ms. Lecompte indicated to Mr. Egglefield that someone had reported his smoke breaks with Ms. Dunn. Mr. Egglefield blamed Ms. Scotton and reacted to the suggestion that someone should be telling him who he could take smoking breaks with. In the ensuing discussion issues of what are described as his loyalty arose. It is acknowledged that in this conversation Ms. Lecompte asked him to consider the context of the complaints that had been filed against her.

[33] On November 22, 2011, Mr. Egglefield met with Ms. Lecompte to raise his discomfort regarding the November 18, 2011 meeting where he found his loyalty had been questioned. In his notes, he listed four “reasons” why his trustworthiness had been questioned. The evidence pertaining to this meeting is considered in detail below.

[34] On December 6, 2011, Mr. Egglefield told Ms. Dunn that his loyalty had been questioned. There is some issue whether he advised her that he told her that Ms. Lecompte was the person who questioned his loyalty, as opposed to telling her on July 11, 2012 when other events were occurring. I conclude that it was not until July that Ms. Lecompte was revealed as the person who had questioned his loyalty.

[35] In April 2012, Mr. Egglefield and Mr. Finn became aware that they were being workforce-adjusted from their positions with AISB. Mr. Egglefield thought it was unusual that the only two managers would be workforce-adjusted and that junior staff would report directly to Ms. Lecompte. He admitted to being upset and believing that this was a reprisal against him by Ms. Lecompte and Ms. Scotton.

[36] On April 20, 2012, Ms. Dunn told Mr. Egglefield that she had requested an extension to her first assignment. However she was required to return to the AISB on May 1, 2012 because of the government-wide workforce adjustment.

[37] On May 28, 2012, Ms. Dunn invited Ms. Gosselin, who was her friend and on assignment at the time, to AISB's mezzanine. Ms. Lecompte had directed that Ms. Gosselin was not to return to the workplace without her being advised. She asked Ms. Dunn to have any future meetings with Ms. Gosselin outside the workplace.

[38] On July 6, 2012, Ms. Lecompte again asked Mr. Egglefield to report all of Ms. Dunn's absences after he had failed to report her sick leave of the prior Friday.

[39] On July 11, 2012, Ms. Lecompte told the staff that she would not change the work schedule to end the work day at 3:30pm. In a meeting with Ms. Dunn after work on the same day Mr. Egglefield informed Ms. Dunn that Ms. Lecompte had questioned his loyalty for taking smoke breaks with her. He also told her that Ms. Lecompte had asked him to report her leave directly to her and that no other employee was required to do this. He advised her to keep a

record of this conversation. He further asked Ms. Dunn to copy Ms. Lecompte on any future leave requests. He testified that he provided this information to Ms. Dunn because he thought she was being treated inappropriately by Ms. Lecompte.

[40] On July 16, 2012, Ms. Lecompte wrote to INAC's Deputy Minister to communicate that she did not feel supported by INAC during this time where she was facing multiple complaints from employees. In this email, she noted that Ms. Dunn had been taking notes of their interactions.

[41] On August 15, 2012, Mr. Egglefield suggested to Ms. Dunn that she not to associate with Ms. Gosselin or Mr. Nicholl until the PSIC investigations were resolved.

[42] On August 17, 2012, Ms. Dunn chose not to attend a work luncheon with Mr. Sterne because Ms. Gosselin had not been allowed to attend.

[43] On August 29, 2012, Mr. Egglefield advised Ms. Dunn that Ms. Lecompte had denied her French language training due to AISB's operational needs, the fact that her position was classified as English essential and the large amount of leave she had taken. Mr. Egglefield commented to Ms. Dunn that other colleagues actually took more leave than her.

[44] Ms. Nadon testified that, around September 2012, she started to dislike Ms. Lecompte for different reasons: because Ms. Lecompte did not like her and that the office was divided into cliques that she liked and did not like.

[45] On September 6, 2012, an incident occurred where Ms. Lecompte considered Ms. Dunn's conduct was rude towards Mr. Sterne, an outside consultant, by turning her head away and not greeting them as they entered the office together. She discussed this with Mr. Egglefield who in turn discussed the incident with Ms. Dunn. Issues arose concerning whether Ms. Dunn was rude in the incident and whether Ms. Lecompte discussed disciplining Ms. Dunn over the incident.

[46] On September 26, 2012, Ms. Dunn filed her second complaint with the PSIC listing six allegations of reprisal by Ms. Scotton and 16 by Ms. Lecompte. A copy of the allegations is attached as appendix "A" to these reasons. Two allegation of reprisal by Ms. Lecompte resulted in a referral to the Tribunal concerning the claims of her singling Ms. Dunn out by monitoring her work absences and segregating Ms. Dunn from her coworkers.

[47] On September 28, 2012, Ms. Gosselin came to AISB's workspace to give Ms. Dunn access to a file they had been working on. Ms. Lecompte reiterated to Ms. Dunn that Ms. Gosselin was not to be allowed in the workspace while she was on assignment.

[48] On October 10, 2012, Ms. Dunn left AISB on her second assignment in response to several requests. Ms. Lecompte had been away from the office and was unaware of the situation until her return and that members of staff were questioning what had occurred. Ms. Lecompte communicated to the team that this was due to her complaints before PSIC.

[49] On October 11, 2012, Mr. Egglefield wrote an email to Ms. Dunn, who was on assignment, advising her that Ms. Lecompte had told AISB staff that she was on assignment

because of her PSIC complaints. He also asked for the email address of the investigator. Mr. Egglefield testified that he sent this email because he was discouraged with the way Ms. Dunn had been treated.

[50] On October 12, 2012 when having coffee with Ms. Dunn, Ms. Nadon and Mr. Egglefield advised her that Ms. Lecompte had told AISB staff that the complaints against her were the reason for her assignment.

[51] Ms. Nadon testified that, at some time in December 2012, while she was tasked with planning the annual holiday party for AISB, she was asked by Ms. Lecompte to retract invitations sent to Ms. Dunn and Ms. Gosselin because they were on assignment.

[52] On December 7, 2012, PSIC launched an investigation into the allegations contained in the second reprisal complaint.

[53] Since her second assignment, Ms. Dunn has not yet obtained signed assignment papers formalizing her move away from ASIB. Ms. Lecompte testified that Ms. Scotton told her she could not sign these papers as Ms. Dunn was no longer under her supervision and any decision with regards to her assignment papers was to be taken by upper management.

[54] On April 7, 2014, PSIC advised Ms. Dunn's that they would not proceed with her second complaint. An application for judicial review of this decision was filed with the Federal Court on

May 7, 2014. PSIC reopened the second complaint on December 30, 2014. On March 2, 2016, the Commissioner referred the matter to the Tribunal.

IV. Legislative Context

[55] The Tribunal was created to protect public servants who report wrongdoing from reprisals. Its mandate is to determine whether a reprisal occurred in relation to an application that has been referred to it by the Commissioner. In *El-Helou v Courts Administration Service*, 2011 PSDPT 1 at para 54 [*El-Helou I*], the Act's purpose was described as follows:

A careful balance must be struck, when interpreting the Act, between the duty of loyalty and the right to freedom of expression. In providing remedies to public servants who have suffered reprisal, including possible compensation for pain and suffering, the Act is a remedial statute. Therefore, the Act should be given a large and liberal interpretation, in light of its objectives, preamble and remedial nature.

[56] A complaint must be referred to the Tribunal through an application made by the Commissioner. The application gives the Tribunal its jurisdiction (*El-Helou v Courts Administration Service*, 2011 PSDPT 4 at para 43 [*El-Helou 4*]). The Commission plays a gatekeeping function similar to that mandated in the *Canadian Human Rights Act*.

[57] Notably, the Commissioner decides which of the complainant's allegations to include in the complaint, which individual respondents should be named, whether an order should be requested regarding a remedy in favour of the complainant, and whether to also seek an order

regarding disciplinary action against a respondent (*El-Helou v Courts Administration Service*, 2011 PSDPT 2 at para 28 [*El-Helou 2*]; and *El-Helou 1* at para 89).

[58] Once the Commissioner has referred a matter to the Tribunal, the Tribunal must determine whether each element of the complaint has been made out on a balance of probabilities. This standard is more demanding than the reasonable grounds required for the Commissioner to make a referral (*El-Helou 4* at para 35).

[59] The relevant provisions of the Act are found in the Appendix.

V. Issues

[60] The Tribunal must decide on the following issues in respect of an application by the Commissioner pursuant to section 20.4(1)(b) for a determination pursuant to section 21.5 (1):

1. Did the Complainant make a “protected disclosure” under the Act?
2. Did the Complainant suffer a “reprisal” under the Act?
 - a. Did the Respondent inappropriately monitor the Complainant’s attendance?
 - b. Did the Respondent attempt to segregate the Complainant?
 - c. Should the Tribunal consider allegations of reprisal not submitted by the Commissioner?
3. Is there a nexus between the Complainant’s protected disclosure of wrongdoing and the alleged reprisal measures such that it is determined that the Complainant has been subject to a reprisal?

- a. What is the applicable test?
 - b. What is the appropriate mental element required to establish a reprisal taken by Ms. Lecompte that results in an order against her for disciplinary action?
 - c. Does the evidence establish a nexus in this case?
4. If a reprisal was taken against the Complainant, whether Ms. Lecompte actually took it against the Complainant?
 5. If it is determined that Ms. Lecompte took a reprisal against the Complainant, whether to direct a further proceeding to determine whether to order the Employer to take appropriate disciplinary measures against Ms. Lecompte?
 6. Whether or not it is determined that Ms. Lecompte did not actually take the reprisal found to have been taken against the Complainant, what is the appropriate remedy pursuant to section 21.7 (1) of the Act of all necessary measures that the Employer should be ordered to provide the Complainant?

VI. Analysis

A. The three-step structure of the Tribunal's analysis

[61] I find that the most appropriate manner to analyse the issues in this proceeding is to begin with the procedure the Tribunal is required to follow in making its determinations, which necessarily leads back to the scheme of the Act in terms of determining whether a reprisal has occurred and the appropriate orders that follow.

[62] Pursuant to section 20.4(1), the scheme of the Act provides two avenues for a reprisal application to the Tribunal. Under subparagraph (a), the Commissioner may request that an order be made for a remedy in favour of the Complainant, which if the Tribunal determines that a

reprisal was taken, would be limited to the remedial factors outlined in section 21.7 (1).

Otherwise, if the application to the Tribunal is brought under subparagraph (b) as in this matter, in which case in addition to ordering a remedy in favour of the Complainant where a reprisal is found to have occurred, the Tribunal may also make an order respecting disciplinary action against Ms. Lecompte as being the person named in the application who took the reprisal against the Complainant.

[63] For ease of reference, the definition of reprisal, the application section 20.4(1) and the remedy section 21.7 (1), with my emphasis are as follows:

Reprisal means any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:

(a) a disciplinary measure;

(b) the demotion of the public servant;

(c) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;

(d) any measure that adversely affects the

représailles L'une ou l'autre des mesures ci-après prises à l'encontre d'un fonctionnaire pour le motif qu'il a fait une divulgation protégée ou pour le motif qu'il a collaboré de bonne foi à une enquête menée sur une divulgation ou commencée au titre de l'article 33 :

a) toute sanction disciplinaire;

b) la rétrogradation du fonctionnaire;

c) son licenciement et, s'agissant d'un membre de la Gendarmerie royale du Canada, son renvoi ou congédiement;

d) toute mesure portant atteinte à son emploi ou à

employment or working conditions of the public servant; and

ses conditions de travail;

(e) a threat to take any of the measures referred to in any of paragraphs (a) to (d).

e) toute menace à cet égard. (reprisal)

20.4 (1) If, after receipt of the report, the Commissioner is of the opinion that an application to the Tribunal in relation to the complaint is warranted, the Commissioner may apply to the Tribunal for a determination of whether or not a reprisal was taken against the complainant and, if the Tribunal determines that a reprisal was taken, for

20.4 (1) Si, après réception du rapport d'enquête, le commissaire est d'avis que l'instruction de la plainte par le Tribunal est justifiée, il peut lui demander de décider si des représailles ont été exercées à l'égard du plaignant et, le cas échéant :

(a) an order respecting a remedy in favour of the complainant; or

a) soit d'ordonner la prise des mesures de réparation à l'égard du plaignant;

(b) an order respecting a remedy in favour of the complainant and an order respecting disciplinary action against any person or persons identified by the Commissioner in the application as being the person or persons who took the reprisal.

b) soit d'ordonner la prise des mesures de réparation à l'égard du plaignant et la prise de sanctions disciplinaires à l'encontre de la personne ou des personnes identifiées dans la demande comme étant celles qui ont exercé les représailles.

21.7 (1) To provide an appropriate remedy to the complainant, the Tribunal may, by order, require the employer or the appropriate

21.7 (1) Afin que soient prises les mesures de réparation indiquées, le Tribunal peut, par ordonnance, enjoindre à l'employeur, à l'administrateur

chief executive, or any person acting on their behalf, to take all necessary measures to

général compétent ou à toute personne agissant en leur nom de prendre toutes les mesures nécessaires pour :

(a) permit the complainant to return to his or her duties;

a) permettre au plaignant de reprendre son travail;

(b) reinstate the complainant or pay compensation to the complainant in lieu of reinstatement if, in the Tribunal's opinion, the relationship of trust between the parties cannot be restored;

b) le réintégrer ou lui verser une indemnité, s'il estime que le lien de confiance qui existait entre les parties ne peut être rétabli;

(c) pay to the complainant compensation in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to the remuneration that would, but for the reprisal, have been paid to the complainant;

c) lui verser une indemnité équivalant au plus, à son avis, à la rémunération qui lui aurait été payée s'il n'y avait pas eu de représailles;

(d) rescind any measure or action, including any disciplinary action, and pay compensation to the complainant in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to any financial or other penalty imposed on the complainant;

d) annuler toute sanction disciplinaire ou autre prise à son endroit et lui payer une indemnité équivalant au plus, à son avis, à la sanction pécuniaire ou autre qui lui a été imposée;

(e) pay to the complainant an amount equal to any expenses and any other financial losses incurred by the complainant as a direct result of the reprisal; or

e) lui accorder le remboursement des dépenses et des pertes financières qui découlent directement des représailles;

(f) compensate the complainant, by an amount of not more than \$10,000, for any pain and suffering that the complainant experienced as a result of the reprisal.

f) l'indemniser, jusqu'à concurrence de 10 000 \$, pour les souffrances et douleurs découlant des représailles dont il a été victime.

[Emphasis added.]

[soulignement ajoutés]

[64] In conjunction with the application section, section 21.5 (1) of the Act imposes a three-step process that must be followed when the application is made to the Tribunal pursuant to section 20.4(1)(b). Section 21.5 (1), with my step numbering in square brackets, along with the fourth step pursuant to section 21.5 (4), is as follows:

21.5 (1) On application made by the Commissioner for the orders referred to in paragraph 20.4(1)(b) the Tribunal must determine [1] whether the complainant has been subject to a reprisal and [2] whether the person or persons identified by the Commissioner in the application as having taken the alleged reprisal actually took

21.5 (1) S'agissant d'une demande visant la prise des ordonnances prévues à l'alinéa 20.4(1)b), le Tribunal décide si des représailles ont été exercées à l'égard du plaignant et si la personne ou les personnes identifiées dans la demande comme étant celles qui les auraient exercées les ont effectivement exercées. S'il décide que des représailles

it. [3] If it determines that a reprisal was taken, the Tribunal may, regardless of whether or not it has determined that the reprisal was taken by the person or persons named in the application, make an order granting a remedy to the complainant.

ont été exercées, le Tribunal peut ordonner — indépendamment de la question de savoir si ces personnes ont exercé les représailles — la prise de mesures de réparation à l'égard du plaignant.

21.5 (4) After issuing the reasons under subsection (3), the Tribunal may make an order [4] respecting the disciplinary action to be taken against any person who was determined by it to have taken the reprisal.

21.5 (4) Après avoir motivé par écrit sa décision en conformité avec le paragraphe (3), le Tribunal peut rendre une ordonnance concernant les sanctions disciplinaires à infliger à toute personne qui, selon lui, a exercé les représailles.

[65] Thus, section 21.5 (1) in conjunction with section 21.5(4) requires that the determination of an application under section 20.4(1)(b) be undertaken following a three, or actually four-step procedure. The first step is to determine whether a reprisal has been made without regard to any person making it. The second step is to determine whether Ms. Lecompte, being the person named in the application actually took the reprisal. This is for the purpose of the fourth step being an order of disciplinary action against her pursuant to section 21.5 (4), if so found. The third step is that in the circumstance where it is found that a reprisal was made against Ms. Dunn, whether or not on identifying a person taking the reprisal, the Tribunal must make an order granting a remedy to the Complainant pursuant to section 21.7(1).

B. The constituent elements of a reprisal

[66] It is common ground that for the Commissioner to succeed on his application to prove that a reprisal occurred he must prove on a balance of probabilities the following three elements that constitute a reprisal under the Act:

- 1) The Complainant must have made a protected disclosure of wrongdoing, or participated in investigation into a disclosure, as defined under the PSDPA;
- 2) The Complainant must have suffered one of the measures listed in the definition of “reprisal” under the PSDPA; and
- 3) The evidence must demonstrate a nexus (“because the public servant has made a protected disclosure”) between the Complainants’ protected disclosure(s) of wrongdoing and the alleged reprisal measures.

[67] In addition, in relation to the nexus, I find contrary to the submissions of the Commissioner (and Complainant) that for the Commissioner to succeed in obtaining an order respecting disciplinary action against Ms. Lecompte, he must further demonstrate that the reprisal was taken intentionally as retaliation because the Complainant made a protected disclosure and filed a reprisal complaint against Ms. Lecompte.

[68] My analysis will be structured around these elements described above, with a particular regard to the issue of the mental element attaching to the nexus in support of an order of disciplinary measures against Ms. Lecompte.

(1) The Protected Disclosure of Wrongdoing

[69] The term “protected disclosure” is defined in the Act as follows:

<i>protected disclosure</i> means a disclosure that is made in good faith and that is made by a public servant	<i>divulgence protégée</i> Divulgence qui est faite de bonne foi par un fonctionnaire, selon le cas :
(a) in accordance with this Act;	a) en vertu de la présente loi;
(b) in the course of a parliamentary proceeding;	b) dans le cadre d’une procédure parlementaire;
(c) in the course of a procedure established under any other Act of Parliament; or	c) sous le régime d’une autre loi fédérale;
(d) when lawfully required to do so.	d) lorsque la loi l’y oblige. (protected disclosure)

[70] More relevant to this matter with respect to a protected disclosure made “in accordance with this Act”, are protected disclosures in relation to section 12 of the Act by an employee to his or her supervisor, as follows:

12 A public servant <u>may disclose to his or her supervisor</u> or to the senior officer designated for the purpose by the chief executive of the portion of the public sector in which the public servant is employed any information that the public servant believes could show that a <u>wrongdoing has been committed</u> or is about to be committed, or that could show	12 Le fonctionnaire <u>peut faire une divulgation en communiquant à son supérieur hiérarchique</u> ou à l’agent supérieur désigné par l’administrateur général de l’élément du secteur public dont il fait partie tout renseignement qui, selon lui, peut démontrer qu’un <u>acte répréhensible a été commis</u> ou est sur le point de l’être, ou qu’il lui a été demandé de
--	--

that the public servant has been asked to commit a wrongdoing. commettre un tel acte.

[Emphasis added.]

[soulignement ajoutés]

[71] Wrongdoing is defined as meaning “a wrongdoing referred to in section 8 of the Act”, as follows:

8 This Act applies in respect of the following wrongdoings in or relating to the public sector:

8 La présente loi s’applique aux actes répréhensibles ci-après commis au sein du secteur public ou le concernant :

(a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;

a) la contravention d’une loi fédérale ou provinciale ou d’un règlement pris sous leur régime, à l’exception de la contravention de l’article 19 de la présente loi;

(b) a misuse of public funds or a public asset;

b) l’usage abusif des fonds ou des biens publics;

(c) a gross mismanagement in the public sector;

c) les cas graves de mauvaise gestion dans le secteur public;

(d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of

d) le fait de causer — par action ou omission — un risque grave et précis pour la vie, la santé ou la sécurité humaines ou pour l’environnement, à l’exception du risque inhérent à l’exercice des

a public servant;	attributions d'un fonctionnaire;
(e) a serious breach of a code of conduct established under section 5 or 6; and	e) la contravention grave d'un code de conduite établi en vertu des articles 5 ou 6;
(f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).	f) le fait de sciemment ordonner ou conseiller à une personne de commettre l'un des actes répréhensibles visés aux alinéas a) à e).
(g) [Repealed, 2006, c. 9, s. 197]	g) [Abrogé, 2006, ch. 9, art. 197]

[72] Reprisals are specifically not considered to be a wrongdoing pursuant to section 8(a) above by its reference to section 19 of the Act, which reads as follows: No person shall take any reprisal against a public servant or direct that one be taken against a public servant.

[73] The alleged protected disclosures in this proceeding are as follows:

1. Ms. Dunn met with her previous Director, Jean-Jacques Lemay, in April or June 2010 to raise concerns regarding a staffing process for an individual who was being promoted while on maternity leave without a competitive process. As a result of the concerns raised, the non-competitive staffing process was withdrawn by the hiring

- manager (Anne Scotton, Chief, Audit and Evaluation Sector) [the Scotton related disclosure].
2. In July 2010, Ms. Dunn contacted the Values and Ethics Office at INAC to raise concerns over a potential conflict of interest issue involving a THS] contract for a consultant, Johanne Lamarre. This contract was being managed by Ms. Lamarre's daughter [KL], an employee of INAC in charge of the business management unit for AISB. Ms. Dunn expressed concerns upon considering the role of the THS consultant did not match the statement of work for which she was hired [the Lamarre related disclosure].
 3. Ms. Dunn was interviewed by the Public Service Commission on December 17, 2010 with regards to a staffing complaint that had been made by another employee relating to another employee's Aboriginal status [The PSC investigation].
 4. On January 18, 2011, Ms. Dunn met with Ms. Sylvie Lecompte, her new Director, who replaced Jean-Jacques Lemay in December 2010 and reported directly to Anne Scotton, to discuss Professional Fees. At the same meeting, Ms. Dunn disclosed to Ms. Lecompte her participation in the PSC investigation regarding a staffing complaint made by another employee. Ms. Dunn also expressed concerns regarding the staffing process in which she herself was currently participating. More particularly, these involved concerns over Ms. Lamarre's involvement in that staffing process, considering the conflict of interest concerns Ms. Dunn had previously disclosed in the Lamarre related disclosure.

[74] The Commissioner argues that if the two allegations of reprisal referred to the Tribunal can be established, the “protected disclosures”, in the plural, would provide a sufficient nexus to constitute a reprisal under the Act.

(a) *January 18, 2011 Disclosure*

[75] The Employer made no submissions with respect to the 2010 protected disclosures. It only argues that the January 18, 2011 disclosure was not a protected disclosure within the meaning of the Act, and on that basis, the reprisal complaint must be dismissed. Its written submission on this point is as follows:

Ms. Lecompte has testified that she did not consider her conversation with Ms. Dunn on January 18, 2011 as being a protected disclosure of wrongdoing but rather an employee venting or complaining (which is quite routine).

- Ms. Dunn told Ms. Lecompte that she was interviewed in the context of a Public Service Commission complaint made by a colleague against another colleague.
- Ms. Dunn expressed concerns because she was in a competitive process that was being run by Ms. Lamarre (who was a consultant). Ms. Dunn had made a disclosure of wrongdoing against Ms. Lamarre because Ms. Lamarre’s daughter was approving the renewal of her contracts. She was concerned that Ms. Lamarre might be biased against her in the hiring process for the AS-5 because she made a protected disclosure against her.

Ms. Dunn did not make a protected disclosure to Ms. Lecompte. The information she shared with Ms. Lecompte does not meet the definition of wrongdoing as found in the Act. She was not disclosing that anyone had done anything wrong, but rather she was concerned a past disclosure might affect her chances in a staffing process.

[76] The Commissioner argued that the January 18, 2011 disclosure was protected pursuant to section 12 of the PSDPA, as follows:

By informing Ms. Dunn that JL would not at all be part of the selection process in which Ms. Dunn was a candidate, the Commissioner is of the opinion that it can be inferred that Ms. Lecompte understood that Ms. Dunn had provided information to her that Ms. Dunn believed could show that a wrongdoing has been committed or is about to be committed — i.e. made a disclosure pursuant to section 12 of the PSDPA.

[77] I find that the disclosure made by Ms. Dunn to Ms. Lecompte on January 18, 2011 referring to an earlier disclosure was for the purpose of ensuring that no possible future retaliation could arise by Ms. Lamarre. She had been named by Ms. Dunn as a wrongdoer in the 2010 Lamarre related protected disclosure and had a role in a staffing competition process for the AS-5 and AS-7 positions that Ms. Dunn was competing to fill.

[78] On the basis of my characterization of the nature of the disclosure as preventing an impending retaliation, I conclude that it was not a protected disclosure within the meaning of the Act. First, what I have described as a possible form of future retaliation arising out of a protected disclosure is explicitly exempted from the category of wrongdoing by section 8 (a) of the Act. A protected disclosure must relate to some form of wrongdoing, apart from a retaliation.

[79] Second, dealing with past wrongdoings, I am of the view that such a disclosure must have some aspect of “whistleblowing” to be protected. The alleged wrongful conduct relating to Ms. Lamarre had already been disclosed and acted upon. Ms. Dunn’s further disclosure could serve no purpose with respect to providing information on a past wrongdoing with the view to taking

corrective action so as to respond to the wrongdoing. In other words, a protected disclosure has a limited shelf life. Once the information of past wrongdoings is conveyed and acted upon, it cannot be resubmitted to other supervisors to make it protected *vis-à-vis* their conduct.

[80] Third, I recognize that Ms. Dunn's disclosure could be said to be for the purpose of showing that a wrongdoing "is about to be committed" as those words are found in section 12 of the Act. This refers to some possible wrongdoing by Ms. Lamarre in the future conduct of the competition process that would infringe the merit principles required for appointments contained in the various public service employment acts. But even were I to accept this submission, while overlooking the issue of the wrongdoing not pertaining to a retaliation, I do not find the evidence in this matter sufficiently persuasive to meet that onus of proof there is a serious possibility that Ms. Lamarre was about to commit a wrongdoing in the competition process. I therefore, agree with the Employer that Ms. Dunn's conversations with Ms. Lecompte on January 18, 2011, disclosing her past protected disclosure in 2010 concerning Ms. Lamarre would not be a protected disclosure under the Act.

(b) *The 2010 Disclosures*

[81] Although not specifically argued by the parties, in my view the conclusion that the January 18, 2011 disclosure was not protected within the meaning of the Act does not mean that Ms. Dunn cannot succeed because there is no protected disclosure upon which to base her allegations of reprisal. The 2010 disclosures would appear to provide a foundation for these reprisal complaints.

[82] There is no issue that they are protected disclosures, which under the scheme of the Act satisfies the first criteria for the proof of a reprisal. The controversial issues that flow from the 2010 protected disclosures, both with respect to determining whether to order a remedy for Ms. Dunn, or an order of disciplinary action against Ms. Lecompte arise out of the interpretation of the meaning of “because” in the nexus definition of reprisal. By the scheme of the Act, the Tribunal should consider nexus issues only after the Commission has established that Ms. Dunn suffered one of the reprisal measures described in the definition of a reprisal.

- (2) The Complainant must have suffered one of the measures listed in the definition of “reprisal” under the PSDPA

[83] It is common ground that the relevant reprisal measure under the definition of reprisal in the Act in this proceeding pertains to whether the Commissioner may demonstrate “measures that adversely affected Ms. Dunn’s employment or working conditions”. In particular, the Commissioner has limited this inquiry to two forms of reprisal: demonstrating that Ms. Dunn was singled out by Ms. Lecompte for monitoring of her late/leave absences and was segregated from her coworkers in respect of the specific instances described in the statement of particulars.

[84] From the analysis that follows below, I find that the Commissioner did not demonstrate on a balance of probabilities that Ms. Dunn suffered these measures, or that they adversely affected her employment or working conditions. On that basis, there would be no requirement to consider the nexus issues that would establish these measures were taken against her because of the 2010 protected disclosures.

[85] However, because these findings are subject to review and could be countermanded, I will proceed to consider the nexus issues. Moreover, in carrying out the detailed analysis of the alleged reprisal measures, it is not practical to consider them apart from related factual issues relating to nexus discussed in the next section.

(3) Nexus issues

[86] To establish a reprisal, the Commissioner must demonstrate on a balance of probabilities that an appropriate nexus exists between the 2010 protected disclosures and any reprisal measure so found. Furthermore, to establish sufficient grounds for a disciplinary order against Ms. Lecompte, the parties take different views as to whether in demonstrating the nexus the Commissioners must prove that the reprisal measures were taken intentionally against Ms. Dunn because of the protected disclosures. Both of these issues will be considered in the analysis that follows.

(a) *The nexus between the 2010 protected disclosures and the alleged reprisal measures*

[87] The issue in this section is whether the 2010 disclosures provide a sufficient nexus to the alleged reprisals. This issue comes down to whether the first reprisal complaint in March 2011 can be considered as part of the causal chain between the 2010 protected disclosures and the alleged reprisal measures that would justify an order of a remedy in favour of Ms. Dunn.

[88] I find that no direct nexus can be demonstrated between the 2010 protected disclosures and any basis for Ms. Lecompte to commit a reprisal against Ms. Dunn. She only joined the

AISB after the alleged wrongdoings disclosed in the 2010 and could not possibly have played any role in relation to these disclosures. Nevertheless, I find that she could still be indirectly implicated in the March 2011 reprisal complaint as the agent carrying out Ms. Scotton's directions in terms of singling out Ms. Dunn for monitoring or segregating her from her co-workers.

[89] So long as the nexus could be vicariously or indirectly established between the 2010 disclosures and Ms. Lecompte acting on behalf of Ms. Scotton, this would still be sufficient to name her in the first complaint of March 2011. Once the first complaint is sufficiently linked to the 2010 protected disclosures, it forms the nexus for the reprisal allegations that are the subject of the hearing in this matter in the September 26, 2012 complaint. By that I mean that being named in a reprisal complaint, even if unfounded, could provide a reasonable nexus, and indeed motivation, for an actual reprisal.

[90] However, I reject this causation chain on the basis of the insufficiency of evidence establishing the indirect causal link between the 2010 protected disclosures and the alleged reprisal measures of Ms. Lecompte that form the basis for the March 2011 reprisal complaint. The Commissioner chose not to introduce into evidence the March 2011 reprisal complaint which might have provided some foundation to consider Ms. Lecompte as an agent carrying out the directions of Ms. Scotton. Ms. Dunn testified that Ms. Lecompte was named in the 2011 reprisal complaint, which she never denied. But this still does not provide a causal link between the 2010 protected disclosures concerning Ms. Scotton and the reprisal measures alleged to have been taken by Ms. Lecompte against Ms. Dunn in the March 2011 reprisal complaint. The only

information provided to the Tribunal turned around the staffing of the AS-5 and AS-7 positions, but this is insufficient to connect Ms. Lecompte with the 2010 protected disclosures.

Accordingly there is no evidence to speak of linking Ms. Lecompte's alleged reprisal measures acting as agent to carry out the directions of Ms. Scotton that can provide the causal link back to the protected disclosures concerning Ms. Scotton or Ms. Lamarre in 2010.

[91] The Tribunal would be surprised if the failure to enter Ms. Dunn's first reprisal complaint of March 2011 into evidence was merely an oversight by the Commissioner, or the Complainant. They were both represented by competent and experienced counsel. Moreover, when a relevant document is not produced by a party, the Tribunal assumes that it would not have been to that party's advantage. There is any number of reasons why the Commissioner would not have wanted this document on display before the Tribunal. The complaints may not have linked Ms. Lecompte as the agent of Ms. Scotton carrying out her directions. Or, Ms. Dunn's complaints may have been so lacking in merit on the face of the documents, that they could not demonstrate any valid basis for the first retaliation complaint, thereby undermining the Commissioner's decision in proceeding to select only two allegations having a relatively minor adverse impact on Ms. Dunn's employment out of the plethora of those lodged against Ms. Scotton and Ms. Lecompte in the two retaliation complaints.

[92] The Tribunal notes as well, that the Commissioner chose not to advance specific arguments demonstrating how the link could be made between the protected disclosures in 2010 and Ms. Lecompte's alleged reprisal taken against Ms. Dunn. Indeed, the only causal link found regarding the nexus between the 2010 protected disclosures and the alleged reprisal measures is

the pluralization of the term “disclosures” found throughout its submissions regarding nexus.

From all of this evidence, I conclude that the Commissioner was primarily basing its case upon the January 2011 disclosure of information to Ms. Lecompte to provide the nexus with the allegations of reprisal against Ms. Dunn.

[93] Instead of making an appropriate link between the reprisals and the 2010 protected disclosures, the Commissioner advanced the unsupported argument that Ms. Lecompte considered Ms. Dunn to be a “complainer”, such as was argued at paragraph 64 and other similar references in his submissions, described below:

Based on the evidence provided, it is the Commissioner’s opinion that Ms. Lecompte considered Ms. Dunn as a “complainer” as a result of the protected disclosures Ms. Dunn made to her regarding staffing irregularities and the conflict of interest issue surrounding the THS consultant (JL).

[94] The Tribunal finds that there is no evidence from the many days of hearing, and none was cited in the Commissioner’s submissions, to support such an unfounded and indeed simply wrong factual conclusion. The only evidence of Ms. Lecompte with respect to her views concerning the reprisal complaints was a sympathetic opinion expressed by her that Ms. Dunn “was not happy in the workplace, and she was very, very hurt that she had not been chosen in...at the end of the staffing process”.

[95] Ultimately, the Commissioner simply submitted in his Statement of Particulars as follows with regard to the issue of nexus:

It is further submitted that while an investigation by PSIC into a reprisal complaint is on-going, the PSDPA continues to provide protection to the Complainant from additional reprisal measures, in accordance with the objectives and purpose of the PSDPA.

[Emphasis added.]

[96] Given that a wrongdoing specifically does not include a reprisal complaint under section 8 of the Act, and that the definition of reprisal requires a causal link between the alleged reprisal measure and a protected disclosure, I reject this argument. The language of the Act cannot be subverted to such an extent that it would allow a protected disclosure as a foundation for a reprisal complaint against a person whose conduct bears no nexus whatsoever to the protected disclosure.

[97] Moreover, the Commissioner's submission described above from its Statement of Particulars does not respond to the Employer's submission that this matter should have never proceeded in the first place based upon the public interest, at least not when the Commissioner attempts to rely upon the "objectives and purposes" of the Act to support an argument for which no basis in the Act exists.

[98] In this regard, it is noted that the Commissioner failed to note when referring to a reprisal during an investigation into a complaint that the complaint being investigated turned out to be unfounded. Informed members of the public could well disagree that the "objectives and purpose of the PSDPA" are well served by allowing or encouraging reprisal complaints that occurred during investigations of reprisal complaints that turned out to be unfounded, unless a good case can be made for doing so. In this regard, the Tribunal was reminded that this legislation was born

out of circumstances relating to very serious frauds on the Canadian Federal Government in relation to the sponsorship scandal. The circumstances herein are strikingly distant from those in the sponsorship scandal. Instead they concerned relatively minor complaints regarding monitoring an employee's work absences and segregating an employee from coworkers when already on a self-requested reassignment. Both matters relate back to the exercise of a manager's discretion in a staffing procedure, where Ms. Lecompte was, at the most, a vicarious actor in relation to any claim of a nexus with the protected disclosure. All this to say that I am not convinced that the circumstances of this case are the most appropriate to attempt to bolster a highly strained argument regarding nexus by reference to the "objectives and purpose" of the Act.

[99] Given the foregoing analysis, I conclude that the Commissioner's application should be dismissed on the basis that there is no nexus between any protected disclosure and the alleged reprisal measures taken against Ms. Dunn.

(b) *Intention is required to establish the grounds for an order of a disciplinary measure against Ms. Lecompte*

(i) Explaining intention

[100] To assist in understanding issues turning around the commonly accepted legal differences in fault-based mental elements attaching to conduct that prejudices or is harmful to another person, I will briefly describe the various distinctions that commonly apply. The lowest rung of fault-based conduct is that of negligence where the results of the delictual conduct are not intended by the defendant, but nevertheless occur because of the objectively determined

unreasonable inadvertence on the part of the defendant, as more particularly defined by the principles applying to a legal finding of negligence. There is no issue of a negligent reprisal in this matter.

[101] In contradistinction to negligence, conduct that is considered intentional in character requires proof that the harmful result of the conduct was both intended by the perpetrator, and in fact occurred as intended. Thus for example, if intention is required to prove a reprisal by Ms. Lecompte, the Complainant would be required to demonstrate that she both gave the directions that resulted in Ms. Dunn being adversely segregated from her workmates and that Ms. Lecompte intended this result to occur in revenge for Ms. Dunn filing a reprisal complaint against her. The defence to an intentional plea focuses on the nexus between the order that resulted in the segregation to determine whether it was intended as a reprisal, or alternatively a reasonable exercise of management discretion for a valid work-related purpose that justified a result whereby Ms. Dunn ended up being segregated from her fellow workers.

[102] In addition to intention, some intentional causes of action require bad faith or malice as a requirement. While the nature of “bad faith” causes of action vary depending upon the context, in this matter it refers to “conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose”: *Macmillan Bloedel Ltd. v. Galiano Island Trust Committee*, 1995 CanLII 4585 at para 53, [1995] B.C.J. 1763(BC CA).

[103] Given the arguments that Ms. Lecompte has insidiously retaliated against Ms. Dunn in respect to the alleged reprisal measures by falsely arguing that they are legitimate exercise of

managerial discretion, I conclude that bad faith is being alleged by the Commissioner against Ms. Lecompte. Regardless of whether bad faith occurred or not by Ms. Lecompte, if intention is a necessary element to sanction an order of disciplinary action against Ms. Lecompte, I do not conclude that the Commissioner must establish that the reprisal measures were taken in bad faith, only that they were intended as revenge for the protected disclosures.

(ii) Submissions of the Parties

[104] The parties take different positions on the issue: the Complainant and Commissioner submit that intent should not be required, whereas the Employer and Ms. Lecompte argue that intention is a necessary element of retaliation under the Act. I will first consider the positions of both parties before undertaking an analysis of the legislation, with the result of upholding both parties' points of view, to some extent.

[105] The Complainant and the Commissioner submit that no intent is required to satisfy the nexus between a protected disclosure of wrongdoing and a reprisal. This argument is grounded in the purpose of the Act, analogous to human rights jurisprudence, and the statutory definition of the word "reprisal". They submit that requiring intent would defeat the purpose of the statutory protection against reprisal. According to *El-Helou v Courts Administration Service*, 2011 PSDPT 1 at para 2, the PSDPA is meant to create a safe haven for public servants to disclose wrongdoing while being protected from reprisal. The Act can only achieve this purpose if the nexus between a protected disclosure and an act of reprisal is defined broadly, in a manner able to capture "the potentially insidious nature of reprisal due to the disclosure of wrongdoing" (*El-Helou v Courts Administration Service*, 2011 PSDPT 3 at para 38). Indeed, at paragraph 48 of

this decision, Justice Martineau stressed that “[a]n overly technical approach to the Act would sterilize its impact”. The Commissioner argues for these same reasons that intent is not required to establish a complaint of retaliation in the human rights context. They argue that human rights jurisprudence is determinative on this question.

[106] The Employer submits that intent is a necessary element of reprisal. It argues that the jurisprudence cited by the Complainant is distinguishable. Those cases cited by the Complainant interpret the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], which establishes retaliation as a discriminatory practice for its purposes. In this statutory framework, retaliation necessarily must be interpreted in line with discrimination, and, as such, intent cannot be required. The PSDPA does not define reprisal as a discriminatory practice and, consequently, the absence of an intent requirement to establish discrimination cannot be imported. This makes the PSDPA analogous to the Ontario *Human Rights Code*, RSO 1990, c H.19, within which the Courts have agreed that intent is required to establish an allegation of reprisal, as they have in other decisions where the term was not defined by reference to discrimination.

- (iii) Human rights jurisprudence is of no import to the interpretation of a reprisal under the Act

[107] While human rights jurisprudence may provide a helpful analogy in matters of procedure, I find it to be of no assistance with respect to the interpretation of the term “reprisal” under the Act.

[108] As described above, the Complainant relies extensively on jurisprudence of the Canadian Human Rights Tribunal [CHRT] in arguing that, in a manner analogous to allegations of “retaliation” for human rights complaints, reprisals under the PSDPA do not require intent.

[109] Notably, the Complainant cites *First Nations Child & Family Caring Society of Canada et al v AG (Canada)*, 2015 CHRT 14 [*First Nations*]. This case concluded that intent was not required to establish allegations of retaliation before the CHRT, but instead, required only that the complainant establish a “reasonable perception” of retaliation. *First Nations* was based upon a line of jurisprudence commencing with the case of *Entrop v Imperial Oil Ltd (No. 7)* (1995), 23 CHRR D/213; aff’d (1998) OAC 188 (Div Ct); varied on other grounds (2000), 50 OR 3(d) 18 (CA) [*Entrop*]. In *Entrop*, the Ontario Board of Inquiry dealt with interpretation of section 8 of the *Ontario Human Rights Code* [the Code], which describes the right to make claims under the Code, “without reprisal or threat of reprisal for so doing”.

[110] There are a number of reasons why I conclude that *First Nations* and *Entrop* should not apply to govern the issue of the mental element required for a reprisal under the PSDPA. First, the *Entrop* line of jurisprudence has not been followed by the Ontario Human Rights Tribunal. I find that the law applicable under Ontario legislation is that set out in *Noble v York University*, 2010 HRTO 878 at paragraphs 31 and 32 [*Noble*], with my numbered square bracketed indications as follows:

[31] In order to prove reprisal, a complainant (now an applicant) must establish that the respondent engaged in an action, or threat, which was intended as a retaliation for the claiming or enforcement of a right under the Code. Unlike an allegation of discrimination, where intention is not a necessary element to prove a violation, [1]

where reprisal is alleged, the complainant must establish that the action was taken with an intent to punish or retaliate. See: *Jones, supra*; *Jones v. Amway of Canada Ltd.*, 2001 CanLII 26217 (ON H.R.T.); *Ketola v. Value Propane Ltd.*, 2002 CanLII 46510 (ON H.R.T.); *Moffatt v. Kinark Child & Family Services* (1998), 35 C.H.R.R. D/205 (Ont. Bd. Inq.).

[32] The complainant disputed this principle. He argued that a complainant cannot know what is in the mind of a respondent. This may be true, and in many cases, there may be no direct evidence of a respondent's intention to reprise. Reprisal, like discrimination, is rarely practiced openly. However, this does not negate the well-established principle in reprisal cases, nor does it prevent a complainant from proving intent. [2] Intention may be proved by inference, drawn from the whole of the evidence. Longstanding human rights jurisprudence provides that where a complainant has established sufficient facts, which if true, would support a finding that the Code has been violated, the evidentiary onus then shifts to the respondent, to provide a reasonable explanation for the impugned conduct. It then falls to the complainant to provide evidence of why the explanation is not credible, or is simply a pretext. The Tribunal will examine all of the evidence and determine, on a balance of probabilities, whether a violation of the Code, in this case a reprisal, has been proved.

[Emphasis added.]

[111] In *Entrop*, the issue of nexus was discussed as a matter of "linkages". The Board approached the mental element not from the perspective of the alleged malefactor, but rather that the alleged victim of the reprisal, based upon whether it gave rise to a "reasonable perception" of retaliation. There are at least three reasons that I conclude that this line of jurisprudence should not be followed. The crux of the Board's reasoning is found at paragraphs 37 to 39 of *Entrop*, with my numbered points in square brackets as follows:

[37] The case of *Donaldson v. 463963 Ontario Ltd.* (unreported, 14 January 1994; Ont. Bd. Inq.) noted that the Oxford Dictionary defines "reprisal" as an "act of retaliation." In order to prove a violation of this section, the Commission must adduce evidence of

an actual or threatened prejudicial act. In addition, the Commission must also establish that there is a linkage between the actual or threatened prejudicial act and the enforcement of a person's rights under the Code.

[38] The linkage can be demonstrated in several different ways.

[39] Where there is evidence that the respondent intended the act or threat to serve as retaliation for a human rights complaint, this will provide the requisite linkage. [1] However, as is well established in human rights jurisprudence, the inability to prove intention is not fatal to the claim. [2] There are many situations in which a respondent is not consciously aware of the discriminatory impact of certain behaviour. The detrimental effect of such actions can still create substantial damage. As the Supreme Court of Canada noted in *Action travail es femmes v. Canadian National Railway Co.* (1987), 8 C.H.R.R. D/4210, "the imputation of a requirement of 'intent', even if unrelated to moral fault, failed to respond adequately to the many instances where the effect of policies and practices is discriminatory even if that effect is unintended and unforeseen." See also *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 and *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536. [3] Human rights legislation is not punitive, but compensatory in nature. The central focus is upon the impact of the behaviour in question. Consequently, the board of inquiry is required to examine the impact of the action upon the perceptions of the complainant. [4] If the complainant reasonably perceived the act to serve as retaliation for the human rights complaint, this would also constitute sufficient linkage, quite apart from any proven intention on the part of the respondent. (See also *Donaldson v. 463963 Ontario Ltd.*, *supra*.)

[112] With respect, I cannot agree with the logic in the reasons at square bracketed paragraphs 1 and 2. I do not understand how because a respondent is not consciously aware of the discriminatory impact of certain behaviour, that intention should not be a prerequisite to establish a reprisal. It is not the discriminatory behaviour, but the complaint against them, which is known by the respondent, that gives rise to seek revenge by the reprisal. To that extent, logic would not rationalize either (1) the shift of the required mental element from the perpetrator to the victim,

or (2) give rise to an objective/subjective mental element test based on the victim's reasonable perceptions to establish a reprisal.

[113] Second, and more importantly, the Board points out that "Human rights legislation is not punitive, but compensatory in nature. The central focus is upon the impact of the behaviour in question". The focus of the PSDPA is to encourage whistleblowing by providing a safe haven from reprisals against persons making protected disclosures. However, the protections are clearly bifurcated. One avenue provides protection and compensation where the whistleblower suffers adverse effects, without any person being identified, or found to have perpetrated a reprisal. The other reprisal complaint procedure is entirely disciplinary in nature with Parliament's intention to punish persons for having taken a reprisal against a person disclosing an alleged wrongdoing. Indeed, once the Tribunal concludes that a person has been found to have taken a reprisal against the complainant, the complainant has no role in determining what punishment should be applied: see section 21.5 (5).

[114] Third, as argued by the Employer, the retaliation provision contained at section 14.1 of the CHRA is unique in being equated with discrimination. This at least creates a pretext, whereby in the context of the CHRA, the required nexus for a discrimination complaint may be made on the premise that the lack of intention of the perpetrator to seek vengeance for a reprisal complaint should be an irrelevant factor, instead being placed by the complainant's reasonable perception that the act was in retaliation, i.e. was taken in vengeance. This would somehow allow the perpetrator to be disciplined therefore, even if his or her actions were reasonable, but

unfortunately not reasonably perceived so by the complainant depending upon his or her objective/subjective perceptions.

[115] I agree with the Employer that the PSDPA is distinguishable from the CHRA on this basis. By importing the concept of retaliation into that of discrimination, the legislator provided a basis to consider that both concepts to be interpreted analogously. The same cannot be said in the context of a reprisal within the PSDPA.

[116] Finally, on a more different substantive point I respectfully disagree with the comments in *First Nations* at paragraph 26 that “[...] a requirement to establish intent would make it very hard to ever substantiate a retaliation complaint”. Determining the insidiousness of conduct of any kind naturally requires more work for the decision-maker because the evidence is not direct and obvious. This will be evident from my analysis that follows. Nevertheless, if a reprisal is insidious, it is something that trial judges have been determining on a daily basis using traditional legal tools developed and applied over centuries. A reprisal claim is just one more form of an intentional cause of action that follows the procedure described in the passage cited from the *Noble* decision above and can occur in all forms of conduct, including those of persons claiming insidious conduct of others.

[117] As the CHRT jurisprudence is not determinative of this issue, I must proceed to interpret the PSDPA’s definition of “reprisal”.

(iv) Textual and Contextual Analysis

[118] The pre-eminent rule of statutory interpretation endorsed by the Supreme Court, is Driedger's "modern principle" as originally formulated by Elmer Driedger in *Construction of Statutes* (2nd ed. 1983): see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21. This provides:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[119] The starting point of statutory interpretation is the "ordinary meaning" of the text. This ordinary meaning, the one that would be understood by a competent language user upon reading the words in their immediate context, is presumed to be the meaning intended by the legislature unless contextual factors suggest some other meaning was intended: Ruth Sullivan, *Statutory Interpretation* (Concord, Ont.: Irwin Law, 1997).

[120] The dictionary definition of the terms being interpreted is particularly useful for establishing the range of plausible meanings a given word may bear (*ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2015 SCC 45 at para 34). "Reprisal" is a somewhat esoteric term for its better-known perfect synonym of "retaliation". The Canadian Oxford dictionary defines "reprisal" as "any act of retaliation". It defines "retaliation" as to "respond to an injury, insult, assault, in like manner; attack in return" The Internet online dictionary is similar, also equating retaliation to "revenge". The Act uses "représaille" to translate "reprisal". The Petit Robert dictionary's definition of "représailles" encourages the reader to see the

definition for “to avenge” (venger). I find the meaning of reprisal and retaliation to be well understood by the general population as capturing the sense of the biblical adage of “an eye for an eye”, or more colloquially “a tit for a tat”. It is all about revenge, which is most certainly an intentional act.

[121] The statute defines “reprisal” at s. 2 of the Act as “any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33” [emphasis added]. I find that the definition of reprisal is ambiguous, or at least purposefully drafted so as to avoid attaching any mental element to the definition of the term, such that intention is to be inferred by the context of where it is employed in the Act.

[122] As noted above, there are two avenues leading to different orders by the Tribunal with respect to reprisals. The first, what I would describe as a restorative and compensatory order takes its direction from section 20.4 (1) (a) enabling a remedy in favour of the complainant as described in section 21.7 (1). The second, leading from section 20.4 (1) (b), in addition to providing for a restorative order in favour of the complainant, enables the Tribunal to make an order respecting disciplinary action against any person named in the application as being the person who took the reprisal against the complainant.

[123] The scheme of the Act therefore, provides for an order of a remedy whereby the complainant will be restored and compensated to the extent possible from any adverse effects of a reprisal, including an amount of \$10,000 for pain and suffering. Insofar as it was Parliament's

intention to protect persons who make disclosures from measures that are taken against them “simply because” they made protected disclosures, the restoration and compensation remedies are intended to achieve that objective without the need to demonstrate responsibility for the adverse effects suffered by any person: *Agnaou v. Canada*, 2015 FCA 29, at para.70.

[124] As a remedy order may be rendered without any individual being named as the person who took the reprisal, intention can obviously play no role where there is no perpetrator of the reprisal to whom it may be attributed. In this respect, I agree with the Commissioner that proving intention is not a prerequisite for a restorative and compensatory order of a remedy by the Tribunal pursuant to either sections 20.4 (1)(a) or 20.4 (1)(b).

[125] This matter was referred to the Tribunal by the Commissioner pursuant to section 20.4 (1)(b) of the Act. It enables a related decision under section 21.5 (1) where the reprisal is determined to have been taken by the individual named in the application for an order respecting disciplinary action pursuant to section 21.5 (4). These provisions together provide that upon finding that a reprisal was taken and depending upon the Tribunal’s determination that it may render two forms of orders: the first, enables an order of a remedy “in favour of the complainant”; while the second authorizes “an order respecting disciplinary action” against the person identified by the Commissioner in the application as being the person who took the reprisal [emphasis added].

[126] The basis for an order respecting disciplinary action is found in section 19 of the Act, as follows:

No person shall take any reprisal against a public servant or direct that one be taken against a public servant.

[127] In considering the scheme of the Act and the nature of the two different orders that the Tribunal may render upon an application under section 20.4 (1) (b), I am satisfied that Parliament intended to avoid the very problem presented in the *Entrop* decision of one reprisal decision with a nexus based on one required mental element resulting in orders both for a compensatory remedy for the complainant and a significant disciplinary measure against the alleged perpetrator of the reprisal. The PSDPA, by requiring the Tribunal to distinguish between the issue of whether a reprisal was taken without regard to any individual having caused it and the determination whether a disciplinary measure should be ordered, clearly demarcated two different procedures with very different consequences. I find that this distinction was for the purpose of allowing a reprisal to be considered in accordance with the ordinary meaning of the term, that is as a form of intentional vengeance. In doing so, Parliament intended to adopt the standard norm in employment law that requires the attribution of fault as a prerequisite for a disciplinary measure.

[128] This conclusion is confirmed by the ordinary meaning of the term “discipline” and thereby what would constitute a disciplinary measure under the Act. As a noun in the Oxford online dictionary, “discipline” is defined as “The practice of training people to obey rules or a code of behavior, using punishment to correct disobedience”. As a verb it is defined, “Train (someone) to obey rules or a code of behavior, using punishment to correct disobedience” [my emphasis in both definitions]. Disobedience is obviously in regard to some form of wrongful act as measured by the applicable code behaviour that is of sufficient severity to require punishment

as a disciplinary action. I conclude that it would be an extremely rare provision, none of which the Tribunal is aware of in the employment world at least, where an employee would be punished for “disobedient” conduct without the prerequisite of the employer proving some form of fault, be it negligence or intentional behaviour, to justify the punishment.

[129] Besides, there are most often two sides to every story in a reprisal complaint where insidiousness is at play. I find this to be the case in this matter. It would be unjust were discipline to be imposed under the PSDPA without finding fault on the part of the alleged perpetrator, and all the more so, if only viewed from the complainant’s perspective of a reprisal, as appears to be the approach under Canadian Human Rights law.

[130] Finally, I find that the Commissioner’s submission that intent is not required to prove a reprisal is inconsistent with its own case. Throughout the proceedings all the allegations made against Ms. Lecompte were that she insidiously retaliated against Ms. Dunn because of her protected disclosure. The applicant parties provided no alternative factual foundation that Ms. Dunn sustained one of the reprisal measures listed in the definition, or that Ms. Lecompte innocently or mistakenly took a reprisal against Ms. Dunn upon to justify a remedy in accordance with section 21.7 (1).

(v) Conclusion

[131] Accordingly, when the Commissioner refers a matter to the Tribunal with the task of determining whether Ms. Lecompte has “actually taken the alleged reprisal” such that disciplinary action may be required, the Commissioner must prove intent on the part of Ms.

Lecompte to commit the reprisal based on the civil standard of a balance of probabilities. This requirement must be met, whether or not the Commissioner alleges insidious conduct by the alleged perpetrator, as a ground for an order of disciplinary action against her.

[132] As an addendum to this conclusion, I should point out that the issue of intent “proper” is usually not the focus of these cases which invariably turn around a careful analysis of the exercise of the manager’s discretion that adversely affects a complainant. I refer back to the *Noble* decision in this regard. It demonstrates that once the employee proves an adverse effect as a result of the manager’s decision, the onus shifts to the manager to prove its reasonableness. For example, in this matter it is acknowledged that all of the impugned actions taken by Ms. Lecompte were deliberate and the consequences intended in the sense that they were the result of an exercise of her managerial discretion. The impugned actions were taken mostly in the form of directions to Mr. Egglefield or Ms. Nadon that the Commissioner claims singled out Ms. Dunn because of the protected disclosure and first reprisal complaint by monitoring her leave/late absences and by segregating her from her co-workers.

[133] Seen in this light, the issue is the same as that raised in *Noble*, namely whether the directions (if established) were justified in the circumstances such as not to constitute a reprisal, but rather a legitimate exercise of managerial prerogative. If the manager’s actions are found not to be reasonably justified, then intent would normally be inferred and an order for disciplinary action would have followed. In these cases, determining intent therefore depends upon the reasonableness of the manager’s conduct that results in the adverse impact on the complainant, often on the basis of whether reasonable alternatives were not employed.

(c) *Sufficiency of the causal link*

[134] The Tribunal agrees with the Commissioner's submission that the causal link between the protected disclosure and a reprisal is sufficient if linked in whole or part of the actions taken by the respondent, as more fully described below:

The Commissioner respectfully submits that, in light of the PSDPA's remedial nature and the ordinary meaning of the words prescribed in the definition of reprisal, a measure need not be taken only because of a protected disclosure made by a public servant. Rather, it is the Commissioner's opinion that as long as there is evidence on a balance of probabilities that establishes that the protected disclosure is sufficiently linked, in whole or in part, to the actions taken by a respondent, the protections provided under the Act are triggered.

[Emphasis added]

C. Was a reprisal taken against Ms Dunn by Ms Lecompte

(1) Introduction

[135] This introduction of the alleged incidents of reprisal is in part an explanation for the length and detail of the evidentiary analysis that follows. Two explanations are offered. First, it is well recognized that most reprisals are of an insidious nature. Indeed, the Complainant spent a considerable amount of time addressing the Tribunal on the insidious nature of retaliatory conduct, particularly in the workplace and the need therefore, for a careful and detailed analysis of the context in which the impugned conduct takes place.

[136] The term insidious connotes a wide range of conduct, mostly of an intentional and malicious nature. Google summarizes the definition of insidious and its synonyms as follows:

Proceeding in a gradual, subtle way, but with harmful effects.

Synonyms: stealthy, subtle, surreptitious, cunning, crafty, treacherous, artful, sly, wily, shifty, underhanded, indirect, sneaky

[137] Thus, the exercise of assessing reprisal complaints requires a meticulous and granular analysis of the events, particularly paying attention to the context of the alleged reprisals to properly judge whether retaliatory conduct has occurred.

[138] Adding to the complexity and insidious nature of this complaint is that the Complainant's case was based almost entirely on the evidence of her supervising manager and only co-worker, being Mr. Egglefield and Ms. Nadon, respectively.

[139] Normally, when third-party witnesses, one being the complainant's manager, support a complainant, the Tribunal's task should be relatively straightforward, particularly when the only witness testifying on the other side is Ms. Lecompte.

[140] However, in this case, it became immediately apparent to the Tribunal that both of the complainant's witnesses exhibited, indeed admitted animus towards Ms. Lecompte. In addition, there were many instances where the incompatibilities between the versions of the two sides were so irreconcilable that the only reasonable conclusion was that someone had to be purposely misleading the Tribunal. No decision-maker likes to be put in this type of situation. This made

the Tribunal's task all the more difficult. It required special attention to consider the minute details of the witnesses' testimony and to explain the reasoning why normally objective third-party witness evidence had been rejected.

[141] Second, this case, like most complaints arising in the workplace, requires the assessment of the exercise of a managerial discretion that is said to have had a negative impact on the employee. That this is the form of analysis to be applied in this matter is recognized by the Commissioner from his argument on the conclusion to be drawn from all the evidence at paragraph 76 as follows:

76. Considering the totality of the circumstances, it is the Commissioner's position that Ms. Lecompte's knowledge of the protected disclosures, the timing of the measures taken against the Complainant, and the lack of sufficient evidence to justify Ms. Lecompte's actions that had a detrimental effect on the Complainant's employment and working conditions, are indicative of reprisal.

[Emphasis added]

[142] But when complaints arise out of the exercise of managerial discretion, particularly where there are allegations of insidious conduct, the decision-maker is required to examine the reasonableness of both the exercise of the manager's discretion, as well as that of the complaint to fully engage the context of insidiousness. This reflects the recognition that grievances and complaints may be used, not only as a shield to protect the employee as the alleged victim, but also on occasion, as a sword by an unhappy employee for various reasons. These latter situations can arise in many circumstances, such as where management is trying to correct a deficient or dysfunctional workplace, or where the employee is not satisfied with the exercise of the

manager's discretion, in this case concerning staffing processes. The double edged sword potential is a particularly difficult aspect of a reprisal complaint, because it is a serious accusation of wrongdoing by the employer, which serves both to protect the employee, as well as attacking the manager's character and reputation.

[143] The Employer and Ms. Lecompte submit that the reprisal complaint is situated within this type of latter context. They argue that Ms. Lecompte was vulnerable by the fact that a number of complaints and criticisms had been lodged against her by employees, including Ms. Dunn, who were unhappy with how she was managing the AISB, and in particular the failure to appoint them to positions in various staffing processes that Ms. Lecompte conducted. She arrived in January 2011 as a new Director with no connection to any of the AISB staff. I find that there is no question that her mandate was to instil some degree of rigor and discipline into what was considered a *laissez-faire* and dysfunctional environment, as well as to clean up a significant backlog of investigations into complaints to INAC regarding the misuse of public funds. Three months later, she was the target of three retaliation complaints. They arose out of staffing processes for positions that her predecessor had left unfilled and therefore, occupied on an acting basis for more than a year. Ms. Dunn applied for two of them, being the acting occupant of the AS-5 position, as well as applying for the AS-7 position. She had exemplary performance reviews over the preceding three years from her previous Director. Ms. Dunn clearly had high expectations for success in at least one of the two competitions.

[144] The Tribunal was not informed of the circumstances of the other two retaliation complaints, except that they too were related to unsuccessful applications in these staffing

processes. Indeed as noted, the first retaliation complaint by Ms. Dunn was not introduced into evidence. In addition, the Tribunal understands that other protected disclosures of wrongful conduct by her were made by employees during the period under review by the Tribunal, which also were not introduced into evidence, but only referred to in testimony. Nevertheless, the existence of three retaliation complaints at the beginning of a transformational manager's mandate and the ongoing conduct of marshaling evidence of wrongful conduct by Ms. Lecompte throughout the relevant period, raises the question of whether she was the target of employee mistreatment, or at least provides some basis for her actions in the face of the difficult context that she faced.

[145] Concerns about mistreatment of managers of this nature is a recognized concern in the Canadian Public Service as recently described in the 2016 report of the Association of Professional Executives of the Public Service of Canada [Apex] (<http://apex.gc.ca/uploads/ase/ase%202015-16%20report%20-%20eng.pdf>, at pages 16-17). The authors noted an increase in the phenomena of malicious complaints as a form of bullying described as follows:

Mobbing is a troubling new phenomenon that the Advisor has heard from some clients. It is an extreme form of bullying and psychological violence in the workplace. It is a passive-aggressive form of harassment, based on ostracizing the target – similar to what is frequently seen in schoolyards. Research shows that those who are somehow different (e.g. race, religion, transformational leaders) frequently become targets. Essentially a number of employees gang up on their superior and file harassment complaints in an effort to rid the office of that person.

Although it is difficult to prove, there is usually a ring-leader who deliberately sets out to humiliate and drive the intended target out of the workplace. This can result in severe psychological injuries

especially when the victim is then immediately and deliberately shunned by their Superiors and peers, removed from their position, sent home or isolated in an office on a ‘special project’.

In many cases, the allegations are ultimately deemed to be unfounded, but the accused’s reputation is affected and occasionally their psychological state of mind has been harmed throughout the process. Many spiral into depression, post-traumatic stress disorder, trauma, anxiety, sometimes resulting in the suicidal thoughts or attempts. Many find themselves out of pocket for legal expenses which they incurred to defend themselves against the allegations. Cases of ‘group bullying’ take an enormous amount of time, energy and resources to conduct an investigation into the facts.

It is important to recognize these kinds of behaviours exist and that there are always two sides to every story, so it is imperative not to jump to any conclusions without having all the facts. Senior leaders may wish to consider doing something in cases where an allegation is deemed to be unfounded – especially where there appears to be malicious intent on the part of the accusers. Rarely is there any consequence for making false accusations or for spearheading a mobbing campaign [emphasis in original document).

[Emphasis added.]

[146] For all these reasons, I decided that, in addition to an exhaustive analysis of the evidence, once satisfied that Ms. Lecompte did not take a reprisal against Ms Dunn, a comprehensive set of reasons was necessary to explain my decision. This was besides the fact that this is the first case being heard on the merits by the Tribunal.

(2) Roadmap of analysis

[147] In the analysis that follows, it is not practical to structure it around the three determinations in the fashion proscribed by Section 21.5(1). Instead, my analysis focuses on the

two principal allegations of reprisal said to negatively affect Ms. Dunn's working conditions.

First it is alleged that she singled out Ms. Dunn by monitoring her leave and late absences when no other staff member was subject to similar scrutiny. Second, the Commissioner contends that Ms. Lecompte segregated Ms. Dunn from her fellow co-workers.

[148] I commence my analysis with an assessment of the acknowledged bias of the Complainant's two principal witnesses, Mr. Egglefield and Ms. Nadon. Thereafter, I approach the reprisal evidence in a mostly chronological manner by reviewing the two general allegations of the Commissioner, first reviewing the limited evidence that Ms. Dunn was singled out by monitoring her leave and late absences, after which I consider the more extensive evidence concerning the segregation complaint. On this latter issue, I again assess the evidence somewhat chronologically beginning with that mainly concerning Mr. Egglefield over the loyalty/smoking issue that occurred in the fall of 2011, followed by a consideration of the evidence relating to Ms. Nadon that Ms. Lecompte segregated Ms. Dunn from her co-workers, much of which occurred after the second complaint was filed.

[149] The conclusion from the analysis of both issues considers not only whether the alleged reprisals were taken by Ms. Lecompte against Ms. Dunn, but whether there was any intention on her part to retaliate, such that they would support an order of disciplinary action.

[150] I conclude with an examination of additional allegations pleaded as particulars that were not referred to the Tribunal by the Commissioner. It is argued that they would corroborate Ms.

Lecompte's intent to retaliate. Similarly, I make some remarks on additional points not pleaded, but also said to demonstrate Ms. Lecompte's bad faith.

(3) Issues of witness credibility or reliability

[151] The Complainant's factual foundation for the allegations in question is primarily the evidence of Mr. Egglefield and Ms. Nadon. Accordingly, to a large extent, the Tribunal's task is to review the evidence of these witnesses to assess its general reliability. For this reason, I will start by setting out my general thoughts on the issues of credibility or bias that each of these third-party witnesses may have presented.

(a) *Mr. Egglefield's animus towards Ms. Lecompte*

[152] I find that Mr. Egglefield harbored a significant animus towards Ms. Lecompte and that this seriously puts into question the reliability of his testimony. As I demonstrate in this section, it is clear that Mr. Egglefield believed he was a target of reprisal because his position and that of his co-manager, Mr. Finn, were eliminated in a workforce adjustment process. Besides providing a motive for bias, I also conclude that such a supposition is unreasonable, further undermining the reliability that I attribute to his evidence.

[153] When asked how he felt about being workforce-adjusted from his position at AISB, Mr. Egglefield originally answered that he thought it was very unusual that the only two managers would be workforce-adjusted, leaving a director at the EX-1 level to manage clerical staff and very junior AS staff as direct reports. When questioned further, Mr. Egglefield agreed that he

found the situation was “unjust” and that he believed that his workforce adjustment “was a reprisal measure against [him] by Sylvie [Lecompte] and Anne Scotton”.

[154] When asked whether he had an axe to grind against Ms. Lecompte, he first avoided the question by talking about how fortunate he was to have found another job. Upon being further questioned on this point, he answered, “Right now, no, I don’t.” When asked about his feelings against Ms. Lecompte at the time when the events were occurring, he answered as follows:

At the time, yeah, certainly I was upset with the decision that two managers would be alternated and essentially told that if we did not find employment within – I can't recall the timeframe. I've got the letter somewhere – that I would be out of a job. Certainly that was an upsetting event particularly given it had been quite unexpected.

[155] Thereafter, I also find that he equivocated on whether he shared his feelings about the situation with Ms. Dunn, answering that he did, because she had also been alternated. He added that both he and Mr. Finn were shocked and “were not particularly happy with the decision”. He would not acknowledge that “angry” was the correct word but, rather, that “displeased” would better describe the situation. He acknowledged that these feelings “certainly” could have influenced how he interacted with his employees at the time.

[156] In re-examination, Mr. Egglefield did not focus his blame on Ms. Lecompte, instead indicating that Ms. Scotton had questioned his loyalty and that this would have been a key factor in the workforce-adjustment decision:

I think that my loyalty being questioned from the Chief Audit Executive Office [Ms. Scotton], you know, was key to that decision. You know, there were earlier instances where shortly after my arrival I was tasked to evaluate a temporary help offer, and Ms Scotton's special advisor, Madam Johanne Lamarre, gave me the answer to the work I was expected to do, indicating that she wouldn't be able to sign the document because she was a consultant.

You know, my understanding was I was probably not perceived as a team player, being as I wasn't doing the things that appeared to be going on in that area.

I am a straight shooter, so if I'm asked to do a job I do it as per the guidelines that are expected of me. I felt that that's not what was being expected of me at times.

[157] In later testimony, he channels his displeasure towards Ms. Lecompte because she was said to have questioned his loyalty. But as shall be seen, based on his notes taken at the time he saw Ms. Scotton as the person who was mostly questioning his loyalty, with his criticisms of Ms. Lecompte being more in respect of his commitment to the job and her style of micromanaging the Branch. The two relatively minor incidents in November 2011 where his loyalty was said to be questioned are insufficient in scope or impact to reasonably result in the loss of his position a few months later in April 2012. Indeed, no further incidents are reported between November 2011 and his work force adjustment in April 2012 involving Ms. Lecompte or anyone else.

[158] Ms. Lecompte denied having any input into whose positions were to be eliminated. I accept this submission. It is unreasonable to think that Ms. Lecompte would want to remove middle managers who are normally the targets of downsizing. This would only add to her workload and would have required her to manage employees, including Ms. Dunn and other employees who had filed retaliation complaints that remained outstanding. In addition, the

removal of middle managers with investigation experience was sure to have a negative impact on productivity, which appears to have been Ms. Lecompte's overriding concern as manager of the Branch.

[159] Moreover, despite there being no evidence or suggestion that Mr. Finn had any difficulties with senior management, he too was laid off in the same workforce adjustment process. The Tribunal finds no basis for Mr Egglefield's belief that he was a target of reprisal in the first place, but it is simply beyond the ken of normal reasoning that Ms. Lecompte or Ms. Scotton would retaliate against Mr. Egglefield to the point of eliminating another manager's position, who by all accounts was an experienced investigator and a solid employee.

[160] As indicated, I find the belief that the downsizing of his and Mr. Finn's positions to be highly irrational, and moreover to be evidence of a questionable mindset upon which to make judgments of Ms. Lecompte's conduct or character. I also do not accept Mr. Egglefield's testimony that his ill will towards Ms. Lecompte dissipated upon his finding new and perhaps better employment at a different agency. Based on his testimony and conduct, I conclude that the adage "[friends come and go, but] enemies are forever" would apply to Mr. Egglefield, particularly as the initial assignment of blame on Ms. Lecompte for his departure from AISB lacks any objective foundation.

[161] In coming to my conclusion that Mr. Egglefield's testimony was biased against Ms. Lecompte, I acknowledge that Mr. Egglefield offered some sympathetic comments, as well as indicating on occasion that his conclusions were speculative. Based on his notebooks, I also

conclude that he was a hard-working and conscientious employee, which to some extent may explain his reaction that being workforce adjusted out of AISB did not add up. Nevertheless, overall and particularly on critical issues, when his testimony and conduct are examined, I find him striving to make a case against Ms. Lecompte and for Ms. Dunn, which simply does not exist on the basis of the objective evidence.

(b) *The reliability of Mr. Egglefield's notes*

[162] Mr. Egglefield is the principal source of evidence for both the monitoring and segregation allegations brought against Ms. Lecompte. In testifying, he relied upon two black binders (C-19 and C-20) containing copious detailed personal daily notes compiled contemporaneously or shortly after the events reported on. The books cover the period from June 12, 2011, when he began working at AISB, to October 9, 2012, when he left the directorate. He explained that as an experienced investigator, it was his practice to maintain notes on assignments and conversations relating to his work.

[163] Mr. Egglefield did not rely upon his notebooks to refresh his memory at the commencement of his examination in chief. Instead, the Tribunal was presented with typed notes that he had prepared in 2016 “in the context of a line of questioning that the [PSIC] investigator ... had asked [him] to prepare for”. Eventually, when difficulties ensued with some of his notes, the original notebooks were entered into evidence as exhibits C-19 and C-20. The discrepancies between the notes he had provided to the investigator and the information taken down contemporaneously are often significant. These demonstrate a distinct bias in favour of Ms. Dunn and against Ms. Lecompte.

[164] I use as an example an event that I do not intend to address in the analysis that follows, but that both the Commission and the Complainant rely upon to demonstrate Ms. Lecompte's alleged animus towards Ms. Dunn. This incident occurred on October 2, 2012 is reported in Mr. Egglefield's notebook as follows:

Discussion with Chantal October 2nd, 2012. Chantal was told that Marylène was not to be in our office. Chantal said it was her fault if Marylène was here because she had asked her to sign documents for Dakota Tipi that were to be mailed to the RCMP.

[165] I find that the incident was modified and reported to the PSIC investigator in an embellished fashion intended to portray Ms. Dunn as the victim of an angry Ms. Lecompte, as follows:

Chantal has been chastised by Sylvie for asking Marylène to come down to our office to sign documents before it was sent to the RCMP.

[As read, emphasis added.]

[166] It is notable that, in the 2016 version, there is no mention of Ms. Dunn acknowledging fault, or any suggestion that Ms. Lecompte "chastised" her in pointing out the problem. Furthermore, in cross-examination, it was also noted that, the 2016 versions makes no mention of the first entry of the same day in his notes where it is recalled that Ms. Lecompte complimented Chantal on her work.

[167] Ultimately, I conclude that Mr. Egglefield's notebooks, often in combination with Ms. Dunn's typed notes, are generally reliable in setting out the events that occurred. This is not so for Mr. Egglefield's interpretation of his notebooks.

(c) *Conclusion on Mr. Egglefield's credibility*

[168] While Mr. Egglefield provided his testimony in a clear and orderly fashion, I nevertheless found it to be problematic in terms of what I determined to be a negative bias towards Ms. Lecompte. The Tribunal admits to being sensitive to an issue of bias given Mr. Egglefield's acknowledgment that he felt Ms. Lecompte had retaliated against him because of his perceived lack of loyalty due to his relationship with Ms. Dunn. I find that the original bias acknowledged by Mr. Egglefield has not abated over time. It comes out on a number of occasions where I judged his testimony to be highly and on some occasions gratuitously unfair towards Ms. Lecompte.

(d) *Ms. Nadon's testimony*

[169] Although the Tribunal found Ms. Nadon to be an intelligent and articulate witness, it nevertheless has similar concerns as it had with Mr. Egglefield with respect to her testimony in terms of its inconsistencies, lack of logic in respect of her conduct and her acknowledged dislike for Ms. Lecompte. As a result, I give less weight to her evidence that adversely portrays Ms. Lecompte's conduct.

[170] An example of what I would describe as Ms. Nadon's tendency for equivocation, I refer to her testimony as to when she "stopped liking" Ms. Lecompte. This evidence was brought out somewhat inadvertently in relation to her testimony that Ms. Lecompte told her not to befriend Ms. Dunn during their first interview in April 2011. She testified that she understood that this was an order that had to be obeyed. Because she acknowledged that her invitation to Ms. Dunn and Ms. Gosselin to the Christmas party in 2012 disobeyed Ms. Lecompte's order, the cross examination focused on when she stopped obeying Ms. Lecompte. This in turn led her to testify that this occurred when she stopped liking Ms. Lecompte.

[171] She first testified on her initial cross-examination that she stopped liking Ms. Lecompte "around September of 2012". She claimed that, as a person, she had no issue with her, but that she did not like her management style. She testified, highly reminiscent of Mr. Egglefield's complaints, that Ms. Lecompte failed "to use her managers [my emphasis] to their full potential or her senior officers to their potential", and that the work "done by fully competent employees was being micromanaged to the point where we were not able to fully do our work and meet our full capacity." I find it highly implausible that she would only stop liking Ms. Lecompte over her management style a year and a half after commencing work with her, particularly when this testimony demonstrates certain parallels with the views of Mr. Egglefield with whom she shared similar dislikes to Ms. Lecompte.

[172] When later cross-examined in reply, Ms. Nadon backed away from giving a specific date for her disobedience, saying only that it was after Ms. Dunn went on her second assignment [September 26, 2012]. Thereafter, in order to avoid a negative bias implication affecting her

testimony regarding Ms. Lecompte at the time she was interviewed by PSIC, Ms. Nadon indicated she was not “100 percent” in disagreement with her managerial style, testifying that “I cannot say whether or not that clearly in my mind I disagreed with Madam Lecompte’s managerial [style]” at the time of her interview, which apparently occurred in 2014. Thereafter, when questioned as to when the PSIC interview occurred, she could not pin down the date within a margin of 24 months.

[173] I find, however, that she more or less abandoned this reasoning by her later testimony about stopping to like Ms. Lecompte. She testified that “[i]t’s hard to like somebody who is directly not liking you”. She then explained that she was part of a group of employees that Ms Lecompte did not like, as follows:

MS VIRC: What do you mean by [Ms. Lecompte’s] personal feelings?

MS NADON: Well, it’s – Ms Lecompte has a, – you know if she likes you and you know if she doesn’t and there’s – you feel it and it was – it was felt and there was tension.

MS VIRC: Tension amongst who?

MS NADON: Just in the group, with different members of the group there was tension.

...

MS VIRC: But you don’t recall – can you maybe tell us who between the group specifically sensed this tension?

MS NADON: Well, there was – it just seemed that there was two – two groups of people in our branch

MS VIRC: Okay. Do you want to maybe...? Which group was Ms Dunn in?

MS NADON: In my group, the not liked group.

MS VIRC: Okay. So you believe you were not liked?

MS NADON: Yes, ma'am.

MS VIRC: And who were you not liked by, you believe?

MS NADON: The group that was liked by Sylvie.

MS VIRC: And what about Ms Lecompte?

MS NADON: Ms Lecompte herself, was she liked?

MS VIRC: Yes – no. What did she think of you?

MS NADON: My belief is that she didn't think much of me. I think her – she had a different value system than I have and we just did not see eye to eye. We had conflicting personalities and it just – it wasn't a good fit.

[174] Thus, in the end, Ms. Nadon offers three grounds for her dislike of Ms. Lecompte: her micromanaging management style, Ms. Nadon being part of an “out” group in the eyes of Ms. Lecompte, and, finally, not having the same values and personality type as Ms. Nadon. I find that it is most likely that she saw herself as part of a group of employees who was in conflict with Ms. Lecompte. I am satisfied that this group included Mr. Egglefield. He criticized Ms. Lecompte for her micromanagement approach, which, given Ms. Nadon's high regard for him, would feed into her dislike of Ms. Lecompte, when she became part of this group, apparently in the late summer of 2012.

[175] It is difficult to understand how work ethics or a value system could have been an issue between Ms. Lecompte and Ms. Nadon. Ms. Lecompte hired Ms. Nadon over other applicants. She testified that Ms. Nadon was very regular and punctual and that there were no problems with her absences from work, although apparently she did take time off for some undisclosed medical problem. Mr. Egglefield acknowledged, in turn, that Ms. Nadon was an excellent worker, who

unlike Ms. Dunn did not require to be placed on a performance improvement program. No clarification was provided by Ms. Nadon as to what values or personality styles led her to stop liking Ms. Lecompte only a year and a half after starting to work with her. She mentioned some significant event having occurred in the fall of 2012, but no further evidence was provided with respect to what this was in reference about.

[176] I conclude that Ms. Nadon saw herself as being part of a group that was disliked by Ms. Lecompte. This is consistent with the evidence of her collaborating with Mr. Egglefield and Ms. Dunn in the fall of 2012 to assist Ms. Dunn by providing information that would support her complaints against Ms. Lecompte. This evidence also supports my finding that the dislike she acknowledged for Ms. Lecompte is reflected in her testimony. Two examples of this collaboration with Ms. Dunn against Ms. Lecompte are apparent from Ms. Dunn's notes.

[177] The first example is in a comment reporting that Ms. Nadon had advised her that she "is now being monitored as of Friday, September 21st, 2012". When this evidence was put to Ms. Nadon, she provided what I consider to be an illogical explanation that "this is in reference to me being watched by [with?] people on my team". Mr. Egglefield's testimony contradicted this statement when similarly asked to comment on Ms. Dunn's note in cross-examination that "it was probable that Ms. Nadon was reporting directly to Ms. Lecompte at this point", noting that this occurred shortly prior to his departure in November.

[178] In any event, I am satisfied that Ms. Nadon provided this information to Ms. Dunn because she had become aware that Mr. Egglefield had advised Ms. Dunn that her leave

absences were being “monitored” and she thought similar information pertaining to herself would be useful to Ms. Dunn. The monitoring term is one that Ms. Dunn and Mr. Egglefield used in their notes and testimony with respect to the allegations of retaliation concerning Ms. Dunn’s work absences. Ms. Lecompte testified that it was not a word she used regarding Ms. Dunn’s work absences. Moreover, the timing of Ms. Nadon providing this “monitoring” information is highly coincidental to Ms. Dunn’s September 26 complaint, which she filed with PSIC five days later. This complaint included the allegation that Ms. Lecompte was monitoring Ms. Dunn’s work absences as a reprisal.

[179] The second example of Ms. Nadon collaborating with Ms. Dunn, and on this occasion with Mr. Egglefield, relates to a discussion over coffee that they had after the staff meeting on Friday, October 12. I understand that the meeting was pre-arranged in order to discuss the orderly transfer of Ms. Dunn’s files to Ms. Nadon. However, during this get together they advised Ms. Dunn that Ms. Lecompte had told the personnel at a staff meeting that Ms. Dunn’s assignment was arranged because of her retaliation complaint. Information discussed at the coffee meeting ended up in Ms. Dunn’s notes, as follows:

Denis, Terry and I went across the street for a coffee. Denis and Terry both confirmed that Sylvie stated at the staffing meeting that I had made complaints at PSIC.

[180] Ms. Dunn testified that she had wanted to maintain the confidentiality of her first complaint (her second complaint of September 26, 2012 was not known to Ms Lecompte). Ms. Lecompte was of the view that it was already well known within ASIB given it was a small branch where two other employees had also filed reprisal complaints. A further difficulty I find

with Ms. Dunn's complaint about disclosing confidential information at that time is that her September 26 complaint to the PSIC indicated that her previous complaint to the PSIC was already widely known ("all Directors, consultants, THSs, some managers and other colleagues from the different branches within audit") which supports Ms Lecompte's understanding of its notoriety, none of which would previously have been attributed to her. But the point here is that I conclude that this comment found in Ms. Dunn's personal notes is further evidence of Ms. Nadon (with Mr. Egglefield) providing Ms. Dunn negative information regarding Ms. Lecompte that ends up being used against her in these proceedings.

[181] Finally, Ms. Nadon was also the subject of a serious disciplinary action by Ms. Lecompte which resulted in her losing three days of pay. Ms. Nadon did not grieve the discipline about which little else in the way of evidence was provided. Three days' loss of pay is a significant penalty in the disciplinary workforce world. It either represents the application of progressive disciplinary problems in the past, which I doubt given Ms. Nadon's success in the competition and perceived excellence as an employee, or of a serious disciplinary breach. Whatever the reason, the fact that Ms. Nadon was subject to a serious disciplinary measure could not but add to her already acknowledged animus against Ms. Lecompte.

D. The Allegation of Monitoring

[182] The Commissioner claims that Ms. Lecompte directed Mr. Egglefield to monitor Ms. Dunn's leave and late arrivals immediately after learning about the reprisal complaint in September 2011 and that no other employee was subject to the same level of scrutiny. The

particulars of the allegation are set out in four paragraphs of the particulars, which I will use as the basis for my analysis.

- (1) Ms. Lecompte was mandated to regularize the work absences situation and she wanted to ensure that Ms. Dunn's leave and late absences were recorded in the PeopleSoft system because they were significantly more numerous than those of any other AISB employee

[183] Sections 19 and 20(1)(b) of the PSPDA Rules require that a party must file a statement of particulars containing, *inter alia*, the material facts that the party intends to prove in the proceedings.

[184] Paragraphs 17 and 19 of the Commissioner's particulars claim that no other employee of ASIB was subject to the same scrutiny as Ms. Dunn, they are as follows:

17. As Manager, Mr. Egglefield supervised two employees, the Complainant and another AISB Investigator, Ms. Teresa Nadon, and reported to Ms. Lecompte.

[...]

19. To our knowledge, no other employee in AISB was subjected to the same level of scrutiny by Ms. Lecompte regarding attendance in the workplace as the Complainant.

[185] Ms. Lecompte testified that upon her arrival at the branch Ms. Scotton indicated that there was no close supervision of staff travel and that employees did not work regular hours. She wanted Ms. Lecompte "to normalize things". For this reason, Ms. Lecompte asked employees to let her know their work schedules and required them to work consistent hours, 9 to 5 as far as

possible. There is evidence that employees were required to provide her with notice of any absences. For example, Ms. Nadon had to clear her leave and other absences with Ms. Lecompte, such as when taking university courses. Ms. Dunn was in a similar situation prior to the notice of her reprisal complaint, for example when she requested to modify her work hours to start later when tending to her mother's illness. Mr. Finn could not recall whether Ms. Lecompte stressed the importance of attendance to the team, but agreed that it was reasonable. Ms. Lecompte indicated that attendance practices did improve, although she had to issue reminders a few times. She was not challenged on this point and I am satisfied that she had made proper attendance and the procedures to ensure them a priority for the Branch.

[186] Ms. Lecompte was originally responsible for managing Ms. Dunn's leave file. It was a complicated file, as she took what Mr. Egglefield agreed to was "a lot of leave". She was sometimes absent due to recurring problems from a previous workplace injury involving her back. This claim had not been addressed completely as there had been some omissions with respect to the reporting and the handling of the occupational health and safety procedures that existed within the department. Completion of this task fell to Ms. Lecompte. Ms. Dunn was also a caregiver for her sick mother, which required some days off and a rearrangement of her schedule to permit for late arrivals, which time was made up later in the day. Ms. Lecompte approved of these arrangements without objection. Indeed, Mr. Egglefield was the only manager who did not approve some of her leave absences.

[187] The particulars of the Commissioner's claim note that Ms. Dunn was the only employee who was subject to issues concerning attendance. None of the other employees managed by Mr.

Egglefield or Mr. Finn had attendance issues comparable to those of Ms. Dunn. Ms. Dunn therefore, was an exception in terms of absences from work, not only with respect to the significant amount of leave taken, but also the need to accommodate her work schedule when she was allowed to arrive late at work and required to make up the time later in the day. That being said, there were no issues with respect to the legitimacy of any of her absences. Ms. Lecompte approved her working schedule as well as leave requests that occurred for whatever reason during the period that she managed Ms. Dunn's leave.

[188] In these circumstances, I find that when responsibility for Ms. Dunn's leave absences was required to be transferred to Mr. Egglefield immediately after learning of the retaliation complaint against her, Ms. Lecompte's specific concern regarding the reporting of Ms. Dunn's leave was not a matter of reprisal, but one of ensuring adherence to the stricter absences regime that she was mandated to implement.

- (2) At the September 12, 2011 meeting Mr. Egglefield was directed to assume Ms. Lecompte's duties to properly implement leave/late absences for Ms. Dunn, as for other employees, as she no longer could manage Ms. Dunn's file given the reprisal complaint, and to ensure they were recorded in the PeopleSoft system

[189] One of the objectives of the September 12 bilateral meeting of Ms. Lecompte and Mr. Egglefield was to transfer the managerial responsibilities of Ms. Dunn's leave to Mr. Egglefield. It is the subject of paragraph 16 of the Commissioner's particulars, which I find does not give any consideration to the context of the transfer of duties. It is as follows:

16. In particular, on Monday, September 12, 2011, Ms. Lecompte met with the Complainant's Manager, Mr. Denis Egglefield, at

which time she informed him of the first reprisal complaint filed by the Complainant, now being investigated by PSIC, and to request that he keep her informed of the Complainant's Leave, including late arrivals at the workplace.

[190] The Commissioner's description of events correctly relates the request to be kept up-to-date by Mr. Egglefield, but does so in a manner that suggests it was a retaliation for the complaint, as opposed to being a necessity arising from the transfer of her file to Mr. Egglefield. The contextual evidence demonstrates that Ms. Lecompte was managing the entire work-absence situation of ASIB as part of her initial mandate. Because of Ms. Dunn's reprisal complaint, she was required to transfer her responsibility for Ms. Dunn's file to Mr. Egglefield. It also happened that Ms. Dunn was the only employee whose leave record could be described as a significant outlier based on the norm of other employees' absences, and therefore a matter of interest in terms of ensuring that all of her absences, for the various different reasons, were recorded. As long as they were recorded, Ms. Lecompte was able to accurately assess the leave situation of AISB and report on it, as were her instructions.

[191] It is in this context, that the Tribunal is required to interpret the comment in Mr. Egglefield's notebook regarding his meeting with Ms. Lecompte on September 12, 2011. Under the heading "Absences" regarding Ms. Dunn it explains that Ms. Lecompte "wants to be kept up-to-date on leave/late". It is to be noted that the term "monitoring" is not that used in his notes. This was followed by further comments regarding Ms. Dunn under the heading "Reprisal complaints" with regards to "staffing" and "French language". These comments presumably refer to the grounds in the first reprisal complaint being alleged against Ms. Lecompte.

[192] Ms. Lecompte has no memory of the meeting or what occurred. Her evidence was that there was no issue concerning the legitimacy of Ms. Dunn's absences, she just wanted them entered into the PeopleSoft computer system. She testified as follows:

Again, I don't remember what Mr. Egglefield intended to write when he wrote: "wants to be kept up to date on leave/late." I could go into the PeopleSoft system at any time to see who was present or absent. I could walk down the hall of the mezzanine and see who was there. I was really asking him to make sure that employees entered their request in the leave request system when they were absent.

[193] Moreover, the transfer of Ms. Dunn's leave/absence file to Mr. Egglefield arose upon her receiving official notice of the reprisal complaint of September 11. As a precautionary step she took steps to limit her contacts with Ms. Dunn while the complaint was outstanding. In other words, she intentionally took steps to avoid any circumstances where further allegations of retaliation could be made against her, wisely adopting this strategy to the extent possible in all her relations with the other employees who had also filed reprisal complaints against her.

[194] This conduct portends an intention to limit further allegations of reprisal, something the Commissioner's investigators appear to have overlooked and portrayed in a completely contrary manner. I find her precautions also entirely understandable. She had just been the target of no less than three reprisal complaints arising out of staffing positions in her first three months at the Branch. Normally complaints about staffing of positions are made pursuant to the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13) which provides for investigations and third-party determination by the Federal Public Sector Labour Relations and Employment Board. She was clearly a target of these employees and she was taking appropriate measures to ensure that no

further complaints could be brought against her. In this regard, it would also have been Ms. Lecompte's understanding that these complaints were groundless, given that they were rejected, but only some 2 ½ years later. But her knowledge that they were groundless would make her realize that she would be the target of further complaints, whether merited or not.

[195] These circumstances obviously also account for the reason that it was necessary that the Ms. Dunn's reprisal complaint was mentioned and recorded in Mr. Egglefield's notes of the meeting on September 12. It was the reason Ms. Dunn's file was being transferred to him, not as the conclusion testified to by him that Ms. Lecompte wanted to be kept up on Ms. Dunn's leave and late absences as a reprisal measure because of her retaliation complaint.

[196] From Mr. Egglefield's notes it is apparent that the principal issues discussed with Mr. Egglefield were those pertaining to his taking responsibility for Ms. Dunn's absences file. His notes of the meeting contain a chart of sorts under the title "Chantal-sick leave" that refers to a number of issues with initials beside them indicating who had responsibility for the item. The first item stated "Sylvie was expecting more info" with a letter C beside it indicating Ms. Dunn's responsibility. Next, there was an item stating "incident report needed", which I understand refers to the work required to complete the workplace injury file that was still outstanding. Responsibility for that task was assigned to Mr. Egglefield. The third item read "I am the lead, Sylvie will give me file", thereby indicating that Ms. Lecompte was to provide Mr. Egglefield with Ms. Dunn's sick leave file.

[197] It is only after these notes that a reference appears on the page in Mr. Egglefield's notes to Ms. Lecompte's request to be kept up-to-date on Ms. Dunn's leave and late occurrences. In this context, these notes seem quite reasonable. She was passing off a relatively complicated employee-absence file in a situation where Ms. Dunn's absences were out of the norm and significantly more numerous than those of the other employees managed by Ms. Lecompte. Also, Ms. Dunn was either working or had worked on a schedule that allowed for late arrivals which time had to be made up for later in the day. This would be another irregular reporting issue depending upon the arrangements with the employer. I find it reasonable therefore, in this context that she would want to be kept up-to-date on the situation in terms of her program to normalize the leave procedure.

[198] Moreover, Ms. Lecompte was emphatic that all she wanted was to ensure that absences and late arrivals were entered into the PeopleSoft system. As said, there were no issues concerning the legitimacy of Ms. Dunn's absences or late arrivals. The only request was to ensure that they were all recorded and accounted for. The purpose of this accounting was not only to maintain proper statistics, but also to be able to make proper decisions around leave-related issues. This was demonstrated when later in 2012 Ms. Lecompte refused to authorize Ms. Dunn's leave for French language training. Ms. Lecompte's review of Ms. Dunn's absences in tandem with the heavy workload led her to conclude that getting the work completed had to have priority over language training.

[199] Ms. Lecompte and Mr. Egglefield both testified that with the transfer of the file to Mr. Egglefield, Ms. Lecompte played no further role in approving or disapproving Ms. Dunn's

request for leave. Mr. Egglefield indicated that on occasion he had refused Ms. Dunn's leave. Given that she had no say in Ms. Dunn's absences, it would appear that the only request Ms. Lecompte could make was to ensure that the information was properly entered in PeopleSoft. This would include the basis for the leave and the time off work. If properly entered, she could track Ms. Dunn's leave situation without having to speak to Mr. Egglefield.

[200] I find it worth bearing in mind that she was "monitoring" the attendance of all the other employees, and, as I understand from Ms. Nadon's testimony, Ms. Lecompte was approving their leave requests. I put the term "monitoring" in quotes, because Ms. Lecompte stated that this was not a word she ever used, but originates from Mr. Egglefield and the complainant. As I view the evidence, Ms. Dunn's leave and late situation was the anomaly at the Branch, and Ms. Lecompte's direction to Mr. Egglefield was merely to ensure that the monitoring of Ms. Dunn would be the same as that the other employees, in a justified and properly recorded regime.

- (3) There is no evidence of Mr. Egglefield reporting Ms. Dunn's leave/late absences to Ms. Lecompte

[201] Another reason that I am not satisfied that the direction of September 12, 2011 was out of the ordinary arises from the fact that Mr. Egglefield could not provide reliable evidence on how he kept Ms. Lecompte up-to-date on Ms. Dunn's leave absences. His testimony, when addressing his later direction in 2012 to Ms. Dunn to copy her leave requests to Ms. Lecompte, is as follows:

MR. GIRARD: If we could look at the exact wording you've used in your handwritten notes under the heading "Absences," it says:

"Wants to be kept up to date on leave." Is that a forward slash? "Late". "Wants to be kept up to date on leave/late." You'd agree with me it doesn't say that she wants you to forward her leave requests; correct?

MR. EGGLEFIELD: That, verbatim, I agree with you, you know, that's what's written there.

MR. GIRARD: How did you keep Ms Lecompte informed of the leave requests and the lateness?

MR. EGGLEFIELD: It's quite frankly, it's been a long time. It would likely have been via email, but I can't say with certainty.

[202] If Mr. Egglefield was monitoring Ms. Dunn's leave as he says, and given the evidence below where he testified that he considered this to be unfair treatment of Ms. Dunn in singling her out, it is difficult to accept that he could not at least recall the means whereby he was carrying out Ms. Lecompte's direction. Moreover, if such emails existed, they should have been brought before the Tribunal as the best evidence possible in support of these allegations.

[203] In conclusion, I am not satisfied that Mr. Egglefield was required to do anything other than ensure that Ms. Dunn's leave absences or un-scheduled late arrivals were recorded in the PeopleSoft system. Indeed, no other conclusion seems possible. He was in charge of allowing or refusing Ms. Dunn's leave, with respect to which he never consulted Ms. Lecompte. The legitimacy of her leave requests was not an issue until sometime later when he refused a number of Ms. Dunn's requests, which might be noted occurred after she was required to copy them to Ms. Lecompte. His responsibility could only have been to ensure that Ms. Dunn's numerous absences were properly justified and entered into the system.

- (a) *Ms. Dunn copying her leave requests to Ms. Lecompte pursuant to Mr. Egglefield's direction is not evidence of a reprisal*

[204] The Commissioner cited as a particular of the monitoring reprisal by Ms. Lecompte the fact that Mr. Egglefield requested Ms. Dunn to copy her leave requests directly to Ms. Lecompte, as follows:

18. Mr. Egglefield subsequently informed the Complainant of Ms. Lecompte's direction. Over time, in order to reduce the reporting burden placed on him, Mr. Egglefield informed the Complainant to copy Ms. Lecompte directly on all communications related to her leave requests, including her late arrivals and reasons.

[Emphasis added]

[205] There is no mention in Mr. Egglefield's notes of him requesting Ms. Dunn to provide a copy of her leave requests to Ms. Lecompte, nor does it appear that he testified to having made that request. The evidence comes from Ms. Dunn. She indicates that the request would have occurred on July 11, 2012, at the same time that she was informed by Mr. Egglefield that Ms. Lecompte had directed him to monitor her leave/late absences. As shall be seen, July 11, 2012 appears to be a date of some significance, as Mr. Egglefield also advised Ms. Dunn that Ms. Lecompte questioned his loyalty because he was seen taking a smoke break with her.

[206] Ms. Dunn's evidence on copying Ms Lecompte with her leave requests is as follows:

MS DUNN: I'm trying to recall. All I can remember is that he told me to record this, but also at the same time he had said that if I was to take leave in the future to CC Sylvie when I'm sending emails to

her (*sic*) on my absences. So I would send it to Denis and then I would CC Sylvie and then sometimes her EA Tara Lavigne.

MR. YAZBECK: And was there a reason that you had to start copying Sylvie?

MS DUNN: He wanted me to specifically copy her. My belief is that I guess he was a little bit frustrated with having to maybe report to her all my leaves, so I would send it to Denis and then I would CC Sylvie and then sometimes her EA Tara Lavigne.

[207] As I have already indicated, I see no evidence of any actual burden on Mr. Egglefield to report Ms. Dunn's leave/late absences. The routine for reporting absences in advance of being absent was for Ms. Dunn to request approval from Mr. Egglefield, and thereafter to enter the information on her absence and reason for it into the PeopleSoft system. Approval was the manager's duty, one that Ms. Lecompte was required to delegate to Mr. Egglefield after the reprisal complaint that prevented her from ensuring the integrity of the PeopleSoft data, as she did for other employees. The "burden" of approving Ms. Dunn's leave requests continued despite Ms. Dunn copying the request to Ms. Lecompte, because Mr. Egglefield retained the sole authority to approve or reject the request.

[208] From the events of July 6, 2012 discussed below where Mr. Egglefield failed to report one of Ms. Dunn's sick leave absences I conclude however, that the reporting of Ms. Dunn's leave requests made in advance was not really the problem. There was a procedure already underway which would result in the request being approved and duly entered into the system by Ms. Dunn. The need to report absences was with regard to those of an impromptu nature. This would extend to situations, such as where Ms. Dunn or her mother was unpredictably indisposed, or where Ms. Dunn would be required to arrive late or leave early for some unexpected reason. It

was in respect of these types of absences that Ms. Lecompte would want to ensure that the manager entered the information into PeopleSoft, particularly for an employee who had a higher frequency of absences like Ms Dunn, many of an unexpected nature, than other employees in the Branch.

[209] I conclude that the direction to Ms. Dunn to copy her request for absences to Ms. Lecompte was of little effect, or concern, to Ms. Lecompte, while doing little to reduce Mr. Egglefield's burden it was his discretion alone to accept or refuse them. The real concern would have been with respect to events such as occurred on July 6, 2012 when Ms. Dunn's unanticipated sick leave had not been recorded. Moreover, I would have thought that Mr. Egglefield would have known that Ms. Dunn copying her leave request to Ms. Lecompte would not solve the problem of a lack of record, nor relieve him of any burden. In light of the other circumstances which I discuss below concerning other events occurring on July 11, 2012, I am concerned that the purpose of the direction to Ms. Dunn was to create a record showing that Ms. Lecompte was monitoring Ms. Dunn's absences in a manner that no other employee was subject to. This is why he gave the direction to copy Ms Lecompte "at the same time" as he advised Ms Dunn that she was being singled out for monitoring her absences and should keep a record of their discussion.

- (b) *Mr. Egglefield breached his duty of loyalty to Ms. Lecompte by disclosing to Ms. Dunn that he was being asked to report her leave directly to Ms. Lecompte, and not that of any other employee, and advising her to record these comments without first raising the issue with Ms. Lecompte*

[210] In addition to Mr. Egglefield's direction to Ms. Dunn to copy her leave requests to Ms. Lecompte, there were a number of other significant events that occurred on July 11, 2012. I will comment on them in order of occurrence so as to provide the appropriate context for my conclusions that Mr. Egglefield acted inappropriately and encouraged Ms. Dunn to believe that she was being singled out because of her reprisal complaint, when such was not the case.

- (i) Mr. Egglefield was reminded by Ms. Lecompte on July 6, 2012 to ensure that Ms. Dunn's leave absences were reported

[211] I find that the events July 11 commence on July 6, 2012 when Mr. Egglefield was confronted by Ms. Lecompte about a failure to report a sick leave absence of Ms. Dunn. His notes record the incident as follows:

Meeting Sylvie Denis (impromptu). Was again asked to report all of Chantal's absences (sick leave) such as last Friday's.

[212] This can be compared with the notes he provided PSIC in support of Ms. Lecompte which describe this incident in which he fails to mention that the request was because he had failed to ensure that Ms. Dunn's sick leave absence was reported, stating only as follows: "I was again asked to report all of Chantal's absences like last Friday".

[213] He testified to the note in his notebook, as follows:

“Without looking at the — at my book and to try to give context, I can't — I can't recall the — what the absence or what the purpose of the absence was. But clearly I would not have reported it to Ms Lecompte.”

[Emphasis added.]

[214] Ms. Lecompte's testimony on the comment in his notebook was as follows:

As I said, I can't remember the facts, I can't remember the cause. But when I look at the date in July, Mr. Egglefield had already received his letter by that time that he was an assigned employee. As I said, his main task was to find another job. So I insisted that he continue ensuring that his team's leave appeared in the system. Do you understand?

[Emphasis added.]

[215] There is an important distinction in the testimony of the two witnesses: Mr. Egglefield indicates that he failed to report the absence to Ms. Lecompte, while she testifies that all she requested was that the information on Ms. Dunn's absences was properly entered into the PeopleSoft program. I accept Ms. Lecompte's testimony over that of Mr. Egglefield for a number of reasons. Overall, I find Mr. Egglefield to lack credibility when discussing the conduct of Ms. Lecompte. This reflects my concern that he was retaliating against her as one of the alleged perpetrators of his position being declared surplus. Second, the note of July 6 does not indicate that Mr. Egglefield failed to report Ms. Dunn's absence to Ms. Lecompte. Third, and what I mostly rely on in arriving at this conclusion is the same reasoning described above, to wit: that Mr. Egglefield was unable to describe how he reported Ms. Dunn's absences to Ms. Lecompte; that there was no evidence of any report of absences being made, including in his

detailed notes; and that in Ms. Lecompte's circumstances, the only logical request to Mr. Egglefield was to ensure that Ms. Dunn's absences were duly reported in PeopleSoft. It is exactly in the circumstances when he failed to report her sick leave absence that Ms. Lecompte was required to bring this omission to his attention.

[216] I also accept that because Mr. Egglefield was seeking new employment, it was reasonable for Ms. Lecompte to be following Mr. Egglefield's efforts to ensure that Ms. Dunn's absences were being entered into the system. It was reasonable that he could well have been preoccupied with matters other than ensuring Ms Dunn entered her leave absences in PeopleSoft. In addition, I also view Ms. Lecompte following Ms. Dunn's leave requests to be reasonable at this point, inasmuch as Ms. Dunn stood out as having been absent on nine occasions between her return to the AISB on May 1, and July 11, 2012.

- (ii) Mr. Egglefield inappropriately advised Ms. Dunn that she alone was being singled out by Ms. Lecompte for monitoring and that she should keep a record of their discussion

[217] With respect to the allegation described at paragraph 18 of the Commissioner's particulars, Mr. Egglefield was questioned on his conduct in advising Ms. Dunn of Ms. Lecompte's direction to report her leave to her that was not required of Ms. Nadon who was the other employee that he managed.

[218] This discussion occurred on the same day as a staff meeting during which Ms. Lecompte rejected a request that employees be allowed to leave at 3:30 PM. It is recorded in Mr. Egglefield's notes as follows: "Schedule - Sylvie does not want anyone to leave before 3:30".

Ms. Lecompte was cross-examined on this note. She indicated that she wanted personnel to remain in the office to respond to requests from persons in other time zones across Canada. To the extent that the request disgruntled staff, it may have been a factor of general discontent with Ms. Lecompte as to how she was managing the Branch. Ms. Nadon was apparently the person who made the request, but Ms. Lecompte applied it to all staff members.

[219] Ms. Dunn testified that Mr. Egglefield wished to speak to her after work. There was no mention of the discussion in Mr. Egglefield's notes, but was recorded in her notes as follows:

Denis told me that Sylvie has requested him to report my leave to her directly, and no other employees of his. He told me to record this.

[Emphasis added.]

[220] Mr. Egglefield testified that his intention was to advise Ms. Dunn that she was being inappropriately singled out by Ms. Lecompte, as follows:

You know, at that stage I was getting ready to leave the organization. I was, you know, attempting to make plans. I was trying to respect the direction that I had received. But, you know, to be very very frank, it's also, you know, one year where I, you know, saw conduct that I deemed to be inappropriate in the workplace and, you know, felt that that was, you know, another instance where once again, you know, she was being singled out.

[221] I have considerable difficulty, not only with Mr. Egglefield's motive behind this conversation, but also with the substance of its description. In terms of the year spent observing Ms. Dunn's treatment at AISB, she was on assignment for 5 ½ months during this period. The first incident claimed by Mr. Egglefield of allegedly singling her out occurred on September 12,

2011, when he was advised to keep Ms. Lecompte up-to-date on Ms. Dunn's leave absences. The second occurred on November 18, 2011 when his loyalty was questioned for taking a smoke break with her while she was on assignment. With respect to this incident however, it shall be seen from my analysis below that in November 2011 his notes record that Mr. Egglefield blamed Ms. Scotton for challenging his loyalty for smoking with Ms. Dunn, not Ms. Lecompte.

[222] In the remaining period of 2 ½ months after her return May 1, 2012 from her assignment, the only leave-related incident appears to have occurred when he was reminded by Ms. Lecompte on July 6, 2012 of his failure to ensure that Ms. Dunn's sick leave absence of the previous Friday was entered into the PeopleSoft system. Accordingly, I do not know what he supposedly saw over a year about her being singled out, apart from his own misinterpretation of Ms. Lecompte's direction in September 2011, which he failed to properly execute as discussed on July 6, 2012, even with respect to ensuring that the PeopleSoft data was complete.

[223] In addition, I am concerned by Mr. Egglefield advising Ms. Dunn that she was being singled out like "no other employee of his". Ms. Nadon was the only other employee being managed by Mr. Egglefield. It was not a fair comparison as Ms Nadon did not present the same leave complications as Ms. Dunn who Mr. Egglefield acknowledges was the only employee with work absence issues in terms of the frequency. I have other concerns about Ms. Dunn's note of August 15, 2012 that after her shift "Denis kept me around to 4:45pm to discuss the matter that I am being monitored for time, so I have been keeping track of my own time and a few others". A somewhat similar comment is found in her notes of Mr. Egglefield advising her on August 29, 2012 that her "colleagues, other managers and Director have has spent more time away from the

office during the same time period” [since her return in April]. This latter comment was in respect of one of the grounds Ms. Lecompte provided to deny Ms. Dunn’s French training. It would appear that Mr. Egglefield was proactively obtaining information and providing it to Ms. Dunn in support of the allegation that she was being improperly monitored by Ms. Lecompte.

[224] I am most concerned by the fact that he would advise Ms. Dunn to maintain a record of their conversations. Mr. Egglefield had already indicated to Ms. Lecompte that Ms. Gosselin was collecting information, which Ms. Gosselin wanted to confirm with him so that she could use it against Ms. Lecompte. The record shows that Ms. Dunn was on this date already maintaining detailed information on Ms. Lecompte’s conduct, which had commenced upon her return to AISB. A further protected disclosure naming Ms. Lecompte was filed during the period of Ms. Dunn’s return to the AISB. Taken altogether, Mr. Egglefield is advising Ms. Dunn that she should be recording all incidents that could be used against Ms. Lecompte, and implicitly that he will “have her back” so to speak, should an occasion arise were she to challenge Ms. Lecompte’s “inappropriate” conduct in the workplace.

[225] To add to my concerns about Mr. Egglefield’s motive, I conclude that at the same time he also advised Ms. Dunn that Ms. Lecompte had questioned his loyalty for taking a smoke break with her. As will be seen below there is some controversy as to when she was advised of the “smoke break/ loyalty” incident. I ultimately accept Ms. Dunn’s testimony that it occurred during this meeting, as she testified that this was the associated memory trigger for that conclusion. Moreover as already indicated, Mr. Egglefield’s notes initially (before his position is

workforce adjusted) place the blame on Ms. Scotton, not Ms. Lecompte, for questioning his loyalty with respect to the “smoke break” incident.

[226] Thus, the scenario painted from the events on July 11, 2012 is that after staff was advised by Ms. Lecompte that she would not authorize an early departure time of 3:30 PM, Mr. Egglefield takes Ms. Dunn aside at the end of the work day. He tells her that Ms. Lecompte has singled her out, first in directing him to report only her work absences, and second by challenging his loyalty for being seen taking a smoke break with her. He instructs her to copy all of her leave requests to Ms Lecompte and to keep a record of their conversation. This information largely comprises the allegations relied upon by the Commissioner in this matter, even though there is no evidence of this conduct having adversely affected Ms. Dunn’s working conditions. Mr. Egglefield is the key witness upon which these claims are founded.

[227] Mr. Egglefield was thereafter asked whether he had discussed with Ms. Lecompte his concerns about what he obviously considered was unfair treatment of Ms. Dunn, that “she was being singled out”.

MR. GIRARD: What did you do about that? Did you talk to Madam Lecompte about this, that you didn't think it was right?

MR. EGGLEFIELD: I spoke to Ms Lecompte about some of the conduct that she had had with Ms Dunn and Ms Gosselin on a few occasions, yes, I did.

MR. GIRARD: Specifically related to leave?

MR. EGGLEFIELD: I can't recall if I did specifically discuss issues related to leave.

MR. GIRARD: So you believe that Madam Lecompte's requiring you to keep her up to date on the leave, you're testifying that you didn't think this was right, but you can't remember ever telling that to Madam Lecompte?

MR. EGGLEFIELD: You know, it's been six or seven years now so, no, my memory is failing me at this stage as to whether or not I did in fact have a discussion with her.

MR. GIRARD: Well you'd think if you were a Manager who had the interests of his employees at stake you would have brought this up to the Director as something that you felt was wrong?

MR. EGGLEFIELD: Ms Lecompte will tell you that if I felt something was wrong that I would bring it to her attention.

[228] Once again I have considerable difficulty with Mr. Egglefield's credibility regarding this testimony. His first response to the effect that he spoke to her "about some of the conduct that she had had with Ms Dunn and Ms Gosselin". This was evasive in response to a straightforward question. It deflected the response to include Ms. Gosselin without any indication of what the nature of discussion was with Ms. Dunn.

[229] Thereafter, he relies upon the passage of time to have erased his memory of what would have been a singularly exceptional meeting with Ms. Lecompte where he would have raised issues of her inappropriate treatment of Ms. Dunn. In addition, he again is confronted by the absence of a note of such an important conversation with his manager in his very detailed notebooks, where there are numerous negative references regarding Ms. Lecompte. I am satisfied that Mr. Egglefield was not truthful and evasive in suggesting that he might have discussed this issue with Ms. Lecompte.

[230] Moreover, I cannot understand why he would not have raised any concerns that he might have had concerning Ms. Lecompte's direction that he monitor Ms. Dunn's leave. These events occurred before his loyalty was questioned on November 18, 2011. He had worked at the PSIC and was by his own reckoning a highly skilled investigator. She had hired him, which normally is appreciated by the employee. If he thought that she might be getting herself into trouble by requesting such information be reported by him, I would think that normally an experienced fellow manager aware of the first reprisal complaint would tactfully point out to his or her superior concerns of such a nature. I find that the best explanation for such a failure to raise such concerns from his meeting with her in September is that he understood that his only responsibility was to ensure that Ms. Dunn's leave absences were properly entered in the PeopleSoft system, as opposed to singling her out as an act of retaliation.

[231] For the reasons above, I conclude that his conduct in advising Ms. Dunn that she was being singled out by Ms. Lecompte and that he would support her if push came to shove, was highly inappropriate, besides being baseless and the sole source of the monitoring complaint.

(4) Conclusion: no reprisal by Ms. Lecompte concerning any issue of monitoring

[232] Based on my analysis, I find that no reprisal was taken against Ms. Dunn relating to Ms. Lecompte being singled out and kept apprised of her work absences, including that no measure was taken that adversely affected her employment or working conditions. I similarly conclude that if it is determined that Ms. Dunn's employment or working conditions were adversely affected by her absences being monitored by Ms. Lecompte, she at no time intended to take a

reprisal against the complainant in her actions, and as such there is no basis to conclude that disciplinary action should be taken against Ms. Lecompte with respect to this allegation.

E. The Allegation of Segregation

[233] The particulars pled by the Commissioner and Complainant with respect to the incidents of her being segregated are as follows:

20. On November 18, 2011, Ms. Lecompte met again with Mr. Egglefield in order to question his interactions with the Complainant while at work. At this meeting, Ms. Lecompte further specified that he should consider limiting his social interactions with the Complainant and, in particular, that he be "mindful of the context" surrounding the PSIC investigations. [Commissioner's Particulars]

26. During PSIC's investigation into the second complaint, Ms. Nadon stated that Ms. Lecompte also often warned her not to talk with the Complainant, and most notably in October 2012 when she took over the Complainant's AISB investigation files. Ms. Nadon further noted that Ms. Lecompte also warned her not to talk to Ms. Marylene Gosselin, a complainant in another reprisal complaint filed against Ms. Lecompte and being investigated by PSIC as of March 8, 2012 (file no. PSIC-2010-1438). [Commissioner's Particulars]

[Emphasis added.]

[234] No evidence was presented to the Tribunal supporting allegation in paragraph 20 that Mr. Egglefield should consider limiting his social interactions with Ms. Dunn, apart from the single incident where Mr. Egglefield considered his loyalty to be questioned in their meeting of

November 18, 2011 regarding smoke breaks while the Complainant was on assignment elsewhere. It is detailed in the Complainant's particulars as follows:

7. In addition to directing the Complainant's co-workers not to interact with her, Ms. Lecompte also questioned the loyalty of the Complainant's peers and Mr. Egglefield when they did interact with her. The questioning of employees' loyalty contributed to the segregation of Ms. Dunn from her co-workers. [Complainant's Particulars]

[Emphasis added]

[235] Again, no evidence was presented to the Tribunal that the "loyalty" incident arising from November 18, 2011 meeting contributed to Ms. Dunn's segregation from her coworkers, or in fact as shall be seen, from Mr. Egglefield.

(1) Mr. Egglefield's Segregation Evidence that his loyalty was questioned for taking smoke breaks with Ms. Dunn

(a) *November 17, 2011 – Ms. Dunn has a smoking break with Mr. Egglefield immediately after going on assignment in Ottawa*

[236] The events surrounding the discussion on Mr. Egglefield's loyalty appear to have had their origin after Ms. Dunn had left the branch on assignment away from her office in Gatineau on November 16, 2011. She testified in chief that she had a prearranged visit with Mr. Egglefield to meet with some First Nation elders on the following day on November 17, 2011. She testified that she picked up Mr. Egglefield using her vehicle to attend the meeting. After the meeting, she and Mr. Egglefield had a smoke break at INAC headquarters in Gatineau, where the AISB was located. Her evidence on this matter is as follows:

I was recalling it afterwards when we were on break and I do remember that Denis did say to me that Ms Lecompte had attempted had talked to him about his loyalty to her. ... And that he had had a discussion with her and that it had taken place. And I believe the incident that they were referring to was when I first went on assignment, the following day I had already made pre arrangements with Denis to introduce him to elders at the Kumik. So I had made arrangements to bring Denis and then I turned around and came back to Ottawa because I was on assignment in Ottawa at the time. But we did have a cigarette outside.

[237] In reply evidence after Ms. Dunn had testified about how the smoke break came about, Mr. Egglefield recalled that he had had a smoke break with Ms. Dunn at this time.

[238] I find as a fact that Ms. Dunn and Mr. Egglefield did take a smoking break at INAC headquarters in Gatineau on the first day after her reassignment to new duties in Ottawa. While I harbor some serious concerns about the evidence concerning the meeting with the First Nation elders, I accept that it likely occurred in the fashion described by Ms. Dunn.

[239] My concerns about this evidence arise because both Mr. Egglefield and Ms. Dunn changed their evidence on this point. Mr. Egglefield originally testified that he could not recall taking any cigarette breaks with Ms. Dunn while she was on assignment, while Ms. Dunn had initially testified that they had not shared any smoke breaks during this period. Both of them later testified to having the smoke break after their prearranged meeting on November 17, 2011, apparently after Ms. Dunn drove him back to headquarters.

[240] Both witnesses offered the evidence gratuitously so to speak, in that the evidence was given, but not in response to the subject or the question being asked of them. In Ms. Dunn's case

she had requested leave of the Tribunal to provide additional evidence after a morning recess. While doing so, she took the opportunity to provide the details described above of how she came to be seen on November 17, 2011, having a cigarette with Mr. Egglefield back at headquarters after their visit with First Nation Elders. Mr. Egglefield provided his evidence corroborating the smoke break in reply evidence. However it was not proper reply evidence in the sense of responding to any evidence from the Employer. As in Ms. Dunn's case, he seemed to be offering an explanation as to how he could be seen having a cigarette with Ms. Dunn on the day after her reassignment across the Ottawa River. Moreover, given this prearranged meeting and the details in Mr. Egglefield's notes, I would have expected it to have been corroborated by some mention in his notebooks.

[241] These concerns aside, I am mostly unable to understand how the particulars of the smoking incident were not brought forward by Mr. Egglefield during either meeting with Ms. Lecompte on November 18 or 22, 2011. Although, Mr. Egglefield was by his own account extremely upset at having his loyalty questioned, at no time did he point to the serendipitous nature of his shared smoking break with Ms. Dunn on the day after her assignment away from the AISB, due to a prearranged work-related meeting. It appears to me that this should have been his immediate response to allay any concerns management might have had for him to be seen smoking with Ms. Dunn in the unusual circumstance of her being just assigned to work away from AISB. In fairness, no one seems to have put together the date of Ms. Dunn's assignment and the smoking incident prior to the hearing, which only came to light when the Tribunal asked questions in an attempt to establish the chronology of events surrounding the "loyalty" incident.

[242] Even though I have concerns about the prearranged meeting, I am not prepared to go so far as to conclude that Ms. Dunn and Mr. Egglefield would fabricate such evidence for the purpose of misleading the Tribunal.

(b) *The November 18, 2011 Lecompte-Egglefield Meetings*

- (i) The First Meeting of November 18: Mr. Egglefield is rebuked for proactively amending a template.

[243] Mr. Egglefield testified in chief that he had three or four “bi-lat” (one-on-one) meetings with Ms. Lecompte on November 18, 2011. In the first one of relevance, which bears the heading “Admissibility Report” in his notebook, he cited the following statement by Ms. Lecompte with the comments that followed:

“When you’re the boss, you can decide”

Did not like that I amended the template to add “Action Taken” and “analysis”. Wanted the info in the little boxes.

[244] During a further meeting on same day, during which the issue of Mr. Egglefield’s loyalty was the focus, he added another note on the subject of the amended template, as follows:

Asked that I bring her problems instead of taking initiative, i.e. templates or asking Terry to make a list of Dept. POI.

[245] Similarly, on November 22, 2011, after a further discussion regarding his loyalty, Mr. Egglefield added the following comment in respect to amending the template:

Also, she [Ms. Lecompte] denied that she had indicated that she preferred that I bring her problems instead of showing initiative.

[246] He explained these notes in the following testimony:

And at that meeting one of the incidents that did occur was that Ms Lecompte was livid that I had modified a template that had been prepared prior to my arrival with the team. The document was the document we relied upon to make determinations on the complaints that we were receiving. So the issue was that the template did not include an area for the employees, we'll call them the investigators here for lack of a better word at this stage. There was no place where they could provide their analysis. There were facts and then there was a conclusion but there was no analysis which, from an investigative perspective, made absolutely no sense. So I modified the document to add an area where the investigator could provide me, the supervisor, the analysis of their findings based on the facts so that their conclusion could be supported.

But Ms Lecompte was upset because she – I guess there was a document, a book of procedures that was being prepared which included templates that was nearing completion, and that for me to start changing things was inappropriate at this stage. And I recall discussing that with Mr. Finn and asking who was present. Mr. Finn had worked with me prior at the Ombudsman's Office for National Defence and had been promoted when he went to the ASIB[sic], so I knew him to be a very good investigator. However, when they prepared those procedures and those templates, Mr. Finn indicated to me that he was not there that day, that it was being done by other AISB staff, none of which in my opinion had the necessary experience to be able to make those sort of calls and to prepare the appropriate documents, including Ms Lecompte, who had no background in investigations other than the fact that she had worked at PSIC in a role of communications. So for her, investigations were new. And so I thought that by bringing my expertise and taking initiative I was doing what was expected of me as an AS7. At that meeting of a few days earlier on November 18, you know, a shocking statement from an executive came to me, which was, you know, "Bring me problems. Don't take any initiatives to resolve issues."

[Emphasis added]

[247] Ms. Lecompte could not recall discouraging Mr. Egglefield's initiatives during the November 18, 2011 discussion. This, perhaps, is understandable with the passage of so much time, a consideration that equally applies to some of Mr. Egglefield's testimony.

[248] Mr. Finn, who was called by the Complainant and was a friend and highly regarded colleague to Mr. Egglefield, was not questioned on this incident.

(I) Analysis

[249] On the basis of Mr. Egglefield's testimony, I find by his own evidence that he has mischaracterized what appears to be a "line of authority issue" for Ms. Lecompte, as opposed to her discouraging his pro-active initiatives.

[250] Although the comment was a form of rebuke, I do not attribute any serious managerial shortcomings to Ms. Lecompte in what is meant to point out that his initiative, however justified in his view, should nevertheless have first been brought to her attention before simply proceeding with the changes to the template after the team had completed its design.

[251] Furthermore, his testimony in chief demonstrates a degree of lack of respect regarding the competence of the other members of the AISB on issues relating to their investigations together with Ms. Lecompte's capacity to lead an investigation branch, ("we'll call them the investigators here for lack of a better word at this stage") and ("none of which in my opinion had the necessary experience to be able to make those sort of calls and to prepare the appropriate documents, including Ms Lecompte, who had no background in investigations other than the fact

that she had worked at PSIC in a role of communications. So for her, investigations were new”). Such an attitude would quite properly require some form of pushback by Ms. Lecompte in order to maintain her authority. This would justify her remark to the effect that until he was the boss, she would be making the decisions.

[252] I further conclude that his description of Ms. Lecompte being “livid” in the first meeting to be inconsistent with his notes that she “did not like” his amendment. Moreover, I admit to having some difficulty with the highly negative statement attributed to Ms. Lecompte being something she would have said in the second meeting after issues of his loyalty had been raised (“bring her problems instead of taking initiative”) given its highly charged nature. Both his evidence and that of Ms. Lecompte show that calling his loyalty into question “extremely extremely” [his words] upset him. As indicated, Ms Lecompte has no memory of any discussion of this initiative-limiting incident, which by Mr. Egglefield’s account was raised on three separate meetings. Her testimony is that her raising his loyalty had greatly angered Mr. Egglefield, that she in turn was chagrined by his reaction, and that the short meeting came to an abrupt end when he became angry and she failed in her attempt to console him. I cannot imagine the earlier subject being raised, or Ms Lecompte making such an incendiary statement in the context of the second meeting, in the face of Mr. Egglefield’s reaction.

[253] Having regard to all of the evidence, I find that what likely occurred was that Ms. Lecompte’s questioning of Mr. Egglefield’s loyalty led him to revisit his impression of the previous meeting. In that state of mind, he likely embellished “when you are the boss” statement to describe it in a more negative manner than was first taken down in his initial note. In any

event, what is clear is that the critical description and tone of events of the earlier meeting portrayed Ms. Lecompte in a more negative fashion than found in his notes, after the loyalty rebuke occurred.

(ii) The Second Meeting of November 18: Mr. Egglefield's Loyalty is Questioned

(I) The Evidence

[254] The particulars of the Commissioner, adopted by the Complainant, regarding the issue of segregation focused in the first instance (prior to Ms. Nadon's new evidence that she was told not to befriend Ms. Dunn in April 2011) on the issue of Mr. Egglefield's loyalty being questioned because he was seen taking smoking breaks with the Complainant. As noted from the above discussion, the second meeting on November 18, 2011 was the first occasion that the matter of Mr. Egglefield's loyalty was raised. His brief note on the subject under the heading "Loyalty" reads as follows:

She questioned my loyalty because I had been seen with Chantal having a smoke. Her words were that there were 'rumours'.

[255] Mr. Egglefield testified on this note as follows:

It was actually a very upsetting meeting. I got called into Sylvie's office and I had been – or Sylvie indicated to me that it had been reported to her from the Chief Audit Executive's Office, Anne Scotton, not necessarily her personally but from her office, that I had been seen outside having a cigarette with Chantal Dunn. I vividly recall that day because particularly for a former military person to have his loyalty questioned is something that is particularly serious ... It was just mind boggling why someone would make a comment like this to me.

Ms Lecompte seemed to believe that I was aiding Ms Dunn in her complaints with PSIC and, you know, particularly given that I had worked there, you know, that I could be of any help to her, which was the furthest from the truth because Ms Dunn made a point, to her credit, that very rarely would she bring up those issues. She was actually keeping the matters confidential, as I'm sure the PSIC investigator was asking her to do. I was being kept informed of when she had appointments, but apart from that we were not discussing her files with PSIC.

[Emphasis added]

[256] Ms. Lecompte similarly testified that Mr. Egglefield became upset when she raised the issue of his smoking breaks with Ms. Dunn and that she was directed by Ms. Scotton to communicate this complaint to Mr. Egglefield. Ms. Lecompte and Mr. Egglefield's testimonies, however, vary substantially in regard to other aspects.

[257] In chief, Ms. Lecompte stated that she initially asked Mr. Egglefield to reduce the frequency and length of his smoking breaks with Ms. Dunn, noting that "[t]here are several people who have pointed out to me that they often see you outside smoking a cigarette with Ms. Dunn". His reply was "I guess it comes from Ms. Scotton or Ms. Lamarre?" She deflected the question, instead testifying that "[i]t does not matter who it comes from. You often left smoking. I just wanted to reduce the frequency of your breaks."

[258] However, she did acknowledge in her testimony that Ms. Scotton was the source of the complaint. Ms. Lecompte was advised by Ms. Scotton that she very often saw Ms. Dunn smoking with Mr. Egglefield. Ms. Lecompte added that she was told to tell Ms. Dunn that "it was not appropriate in the context" and that Mr. Egglefield should shorten his breaks. There is no evidence that Ms Lecompte spoke to Ms Dunn, who was on reassignment at the time, about the

subject. However, I do not believe that to have been the express direction. Rather it was understood that she was to tell Mr. Egglefield to advise Ms. Dunn that it was not appropriate for her to travel to INAC headquarters given she was on assignment.

[259] Ms Lecompte testified that she had her own concerns about Mr. Egglefield's smoking breaks with Ms. Dunn. She stated that when she went to Mr. Egglefield's office, he was often not there and that his colleagues always told her that he had gone to smoke with Ms. Dunn. She was never told that he was smoking with anyone else. She states that her intention in confronting Mr. Egglefield was for him to reduce his smoke breaks generally with Ms. Dunn, but not prohibiting them.

[260] Ms Lecompte stated that after raising the issue with Mr. Egglefield he became very angry, even aggressive: "He told me that Ms Scotton and Ms Lamarre couldn't tell him when or with whom to smoke or for how long; that he was really angry about that." I generally disagree with Mr. Egglefield's reaction. If there were legitimate concerns about how long and when he was taking smoke breaks, this would be a consideration that management was entitled to address. And if the smoke breaks were limited to one employee, then that employee would also be subject to a similar management direction. Their conduct, together, would single them out for the attention of management.

[261] It was only in response to Mr. Egglefield's anger that Ms. Lecompte says she raised the question of Mr. Egglefield's loyalty, although in cross-examination she testified that she does not

believe that this was the term she used, rather being an issue of “context”, despite his referring to it over and over again. In any event, she testified as follows:

It’s also a question of loyalty and collegiality with management. I asked him to understand the context of all the reprisal complaints with him, and that it was the fact that he was always seen with Ms Dunn, whereas she was on an assignment away from our team at the time.

[262] She went on to testify that “he was insulted that I should question his loyalty. And, in the end, I told him – Since I saw that he was really upset by this, I said, “Listen, Denis, forget all that.” She stated that she had been “tactless” and that “she wanted to preserve her relationship with Mr. Egglefield.” Mr. Egglefield denied that Ms. Lecompte told him to forget about this conversation. Ms. Lecompte testified that all she wanted was for Mr. Egglefield to limit his smoking breaks with Ms. Dunn. Despite her efforts to calm the situation, she testified that the meeting ended quite abruptly.

[263] During cross-examination, Mr. Egglefield stated that he could not recall whether Ms. Lecompte suggested that he decrease his smoke breaks with Ms. Dunn, although he stated that no one was abusing their smoke breaks. I interpret this to mean that he was smoking regularly enough with Ms. Dunn that it was possible that he had been asked to reduce his breaks with her. He also first testified that he could not recall whether she came back again to smoke with him once she was on assignment. As mentioned, in reply evidence, he changed that testimony to relate the occasion as had been mentioned by Ms. Dunn involving a pre-arranged meeting with a third party, adding that there may have been one or two other occasions when he had a cigarette with Ms. Dunn while she was on assignment.

[264] In cross-examination challenging his selective memory, Mr. Egglefield explained why he was unable to recall whether Ms. Lecompte suggested he decrease his smoke breaks with Ms. Dunn, but remembered clearly that she questioned his loyalty. Mr. Egglefield explained how serious the loyalty issue was to him as follows:

You know, when someone questions your loyalty, as I explained yesterday, it's extremely, extremely serious. It was based on, as far as I'm concerned, baseless allegations that, you know, why would, why would people be paying attention to such things. So yes, it was particularly serious. I do recall, you know, spending the weekend, you know, brewing the issue and trying to figure out how I would raise it with her because it was, you know, unacceptable the way that, you know, I had been treated.

[Emphasis added.]

[265] Other relevant passages regarding events of November 18 are taken from the cross-examination of Ms. Lecompte. She was being asked why it was necessary for her to request or imply that Mr. Egglefield should stop smoking with Ms. Dunn. In the first instance she testified that she "spoke to Mr. Egglefield about himself, about his cigarette breaks" and that she never intended to isolate him, to limit his social contacts with Ms. Dunn. She stated: "I simply wanted him to reduce his number of cigarette breaks, their length, that's all." Under further cross-examination, however, this evidence changed, as follows with my emphasis:

MR. YAZBECK: Okay. So why on earth would you have a concern about them having smoke breaks together when they work on two sides of the river?

MS. LECOMPTE: She was still seen with Ms. ... He was seen with Ms. Dunn in the lobby, elsewhere, near the building smoking. I understand that she worked elsewhere, but she clearly came to headquarters.

MR. YAZBECK: Well, the question is how could Mr. Egglefield – sorry – how do you know Mr. Egglefield smoking with Ms Dunn was a problem when they worked on two sides of the river?

MS. LECOMPTE: I said Mr. Egglefield had been seen by people in my surroundings, including Ms. Scotton, smoking, not on the other side of the river, not on the bridge, at headquarters. So...

MR. YAZBECK: And tell me this: The problem as you're describing it is with Mr. Egglefield's behaviour; right?

MS. LECOMPTE: Yes.

MR. YAZBECK: Okay. Why wouldn't you just tell Mr. Egglefield to decrease his smoking breaks, period?

MS. LECOMPTE: I should have done that. But every time I still went looking for Mr. Egglefield in his office before Ms. Dunn left on assignment, his colleagues always, always said he went for a smoke with Chantal. So, it was like he was spending a lot of time with her during cigarette breaks. So I added, cut back on his cigarette time with Chantal.

MR. YAZBECK: So you said you should have done that, but you didn't; right? You only prohibited him from taking more smoking breaks with Ms Dunn; correct?

MS. LECOMPTE: Yes, that's true. That's the big crime here. I killed someone.

[Emphasis added]

(II) Analysis

[266] I conclude that there were three motivating factors leading to Ms. Lecompte's confrontation with Mr. Egglefield concerning his smoke breaks with Ms. Dunn. First, he was often seen by Ms. Scotton taking smoke breaks with Ms. Dunn, which was confirmed by Ms. Lecompte. Second, Mr. Egglefield was now continuing to take smoke breaks with Ms. Dunn even though she had been reassigned, (at her own request without any connexion to the reprisal

complaint) and was working at a considerable distance from INAC headquarters. Third, the context of the retaliation complaints by the employees made his smoke breaks with Ms. Dunn, as one of the complainants when she was on assignment, an issue regarding his loyalty to the management team who had to deal with these complaints. I also accept Ms. Lecompte's testimony that she only raised the issue of the context of the complaints after Mr. Egglefield responded angrily to his being seen having smoke breaks with Ms. Dunn, and blaming Ms. Scotton or Ms. Lamarre for questioning his loyalty. I find a number of other conclusions flow from this factual scenario.

1. Ms. Lecompte was following the instructions of Ms. Scotton, but added the reference to the retaliation complaints

[267] Ms. Lecompte was carrying out the directive of her manager, Ms. Scotton, in confronting Mr. Egglefield concerning his smoke breaks with Ms. Dunn. I am satisfied that she would not have confronted him, otherwise. While she claims that she did not advise Mr. Egglefield that she was carrying out Ms. Scotton's direction, he nevertheless attributed blame to Ms. Scotton, both in his testimony as to how he reacted on November 18, and in the notes of his November 22 meeting with Ms. Lecompte. Indeed, on the basis of this evidence, I conclude that Ms. Lecompte was a secondary target of Mr. Egglefield's displeasure with his loyalty being questioned.

[268] I cannot criticize Ms. Lecompte for the manner by which she first attempted to deal with the issue of his smoke breaks, which was sufficiently tactful in the circumstances. However, she does not appear to have followed Ms. Scotton's direction, which was for Mr. Egglefield to advise Ms. Dunn that the smoke breaks were inappropriate in the vicinity of the INAC headquarters. She confused this justification with her own additional explanation relating to the "context",

which included Ms. Dunn being on assignment and the situation of the retaliation complaints. This led Mr. Egglefield to perceive that his loyalty had been put into question, because the interdiction was aimed at him rather than at Ms. Dunn.

2. The “Context” Justified Curtailing Ms. Dunn’s Smoke Breaks While on Assignment and the Mentioning of the Retaliation Complaints

[269] I am satisfied that Mr. Egglefield regularly took smoke breaks with Ms. Dunn prior to November 18, 2011. He had attempted to stop smoking after his operation, but could not overcome his addiction to cigarettes. His evidence on the number of smoking breaks in reply was equivocal. In my view, it is a topic that should have been addressed in chief given Ms. Lecompte’s statement of particulars specifically addressing the issue. I also cannot overlook the fact that the complainant called two witnesses, both of whom could have addressed this issue. In particular, Ms. Nadon, who was the other employee managed by Mr. Egglefield, could have provided evidence challenging Ms. Lecompte’s testimony that she often was looking for Mr. Egglefield and was told he was on smoke break with Ms. Dunn. Mr. Egglefield only specifically addressed this issue in his reply evidence. Again, I would have further expected corroboration by Ms. Nadon, who was also called to provide reply evidence.

[270] In regard to the smoke break on November 17, 2011, Ms. Dunn was the employee that would appear to have been abusing her break time by leaving her workplace in Ottawa in a coordinated fashion with Mr. Egglefield so as to have their smoke breaks together. In my view, this was the point perplexing management as to how they could be seen smoking together the day after she was reassigned when she was working across the river. It is also the reason for my

concern about Ms. Dunn and Mr. Egglefield gratuitously testifying on these issues as described above, that the smoke break was preplanned. This extends as well to my puzzlement over how the preplanned meeting was never mentioned to Ms. Lecompte in the November meetings, nor referred to anywhere else in the evidence. Nevertheless, no such explanation was provided to Ms. Lecompte.

[271] In the circumstances, I am of the view that Ms. Dunn's reappearance for a smoke break with Mr. Egglefield a day after being assigned to work in Ottawa would be a valid work-related reason for attempting to prohibit Ms. Dunn from having further smoke breaks with Mr. Egglefield at INAC headquarters during work hours. I would think that for these breaks to occur, the two individuals would have to coordinate their timing, besides requiring Ms. Dunn to take considerable time off work to travel back and forth for the pleasure of simply sharing a cigarette with Mr. Egglefield. I do not consider this to be a work-related activity.

[272] Furthermore, these smoke breaks would not be a good example of how external assignments were supposed to work. Ms. Dunn had just left on assignment claiming that she needed to be removed from her work environment and yet, the next day, she is seen returning to the workplace, requiring an extra-long break due to the considerable travel time. These circumstances would reflect poorly on Mr. Egglefield as her manager who condoned Ms. Dunn's conduct. He would also have been aware that Ms. Dunn was the employee with the most significant number of absences from the office for various reasons, in addition to having special leave privileges because of her mother's illness. Frankly, I am surprised that Mr. Egglefield did not recognize that his being seen taking a smoke break with Ms. Dunn, in the circumstances

described, would raise the eyebrows of the upper management team. This again begs the question as to why he did not describe their work-related, or at least associated, basis to be seen smoking together to Ms. Lecompte in his two meetings with her, when he felt his loyalty was being challenged for being seen smoking with her.

[273] I also consider that the context of a dysfunctional work environment, contributed to the reprisal and other complaints and conflicts between employees, to be a contextual factor justifying reference to the retaliation complaints. I agree with Ms. Lecompte's characterization of the office as highly dysfunctional. While Mr. Egglefield testified it was not, I attribute this view to his desire to negatively portray Ms. Lecompte due to his unreasonable bias against her. He was aware for example that two managers were required because certain employees could not work with each other.

[274] Similarly, an important indicia of the troubled workplace situation within AISB is the fact that among the first steps taken by Ms. Lecompte upon becoming a Director was to retain Mr. Sterne, a human resources consultant, to engage in a teambuilding exercise. This resulted in most of the staff agreeing to a Team Charter consisting of the following terms:

We collectively and individually commit to:

Communications:

- Communicating in a respectful, open and courteous manner
- Encouraging the "challenge" function
- Sharing information, experiences and knowledge
- Communicating expectations clearly

Working relationships:

- Being loyal to the team by looking after each other and working in the best interest of the team
- Being open-minded and accepting individual differences
- Contributing to a pleasant work environment
- Raising matters of concern with others in a timely manner

Engagement and accountability:

- Being fully engaged
- Being responsible for our personal and team success
- Participating actively in AISB meetings
- Being held accountable for our work and our behaviours to ourselves and our co-workers

[275] Ms. Dunn refused to sign the Team Charter. Mr. Egglefield's notes indicate that on November 9, 2011 all of the employees agreed to sign the Team Charter with the exception of Ms. Dunn and Marylène Gosselin. Mr. Egglefield described Ms. Gosselin as a very difficult employee who was a friend of Ms. Dunn and who was seeking to build a case against Ms. Lecompte. Ms. Gosselin is also involved in later segregation issues referred to the Tribunal. Mr. Egglefield's notes similarly indicate his displeasure with Ms. Dunn's continued refusal to sign the Charter after her return to AISB in May 2012. Ms Dunn's notes indicate that on August 15, 2012 Mr. Egglefield suggested to her "not associate with Marylene" after she refused to participate in a luncheon with the consultant because Ms. Gosselin had not been invited.

[276] Ms. Dunn's refusal to sign the Charter was one of the factors that led her to request the assignment out of the AISB which was granted and commenced on November 16, 2011. A temporary assignment on the consent of the employee does not constitute a reprisal under section 51.1 (5) of the Act. In any event, it is not alleged, nor is there any ground to conclude that this assignment was a result of Ms. Dunn's protected disclosures or her reprisal complaint.

[277] It is my opinion that the refusals of Ms. Dunn and Ms. Gosselin to sign the Team Charter on top of the three reprisal complaints brought against Ms. Lecompte, two of which were by them, should have generated some degree of empathy for Ms. Lecompte's request that he consider the workplace "context". As a manager he should have been concerned that these employees, including Ms. Dunn and Ms. Gosselin, were ganging up on Ms. Lecompte and that their complaints against her were retaliatory because they had not succeeded in competitive staffing processes when she had been Director for only three months. I find this to be all the more so, inasmuch as Mr. Egglefield had been an employee with PSIC and as an experienced investigator, should have been in a position to assess the situation.

3. Ms. Lecompte advised Mr. Egglefield to forget about her concerns about smoke breaks with Ms. Dunn, but simply to reduce his cigarette breaks

[278] The final factual issue for determination is whether Ms. Lecompte told Mr. Egglefield to forget about her concerns pertaining to his smoke breaks with Ms. Dunn. In the end I accept her testimony, not simply because I find her to be the more reliable witness, but also because I find it describes the most likely and logical scenario from the events that followed Mr. Egglefield becoming angry and the continuing smoke breaks he had with Ms Dunn. Backtracking on the issue of his smoking with Ms. Dunn is consistent with her retreating from the tempestuous meeting with Mr. Egglefield because of her concerns of having offended him. He was upset by having his loyalty questioned and reacted accordingly. It was not her idea to confront Mr. Egglefield in the first place. Moreover, as his manager she still maintained the somewhat face-saving direction to simply reduce the frequency of smoke breaks, such that she was not totally abandoning Ms. Scotton's direction.

[279] I also find that subsequent events support her testimony that she withdrew any direction concerning smoking with Ms. Dunn. Mr. Egglefield admitted that he possibly had shared a cigarette with Ms. Dunn on one or two occasions during her assignment in addition to that on November 17, 2011. I assume he would not have disobeyed a direct order from Ms. Lecompte, even if he disagreed with it. Admitting that there was a possibility that he had other cigarette breaks with her during her assignment is tantamount to his acceptance that there was no prohibition against him doing so after his meetings with Ms. Lecompte of November 18 and 22. Furthermore, the evidence is undisputed that he and Ms Dunn continued to take smoke breaks after she returned from assignment in May 2012. I find that there was no prohibition for them smoking together at any time after the meeting of November 18, 2011.

(c) *The November 22 Meeting: Questioning Mr. Egglefield's Loyalty*

(i) The Evidence

[280] There was a follow-up meeting that Mr. Egglefield described as lasting about half an hour on November 22, 2011 during which he raised his "discomfort with her statements of Friday [November 18, 2011], re my loyalty". Ms. Lecompte recalled from the meeting that Mr. Egglefield had thought a lot about their discussion of November 18, which had greatly bothered him, and that he wanted to go back over the smoking incident. The summary of her testimony is that she again told him not to pay any attention to it, that she had said what she had to say, which was simply that he should take shorter smoking breaks.

[281] Mr. Egglefield testified that Ms. Lecompte “explained her reasons” for questioning his loyalty. These reasons consisted of four points listed in his notes, as follows:

- 1) My going on sick leave when I arrived and was extended [absence for the first 12 weeks after his hiring date]
- 2) My application to the position of Director of Operations PSIC
- 3) Anne Scotton’s comments/questions on my trustworthiness because I had been seen (by more than one person) having a smoke break with Chantal [Dunn]
- 4) She was unaware if PSIC had interviewed me re the allegations of wrongdoing and/or reprisal

[Emphasis added.]

[282] Ms. Lecompte also disagreed that their discussion followed the outline described in Mr. Egglefield’s notes. She replied to this evidence as follows:

No, I never gave him reasons. Mr. Egglefield noted it down that way. I don't remember saying to him, telling him: "I question your loyalty for four reasons. Here they are: because you went on sick leave when you arrived, because you applied for the position of..." He is the one...this is Mr. Egglefield's interpretation. I didn't give reasons why I asked him to cut back on his smoking time.

[283] She added that she did not see the connexion between some of these alleged “reasons” and the issue of his loyalty, with which I agree, and which is evident from Mr. Egglefield’s characterization of them.

[284] Unlike the rest of the notes in the two books, these comments do not record specific instructions or events Looking at all the points together, it would appear that they represent Mr.

Egglefield's summary at the completion of the half hour meeting concerning the difficulties in his relationship with Ms. Lecompte and, vicariously, with Ms. Scotton. I find them to be defensive in nature and meant to express his side of the situation, with no suggestion that he might have contributed to the relationship problem. I further find that only one of these points relates to challenging his loyalty in terms of segregating him from the Complainant for smoke breaks, blame for which again is attributed to Ms. Scotton.

(ii) Analysis

- (I) Reasons 1 and 2: Going on extended sick leave on his first day of work and applying for a position outside of the branch relate to his commitment not his loyalty

[285] I would agree with Ms. Lecompte that the first two items are unrelated to the issue of loyalty. They speak to his unfortunate absence at the start of his work with the AISB and his apparent lack of long-term commitment to the branch by having previously applied for another position outside of the branch. With regards to the first item, although she could not recall discussion of the issue on November 22, Ms. Lecompte nevertheless testified to her being unhappy that Mr. Egglefield was absent during the first 12 weeks of his employment. Her testimony on his unexpected early absence is as follows:

I wasn't unhappy with him. He had health problems. I was thinking of my own situation. I had a very, very high volume of work. I expected him to come and help support my operations, and he signed on the dotted line, and the next day he left for several months. So I was really upset.

He told me during the interview, but he was on a waiting list and said it could take up to a year. So I wasn't really expecting him to leave.

[286] Her testimony on his lack of long-term commitment to the Branch refers to his informing Ms. Lecompte that his name was still in for a directorate position with PSIC when he joined ASIB. She appreciated his honesty, but indicated that in the circumstances she was so desperate for someone with his experience that she went ahead and retained his application. It is fair to conclude that he was not committed to remaining at ASIB, which he would have considered to be a second-best opportunity until something better came along. I find this to be consistent with his testimony commented on earlier that he assessed himself as the only person with appropriate investigation skills, apart perhaps from Mr. Finn, at the AISB.

[287] At best, I find these concerns relevant only as providing further alternative reasons explaining why Mr. Egglefield would harbor a negative bias towards Ms. Lecompte by adding further grounds for his speculative belief that she was partly responsible for his position being designated for a workforce adjustment. Moreover, I do not find them particularly well-justified and demonstrating little empathy for her situation.

(II) Reason 3: Mr. Egglefield considered Ms. Scotton to be the source of questions about his trustworthiness, not Ms. Lecompte

[288] The third item described in the note is highly relevant and highly exculpatory of Ms. Lecompte. Ms. Scotton is identified as the manager who questions Mr. Egglefield's trustworthiness and directed her to prevent further smoke breaks with Ms. Dunn, not Ms. Lecompte. That conclusion is arrived at straight from his notes.

[289] Despite the absence of any reference to Ms. Lecompte with regard to the only item in his notes that raises questions of his loyalty, when questioned in chief, Mr. Egglefield testified so as to portray Ms. Lecompte as harboring concerns about his loyalty. His testimony on this point is set out below:

MR. EGGLEFIELD: The third point was observations, comments she had received from Anne Scotton, who was the Chief Audit Executive, Sylvie Lecompte's supervisor,

... And so Anne Scotton would have commented and questioned my trustworthiness because I had been seen, apparently by more than one person, having a smoke with Chantal.

MR. YAZBECK: ... Was there any rationale given as to why your loyalty shouldn't be trusted because you are having a smoke with Chantal Dunn?

MR. EGGLEFIELD: No, my trustworthiness was questioned because of those four points together.

MR. YAZBECK: Okay.

MR. EGGLEFIELD: My loyalty [was questioned] because I was discussing with Chantal were -- as I say, in at least one instance Ms Lecompte was of the belief that I was assisting Ms Dunn with the -- you know, with her part in the investigation because of my knowledge and experience as an investigator and specifically within PSIC. And that's something she did mention to me. It may have been during that meeting. It may have been during another meeting. I can't recall for certain.

[Emphasis added.]

[290] He was cross-examined on this latter statement by Mr. Girard, confirming that this was a statement she actually made:

MR. GIRARD: You testified that Ms. Lecompte seemed to believe that you were aiding Ms. Dunn in her complaint with PSIC given that you had worked there. Is this your perception or did she actually say that to you?

MR. EGGLEFIELD: She actually did say that.

[291] Ms. Lecompte denied making any such statement testifying, “[w] ell, I think that’s really his interpretation. I never raised the point that he was helping her with her complaint”.

[292] I find that Mr. Egglefield tried to undermine the obvious conclusion from his notes on both November 18 and 22, 2011 that Ms. Scotton not Ms. Lecompte was the manager questioning his loyalty. Instead of answering the question with respect to the note that referred to Ms. Scotton, he gratuitously attacks Ms. Lecompte for questioning his loyalty to the extent of her specifically stating to him that she thought he was helping Ms. Dunn with her PSIC complaint. I conclude that Mr. Egglefield purposively invented such a discussion and that Ms. Lecompte never made a statement attributed to her for a number of reasons.

[293] First, Mr. Egglefield originally testified in chief regarding the meeting of November 18, 2011 that “Ms Lecompte seemed to believe that I was aiding Ms Dunn in her complaints with PSIC and, you know, particularly given that I had worked there, you know, that I could be of any help to her,..”. Seeming to believe something is clearly not the same as hearing the statement being made by Ms. Lecompte. One is a speculative inference with no basis in other facts from the meeting upon which it could be drawn, while the other is a stated fact, which if accepted, is highly probative evidence of the mindset of the speaker.

[294] Second, Mr. Egglefield testifies that allegations pertaining to his trustworthiness now involve not simply questioning his loyalty because of smoking with Ms. Dunn, but his

commitment to the Branch by reference to all of the four points in his notes, the first two items being related to issues of commitment and the fourth being, by his own admission, speculative.

[295] Third, Mr. Egglefield indicated that he had been shocked by certain statements made by Ms. Lecompte, such as her telling him not to take proactive actions by bringing problems to her. In my view, if there was one shocking statement made by Ms. Lecompte that Mr. Egglefield would have immediately noted in his compendious notebooks, it would have been her stating that she thought he was assisting Ms. Dunn with her reprisal complaint. Such a statement, had it been uttered, would clearly demonstrate that Ms. Lecompte deeply mistrusted Mr. Egglefield's loyalty to the point of her imputing serious bad faith to him by working with one of his subalterns behind her back to assist her in formulating complaints against Ms. Lecompte. It also would have been highly hypocritical conduct by her that was in clear contradiction with the terms of the Team Charter that, the week prior, she was attempting to have all the employees sign on to.

[296] Fourth, there is no evidence that Ms. Dunn was working on a reprisal complaint on November 22, 2011. Her first reprisal complaint had just been recently disclosed to Ms. Lecompte in September. She was on assignment out of the office at her own request, having not raised any further issue of reprisal against Ms Lecompte in this regard. Mr. Egglefield had not yet disclosed to Ms. Dunn Ms. Lecompte's instructions to monitor her leave and late absences. There is no indication anywhere that Ms. Dunn was working on new reprisal allegations against Ms. Lecompte before Mr. Egglefield's disclosures in July 2012. It was at that time that he

advised Ms. Dunn that Ms. Lecompte had questioned his loyalty and that he had been directed to monitor her late leave absences.

[297] Fifth, I similarly find that Mr. Egglefield is not credible by his statement that “[i]t may have been during another meeting” that Ms. Lecompte accused him of helping Ms. Dunn with her reprisal complaint. I am satisfied that Mr. Egglefield recognized that without any note of such an accusation by Ms. Lecompte regarding the November 22, 2011 meeting, he had to attribute the statement to some other meeting. There is no evidence of any further meeting or event where Ms. Lecompte would have questioned his loyalty in any fashion on the record.

[298] Finally, my assessment of Ms. Lecompte is that she was far too circumspect a manager to let her guard down to Mr. Egglefield and to make such an obviously shocking accusation of bad faith against him, particularly any time after their charged meeting on November 18 where he reacted to what he thought was an attack on his loyalty. On the point of his immediately becoming upset once the issue of his smoking with Ms. Dunn was raised, I accept Ms. Lecompte’s evidence. It is in any event largely supported by Mr. Egglefield’s testimony that he was noticeably upset by what he thought were her, or rather Ms. Scotton’s, unfair criticisms of his loyalty: “when someone questions your loyalty, as I explained yesterday, it’s extremely, extremely serious”. From the point of initially raising the smoking issue with Ms. Dunn, it is highly inconsistent to suggest that Ms. Lecompte would utter such an inculpatory statement, which would surely exacerbate the tensions between them.

[299] As a collateral point I find demonstrating the bias of Mr. Egglefield's testimony in recounting these events, the Tribunal notes that the absence of relevant facts in his reference to his trustworthiness being questioned because "I had been seen, apparently by more than one person, having a smoke with Chantal". This testimony overlooks the fact that he was seen often having a smoke break with Ms Dunn, and that the reason the smoke break attracted management's attention was because it occurred outside of their offices on the day after Ms. Dunn had commenced her self-requested assignment at another office across the river in Ottawa.

[300] In conclusion, based on this evidence and other evidence throughout the hearing, I find that Ms. Lecompte made no such statement suggesting that Mr. Egglefield was helping Ms. Dunn with her reprisal complaint. I find that, at best, it was intended somehow to negate his actions on July 11, 2012 and thereafter when he started to provide information to Ms Dunn that eventually ended up in the further retaliation complaint. It is on this date that he provided information to Ms. Dunn regarding Ms. Lecompte's direction to monitor her late/leave absences, adding that she should make a note of their conversation; and that Ms Lecompte had questioned his loyalty because of taking a smoke break with her. Both items are significant allegations underlying this reprisal complaint.

[301] The fact that Mr. Egglefield would attempt to embellish in such a negative fashion his depiction of Ms. Lecompte's treatment of him in respect of the reprisal allegations against her, adds to my conclusion that he was a highly biased witness against Ms. Lecompte. It further provides grounds for the Tribunal to have concerns about his role in instigating these complaints against Ms. Lecompte.

(III) Reason 4: Inquiring as to whether Mr. Egglefield had been interviewed by PSIC

[302] With respect to the fourth numbered item that Ms. Lecompte was unaware whether Mr. Egglefield had been interviewed by PSIC, Mr. Egglefield testified as follows:

The fourth point, she was unaware if PSIC had interviewed me regarding the allegations of wrongdoing and/or reprisal.” So she was concerned as I basically just alluded to right now, she was concerned that, you know, I may have been interviewed by PSIC. You know she probably, and I'm speculating here, obviously, felt that I had a duty of loyalty to report that to her if I had been interviewed by PSIC which I likely would never have reported to her.

[303] It is difficult to understand how these comments could have been made on November 22, 2011. There is no apparent reason why the PSIC would have wanted to interview Mr. Egglefield in November 2011 concerning Ms. Dunn’s complaints made in March of the same year about which he would have no information. He only started working in July 2011. There is no indication of other complaints being made by Ms. Dunn. The alleged reprisals that are before the Tribunal concerning monitoring and segregating of Ms. Dunn could not have been live issues with the PSIC in November 2011.

[304] In any event, I agree with Mr. Egglefield that these comments, which do not specifically refer to any statement by Ms. Lecompte, constitute speculation, in addition to my previous conclusions about his highly negative bias towards her. On this occasion Mr. Egglefield is attempting to depict Ms. Lecompte as improperly seeking to obtain information from him on the investigation of Ms. Dunn’s complaints. This could be framed as conduct questioning his

preparedness to undermine the reprisals investigation process of the PSIC. Moreover, in an attempt to demonstrate that he would not disclose such information to Ms. Lecompte, he apparently trips over his own ambiguity on what constitutes appropriate behaviour, stating however that he would “likely” not provide this information to her.

(IV) Ms. Lecompte never apologized but pointed out that she herself felt at risk and unable to trust anyone

[305] The November 22 note also contained a complaint by Mr. Egglefield that Ms. Lecompte “never apologized or changed her position”. This remark was made in reference to both his loyalty and commitment, as follows:

I reaffirmed my loyalty and commitment to moving AISB forward on two or three times, but Sylvie never apologized or changed her position. She claimed the context of many [complaints] against her (i.e. Chantal and Marylène) and Anne [Scotton]. She is uncertain who she can trust. [Mr. Egglefield’s emphasis]

[306] There are a few additional points to draw from this note and the evidence regarding the loyalty issue. First, Mr. Egglefield described the problems in his relationship with Ms. Lecompte as relating to both loyalty and commitment. This reflects the fact that the first two items in his note would be commitment issues, as opposed to those concerning loyalty. I have already noted how he has attempted to expand the loyalty issue beyond that relating to his smoking breaks with Ms. Dunn. This evidence in fact weakens the argument that Ms. Dunn was segregated because of the smoke break in relation to questions of his loyalty. It just becomes one more factor why he believed Ms. Lecompte was questioning his loyalty.

[307] Second, the note also provides some meaning to Ms. Lecompte's use of the term "context" when she comments about her concern about "the many complaints against her" and Ms. Scotton and the fact that her concerns about trust were not limited to Ms. Dunn. In this regard, I repeat my surprise that Mr. Egglefield did not express more empathy for Ms. Lecompte's difficult managerial situation.

[308] Third, it would appear that Ms. Lecompte opened up somewhat in an attempt to explain her obviously precarious situation stemming from three retaliation complaints, which even though she knew were baseless (as they turned out to be), put her in a situation of being ganged up on by employees; a situation in which she was counting on Mr. Egglefield to provide assistance. In later testimony, he disagreed with Ms. Lecompte's characterization of the dysfunctional and toxic work environment that she inherited and soon became enmeshed in, which in my view again demonstrates his overriding and highly unsympathetic bias against her. There is no regard for Ms. Lecompte's challenging managerial circumstances, either on the occasion when she asks him to consider her context on November 18 and thereafter, provides more information about her concerns of who to trust on November 22. From his perspective, the whole matter appears to have been all about him not obtaining an apology from Ms. Lecompte, even though his note points out that it was Ms. Scotton who questioned his loyalty, not Ms. Lecompte.

- (d) *Mr. Egglefield discloses to Ms. Dunn that his loyalty has been questioned because he is taking smoke breaks with her*

(i) The Evidence

[309] The last factual incident to be addressed in connexion with the loyalty/segregation issue arises out of the testimony of Ms. Dunn to the effect that Mr. Egglefield disclosed to her that his loyalty had been questioned because he was seen taking a smoke break with her. Her evidence about when this occurred and its impact on her is highly inconsistent, being presented in three versions. Her evidence impacts substantive issues as well as the credibility of both her and Mr. Egglefield concerning this issue. I will only review Ms. Dunn's evidence, as Mr. Egglefield did not address this issue, despite it being specifically raised in the employer's particulars.

(I) First version

[310] Ms. Dunn first testified on this issue in chief when asked to respond to Mr. Egglefield's comment in his notes that he heard from Ms. Lecompte as follows: "Questioned my loyalty because I had been seen with Chantal having a smoke." Her initial response to how she became aware of these comments was that it was "after I had been put on my second assignment and Denis Egglefield had left the department", i.e. October 2012. She also testified that Mr. Egglefield did not advise her that Ms. Lecompte had questioned him about having a smoke break with her.

[311] She further testified that when she ultimately found out that Mr. Egglefield's loyalty was being challenged because of smoking with her she was "a little bit upset because I did not want

people to get into trouble because they were seen talking to me” [my emphasis]. In her testimony, she attributed this conclusion to the fact that Mr. Egglefield’s loyalty was questioned. The Tribunal does not accept that the questioning of Mr. Egglefield’s loyalty, which was not known to the other members of the Branch, could have impacted on the reluctance of any staff member to talk or relate to her.

[312] Ms. Dunn was also asked in chief to comment on the “so called smoke breaks” with respect to how often they happened and when and how long it lasted. She testified as follows:

Not very long. When Denis came back from his back surgery he was not smoking. And then I went on my first assignment in November 2011 to ... I returned May 1st, 2012, so I had no contact with Mr. Egglefield then. And then it's when I came back, then I noticed the extra tension in the office when we moved to the mezzanine. And then I would go maybe well, not too often, once in a while. But he would also go out with other employees like Donna Young. He used to take coffee breaks with Brian Finn.

[313] I do not accept the relevant portions of this evidence. While it is true that Mr. Egglefield had stopped smoking after his back surgery, he recommenced and was taking regular smoke breaks with Ms. Dunn, as described by Ms. Lecompte. This evidence was never denied by Mr. Egglefield. His evidence was only that he could not recall whether she asked him to decrease the number of these breaks when the issue was discussed on November 18, 2011. In addition, AISB moved to the Mezzanine in September 2011, before she went on assignment.

[314] Similarly, the contention that Ms. Dunn did not have smoke breaks with Mr. Egglefield while on assignment before returning on May 1, 2012 is contradicted by Mr. Egglefield. He

acknowledged that they had smoke breaks, possibly up to three, with him during this period. This testimony and the evidence that they had smoke breaks together after her return, would appear to support Ms. Lecompte's contention that she did not prohibit further smoke breaks together, but only asked that Mr. Egglefield reduce their occurrence.

(II) Second version

[315] After the morning break in her testimony, Ms. Dunn asked the Tribunal to correct some of her testimony regarding when she was advised by Mr. Egglefield that his loyalty had been questioned, which I permitted. She corrected her testimony first by stating that she was advised on July 11, 2012 and second that "I do remember that Denis did say to me that Ms Lecompte had attempted had (*sic*) talked to him about his loyalty to her."

[316] Ms. Dunn also corrected her evidence that she did not have a smoke break with Mr. Egglefield when on assignment beginning on November 16, 2011. In doing so she took the opportunity to provide the unrelated details already described above of how she came to be seen on November 17, 2011 having a cigarette with Mr. Egglefield back at headquarters after their visit with First Nation Elders.

[317] Ms. Dunn further testified that it was at this time in July that she had found out from Mr. Egglefield that her leave absences were being monitored by Ms. Lecompte. She testified that this led her to request a further reassignment, which she testified was denied until she filed the additional complaints in September 2012 that are the subject of this matter.

(III) Final version

[318] During cross-examination, Ms. Dunn was referred to the “final Investigation Report” in which, under the heading “Segregating Ms. Dunn from her colleagues and her manager by calling into question their loyalty whenever they associated with her”, the report noted that Ms Dunn explained that on December 6, 2011 “Mr. Egglefield told her that Ms. Lecompte called his loyalty into question because he had been seen having a cigarette with her.” Upon being directed to this comment, Ms Dunn acknowledged that December 6, 2011 was indeed the date that Mr. Egglefield told her that his loyalty was put into question by Ms. Lecompte because he had been seen having a cigarette with her.

(IV) Analysis

[319] I conclude that the most likely scenario regarding the discussions between Ms. Dunn and Mr. Egglefield regarding Ms. Lecompte questioning his loyalty is a combination of the last two versions of Ms. Dunn’s testimony. By this I mean that Mr. Egglefield advised Ms. Dunn that his loyalty had been questioned in December 2011, but only told her that it was questioned by Ms. Lecompte on July 11, 2012.

[320] I find it unlikely that he advised Ms. Dunn in December 2011 that his loyalty had been questioned by Ms. Lecompte. His notes, both those of November 18 and November 22, demonstrate that he did not place blame on Ms. Lecompte for questioning his loyalty because he was seen smoking with Ms Dunn. He attributed blame for this to Anne Scotton or Joanne Lamarre. Although he was unhappy about not receiving an apology from Ms. Lecompte this was in regard to his being rebuffed for taking initiative.

[321] His notes also demonstrate that Ms. Lecompte opened up to him about her vulnerability from the reprisal complaints and her situation generally as to who she could trust. For him to have named her as the person questioning his loyalty when this was not what he had said in his notes, and with no other problems noted between him and Ms Lecompte up to December 2011, I find that it would have been an inexcusable breach of the loyalty that he claimed was so important to him. I would not attribute such a violation of his work code of honour without some significant reason for him to hold Ms Lecompte in such disregard.

[322] I conclude that Mr. Egglefield only turned on Ms. Lecompte after he and Mr. Finn were targeted during the workforce adjustment process. Mr. Egglefield admitted that he considered his loss of position to be the result of an act of retaliation by Ms. Lecompte because (in his mind) she considered him untrustworthy. July 11, 2012 is also the same date when Mr Egglefield disclosed to Ms. Dunn that he had been asked to monitor her leave absences and for her to make a note of their conversation, which I find to be indicative of his strong animus towards Ms. Lecompte. Moreover, joining the timing of these two significant disclosures from Mr. Egglefield was the memory trigger that she used to recall when he told her that Ms Lecompte had questioned his loyalty over taking a smoke break with her. This scenario makes more sense in the overall context of events, than some isolated, unexplained and uncorroborated date in December 2011 provided the PSIC investigator some time later.

(e) *Conclusions on the allegation of segregation relating to Mr. Egglefield's loyalty being called into question*

- (i) No reprisal was taken against Ms. Dunn relating to issues of Mr. Egglefield's loyalty in taking smoke breaks with her

[323] There is no evidence of Ms. Dunn being segregated or her employment or working conditions being adversely affected because of management's questioning of Mr. Egglefield's loyalty. There is no evidence that any loyalty issue regarding Mr. Egglefield impacted on any other employee's relationship with Ms. Dunn. Moreover, I find as a fact that Mr. Egglefield and Ms. Dunn continued to take smoke breaks together after November 18, 2011, both during her period on assignment and after her return from assignment in May 2012 without any concerns relating to disobeying a direction from management.

[324] Based on Ms. Dunn's evidence, her segregation in November 2011 was at her request. There is no evidence that it was related to any actions by Ms. Lecompte that would have been known to Ms. Dunn. There is also no evidence that the issue of Mr. Egglefield's loyalty had any impact on her working conditions after returning to AISB in May 2012. No other employees would have been aware of these issues unless she disclosed them to them. These matters related solely to the managerial relationship between Ms. Lecompte and Mr. Egglefield.

[325] I further accept Ms. Lecompte's testimony that in attempting to conciliate the situation after raising Mr. Egglefield's managerial loyalty with him, she countermanded her direction to stop taking smoke breaks with Mr. Egglefield at the headquarters workplace, but merely to reduce them in duration and frequency.

[326] I also find that Mr. Egglefield breached his managerial duty of confidentiality in first disclosing to Ms. Dunn in December 2011 that his loyalty had been questioned, and thereafter in July 2012 when he identified Ms. Lecompte as the manager who questioned his loyalty, without first raising the issue with Ms. Lecompte. I also find the information he provided Ms. Dunn to be misleading, inasmuch as the evidence demonstrates that Mr. Egglefield attributed statements questioning his loyalty to Ms. Scotton, not Ms. Lamarre. In addition, he overlooks that fact that the issues arose out of the smoke break with Ms. Dunn being taken on the day after she went on assignment out of the area of the AISB. I also find that Mr. Egglefield's disclosure of this information in July, if not intended to instigate a reprisal complaint against Ms. Lecompte, inappropriately contributed to it based on the speculative and unreasonable conclusion that she was responsible for his position being eliminated.

- (ii) It was not Ms. Lecompte's intention to prevent Ms. Dunn from having smoke breaks with Mr. Egglefield

[327] Based on Ms. Lecompte's testimony and the evidence of Mr. Egglefield, consistent with his notes, I conclude that Ms. Lecompte was carrying out a direction by Anne Scotton to prevent Mr. Egglefield from smoking with Ms. Dunn at the workplace while she was on assignment. Her actions on November 18, 2011 were not those that she would have undertaken without being so directed. To the extent that any reprisal resulted therefore, it was not the intention of Ms. Lecompte that it occur in the sense of seeking revenge for any complaint made by Ms. Dunn.

- (2) Ms. Nadon's Evidence that Ms. Lecompte segregated Ms. Dunn from her fellow employees

[328] Ms. Nadon was called by the Complainant to provide evidence mostly with respect to the segregation issue. Her testimony intended to demonstrate that Ms. Lecompte had segregated Ms. Dunn refers to three incidents, as follows:

- (i) When she first started in April 2011, Ms. Lecompte told her that Ms. Dunn had a difficult personality and that she should not befriend her;
 - (ii) At some point when Ms. Dunn was on her second assignment, Ms. Lecompte chastised Ms. Nadon for having a social conversation with Ms. Dunn in the lobby of the building; and
 - (iii) Ms. Lecompte asked Ms. Nadon to pull back invitations to Ms. Dunn and Ms. Gosselin for the 2012 year-end party because they were on assignment.
- (a) *Ms. Lecompte did not say to Ms. Nadon during one of their first meetings in April 2011 that Ms. Dunn had a difficult personality, nor did she direct her not to befriend her*

[329] I conclude that Ms. Lecompte did not tell Ms. Nadon that Ms. Dunn had a difficult personality, and, in particular, that she should not befriend her. I accept Ms. Lecompte's testimony categorically denying any such conversation.

[330] First, concerning Ms. Dunn suffering a reprisal as a result of the alleged directive by Ms. Lecompte to Ms. Nadon not to befriend her, there is no evidence suggesting that this had any impact on Ms. Nadon's work or personal relations with Ms. Dunn. It would appear that both employees maintained a friendly professional working relationship throughout their time

together working under Mr. Egglefield's direction. The alleged direction from Ms. Lecompte therefore, did not "adversely affect the employment or working conditions" of Ms. Dunn.

[331] Furthermore, the Tribunal concludes that the testimony of Ms. Nadon that she was told not to befriend Ms. Dunn is not credible. I find that it is simply not plausible that this alleged direction, which is highly critical of Ms. Lecompte, would not have been shared with Mr. Egglefield and Ms. Dunn and found somewhere in their notes, rather than being elicited the first time at a hearing six years later.

[332] Similarly it is incomprehensible that such damaging evidence from someone who strongly disliked Ms. Lecompte, and was going out of her way to criticize her, would not have been provided to PSIC and been prominently referred to in the investigation report. No mention was made of it, while the particulars referred to Ms. Lecompte segregation evidence involving events primarily "in the fall of 2012", not the spring of 2011.

[333] The Complainant's Counsel attempted to bolster this evidence by having Ms. Nadon relate how it was that she retained such a clear memory of this discussion with Ms. Lecompte. She testified that her vivid recollection of these discussions could be accounted for by her situation in April 2011 when she was coming from a toxic work environment where people were not being included, which was something that she did not wish to encounter again. With respect to such forms of corroboration, this evidence adds little to the reliability of the primary statement that it is supposed to enhance, given its self-serving nature without any means of external corroboration. However in this instance, I find that this added testimony serves to diminish the

reliability of her evidence, because it serves to heighten the inconsistency of Ms. Nadon not referring to it in the first instance. If this incident had made such an indelible impression on Ms. Nadon as she claims, it would make it all the more probable that she would have described it to Mr. Egglefield or Ms. Dunn, as well as to the PSIC investigator inquiring into the very subject matter that it pertains to.

[334] In addition, I conclude that Ms. Lecompte's testimony is highly consistent with the circumstances that she was facing. In chief, she vehemently denied having advised Ms. Nadon not to be friends or to have relations with Ms. Dunn. As a Director, she indicated that she did not know why she would have said that, because it would have been completely inappropriate. This conclusion is reinforced by the fact that she was taking steps, setting up a reunion with Mr. Sterne to draft a team charter and create a positive work environment in the Branch.

[335] In cross, she further denied that she thought Ms. Dunn had a difficult personality. She acknowledged that Ms. Dunn was unhappy in her work environment after she did not succeed in achieving a promotion. Her testimony (translated from French) is as follows:

Ms. Dunn was not really happy in her work environment after the decision to pass her over for the competition. She made access to information requests. She tried hard to find out the reason. She was within her right to properly understand the process. Then she brought a complaint, again acting within her rights.

Where was I going with that? I was engaged in many activities with Mr. Sterne, team building activities. So I would certainly not have told Ms. Nadon not to be friends with Ms. Dunn. There were so many interpersonal conflicts, I really didn't want... I would never have asked someone to limit... to not be friends with another employee.

[336] Ms. Lecompte also referred to Ms. Dunn's problem with her coworker, Ms. Young, who was deeply affected by the complaint made against her for not having aboriginal status as required for the position she held. Ms. Young was very angry with Mr. Nicholl, who made the complaint, but also with Ms. Dunn because she had testified against her.

[337] In the circumstances, I agree that it would be entirely illogical for a director who brings in an outside consultant to eliminate some of the internecine relationship problems of her staff to advise a new employee not to befriend Ms. Dunn. Not only would such conduct undermine the consultant's work, but it would portray Ms. Lecompte as a serious hypocrite.

[338] None of Ms. Nadon's testimony is consistent with my evaluation of Ms. Lecompte. I found her generally to be a highly credible witness who provided rational and plausible explanations, with very few inconsistencies throughout her testimony. For the most part, she persuasively contradicted the numerous critical allegations against her, many which I find were unfounded and reflect poorly upon her accusers.

[339] Having come to this conclusion, this obviously pits the credibility of Ms. Nadon directly against that of Ms. Lecompte in a fashion that allows for few shades of gray. For all the reasons indicated concerning Ms. Nadon's inconsistent testimony and her bias against Ms. Lecompte, in addition to other comments that follow below, I give little weight to Ms. Nadon's evidence on this point and throughout when negatively portraying Ms. Lecompte.

- (b) *Ms. Lecompte did not commit a reprisal of segregation when she advised Ms. Nadon and staff that Ms. Dunn and Ms. Gosselin were not to have access to the workplace in the mezzanine when on voluntary assignment to avoid further acts of retaliation by her*

[340] This allegation provides specificity to the Complainant's particulars regarding segregation to the effect that "Ms Nadon stated that Ms Lecompte also often warned her not to talk with the Complainant, and most notably in October [2012]." Ms. Nadon's evidence was that she had been "chastised" by Ms. Lecompte for having a social conversation with Ms. Dunn when she was in the ASIB workplace, which was in the mezzanine of the building. I have already noted that Mr. Egglefield also described the scenario as Ms. Lecompte "chastising" an employee in his PSIC table, which was not the terminology used in his notes. Ms Lecompte had no recollection of "chastising" Ms Nadon for having social conversations with Ms. Dunn in the mezzanine. Given my views on Ms. Nadon's credibility, I am not satisfied that she was "chastised" by Ms. Lecompte as claimed.

[341] However, Ms. Lecompte did not shirk from agreeing that she gave instructions to staff that, when Ms. Dunn or Ms. Gosselin were on assignment, they did not have access to the mezzanine. She explained the reasoning behind this directive as follows:

The mezzanine was -- As I explained, it was a secure space, and it was for people working on investigation files. So I thought it was inappropriate to have them there because we talked openly about the files and the files were on the desks and so on, but, more specifically, because Ms Dunn and Ms Gosselin had requested an assignment and felt -- were uncomfortable, more than uncomfortable, didn't like being in my presence and felt that I was harassing them and so on. So I felt it was not at all appropriate for them to be in the same workplace. That left me vulnerable.

[342] I do not find that persons who have chosen to segregate themselves from the workplace because of fear of retaliation or harassment can complain when their intention to be segregated is acted upon by the manager who shares a reciprocal fear of vulnerability whenever they were present at the workplace. At this point in time, some year and a half after the first three reprisal complaints, another protected disclosure accusing her of additional wrongful conduct by “the team” as she described her accusers and the obvious negative notetaking by numerous employees testifying against her, she had every reason to keep Ms. Gosselin and Ms. Dunn at arm’s length so as to avoid any possibility of new criticisms. This reasoning is better amplified in the context of the testimony around the next and last incident that I discuss below involving Ms. Nadon being instructed to cancel invitations to Ms. Dunn and Ms. Gosselin to the 2012 Christmas party.

- (c) *Ms. Lecompte did not commit a reprisal of segregation by directing Ms. Nadon to pull back invitations to Ms. Dunn and Ms. Gosselin for the 2012 year-end party when they had voluntarily segregated themselves from the workplace*

[343] As was noted in the investigation report and in the statement of particulars, most of Ms. Nadon’s evidence of retaliation occurred after Ms. Dunn filed her second set of complaints. Most also related to incidents that occurred in the mezzanine, when either Ms. Dunn or Ms. Gosselin, who were on assignment, reappeared.

[344] In this case, Ms. Nadon had proceeded to invite both Ms. Dunn and Ms. Gosselin to the year-end Christmas party. Ms. Nadon testified that they were still part of the team even though they were on assignment and, therefore, should have been invited to the Christmas party. Ms. Nadon acknowledged that she was disobeying an order in doing so. I find, and she admits, that

she invited these employees knowing full well that this would cause consternation to Ms. Lecompte. She should have at least raised it with Ms. Lecompte whether it was appropriate in the circumstances prior to extending the invitation.

[345] With respect to the Christmas invitation, Ms. Lecompte explained her action in pulling back the invitations, both on the basis of her personal situation of vulnerability and the expectations of the two invitees, who would not have expected an invitation, as follows:

MR. YAZBECK: Okay. Can you explain to me why that would be inappropriate.

MS. LECOMPTE: These two employees were gone on assignment for work conflict problems with me. It was entirely inappropriate to bring them ... a holiday celebration in a small team, where we come face to face. It seemed very logical to me.

MR. YAZBECK: They were on assignment. Their substantive positions were still on the team; right?

MS. LECOMPTE: Yes, that's right.

MR. YAZBECK: Did you consult with anybody who would be at this Christmas celebration to say, Will you feel uncomfortable with them being there?

MS. LECOMPTE: Not, it's... I was speaking for myself. I would have been very uncomfortable and I would have felt vulnerable again, exposed to things I might have said or done. It was totally inappropriate. As she was leaving, Ms. Gosselin implied... that she had a doctor's certificate saying that I harassed her, apparently. So you can't put two people... one who feels harassed with the other, face to face at a Christmas party.

MR. YAZBECK: Well, that applies to Ms Gosselin, but that doesn't apply to Ms Dunn, though; right?

MS. LECOMPTE: Yes, but Ms. Dunn was also gone on assignment at that time.

MR. YAZBECK: Did you consider the impact of excluding them from this occasion on Dunn or Gosselin?

MS. LECOMPTE: The impact on themselves, on the team, on what?

MR. YAZBECK: Yeah, on them.

MS. LECOMPTE: I would have been very surprised if they expected to be invited. When a person leaves on assignment, they are rarely invited back to their substantive team, especially if they leave in the context of a work conflict.

[346] In other words, Ms. Dunn and Ms. Gosselin had chosen to segregate themselves in order to avoid any further acts of alleged retaliation or harassment they claim she perpetrated on them. Ms. Dunn's Counsel compared the situation with other employees who were on assignment and who were invited back to participate in social events. I find little to compare the situation of Ms. Dunn or Ms. Gosselin with other employees who did not segregate themselves from their manager on the basis of allegations of reprisal against them. Moreover, I do not see how Ms. Lecompte could have made an exception for Ms. Dunn and not Ms. Gosselin. The evidence is clear that both were compiling information to support further complaints against Ms. Lecompte.

[347] The ability of Ms. Dunn and Ms. Gosselin to return to the workplace when on assignment under the guise of their self-segregation could not have had repercussions for them. Rather these two friends would be in a position to be able to conduct themselves, along with their ally Ms. Nadon, to work up further allegations of impropriety against Ms. Lecompte. I find this to be an example of insidious behaviour by Ms. Nadon and Ms. Dunn claiming wrongdoing by Ms. Lecompte by not letting them create circumstances that would make Ms. Lecompte vulnerable to further complaints by one or all three of her antagonists, and for this reason she had forbidden to return to the work area when self-segregated.

- (d) *Ms. Dunn's reprisal complaints had significant negative personal and career repercussions for Ms. Lecompte*

[348] Ms. Lecompte's sense of vulnerability led her to seek help from her Deputy Minister in an email in June 2012 (which was not responded to) about which she was cross-examined. At this point, with the workforce adjustment process underway, Ms. Dunn had returned to the mezzanine. Ms. Lecompte wrote in her email, in reference to Ms. Dunn, that "[o]ne of the employees in question is back with my team and I understand she is still compiling info on what I say and do." For Ms. Dunn, she agreed this was more of a perception or, maybe more accurately, an inference (and one that turned out to be entirely correct) based primarily upon the conduct of Ms. Gosselin, who was a close friend of Ms. Dunn's. She testified on this sense of vulnerability as follows:

That was more of a perception. Ms. Gosselin had been... had also made a reprisal complaint against me. And I received a notice from Ms. Gosselin of the notice of motion in March 2012. There were four allegations. And in June and July, six more allegations came along. So I associated Ms. Dunn and Ms. Gosselin, that, really, they took notes on everything I said, everything I did, and I would end up the loser... They would certainly take a sentence or gesture out of context. So, I felt like I was walking on egg shells all the time.

[...]

I don't have access to the notes. I'll give you an example. Ms.... Mr. Egglefield told me to pay very careful attention to Ms. Gosselin because she... when there were management meetings, the small management team, she always took a lot of notes. And then she wanted to compare her notes with Mr. Egglefield's notes.

And he told me that she was building a case against me, and was taking notes on everything I said, and everything that could be taken out of context. And Mr. Egglefield said he didn't want to get

mixed up in it, he didn't want to share his notes. But he told me to be careful with her, with Ms. Gosselin.

So I know, now I'm speaking of Ms. Gosselin, but Ms. Gosselin and Ms. Dunn were close friends. And I associated the two of them together. So in my mind, the two were taking notes on what I said, what I did and what I was going through in a context like that.

[...]

Ms. Gosselin told me in the fall of 2011 that an outside group was protecting her, without naming the Office of the Commissioner, and that the group in question was very interested in everything I was saying and doing. So it was clear to me that Ms. Gosselin and Ms. Dunn felt they were in a situation where they needed protection from me, let's say.

[349] The Complainant's Counsel referred to another note in Ms. Lecompte's email: "You will understand that I feel vulnerable, exposed to more allegations/complaints from these two employees." In responding to why she felt exposed to more allegations from Ms. Dunn and Ms. Gosselin she replied as follows:

Well, once again, as I told you, when complaints were made, and I'll use Ms. Gosselin again as an example, there were four allegations. Then, next, I get another letter. Then there are six more allegations added on. It was never-ending. There didn't seem to be any specific time frame. Employees could just keep on submitting all sorts of complaints. That was my impression.

[350] Ms. Lecompte also made reference to receiving a disclosure of wrongdoing notice in the summer of 2012, which added to her sense of vulnerability. She stated that while the disclosure of the name of the employee was protected, the allegations concerned everything she was doing: human resources, finances and contracts. The disclosure of wrongdoing concerned her work. She

suspected Ms. Dunn was involved because the disclosure mentioned the AS-5 and AS-7 staffing processes which she was involved in. She stated, “[s]o I knew it had to come from the team.”

[351] I do not know whether Ms. Dunn was the author of this or other protected disclosures. It was raised by her Counsel, but I did not hear evidence from her on the issue. Mr. Egglefield at one point in his testimony referred to her protected disclosure. What is clear is that all three reprisal complaints originally filed in addition to all disclosures of wrongful conduct were dismissed. In addition, the Tribunal is able to establish that none of the grounds advanced in the September 26, 2012 complaint could be substantiated. As for the two remaining counts against her, I similarly conclude that they are entirely without merit.

[352] Ms. Lecompte described the impact of these complaints and the long investigations she faced as follows:

MS. LECOMPTE: It took more than two years at least before a first decision was made to dismiss one complaint. Then another was dismissed in 2014. The length of the investigation process was really challenging, never knowing when employees would complain, if they had complained, or what decisions would be made. And the complaints were always drawn out. For example I had one complaint of reprisals against Ms. Gosselin that included four allegations. Then I received a letter informing me that they had added another six allegations. So I always felt like the process was endless. I don't know what... whether I answered your question.

MR. GIRARD: How did this process affect you personally?

MS. LECOMPTE: Like Ms. Dunn, I spent a lot of my personal time responding to a lot of preliminary reports by the Office of the Commissioner. I had a very heavy workload. So it added to my managerial duties. I felt very vulnerable around employees. I knew that a lot of notes were being taken about things I said and did.

I knew that I wasn't perfect, and that things would be held against me as I performed my official duties. It damaged my reputation. Ms. Nadon, for example, said that I often had wine in the office. These reports reached our Deputy Minister. And I felt it really affected my reputation...

Yes. I have often have wine and cheese events in the office, so I believe it affected my reputation. The reports were ... falsehoods that damaged my reputation. I thought it was unfair. I had a very big...a lot of financial impacts because I had to pay my legal costs and every time I had to ask the Office of the Commissioner for charity, to give me \$1500 or \$3000 every time.

It didn't really seem fair to me. I was the focus of those procedures too. Once all the complaints were dismissed in 2014, I applied to the Deputy Minister for reimbursement of legal costs not covered by the Office of the Commissioner. That took a few more months, and Ms. Swords, who was the Deputy Minister at the time, acknowledged that the action I took was part of my duties and gave me a full reimbursement.

But then, when the Office of Commissioner decided to reopen the investigation, I had to get a private lawyer again. Once again my costs were very high. I was asked to take part in a mediation procedure with the Tribunal. I agreed, certain that my Deputy Minister would reimburse my costs. And in December, I asked for reimbursement of the costs from August 2016. Then in December 2016, my Deputy Minister answered that she was unwilling to reimburse them at that time. And by then, my costs were over \$17,000. So I decided to go without representation because the financial burden was too much.

So I never really felt that the department supported me through this whole investigation ordeal.

I also think that it hurt my professional development opportunities. I tried to change workplaces several times amidst all these complaints. More I would say in 2013 2014. And even internally, it was very difficult because everyone knew about the complaints. Ms.... in the end, the complainants worked in other sectors, so it was... it was obvious that a lot of people in the department knew about it.

So I think it also hurt my professional development opportunities. It damaged my chances of moving to other locations ... and other opportunities

[353] I conclude that Ms. Lecompte's premonitions of Ms. Dunn's being in search of grounds to add further complaints against her were well founded and justify her concerns in respect to her vulnerability from any close encounter or relationship with these two employees. I also accept that it was the voluntary choice of Ms. Dunn and Ms. Gosselin to remove themselves from the workplace, presumably due to concerns about their own vulnerability. As such, putting these parties together in a supposedly festive event of the year-end Christmas party was justified in the context of the highly antagonistic attitude of Ms. Dunn and Ms. Gosselin, not to mention Ms. Nadon. I find no reprisal on the part of Ms. Lecompte in pulling back the invitations that Ms. Nadon knew full well she should have never sent out in the first place. Moreover, in the circumstances, I also do not see their non-attendance at this event as meeting the minimum requirements of conduct that adversely affects the employment or working conditions of the employees.

(3) Other incidents pertaining to the alleged segregation of Ms. Dunn

- (a) *Ms. Lecompte instructing Ms. Dunn not to request Ms. Gosselin be in the workplace while she was on assignment*

[354] Ms. Dunn alleged that she was being intimidated with disciplinary action if she associated with other employees who had filed reprisal complaints. There is no evidence of her ever being threatened with disciplinary action by Ms. Lecompte for any of her conduct. This allegation refers to two or three situations where Ms. Dunn invited Ms. Gosselin who was on assignment back to the workplace. Mr. Egglefield considered Ms. Gosselin to be a "particularly difficult employee" and "was being quite inappropriate in the workplace in the way she was conducting herself, particularly with Ms. Lecompte". I have already pointed out that Ms. Dunn's

notes and those of Mr. Egglefield indicate that she did not raise any objections to the direction, yet he characterizes Ms. Lecompte as “chastising” Ms. Dunn over this incident. In any event, this direction pertained to Ms. Gosselin, not to Ms. Dunn and cannot be considered to have adversely affected her employment or work conditions.

(b) *Failure to invite Ms. Dunn, Mr. Egglefield and a Temporary Support Worker to a social event*

[355] Ms. Lecompte acknowledged that due to a miscommunication with another employee, who misunderstood her direction that Ms. Gosselin was not to be invited to a social event on September 13, 2012, Ms. Dunn, Mr. Egglefield and a temporary support worker [THS] by the name of Mr. Benoit did not receive an invitation. The incident arose when Ms. Dunn asked the employee organizing the event whether Ms. Gosselin (who had been assigned out of the workplace) would be attending. When Ms. Lecompte was asked, she indicated she was not to be invited, but apparently was motioning towards where Ms. Dunn, Mr. Egglefield and Mr. Benoit were standing, which was misinterpreted as an indication that they were not to be invited either.

[356] After Mr. Egglefield sent an email questioning why the three team members were not invited to the event, Ms. Lecompte immediately apologized to Mr. Egglefield by email, and then repeated her explanation to him several times. Mr. Egglefield indicated in his notes that he did not consider the explanation to be truthful. Ms. Dunn did not provide testimony concerning this incident and the incident was not a ground in Ms. Dunn’s September 26, 2012 complaint. Ms. Lecompte acknowledged that she did not apologize to Ms. Dunn, although she expected that her apology would have been conveyed to her by Mr. Egglefield.

[357] Based on all of the evidence, I conclude that the failure to invite Ms. Dunn along with her manager and a THS was not a reprisal intended to segregate her from her co-workers or in any manner related to her protected disclosure, but rather the result of an unintended miscommunication between her and a co-worker.

- (4) Conclusion: no reprisal taken by Ms. Lecompte against Ms. Dunn in regard to any issue of her segregating Ms. Dunn from her coworkers

[358] I conclude that no reprisal was taken against Ms. Dunn in the form of segregating her from her fellow employees, or that she sustained a measure that adversely affected her employment or working conditions within the meaning of the term “reprisal” under the Act. I similarly conclude that if it is determined that Ms. Dunn’s employment or working conditions were adversely affected by her being segregated from her coworkers Ms. Lecompte at no time actually took the reprisal as this was not intended, and as such there is no basis to conclude that disciplinary action should be taken against Ms. Lecompte.

F. Additional allegations not in the particulars

[359] The Complainant made other allegations in her Statement of Particulars that were not referred to the Tribunal, as follows:

9. In addition to the facts related to the two allegations that have been referred to the Tribunal, it is the Complainant's position that the Tribunal should hear evidence regarding the full pattern of events, in order to properly determine whether reprisal has occurred. The Complainant maintains that the following facts are relevant to the Tribunal's inquiry:

a. Ms. Lecompte inappropriately disclosed to directors, managers, consultants and other employees that the Applicant had made a reprisal complaint. She advised staff on October 12, 2012 that Ms. Dunn was leaving on an assignment due to "des demarches en cours au Commissariat" [procedures before the PSIC]. There was also a wine and cheese celebration held that same day

b. Ms. Lecompte informed Mr. Egglefield that she intended to discipline the Complainant for failing to greet her in the hallway on September 6, 2012.

10. While these allegations were not referred to the Tribunal, they provide important context to the allegations that will be considered in the hearing of this Application. For example, the fact that Ms. Lecompte intended to discipline Ms. Dunn for an innocuous incident is relevant to the Tribunal's determination of whether Ms. Lecompte's actions as a whole amounted to reprisal within the meaning of the Act.

[360] The Tribunal accepts the Complainant's argument that contextual evidence is relevant in a reprisal claim, but only in possibly corroborating the allegations that Ms. Lecompte acted intentionally or in bad faith with respect to the two allegations that define the scope of the hearing. Otherwise, these allegations have no bearing on the two principal grounds of reprisal that were referred to the Tribunal. Accordingly, I will consider the Complainant's additional particulars of reprisal.

- (1) Ms. Lecompte did not commit a reprisal against Ms. Dunn in advising her staff at a meeting that Ms. Dunn was on assignment because she had made complaints to the PSIC, nor did she celebrate her departure with wine and cheese events
 - (a) *Ms. Lecompte disclosing to the Branch staff on October 12, 2012 that Ms. Dunn was on assignment because she had made a reprisal complaint against her*

[361] I find that Ms. Lecompte has provided a satisfactory justification for her explanation to her staff at their staff meeting on October 12, 2012 for why Ms. Dunn was leaving the Branch on a second assignment. For this reason, this incident cannot be considered an act of reprisal against her.

[362] Ms. Lecompte's evidence, which was not challenged, was that she was completely taken aback by Ms. Dunn going on a second assignment. She testified that she arrived from a meeting out of the office and was advised that a crisis had occurred in her absence, which she described as Ms. Dunn being escorted from the office by Mr. Egglefield. She was told that the Senior Officer for internal disclosure had arrived at Ms. Dunn's office and instructed her to gather all of her personal belongings and to leave the office immediately. Ms. Lecompte testified that she was very upset at what she felt was the very cavalier way the assignment was implemented and the fact that she had not been informed in advance and the fact that it appeared to upset staff.

[363] Ms. Lecompte also indicated that Ms. Dunn's departure had been carried out as though Ms. Dunn had done something wrong or improper when seeing being escorted out of the office by management. She testified that she thought the staff was wondering whether Ms. Dunn was being punished. Ms. Nadon in particular came and asked what was happening to Ms. Dunn. Ms.

Lecompte concluded that there were a lot of rumours and a lack of understanding amongst the team regarding the situation. She then phoned Ms. Scotton and the Senior Officer for internal disclosure and was told that Ms. Dunn had left on assignment at her request pursuant to arrangements that had been made by the Department's PSIC officer, and that she was not being punished. She was not advised by PSIC of Ms. Dunn's second set of complaints filed September 26, 2012 until sometime in 2013.

[364] Given the circumstances, she decided to hold a meeting with staff in part "to resume leadership of the team", which reflected the fact that these actions were taken without her being advised or being in any way allowed to prepare. At the meeting, she advised staff that Ms. Dunn had left on assignment voluntarily because of her retaliation complaints as follows:

MR. GIRARD: In the context of the PSIC reprisal investigation, did you explain that to the investigator?

No, [to having advised the investigator] but as explained several times, it was a small team. A lot of people had already been interviewed by the Office of the Commissioner. Everyone knew that Chantal had filed complaints, as well as Ms Dunn and Ms Gosselin. Ms Gosselin in particular was very vocal. She spoke very openly about the complaints she had filed against me. So that wasn't a secret, but I was the subject of a lot of complaints in the Department. I had no intention of harming Ms Dunn. My intention was to resume leadership of the team and to communicate what I knew, which was not much, that she had left of her own -- free will.

[365] I find Ms. Lecompte's actions justified in the circumstances. She reasonably sought to clarify an unexpected and upsetting situation. It was also necessary that an explanation be

provided for Ms. Dunn's departure to protect her reputation given the questions being raised by staff. I find no reprisal in this conduct.

[366] I also find that Ms. Dunn's attempt to use these events is an example of the numerous unfounded complaints that she lodged against Ms. Lecompte. Ms. Lecompte was not aware that Ms. Dunn had filed the additional complaints in September 26, 2012. In her testimony, Ms. Lecompte indicated her view that everyone in their small Branch knew that Ms. Dunn had filed the 2011 complaint along with Ms. Gosselin, and Mr. Nicholl. Ms. Nadon for example, did not testify that she had learned of the reprisal complaint when meeting with Mr. Egglefield and Ms. Dunn after the staff meeting whereat, she was reminded that this had happened. When originally questioned on the issue she could not recall anything particular about the staff meeting, until her memory was refreshed, no less using Ms. Dunn's notes. If she had learned for the first time of the reprisal complaint at that staff meeting, it should have been a more memorable incident.

[367] Similarly, the Tribunal notes that Ms. Dunn alleged a breach of privacy against Ms. Lecompte in her September 26, 2012 complaint on the grounds that "all Directors, consultants, THSs (Temporary Help Services), some managers and other colleagues from the different branches within Audit know about my complaint with PSIC" (Ms. Dunn's emphasis). Ms. Dunn had also acknowledged that she had herself advised Ms. Gosselin of this complaint, who similarly had brought a complaint against Ms. Lecompte. I conclude that the reprisal allegation of Ms. Lecompte disclosing the complaints against her to staff as the reason for her departure on assignment to be contrived. She made a similar complaint against Ms. Lecompte several weeks

prior the staff meeting that other branches had become aware of her complaint, not to mention blaming Ms. Lecompte for this when she had no proof to support such an allegation.

[368] I have already noted in the introductory summary of facts that on October 11, 2012, Mr. Egglefield wrote an email to Ms. Dunn, who was on assignment, advising her that Ms. Lecompte had told AISB staff that she was on assignment because of her PSIC complaints. He also asked for the email address of the investigator. Mr. Egglefield testified that he sent this email because he was quite discouraged with the way Ms. Dunn had been treated. I have already commented that I seriously question the motive behind Mr. Egglefield's actions in assisting Ms. Dunn with respect to these complaints. I note as well that he appears to be proactively requesting the email address of the investigator, presumably because he alone was aware of the second complaint and wished to contact the investigator. I also note that Ms. Lecompte testified that she asked Mr. Egglefield if he was aware of why Ms. Dunn had left with him on assignment to which he provided no response.

[369] Finally, I would also add that it is not clear to the Tribunal that there would be any problem with Ms. Lecompte, as the target of retaliation complaints, advising her staff that Ms. Dunn was on a voluntary assignment pending the determination of her reprisal complaint against her. The confidentiality of the protected disclosures is understandable as necessary to encourage anonymous information on wrongdoing being brought to light. But once the disclosures of wrongdoing metamorphoses into an accusation of retaliation by another employee, I do not see how a veil of secrecy can be justified if it is detrimental to the alleged wrongdoer's circumstances. Obviously, revelation of a reprisal complaint must be appropriate and fair in the

context of the workplace. I find Ms. Lecompte's explanation for the context of Ms. Dunn's unseemly removal from the office to have been appropriate, as opposed to letting whatever rumors swirl about the Branch. In no sense do I consider this incident to constitute a reprisal.

(b) *Wine and cheese celebrations of Ms. Dunn's assignments out of the workplace*

[370] Mr. Egglefield testified that there were celebrations on the two occasions when Ms. Dunn went on assignment. Neither Ms. Nadon nor Mr. Finn testified with respect to this allegation. Mr. Egglefield originally testified that the celebration "always coincided [with] when Ms Dunn would be leaving for an assignment". When asked how many times it occurred, his response was "at least two times". This would obviously refer to her two assignments out of the workplace.

[371] He described the event as being "celebrative in some way, shape or form. That's the feeling that certainly I personally had". In cross-examination, Mr. Egglefield acknowledged that Ms. Lecompte "never said, to the best of my recollection, you know, we are celebrating, you know, Chantal's departure. It was implied."

[372] The only basis offered to support his inference of her celebratory mood over her departure was that it "coincided with the events that were happening". Her first departure was on November 16, 2011, the day after which he was seen having a smoke break with Ms. Dunn. Given the coincidence of all these events together, one would think that they would have served as a memory trigger to corroborate somewhat the event. With respect to Ms. Dunn's second abrupt departure as discussed above, Ms. Lecompte found herself in a troubling situation due to

the unexpected and controversial manner of her departure. Holding a staff meeting with the view to reestablishing authority and team coherence would appear to be reasonable in the circumstances. It also would appear that this event occurred four days after Ms. Dunn's departure, giving cause to believe that the event was intended to serve a beneficial purpose for encouraging team cohesion, as opposed to celebrating Ms. Dunn's departure.

[373] When questioned during cross examination over whether there were similar wine and cheese events on other occasions, Mr. Egglefield first replied "at Christmas one year", obviously forgetting that he had been with the branch for only one year. He then testified that he could not remember specific instances, claiming it was "a long time ago". "I can't recall the number of specific instances where there were wine and cheeses. There were a few of them, yes, there were". If there were other celebratory wine and cheese or similar events with staff, unless Mr. Egglefield could distinguish between these events and those when Ms. Dunn left, there is no basis upon which to evaluate his speculative opinion.

[374] Given Mr. Egglefield's animus towards Ms. Lecompte regarding his forced departure, and in light of the highly negative manner in which he has testified in respect of Ms. Dunn throughout these proceedings, I conclude that these remarks are not merely speculative, but intended to portray Ms. Lecompte in a negative fashion reflecting his own mindset, as opposed to the events that actually occurred.

[375] There are other examples to support my conclusion that he generally imputed bad faith to Ms. Lecompte when there was no basis to do so. His testimony on Ms. Lecompte's desire to

provide a negative evaluation of Ms. Dunn's performance similarly reflects his tendency toward negative speculation of her. He testified on this point, as follows:

I know that Sylvie did not like the assessments I wrote for Chantal because she would have liked to use a negative assessment to performance manage her.

[Emphasis added]

[376] In commenting on this note, he testified as follows:

Well, it was my opinion, and, you know, I was [of] this is an opinion that I made, it's my own conclusion, that I felt that the evaluations I was preparing were not necessarily in line with what Ms Lecompte would have given for an assessment. However, you know, to her credit, I don't recall being asked to make any substantial changes to the evaluation reports.

[377] There was no evidence or grounds provided by Mr. Egglefield to "know" that Ms. Lecompte did not like his performance evaluation of Ms. Dunn. Moreover, it was ultimately Mr. Egglefield's decision to performance manage Ms. Dunn, without there being any suggestion that Ms. Lecompte played a role in his decision.

- (2) Ms. Lecompte did not advise Mr. Egglefield that she intended to discipline Ms. Dunn for her conduct in meeting Mr. Sterne and her in entering the workplace on September 6, 2012

- (a) *Ms. Dunn was rude to Mr. Sterne and Ms. Lecompte by inappropriately looking away and ignoring them when meeting them upon entering the workplace*

[378] The Particular regarding the “Sterne incident”, as I would describe its proper characterization, misstates the relevant facts in complaining that “Ms. Lecompte informed Mr. Egglefield that she intended to discipline the Complainant for failing to greet her in the hallway on September 6, 2012”. The incident actually concerns Ms. Lecompte being taken aback because Ms. Dunn looked away and ignored the external consultant, Mr. Sterne, as he entered the workplace with Ms. Lecompte, as follows:

Yes, and I was with him, and Ms Dunn turned her head or lowered her head, I don’t remember. And she really ignored us, and I felt that that conduct, in the presence of Mr. Stern, was not professional. I remember telling Mr. Egglefield that I really wanted to clarify my expectations with Ms Dunn. She was able to ignore me, [but] when I was with people like that, and I felt that was unacceptable conduct.

[Emphasis added]

[379] Ms. Dunn provided a different version, testifying that “they were talking, so as I was entering the door to go into the work office space I just nodded and kept going, because they were in the middle of talking and I didn’t want to disrupt their communication.” This is somewhat in accordance with her typed note of the same date describing that she nodded, except that rather than excusing her own conduct, she blames Ms. Lecompte for not acknowledging her

after her nodding salutation, as follows “[s] he walked passed (*sic*) me to escort him into the building and she did not acknowledge me again after I nodded”.

[380] Mr. Egglefield’s notes from his meeting with Ms. Lecompte immediately after the incident confirm her version, i.e. Ms. Dunn “put her head down (rude)”. They contain no comment of his discussion with Ms. Dunn later that afternoon. He nevertheless testified on the discussion with Ms. Dunn wherein he reports that she indicated having nodded, but without any suggestion of blaming Ms. Lecompte for not acknowledging her. I interpret this as her providing a neutral explanation for why her salutation of a nod was not acknowledged.

[381] Despite this, I find that Mr. Egglefield modifies his testimony by implicitly accepting Ms. Dunn’s version concluding that it was a miscommunication, but blaming Ms. Lecompte as misinterpreting Ms. Dunn’s nod, testifying as follows: “I believe it was earlier this morning, [I] indicate that Ms Dunn had nodded as a courtesy, whereas it was interpreted by Ms Lecompte as being a rude gesture. I think it was just a misunderstanding between the two.” [My emphasis.]

[382] I am not sure how Mr. Egglefield interprets Ms. Dunn’s evidence that her nod was not noticed by Ms. Lecompte, into it being noticed by Ms Lecompte, but being a rude gesture. Indeed, I do not understand how he could be in a position to pass judgment on the veracity of the two statements, as he was not a witness to either, did not make a record of Ms. Dunn’s explanation as an aid to his memory five years later, yet out-right rejects Ms. Lecompte’s version that Ms. Dunn intentionally looked away or down in a rude fashion provide to him as recorded in his notes immediately after the incident.

[383] There is nothing in the evidence itself which would support him being able to interpret the two versions in this fashion. Given his bias against Ms. Lecompte, I am not surprised that he supports Ms. Dunn and attempts to turn it into exactly the opposite of what I find occurred: making it an issue of Ms. Lecompte totally misinterpreting a friendly salutation nod from Ms Dunn.

[384] Thereafter, Ms. Dunn's lawyer attempted to reconcile the situation to be one of a misunderstanding of perceptions, obviously on the part of Ms. Lecompte. Ms. Lecompte acknowledged that it could be a possibility there was a misunderstanding, but in the end she held her ground referring to Mr. Sterne having noticed the same conduct, and moreover I find the two versions irreconcilable as a misunderstanding.

[385] I accept Ms. Lecompte's version. First, I find her to generally have been a considerably more reliable witness than Ms. Dunn. In this regard, Ms. Dunn changes the thrust of her own description of these events as first recorded, or at least noted in her typed version of notes, from blaming Ms. Lecompte for not acknowledging her nod, to one where I find that she is attempting to explain a misunderstanding by Ms. Lecompte and Mr. Sterne being engaged in a conversation and not being fully aware of what occurred. This version is quite different from that of Mr. Egglefield version of events that he was not a witness to.

[386] Second, Ms. Lecompte's version is supported by the notes of Mr. Egglefield taken immediately after the incident, describing her reaction to Ms. Dunn putting her head down, as being rude. There is no note of the second meeting, when one would anticipate some comment

given that according to Mr. Egglefield it was something he was looking into and would report back to Ms. Lecompte on.

[387] Third, Mr. Sterne's involvement had already caused Ms. Dunn problems. Back in November 2011, she and Ms. Gosselin had refused to sign the Team Charter worked out with staff with Mr. Sterne's assistance. On the alleged point of refusal, Ms. Lecompte had indicated that a breach of the Charter could not be used for disciplinary purposes, moreover, as being contrary to everything she was trying to achieve with staff by having them sign on to the Charter. Such a concern could easily have been brought forward with Ms. Lecompte and Mr. Sterne for confirmation that it could not be used for that purpose. Thereafter, Mr. Egglefield criticized Ms. Dunn on her return to the workplace in May 2012 for her continued refusal to sign the Team Charter ("May have an issue with Denis Egglefield (Manager). He is not happy with me not signing the Team Charter."). There also appears to be some criticism of Ms. Dunn, including by Mr. Egglefield, over not attending a luncheon on August 17, 2012 with Mr. Sterne because Ms. Gosselin had not been invited. With this background, I find it reasonable to infer that when Mr. Sterne was seen by Ms. Dunn walking into the building with Ms. Lecompte, that this would generate some negative sentiment towards both of them, causing her momentarily, and I would say even unintentionally, to react in a manner that might be interpreted as rude.

[388] Fourth, if Ms. Dunn had nodded in acknowledgment, Ms. Lecompte's actions would have had to be totally unreasonable and contrary to all her concerns in avoiding any other reprisal complaints on an incident that a highly credible third-party witness could describe. Mr. Sterne was not called as a witness, no doubt because the incident was not included in the

Commissioner's particulars of reprisal, but Ms. Lecompte nevertheless testified that Mr. Sterne "didn't see Ms. Dunn rise either".

[389] Fifth, I give no weight to Mr. Egglefield's attempt to "bootstrap" his unsupported judgment call that Ms. Dunn's testimony should be preferred. He testifies that the nodding salutation was "what we often do" as a general practice in the office. Thereafter, he adds "[i]n my opinion, in my observations, Ms Dunn was polite with all the staff at all times, including Ms Lecompte", i.e. that Ms. Dunn would never be rude to Ms. Lecompte. This ignores the fact as explained to him that the issue was being rude to Mr. Sterne.

[390] He also lavished similar praise on Ms. Dunn in his description of these events in the typed notes he provided to the PSIC concerning his recommendation to Ms. Lecompte that she not confront Ms. Dunn to explain her expectations, as follows:

I recommended that she not do that as long as Chantal worked for me. Her conduct with everyone else has not been a problem, she has a great attitude and that I would want to know her version before accusing her.

[Emphasis added]

[391] His notes from the meeting with Ms. Lecompte contain no glowing comments on Ms. Dunn's attitude, or his wanting to know Ms. Dunn's version of events before accepting Ms. Lecompte accusations against her. The comment in the notes is simply that "I recommended Sylvie wait until I leave to have meeting re-expectations". In other words, he did not even want to meet with Ms. Dunn, although Ms. Lecompte testified that he would meet with her. I frankly

cannot understand why Mr. Egglefield should not attend the proposed meeting with Ms. Dunn. Ms. Lecompte would not meet Ms. Dunn without a witness to ensure that her explanation of her expectations was not misinterpreted as a reprisal. Mr. Egglefield would be the most appropriate person to attend, being her manager. I think the more likely explanation is that given by Ms. Dunn that he did not want to become involved in this matter as he was about to leave the branch.

[392] More significantly, I find it unlikely that Mr. Egglefield would have made any of these comments to Ms. Lecompte as a recommendation. In effect, he is describing Ms. Lecompte's conduct to the PSIC as being rash, while presenting himself as the fair-minded manager attempting to contend with an out-of-control director by rationally investigating and obtaining Ms. Dunn's version of events, so as to be able to judge "her accusing" Ms. Dunn. Such a response from Mr. Egglefield to Ms. Lecompte's expectations would have been completely unacceptable to Ms. Lecompte.

[393] She and Mr. Sterne were themselves participants in the incident and it is completely improbable that Ms. Lecompte would accept to have him meet with her to present her with Ms. Dunn's side of the story before acting. She testified that he agreed that Ms. Dunn's conduct was unacceptable. Her intention was to meet with Ms. Dunn and Mr. Egglefield to advise Ms. Dunn of what her expectations were with respect to salutations to outside people visiting at AISB. His only concern was not to be present at the meeting, according to this notes, and this because he did not want to get involved, according to Ms. Dunn. Despite his notes, he did meet with Ms. Dunn, but without there being any written evidence of what he learned, or any indication that he

advised Ms. Lecompte what transpired at his meeting with Ms. Dunn, i.e., she has a very different version of events.

[394] Moreover, Mr. Egglefield's description of Ms. Dunn's "great attitude" is not supported by the evidence presented to the Tribunal. The evidence indicates that she had some serious relationship problems with other employees that cannot all be blamed on them. She also failed to follow Mr. Egglefield's advice to sign the Team Charter on several occasions, as did the remainder of the employees, except her friend Ms. Gosselin whose character Mr. Egglefield seriously disparaged. His notes indicate that he also had to speak to her concerning adverse comments by other employees about her behaviour. I conclude once again that Mr. Egglefield was attempting to boost Ms. Dunn's case that she was a victim of a reprisal by Ms. Lecompte by means of this gratuitous description of her great attitude etc. intending to reinforce that she would not have been rude to Ms. Lecompte or Mr. Sterne, such that Ms. Lecompte is not to be believed and was retaliating against Ms. Dunn. I reject all of his evidence in this regard.

[395] In conclusion, I find that Ms. Dunn acted in the manner indicated by Ms. Lecompte in turning her head away or down from her and Mr. Sterne upon accosting them on arrival at the office, which necessarily gave rise to the meeting that followed with Mr. Egglefield with the view to preventing such behaviour recurring in the future.

- (b) *Ms. Lecompte did not advise Mr. Egglefield that she was considering taking disciplinary action against Ms. Dunn over the incident, yet Mr. Egglefield advised her that she did*

[396] Whether or not Ms. Dunn was rude in not properly acknowledging Mr. Sterne is not the primary issue in this reprisal complaint. It is about allegations of threatening discipline over such a trifling matter of rudeness, at most, as the Complainant argues:

For example, the fact that Ms. Lecompte intended to discipline Ms. Dunn for an innocuous incident is relevant to the Tribunal's determination of whether Ms. Lecompte's actions as a whole amounted to reprisal within the meaning of the Act

[397] If the threat of discipline was accepted, I agree that it would demonstrate some degree of animus and an improper exercise of managerial discretion by Ms. Lecompte concerning Ms. Dunn, even if her conduct was rude to Mr. Sterne.

[398] However, I conclude that Ms. Lecompte never gave cause to Mr. Egglefield for him to believe that it was her intention to discipline or to threaten to discipline Ms. Dunn over the incident. She categorically denies raising an issue of discipline. Moreover, Mr. Egglefield's notes clearly describe the purpose of the proposed meeting being for the purpose "to explain her expectations" in terms of relations with persons attending at the office, such as Mr. Sterne. Despite this, I find that Mr. Egglefield through a series of evasive and contradictory testimony again attempts to present the situation as one where discipline may have been mentioned and where the whole matter was a misunderstanding on the part of Ms. Lecompte.

[399] Ms. Lecompte testified on this matter in cross-examination as follows:

MR. YAZBECK: Well, Ms Dunn explained that she did not to acknowledge you two and then didn't want to interrupt and went past. Is that not a reasonable explanation for her behaviour?

MS. LECOMPTE: Look. I was with Mr. Sterne. He didn't see Ms. Dunn rise either. I saw Ms. Dunn's explanation after reading the files. I spoke about it only to Mr. Egglefield. I told him that such behaviour was unacceptable, and that I intended to discuss my expectations directly with Ms. Dunn.

Mr. Egglefield asked me to be patient, said that he would talk to her and that he acknowledged it was unacceptable. Then Ms. Dunn wrote that I had threatened to take disciplinary action. I categorically deny threatening to take disciplinary action over something like that

...

MR. YAZBECK: Now, I'm not talking about this behaviour specifically but, in general, if an employee engages in unacceptable behaviour in the workplace that could be open to discipline. That's an option available?

MS. LECOMPTE: It's one option, but it's quite a process. First come the informal meetings, as you well know. It's not... the first measure is not disciplinary action.

[Emphasis added.]

[400] As indicated, Mr. Egglefield originally testified that discipline was not in the air as follows:

MR. YAZBECK: Mr. Egglefield, do you recall any discussions about Ms Dunn potentially being disciplined by Ms Lecompte?

MR. EGGLEFIELD: No, I can't say I do. The most upset I recall seeing Ms Lecompte regarding Ms Dunn was the issue with Mr. Stern that we discussed, you know, 15 minutes ago, and I don't think there was any intent to discipline her at that time.

[Emphasis added.]

[401] I find this to be clear evidence by Mr. Egglefield of a lack of intent by Ms. Lecompte to have contemplated taking disciplinary action against Ms. Dunn over the Sterne incident, or at all. He first responded to an open-ended question by indicating that he was not able to recall Ms. Lecompte considering discipline of Ms. Dunn, at any time. In responding, he states that he cannot recall, but then fixes on the incident where he can specifically recall Ms. Lecompte being upset at Ms. Dunn involving the Sterne incident. He concludes that, even in that specific instance when it was most likely to happen (“at that time”), there was no intent to discipline Ms. Dunn.

[402] However, in cross-examination, when confronted with Ms. Dunn’s note when he told her that Ms. Lecompte was contemplating disciplinary action against her, he equivocates, as follows:

[Reading from Ms. Dunn’s note] "1:05 Denis spoke with me about his bilat with Sylvie this morning. She told him that I did not say good morning to her. This is not being fair to me. Denis said he did not want to get involved as he will be leaving the department hopefully in the next couple of weeks. He did say though that she will be looking into disciplinary action against me and I should be prepared."

Would you agree with that?

MR. EGGLEFIELD: I testified earlier that I can’t recall, you know, any intention of disciplining Ms Dunn as a result of the incident in the hallway crossing Mr. Sterne. I can't remember.

MR. GIRARD: I don’t think you testified you can't remember, I think you testified — I will have to check the transcript — that there was no intent to discipline.

MR. EGGLEFIELD: I can't remember that there was any intent to discipline at that stage.

MR. JUSTICE ANNIS: I just want to get that answer, I’m misunderstanding. What did you say then, please?

MR. EGGLEFIELD: I said, you know, it’s been a long time. Honestly, I cannot recall, you know, Ms Lecompte indicating her

desire to discipline Ms Dunn as a result of the incident. My notes do reflect, and I saw them earlier, that she wanted to read to her or to indicate to her what her expectations with respect to conduct were in the workplace.

MR. JUSTICE ANNIS: So is that what we are to rely upon?

MR. EGGLEFIELD: Yes.

[Emphasis added.]

[403] Mr. Egglefield is here referring to the notes from his meeting with Ms. Lecompte on September 6, 2012, as follows:

-meeting Sylvie/Chantal September 7: I will listen only; Sylvie will explain expectations

-I recommended Sylvie wait until I leave to have meeting re-expectations and to address only the issue of the stairs

[Emphasis added.]

[404] The Employer's Counsel then proceeded with a line of questioning intended to show that there was no basis for Mr. Egglefield saying he could not recall the events instead of relying on his notes, which he had used throughout the hearing in support of his testimony. Mr. Egglefield returns to his testimony that he could not recall whether discipline was an issue, as follows:

MR. GIRARD: You would agree with me that the typed notes [provided to the PSIC] and your handwritten notes don't actually say discipline?

MR. EGGLEFIELD: That's correct.

MR. GIRARD: Presumably that's something important. If someone was going to discipline another employee, you would have taken note of that?

MR. EGGLEFIELD: I suspect I would have, yes.

MR. GIRARD: Regardless, being part of the management team, is that something you should tell an employee you are supervising?

MR. EGGLEFIELD: These are Ms Dunn's notes, so, you know, if her interpretation were that she was to be disciplined, this is her interpretation. I indicated that I can't recall, you know, discipline being an issue. I do recall specifically trying to find out her side of the story with regards to the incident and I did, I believe it was earlier this morning, indicate that Ms Dunn had nodded as a courtesy, whereas it was interpreted by Ms Lecompte as being a rude gesture. I think it was just a misunderstanding between the two.

[Emphasis added.]

[405] To summarize, Mr. Egglefield begins by acknowledging that Ms. Lecompte did not describe to him an intention to discipline Ms. Dunn over the incident, which confirms his earlier evidence in chief when describing the incident. However, when confronted with his inconsistent statement recorded by Ms. Dunn to be prepared for discipline, he testifies he “cannot recall” whether he told her that “she will be looking into disciplinary action against me and I should be prepared”, given the lapse of time. He does not disclaim her notes, only that it was a matter of her interpretation. He does not say that it was an inaccurate or baseless interpretation. I am satisfied that he indicated words of this nature such that Ms. Dunn thought that she would be a target of discipline sufficient to make it an allegation in her complaint with the view to Mr. Egglefield backing her up.

[406] When further confronted with this inconsistency and his inability to recollect the issue of discipline, he relies on a lack of memory whether there was an intention to discipline, thereby leaving it as a possibility. He does this despite his notes clearly recording, twice, Ms. Lecompte’s

intention only to clarify expectations to avoid further incidents of this nature in the future. When the Tribunal asks the point-blank question of whether this is the version it should rely upon, he answers yes.

[407] However, when pursued further by Counsel, he testifies that he “suspects” that he would have noted discipline in his notes had it been said. When confronted with a follow-up question as to whether it was appropriate to advise an employee of contemplated discipline gleaned from a confidential meeting with his manager, he returns to the theme that he could not recall discipline being an issue, thus again leaving some equivocation in what Ms. Lecompte indicated to him. Finally, he closes out the discussion without responding to the question, but rather postulating that he thought the whole incident was a misunderstanding by Ms. Lecompte of a courteous salutation nod from Ms. Dunn. In effect, he takes Ms. Dunn’s side concerning the nature of the incident, implying it never should have been pursued at all. This was his conclusion, not from having observed the incident, certainly not from anything Ms. Lecompte said to him, and despite the various versions that Ms. Dunn has put forward as to what occurred.

[408] The Tribunal is satisfied that Ms. Lecompte never indicated an intention or threat to discipline Ms. Dunn. I further conclude that Mr. Egglefield misrepresented the results of his conversation with Ms. Lecompte such that Ms. Dunn thought she might be disciplined over an innocuous matter and that she should be “be prepared for it”. I find it likely that such a misrepresentation of Ms. Lecompte’s intention to discipline Ms. Dunn would have contributed to her decision to file the second reprisal complaint two weeks later containing an allegation regarding the incident, which I reject.

[409] If I have analyzed and interpreted in detail Mr. Egglefield's evidence regarding this incident, it is because I find that in a case focusing on the credibility of witnesses, it is an example of a line of testimony that supports my overall conclusion that he was a highly unreliable witness, because he was so strongly biased against Ms Lecompte. The evidence also reinforces my conclusion that his actions contributed to Ms. Dunn making a baseless reprisal complaint against Ms. Lecompte; not only that she threatened discipline over a relatively trifling matter, but in the other instances of unfounded allegations, as described and rejected above.

VII. Conclusion: Ms. Lecompte did not take a reprisal against Ms. Dunn

[410] It follows from the foregoing analysis that I conclude Ms. Lecompte took no reprisal against Ms. Dunn. This constitutes a second ground to reject the application, in addition to my conclusion that there existed no protected disclosure to form a nexus with the allegations of reprisal, even were they to be established.

VIII. Remedy

[411] Despite finding that no reprisal was taken or that those alleged have no nexus with a protected disclosure, I conclude that I am nevertheless required to provide my conclusions with respect to the remedies claimed by the Complainant in case the matter proceeds to a judicial review application.

[412] The Complainant seeks compensation in the nature of general damages for her pain and suffering resulting from reprisals, in addition to special damages for reimbursement of parking expenses and leave absences, plus a small costs claim.

[413] The Complainant argues that she should be awarded the maximum amount of \$10,000 for each of the two allegations of reprisal, or \$20,000 in total. An award of pain and suffering is purely compensatory in nature. It comprises no deterrent content, given that the disciplinary track of the reprisal procedures accounts for any legislative intention of this sort. However, I accept the Commissioner's argument to some extent that the character and design of the conduct of the perpetrator of the reprisal is a factor in assessing a pain and suffering awarded, but only in respect of providing some causal link to justify the amount claimed.

[414] I also agree with the position of both the Employer and the Commissioner that there is no basis to assess damages for pain and suffering in respect of each proven reprisal allegation, or that each allegation is subject to the statutory \$10,000. In most cases, as in this matter, the Tribunal could not distinguish what aspect of general pain and suffering applies to which allegation of reprisal, particularly inasmuch as they would probably be cumulative and of increasing severity in nature, if numerous and over a significant period of time. Pain and suffering should be a global assessment carried out by the Tribunal at the conclusion of the proceeding when all aspects of the reprisals and their effects are known and subject to the single \$10,000 limit imposed by the Act.

[415] The Claimant provided little evidence of any impact that the alleged reprisals had on her. No medical evidence was provided to support her claim. The reprisals alleged in this matter are not significant or of long duration. I could not imagine anything but an assessment of a somewhat symbolic amount in the range of \$1000, had they been proven.

[416] The Complainant also sought \$1000 for parking. I agree with the Employer that it was unnecessary for her to maintain two parking spots, which is the basis for this claim. With respect to the leave claim for time spent dealing with the complaint, I conclude that where there is potential dispute over the effects of a reprisal, the evidence should have been presented to the Tribunal for determination, rather than seeking a direction that the Employer provide appropriate compensation for these claims. Nevertheless, the Employer indicated its willingness to consider reparation for leave used by the Complainant. This would be limited however, to time off work claimed as leave only, and would not comprise such items as preparation for investigations or attending at the hearing, unless granted leave for that purpose.

[417] The Complainant also sought reimbursement of her legal costs in the amount of \$1,291.53. This does not in any manner represent the Complainant's legal costs for a six day hearing conducted by experienced counsel, and all the preparation and preliminary expenses that accompanied it. I conclude that the Employer has indemnified Ms. Dunn for all but a minor amount of her billed costs. The *de minimis* cost claim makes discussion of the legal parameters guiding the issue somewhat theoretical in the circumstances.

[418] Costs are not an item referred to under the Act. The Commissioner argued, quite correctly in my view, that the Complainant's legal costs should not awarded or considered a remedy under subparagraph 21.7 (1) (e): "[to] pay to the complainant any amount equal to any expenses and any other financial losses incurred by the complainant as a direct result of the reprisal", [my emphasis]. I agree that legal costs cannot be considered to directly result from a reprisal. Normally, if it was Parliament's intention to compensate a successful complainant for her costs, appropriate wording would have been contained in the legislation.

[419] Moreover, the Act would appear to contemplate the Commissioner having carriage of the prosecution of the case, which is the opposite of what happened in this matter. Admittedly, the complainant is a party to the proceedings, and therefore, legal representation should normally be contemplated to allow the person to fully participate in the hearing. However, determining who between the Commissioner and the complainant should have conduct of the matter and who should pay any costs incurred by the complainant is not something that the Tribunal should be involved in. Nor should it act as backstop to a complainant where the Commissioner or Employer does not consent to pay legal costs when incurred.

[420] I conclude that it was not Parliament's intention to indemnify a complainant for his or her costs incurred in a reprisal claim, whether successful or not. Given that the Act is limited to protecting public servants, and with the knowledge that employees, both as complainants or targets of reprisal claims, may seek reimbursement of their costs, as was done in this matter, I interpret the legislation such that any indemnification of parties' legal costs incurred in reprisal

proceedings is a matter for the Employer and Commissioner to decide. I agree with the Commissioner that it is not a matter within the jurisdiction of the Tribunal to rule on.

IX. Conclusion

[421] The Tribunal concludes that Ms. Lecompte did not take any measure against the Complainant, be it with regard to the allegations of singling out Ms. Dunn by monitoring her work absences, segregating her from her co-workers, or any other conduct that is alleged to have adversely affected her employment or working conditions, or otherwise constitute a reprisal under the Act.

[422] I further conclude that the measures alleged to have adversely affected her employment or working conditions, which were not proven, also bear no nexus with any protected disclosure on the part of the Complainant.

[423] Accordingly, the application is dismissed.

THE TRIBUNAL ORDERS that the application be dismissed

Peter Annis
Member

DATED this 3rd day of October, 2017.

Appendix A

**Allegations of reprisal by Ms. Scotton and Ms. Lecompte from
Ms. Dunn's second complaint with PSIC – September 26, 2012**

By Anne Scotton

- 1) Anne approved for my ACFE membership fees to be paid for the years 2008 and 2009. When the disclosure was made in 2010 she refused to authorize the 2010 membership fees.
- 2) Unprofessional behaviour - discussing my culture, work and weight at management meetings and to my colleagues.
- 3) Intimidation and loss of employment - in front of a senior HR advisor, she stated I was not qualified for an AS04 internal audit officer position in Internal Audit and to stay in AISB. My letter of offer has me designated as an AS04 internal audit officer. (at the time)
- 4) While I was away on assignment, she made comments about me to senior management at Office of the Federal Interlocutor (interfered in my assignment).
- 5) Numerous requests were made for additional time on my assignment to get me away from this situation, all requests have been denied. I was told by Ms. Lévesque that I needed Sylvie and Anne's permission to have additional time for my assignment. I returned to AISB on May 2, 2012. I believe this may have been done in good faith, as Sylvie and Anne, continue to hire THSs (x4) at AS07 level. I was not needed back in AISB due to resource concerns as stated before.
- 6) Privacy - all directors, consultants, THS and some managers and other colleagues from different branches within Audit know about my complaint to PSIC.

By Sylvie LeCompte

- 1) ACFE membership fees. Sylvie stated she talked to Anne about them, denied ACFE membership fees paid for 2010, 2011 and 2012. I paid for them on my own to keep my designation in good standing. CIA and ACFE memberships are paid for others but not designation in good standing. CIA and ACFE memberships are paid for others but for me.
- 2) Designations not on my business cards - all others who have designations in AES have them listed on their cards.
- 3) Continual French language training denied (3x) - while other colleagues were allowed to attend. Manager emailed me, telling me to apply then I was denied. The course was for one day a week, no fees to the sector and management continued to hire THSs. Resources would not have been a problem.

- 4) Sylvie promised to look into my work injury file in April 2011 to date no action by AISB. I had to go myself to OHS in May 2012.
- 5) Negotiation course for all of AISB staff (mandatory) - requested to attend for March 20, 2012, but was denied. Requested once again on my Learning Plan, denied again. Was told it was allegedly going to be used to screen me out during the Work Force Adjustment because I did not take the course.
- 6) Intimidated -thought I was going to lose my job with the new Workforce Adjustment, due to the threats in staffing meetings about not signing the Team Charter, denial of mandatory courses that my colleagues were going on, which was to be used in the Statement Merit of Criteria against me if I had received an effective letter.
- 7) Email to Departmental Directors in other sectors to remove my name from their contact list (March 29, 2011). No explanation attached or given to them or me.
- 8) Since Sept. 2011, she requested from my manager to be informed of my leave requests. I was told that I am his only employee she has requested this information even when approved by my manager.
- 9) Segregation of duties - NACC - May 2, 2012 - volunteered to help at a staff meeting; she ignored me in the meeting, very embarrassing as it was done in front of my colleagues.
- 10) Segregation from other employees including my manager; Director is questioning my peers and manager of their loyalty when they are seen talking to me.
- 11) Intimidation - all my colleagues report to their managers, I have to report to my manager and Sylvie Lecompte.
- 12) Privacy - all Directors, consultants, THSs, some managers and other colleagues from the different branches within Audit know about my complaint to PSIC. Being dismissed when they used to talk to me.
- 13) Intimidation of disciplinary action if I associate with other colleagues who filed reprisal complaints – It has been recommended to me on two separate occasions by my manager not to be seen with others who have filed complaints, as I should put myself in my Director's shoes (Sylvie Lecompte).
- 14) Threat of disciplinary action - latest incident (September 6, 2012) was that I only nodded good morning to my Director instead of it being verbally said. She notified my manager of her dislike of me.
- 15) Numerous requests were made for additional time on my assignment to get me away from this situation, all requests have been denied. I was told by Ms. Lévesque that I needed Sylvie and Anne's permission to have additional time for my assignment. I returned to AISB on May 2, 2012. I believe this may have been done in good faith, as Sylvie and Anne, continue to hire THSs (x4) at AS07 level. I was not needed back in

AISB due to resource concerns as stated before.

16) Threats of additional reprisals against me. My manager will be leaving on October 19, 2012, Anne Scotton has agreed to pay for his assignment until his alternation position at another government agency starts. I will then start reporting directly to the Sylvie Lecompte. He told me he was worried for me, as he will not be able to act as a buffer between us. He suggested I try and get another assignment

Appendix B

Relevant Provisions of the Act

reprisal means any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:

- (a) a disciplinary measure;
- (b) the demotion of the public servant;
- (c) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;
- (d) any measure that adversely affects the employment or working conditions of the public servant; and
- (e) a threat to take any of the measures referred to in any of paragraphs (a) to (d).

protected disclosure means a disclosure that is made in good faith and that is made by a public servant

- a) in accordance with this Act;
- b) in the course of a parliamentary proceeding;
- c) in the course of a procedure established

représailles L'une ou l'autre des mesures ci-après prises à l'encontre d'un fonctionnaire pour le motif qu'il a fait une divulgation protégée ou pour le motif qu'il a collaboré de bonne foi à une enquête menée sur une divulgation ou commencée au titre de l'article 33 :

- a) toute sanction disciplinaire;
- b) la rétrogradation du fonctionnaire;
- c) son licenciement et, s'agissant d'un membre de la Gendarmerie royale du Canada, son renvoi ou congédiement;
- d) toute mesure portant atteinte à son emploi ou à ses conditions de travail;
- e) toute menace à cet égard

divulgation protégée Divulgation qui est faite de bonne foi par un fonctionnaire, selon le cas :

- (a) en vertu de la présente loi;
- (b) dans le cadre d'une procédure parlementaire;

under any other Act of Parliament; or

d) when lawfully required to do so. in accordance with this Act;

8 This Act applies in respect of the following wrongdoings in or relating to the public sector:

a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;

(a) a misuse of public funds or a public asset;

(b) a gross mismanagement in the public sector;

(c) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;

(d) a serious breach of a code of conduct established under section 5 or 6; and

(e) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

[Repealed, 2006, c. 9, s. 197]

12 A public servant may disclose to his or her supervisor or to the senior officer designated for the purpose by the chief executive of the portion of the public sector in which the public servant is employed any information that the public servant believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a

(c) sous le régime d'une autre loi fédérale;

(d) lorsque la loi l'y oblige.

8 La présente loi s'applique aux actes répréhensibles ci-après commis au sein du secteur public ou le concernant :

la contravention d'une loi fédérale ou provinciale ou d'un règlement pris sous leur régime, à l'exception de la contravention de l'article 19 de la présente loi;

a) l'usage abusif des fonds ou des biens publics;

b) les cas graves de mauvaise gestion dans le secteur public;

c) le fait de causer par action ou omission un risque grave et précis pour la vie, la santé ou la sécurité humaines ou pour l'environnement, à l'exception du risque inhérent à l'exercice des attributions d'un fonctionnaire;

d) la contravention grave d'un code de conduite établi en vertu des articles 5 ou 6;

e) le fait de sciemment ordonner ou conseiller à une personne de commettre l'un des actes répréhensibles visés aux alinéas a) à e).

[Abrogé, 2006, ch. 9, art. 197]

12 Le fonctionnaire peut faire une divulgation en communiquant à son supérieur hiérarchique ou à l'agent supérieur désigné par l'administrateur général de l'élément du secteur public dont il fait partie tout renseignement qui, selon lui, peut démontrer qu'un acte répréhensible a été commis ou est sur le point de l'être, ou qu'il lui a été demandé

wrongdoing.

19 No person shall take any reprisal against a public servant or direct that one be taken against a public servant.

20.4 (1) If, after receipt of the report, the Commissioner is of the opinion that an application to the Tribunal in relation to the complaint is warranted, the Commissioner may apply to the Tribunal for a determination of whether or not a reprisal was taken against the complainant and, if the Tribunal determines that a reprisal was taken, for

(a) an order respecting a remedy in favour of the complainant; or

(b) an order respecting a remedy in favour of the complainant and an order respecting disciplinary action against any person or persons identified by the Commissioner in the application as being the person or persons who took the reprisal.

21.5(1) On application made by the Commissioner for the orders referred to in paragraph 20.4(1)(b) the Tribunal must determine whether the complainant has been subject to a reprisal and whether the person or persons identified by the Commissioner in the application as having taken the alleged reprisal actually took it. If it determines that a reprisal was taken, the Tribunal may, regardless of whether or not it has determined that the reprisal was taken by the person or persons named in the application, make an order granting a remedy to the complainant.

21.5 (4) After issuing the reasons under subsection (3), the Tribunal may make an order respecting the disciplinary action to be taken against any person who was determined by it to have taken the reprisal.

de commettre un tel acte.

19 Il est interdit d'exercer des représailles contre un fonctionnaire, ou d'en ordonner l'exercice.

20.4(1) Si, après réception du rapport d'enquête, le commissaire est d'avis que l'instruction de la plainte par le Tribunal est justifiée, il peut lui demander de décider si des représailles ont été exercées à l'égard du plaignant et, le cas échéant :

a) soit d'ordonner la prise des mesures de réparation à l'égard du plaignant;

b) soit d'ordonner la prise des mesures de réparation à l'égard du plaignant et la prise de sanctions disciplinaires à l'encontre de la personne ou des personnes identifiées dans la demande comme étant celles qui ont exercé les représailles.

21.5(1) S'agissant d'une demande visant la prise des ordonnances prévues à l'alinéa 20.4(1)b), le Tribunal décide si des représailles ont été exercées à l'égard du plaignant et si la personne ou les personnes identifiées dans la demande comme étant celles qui les auraient exercées les ont effectivement exercées. S'il décide que des représailles ont été exercées, le Tribunal peut ordonner indépendamment de la question de savoir si ces personnes ont exercé les représailles la prise de mesures de réparation à l'égard du plaignant.

21.5 (4) Après avoir motivé par écrit sa décision en conformité avec le paragraphe (3), le Tribunal peut rendre une ordonnance concernant les sanctions disciplinaires à infliger à toute personne qui, selon lui, a exercé

21.5 (5) The parties in respect of proceedings held for the purpose of subsection (4) are the Commissioner, the person against whom the disciplinary action would be taken and, for the purpose of making submissions regarding disciplinary action on behalf of the person or entity who would be required to implement the order if it were made, any person designated by the Tribunal.

21.7 (1) To provide an appropriate remedy to the complainant, the Tribunal may, by order, require the employer or the appropriate chief executive, or any person acting on their behalf, to take all necessary measures to

- (a) permit the complainant to return to his or her duties;
- (b) reinstate the complainant or pay compensation to the complainant in lieu of reinstatement if, in the Tribunal's opinion, the relationship of trust between the parties cannot be restored;
- (c) pay to the complainant compensation in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to the remuneration that would, but for the reprisal, have been paid to the complainant;
- (d) rescind any measure or action, including any disciplinary action, and pay compensation to the complainant in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to any financial or other penalty imposed on the complainant;
- (e) pay to the complainant an amount equal to any expenses and any other financial losses incurred by the complainant as a direct result of the reprisal; or

les représailles.

21.5 (5) Outre le commissaire, sont parties à la procédure pour l'application du paragraphe (4) chaque personne à l'égard de laquelle il entend demander qu'elle fasse l'objet de sanctions disciplinaires et la personne désignée par le Tribunal en vue de présenter des observations en matière disciplinaire pour le compte de la personne ou de l'entité à qui le Tribunal enjoindrait d'exécuter l'ordonnance.

21.7 (1) Afin que soient prises les mesures de réparation indiquées, le Tribunal peut, par ordonnance, enjoindre à l'employeur, à l'administrateur général compétent ou à toute personne agissant en leur nom de prendre toutes les mesures nécessaires pour :

- a) permettre au plaignant de reprendre son travail;
- b) le réintégrer ou lui verser une indemnité, s'il estime que le lien de confiance qui existait entre les parties ne peut être rétabli;
- c) lui verser une indemnité équivalant au plus, à son avis, à la rémunération qui lui aurait été payée s'il n'y avait pas eu de représailles;
- d) annuler toute sanction disciplinaire ou autre prise à son endroit et lui payer une indemnité équivalant au plus, à son avis, à la sanction pécuniaire ou autre qui lui a été imposée;
- e) lui accorder le remboursement des dépenses et des pertes financières qui découlent directement des représailles;
- f) l'indemniser, jusqu'à concurrence de 10 000 \$, pour les souffrances et douleurs découlant des représailles dont il a été victime.

(f) compensate the complainant, by an amount of not more than \$10,000, for any pain and suffering that the complainant experienced as a result of the reprisal.

33 (1) If, during the course of an investigation or as a result of any information provided to the Commissioner by a person who is not a public servant, the Commissioner has reason to believe that another wrongdoing, or a wrongdoing, as the case may be, has been committed, he or she may, subject to sections 23 and 24, commence an investigation into the wrongdoing if he or she believes on reasonable grounds that the public interest requires an investigation. The provisions of this Act applicable to investigations commenced as the result of a disclosure apply to investigations commenced under this section.

33 (2) The Commissioner may not, in the course of an investigation commenced under subsection (1), use a confidence of the Queen's Privy Council for Canada in respect of which subsection 39(1) of the Canada Evidence Act applies, or information that is subject to solicitor-client privilege, if the confidence or information is disclosed to the Commissioner.

51.1 (1) A chief executive may temporarily assign other duties to a public servant who is involved in a disclosure or a complaint in respect of a reprisal if the chief executive believes on reasonable grounds that the public servant's involvement has become known in the public servant's workplace or that the temporary assignment is necessary to maintain the effective operation of the workplace.

51.1 (5) Subsection (1) applies to a public servant, other than a public servant who is the subject of the disclosure or who is alleged to

33 (1) Si, dans le cadre d'une enquête ou après avoir pris connaissance de renseignements lui ayant été communiqués par une personne autre qu'un fonctionnaire, le commissaire a des motifs de croire qu'un acte répréhensible ou, dans le cas d'une enquête déjà en cours, un autre acte répréhensible a été commis, il peut, s'il est d'avis sur le fondement de motifs raisonnables, que l'intérêt public le commande, faire enquête sur celui-ci, sous réserve des articles 23 et 24; les dispositions de la présente loi applicables aux enquêtes qui font suite à une divulgation s'appliquent aux enquêtes menées en vertu du présent article.

33 (2) Lorsqu'il fait enquête aux termes du paragraphe (1), le commissaire ne peut utiliser des renseignements confidentiels du Conseil privé de la Reine pour le Canada visés par le paragraphe 39(1) de la Loi sur la preuve au Canada ou des renseignements protégés par le secret professionnel liant l'avocat à son client en cas de communication de tels renseignements.

51.1(1) L'administrateur général peut assigner temporairement de nouvelles attributions à un fonctionnaire s'il est d'avis, sur le fondement de motifs raisonnables, que la mise en cause du fonctionnaire dans une divulgation ou une plainte relative à des représailles est généralement connue dans l'élément du secteur public auquel il appartient ou que l'assignation temporaire est nécessaire pour le bon déroulement des opérations sur les lieux de travail.

51.1 (5) Le paragraphe (1) ne s'applique pas au fonctionnaire, autre que celui qui est visé par la divulgation ou celui qui aurait exercé des

have taken the reprisal, as the case may be, only if the public servant consents in writing to the assignment. The assignment is deemed not to be a reprisal if the public servant's consent is given.

représailles, à moins qu'il n'y consente par écrit. Le cas échéant, l'assignation temporaire d'attributions ne constitue pas des représailles.

PUBLIC SERVANTS DISCLOSURE PROTECTION TRIBUNAL

PARTIES OF RECORD

DECISION NUMBER: 2017 PSDPT 3

TRIBUNAL FILE: T-2016-01

STYLE OF CAUSE: Dunn v. Indigenous and Northern Affairs Canada
and Sylvie Lecompte

BEFORE: Honourable Justice Peter Annis

**DECISION OF THE TRIBUNAL
DATED:** October 3, 2017

PLACE OF HEARING: Ottawa, Ontario, Canada

DATE OF HEARING: 3,4,5,6,7,12,18 of April 2017

APPEARANCES:

David Yazbeck
Counsel
Raven, Cameron, Ballantyne, Yazbeck
Ottawa, Ontario

For Chantal Dunn

Sonia Virc
Counsel
Ottawa, Ontario

For the Commissioner

Michel Girard
Counsel
Department of Justice
Ottawa, Ontario

For Indigenous and Northern Affairs
Canada

Sylvie Lecompte
Gatineau, Quebec

Self-represented