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Dockets: T-2027-11
T-2029-11
T-2033-11
T-2030-11
T-2032-11

Citation: 2014 FC 246

Ottawa, Ontario, March 25, 2014

PRESENT: The Honourable Madam Justice Mactavish

Dockets: T-2027-11
T-2029-11
T-2033-11

BETWEEN:

SHIV CHOPRA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dockets: T-2030-11
T-2032-11

AND BETWEEN:

MARGARET HAYDON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC REASONS FOR JUDGMENT AND JUDGMENT
(Confidential Reasons for Judgment and Judgment released March 13, 2014)

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I. Introduction

[1] Following a lengthy hearing, an adjudicator dismissed grievances filed by Dr. Shiv Chopra and Dr. Margaret Haydon with respect to disciplinary measures imposed on them by their employer, Health Canada. These included the suspension of Dr. Chopra for insubordination and an unauthorized absence from work, the suspensions of both applicants for speaking to the media, and the termination of their employment for insubordination.

[2] Drs. Chopra and Haydon have each brought applications for judicial review with respect to the adjudicator's decision. Dr. Chopra challenges the dismissal of his grievances relating to 10-day and 20-day suspensions, and the termination of his employment. Dr. Haydon seeks judicial review of the decision dismissing her grievances with respect to a 10-day suspension and the termination of her employment. Because the facts of these cases are intertwined, these reasons shall apply to all five applications for judicial review.

[3] For the reasons that follow, I have concluded that Dr. Chopra's application for judicial review of his 10-day suspension for insubordination and for being on unauthorized leave should be dismissed. However, Drs. Chopra and Haydon's applications for judicial review of their suspension for speaking to the media will be granted.

[4] I have further concluded that the findings of insubordination giving rise to the termination of Drs. Chopra and Haydon's employment were reasonable. However, the appropriateness of termination as a sanction for that misconduct will have to be re-determined in Dr. Haydon's case because of the Adjudicator's erroneous reliance on stale discipline in

upholding the penalty. The appropriateness of termination as a sanction in both cases may also have to be revisited in the event that Dr. Chopra and Dr. Haydon are ultimately successful in challenging their suspensions for speaking to the media.

II. Background

[5] The following review is intended to provide a general context for these applications. A more detailed review of the facts giving rise to each of the applications will be provided further on in these reasons, as each application for judicial review is addressed.

[6] Dr. Chopra began working as a drug evaluator for what was then called the Bureau of Veterinary Drugs (BVD) at Health Canada in 1987. The BVD is now known as the Veterinary Drug Directorate (VDD). At the time of the events at issue in these proceedings, Dr. Chopra worked in the Human Safety Division (HSD) of the VDD. Dr. Haydon began working as a drug evaluator for Health Canada in 1983. At the material time she worked in the Clinical Evaluation Division (CED) of the VDD.

[7] "Veterinary drugs" are substances which are used to prevent and treat disease in animals, to promote growth, control reproduction, or provide humane means of restraint and relief of pain in animals.

[8] Health Canada is the regulatory authority responsible for approving new veterinary drugs and new uses of existing approved drugs in accordance with the provisions of the *Food and*

Drugs Act, R.S.C., 1985, c. F-27. Amongst other things, Health Canada's mandate is to protect the health and safety of Canadians in accordance with the applicable legislation.

[9] Drug evaluators are responsible for making scientific assessments and recommendations as to the safety and efficacy of pharmaceutical products for use in animals and fish. They are also required to examine whether new veterinary drugs may have adverse effects on human health, and to ensure that new drugs comply with the human safety requirements of the *Food and Drugs Act* and Regulations.

[10] Drug evaluators do not themselves approve or reject New Drug Submissions. Once they have reviewed the relevant data, they make a recommendation as to whether or not a veterinary drug should be approved for sale in Canada. The decision to approve or reject a new drug submission is ultimately made by a delegate of the Minister of Health.

[11] Once a veterinary drug is approved for use by Health Canada, a Notice of Compliance ("NOC") is issued to the manufacturer. This permits the marketing of the product in Canada in accordance with the terms of the approval.

[12] Over the years, a number of issues arose between Drs. Chopra and Haydon and Health Canada. Amongst other things, by the late 1990s, the applicants (and some of their colleagues) had become concerned that problems with the drug review process were potentially having a negative impact on the health and safety of Canadians.

[13] In particular, the applicants believed that drug evaluators were being pressured to approve drugs of questionable safety. Drs. Chopra and Haydon were particularly concerned about the use of growth hormones and antibiotics in animals intended for human consumption, given the potential impact of these drugs on human health and safety. In the case of antibiotics, the applicants were concerned that their non-therapeutic use in animals was contributing to the development of antimicrobial resistance (or "AMR") which poses a risk to human health. AMR develops when strains of pathogenic microbes become increasingly resistant to antibiotics over time, making infections more difficult and potentially impossible to treat.

[14] Drs. Chopra and Haydon endeavoured to have their concerns addressed internally through various means. These included raising the matter with their Union, filing several grievances, and writing to the Health Minister requesting his intervention in the matter.

[15] Dr. Chopra also filed a grievance against "Health Canada Management" in 1997 alleging "persistent and repeat harassment". He asserted, among other things, that he had been subject to coercion to approve drug products of questionable safety, and that he had been denied access to required regulatory information to allow him to perform his job. Dr. Chopra further alleged that he had been subject to direct and implied threats of discipline, and that he had been defamed.

[16] However, the applicants were not satisfied with the results of these efforts, believing that their employer had failed to properly address their concerns.

[17] The applicants also requested an external investigation of the drug approvals process in Canada, and voiced their concerns outside of Health Canada. Amongst other things, the applicants wrote a letter to the Prime Minister requesting his assistance in the matter. They also initiated proceedings before the Public Service Staff Relations Board under the *Public Service Staff Relations Act*, S.C. 2003, c. 22, s. 2, and participated in hearings before the Standing Senate Committee on Agriculture and Forestry.

[18] Drs. Chopra and Haydon also spoke to the media on a number of occasions with respect to these and other concerns. These public statements led to disciplinary action being taken against them by their employer which ultimately resulted in this Court's decision in *Haydon v. Canada*, [2001] 2 F.C. 82, 192 F.T.R. 161(T.D.) (*Haydon* #1), *Chopra v. Canada (Treasury Board)* [2005] F.C.J. No. 1189, aff'd 2006 FCA 295 (*Chopra* #1), and *Haydon v. Canada (Treasury Board)*, [2004] F.C.J. No. 932, aff'd 2005 FCA 249, [2006] 2 F.C.R. 3 (*Haydon* #2).

[19] Drs. Chopra and Haydon were successful in challenging the disciplinary action taken against them in *Haydon* #1. Justice Tremblay-Lamer found that the applicants' statements with respect to their concerns regarding the approval of growth hormones and antibiotics and their view that drug evaluators were being pressured to approve drugs of questionable safety amounted to the disclosure of policies that jeopardized life, health or safety of the public. As a consequence, the statements came within one of the exceptions to the duty of loyalty recognized by the Supreme Court of Canada in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, [1985] S.C.J. No. 71.

[20] The applicants were, however, unsuccessful in having the disciplinary measures against them set aside in *Haydon* #2 and *Chopra* #1.

[21] In *Chopra* #1, this Court concluded that it was reasonable for an adjudicator to find that Dr. Chopra breached his duty of loyalty by publicly criticizing a decision by Health Canada to stockpile drugs, including ciprofloxacin, in response to the anthrax scare in the wake of the 9/11 attacks on New York and Washington, and by attributing inappropriate motives to his employer. The Court concluded that these remarks could not be justified as coming within a *Fraser* exception to the duty of loyalty.

[22] In *Haydon* #2, public comments by Dr. Haydon relating to the allegedly political nature of a ban on Brazilian beef in the wake of concerns regarding bovine spongiform encephalopathy (or BSE, commonly known as "mad cow disease"), were found to relate to a trade dispute rather than a question of public health and safety. As a consequence, the comments were found not to come within a *Fraser* exception to the duty of loyalty.

[23] In the wake of all of this, it is hardly surprising that by the early 2000s, there was significant inter-personal conflict between Drs. Chopra and Haydon and some of their co-workers and supervisors at Health Canada. This led to 16 of the applicants' co-workers bringing a harassment complaint against Drs. Chopra and Haydon in December of 2002. Also named as respondents to the complaint were Dr. Gérard Lambert (a co-worker who shared the applicants' views) and a fourth scientist. The harassment complaint alleged that as a result of the attention brought on by the applicants' comments in the media, the complainants' workloads

increased, they did not wish to "[b]e distracted or dragged into this imbroglio," and that the media reports put their "[j]obs and professional integrity to disrepute.": Adjudicator's decision at para. 62.

[24] A second complaint was filed against Dr. Chopra by the same co-workers in April of 2003 as a result of comments that he had made to the media regarding official bilingualism.

[25] An independent investigation into the complaints against Drs. Chopra and Haydon concluded that there had been no harassment. The 2004 investigation report (the Chodos Report) was, however, very critical of the applicants' behaviour, noting that "[i]t may well be argued that by contributing to a climate of hostility and suspicion in their workplace [Drs. Chopra and Haydon] have in fact harmed the public interest, rather than promoting it": Adjudicator's decision at para. 68.

[26] The Chodos Report further found that Drs. Chopra and Haydon "have to take some responsibility for the climate of suspicion and distrust that has permeated the Directorate for a number of years ... These suspicions, whether warranted or not, undermine the spirit of collegiality that is necessary in order for VDD scientists to work cooperatively to fulfill their mandate under the *Food and Drugs Act*": Adjudicator's decision at para. 62.

[27] In 2003, the applicants and Dr. Lambert filed their own harassment complaint in which they alleged that "they had been subjected to '... intense political influence, pressure and harassment by Health Canada management to pass or maintain a variety of drugs of questionable

safety to favour the political lobbying of certain special interest groups and to the detriment of the public interest'": Adjudicator's decision at para. 61. They identified unfair performance appraisals as one method of reprisal taken against them by their employer for making their views known.

[28] These events resulted in what the Chodos Report called a "climate of hostility and suspicion at the workplace" and what the Adjudicator called an "unpleasant" workplace. I do not understand either side to take issue with this characterization of the atmosphere within the VDD at this time, although each blames the other side for creating this toxic environment.

[29] With this overview of the background to the events at issue, I turn now to examine Dr. Chopra's application for judicial review with respect to his 10-day suspension.

III. Dr. Chopra's 10-Day Suspension

[30] On May 30, 2003, Dr. Chopra was suspended for 10 days for insubordination and for being on unauthorized leave. The adjudicator concluded that Health Canada had just cause to impose discipline on Dr. Chopra, and that the 10-day suspension was appropriate in the circumstances. As a consequence, he dismissed Dr. Chopra's grievance.

A. *The Circumstances Giving Rise to the Discipline*

[31] During the time in question, Health Canada had a Flexible Work Arrangements Guide which allowed employees to work from home with the agreement of the Department, and at the discretion of management. In accordance with this policy, Dr. Chopra worked from his home

under a succession of telework agreements from 1997 until 2002.

[32] On October 25, 2002, Dr. Chopra signed what would be the final extension to his telework agreement extending the arrangement until December 31, 2002. This extension agreement provided that:

> a. The telework arrangement was to be for a 4 month period commencing on September 1, 2002;
>
> b. Subject to satisfactory performance on the part of Dr. Chopra, the agreement could be extended for a further four month period;
>
> c. Dr. Chopra acknowledged that "tele-working is a privilege & not a right & that the continuation of the arrangement if accepted is based on [his] productivity & performance."
>
> d. Telework is voluntary and may be terminated by either party with reasonable notice.

[33] On January 30, 2003, a meeting was held between Dr. Chopra, his Team Leader, Dr. Mehrotra, and the Director of the Human Safety Division at the VDD, Dr. Vasu Dev Sharma. The purpose of this meeting was to discuss Dr. Chopra's performance.

[34] Deficiencies in Dr. Chopra's performance were identified by his managers in the course of this meeting, specifically in relation to his level of productivity and his alleged lack of interest in the work assigned to him.

[35] At the end of the meeting, Dr. Sharma advised Dr. Chopra that because of his poor performance, his telework agreement was not going to be renewed. Dr. Chopra does not agree

with the assessment of his performance and he asserts that he had no opportunity to address the employer's concerns before the decision was made to cancel his telework arrangement.

[36] However, the cancellation of Dr. Chopra's telework agreement, the validity of his January 2003 performance appraisal, and the merits of the grievance that followed are not at issue in this proceeding, with the result that I make no finding in this regard. I have, however, had regard to Dr. Chopra's views of these matters as forming part of the context for the events that followed.

[37] The cancellation of Dr. Chopra's telework agreement was confirmed by an email from Dr. Mehrotra to Dr. Chopra on January 31, 2003. This email instructed Dr. Chopra to report for work at the Holland Cross offices of the VDD on February 3, 2003. Dr. Chopra was further advised that he was expected to be "on location" between the hours of 7:00 am and 9:00 am, and to remain at work for the duration of the standard 7.5 hour working day from Monday to Friday of each week. Dr. Chopra reported to work on February 3, 2003, as instructed.

[38] Because the sequence of events between Dr. Chopra's return to work and his suspension for insubordination are in issue, it is important to review those events in some detail. In particular, regard must be had to these events in light of Dr. Chopra's contention that the Adjudicator erred in failing to explicitly find that he intended to be insubordinate and his claim that, as a result of the ongoing discussions between himself and his employer, Health Canada condoned his continued absence from the workplace.

[39] Dr. Chopra testified that he had an interaction with Dr. Aspi Maneckjee on his first day back at work which caused him to leave the workplace. Dr. Maneckjee was one of the 16 complainants in the harassment complaint against Drs. Chopra and Haydon.

[40] Dr. Maneckjee had previously sent Dr. Chopra an email in which he referred to comments made in the media by Dr. Chopra, asking him not to "make general statements when you have no definite proof, as you are hurting people (me)." Dr. Chopra responded that the accusation was "completely baseless and false", stating that he did not wish to have any further discussion about the matter.

[41] According to Dr. Chopra, Dr. Maneckjee spoke to Dr. Chopra in the staff lunchroom on February 3, 2003. According to an email sent by Dr. Chopra to his union representative later that day, Dr. Maneckjee said "Shiv, you don't talk to me". When Dr. Chopra did not respond, Dr. Maneckjee repeated, "Shiv, you don't talk to me", to which Dr. Chopra replied "Do I need to?"

[42] Dr. Maneckjee then allegedly responded in a patronizing tone stating "You must always talk to people." Dr. Chopra replied that "because you have filed a harassment complaint against me I do not wish to talk to you". Dr. Chopra says that he "quickly cut the conversation short and requested him not to talk to me any further". At this point Dr. Maneckjee left the room.

[43] Dr. Chopra testified at the hearing before the Adjudicator that this incident caused him to have serious concerns for his personal safety and security. Not only was he concerned that his

co-workers could become "more aggressive" with him, he says that he was also concerned about how he was going to react to them.

[44] Dr. Chopra describes this as an incident of "workplace violence" or "threat" in his memorandum of fact and law, and he testified that "this is the incident that is now the ultimate of that aggression coming from that side. I cannot predict whether he's going to hit me and - or hurt me but he's told me that I'm hurting him". It is interesting to note, however, that Dr. Chopra's description of the event in his contemporaneous email to his union representative is far less dramatic, and there is no suggestion in that email that Dr. Chopra felt threatened in any way.

[45] Dr. Chopra testified that he returned to his desk after the incident with Dr. Maneckjee and called his doctor. He then left the workplace to see the doctor. Dr. Chopra did not advise anyone of his departure, nor did he report the incident to his supervisors at this time.

[46] Dr. Chopra described his discussion with his doctor on the afternoon of February 3, 2003, noting that the doctor told him that he "was not sick", nor was he "psychiatrically ill". It appears from Dr. Chopra's description of the appointment that he wanted the doctor to document that he had reported a problem at work, and to have the doctor refer him to a psychologist.

[47] Dr. Chopra called the HSD secretary the following day, advising her that he was ill and would not be coming to the office. He did not contact either Dr. Mehrotra or Dr. Sharma. He spoke to the secretary again on February 7, 2003, stating that he was still unwell and that he would be seeing his doctor again.

[48] On February 10, 2003, Dr. Mehrotra emailed Dr. Chopra acknowledging that he had been away from work on account of illness and enquiring as to his current status and when he expected to return to work. Dr. Chopra responded that he had seen his doctor and that he would let Dr. Mehrotra know when he was well enough to return to work.

[49] Dr. Chopra's supervisors heard nothing further from Dr. Chopra. As a result, Dr. Mehrotra emailed him again on March 5, 2003 stating "[i]n order to consider your request for sick leave with pay, I would request that you provide me with a certificate from your doctor which also indicates the expected date of return to duty." Dr. Chopra was asked to provide the medical certificate by March 12, 2003.

[50] Dr. Chopra responded to Dr. Mehrotra's email on March 12, 2003, stating that he would not be providing the requested medical certificate. Instead Dr. Chopra asked Dr. Mehrotra to contact his legal counsel, David Yazbeck.

[51] In the meantime, Mr. Yazbeck had been in communication with the Deputy Minister of Health, expressing concerns with respect to Drs. Chopra and Haydon and two co-workers. Mr. Yazbeck identified matters that he said represented a "... clear attempt by Health Canada management" to deliberately target four scientists, including Drs. Chopra and Haydon, to dissuade them from expressing their views. Mr. Yazbeck identified the negative performance appraisals for the four scientists, the cancellation of Dr. Chopra's telework arrangement, and the harassment complaint filed against the four by their colleagues as retaliatory measures.

[52] Mr. Yazbeck further stated in his letter to the Deputy Minister that he did not understand why Dr. Chopra "... would be compelled to return to work," given the harassment complaint and the hostile attitude of his colleagues. Mr. Yazbeck urged the Deputy Minister to direct managers to "restore the status quo" until these issues could be addressed. At a minimum, Mr. Yazbeck asked that Dr. Chopra's telework arrangement be restored and that the performance appraisals for all four scientists be rescinded.

[53] At the same time, Mr. Yazbeck was in communication with the Assistant Deputy Minister with respect to the harassment complaint against the four scientists. There was also communication between Dr. V. Sharma and Dr. Chopra with respect to the finalization of Dr. Chopra's performance appraisal in which Dr. Sharma noted that despite Dr. Chopra's views as to the validity of the appraisal, he should nevertheless be aware that he was "... required to undertake and complete work that has been assigned to [him]."

[54] Grievances were subsequently filed by Dr. Chopra with respect to both his performance appraisal and the cancellation of his telework agreement. In response to further correspondence from Mr. Yazbeck asking whether she intended to address his concerns with respect to the cancellation of Dr. Chopra's telework arrangement, the Assistant Deputy Minister noted that these matters were the subject of grievances and that his concerns would be addressed through the grievance process.

[55] There were also discussions between the parties with respect to Dr. Chopra's ongoing failure to produce a medical certificate to justify his absence from work. On March 18, 2003, Dr. Mehrotra repeated her request for a medical certificate, asking that it be provided by March 25, 2003. She advised Dr. Chopra that failing to provide the certificate would lead her to conclude that he was on unauthorized leave, which could result in disciplinary action.

[56] Dr. Chopra did not want to provide the certificate to Dr. Mehrotra, as she was one of the complainants in the harassment complaint against him and he believed that it would only be used against him. He advised Dr. Mehrotra that her request for a medical certificate was contrary to the harassment policy, referring her to Mr. Yazbeck. Dr. Chopra also advised Dr. Mehrotra that he would continue to work as best he could on the drug evaluation assigned to him.

[57] Ms. Diane Kirkpatrick was the Director General of the VDD at this time. She wrote to Mr. Yazbeck on March 27, 2003, regarding the separation of the complainants from the respondents to the harassment complaint. She advised that, as of March 31, 2003, Dr. Chopra's office would be moved to an alternate location within the same office complex.

[58] There was further correspondence regarding these arrangements, with Ms. Kirkpatrick reiterating that, in the meantime, Dr. Chopra was expected to report for work at his current work location.

[59] On March 28, 2003, Ms. Kirkpatrick emailed Dr. Chopra, setting up a meeting for April 4, 2003 to discuss his absence from the workplace. In addition to the issue of the missing

medical certificate, Ms. Kirkpatrick indicated that she wished to discuss Dr. Chopra's comment that he was continuing to work from home, given that his telework arrangement had been discontinued.

[60] Ms. Kirkpatrick, Dr. V. Sharma, Dr. Chopra, Mr. Yazbeck and a human resources advisor attended the April 4, 2003 meeting. For the first time, Dr. Chopra told his employer about his February 3, 2003 encounter with Dr. Maneckjee. While he asserted that he had a health and safety concern, Dr. Chopra did not provide his employer with any details about the incident.

[61] Ms. Kirkpatrick told Dr. Chopra that he could provide his medical certificate to Dr. Sharma or to her. She also noted Dr. Chopra's comment that he was working from home, asking him when he expected return to work from sick leave. Dr. Chopra advised Ms. Kirkpatrick that he still considered himself to be on telework. Ms. Kirkpatrick once again reminded Dr. Chopra that his telework arrangement was over, and that he was expected to work at the VDD site.

[62] An April 9, 2003 follow-up letter from the Assistant Deputy Minister reiterated the request for an expected return to work date, and again reminded Dr. Chopra that unless he was on authorized leave, he was "required to perform his duties at his designated workplace".

[63] On April 17, 2003, Dr. Chopra provided Ms. Kirkpatrick with a medical certificate for his absence from the workplace from February 4, 2003 to March 15, 2003. The certificate was provided through Mr. Yazbeck, who wrote in a covering letter that "the decision to order Dr.

Chopra" to perform his duties at a location other than his home constituted further harassment against him. While Ms. Kirkpatrick had some concerns about the legitimacy of Dr. Chopra's illness, she accepted the certificate and approved his sick leave for the period ending March 15, 2003.

[64] There was further correspondence between the parties which included a discussion about the relocation of Dr. Chopra's office. On May 12, 2003, Mr. Yazbeck wrote to Ms. Kirkpatrick again raising concerns with respect to "the decision to require [Dr. Chopra] to work in another workplace", which he advised was viewed as a further incident of harassment. Mr. Yazbeck's letter closed by informing Ms. Kirkpatrick that unless his client's various concerns were addressed, Dr. Chopra would continue to work from home, absent a specific direction that Dr. Chopra move to his new office location.

[65] Mr. Yazbeck continued to raise concerns with respect to the cancellation of Dr. Chopra's telework arrangement, leading the Assistant Deputy Minister to advise Mr. Yazbeck on April 30, 2003 that the decision to cancel the telework agreement "was taken at the appropriate level of delegation within the Department".

[66] Throughout this period, and despite the fact that Dr. Chopra was not on sick leave after March 15, 2003, he still did not return to the workplace.

[67] On May 30, 2003, Ms. Kirkpatrick wrote to Dr. Chopra imposing the 10-day suspension that underlies this application for judicial review. She also indicated that action would be taken

to recover Dr. Chopra's salary for the period when he had been absent from work.

Ms. Kirkpatrick's letter reads, in part:

> I conclude that you have been on unauthorized leave from the workplace since March 16, 2003. As a result, action will now be taken to recover salary from your pay account from March 16, 2003, until you report to duty at your designated workplace.
>
> Furthermore, your continued unauthorized absence from the workplace, your insistence that you remain on telework contrary to repeated management instructions, your failure to provide in a timely manner, notwithstanding repeated requests, a medical certificate or any other justification for your absence and your failure to provide in a timely manner, again despite repeated requests, any information relating to your allegation with respect to safety and security, constitutes, in my view, insubordination and unacceptable conduct on your part.
>
> Accordingly, I am left with no alternative but to suspend you from work without pay for a period of ten days. You will be notified of the specific dates as to when this suspension will be served.
>
> You are required to report for duty immediately. Failure to report to work could lead to further disciplinary action up to and including termination of employment.

[68] Following receipt of this letter, Dr. Chopra returned to work, as instructed, on June 3, 2003.

B. *The Adjudicator's Decision*

[69] An adjudicator was appointed under the provisions of the *Public Service Staff Relations Act* to deal with Drs. Chopra and Haydon's grievances.

[70] After reviewing the various interactions between Dr. Chopra, Mr. Yazbeck and Health Canada, the Adjudicator made a number of findings with respect to Dr. Chopra's absence from work between February 3 and May 30, 2003.

[71] The Adjudicator was prepared to give Dr. Chopra the benefit of the doubt with respect to his explanation for refusing to provide a medical certificate until April of 2003. However, the Adjudicator also found that Dr. Chopra's concerns about workplace violence and harassment did not result in a "retrospective exception to the 'obey now, grieve later' principle" and were not sufficient to justify him acting in the way he did.

[72] In particular, the Adjudicator found that Dr. Chopra had insisted on working from home despite the non-renewal of his telework agreement and his employer's clear instructions that he was to report for duty at his designated work location.

[73] The Adjudicator further found that Dr. Chopra had no legitimate excuse for disobeying the order to return to the workplace, that his absence from work after March 15, 2003 was unauthorized, and that he had engaged in unacceptable conduct constituting insubordination. As a consequence, Health Canada had just cause to impose discipline and the ten-day suspension was reasonable in light of Dr. Chopra's past disciplinary record.

[74] Finally, the Adjudicator concluded that based on the principle of "no work, no pay", the recovery of salary for the period when Dr. Chopra was absent from the workplace was an

administrative action and not a disciplinary one. Dr. Chopra has not challenged this aspect of the Adjudicator's decision.

C. *The Issues*

[75] The global issue raised by this application is whether the Adjudicator's decision to uphold the 10-day suspension was reasonable. Dr. Chopra argues that it was not as the Adjudicator failed to address crucial issues, and the evidence in the record did not establish all of the necessary elements to support a finding of insubordination.

[76] In support of this contention, Dr. Chopra identifies four questions that he says the Adjudicator failed to address. These are:

a. Whether Dr. Chopra knew he was disobeying a clear and direct order;

b. Whether Health Canada condoned Dr. Chopra's absence from the workplace, given its failure to insist that he return to work at an earlier point in time;

c. Whether Health Canada was entitled to discipline Dr. Chopra in circumstances where he genuinely feared for his health and safety; and

d. Whether the employer proved all the allegations relied upon to support the discipline in question.

D. *Analysis*

[77] The parties agree that the standard of review to be applied to the Adjudicator's decision is that of reasonableness. I agree. Although the application does raise questions of mixed fact and law, the resolution of these questions largely depends upon the Adjudicator's appreciation of the facts.

[78] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47.

[79] Reasonableness is a deferential standard. It recognizes that there may not be a single correct answer to issues in dispute and further recognizes that Parliament assigns primary decision-making responsibility to specialist tribunals because of their particular expertise in the subject area. As a consequence, reasonableness review requires an attitude of respect for the decisions of specialist administrative tribunals by reviewing courts: *Dunsmuir*, at para. 48.

[80] This is particularly true in the labour arbitration context. Indeed, as the Federal Court of Appeal observed in *Tobin v. Canada (Attorney General)*, 2009 FCA 254, [2009] F.C.J. No. 968, an adjudicator appointed under the *Public Service Staff Relations Act* is "not simply an expert in labour relations but an expert in public service labour relations": at para. 40.

[81] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Supreme Court provided further clarification as to the scope of reasonableness review. The Court observed that inadequacies in an administrative tribunal's reasons will not necessarily render the tribunal's decision unreasonable. Reviewing courts may still uphold a tribunal decision if it falls within the *Dunsmuir* range of possible, acceptable outcomes which are defensible in light of the facts and the law: at paragraph 14.

[82] Importantly for our purposes, the Court was very clear in *Newfoundland Nurses* that administrative tribunals need not address every issue and every argument raised by the parties, nor is it required to make an explicit finding on each element, however subordinate it may be, leading to its final conclusion. The failure of a tribunal to do so will "not impugn the validity of either the reasons or the result under a reasonableness analysis": at para. 16. See also *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3, where the Supreme Court of Canada noted that the task for the reviewing court is to consider whether "the decision, viewed as a whole in the context of the record, is reasonable."

[83] While a reviewing Court may not substitute its own reasons for those of the administrative decision-maker, the Court may have regard to the reasons offered by the administrative tribunal and to the record in order to assess the reasonableness of the decision under review: *Newfoundland Nurses* at para. 15. It is sufficient if the administrative decision-maker's reasons "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland Nurses* at para. 16.

[84] It is not the function of a reviewing court to reweigh the evidence. There is, moreover, a presumption that a decision-maker has considered the entirety of the record.

[85] These admonitions as to the deference owed to administrative decision-makers are particularly apposite here, in light of the monumental task that faced the Adjudicator in this case. Indeed, before turning to assess whether the Adjudicator's decision in this case was reasonable, it is important to have an understanding of the task that faced the Adjudicator in relation to the various grievances brought by Drs. Chopra and Haydon.

[86] The Adjudicator was in fact dealing with eight grievances: the three filed by Dr. Chopra, Dr. Haydon's two grievances, and three others filed by Dr. Lambert. Dr. Lambert was partially successful before the Adjudicator and the parties have since resolved their differences with the result that Dr. Lambert is no longer a party to these proceedings.

[87] The hearing of the grievances extended over some 4 1/2 years. There were over 150 hearing days, during which time the Adjudicator heard from 11 witnesses. The record is some 20,000 pages in length, and voluminous evidence was adduced with respect to the issues that divided the parties. In addition to testimony regarding the events in issue, complex and technical scientific evidence was also put before the Adjudicator, and both sides filed lengthy and detailed written submissions. The process culminated in a 208-page decision by the Adjudicator.

[88] As counsel for the respondent observed at the hearing of these applications, if ever there was a case that cried out for judicial deference, this is it.

(1) Did the Adjudicator Fail to Make a Finding as to Whether Dr. Chopra Knew he was Disobeying a Direct Order?

[89] Dr. Chopra contends that the decision dismissing his grievance is unreasonable because the Adjudicator failed to explicitly address whether he had the necessary subjective intent to be insubordinate.

[90] While acknowledging that his telework agreement had been cancelled and that he had been given a clear and unequivocal order to report to Health Canada's Holland Cross offices on February 3, 2003, Dr. Chopra notes that he did so. He left the office later that day as a result of his confrontation with Dr. Maneckjee, and was on certified sick leave until March 15, 2003.

[91] Dr. Chopra's counsel continued to interact with Health Canada representatives regarding the legitimacy of his performance appraisal, the cancellation of his telework arrangement, his allegations of harassment, his health and safety concerns, and the alleged failure of his employer to address the issues that he had identified.

[92] According to Dr. Chopra, the parties were actively engaged in discussions as to the terms and conditions under which he would return to work, and it was understood throughout this period that Dr. Chopra would remain at home. Dr. Chopra submits that "the very nature of the discussion among the parties assumed that he would not yet return to work".

[93] Dr. Chopra further asserts that a fair reading of the correspondence between the parties between February and May of 2003 reveals that the employer was no longer insisting on his immediate return to duty at the VDD's Holland Cross offices. Indeed, Dr. Chopra contends that at no time between February 3 and May 30, 2003 did Health Canada issue a direct order for him to report to work at the VDD's Holland Cross offices. When he received such a direct order in Ms. Kirkpatrick's May 30 letter, he complied.

[94] According to Dr. Chopra, it was not enough for his employer to merely refer to its "expectation" that he report to work at his office, as Ms. Kirkpatrick did at the April 4, 2003 meeting. Rather, he says that employer expectations must be explicitly framed as a direct order, and employees must be specifically advised that non-compliance with the order may result in disciplinary consequences before a finding of insubordination can be made.

[95] Dr. Chopra argues that insubordination requires the intentional and purposeful defiance of a clear order, citing authorities such as Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, 4th ed. (Toronto: Thomson Reuters Canada Ltd, 2012), at para. 7:3612; *National Harbours Board, Vancouver v. Vancouver Harbour Employees Association, Local 517, I.L.W.U.* (1974), 6 L.A.C. (2d) 5 B.C.C.A.A.A. No. 6 (Monroe), at para. 36; *Re Hunter Rose Co. Ltd. And Graphic Arts International Union, Local 28-B,* 27 L.A.C. (2d) 338, [1980] O.L.A.A. No. 92.

[96] Dr. Chopra further contends that arbitral jurisprudence has long-established that in insubordination cases "the true basis of the imposition of disciplinary penalties is not simply the

objective facts of unjustified conduct *but also the employee's awareness that he is doing something improper*." *Stancor Central Ltd. v. Industrial Wood and Allied Workers of Canada, Local 2-500 (Collective Agreement Grievance)*, 22 L.A.C. 184 at para. 4, [1970] O.L.A.A. No. 2 (Weiler). In other words, a grievor's subjective understanding is a relevant consideration in assessing the clarity of the order and the appropriateness of the penalty imposed.

[97] I am prepared to accept that there can be a subjective component to insubordination. While an employer order might be perfectly clear when viewed from an objective perspective, surely insubordination would not be established if it could be demonstrated that a hearing impairment or language barrier prevented the employee from properly understanding what he or she was being asked to do? In such a case, the failure of the employee to comply with the employer's instructions could be excused on the basis that the employee lacked the intent to defy their employer. This is not, however, such a case.

[98] The Adjudicator understood that the onus was on Health Canada to justify the discipline imposed on Dr. Chopra. He found that the order directing Dr. Chopra to return to work at the VDD's Holland Cross offices was clear, and the fact that he showed up at work on February 3, 2003 demonstrated that Dr. Chopra understood the order to return to work: the Adjudicator's decision at para. 177.

[99] The Adjudicator went through a painstaking review of the events that transpired between February 3 and May 30, 2003, concluding that there had been no "waiver" by Health Canada,

and that once an employer has given a clear order, it is not required to repeat the order just because the employee does not agree or comply with it: the Adjudicator's decision at para. 178.

[100] It is, moreover, evident from the record that Health Canada did in fact repeat the order for Dr. Chopra to return to work at his designated workplace on several occasions throughout this period.

[101] In her March, 2003 correspondence, Ms. Kirkpatrick was clear that Dr. Chopra was expected to report for work at his Holland Cross office. At the April 4 meeting, Ms. Kirkpatrick once again confirmed to Dr. Chopra that his telework arrangement was over, and that he was expected to report to work at the VDD site. The April 9, 2003 follow-up letter from the Assistant Deputy Minister once again reminded Dr. Chopra that unless he was on authorized leave, he was "*required* to perform his duties at his designated workplace" [my emphasis].

[102] Dr. Chopra says that he continued to work at home throughout the majority of this period, and the Adjudicator was required to consider his subjective understanding of the events in order to ascertain whether he was being insubordinate. The failure of the Adjudicator to do so renders the decision unreasonable.

[103] It should be noted at the outset that the Adjudicator had ample opportunity to assess the parties' competing versions of events including the correspondence that they exchanged, their interpretation of those events, and their attitude towards what was transpiring in the spring of

2003. The Adjudicator also heard Dr. Chopra's testimony with respect to the incident with Dr. Maneckjee, and the parties' descriptions of what went on at the April 4 meeting.

[104] In light of Dr. Chopra's contention that the ongoing discussions between his counsel and the employer regarding the "nature and timing" of his return to work is "uncontradicted evidence" of his understanding that he was under no direct order to return to work, it was reasonable for the Adjudicator to look to the record in order to ascertain the parties' intentions.

[105] Contrary to Dr. Chopra's submissions, the record does not show that it was understood by the parties throughout the period after March 15, 2003 that Dr. Chopra would continue to work at home. What the record does show was that Dr. Chopra did not agree with his performance appraisal or the cancellation of his telework arrangement, and that he was not going to return to work until such time as these and other issues were addressed to his satisfaction.

[106] Indeed, it is noteworthy that Mr. Yazbeck's March 20, 2003 letter to the Assistant Deputy Minister observed that Dr. Chopra had "requested that the decision to return him to the Health Canada workplace be rescinded", clearly recognizing that the original order remained in effect. Similarly, Mr. Yazbeck's April 17, 2003, letter to Ms. Kirkpatrick acknowledges "the decision *to order* Dr. Chopra" to perform his duties at a location other than his home, and his May 12, 2003, letter recognizes that a decision had been made "*to require* [Dr. Chopra] to work in another workplace" [my emphasis].

[107] It is apparent that the Adjudicator understood Dr. Chopra's argument: see paras. 135-157 of the decision. He nevertheless found as a fact that Dr. Chopra's employer had issued a clear order for him to report to work at the Holland Cross location, that this order was understood by Dr. Chopra, that the order had never been rescinded, and that Dr. Chopra refused to comply with it. Implicit in this is the finding that Dr. Chopra was intentionally insubordinate.

[108] Such a conclusion is amply supported by the record and is well within the *Dunsmuir* range of possible acceptable outcomes which are defensible in light of the facts and the law.

(2) Did Health Canada Condone Dr. Chopra's Absence from the Workplace?

[109] I will have more to say with respect to the issue of condonation when I deal with the next two applications for judicial review. Briefly stated, the principle of condonation requires an employer to decide whether or not to discipline an employee when it becomes aware of undesirable employee behaviour. The failure of the employer to do so in a timely manner can constitute condonation of the employee misconduct.

[110] That is, a long delay in imposing discipline may entitle an employee to assume that their conduct has been condoned by their employer where no other warning or notice is given. Once behaviour has been condoned, the employer may not then rely on that same conduct to justify discipline. Allowing employees to believe that their behaviour has been tolerated, thereby lulling them into a false sense of security, only to punish them later is unfair to employees: *McIntyre v. Hockin*, [1889] O.J. No. 36 (C.A.), at paras. 13 and 16, *Miller v. Treasury Board (Department of National Defence)*, [1983] C.P.S.S.R.B. No. 22, at p. 13.

[111] Dr. Chopra argues that Health Canada effectively condoned his absence from the workplace between March 15 and May 30, 2003, given its failure to insist that he return to work prior to May 30, 2003. According to Dr. Chopra, the failure of the Adjudicator to "squarely address" the issue of condonation renders the Adjudicator's decision unreasonable.

[112] Dr. Chopra accepts that the Adjudicator specifically found that there was no "waiver" of the employer's order: at para. 178. However, he attempts to distinguish a "waiver" from "condonation", arguing that "waiver" means that the original order no longer exists whereas "condonation" means that the employer's order stands, but employer is no longer insisting on compliance.

[113] In my view, Dr. Chopra is attempting to split hairs. The record amply supports the Adjudicator's conclusion that the January 2003 order that Dr. Chopra report to work at Holland Cross had never been rescinded. Indeed, the record shows that throughout the period in question, Dr. Chopra was repeatedly advised by his employer that he was expected to report to work at the VDD's Holland Cross offices. The Adjudicator's finding that there had been no waiver of the original order to return to the workplace clearly addresses Dr. Chopra's condonation argument. As a result, Dr. Chopra has not persuaded me that the Adjudicator erred in this regard.

[114] Finally, Dr. Chopra says that Ms. Kirkpatrick's May 30, 2003 letter was the first direct order that he report to work at Holland Cross after his sick leave, and that it was unfair to impose

discipline on him at the same time that the first order was made without first giving him the chance to comply with the order. There is no merit to this submission.

[115] As noted, Dr. Chopra had been repeatedly directed to report to work at Holland Cross. He refused to do so. The May 30, 2003 letter imposed discipline on him for his *past* misconduct. He was further warned that a continued refusal to comply would result in further discipline. There was nothing unfair about this.

(3) Was Health Canada Entitled to Discipline Dr. Chopra in Light of his Health and Safety Concerns?

[116] Dr. Chopra submits that Health Canada was not entitled to discipline him because he had raised legitimate concerns regarding his health and safety which were never addressed by Health Canada. He submits that the Adjudicator's finding that he did not provide sufficient particulars for the employer to investigate these concerns was unreasonable, as was his conclusion that Dr. Chopra's "general concerns" about harassment did not justify him disobeying an order. According to Dr. Chopra, this conclusion was also contrary to the Treasury Board Policy on Harassment which requires employers to address concerns of harassment immediately and effectively.

[117] The Adjudicator expressly considered whether Dr. Chopra had a legitimate excuse for disobeying the order to return to the workplace: paras.179-182. He was satisfied that the employer had approved Dr. Chopra's absence from the workplace from February 3 until March 15, 2003. The Adjudicator was not, however, satisfied that Dr. Chopra's alleged health and safety concerns entitled him to refuse to return to work after the end of his sick leave.

[118] The Adjudicator noted that in order to be able to rely on a health and safety concern to justify a refusal to follow an order, an employee must raise the concern at the earliest possible opportunity. The Adjudicator noted that Dr. Chopra did not mention the February 3, 2003 lunchroom incident to his employer until the April 4, 2003 meeting, and even then, he refused to provide his employer with any details of the incident. It was only on April 17, 2003 that Dr. Chopra forwarded a copy of the email that he had sent to his union representative to his employer.

[119] The Adjudicator found as a fact that this was too late to allow Dr. Chopra to justify his refusal to return to work after the expiry of his sick leave, and that his circumstances did not bring him within an exception to the "obey now, grieve later" principle. This finding is one that falls squarely within the Adjudicator's expertise, is amply supported by the record, and is entirely reasonable.

[120] As noted earlier, the email to Dr. Chopra's union representative contained only a neutral description of the event, and made no mention of any concerns on Dr. Chopra's part as to his personal safety. Indeed, as the Adjudicator observed, Dr. Chopra's concern about workplace violence was never articulated to his employer and was raised for the first time at the hearing.

[121] The Adjudicator also squarely addressed Dr. Chopra's general concerns with respect to harassment and his work environment. The Adjudicator found that the evidence did not show any concern beyond difficult relationships with some of Dr. Chopra's colleagues, finding that

the fact that his workplace may have been unpleasant did not justify his disobeying an order: at para. 181. No error has been demonstrated with respect to this finding.

(4) Did Health Canada Fail to Prove all of the Grounds for Discipline**?**

[122] Dr. Chopra's final argument is that the employer failed to prove all of the allegations supporting the discipline in question.

[123] It will be recalled that Ms. Kirkpatrick's May 30, 2003 letter cited several grounds for discipline. These included Dr. Chopra's unauthorized leave from the workplace, his insistence that he remained on telework despite repeated management instructions to the contrary, his failure to provide a medical certificate despite repeated requests, and his failure to provide information relating to his health and safety allegations in a timely manner.

[124] Dr. Chopra argues that the Adjudicator accepted his explanation for his failure to provide a medical certificate for his absence from work prior to March 15, 2003 with the result that his earlier failure to provide certificate could not have reasonably been used to support discipline. He further submits that because his leave up to March 15, 2003 was found to have been justified, so too was a large proportion of his so-called "unauthorized absence" from the workplace. As a consequence, Dr. Chopra says that Health Canada could not rely on the full period of his absence as a basis for imposing discipline.

[125] However, this argument ignores the fact that it is apparent on the face of the May 30, 2003 letter that Ms. Kirkpatrick accepted the medical certificate that Dr. Chopra had provided,

and that he was only being disciplined for his unauthorized absence from the workplace *after March 15*.

[126] Dr. Chopra says that it was factually incorrect to say that he failed to provide information about his health and safety concerns in a timely manner. He also disputes whether a failure to provide such information could ever form a valid basis for discipline, noting that, in any case, the Adjudicator failed to specifically find that this was a proper basis for discipline.

[127] However, it is apparent from the Adjudicator's reasons that he found as a fact that Health Canada had proven that Dr. Chopra was insubordinate by not returning to work when he was required to do so, and that he had not shown any justification for refusing to do so. As a result, the Adjudicator held that the employer was justified in disciplining Dr. Chopra on this basis.

[128] The Adjudicator then had specific regard to the appropriateness of the penalty imposed by the employer, in light of *this particular misconduct*. Given Dr. Chopra's past disciplinary record and the seriousness of the insubordination, the Adjudicator concluded that a 10-day suspension was reasonable. This was an assessment that was squarely within the Adjudicator's expertise and was, moreover, one that was reasonably open to him on the record before him.

E. *Conclusion*

[129] For these reasons, Dr. Chopra's application for judicial review of the Adjudicator's decision with respect to his 10-day suspension is dismissed. The issue of costs will be dealt with at the conclusion of these reasons.

IV. The "Speaking Out" Grievances

[130] Dr. Chopra and Dr. Haydon were each disciplined for public statements that they made on a number of occasions between July 3, 2002 and October 4, 2003 regarding various matters. By letter dated December 9, 2003, Dr. Chopra received a 20-day suspension, whereas Dr. Haydon received a 10-day suspension on February 17, 2004. I understand the differential treatment to be a function of the doctors' respective disciplinary records rather than a reflection of differences in the gravity of the alleged misconduct.

[131] Drs. Chopra and Haydon each grieved the discipline imposed upon them. The parties refer to these grievances as the "speaking out" grievances.

[132] The speaking out grievances were addressed jointly by the Adjudicator, and Drs. Chopra and Haydon's applications for judicial review were argued together before me. As a result, I will deal with the two applications in one set of reasons, noting where necessary any material factual difference between Dr. Chopra's case and that of Dr. Haydon.

[133] As was noted earlier in these reasons, Drs. Chopra and Haydon had a long history of speaking out on issues that concerned them regarding matters coming within the jurisdiction of Health Canada, and the drug approvals process in particular.

[134] Both scientists had previously been disciplined for their conduct. In *Haydon* #1, Drs. Chopra and Haydon were successful in having the discipline set aside on the basis that their

claim that drug evaluators were being pressured to approve drugs of questionable safety constituted the disclosure of matters that could jeopardize the life, health or safety of the public. As a consequence, their statements were found to come within a recognized exception to the duty of loyalty.

[135] On other occasions, however, Drs. Chopra and Haydon were unsuccessful in having the disciplinary measures imposed on them for their public comments set aside: *Haydon* #2 and *Chopra* #1. Dr. Haydon did, however, succeed in having the penalty imposed on her in *Haydon* #2 reduced though the grievance process.

A. *The Statements in Issue*

[136] On July 3, 2002, a report aired on the CTV National News regarding the veterinary drug approval process at Health Canada. Dr. Chopra was interviewed, and stated that "[w]e were being pressured to pass drugs of questionable safety to favour the pharmaceutical companies." Dr. Haydon stated, "[t]he public doesn't know what happens in Health Canada and this is why I am here to speak out." A Health Canada representative denied the allegations, and the news report concluded with the reporter's statement that the "dissident" scientists would not be satisfied until there was a full Senate investigation into the drug approval process.

[137] Dr. Chopra was interviewed on Canada AM on July 4, 2002. He was asked about an incident that led to the four scientists speaking out. He replied by stating that this "is the latest and is the worst example of something that has been happening for a number of years going back to 1996 and before". Dr. Chopra described the pressure at Health Canada to approve drugs

quickly, and to approve drugs of questionable safety. He went on to describe the various efforts that he and his colleagues had made to have their concerns addressed, all to no avail.

[138] Dr. Chopra was asked about the approval of certain products that included a drug called Tylosin. He stated that the drug was "banned in Europe" and that the only person who could "fix the problem" was the Prime Minister.

[139] Drs. Chopra and Haydon and others sent an open letter to the Canadian Veterinarian Medical Association and to all provincial veterinary medical associations and provincial veterinarian licensing bodies on July 17, 2002. The letter stated that the authors were "... attempting to stop our supervisors from pressuring us to approve and maintain a series of veterinary drugs without the required proof of Human Safety under the *Food and Drugs Act* and Regulations." They observed that the issues touched on food safety and health and were of "grave concern" both to the authors and to the public.

[140] A "fact-finding meeting" was held with the applicants and the Acting Director General of the VDD, Ms. Kathy Dobbin, on July 22, 2002. Drs. Chopra and Haydon were told that the purpose of the meeting was to establish the facts concerning their allegations in the media that they were being pressured to approve drugs that might not be safe. Drs. Chopra and Haydon were specifically informed that this was *not* a disciplinary meeting, nor were they told at the meeting that they would be subject to discipline for their actions or that they should cease speaking to the media about their concerns.

[141] Ms. Dobbin followed up on this meeting with a letter to Drs. Chopra and Haydon dated August 22, 2002, which noted that they had made a disclosure to the Public Service Integrity Office (PSIO). Ms. Dobbin advised the applicants that a decision regarding their comments to the media would not be made until such time as the employer had reviewed the PSIO's findings. She stated that the employer "... regard[ed] this matter as serious in nature, and have undertaken a thorough and comprehensive review."

[142] On August 19, 2002, Drs. Chopra and Haydon and others wrote to the Deputy Minister regarding "complaints of wrongdoing" involving Health Canada management. The Minister of Health, the Clerk of the Privy Council, the head of the PSIO, and the President of the Professional Institute of the Public Service of Canada (PIPSC) were copied with the letter. Transcripts of the CTV news story and other documentation were attached to the letter.

[143] In October of 2002, Dr. Chopra and Dr. Lambert were interviewed for a Country Canada report about the approval of a medicine including Tylosin. Portions of those interviews were excerpted on the CBC National News and in the newspaper *Le Devoir*.

[144] Dr. Chopra stated that the drug should not have been approved because the company had provided no human safety data. He told the interviewer that pressure to approve drugs did not come directly from pharmaceutical companies, but was exerted indirectly through the companies' lobbying of the Prime Minister, the Minister of Health and the Privy Council Office.

[145] Dr. Chopra explained that the pressure then flowed down to drug evaluators at his level, telling the interviewer about the pressure that he had experienced to approve a drug called Baytril in the absence of necessary anti-microbial residue data.

[146] Dr. Chopra stated "[t]hey call it risk management. In other words, to make profit let us take risk, and we will wait 20 or 30 years. If cancers occur, reproductive disorders occur, if people ... too many people die from antimicrobial resistance, then we will think about it. Then we will manage it." He later stated "Nothing is going to happen to you tomorrow, or maybe even in a year's time. But over [the] long term you may get cancer, there will be reproductive disorders in ... your children and grandchildren."

[147] Dr. Chopra was also dismissive of Ms. Kirkpatrick's qualifications in the interview, noting that she had a PhD in physical chemistry, but was not a veterinarian or a microbiologist or a biologist. In actual fact, Ms. Kirkpatrick has an Honours Bachelor of Science degree, with a Specialization in Physical Chemistry.

[148] Drs. Chopra and Haydon and others wrote a second letter to the Prime Minister on November 4, 2002, once again voicing their concerns about the drug approval process. This letter was copied to the Minister of Health, the Deputy Minister of Health, the Clerk of the Privy Council, the PSIO, the President of the PIPSC, the Council of Canadians, the National Farmers' Union, the Canadian Health Coalition, the Sierra Club of Canada and the Sierra Legal Defence Fund.

[149] On November 15, 2002, Ms. Kirkpatrick emailed Drs. Chopra and Haydon advising them that she had become aware that they were planning to speak at a press conference scheduled for November 18, 2002. Ms. Kirkpatrick reminded Drs. Chopra and Haydon of their duty of loyalty to Health Canada and the "balance that needs to be struck between the public interest in maintaining an impartial and effective public service and employees' freedom of speech". She further reminded the applicants of the avenues available to them within Health Canada to have their concerns addressed.

[150] At the November 18, 2002 press conference held by the Council of Canadians and the National Farmers Union, Dr. Chopra reiterated that drugs had to be approved based upon data, and not just on testimonial information. He also said that the problem was not just with one drug, but was rather with "the whole system." He stated that "[w]e must do our job which is to make sure that the data required under the *Canadian Food and Drugs Act* which comes under the *Criminal Code* is provided. To falsify and to say anything else otherwise would be wrong and would be against the *Criminal Code*." Dr. Chopra also reiterated his concerns with respect to the pending approval of a Tylosin product, noting once again that the drug combination had been banned in Europe.

[151] Dr. Chopra and Dr. Haydon both spoke of the harassment and coercion that they said they had experienced at Health Canada. Dr. Chopra said that he viewed Ms. Kirkpatrick's cautionary email sent before the press conference as "intimidation" and "clearly a threat", noting that this Court "has ruled that it is our duty to the public as public service employees" to speak out with respect to matters of human safety.

[152] Dr. Chopra reiterated his concerns with respect to the use of growth hormones and antibiotics and the implications that the use of these drugs could have for human health. Dr. Haydon stated that "it's a shame that public funds are actually being spent to harm the public". Both applicants repeated their request for an inquiry into the drug approval process.

[153] In a subsequent article in the *Globe and Mail*, Dr. Haydon was quoted as saying that the drug approval system was in "chaos".

[154] Dr. Chopra was interviewed on CFAX-AM in Victoria, British Columbia on November 21, 2002. In addition to restating his allegations with respect to pressure being brought to bear on Health Canada drug evaluators and his criticism regarding Ms. Kirkpatrick's qualifications, Dr. Chopra also reiterated his concerns with respect to the use of growth hormones and antibiotics, their role in the development of anti-microbial resistance, and their implications for human health and safety.

[155] Dr. Chopra was asked if he was aware whether anyone was being paid by pharmaceutical companies to approve drugs. Dr. Chopra stated that he had no direct knowledge of this, but that this was "not how modern corruption works". When asked if he believed that a lot of corruption was occurring at Health Canada, Dr. Chopra replied "Well, in the sense if people who don't deserve, who don't have the knowledge, get the jobs and are maintained for years and years and years, and they keep on bringing more and more people, and so this ... you know, the word 'corruption' is a technical ... word because it's a legal term in that sense". Dr. Chopra further

stated that he did not know whether there was money involved or not, but that "certainly the companies are making money on useless products". He characterized what was going on as "wrongdoing to the public".

[156] On January 24, 2003, Dr. Chopra spoke at an information session about food irradiation organized by Health Canada and others. Ms. Kirkpatrick became aware of his intent to participate in this event and emailed Dr. Chopra a few days beforehand indicating that she wanted to ask him about the circumstances of his participation in the event given that he had no responsibility with respect to the regulation and control of food irradiation. She advised Dr. Chopra that he should explicitly state that he was speaking as a private citizen if he spoke at the event. She also reminded him of the need to ensure the accuracy of his remarks and of his obligation to raise concerns internally before going public.

[157] At the information session, Dr. Chopra described Ms. Kirkpatrick's email as a "warning". He went on to state that the presence of bacteria on food is an indicator of contamination, and that the source of the contamination should be identified rather than simply destroying it as this would be "covering up wrongdoing."

[158] Ms. Kirkpatrick followed up with Dr. Chopra after this session on February 12, 2003, noting that she was assessing the situation and offering him an opportunity to provide input by February 19, 2003. Dr. Chopra replied on the following day, referring her to Mr. Yazbeck.

[159] Mr. Yazbeck wrote to Ms. Kirkpatrick on several occasions concerning Dr. Chopra's comments at the food irradiation session. In his June 30, 2003 letter, Mr. Yazbeck asked whether it was the employer's "intention to impose discipline on Dr. Chopra" and whether the "imposition of discipline" was being considered. Ms. Kirkpatrick responded on July 31, 2003 advising that the employer was engaged in a "fact-finding exercise" in order to determine the appropriateness of Dr. Chopra's comments and that "inappropriate activities may result in disciplinary action."

[160] In the meantime, on May 21, 2003, Dr. Haydon was interviewed by the CBC about the recent discovery of a case of bovine spongiform encephalopathy (also known as mad cow disease or BSE). BSE is a brain disease of cattle characterized by a progressive degeneration of the animal's nervous system.

[161] Dr. Haydon was quoted as having said that the government had not done enough to prevent the spread of BSE because the disease could remain dormant for up to a decade. The report also quoted Dr. Haydon as saying that she was "sorry to say that I told you so. And I think this is just the beginning."

[162] Drs. Chopra and Haydon made further comments on the BSE issue in an interview with a CTV reporter on June 5, 2003. Dr. Haydon stated that she had been telling her employer about ruminant feed spreading BSE since February of 2001. Dr. Chopra asked "Why are we taking this risk? It's such a simple thing, that you don't feed it and the disease stops. It doesn't spread. It's as simple as that. Why wouldn't they listen?"

[163] The reporter noted that Dr. Chopra had been suspended from his job three days after sending a letter to the Minister of Health about the BSE issue. This was the 10-day suspension for unauthorized absence from work and insubordination that was addressed in the previous section of these reasons. When asked whether there was a connection between the letter and the suspension, Dr. Chopra responded "I have no proof that ... this is the reason why it happened. But it makes you wonder."

[164] Similarly, a report in the *Globe and Mail* stated that Dr. Chopra had been suspended for two weeks and fined three months' pay "... soon after urging the department to ban animal feeds that are suspected to cause mad cow disease." Dr. Chopra was reported to have once again voiced his suspicions with respect to the timing of the disciplinary action. Dr. Haydon was also reported to have said that she was upset about Dr. Chopra's suspension as they had complied with a Health Canada request not to make the matter public.

[165] Drs. Chopra and Haydon repeated their concerns with respect to the BSE issue in an interview on the CTV Canada Now program on June 6, 2003. That same day, they were interviewed by Dave Rutherford for a live radio show. Dr. Chopra stated that Canada was continuing with what he characterized as a "disastrous practice". Dr. Haydon said that the ban on ruminant feed introduced in Canada in 1997 was not "a true ban" but rather "a paper tiger", explaining that "[a] true ban has to be a complete ban of all this rendered material in all types of feed".

[166] Dr. Chopra and Dr. Haydon both claimed that BSE could cross over into other species. Dr. Haydon explained that British scientists had demonstrated in a lab that pigs could be infected with BSE, although she later acknowledged that there was "an awful lot" that was not known about the disease. Dr. Haydon reiterated that she and her colleagues had concerns about human safety, and Dr. Chopra accused Health Canada of "sleeping" by not dealing with the scientists' concerns in a timely manner. Both Dr. Chopra and Dr. Haydon also referred to what they viewed as the retaliatory measures that had been taken against them by their employer.

[167] On July 30, 2003, Ms. Kirkpatrick emailed Drs. Chopra and Haydon with questions regarding their comments in the media relating to BSE, asking about the basis for their comments and what efforts they had made to raise their concerns internally. Ms. Kirkpatrick described the purpose of her questions as "fact-finding". While she did indicate that she required answers to her questions in order to determine whether any action would be required on her part with respect to the applicants' comments on BSE, once again there was no suggestion at this point that the applicants would be subject to discipline for their actions.

[168] Dr. Chopra and Dr. Haydon responded in writing, advising Ms. Kirkpatrick that the journalists had contacted them and that the information being sought by the journalists was specific to their own concerns and thus could not have been provided by a spokesperson for the employer in accordance with Health Canada's policy on speaking to the media.

[169] Finally, Dr. Chopra was interviewed on a radio talk show hosted by Stirling Faux on October 4, 2003. He described being told to approve drugs because they had already been

approved in the United States. Dr. Chopra said that pressure was coming from the PCO, and not directly from the drug companies, and repeated his belief that he had been subjected to retaliatory measures for speaking out.

B. *The Disciplinary Letters*

[170] On December 9, 2003, some 17 months after Dr. Chopra's initial public statement, Ms. Kirkpatrick wrote to Dr. Chopra advising him that he was being suspended for 20 days for his public comments which she characterized as containing "unsubstantiated allegations and erroneous statements" and "misleading information". She also stated that he had neglected to exhaust internal processes, did not await their outcome when the processes were engaged, and refused to accept their conclusions if they differed from his own.

[171] Ms. Kirkpatrick concluded that Dr. Chopra's actions did not constitute appropriate speech by a public servant. While he "purported to be speaking out on health and safety matters", his comments led her to believe otherwise. She also stated that his actions demonstrated a lack of judgment and objectivity and negatively impacted on his ability to perform the duties of a drug evaluator in an impartial and effective manner.

[172] In imposing a 20-day suspension on Dr. Chopra, Ms. Kirkpatrick expressly stated that she was taking his prior disciplinary record into account, along with "the repetitive nature of [his] behaviour". Ms. Kirkpatrick further warned Dr. Chopra that any further acts of misconduct on his part would lead to the termination of his employment.

[173] Ms. Kirkpatrick acknowledged that there had been a delay in imposing discipline, attributing it to the "mutual decision" to await the outcome of the PSIO investigation into the scientists' allegations of wrongdoing. She also noted that Dr. Chopra's absence from the workplace from February 3 to May 30, 2003 "was also a further significant factor".

[174] Discipline was imposed on Dr. Haydon in a letter written to her by Ms. Kirkpatrick on February 17, 2004, some 20 months after Dr. Haydon's initial public statements. In addition to faulting Dr. Haydon for having failed to exhaust internal recourse processes and for refusing to accept conclusions that differed from her own, Ms. Kirkpatrick also stated that Dr. Haydon had "eroded public trust" by "making and endorsing unsubstantiated allegations and erroneous statements, and by disseminating misleading information".

[175] According to Ms. Kirkpatrick, Dr. Haydon had engaged in "irresponsible and unacceptable behaviour" in creating confusion and apprehension about the Canadian food supply which amounted to "serious misconduct". As was the case with Dr. Chopra, Ms. Kirkpatrick did not accept that Dr. Haydon had been speaking out on health and safety matters, finding that her actions had compromised her ability to perform the duties of a drug evaluator in an impartial and effective manner.

[176] In imposing a 10-day suspension on Dr. Haydon, Ms. Kirkpatrick once again stated that she was taking Dr. Haydon's prior disciplinary record into account, along with "the repetitive nature of [her] behaviour". Ms. Kirkpatrick also warned Dr. Haydon that any further acts of misconduct on her part would lead to the termination of her employment.

[177] Ms. Kirkpatrick once again acknowledged that there had been a delay in imposing discipline. She noted that Dr. Haydon's comments required a "full and comprehensive review", and that "several relevant factors intervened". The "mutual decision" to await the findings of the PSIO was identified as being a "key" factor. Ms. Kirkpatrick also noted that the PSIO had concluded that the scientists' allegations of harassment had not been substantiated.

C. *The Adjudicator's Decision*

[178] The Adjudicator found as a preliminary matter that there had been no condonation of Dr. Chopra's and Dr. Haydon's conduct in speaking to the media, despite Health Canada's delay in imposing discipline.

[179] The Adjudicator reviewed the law with respect to the duty of loyalty and public statements made by public service employees. The Adjudicator noted that in *Fraser*, the Supreme Court recognized exceptions to the duty of loyalty where the statements in question related to illegal acts, policies that jeopardize the life, health or safety of the public, or where the statements had no impact on the employee's ability to perform his or her duties. The Adjudicator further noted that in *Read v. Canada (Attorney General)*, 2006 FCA 283, [2007] 3 F.C.R. 536, the Federal Court of Appeal explicitly rejected the proposition that speaking out with respect to matters "of public concern" was sufficient to ground an exception to the duty of loyalty.

[180] While accepting that some of the issues raised by Drs. Chopra and Haydon concerned the health and safety of the public, the Adjudicator noted that these issues were already in the public

sphere and were being addressed by the government. According to the Adjudicator, the applicants' comments were "simply criticisms of the government's approaches" to dealing with BSE and AMR.

[181] The Adjudicator observed that while employees are expected to raise concerns internally before going public, this obligation was "not absolute", but was a "factor to consider". He further noted that Drs. Chopra and Haydon did not wait for the outcome of the PSIO investigation before making their public comments.

[182] The Adjudicator was prepared to draw an inference that Drs. Chopra and Haydon's ability to do their jobs had been impaired by reason of their public comments, because the comments had become "increasingly vituperative". The Adjudicator was also satisfied that there was also direct evidence of impairment as Drs. Chopra and Haydon's public comments had further strained relationships in the workplace, as evidenced by, among other things, the harassment complaint against them.

[183] According to the Adjudicator, many of Dr. Chopra's statements were not about public safety, but were critical of his supervisor and were insubordinate and unjustified. Dr. Chopra had alleged corruption at the highest levels of government without any supporting evidence, and was misleading with regards to the nature of the risks to the public, again without any evidentiary foundation. The Adjudicator concluded that in light of these findings and Dr. Chopra's previous 10-day suspension, a 20-day suspension was reasonable.

[184] The Adjudicator also found that many of Dr. Haydon's comments were not about public health or safety, were not supported by the evidence and were misleading or "unnecessarily inflammatory." The Adjudicator also found that although Dr. Haydon's status as a Health Canada veterinarian gave weight to her comments, her work gave her "no specific knowledge" concerning the health effects of BSE or the actions being taken by the Canadian Food Inspection Agency. In light of these findings, as well as Dr. Haydon's previous five-day suspension for speaking to the media, the Adjudicator found that a 10-day suspension was an appropriate response.

D. *The Issues*

[185] Drs. Chopra and Haydon allege that the Adjudicator made numerous errors in dismissing their grievances with respect to the discipline imposed on them for speaking out. They say that the Adjudicator erred:

> (a) in concluding that the employer's delay in imposing discipline did not constitute condonation of their conduct;
>
> (b) in concluding that their comments did not fall within the public health and safety exception on the basis that the issues were already in the public sphere;
>
> (c) in failing to apply the general requirement that the employer provide direct evidence of impairment, instead inferring that the applicants' public statements had impaired their ability to perform their duties;
>
> (d) in requiring Drs. Chopra and Haydon to meet a standard of absolute truth in their public statements, and failing to establish that such a requirement met Charter scrutiny;
>
> (e) in concluding that discipline was appropriate, given the applicants' failure to await the conclusion of the PSIO investigation before commenting publicly on the reprisal against

> Dr. Lambert, and in failing to establish that such a requirement met Charter scrutiny; and
>
> (f) in concluding that the applicants' statements otherwise warranted discipline and that there was no evidence in support of many of their statements.

[186] Given my conclusion on the issue of condonation, it is not necessary for me to address Drs. Chopra and Haydon's other five issues.

E. *Was the Adjudicator's Finding on the Issue of Delay Reasonable?*

[187] A finding that there has or has not been undue delay in the imposition of discipline or condonation by an employer in a specific situation is primarily a finding of fact, although it does require an understanding of the underlying legal concepts. As such I agree with the parties that this aspect of the Adjudicator's decision should be reviewed against the standard of reasonableness.

[188] I have previously discussed the meaning of reasonableness review and the Supreme Court's admonition in *Newfoundland Nurses* that administrative tribunals need not address every issue and every argument raised by the parties, or make an explicit finding on each element, however subordinate it may be, leading to its final conclusion.

[189] I have also recognized that the failure of a tribunal to do so will "not impugn the validity of either the reasons or the result under a reasonableness analysis", as long as the administrative decision-maker's reasons "allow the reviewing court to understand why the tribunal made its

decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland Nurses* at para. 16.

[190] I am also conscious of the Supreme Court's admonition that reviewing judges should pay "respectful attention" to administrative decision-makers' reasons, and "be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful": *Newfoundland Nurses* at para. 17.

[191] That said, administrative tribunals must consider the important points in issue in a given case, and its reasons must show that it has considered the main relevant factors: *Turner v. Canada (Attorney General)*, 2012 FCA 159, 431 N.R. 327, at para. 41; *Via Rail Canada Inc. v. National Transportation Agency*, [2000] 3 F.C. 282, [2000] F.C.J. No. 286, at para. 22.

[192] A reviewable error may be found to exist where an applicant can establish that he or she raised an important and relevant point before an administrative decision-maker, if the tribunal's reasons, taking into account the record as a whole, do not allow the reviewing court to understand why the point was disregarded: *Turner* above at paras. 40-42; *Stelco Inc. v. British Steel Canada Inc.*, [2000] 3 F.C. 282, [2000] F.C.J. No. 286, at paras. 24 to 26. I am satisfied that the Adjudicator made just such an error in this case.

[193] It will be recalled that in the labour relations context, employers are required to decide in a timely manner whether or not to discipline an employee when it becomes aware of undesirable behaviour on the part of the employee. The failure to do so can constitute condonation of the

employee misconduct or can otherwise void the discipline. The rationale for this principle is simple fairness to the employee.

[194] As the arbitrator observed in *Re Corporation of The Borough Of North York and Canadian Union of Public Employees, Local 373*, , [1979] O.L.A.A. No. 3, 20 L.A.C. (2nd) 289, amongst other forms of unfairness, the failure of an employer to impose discipline in a timely manner may lead the employee to assume "that, absent discipline, the previous conduct was tolerable and, relying on the assumption, may have unknowingly repeated it, thereby building a longer record of what the employer now says was misconduct": at para. 12.

[195] That is, a long delay in imposing discipline may entitle an employee to assume that their conduct has been condoned by their employer, where no other warning or notice of potential discipline is given. Allowing employees to believe that their behaviour has been tolerated, thereby lulling them into false sense of security only to punish them later, is unfair to employees: *McIntyre*, above at para. 13, *Miller*, above at p. 13.

[196] In assessing whether discipline ought to be set aside because of delay, arbitrators consider three main factors. These are the length of the delay, the reasons for the delay, and any prejudice caused by the delay: M. G. Mitchnick and B. Etherington, *Leading Cases on Labour Arbitration*, looseleaf, (Toronto: Lancaster House, 2012), Vol. 2, Discharge and Discipline, p. 10-112; Donald J.M. Brown & David M. Beatty, *Canadian Labour Arbitration*, looseleaf (Aurora: Canada Law Book, 2013), at para. 7:2120; *C.U.P.E. v. Stapleford et al.*, [2007] S.L.A.A. No. 3, 88 C.L.A.S. 362, at paras. 81-84.

[197] Where there has been a delay in imposing discipline, an arbitrator is required to balance the employer's explanation for the delay against whatever prejudice has been suffered by the grievor as a result in order to reach a "just and equitable resolution of those competing interests": *British Columbia v. British Columbia Government and Service Employees' Union (Lawrie Grievance)*, [1995] B.C.C.A.A.A. No. 68, 47 L.A.C. (4th) 238, at para. 33.

[198] The arbitrator in the *Lawrie Grievance* went on to observe that just as a grievor must pursue his or her grievance rights under a collective agreement in a timely fashion, "so may an employer lose its right to discipline an employee for alleged acts of misconduct because of delay in exercising that right": at para. 33.

[199] The "speaking out" grievances involved public statements made by Drs. Chopra and Haydon on 14 occasions over a 15-month period, between July 2002 and October 2003. During this period, Health Canada took no action to discipline them for their public comments, or to warn them that it viewed their comments as misconduct that would be subject to future discipline.

[200] The Adjudicator's analysis of the question of delay in this case takes up one paragraph of a decision that is some 841 paragraphs in length. The sum total of the Adjudicator's analysis of this issue appears at paragraph 457 of the decision. It states:

> The grievors submitted that the delay in imposing discipline was condonation by the employer of their behaviour. It was clear to the grievors that the employer had concerns about them speaking to the media. Fact-finding processes were conducted. Although it may be

> that the grievors did not agree to wait for the results of the PSIO investigation, it was a legitimate reason for the employer to hold off considering discipline; see *Stewart v. Public Service Staff Relations Board*, [1978] 1 F.C. 133 (C.A.).

[201] I would start by observing that the decision in *Stewart* relied upon by the Adjudicator does not actually deal with issues of delay or condonation. To the extent that it says anything of relevance to this issue, the decision actually assists Drs. Chopra and Haydon.

[202] That is, in *Stewart* the Federal Court of Appeal cited with approval a portion of the decision under review in that case where the adjudicator stated that:

> ... most employees understand full well that public denunciation of their leaders or superiors is incompatible with the employment relationship, will be regarded as "misconduct" **and will not be tolerated very long by any employer**, whether the employer be a company, a trade union or a government. [at para. 7, my emphasis]

[203] Health Canada argues that the applicants knew, or should have known, that their comments were inappropriate and that they breached the duty of loyalty that they owed to their employer. In response, counsel for Drs. Chopra and Haydon took me through a painstaking comparison of the comments that were at issue in *Haydon* #1 and the comments that gave rise to the discipline in this case. While it is not necessary for me to decide the issue, suffice it to say that it is not immediately apparent that the public comments made by Drs. Chopra and Haydon that are at issue in this case were materially different in nature from those that had just recently been found by this Court to come within the *Fraser* public health and safety exception in *Haydon* #1.

[204] Moreover, the Adjudicator did not find that Drs. Chopra and Haydon knew (or should have known) that their comments were an unjustifiable breach of the duty of loyalty that they owed to Health Canada. What the Adjudicator found was that it "was clear to the grievors that the employer had concerns about them speaking to the media".

[205] With respect, the question was not whether Drs. Chopra and Haydon were aware that Health Canada had concerns about them speaking to the media. The relevant question was whether they were made aware in a timely manner that their employer believed that their comments warranted discipline.

[206] The failure of Health Canada to warn the applicants that their statements warranted discipline also had to be considered in light of the positive comments that had previously been made by the employer with respect to testimony given by Drs. Chopra and Haydon in Senate Committee hearings regarding their safety concerns about a drug known as rBST. The applicants' testimony before the Senate Committee also included criticisms of the qualifications of their supervisors, allegations of pressure being brought to bear in the drug approval process, and of reprisals taken against the applicants by their employer for voicing their concerns.

[207] Nevertheless, in that case, the then-Deputy Minister of Health sent a message to all Health Canada employees on May 5, 1999 stating:

> During my testimony [to the Senate Committee on Agriculture and Forestry], I received a comment from a Senator that I'd like to share with you. He referred to several Health Canada employees [including Drs. Chopra and Haydon] as "heroes" for speaking publicly on the rBST file. I replied that we have 6000 heroes at Health Canada - dedicated staff who work every day, and many

> nights and weekends, to protect the health and safety of Canadians. **Everyone in the department works diligently in their particular area of expertise. The individuals who appeared before the Senate Committee were doing that.** So are all the employees at Health Canada who will never appear before a Senate Committee or be publicly called a hero. [my emphasis]

[208] The Adjudicator also observed that "[f]act-finding processes were conducted". This is true, but it is also true that Drs. Chopra and Haydon were specifically told that these processes were *not* disciplinary in nature. Indeed, Health Canada allowed Drs. Chopra and Haydon to make numerous public statements over an extended period of time without ever advising them that it believed that their comments warranted discipline.

[209] Health Canada was aware of each of the applicants' public comments at, or shortly after the time that the comments were made. As a consequence, there could be no suggestion that the delay in imposing discipline could be justified on the basis that the employer had only recently become aware of Drs. Chopra and Haydon's comments.

[210] In at least two cases, Ms. Kirkpatrick knew of the applicants' intent to speak publicly in advance of the media interviews. In neither case did she instruct Drs. Chopra and Haydon not to speak out, but instead simply reminded them of their "responsibilities" as public servants and Health Canada employees.

[211] While Ms. Kirkpatrick did indicate in her July 31, 2003 to Mr. Yazbeck that "inappropriate activities may result in disciplinary action", at no point prior to the imposition of

discipline did she inform Drs. Chopra and Haydon that she considered their comments to have been inappropriate.

[212] There is, moreover, no suggestion by Health Canada that there was any kind of "culminating incident", following which employer forbearance was no longer possible.

[213] Health Canada offered several explanations for its delay in imposing discipline on Drs. Chopra and Haydon. These included the need to fully investigate their comments, the "mutual agreement" to wait for the findings of the PSIO investigation, and, in the case of Dr. Chopra, his absence from the workplace between February and May of 2003. In oral argument, the respondent also suggested that discipline had been delayed for Dr. Haydon due to her absence from the workplace in January of 2004.

[214] The Adjudicator appeared to accept Drs. Chopra and Haydon's evidence that there was no "mutual agreement" to wait for the findings of the PSIO investigation. In any event, even if it was reasonable for Health Canada to wait for the results of the PSIO investigation, this does not explain why it took *a further eight months* after the release of the PSIO's report on March 21, 2003 to impose discipline on Dr. Chopra, and *a further 10 months* to do so in the case of Dr. Haydon, during which time they continued to make comments to the media. The Adjudicator simply did not address this issue.

[215] The Adjudicator also did not address the employer's explanation that Dr. Chopra's absence from the workplace between February and May of 2003 contributed to the delay, and it

is not apparent why it took Health Canada *a further seven months* after Dr. Chopra returned to work in May of 2003 to discipline him for his public comments. Nor is it apparent how Dr. Haydon's absence from the workplace in January of 2004 could explain why no discipline was imposed on her in the *nine months* between the release of the PSIO investigation report in March of 2003 and her absence from the workplace in January of 2004.

[216] When Health Canada did finally discipline Drs. Chopra and Haydon, the discipline was based, in part, on the repetitive nature of their alleged misconduct. That is, the fact that the applicants continued to make public comments over an extended period of time was viewed by the employer as an aggravating factor in assessing the penalty to be imposed upon them. In these circumstances, the question of whether the delay in imposing discipline had prejudiced the applicants was a matter that the Adjudicator needed to address and failed to consider.

[217] Health Canada argues that there was no prejudice to the applicants as a result of its delay in imposing discipline. It submits that even if they had been disciplined for their earlier statements in a timely manner, Drs. Chopra and Haydon would never have stopped speaking publicly about the issues that concerned them. Indeed, Health Canada says that its delay in acting actually operated to the applicants' *benefit* as they would otherwise have been subjected to repeated sanctions for their comments over the period in question.

[218] I am not prepared to speculate as to what the applicants would or would not have done, had they been disciplined for speaking out in a timely manner. The purpose underlying the arbitral jurisprudence relating to delay and the principle of condonation is to give employees an

opportunity to modify behaviour that an employer believes warrants discipline. While Drs. Chopra and Haydon may have been aware that discipline was a possibility, they never had a chance to make an informed decision whether or not to risk continuing with their public comments as their employer failed to tell them that it viewed their comments as warranting discipline prior to actually imposing that discipline.

[219] Once again, the implications of all of this are not for me to decide, but were matters to be determined by the Adjudicator who was required to balance Health Canada's explanation for the delay against whatever prejudice had been suffered by Drs. Chopra and Haydon as a result. No such balancing exercise was undertaken by the Adjudicator in this case.

F. *Conclusion on the "Speaking Out" Grievances*

[220] As was noted earlier, an administrative decision-maker is not required to address every issue and argument raised by a party, nor is it required to make an explicit finding on each element leading to its final conclusion. However, the failure of the Adjudicator to address material facts and arguments relevant to the issues of delay and condonation in this case means that the decision lacks the justification, transparency and intelligibility required of a reasonable decision. It also makes it impossible for me to determine whether the Adjudicator's conclusion that there had been no condonation in this case was one that was within the range of acceptable outcomes, nor have I been directed to evidence in the record that would assist in this regard: *Newfoundland Nurses* at para. 16.

[221] As a consequence, this aspect of the Adjudicator's decision is unreasonable and will be set aside. Given my finding on this point, it is not necessary for me to address the remainder of Drs. Chopra and Haydon's arguments with respect to the speaking out grievances.

V. The Termination of Dr. Chopra's Employment

[222] Dr. Chopra's employment with Health Canada was terminated for insubordination on July 14, 2004, specifically his failure to comply with his employer's instructions in completing work assigned to him.

[223] The termination letter signed by Ms. Kirkpatrick stated:

> In early April you were assigned a project, which you agreed was well within the scope of your duties and professional capabilities as a senior veterinary drug evaluator. It was understood and agreed that the work would be completed within 90 days. Given concerns raised previously about your work performance, it was considered appropriate to seek progress updates at regular intervals.
> The initial, thirty day progress review was completed on May 5, 2004. From my review, I determined that no actual work was completed in that period and you provided no reasonable rationale for the total lack of progress. On two further occasions you were provided with additional specific instructions as to what the project required but your responses failed to demonstrate that any meaningful work as was requested was done. Based on the foregoing, I have concluded that you have chosen to deliberately refuse to comply with my instructions and I have also concluded that your conduct in that regard constitutes insubordination.
>
> Given your previous disciplinary record and your continued unwillingness to accept responsibility for work assigned to you, I have determined that the bond of trust that is essential to a productive employer employee relationship has been irreparably breached, that there is no reasonable expectation that your behaviour will change and that the existing employer employee relationship is no longer viable.

> On the basis of the foregoing I have decided to terminate your employment for cause pursuant to the authority delegated to me by the Deputy Head and in accordance with the *Financial Administration Act* Section 11(2)(f). In reaching my decision I have considered mitigating factors, particularly your lengthy years of service.

A. *Background*

[224] Ms. Kirkpatrick became Dr. Chopra's supervisor in March of 2003. Two months later, Dr. Chopra was assigned to carry out a drug review which he completed in November of 2003. He was absent from the workplace for significant periods of time between December 2003 and March 2004, while serving a disciplinary suspension and on certified sick leave. During this time, he did not receive any further assignments, nor did he advise anyone in management that he did not have any assignments or seek any new assignments. According to Dr. Chopra's testimony, this was "not his responsibility."

[225] Ms. Kirkpatrick held a meeting with Dr. Chopra on April 5, 2004 to discuss issues relating to his leave and the performance appraisal process and to give him a new assignment. Ms. Kirkpatrick had developed this assignment with the assistance of human resources advisors and another employee who was, as Dr. Chopra points out, one of the employees who had filed the harassment complaint against him.

[226] There were two parts to the assignment, a description of which was provided to Dr. Chopra in writing. The first was for Dr. Chopra to propose a "... classification of antimicrobial drugs on the basis of the risk of human exposure to resistant bacteria or resistance genes associated with specific antimicrobial drugs [AMDs]." Dr. Chopra was instructed that the

"... appropriate scientific rationale as well as an assessment of the weight of scientific evidence should be developed to justify the proposed classification scheme." He was provided with relevant documentation and was advised that he could consult other international documents.

[227] The second part of the assignment required Dr. Chopra to develop a new "evidence-based rating system" that could be used to evaluate the weight of scientific evidence related to AMR. The assignment document identified the approach used in Australia as a good model for consideration.

[228] According to Health Canada, Dr. Chopra's assignment was part of the VDD's response to the recommendations made by the Advisory Committee on Antimicrobial Use in its *Report on Animal Uses of Antimicrobials and Impact on Resistance and Health* (the McEwen report). Dr. Chopra had been a member of the Secretariat providing support to the McEwen Committee, and he had been involved in and privy to the discussions of the Committee during the meetings leading to the finalization of the McEwen Report. Moreover, Dr. Chopra had extensive knowledge of antimicrobial drugs and considered himself to be an expert in AMR.

[229] As was noted previously, concerns had been identified regarding Dr. Chopra's productivity in his January 2003 performance appraisal. However, the employer's performance expectations with respect to this last assignment were made very clear: Dr. Chopra was given ninety days to complete the assignment, and he was required to provide monthly updates as to the progress of his work on the assignment.

[230] Ms. Kirkpatrick met with Dr. Chopra on May 4, 2004 in order to discuss his progress to date. She asked Dr. Chopra about his approach to the task, and more specifically about the kind of information he was assembling to respond to the assignment. Health Canada contends that Dr. Chopra was unable to provide any details of his approach at this meeting and that he persistently failed to do so in his cross-examination.

[231] Ms. Kirkpatrick also asked Dr. Chopra whether he faced any obstacles or challenges in completing the assignment. Dr. Chopra responded that he was seeking a list of all of the approved submissions for antimicrobial drugs. Ms. Kirkpatrick testified that she responded that this list was not relevant to the assignment and that, in any case, this list was available on the Internet.

[232] Dr. Chopra states in his memorandum of fact and law that he expressed concerns about the assignment to Ms. Kirkpatrick at the May 4 meeting, in particular, his concern about the limited direction that had been provided to him by Ms. Kirkpatrick, although he cites no evidentiary support for this assertion. In fact, Dr. Chopra testified before the Adjudicator that he did *not* raise concerns about the assignment at the May 4, 2004 meeting because he was worried about his relationship with Ms. Kirkpatrick.

[233] Ms. Kirkpatrick followed up on this meeting with an email to Dr. Chopra stating that she expected a progress update from him by the end of the week that outlined his approach to the assignment. The email went on to state "it will be important to have a well thought out plan for identifying/focussing in on salient research. As a third of the time for undertaking this work has

already gone by, it will also be important to identify any obstacles that you have encountered or anticipate so as to take appropriate action as soon as possible. This first interim report is due to me by the end of this week".

[234] Dr. Chopra replied the following day, providing a four-page "Preliminary Outline". According to Health Canada, this document simply restated the assignment and provided a partial listing of antimicrobial drugs. However, it did not specify an approach to the assignment, as had been requested by Ms. Kirkpatrick.

[235] Characterizing the assignment as "a huge project of international importance with many different dimensions", Dr. Chopra emailed Ms. Kirkpatrick on May 5, 2003 asking if she could arrange for him to consult with other VDD scientists. He testified that he was reluctant to approach his colleagues directly as a result of the harassment complaint that had been brought against him.

[236] Ms. Kirkpatrick replied later that same day, stating that Dr. Chopra's "Preliminary Outline" still did not outline his approach. As a consequence, she asked him to provide a "complete response as requested by the end of this week." Ms. Kirkpatrick testified that she did not respond to Dr. Chopra's request to consult other evaluators because she did not see the relevance of this to his assignment, but that she did nothing to prevent him from speaking to his colleagues.

[237] Dr. Chopra responded by email on May 7, 2004. His email describes his approach to the assignment as being "to obtain the necessary background information … from both the published and unpublished sources and to consult, if allowed, with other scientific evaluators in VDD for their views on the subject."

[238] In contrast to his statement earlier in the week that the classification assignment was "a huge project of international importance", Dr. Chopra told Ms. Kirkpatrick in this email that, in his view, the assignment was "not scientifically amenable". He further stated that he found the "instruction to review current Health Canada Guideline Evidence Based Rating System and … formulate a draft Rating System that can be utilized to evaluate the weight of scientific evidence as it relates to antimicrobial resistance to be at variance with most scientific opinions on this subject in the internationally published literature."

[239] Dr. Chopra then sought to obtain a list of approved antimicrobial drugs he had requested at the May 4 meeting with Ms. Kirkpatrick directly from the individual responsible.
Ms. Kirkpatrick was made aware of this request, and contacted Dr. Chopra to inform him that the staff was busy with other priorities and that she had instructed them not to provide him with the requested information. Ms. Kirkpatrick stated that she had based her decision on her earlier discussions with Dr. Chopra, asking that any future requests be made through her.

[240] On May 17, 2004, Ms. Kirkpatrick advised Dr. Chopra that his May 7, 2004 response to her request for an outline of his approach to the assignment was still unsatisfactory as he still had not provided an update of the work that he had completed to date together with an outline of the

scientific approach that he was following so that he would be able to complete the project by the first week of July.

[241] According to Ms. Kirkpatrick's email "simply gathering views and background information does not constitute science or a scientific approach. The same applies for your opinions on the utility of the project you have been assigned". She went on to say "I'm sure that after almost six weeks you have defined a research and analysis framework upon which these views are based and within which the background documents will be applied and upon which conclusions can be reached". She concluded by once again asking Dr. Chopra to provide her with a copy of his detailed approach for completing the project as instructed.

[242] Dr. Chopra responded to Ms. Kirkpatrick's request by email on May 18, 2004. He emphasized his concern that he was not being permitted to obtain critical data and information from departmental records or to consult with other VDD scientists. He also stated:

> I thought your instruction for the AMR assignment was exactly what I have been following all along. . . . I have already provided a running report on my **research, analysis framework and update of the work completed** in the attached email memoranda. . . . For the assignment to compare Health Canada versus Australian **Rating Systems** I reported to have found no practical difference between the two methodologies to either forestall or prevent AMR of Human health impacts via the farm and other animal applications of any class of AMDs. . . . As for the formulation of a new draft rating system toward better clinical applications of AMDs in human and animal medicine, I found the system recommended by the Australian Expert Advisory Group on Antimicrobial Resistance ... (EAGAR) ... to be a perfectly **good model** without the need for any further modification. . . . These are thus far my findings on the assignment . . . Should you feel my approach is improper or requires additional explanation … please let me know about your concerns . . . I expect to submit a complete

> report on or before the assigned date – July 6, 2004. [emphasis in original]

[243] Ms. Kirkpatrick had no further communication with Dr. Chopra with respect to the assignment. She testified that, based upon his first status update, she believed Dr. Chopra had no intention of completing the assignment and that she saw no value in continuing to communicate with him. She further concluded from his May 18, 2004 email that although he had fully understood his assignment, he had made no progress on it and was spending his time on matters unrelated to it.

[244] In contrast, Dr. Chopra testified that he did not understand Ms. Kirkpatrick's expectations and that he did his best to comply with Ms. Kirkpatrick's instructions and complete the assignment.

[245] Dr. Chopra left the office on sick leave on May 21, 2004. He did not return to work before his employment was terminated on July 14, 2004, and Health Canada never received a completed report from Dr. Chopra.

[246] After Dr. Chopra's departure from Health Canada, the classification assignment was given to Dr. Shiva Ghimire, another VDD employee. Dr. Ghimire prepared a comprehensive 83 page draft report within a period of four or five weeks. Dr. Chopra asserted that Dr. Ghimire largely followed his recommended approach which confirmed that Dr. Chopra's final report, had he been given the opportunity to complete it, would likely have been similar to that of Dr. Ghimire. Health Canada contends that this argument is based on speculation, and that there

could be no parallels between the work done by the two individuals, as Dr. Chopra never identified a discernible approach to the assignment.

B. *The Adjudicator's Decision*

[247] The Adjudicator identified the requirements for a finding of insubordination as being whether there was a clear order given by a person in authority, and whether the order was disobeyed. The Adjudicator found that Health Canada was justified in concluding that Dr. Chopra's actions amounted to insubordination, and that termination of his employment was appropriate under the circumstances. The Adjudicator concluded his analysis with the finding that Dr. Chopra had "demonstrated that he is incapable of being supervised".

[248] There was no question that Ms. Kirkpatrick was a person in authority as Dr. Chopra's direct supervisor. The Adjudicator further found that the clarity of an order required "an objective assessment of its content and the context in which it was given". While recognizing that it could be relevant if an employee expressed confusion at the time that an order was given, the Adjudicator noted that Dr. Chopra never told Ms. Kirkpatrick that he did not understand the assignment when it was given to him. Rather, he simply disagreed with its foundation.

[249] The Adjudicator also considered and rejected Dr. Chopra's testimony that he did not raise his confusion about the assignment with Ms. Kirkpatrick because he was concerned about his relationship with her. In finding his testimony on this point not to be credible, the Adjudicator observed that Dr. Chopra "had no qualms in the past about raising concerns with her or with

others". Nor was Dr. Chopra reticent about sharing his views on the assignment with Ms. Kirkpatrick in his various emails to her.

[250] The Adjudicator also found as a fact that someone of Dr. Chopra's experience and expertise should have had no difficulty understanding the assignment, and that his subsequent correspondence with Ms. Kirkpatrick demonstrated that he had a good understanding of what had been requested of him.

[251] According to the Adjudicator, Dr. Chopra was intent on debating the merits of the assigned work, rather than actually doing it. The Adjudicator noted that the "debate continued at this hearing", with Dr. Chopra suggesting that it was up to his employer to convince him of the merits of the assignment. The Adjudicator observed that this "turned the employment relationship on its head", given that an employee is required to follow legitimate instructions. The Adjudicator further noted that "the workplace is not a democracy in which supervisors must convince employees of the merits of following a particular order".

[252] The Adjudicator noted that Dr. Chopra's intentions with respect to the assignment had been made clear at the hearing, finding that he had actively avoided doing his assigned work and that he had been insubordinate.

[253] In coming to this conclusion, the Adjudicator noted that Dr. Chopra had been given specific instructions at the May 4, 2004 meeting not to pursue his plan to review all the drug

submission files for antimicrobial drugs, and that he had disobeyed those instructions and requested a list of submissions from the responsible VDD section.

[254] According to the Adjudicator, Dr. Chopra's testimony regarding his progress on the assignment was confusing. At one point Dr. Chopra testified that he had completed the project, whereas at another point he said that the task was impossible and that he had given up. The Adjudicator found as a fact that this latter statement was more likely, and that Dr. Chopra had decided that the assignment "was not worthy of his attention": at para. 797.

[255] The Adjudicator found that the status report prepared by Dr. Chopra did not demonstrate any real progress on the assignment, but simply repeated the assignment and then listed point-form headings, without any explanation of their importance or relevance to the assignment. According to the Adjudicator, Dr. Chopra's suggestion that Ms. Kirkpatrick should have known what he was referring to, or should have asked her staff to help her understand what he was saying "entirely misses the nature of the employment relationship. He seems to suggest that he was not part of the VDD staff. A supervisor should not have to seek an explanation for a status report from other employees. As his supervisor, she requested a status report and was entitled to one": at para. 798.

[256] The Adjudicator concluded that Dr. Chopra believed that the classification assignment was a waste of his time. While Dr. Chopra "wanted to change the scope of his assignment and make it into a full-blown inquiry into AMR", the Adjudicator observed that he had been given a much more focused assignment, and that regardless of the scientific merits of his opinion, it was not open to

Dr. Chopra to unilaterally change the nature of his assignment without his employer's approval or to ignore the tasks assigned to him: at para. 799.

[257] In response to Dr. Chopra's contention that he had not been given an opportunity to respond to Ms. Kirkpatrick's concerns, the Adjudicator found that she had set out her concerns in her emails to Dr. Chopra, and that he had had an opportunity to clarify his approach in response. The Adjudicator noted that not only is there a general expectation that employees follow employer instructions, Dr. Chopra had previously been warned of the consequences of further misconduct.

[258] The Adjudicator also did not accept that regard should be had to whether Health Canada had suffered any actual harm as a result of his insubordination, observing that the assignment was within Dr. Chopra's area of responsibility, and that his employer was entitled to receive service from its employees.

[259] Even though Dr. Chopra's employment had been terminated while he was on sick leave, the Adjudicator found that his misconduct had occurred prior to the commencement of his leave. As a result, it was open to Health Canada to dismiss him, and Dr. Chopra's disciplinary record justified such a sanction.

C. *The Issues*

[260] The parties agree that the standard of review to be applied to the Adjudicator's decision to dismiss Dr. Chopra's grievance regarding the termination of his employment is that of reasonableness. Having regard to the largely factual nature of the inquiry, I agree that reasonableness is the appropriate standard of review.

[261] The global issue raised by this application is thus whether the Adjudicator's decision to uphold the termination of Dr. Chopra's employment for insubordination was reasonable. Dr. Chopra says that it was not, arguing that the Adjudicator:

1. Ignored evidence regarding Health Canada's similar treatment of Dr. Chopra, Dr. Haydon and Dr. Lambert;

2. Misstated the law on insubordination resulting in a flawed analysis;

3. Failed to address relevant arguments and evidence; and

4. Failed to assess Health Canada's entire rationale for the discharge.

D. *Analysis*

[262] I begin my analysis with a preliminary observation.

[263] Dr. Chopra says that in assessing the reasonableness of the Adjudicator's decision to uphold his termination, I should limit my consideration to the exchange of emails between Ms. Kirkpatrick and Dr. Chopra "on their face", as that is all that Ms. Kirkpatrick had to go on when she found that Dr. Chopra was being insubordinate. I do not agree.

[264] First of all, the interaction between Ms. Kirkpatrick and Dr. Chopra at the time in question was not limited to their exchange of emails, but included at least two face-to-face meetings. As a consequence, the parties' testimony as to what went on at those meetings was clearly relevant to the Adjudicator's decision, and provided a context for the correspondence that followed.

[265] For example, in assessing Dr. Chopra's conduct, the Adjudicator had to deal with the fact that he had not indicated any confusion with respect to the nature of the classification assignment. The Adjudicator quite properly considered Dr. Chopra's explanation that he did not ask any questions about the assignment because he was concerned about his poor relationship with Ms. Kirkpatrick and her ongoing criticism of his work.

[266] The Adjudicator found that Dr. Chopra's testimony on this point was not credible as he had never had any qualms about raising his concerns in the past, and was not reticent about sharing his views on the assignment in later emails to Ms. Kirkpatrick. This finding was clearly relevant to the issues that the Adjudicator was called upon to decide, and is one that is amply supported by the record.

[267] Similarly, the parties gave competing evidence with respect to the progress report given to Ms. Kirkpatrick by Dr. Chopra at the May 4 meeting. Once again, the parties' testimony as to what went on at that meeting and the extent of Dr. Chopra's progress on the assignment was clearly relevant to the Adjudicator's task.

[268] The Adjudicator did, of course, have to have regard to the correspondence exchanged by Dr. Chopra and Ms. Kirkpatrick with respect to the classification assignment in assessing the conduct of Dr. Chopra and Ms. Kirkpatrick. However, in addition to the text of the correspondence itself, it was also necessary for the Adjudicator to have an appreciation of the parties' interpretations of the documentation, and their attitude towards what was transpiring between April and July of 2004. It was therefore entirely reasonable for the Adjudicator to have regard to the testimony of both Dr. Chopra and Ms. Kirkpatrick in order to ascertain Dr. Chopra's intentions with regards to the classification assignment.

[269] Indeed, the Adjudicator found that Dr. Chopra's true intentions with respect to the assignment were made clear by the emails that he sent to Ms. Kirkpatrick, together with Dr. Chopra's own testimony at the hearing. Referring to Dr. Chopra's stated opinion that classification was not the proper approach and was completely irrelevant, and his view that Ms. Kirkpatrick was trying to "pin it on [him]", the Adjudicator found as a fact that Dr. Chopra had actively avoided his assigned work and was insubordinate. Dr. Chopra has not persuaded me that this finding was unreasonable.

(1) Health Canada's Similar Treatment of Drs. Chopra, Haydon and Lambert

[270] Dr. Chopra also submits that the Adjudicator's decision was unreasonable because he ignored or was dismissive of evidence demonstrating that Health Canada had adopted a common approach in terminating the employment of Drs. Chopra, Haydon and Lambert.

[271] In support of this contention, Dr. Chopra points out that all three individuals had a history of speaking out with respect to their concerns regarding drug safety and the drug approvals process, and all had been disciplined for their actions. Dr. Chopra further contends the difficulties that all three scientists experienced in the workplace, including acrimonious relationships with Ms. Kirkpatrick and the allegations of harassment against them, stemmed from their speaking out.

[272] Dr. Chopra notes that the employer's disciplinary approach towards the three scientists started at the same time, and proceeded in tandem. Their final assignments were all based on similar considerations. Each of the three had expressed concerns or identified "barriers" to completing their final assignments, yet the employer ignored their concerns or requests, later arguing that raising these concerns constituted insubordination. Finally, the employer's concerns with respect to the scientists' progress on their assignments culminated in their dismissal on the same day, by way of similarly worded letters of termination that had been prepared together.

[273] According to Dr. Chopra, an employer has an obligation to manage the work of an employee on an individual basis, based on his or her personal circumstances. The fact that the three employees were dealt with together suggested that some "inappropriate consideration"

motivated the employer's actions, namely the fact that they were all whistleblowers, considered by their employer to be "troublemakers" and "dissidents".

[274] While recognizing that the Adjudicator addressed this argument at paragraph 497 of his reasons, Dr. Chopra says that the Adjudicator erred by characterizing the concern as merely relating to the timing of the terminations, and by failing to take all of the relevant circumstances into account. I do not agree. A fair reading of the Adjudicator's reasons discloses that he was well aware of the extent of the relationship between the three cases.

[275] Having heard all three termination grievances, the Adjudicator was clearly aware of the way in which the three individuals were being managed by Health Canada. In the case of Dr. Chopra, the Adjudicator did not just have regard to the timing of his termination relative to that of the other two scientists. He also considered the fact that Ms. Kirkpatrick had consulted with human resources advisors before establishing the assignment for Dr. Chopra: see the Adjudicator's decision at para. 791. In this regard, the Adjudicator observed that "If a manager has legitimate concerns about the conduct of an employee, there can be nothing nefarious in consulting professional advisors".

[276] The Adjudicator also explicitly recognized that Health Canada had identified an issue which it viewed as being common to all three individuals, namely delays in completing assigned work, and that it had addressed that issue by closely monitoring the performance of each individual in relation to specific projects: at para. 497. He further found that the fact that all three individuals had their employment terminated on the same day was "not nefarious", and that

Health Canada "likely had some reason" to terminate Drs. Chopra, Haydon and Lambert on same day. The Adjudicator found that there was likely a "strategic or tactical reason" for this approach that did not "impugn the decisions made separately to terminate the employment of all three grievors": at para. 497.

[277] The Adjudicator was clearly aware that it was incumbent on Health Canada to justify its disciplinary actions with respect to all three individuals, and he assessed each case on its own individual merits. That the Adjudicator understood that the employer had to justify each disciplinary action on its own merits is evidenced by the fact that while he dismissed the termination grievances brought by Drs. Chopra and Haydon, he allowed the termination grievance of Dr. Lambert.

[278] It may well be that Health Canada had had enough of the actions of Dr. Chopra and his two colleagues and had decided to take a tough and co-ordinated approach to the management of their performance. Be that as it may, it does not take away from the fact that Dr. Chopra had been assigned a project by his employer that was within his area of expertise, and that the Adjudicator found as a fact that he refused to do it.

(2) Did the Adjudicator Err in Making his Finding of Insubordination?

[279] Dr. Chopra submits that the Adjudicator erroneously concluded that the law of insubordination did not require an assessment of his subjective understanding of the order in issue, in addition to an objective consideration of the order's clarity.

[280] While I have previously accepted that an employee's subjective understanding of an employer order could be relevant to a finding of insubordination, I am not persuaded that any error that the Adjudicator may have committed in this regard was material to the outcome of this case. This is because the Adjudicator did in fact consider whether Dr. Chopra actually understood the assignment given to him by Ms. Kirkpatrick on April 5, 2004.

[281] In coming to the conclusion that Dr. Chopra did indeed understand the nature of the assignment given to him, the Adjudicator had regard to the contemporaneous documentation exchanged by Dr. Chopra and Ms. Kirkpatrick. He also considered their testimony with respect to what they meant and understood at the relevant times, and heard detailed evidence with respect to the salient scientific matters.

[282] As a consequence, the Adjudicator was well-positioned to assess what someone with Dr. Chopra's years of experience and his expertise in AMR issues would understand with respect to the nature of the assignment. In addition to this objective assessment, however, the Adjudicator also had regard to what Dr. Chopra did in fact understand about the assignment.

[283] As noted earlier, the Adjudicator did not believe Dr. Chopra's explanation for his failure to raise any questions he may have had about the nature or scope of the assignment with Ms. Kirkpatrick. The Adjudicator further found that Dr. Chopra's subsequent correspondence indicated that he had a good understanding of what was expected of him: he just did not agree with it.

[284] The Adjudicator also found that Dr. Chopra's intentions with respect to the assignment were made clear in his testimony when he stated that classification was not the proper approach and was "completely irrelevant". The Adjudicator further found that Dr. Chopra wanted to change the scope of the assignment and make it into a full-blown inquiry into antimicrobial resistance. These findings and conclusions are based on the totality of the evidence and were reasonably open to the Adjudicator on the record before him.

(3) Did the Adjudicator Fail to Consider Relevant Arguments and Evidence?

[285] Dr. Chopra submits that the Adjudicator erred by failing to consider evidence demonstrating that Ms. Kirkpatrick had made up her mind that any further misconduct on the part of Dr. Chopra would lead to the termination of his employment, and that that she failed to warn him of the consequences of failing to complete the assignment.

[286] This argument may be quickly disposed of: the December 9, 2003 letter from Ms. Kirkpatrick to Dr. Chopra imposing the 20-day suspension for speaking out stated clearly that *any* further misconduct on his part would lead to the termination of his employment. Moreover, as the Adjudicator observed, it is "implicit that failing to follow instructions or an order could lead to discipline": at para. 801.

[287] Dr. Chopra also submits that Ms. Kirkpatrick terminated his employment before giving him a chance to complete the assignment. In support of his contention that this was unfair, Dr. Chopra noted that the Adjudicator set aside the termination of Dr. Lambert, in part, because he had not been afforded an opportunity to complete his assignment.

[288] There was, however, a material difference between Dr. Chopra's case and that of Dr. Lambert. As the Adjudicator pointed out at paragraph 830 of his reasons, unlike the situation of Dr. Lambert, Dr. Chopra had clearly communicated his intention not to complete the assignment prior to the termination of his employment. Once again, this was a factual determination made by the Adjudicator on the basis of the record before him and I have not been persuaded that the finding was unreasonable.

[289] Dr. Chopra also notes that his employment was terminated while he was on sick leave. He submits that Health Canada should have extended the deadline for the completion of his assignment until after he returned to work, particularly given that there was nothing urgent about the project.

[290] Dr. Chopra observes that the Adjudicator set aside Dr. Lambert's termination in part because of Health Canada's failure to make inquiries with respect to his ability to complete the assignment, arguing that the same result should have applied in his case. Dr. Chopra further submits that Health Canada's failure to extend the time for the completion of his assignment in light of his illness was discriminatory.

[291] Dealing with this last point first, I have not been directed to any evidence that would suggest that Dr. Chopra suffered from a condition that would have qualified as a disability rather than a transitory ailment, thus engaging the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

[292] More fundamentally, however, as was noted earlier, there were material differences between the case of Dr. Lambert and that of Dr. Chopra. In the case of Dr. Lambert, the Adjudicator found that Health Canada's conclusion that he was not going to complete the assignment, made halfway through the assigned period for its completion and while he was on sick leave, was "premature".

[293] In contrast, the Adjudicator found as a fact that by the time that Dr. Chopra went on sick leave, he had told his employer that his assignment was "not scientifically amenable", that he had decided that the classification assignment "was not worthy of his attention", and that he had given up on it. In these circumstances, Dr. Chopra's misconduct had already occurred by the time that he went on sick leave, and nothing would have been gained by extending the deadline for the completion of the assignment until after his return from leave.

[294] Dr. Chopra submits that the Adjudicator also erred by failing to address his submission that Ms. Kirkpatrick should have treated his case as a performance management issue, rather than a disciplinary one, and that she failed to follow the Treasury Board's *Guidelines for Discipline*. These Guidelines require that employees be given an opportunity to respond to their employer's concerns before being dismissed. According to Dr. Chopra, Ms. Kirkpatrick's failure to follow the Guidelines should vitiate the discipline.

[295] It is apparent that Health Canada did initially treat this matter as a performance management issue rather than a disciplinary one. Dr. Chopra received a performance appraisal in early 2003 that clearly identified the employer's concerns with respect to his productivity. He

was then given an assignment with strict timelines and reporting requirements, which is again consistent with performance management.

[296] Ms. Kirkpatrick testified that it was only after encountering Dr. Chopra's resistance to carrying out the assignment in accordance with his employer's instructions that she began to see this as a disciplinary matter rather than a performance problem.

[297] I note that Dr. Chopra was unable to cite any jurisprudence to support his claim that any procedural defects in the disciplinary process should vitiate the outcome. Moreover, where grievances allege a breach of procedural requirements, the "key issue is whether the provision in question creates a mandatory substantive right, in which case the discipline is generally held to be void *ab initio* in the event of non-compliance": Morton Mitchnick and Brian Etherington, *Labour Arbitration in Canada, 2nd edition*, looseleaf (Lancaster House: Toronto, 2012) at p. 231; See also: *Northwestern General Hospital and O.N.A.*, [1992] O.L.A.A. No. 10, 30 L.A.C. (4th) 95 (Starkman). The Treasury Board's *Guidelines for Discipline* specifically state that they are non-prescriptive and non-restrictive, and as such they do not create substantive rights.

[298] The more fundamental flaw in Dr. Chopra's argument is that he was in fact made aware of Ms. Kirkpatrick's concerns with his performance, and was given an opportunity to respond. Indeed, the Adjudicator expressly acknowledged Dr. Chopra's argument but found as a fact that Ms. Kirkpatrick had "expressed her concerns in her emails to him" and that he "had an opportunity to clarify his approach in his reply emails": at para. 800.

[299] Finally, Dr. Chopra submits that the Adjudicator erred by failing to consider the fact that Dr. Ghimire ultimately adopted Dr. Chopra's own approach to the assignment. According to Dr. Chopra, this not only confirmed that his concerns with the assignment were valid, but also that had he been given the opportunity to complete his report, it would likely have been similar to that of Dr. Ghimire.

[300] I am not persuaded that the failure of the Adjudicator to expressly address this argument constitutes a reviewable error. Not only is the Adjudicator presumed to have considered all of the evidence before him, Dr. Chopra had also not demonstrated that this evidence would have actually assisted him.

[301] The Adjudicator accepted Ms. Kirkpatrick's evidence that Dr. Chopra never provided a discernable approach to the assignment, so it is difficult to see how Dr. Ghimire could have adopted Dr. Chopra's approach. Moreover, not only does Dr. Ghimire's report confirm that the assignment was indeed "scientifically amenable", the extent of the work accomplished by Dr. Ghimire in four or five weeks stands in sharp contrast to what Dr. Chopra had accomplished in the seven weeks before he went on sick leave, the only evidence of which was Dr. Chopra's four-page "Preliminary Outline" and the emails he exchanged with Ms. Kirkpatrick.

(4) Did the Adjudicator Fail to Consider both Grounds for Discharge?

[302] Dr. Chopra submits that his termination letter identified two separate reasons for the termination of his employment: first, that he did not complete any work on his final assignment and could provide no rationale for his lack of progress; and second, that based on his disciplinary record and continued unwillingness to accept responsibility for assigned work, the bond of trust

between Dr. Chopra and Health Canada had been irreparably breached. Dr. Chopra says that the Adjudicator erred by only addressing the first ground for his dismissal, and failing to address the second, forward-looking allegation.

[303] According to Dr. Chopra, the burden is on the employer to prove that each of the alleged grounds of misconduct actually occurred. If the employer successfully proved some of the grounds but failed to prove others, the Adjudicator was required to examine the grounds that had been established in order to determine if they were sufficient to support the discipline imposed.

[304] Dr. Chopra has not disputed Health Canada's contention that the argument that the employer had advanced two separate grounds for his termination and had failed to establish both of these grounds was never raised before the Adjudicator. While the viability of the employment relationship was raised in assessing the appropriateness of the sanction imposed on Dr. Chopra, Health Canada says that it was never the subject of any submissions as a ground of termination.

[305] As a consequence, Health Canada submits that this Court should exercise its discretion not to entertain this argument. The argument does not relate to an issue of jurisdiction, and it would be prejudicial to the employer and indeed to this Court to now consider these arguments concerning the scope of the termination letter.

[306] Reviewing courts clearly have the discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so. As a general rule, this

discretion will not be exercised in favour of an applicant where the issue could have been, but was not raised before the first-instance tribunal.

[307] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 22-28, the Supreme Court identified the considerations underlying this general principle. These include the fact that the legislature has entrusted the determination of the issue to the administrative tribunal in question. As a result, courts should respect the legislative choice of the tribunal as the first-instance decision maker by giving the tribunal the opportunity to deal with the issue first and make its views known. This is especially so where the issue in question relates to the tribunal's specialized functions or expertise.

[308] In addition, raising an issue for the first time on judicial review can unfairly prejudice the opposing party and may deny the Court the evidentiary record required to consider the issue: see *Toussaint v. Canada Labour Relations Board*, [1993] F.C.J. No. 616, 160 N.R. 396 (F.C.A.), at para. 5

[309] The issue here goes directly to the specialized function of the Adjudicator, namely, the proper approach to deciding questions of discipline in an employment setting. As a consequence, I find that it is inappropriate for Dr. Chopra to raise the issue for the first time on judicial review.

[310] In the alternative, even if I had been prepared to exercise my discretion in Dr. Chopra's favour and to entertain this argument, I would not have accepted his submission. This is because

a plain reading of the termination letter discloses that the only ground advanced for the termination of Dr. Chopra was "insubordination" based upon his conduct with respect to the classification assignment. The comments made with respect to the breakdown in the employer/employee relationship were offered as a rationale for the choice of termination as the appropriate sanction, and not as a separate, independent ground for discipline.

E. *Conclusion*

[311] For these reasons, Dr. Chopra has not persuaded me that the Adjudicator's decision to uphold the finding of insubordination with respect to the classification assignment was unreasonable. That is not, however, the end of the matter.

[312] The Adjudicator also upheld the sanction that had been imposed on Dr. Chopra for his misconduct, namely the termination of his employment. The Adjudicator's finding that this sanction was justified was based upon Dr. Chopra's prior disciplinary record, which included three suspensions: one for five days, one for ten days and one for 20 days. While recognizing that Dr. Chopra's lengthy service with Health Canada was a mitigating factor, the Adjudicator nevertheless found that it was not sufficient to mitigate his misconduct, that the bond of trust between Dr. Chopra and Health Canada had been irreparably breached, and Dr. Chopra had demonstrated that he was incapable of being supervised.

[313] Dr. Chopra's five-day suspension was evidently upheld at adjudication and is not before me, and I have dismissed Dr. Chopra's application for judicial review with respect to the Adjudicator's decision to uphold the ten-day suspension.

[314] The finding that termination was an appropriate penalty for Dr. Chopra's insubordination with respect to the classification assignment was reasonable, to the extend that it was based upon a prior disciplinary record that included a five-day, a ten-day and a 20-day suspension. I have, however, quashed the Adjudicator's decision with respect to Dr. Chopra's 20-day suspension for speaking out.

[315] Given that the disciplinary action for speaking out will have to be revisited, it may also become necessary to revisit the appropriateness of the penalty imposed on Dr. Chopra in this case. Consequently I will set aside the Adjudicator's finding that the termination of Dr. Chopra's employment was a reasonable sanction for his insubordination in relation to his classification assignment so as to permit the issue to be revisited, recognizing that this will only be necessary if Dr. Chopra's 20-day suspension is ultimately varied or set aside.

[316] To be clear: the *only* issue being remitted for redetermination is the appropriateness of the termination of Dr. Chopra's employment as a sanction for his demonstrated insubordination in light of his prior disciplinary record, and this issue is only being remitted for redetermination in the event that Dr. Chopra's 20-day suspension for speaking out is ultimately varied or set aside.

VI. The Termination of Dr. Haydon's Employment

[317] Dr. Haydon's employment with Health Canada was terminated for insubordination on July 14, 2004, specifically for her failure to properly complete work assigned to her in a timely manner.

[318] The termination letter signed by Ms. Kirkpatrick stated:

> In early December 2003, you and your immediate supervisor held a discussion regarding your performance evaluation and for the second consecutive year your performance was assessed as being significantly below acceptable standards for a senior veterinary drug evaluator. At that time, you indicated that the review of submissions in your possession would be concluded in less than two months - this commitment was not met. In early May 2004, you were provided with a written warning that significant improvements were expected in your overall performance.
>
> Your response to these events has been most disturbing. Under no circumstances, and contrary to your assertions otherwise, can you claim a lack of knowledge of the issues brought to your attention during your performance evaluation process. However, you have again chosen not to accept any responsibility for your negative performance.
>
> The most recent scheduled update on your work assignment shows little evidence of any efforts or intention on your part to achieve the significant improvements required in your performance. Specifically, I note the commitment by you to finally complete, by June 4, 2004, the drug submissions which have been in your possession for over two years. Instead of complying with the agreed instructions, you submitted an incomplete draft document and stated that there would be further delays in completing the assignment, despite not having any other work assigned to you. The final report submitted by you lacks coherency and is incomplete, and is inadequate to reach any decision respecting the disposition of the submissions. I conclude that the excessive amount of time consumed by you to assemble this inconclusive report is a deliberate and systematic attempt on your part to avoid and evade work assigned in accordance with instructions given to you, and that your conduct constitutes insubordination.
>
> Given your previous disciplinary record and your continued unwillingness to accept responsibility for work assigned to you, I have determined that the bond of trust that is essential to a productive employer employee relationship has been irreparably breached, that there is no reasonable expectation that your behaviour will change and that the existing employer employee relationship is no longer viable.

> On the basis of the foregoing, I have decided to terminate your employment for cause pursuant to the authority delegated to me by the Deputy Head and in accordance with the *Financial Administration Act* Section 11(2)(f). In reaching my decision I have considered mitigating factors, particularly your years of service.
>
> The termination will take effect immediately.

A. *Background*

[319] Dr. Haydon's immediate supervisor at the relevant time was Dr. Ian Alexander. Dr. Alexander was the Chief of the Clinical Evaluation Division (CED) of the VDD at Health Canada, reporting to Ms. Kirkpatrick as the Director General of the VDD.

[320] In 1996, Health Canada issued a NOC for a drug called Pirsue, which was the trade name for an aqueous gel formulation containing the generic antibiotic pirlimycin, used in the treatment of mastitis in dairy cattle. As a result, the VDD had information on Pirsue in its possession.

[321] In August of 2000, the manufacturer of Pirsue submitted a New Drug Submission (NDS) for a Pirsue Sterile Solution, which contained the same dosage of antibiotics as the aqueous gel, but different additives. With respect to the efficacy of the new Sterile Solution, the manufacturer relied on a bioequivalence report for the already-approved Pirsue aqueous gel.

[322] The manufacturer subsequently submitted two Supplementary New Drug Submissions (SNDSs) for additional uses of the aqueous gel and the not-yet approved Sterile Solution. The first was for the use of the Pirsue aqueous gel to treat clinical and sub-clinical mastitis caused by certain specified kinds of bacteria. The second SNDS related to an additional use of the Pirsue

Sterile Solution for the treatment of clinical and sub-clinical mastitis in dairy cows caused by bacteria other than that those specified in the original NDS.

[323] In January of 2002, Dr. Haydon was assigned to review the Pirsue NDS, and by March of 2002, the review of the animal safety and efficacy of all three Pirsue drug submissions had been assigned to her. It was Dr. Haydon's work on these drug submissions that ultimately led to the termination of her employment in July of 2004.

[324] Dr. Alexander estimated in 2002 that the review of the Pirsue NDS should take approximately 2 months, and that a further month would be required for the review of the SNDSs. In her October to December, 2002 work plan, Dr. Haydon advised Dr. Alexander that her review of the Pirsue NDS was "almost complete".

[325] Dr. Haydon had received a positive performance appraisal for the period from June to December of 2001, which noted that she was "very dedicated to conducting her reviews in a complete and thorough manner."

[326] However, in February of 2003, Dr. Haydon received a negative performance appraisal from Dr. Alexander for the period from January to September 2002, rating her overall performance as "low". Dr. Alexander emphasized the need for Dr. Haydon to focus on the review of the scientific and technical aspects of data in drug submissions, to limit the inclusion of unnecessary and extraneous details in her reviews, and to be concise and clear. He also stressed the need for her reviews to stay within the mandate of the VDD, namely animal safety

and efficacy. Objectives were identified for the following year which included the requirement that Dr. Haydon meet deadlines for deliverables.

[327] Dr. Haydon confirmed in her testimony before the Adjudicator that Dr. Alexander had spoken to her about the quality of her reports, counselling that her reviews should stay within the mandate of the Division, and not include her personal opinions or extensive historical information. Dr. Haydon also acknowledged that even Dr. Chopra had commented on the length of one of her reports when he was Acting Chief of the Division.

[328] Dr. Haydon viewed Dr. Alexander's negative comments regarding her performance as constituting harassment and retaliation. She referred the matter to Mr. Yazbeck and correspondence between Mr. Yazbeck and the employer ensued. Dr. Haydon ultimately grieved this performance appraisal. It appears that this grievance was dismissed at the final level within Health Canada, and it was not before the Adjudicator.

[329] Dr. Haydon submitted her review of the Pirsue NDS on May 8, 2003. The next day, she submitted a draft letter to be sent to the manufacturer requesting additional information (known as an Additional Data Letter or ADL). Dr. Haydon's only remaining assignments at that point were the two SNDS files for Pirsue.

[330] In accordance with VDD practice, Dr. Haydon's review of the Pirsue NDS was then sent to a second reviewer. Additional data was provided by the manufacturer in response to the ADL in October of 2003, including supporting data for a report on safety that had previously been

submitted. With respect to the efficacy issue, the manufacturer reiterated its earlier position as to bioequivalence, submitting that it should not be required to submit additional bioequivalence data as reliance could be placed on the same bioequivalence study on which the American approval of the Pirsue Sterile Solution had been based.

[331] Dr. Alexander met with Dr. Haydon in November of 2003. He inquired about the approval of Pirsue in the United States and asked Dr. Haydon to look at what the United States authorities had considered when they used the manufacturer's bioequivalence study as the basis for their approval.

[332] Dr. Haydon testified that she did not recall being asked to carry out that review. In a follow up email summarizing the discussion and sent to Dr. Alexander on November 19, 2003, Dr. Haydon noted that "the manufacturer appears to still be pursuing bioequivalence studies despite the study being rejected and [sic] because it did not address the subject product."

[333] Dr. Alexander and Dr. Haydon met again in December of 2003 in order to discuss her performance evaluation. In the course of that meeting, Dr. Haydon advised Dr. Alexander that her review of the Pirsue submissions would be completed in less than two months.

[334] Dr. Haydon raised a concern at this meeting about the appropriateness of reviewing the SNDS for the Pirsue Sterile Solution before the NDS review for the same product was finished, suggesting that it was contrary to the law to do so, although she did not provide any legal support for her concern. Dr. Alexander testified before the Adjudicator that the VDD had approved the

simultaneous review of the Pirsue submissions because they were linked and relied on the same data, with the understanding that the SNDS would not be approved unless the original Pirsue NDS was also approved.

[335] On February 17, 2004, Dr. Alexander wrote to Dr. Haydon requesting an update on the status of the Pirsue reviews and an estimate of the time required for their completion. Dr. Haydon responded that she had been on sick leave in December and January and that she was scheduled to serve her 10-day suspension for speaking out in late February/early March. As a result, she said that she could not provide Dr. Alexander with either a status report or an estimated completion time. Dr. Alexander then indicated that they could discuss the status of the Pirsue reviews when she returned to work in March. This meeting never took place.

[336] On March 22, 2004, Dr. Haydon wrote to the second reviewer outlining her concerns with the SNDSs for the Pirsue Sterile Solution. She again noted that the manufacturer had not submitted bioequivalence data for the Sterile Solution, which was formulated differently from the aqueous gel. Dr. Haydon also restated her view that it was both inappropriate and contrary to the law to review the SNDS for the Pirsue Sterile Solution when a NOC had not yet issued for the original NDS.

[337] Dr. Alexander met with Dr. Haydon on May 6, 2004 to discuss his ongoing performance concerns. He also gave her a letter that day, noting that his concerns had been raised with Dr. Haydon in the past, both in discussions and formal performance review documents. Dr. Alexander's letter stated that Dr. Haydon's productivity had not improved since her last

performance appraisal, and that she still did not meet the minimal standard set for drug evaluators. According to Dr. Alexander, even though her workload had been reduced to allow her to focus on specific overdue submissions, there remained "large amounts of unaccounted for and unproductive time" and Dr. Haydon's productivity was "so minimal as to be almost non-existent".

[338] Dr. Alexander also noted that there appeared to be some reluctance on Dr. Haydon's part to conduct her work within the animal safety and efficacy mandate of the VDD, with her opting instead to address matters relating to human safety evaluations.

[339] Dr. Alexander advised Dr. Haydon that her performance remained at an unsatisfactory level that could not continue. As a consequence, she was to be placed on a shorter work planning cycle with detailed work plans for her to complete during each reporting period. Dr. Haydon was also warned that in the event that her performance did not improve, it could result in her demotion or the termination of her employment. Dr. Alexander also asked Dr. Haydon to immediately bring to his attention "any issues that prevented her from accomplishing her assigned tasks".

[340] Ms. Kirkpatrick was evidently involved in drafting Dr. Alexander's May 6, 2004 letter to Dr. Haydon and she testified that she agreed with its observations and conclusions.

[341] Dr. Alexander also signed off on Dr. Haydon's performance evaluation for the period from October 2002 to September 30, 2003 on May 6, 2004. This appraisal noted that based upon

Dr. Haydon's accomplishments over the period under review, Dr. Alexander could not account for her time, and that her level of productivity continued to be low. Dr. Alexander reiterated that clear expectations would be set for Dr. Haydon's performance and time lines would be set for the completion of projects.

[342] Dr. Haydon responded to Dr. Alexander's May 6, 2004 comments by asking for evidence of her alleged performance problems, suggesting that the comments constituted "aggravated harassment against [her]". Although Dr. Haydon stated that Dr. Alexander never answered her request for "evidence", he did respond to her message stating that his "concerns about [her] unacceptable performance and output ha[d] been adequately documented and discussed with [her]." Dr. Alexander confirmed in his testimony that he did not answer Dr. Haydon's request for "evidence" because he had already explained his concerns about her performance to her.

[343] By mid June of 2004, Dr. Haydon had completed and submitted all of the outstanding Pirsue drug reviews that had been assigned to her.

[344] Dr. Alexander and Ms. Kirkpatrick reviewed Dr. Haydon's work and both had significant concerns with respect to the quality and content of the reports. Amongst other things, they were concerned about Dr. Haydon's failure to review the manufacturer's bioequivalence study. They were of the view that she should have done this as a matter of course, without being asked. They were all the more concerned because Dr. Haydon had been specifically asked on several occasions to review the American bioequivalence data, and she still did not do so.

[345] Dr. Alexander viewed Dr. Haydon's work output on all three assignments as unsatisfactory, concluding that he would have to reassign the work to another evaluator to be redone. Dr. Alexander was of the opinion that a senior drug evaluator of Dr. Haydon's experience should have been able to produce a "more succinct report and evaluation of the data".

[346] Ms. Kirkpatrick was of the opinion that Dr. Haydon's work was incoherent, and that it raised more questions than answers. She testified that it could not be used as a decision-making tool and that a second reviewer would not be able to conduct another review based upon Dr. Haydon's initial review. According to Ms. Kirkpatrick, a second reviewer should be able to conduct his or her own review on the basis of the contents of the first review, and should not have to review the original drug submission and data.

[347] Ms. Kirkpatrick testified that after reviewing Dr. Haydon's work and speaking with Dr. Alexander, she no longer saw Dr. Haydon's actions as a performance issue but rather as a behavioural matter. She concluded that Dr. Haydon had no intention of completing the work assigned to her, and that the deficiencies in her reports were the result of insubordination rather than poor performance. Dr. Haydon notes that her supervisors reached their conclusions without ever discussing their concern that she was acting deliberately with her.

[348] Health Canada submitted that the work assigned to Dr. Haydon was neither voluminous nor complex, that it was well within her abilities and experience as a senior drug evaluator, that she had not done what she had been instructed to do, and that the completion of her reports should not have taken the "inordinate length of time" that they did.

[349] Dr. Haydon went on sick leave on June 21, 2004. She did not return to work prior to the termination of her employment on July 14, 2004.

[350] At the hearing before the Adjudicator Health Canada identified some 30 problems with Dr. Haydon's work on the Pirsue reviews, providing detailed submissions with respect to each problem. These are described at paragraphs 570 to 576 of the Adjudicator's decision.

[351] Dr. Haydon objected to these concerns only being raised at the adjudication hearing, suggesting that basic labour relations principles required that any deficiencies in her performance should first have been raised with her in order that she could have an opportunity to respond. The Adjudicator nevertheless found that the problems were "sufficient to demonstrate the employer's concerns": at para. 569.

B. *The Adjudicator's Decision*

[352] While identifying "some inconsistencies" in Dr. Haydon's letter of termination and some confusion in Ms. Kirkpatrick's testimony as to which document she was referring to in the letter, the Adjudicator nevertheless found that the letter sufficiently identified Health Canada's grounds for terminating Dr. Haydon's employment, specifically its conclusion that the amount of time Dr. Haydon had spent preparing an inadequate, incoherent and inconclusive report amounted to "a deliberate and systematic attempt to 'avoid and evade' work assigned to her": at para. 811.

[353] The Adjudicator also accepted that what Dr. Alexander and Ms. Kirkpatrick had initially treated as a performance-related concern came to be viewed as a matter of misconduct when they concluded that Dr. Haydon's lack of productivity and the quality of her work was in fact an intentional act of misconduct.

[354] The Adjudicator observed that the grievance of Dr. Haydon's negative performance appraisal was not before him, and that evidence related to that evaluation was only relevant inasmuch as it demonstrated that Health Canada had initially tried to address its concerns through a non-disciplinary process. The evidence also demonstrated that Dr. Haydon was aware of Dr. Alexander's concerns about her lack of productivity.

[355] The Adjudicator restated the elements of insubordination as requiring that a clear order given by someone in authority, evidence that the order or instruction was disobeyed, and the absence of any reasonable explanation for the employee's failure to comply with the order.

[356] The Adjudicator found as a fact that Dr. Haydon was aware of her duties and responsibilities in carrying out a drug review, that she had been specifically instructed by Dr. Alexander to consider the United States' approval of Pirsue in her review of the Canadian submission, and that the instructions to Dr. Haydon in this regard were clear.

[357] The Adjudicator noted that while Health Canada had attempted to draw its concerns to Dr. Haydon's attention, both through Dr. Alexander's face to face discussions with her and via her performance appraisals, Dr. Haydon viewed Dr. Alexander's comments as harassment. The

Adjudicator found as a fact that Dr. Haydon "was unwilling to direct her mind to [Dr. Alexander's] legitimate concerns about her overall job performance". He also found that she refused to recognize any fault or deficiencies in her work, either at the time in question or at the hearing: at para. 814.

[358] While recognizing that the 30 problems with the Pirsue review identified by Health Canada at the hearing had not been raised with Dr. Haydon prior to the termination of her employment, the Adjudicator found that "she was either aware of or should have been aware of many of the identified problems": at para. 815.

[359] According to the Adjudicator, the problems with Dr. Haydon's work "demonstrated a sloppiness in presentation and analysis that were, for an evaluator of Dr. Haydon's experience, unacceptable and ultimately unexplained". The Adjudicator found as a fact that Dr. Haydon "displayed a conscious disregard of the standards and work expectations of a senior evaluator, which rendered her conduct deliberate" and that she had made a conscious choice to perform her duties in the manner that she chose to consider adequate: at paras. 815-816.

[360] The Adjudicator found that Dr. Haydon had not provided a reasonable explanation for her failure to obey Dr. Alexander's instructions. Although Dr. Alexander made efforts to assist Dr. Haydon in improving her performance, her conduct demonstrated a conscious choice to disregard the obligations of her position: at paras. 817-818.

[361] The Adjudicator also concluded that there had been no condonation of Dr. Haydon's performance by Health Canada, given that the employer had raised its performance concerns with

her on several occasions and that these attempts to manage her performance were ultimately unsuccessful. According to the Adjudicator, Health Canada's "initial efforts to address performance issues through the evaluation process and to give Dr. Haydon an opportunity to demonstrate an improvement in performance cannot be considered condonation": at para. 819.

[362] Given Dr. Haydon's past disciplinary record, the Adjudicator found that the termination of her employment was not an excessive disciplinary measure. He noted that all of her acts of misconduct reflected "an underlying defiance of her employer" and "displayed Dr. Haydon's fundamental inability to accept supervision and direction from her employer": at para. 820.

[363] The Adjudicator concluded that Health Canada had shown that Dr. Haydon was "not capable of working under supervision and that the employment relationship is not salvageable". He further found that her refusal to acknowledge any remorse or fault on her part also supported the finding that the employment relationship could not be restored. He concluded by observing that Dr. Haydon had "remained quietly defiant to the end". Consequently her grievance was dismissed: at paras. 820-822.

C. *The Issues*

[364] As with Dr. Chopra's termination grievance, I agree with the parties that the standard of review to be applied to the Adjudicator's decision to uphold the termination of Dr. Haydon's employment is that of reasonableness.

[365] Dr. Haydon says that the decision was not reasonable, arguing that the Adjudicator:

1. Ignored evidence regarding Health Canada's similar treatment of Dr. Chopra, Dr. Haydon and Dr. Lambert;
2. Misstated the law on insubordination resulting in a flawed analysis;
3. Failed to address relevant arguments and evidence; and
4. Failed to assess Health Canada's entire rationale for the discharge.

D. *Analysis*

[366] I would once again start my analysis by observing that not only did the Adjudicator carefully review the contemporaneous documentation relevant to this grievance, he also had the opportunity to hear from the major players and to assess the relative credibility of their competing versions of the events in issue. It also bears repeating that it is not the role of this Court, sitting in review, to second-guess the Adjudicator's factual findings (including his findings of credibility) unless it can be shown that those findings were unreasonable.

(1) Health Canada's Similar Treatment of Drs. Chopra, Haydon and Lambert

[367] Dr. Haydon advances the same argument as did Dr. Chopra with respect to the "common approach" taken by Health Canada in terminating the employment of Drs. Chopra, Haydon and Lambert. I have already addressed this argument in the context of Dr. Chopra's application for judicial review of the termination of his employment and my analysis there has equal application to this case.

(2) Did the Adjudicator Misstate the Law on Insubordination Resulting in a Flawed Analysis?

[368] Dr. Haydon observes that she had completed all of the Pirsue reviews assigned to her prior to the termination of her employment. As a consequence she submits that it cannot be said that she had failed to do what was asked of her.

[369] According to Dr. Haydon, the Adjudicator erred by failing to find that she had actual knowledge of the various problems with her work on the Pirsue drug submissions, noting that the Adjudicator found only that she knew *or should have known* of at least some of the 30 problems with her work that were identified by Health Canada at the hearing.

[370] Dr. Haydon says that the Adjudicator erred in failing to consider whether she had the requisite intent to be insubordinate. She submits that there was no evidence of any such intent on her part, and questions how she could be found to be insubordinate in the way that she carried out the Pirsue reviews, given that she was simply doing what she had always done in conducting drug reviews.

[371] As noted earlier in these reasons, I have accepted that there can be a subjective component to insubordination, and that a genuine lack of understanding on the part of an employee as to what is being asked of him or her may excuse a failure to comply with a clear order. That said, I have not been directed to any evidence in this case where Dr. Haydon suggested that she did not understand the assignments given to her or what was expected of her by her employer. Rather, her position is that she did in fact follow the employer's orders, by completing the Pirsue assignments.

[372] It is, moreover, apparent from a review of the entirety of the reasons given by the Adjudicator for dismissing Dr. Haydon's grievance with respect to the termination of her employment that he found that Dr. Haydon did in fact understand what had been asked of her, and that she made a conscious decision not to comply with her employer's demands. These findings of fact were reasonably open to the Adjudicator on the record before him.

[373] It is true that in discussing Dr. Haydon's awareness of the shortcomings of her work, the Adjudicator used the words "*knew or should have known*" at paragraph 815 of his reasons. Although this may not have been the most appropriate word choice, the modern approach to reasonableness review requires that reviewing courts should have regard to the reasons of an administrative decision-maker as a whole, in light of the record, rather than parsing individual words used in the decision. When the reasons in this case are read as a whole, with a view to the underlying record, it is readily apparent that the Adjudicator was satisfied that Dr. Haydon was aware of what was being asked of her, and that she consciously intended to defy her employer.

[374] This is evident from the Adjudicator's finding that Dr. Haydon "displayed a *conscious disregard* of the standards and work expectations of a senior evaluator, *which rendered her conduct deliberate*": at para. 816. The Adjudicator further found as a fact that Dr. Haydon's conduct "demonstrated a *conscious choice* to disregard her obligations as a senior veterinary drug evaluator": at para. 818.

[375] The Adjudicator found as a fact that Dr. Haydon had been specifically instructed by Dr. Alexander to address the bioequivalence study relied upon by the manufacturer of Pirsue in support of its efficacy claims for the Pirsue Sterile Solution. She was also instructed to examine how the bioequivalence study was treated by the United States' drug authorities in approving Pirsue products for use in that country. These instructions were understood by Dr. Haydon who chose to ignore them, and her cross-examination on this point amply supports the Adjudicator's finding that Dr. Haydon "remained quietly defiant to the end": see Applicant's Record, pp. 11044, 11050-11059 and the Adjudicator's decision at para. 821.

[376] In light of the above, Dr. Haydon has not persuaded me that the Adjudicator made a reviewable error in this regard.

(3) Did the Adjudicator Fail to Address Relevant Arguments and Evidence?

[377] Dr. Haydon contends that the adjudicator failed to undertake a complete analysis of the employer's decision to terminate her employment. In particular, she says that the Adjudicator ignored submissions and relevant evidence on the main issues before him, including arguments with respect to Health Canada's failure to apply its own policies in terminating Dr. Haydon. Amongst other things, Dr. Haydon argues that Health Canada failed to follow Treasury Board policies and did not draw its concerns about her drug review reports to her attention or give her a proper opportunity to address those concerns.

[378] I have already addressed the import of Treasury Board policies in the context of Dr. Chopra's application for judicial review. Dr. Haydon's argument is, moreover, addressed by the Adjudicator's findings that Health Canada did initially attempt to deal with the problems with

Dr. Haydon's work as a performance management issue, and that the employer's concerns with respect to her performance were repeatedly drawn to her attention and discussed with her. It was only when the employer came to see the matter as a behavioural issue that it began to treat the matter as a disciplinary one.

[379] Dr. Haydon also says that it was a reviewable error for the Adjudicator to fail to deal expressly with her contention that her work on her final assignment was consistent in form and content with the work that she had previously submitted to Health Canada which had been accepted by her employer without any negative comment. As a consequence, Dr. Haydon argues that it was simply impossible for the employer to justify discipline on the basis that her manner of completing the Pirsue assignments constituted insubordination.

[380] This argument is based upon an inaccurate premise: Health Canada had in fact repeatedly raised concerns with Dr. Haydon about her work. She had received two unsatisfactory performance evaluations specifically alerting her to the fact that she had failed to meet the minimum standards set for drug evaluators. She had also been also informed that her level of performance was unacceptable, and that her continued employment was at risk unless she improved her performance.

[381] By way of example, Dr. Alexander had spoken to Dr. Haydon about an earlier review that she had conducted with respect to a drug called Synergisten. Dr. Alexander had informed Dr. Haydon that her report contained extraneous information that made it hard to follow, and that

her reports should be more focused and concise. Indeed. as previously mentioned, even Dr. Chopra had criticized Dr. Haydon's reports for being too long.

[382] Furthermore, Dr. Haydon's performance appraisal for the period from January 1, 2002 to September 30, 2002 and October 2002 to September 30, 2003 also identified concerns with respect to the time that it took Dr. Haydon to carry out her drug reviews. The earlier appraisal noted that she had to reduce her review times, advising her to focus on "the review of scientific/technical aspects of data and [decrease] the amount of unnecessary/extraneous details in evaluation reports." She was also counselled to stay within the animal safety and efficacy mandate of her Division. The later appraisal indicated that Dr. Alexander could not account for much of Dr. Haydon's time, that her productivity remained low, and that clear expectations and timelines would be set for the completion of her projects.

[383] Rather than address her employer's concerns, Dr. Haydon chose to treat her supervisor's comments about her performance as "baseless accusations" and "harassment". An email exchange between Dr. Haydon and Dr. Alexander concerning the earlier performance appraisal is instructive in this regard. On February 21, 2003, Dr. Alexander instructed Dr. Haydon that, "[n]otwithstanding your views on this Performance Evaluation, you should be aware that you are required to undertake and complete work that has been assigned to you." He added that the Performance Evaluation Process "is an on-going, discussion process between supervisors and employees" on performance and work plans. In response, Dr. Haydon wrote on February 25, 2003, that Dr. Alexander had, the previous day, "visited [her] office to deliver … the

Performance Discussion document", that she considered this visit "to be intimidating, retaliatory and further harassment", and that she would be "pursuing this matter by filing a grievance."

[384] As the Adjudicator observed, when Dr. Alexander raised his concerns with Dr. Haydon, she "was unwilling to direct her mind to his legitimate concerns about her overall job performance": at para. 814.

[385] Moreover, the Adjudicator's finding that Dr. Haydon had been insubordinate was based in part upon her intentional defiance of her employer's instructions with respect to her review of the Pirsue submissions. I do not understand Dr. Haydon to be arguing that she had a past practice of intentionally defying her employer's instructions in her drug reviews that had been condoned by her employer.

[386] In addition to the performance management discussions referred to above, Dr. Haydon had also been told in the 2003 letter suspending her for speaking out that any additional misconduct on her part could result in the termination of her employment. While there may be a question as to the appropriateness of the finding of misconduct with respect to Dr. Haydon's speaking out, she was clearly aware of the potential consequences of further misconduct.

[387] Dr. Haydon was, moreover, once again put on notice by Dr. Alexander in May of 2004 that failure to improve her performance could result in her demotion or the termination of her employment. As a consequence, Dr. Haydon received fair notice that her conduct was putting her job in jeopardy.

[388] Dr. Haydon submits that the fact that she completed the Pirsue assignments undermines the allegation she purposefully evaded work. However, this argument ignores the fact that it took Dr. Haydon an inordinate length of time to complete the assignments. Dr. Haydon was assigned the Pirsue NDS review in January of 2002 and the two Pirsue SNDSs by March of 2002. Dr. Alexander had estimated that the NDS review should take approximately two months, and that the review of the SNDSs should take a further month. Yet Dr. Haydon only completed her review of the Pirsue NDS in March 2003, some 14 months after it was assigned to her. The Pirsue SNDS reviews were not completed until mid-June 2004, some 27 months after they were first assigned to Dr. Haydon.

[389] Dr. Haydon's argument also fails to take into account Dr. Alexander's observation in May of 2004 that even though her workload had been reduced to allow her to focus on specific overdue submissions, there remained "large amounts of unaccounted for and unproductive time" and that her productivity was "so minimal as to be almost non-existent".

[390] Dr. Haydon also contends that the Adjudicator erred by failing to address her concern that the employer's "policy" decision to proceed with the Pirsue SNDS before it had approved the NDS for the drug was illegal. She submits that the Adjudicator's failure to address this issue implies that it is acceptable for an employer to discipline an employee for merely questioning the legality of an employer's order, even if the employee has a professional responsibility to raise these issues with the employer.

[391] I am not persuaded that the failure of the Adjudicator to expressly address this issue constitutes a reviewable error. Not only is an administrative decision-maker not required to address every issue and argument raised before him, it is not at all clear that Dr. Haydon's concerns on this point played any role in the decision to terminate her employment.

[392] For these reasons, I am not persuaded that the Adjudicator failed to address relevant arguments and evidence. He found as a fact that Dr. Haydon did not complete her assignments in a manner consistent with her years of experience as a senior drug evaluator. His reasons demonstrate that he understood the nature of the issue at hand, and the nature of the employer's concerns with respect to how Dr. Haydon handled the assignment. Overall, the decision discloses a logical and coherent connection between the evidence before the Adjudicator and the reasons given for the dismissal of the termination grievance.

(4) Did the Adjudicator Fail to Consider all of the Grounds for Discipline?

[393] Finally, Dr. Haydon submits that her termination letter identified four main grounds for discipline. These are the employer's claims that:

(1) Dr. Haydon's performance had been below acceptable standards for the second consecutive year, and that despite a commitment in December 2003 to complete all review submissions in her possession within two months, she failed to do so;

(2) She submitted a draft document on June 4, 2004, and said there would be further delays in completing the assignment despite having no other work assigned to her;

(3) Her final report on the Pirsue assignment was evidence that she had no intention of improving, and the excessive amount of time she spent assembling it was a deliberate attempt to evade work; and

(4) Based on her previous disciplinary record and her unwillingness to accept responsibility for assigned work, the "bond of trust that is essential to a productive employer employee relationship ha[d] been irreparably breached …"

[394] According to Dr. Haydon, the adjudicator failed to determine whether the employer had proven each of these allegations. If Health Canada failed to prove any of the allegations, Dr. Haydon says that the Adjudicator was required to consider whether discharge was still justified on the basis of the ground that had been proved, and that he failed to do so.

[395] Dr. Haydon submits that the Adjudicator's reasons only focus on her past performance evaluations and the Pirsue assignment. There were no findings with respect to the other allegations, including what she says was the most serious one: namely the claim that, based on her past record, the bond of trust between Dr. Haydon and her employer had been irreparably breached.

[396] According to Dr. Haydon, it was not enough for the Adjudicator to find that she could not be supervised - he had to go on and actually link this finding to his conclusion that the bond of trust between employer and employee had been irreparably broken.

[397] Dr. Haydon submits that a breach of the bond of trust between and employee and an employer contemplates a severe problem in the overall employment relationship, beyond the incident that led to the discipline. This necessarily requires an assessment of whether the employment relationship is viable on a *going-forward* basis.

[398] As was the case with Dr. Chopra, it does not appear that this argument was advanced before the Adjudicator, and it is not appropriate for Dr. Haydon to raise it for the first time on judicial review. For the reasons outlined in my analysis of Dr. Chopra's termination grievance, I decline to exercise my discretion to entertain this argument for the first time on judicial review.

[399] Moreover, and in any event, I agree with Health Canada that a plain reading of the letter of termination reveals that there was really only one ground advanced for the termination of Dr. Haydon's employment, namely her "deliberate and systematic attempt[s] … to avoid and evade work assigned in accordance with instructions given to [her]", leading to Health Canada's ultimate conclusion that her conduct constituted insubordination.

[400] I am further satisfied that the comments made in the termination letter with respect to the breakdown of the employer/employee relationship were offered as a rationale for the choice of termination as the appropriate sanction, and not as a separate, independent ground for discipline. The finding that the bond of trust between Dr. Haydon and her employer had been irreparably breached was, moreover, amply supported by the record before the Adjudicator, including the extensive oral testimony given by Dr. Haydon during the hearing. Consequently, Dr. Haydon has not persuaded me that the Adjudicator erred in this regard.

E. *Conclusion*

[401] For these reasons, Dr. Haydon has not persuaded me that the Adjudicator's decision to uphold Health Canada's finding of insubordination was unreasonable. Once again, however, this is not the end of the matter.

[402] As was the case with Dr. Chopra, the Adjudicator upheld the sanction imposed on Dr. Haydon for her misconduct, namely the termination of her employment, based upon her prior disciplinary record. This included her 10-day suspension in 2003 for speaking out. Given that I have quashed the Adjudicator's decision with respect to that suspension and the disciplinary action will have to be revisited, it may also become necessary to revisit the appropriateness of the penalty imposed on Dr. Haydon, to the extent that it was based upon this prior discipline.

[403] There is, however, a second concern with respect to Dr. Haydon's discipline that did not arise in the case of Dr. Chopra. Ms. Kirkpatrick confirmed in her testimony that in fashioning her disciplinary response to Dr. Haydon's insubordination, she relied on Dr. Haydon's *two* prior suspensions for speaking out. These were the 10-day suspension in February of 2004 that was addressed earlier in these reasons, and an earlier suspension from February of 2001, which was also for speaking out. This suspension was the subject of the proceedings in *Haydon # 2*.

[404] However, the 2001 suspension was only to stay on Dr. Haydon's disciplinary record for two years, assuming that no further disciplinary measures were imposed upon her in the interim.

That is, the "sunset clause" in the collective agreement in effect between Dr. Haydon's union and the employer provided that:

> **37.04** Notice of disciplinary action which may have been placed on the personnel file of an employee shall be destroyed after two (2) years have elapsed since the disciplinary action was taken provided that no further disciplinary action has been recorded during this period.

[405] Nearly three years had elapsed between Dr. Haydon's two suspensions for speaking out without any intervening disciplinary measures being taken against her. Consequently it was not open to Ms. Kirkpatrick to rely on the 2001 suspension in determining the appropriate sanction for Dr. Haydon in 2004.

[406] This argument was referred to by the Adjudicator as part of his summary of Dr. Haydon's submissions: see para. 705. However, he never addressed the issue in assessing the appropriateness of discharge as a sanction for Dr. Haydon's insubordination, nor did Health Canada make any submissions with respect to the issue in the context of this application for judicial review.

[407] In light of this error, I will set aside the Adjudicator's finding that the termination of Dr. Haydon's employment was a reasonable sanction for her 2004 insubordination. This issue will have to be re-determined, having regard to principles of progressive discipline and without taking Dr. Haydon's 2001 suspension into account. In addition, in the event that Dr. Haydon's 10-day suspension from 2004 is ultimately varied or set aside, this will also have to be taken into

account in determining the appropriateness of the sanction for her misconduct in relation to the Pirsue drug submissions.

[408] Once again, it is important to note that the *only* matter being remitted for re-determination in this case is the question of the appropriate sanction to be imposed on Dr. Haydon in light of her demonstrated insubordination in relation to the Pirsue drug submissions and her post-2001 disciplinary record.

VII. Final Conclusion

[409] For these reasons, Dr. Chopra's application for judicial review with respect to his 10-day suspension for insubordination and being on unauthorized leave (T-2027-11) is dismissed.

[410] Drs. Chopra and Haydon's applications for judicial review with respect to their 20 and 10-day suspensions for speaking out (T-2029-11 and T-2030-11) are granted.

[411] Dr. Chopra's application for judicial review with respect to the termination of his employment (T-2033-11) is granted in part. I have upheld the finding of misconduct with respect to the classification assignment. However, I have also concluded that the appropriateness of the termination of Dr. Chopra's employment as a sanction for his demonstrated insubordination in light of his prior disciplinary record may have to be revisited, but only if his 20-day suspension is ultimately varied or set aside.

[412] Dr. Haydon's application for judicial review with respect to the termination of her employment (T-2032-11) is also granted in part. I have upheld the finding of insubordination based upon her failure to properly complete the work assigned to her in a timely manner. However, the severity of the discipline imposed on Dr. Haydon will have to be re-determined without considering her 2001 suspension as part of her disciplinary record. In addition, as with Dr. Chopra, the appropriateness of Dr. Haydon's termination may also have to be revisited in the event that her 2003 10-day suspension for speaking out is ultimately varied or set aside.

[413] The applicants have not persuaded me that these matters should be sent back to a different adjudicator, even if the original Adjudicator is still available. I have found neither bias on the part of the Adjudicator nor a breach of procedural fairness that would limit his ability to deal with this matter anew, and it would obviously be far more efficient for all concerned if the original Adjudicator were to deal with the outstanding issues if he is available to do so.

[414] Regardless of who ends up re-determining these matters, I agree with the parties that the new hearing should proceed on the basis of the existing record, with no new evidence to be adduced by either party. The parties shall, however, be afforded the opportunity to make additional submissions with respect to the outstanding issues.

VIII. Costs

[415] Dr. Chopra's application for judicial review of his 10-day suspension has been dismissed. The respondent is entitled to its costs for T-2027-11. In accordance with the agreement of the parties, these are fixed in the amount of $2,000. The respondent shall also have its allowable

disbursements. If the parties cannot agree on the disbursements to which the respondent is entitled, then they are to be assessed in accordance with the *Federal Courts Rules*.

[416] Drs. Chopra and Haydon have succeeded in having their 20 and 10-day suspensions set aside in applications T-2029-11 and T-2030-11. Each is entitled to his or her costs which are fixed in the amount of $5,000 each, in accordance with the agreement of the parties. They are also entitled to their allowable disbursements to be assessed in accordance with the *Federal Courts Rules*, if necessary.

[417] Given that applications T-2033-11 and T-2032-11 have been dismissed insofar as the Adjudicator's findings of misconduct are concerned, the respondent is entitled to an award of costs in relation to each of these applications. However, some allowance should be made to reflect my findings with respect to the appropriateness of the sanction in each case, particularly in the case of Dr. Haydon, where the appropriateness of the termination of her employment will definitely have to be revisited. In the exercise of my discretion, the respondent shall have a single set of costs for these two applications fixed in the total amount of $6,000, together with its allowable disbursements for each case, to be assessed if necessary.

POSTSCRIPT

[1] These Reasons for Judgment are un-redacted from confidential Reasons for Judgment and Judgment which were issued on March 13, 2014 pursuant to the Direction dated March 13, 2014.

[2] The Court canvassed counsel for the parties whether they had concerns if the reasons were issued to the public without redactions. On March 19, 2014, in separate correspondence, the parties advised that there are no portions of the confidential Reasons for Judgment and Judgment that should be redacted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. Dr. Chopra's application for judicial review in file T-2027-11 is dismissed;

2. Dr. Chopra's application for judicial review in file T-2029-11 is granted and the matter is remitted to the same Adjudicator, if available, for redetermination in accordance with these reasons;

3. Dr. Haydon's application for judicial review in file T-2030-11 is granted and the matter is remitted to the same Adjudicator, if available, for redetermination in accordance with these reasons;

4. Dr. Chopra's application for judicial review in file T-2033-11 is granted in part. The application is dismissed inasmuch as it relates to the Adjudicator's finding of misconduct. However, the appropriateness of the termination of Dr. Chopra's employment as a sanction for his demonstrated insubordination shall be re-determined in accordance with these reasons, but only if his 20-day suspension for speaking out is ultimately varied or set aside;

5. Dr. Haydon's application for judicial review in file T-2032-11 is granted in part. The application is dismissed inasmuch as it relates to the Adjudicator's finding of

misconduct. However, the appropriateness of the termination of Dr. Haydon's employment as a sanction for her demonstrated insubordination is remitted to the same Adjudicator, if available, for redetermination in accordance with these reasons. The Adjudicator is directed not to take Dr. Haydon's 2001 suspension for speaking out into account as part of her disciplinary record. The Adjudicator shall, however, consider any penalty that may ultimately be assessed in relation to Dr. Haydon's grievance with respect to her 2003 suspension for speaking out;

6. The respondent shall have its costs of application T-2027-11, fixed in the amount of $2,000, together with its allowable disbursements;

7. Drs. Chopra and Haydon shall have their costs for applications T-2029-11 and T-2030-11, fixed in the amount of $5,000 for each application, together with their allowable disbursements for each case; and

8. The respondent shall have a single set of costs for applications T-2033-11 and T-2032-11, fixed in the amount of $6,000, together with its allowable disbursements for each case.

"Anne L. Mactavish"

Judge

FEDERAL COURT

DOCKETS:	T-2027-11, T-2029-11, T-2033-11
STYLE OF CAUSE:	SHIV CHOPRA v ATTORNEY GENERAL OF CANADA
AND DOCKETS:	T-2030-11, T-2032-11
STYLE OF CAUSE:	MARGARET HAYDON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 3, 2014, FEBRUARY 4, 2014, FEBRUARY 5, 2014, FEBRUARY 7, 2014, FEBRUARY 10, 2014, FEBRUARY 11, 2014, FEBRUARY 12, 2014
PUBLIC REASONS FOR JUDGMENT AND JUDGMENT:	MACTAVISH J.
DATED:	MARCH 25, 2014

APPEARANCES:

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