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File: 166-2-34132

Citation: 2006 PSLRB 10



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

HUGUETTE MORISSETTE

Grievor

and

**TREASURY BOARD
(Department of Justice)**

Employer

Indexed as
Morissette v. Treasury Board (Department of Justice)

In the matter of a grievance referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Yvon Tarte, adjudicator

For the Grievor: Glen Chochla, Public Service Alliance of Canada,
Kim Patenaude-Lepage, counsel

For the Employer: Harvey Newman, counsel, Drew Heavens, Treasury Board
Secretariat

Heard at Ottawa, Ontario, February 14, 15, 16 and September 26 to 29, 2005.
Written submissions, October 31, November 23 and December 8, 2005.

REASONS FOR DECISION

Grievance referred to adjudication

[1] Ms. Morissette has grieved the employer's decision to terminate her employment as legal secretary for non-disciplinary reasons as of November 26, 2003. The grievor has asked that her case be heard in English.

[2] At the hearings held in February 2005, Ms. Morissette was represented by Glen Chochla of the Public Service Alliance of Canada. When the hearings in this matter resumed in September 2005, the grievor was represented by Kim Patenaude-Lepage.

[3] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C 1985, c. P-35 (the "former Act").

[4] An order excluding witnesses was requested and granted.

Summary of the evidence

For the employer

[5] Clare Barry, whose résumé was adduced as Exhibit E-5, is Senior General Counsel and Director of the Criminal Law Section, Federal Prosecution Service, at the Department of Justice.

[6] When Ms. Barry assumed her functions as Senior General Counsel in August 2000, she was advised that the grievor, who had recently joined the Department as a casual employee (Exhibit E-6), would work for her.

[7] At that time, Ms. Morissette also provided secretarial services to two other lawyers, Brad Allison and Bill Corbett. The grievor's responsibilities were arranging meetings, logging correspondence, managing the flow of paper, tracking files and preparing travel authorities and claims.

[8] Ms. Morissette was given training in the use of certain software programs and was also coached by Jeannette Walker concerning office practices. Ms. Walker, who was then an experienced legal secretary, advised Ms. Barry in the fall of 2000 that the grievor needed help.

[9] The witness was of the view that Ms. Morissette made many mistakes, did not type well, had difficulty carrying out instructions and paid no attention to detail. Given that the grievor was new to the public service, Ms. Barry was willing at that time to make allowances. The problem areas were discussed with Ms. Morissette. Errors continued to be made on a regular basis. Ms. Walker was asked to continue helping Ms. Morissette to improve. Exhibit E-7 is a list of matters discussed between Ms. Walker and the grievor in December 2000.

[10] On January 4, 2001, Ms. Morissette was offered a determinate appointment from January 4, 2001 to November 23, 2001. This offer was necessary since the grievor had been employed as a casual employee for close to 90 days. Ms. Morissette accepted the offer on January 15, 2001.

[11] The grievor's performance did not improve from January to March 2001. Mistakes continued to be made. As well, a conflict developed between Ms. Walker and Ms. Morissette. Ms. Walker found the grievor to be uncooperative. Ms. Barry continued to speak to Ms. Morissette, expressing concern about the repeated mistakes and the less than satisfactory performance.

[12] In February 2001, Ms. Morissette complained to Mr. Corbett that Mr. Allison was harassing her about travel claims. Ms. Barry discussed the matter with the grievor on February 27, 2001 (Exhibit E-9). After that meeting, Ms. Morissette did not work for Mr. Allison again. Mr. Allison did, however, prepare a five page memorandum (Exhibit E-10) highlighting the problems he had encountered in recent months because of Ms. Morissette's handling of his travel claims.

[13] On March 6, 2001, Ms. Barry met with Ms. Walker who again told her that the grievor continued to be abrupt, uncooperative and inconsistent.

[14] Two days later, Ms. Barry met with Mathilde Gravelle-Bazinet of the Department's Office of Conflict Management in order to discuss possible solutions to the continuing conflicts in her sector, all of which revolved around Ms. Morissette.

[15] At that time, the grievor advised Ms. Barry that she was having marital problems and that she had been arrested and charged with assault on her spouse. The grievor had been forced to leave the matrimonial home and live in a women's shelter. The grievor's work performance continued to deteriorate. Ms. Barry advised Ms. Morissette

that the Employee Assistance Program was available and gave the grievor a contact number.

[16] On March 30, 2001, the employer made an offer of indeterminate employment (Exhibit E-14) to the grievor, which she accepted on April 2, 2001. In April 2001, the grievor, on the advice of her doctor, sought and obtained approximately 18 days of leave. When Ms. Morissette returned to work, she appeared fit and seemed to be able to carry out her duties.

[17] Exhibit E-13, collated in June 2001, provides examples of the many mistakes made by Ms. Morissette during the preceding months.

[18] On June 18, 2001, Ms. Barry was at the grievor's workstation discussing items of business when Ms. Morissette advised her that she was going to complain that Ms. Barry was harassing her (Exhibit E-15). A meeting was set up on July 6, 2001, to discuss Ms. Morissette's belief that she was being harassed. According to Ms. Barry, very little work was given to the grievor from that point on.

[19] In late July 2001, Ms. Barry and Mr. Corbett prepared an employee performance report, which Ms. Morissette refused to sign (Exhibit E-17). The narrative portion of the report concludes by stating as follows:

Huguette's work has been inconsistent. Errors in documents and travel arrangements needed correction. In addition, concern has been expressed about her interpersonal skills and teamwork which is vital to the success of the section. Care and attention to detail and greater efforts to work effectively with others will improve performance. With more experience, it is expected that performance will improve.

[20] The performance evaluation report was discussed with the grievor at a meeting held in Mr. Corbett's office on July 27, 2001 (Exhibit E-18).

[21] Approximately one month later, on August 30, 2001, Ms. Morissette grieved her performance evaluation report as well as perceived instances of harassment (Exhibit E-19).

[22] The grievances were referred to Human Resources and to Kathleen Mitchell-Jensen (Senior Advisor, Office of Conflict Management) who met with Ms. Morissette to ascertain who was allegedly harassing the grievor.

[23] In late October, 2001, Ms. Morissette was seconded to the Department's Francophonie Division (Exhibit E-23). Ms. Barry consented to the secondment which was to last until April 19, 2002, in the hope that it would give the grievor an opportunity for a fresh start.

[24] The secondment agreement was terminated in January 2002, by the Francophonie Division which felt that Ms. Morissette (Exhibit E-24):

[Translation]

Does not retain information communicated to her;

Is unable to follow instructions given to her in carrying out a task;

Does not check her work before submitting it.

[25] Ms. Barry and Ilene Strong, a human resources advisor, met with Ms. Morissette and her union representative on January 28, 2002, to discuss performance and work objectives for the next three months (Exhibit E-25). Early in February 2002, the grievor was given a generic job description for the position she occupied (Exhibit E-26).

[26] During that period, the employer approved training for Ms. Morissette in preparing hospitality and travel claims, Excel and PowerPoint, PeopleSoft-Leave and Caseview (Exhibit E-27).

[27] At the time Ms. Morissette returned to work in Ms. Barry's section, the harassment complaints and grievances had not yet been resolved. During a meeting held on February 11, 2002 (Exhibit E-29) with Mr. Corbett, the grievor indicated that she would withdraw her grievance concerning the performance evaluation if the employer removed the negative comments it contained.

[28] On February 12, 2002, the employer finally obtained particulars concerning Ms. Morissette's various complaints (Exhibit E-30).

[29] The next day (February 13, 2002), Ms. Morissette and Ms. Barry signed a one-year secondment agreement to allow the grievor to work for the Tax Court of Canada (Exhibit E-31). The secondment agreement was cancelled shortly thereafter because of an injury to the grievor which prevented her from working. Ms. Morissette appears to have been away from work on sick leave from February 25 to July 4, 2002.

[30] Upon her return to work in July 2002, the grievor went to work in another office involved in victims' issues and policy. The witness never again worked with Ms. Morissette.

[31] In September 2002, the harassment complaints against Brad Allison, Clare Barry, William Corbett and Jeannette Walker were deemed to be unfounded (Exhibit E-32).

[32] Ms. Barry was later advised of the decision to terminate Ms. Morissette's employment. Although she may have talked to certain persons about the termination and probably agreed with it, she did not make the decision.

[33] Under cross-examination by Mr. Chochla, the witness was asked to elaborate on several exhibits and to give more specific details about the nature of the grievor's shortcomings. Ms. Barry indicated that the exhibits constituted only examples of the grievor's mistakes. There were many more examples that she had not kept.

[34] Ms. Barry did not provide the grievor with a performance evaluation report prior to the appraisal conducted in July 2001 (Exhibit E-17), because she felt Ms. Morissette was in a "weakened personal state" and would not cope well with the negative comments it would necessarily contain.

[35] The witness acknowledged that she did not have extensive dealings with the grievor after January 2002. Furthermore, she was not aware that Ms. Morissette was discussing her work performance with Mr. Corbett or that he apparently told her that her work was all right.

[36] Ms. Barry acknowledged that, while she was concerned about the grievor's work performance in March 2001, her concerns were not sufficient to preclude an offer of permanent employment. Nor did Ms. Barry consider the possibility of rejecting Ms. Morissette on probation even though her evidence suggests she believed Ms. Morissette to be incapable of properly functioning in her position.

[37] Under re-examination, Ms. Barry indicated that the grievor's period of probation ended when she was on secondment to the Francophonie Division. Unfortunately, Ms. Barry was made aware of Ms. Morissette's performance problems with the Francophonie Division only after her return to the section, at which time her probation period had ended.

[38] Suzanne Poirier has held various positions at the Department of Justice since 1982. Since 2000, she has been General Counsel for the Francophonie Division. She also worked at the Privy Council Office as Assistant Secretary to the Cabinet for Legislation and House Planning between 1994 and 1997. She was the grievor's ultimate supervisor when Ms. Morissette was seconded to the Francophonie Division in October 2001.

[39] Ms. Morissette was offered the secondment in order to replace an employee who had recently been promoted within the section. The grievor was to be responsible for travel arrangements and travel claims, some filing and typing, and arranging meetings.

[40] The grievor was to work with Jean-François Bonin, a lawyer, and Marie-Claire Parisien, the unofficial office manager.

[41] Very early on, it became evident that Ms. Morissette did not proof read her work and could not follow instructions or retain information given to her. In addition, she spent a lot of time talking to others about her personal problems.

[42] Ms. Poirier met with Ms. Morissette on November 30, 2001, to discuss her work related problems. Following this meeting, the witness wrote to the grievor to advise her that she would be subjected to a "probationary period" until January 18, 2002 (Exhibit E-34).

[43] Since Ms. Morissette was absent for most of the month of December for personal reasons, weekly appraisals were not conducted until early January.

[44] On Friday, January 4, 2002, Ms. Parisien asked the grievor to re-type a 14 page job description. Ms. Morissette was told to take her time.

[45] The grievor returned two completed pages the same day and the rest on Monday, January 7, 2002. The work was poorly done. Ms. Parisien spent more than two hours correcting the numerous mistakes (Exhibit E-35).

[46] Ms. Poirier met with the grievor on January 11, 2002, to tell her that her work was unsatisfactory and that the secondment would be terminated in two weeks. Ms. Morissette, who was accompanied by a union representative at the meeting, did not deny her shortcomings. She was told that she was not to report to work for the last two weeks of her secondment but that she would nevertheless be paid for those two

weeks. Ms. Parisien prepared an evaluation report (Exhibit E-24) of the grievor's performance while on secondment to the Francophonie Division.

[47] Under cross-examination, Ms. Poirier was adamant that the job description document given to the grievor to re-type was in hard copy only. At no time was an electronic version of the document given to Ms. Morissette.

[48] The next witness to testify for the employer was Eugene Williams, General Counsel for the Federal Prosecution Service. He has been with the Department of Justice since 1980.

[49] A Fine Recovery Unit was set as part of the operations of the Federal Prosecution Service. This Unit was initially staffed in 2002. It became evident that the Unit would require secretarial help. Early in 2003, arrangements were made to have the grievor join the Unit.

[50] Mr. Williams had met the grievor previously in his dealings with Ms. Barry and the Criminal Law Section. He was somewhat aware of the conflict surrounding Ms. Morissette and the disharmony it had created in Ms. Barry's sector. Nevertheless, he was prepared to take the grievor on. Ms. Morissette started work in the Fine Recovery Unit on February 20, 2003.

[51] The witness, in anticipation of the grievor's arrival, had asked Claudine Girault (a lawyer) and Nadia Normand (a paralegal assistant) to develop a list of roles and responsibilities as well as templates for the grievor.

[52] During her first week in the Unit, Ms. Morissette was given training. On September 28, 2003, Mr. Williams met with the grievor to discuss duties and objectives (Exhibit E-37); Ms. Morissette was told that she would report to both Ms. Girault and Ms. Normand.

[53] At the September 28, 2003, meeting, which lasted approximately one and one-half hours, the grievor was told of an office protocol against discussing personal matters in the workplace. Mr. Williams believed the application of the protocol to be particularly important in this case since the Unit dealt with many police agencies, some of which the grievor had had contact with because of her personal problems.

[54] Although things went fairly well for approximately a month while Ms. Morissette was learning the ropes of her new position, errors of attention started to appear. On March 21, 2003, Ms. Girault and Ms. Normand met with the grievor to discuss their concerns about her work (Exhibit E-39). During that meeting, the grievor indicated that she did not need additional training.

[55] The numerous mistakes made by Ms. Morissette slowed down the office work. Ms. Normand, who was continuously correcting the grievor's work, was prevented from doing her own work.

[56] On March 25, 2003, Mr. Williams had to remind Ms. Morissette of the office protocol concerning the discussion of personal matters in the workplace (Exhibit E-40).

[57] One month later, in April 2003, the witness met with the grievor (Exhibits E-43, E-44 and E-45) to discuss the issue of her performance. Ms. Morissette, who was accompanied by a union representative, was told that the employer would continue to monitor her work.

[58] On May 6, 2003, Ms. Girault wrote a memorandum to Mr. Williams detailing some of the grievor's many mistakes (Exhibit E-46). The same mistakes continued to be made on a regular basis.

[59] In late June 2003, Ms. Girault wrote a two-page memo to Mr. Williams concerning the grievor's performance (Exhibit E-48). In this memo, Ms. Girault stated:

Nadia has brought to my attention that Huguette is still opening files for fine recovery and on virtually every one of the files there are errors. Opening a file has remained unchanged. At this point in time Nadia must still minutely verify everything Huguette produces as there are errors; be they errors of inattention or carelessness. This minute monitoring is not efficient. Unfortunately, work produced by Huguette cannot be relied on. I used to give Huguette simple, short letters to type from handwritten notes I had made. Invariably, the letter had to be redone 2 to 3 times as it contained errors. I instructed Huguette as to when a letter was sent to the person directly or when it is sent to an organization and Attention to a certain person. She still does not address letters appropriately.

For the past month, the pace of work has been hectic; hearings were held, trials, extradition hearings etc. Work had to be produced fast and correctly the first time around.

For this reason, I could not ask Huquette for any assistance. I relied on Nadia and Katie (a co-op student from a high school) to produce work that would not have to be redone.

Huquette has a very light workload. She periodically sends me or Nadia or both an e-mail saying that she has no work to do. I no longer forward these to the section as many are unwilling to deal with Huquette.

[60] Mr. Williams and others again met with the grievor on July 3, 2003, to discuss performance issues (Exhibit E-49, E-50). At that meeting, Ms. Morissette was given a binder containing numerous examples of errors that she had made in the performance of her duties (Exhibit E-37).

[61] Another meeting with the grievor took place on July 9, 2003 (Exhibit E-51), to deal with a breakdown of communications between Ms. Morissette and her team leader Ms. Girault.

[62] In early September 2003, following a meeting with Ms. Morissette, Mr. Williams ended the grievor's assignment to his section (Exhibit E-52, E-53). The termination of the assignment was prompted by the grievor's continued and constant errors and her apparent inability to correct them. Mr. Williams discussed Ms. Morissette's return to the Criminal Law Section with Tom Beveridge who was acting in Ms. Barry's position while she was away from the office on French language training.

[63] At a later date, Mr. Beveridge discussed with Mr. Williams the possible termination of the grievor's employment. Mr. Williams believes he did everything to help Ms. Morissette perform adequately. Unfortunately, the grievor simply could not perform satisfactorily.

[64] Under cross-examination, Mr. Williams indicated that it normally takes no more than two months to understand and perform satisfactorily the duties of the position Ms. Morissette occupied in the Fine Recovery Unit.

[65] The witness believes the grievor received satisfactory training to enable her to perform her work. Ms. Morissette herself confirmed this fact with Mr. Williams during the July meeting. Most of the mistakes made by the grievor had to do with accuracy and lack of attention to details. At the April 24, 2003, meeting, specific examples of mistakes and errors were given to Ms. Morissette.

[66] The grievor was present at three meetings where her performance was discussed. Ms. Morissette was warned during the July meeting that her assignment to the Fine Recovery Unit would be terminated if she did not improve.

[67] In his discussions with Mr. Beveridge, Mr. Williams did not recall discussing the possibility of offering employment to the grievor outside the Department.

[68] Marie-Claire Parisien has been employed at the Department of Justice for approximately 15 years. She has held various positions and, during the period relevant to this grievance, she was the unofficial office manager in the Francophonie Division. She reported to Ms. Poirier.

[69] Only one month into the grievor's secondment to the Francophonie Division, Ms. Parisien started getting comments concerning problems with Ms. Morissette's work.

[70] Ms. Parisien provided a hard copy of the job description that the grievor was asked to re-type in January 2002 (Exhibits E-35 and E-54). The document eventually produced by Ms. Morissette was full of mistakes, many of which could have been corrected by a simple spell check. The grievor's work was unacceptable.

[71] At Ms. Poirier's request, the witness prepared Exhibit E-33, a detailed account of problems and situations involving Ms. Morissette from November 28, 2001, to January 11, 2002.

[72] Under cross-examination, Ms. Parisien indicated that it would have been impossible to give Ms. Morissette an electronic version of Exhibit E-54 since none existed.

[73] Nadia Normand is a paralegal assistant with the Department of Justice. She took her legal training at the Cité Collégiale in Ottawa from 1998 to 1999, at the same time as Ms. Morissette. She therefore knew who the grievor was when Ms. Morissette joined the Fine Recovery Unit.

[74] Very early on, Ms. Normand prepared a binder of documents to help the grievor perform her work (Exhibit E-55). It did not take long to realize that Ms. Morissette repeatedly made the same mistakes. The grievor was made aware of the seriousness

of her mistakes and of the consequences that they had on the Unit's ability to recover fines.

[75] Ms. Normand indicated that the time she spent correcting Ms. Morissette's work impeded her ability to do her own work. Numerous examples of mistakes made by the grievor were placed in a binder (Exhibit E-37) and discussed with Mr. Williams and Ms. Morissette. Ms. Morissette did not try to explain her mistakes, nor did she feel she needed more training.

[76] The situation deteriorated to the point where Ms. Normand contemplated leaving her employment because of the stress created by the grievor's inability to do her work.

[77] Tom Beveridge joined the Department of Justice in 1990. Since January 2002, he has been the director of the International Assistance Group, which is part of the Criminal Law section headed by Ms. Barry.

[78] From August 2003 to August 2004, Mr. Beveridge acted as the Director of the Criminal Law section while Ms. Barry was away on training. In this acting capacity, he was involved in Ms. Morissette's termination.

[79] On November 13, 2003, Mr. Beveridge wrote a memorandum to the Deputy Minister of Justice recommending termination of the grievor's employment (Exhibit E-57). Prior to making this recommendation, Mr. Beveridge spoke with Mr. Williams who provided a report on the grievor's inability to perform satisfactorily while at the Fine Recovery Unit (Exhibit E-52).

[80] In discussions with other persons, Mr. Beveridge came to realize that Ms. Morissette had been unable to perform at a satisfactory level throughout her employment at the Department.

[81] On October 1, 2003, Mr. Beveridge met with the grievor (Exhibit E-58). During that meeting, Ms. Morissette was told to stay home with pay while the employer further investigated her shortcomings. Mr. Beveridge also suggested that Ms. Morissette might wish to consider resigning from her position "with a possibility of settlement", a solution which had been raised by the grievor's union representative prior to the meeting. For a while, Ms. Morissette seemed to consider the possibility of resigning (Exhibit E-59).

[82] During this period, the possibility of finding employment elsewhere for the grievor was considered. In the end, Mr. Beveridge felt that Ms. Morissette's level of incompetence and inability to follow instructions called for termination of her employment. The letter of termination (Exhibit E-1) was sent to Ms. Morissette on November 26, 2003.

[83] Under cross-examination, Mr. Beveridge acknowledged that the possibility of termination was first raised by the employer on October 1, 2003. He did not know whether the grievor was given a last chance to improve.

For the grievor

[84] Ms. Morissette is 46 years old. She has three children aged 14, 17 and 24 and is separated from her husband. Her résumé was adduced as Exhibit G-4.

[85] Ms. Morissette explained how she first came to work for the Department of Justice in August 2000. She received an offer of term employment in December 2000, and accepted it on January 15, 2001 (Exhibit E-8).

[86] When shown Ms. Barry's notes of the meeting on February 27, 2001, Ms. Morissette could not recall the event.

[87] Ms. Morissette stated that the employer's March 30, 2001, offer of indeterminate employment (Exhibit E-14) was given to her by Ms. Barry in a rude manner.

[88] In April 2001, the grievor separated from her husband. Later that month, she was arrested for assault on her husband. At Ms. Barry's insistence, Ms. Morissette consulted a doctor, who authorized a one-month medical leave of absence. She returned to work on May 15, 2001.

[89] According to Ms. Morissette, her workload was greatly reduced upon her return to work because of the personal problems she was then experiencing. Ms. Morissette did not agree with this workload reduction and talked to Mr. Corbett about it.

[90] Ms. Morissette's relationship with Ms. Barry was not very good. The grievor felt that Ms. Barry often mocked her. At times, her supervisor would talk to her in a little voice and would tear up memos in front of her and laugh. At this point, Mr. Newman pointed out that these assertions had never been put to Ms. Barry during her cross-examination.

[91] Ms. Morissette denied that she requested a Performance Review and Evaluation Appraisal (PREA) in June 2001 as is stated in a note to the file prepared by Ms. Barry (Exhibit E-15). In July 2001, the grievor refused to sign her PREA (Exhibit E-17), which contained negative comments about her performance. According to Ms. Morissette, the issues raised in the PREA had never been raised with her previously.

[92] Following her return to work in August 2001, after a period of annual leave that she states she was ordered to take, Ms. Morissette filed two grievances (Exhibit E-19). In the first grievance, Ms. Morissette alleged that she was the victim of harassment; in the second grievance she contested the contents of her PREA.

[93] In October 2001, Ms. Morissette accepted a secondment to the Francophonie Division (Exhibit E-23) at the suggestion of her union representative. Very early on in this new assignment she realized that Ms. Poirier did not like her work. The late November 2001 letter (Exhibit E-34), stating that she was being subjected to a “probationary period” until January 18, 2002, did not come as a surprise.

[94] Ms. Morissette was adamant that she received the job description to re-type from Ms. Parisien in both electronic and hard copies (Exhibit E-53 and E-35). The grievor is also certain that she did not attend a meeting with Ms. Barry on June 28, 2002 (Exhibit E-25).

[95] In early February 2002, Ms. Morissette met with Ms. Barry and Mr. Corbett. During that meeting, Mr. Corbett asked her “aggressively” to withdraw her grievances.

[96] The grievor prepared, in February 2002, a list of events which she believed amounted to harassment and therefore supported her grievance (Exhibit G-6).

[97] The grievor does not recall signing the secondment agreement to the Tax Court of Canada (Exhibit E-31) even though her signature appears on the document. Ms. Morissette did, however, work one week at the Tax Court. On Sunday, February 24, 2002, she injured her shoulder and was off work until July 4, 2002.

[98] Upon her return to work in July, Ms. Morissette worked for a few months with Lisette Lafontaine doing travel claims, memorandums and some research. In early October 2002, the grievor was told that the employer wanted her to be assessed by Health Canada. In a memorandum (Exhibit G-7) and a letter (Exhibit G-8),

Ms. Morissette was told that she could stay at home with pay until the Health Canada assessment was completed.

[99] In late February 2003, Ms. Morissette joined the Fine Recovery Unit. The work that was given to her to perform was mostly routine and repetitive.

[100] The grievor does not recall meeting with Ms. Girault and Ms. Normand on March 24, 2003 (Exhibit E-39). She does, however, recall being told by Ms. Girault around that time “to watch out” and that she was “making many mistakes”.

[101] The witness recalls a situation following an exchange of e-mail messages (Exhibit E-41) where Ms. Normand was screaming at her. According to the grievor, Ms. Normand “lost it”. Exhibit E-42 was written by the grievor the day after this incident. This e-mail message mentions that Ms. Normand appeared frustrated, lacked diplomacy and could be heard by others in the hallway.

[102] Ms. Morissette met with Mr. Williams and others on April 24, 2003, for approximately two and one-quarter hours. During this time, Ms. Morissette said very little. Furthermore, her performance was not discussed.

[103] The grievor indicated that she obtained different answers to her questions depending on who was answering. This created confusion. In any event, more often than not, those who were supposed to answer her questions were too busy to talk to her.

[104] Ms. Morissette again met with Mr. Williams on July 3, 2003, to discuss her performance (Exhibit E-50). Again, the grievor was accompanied by a union representative. Ms. Morissette does not believe that she is responsible for all the mistakes contained in the binder given to her at that meeting. There were “too many mistakes just for her”. The grievor was adamant that she was not told that her assignment would be terminated if her performance did not improve.

[105] According to Ms. Morissette, the meeting referred to in Exhibit E-51 never took place. She was advised on September 12, 2003, that her assignment with the Fine Recovery Unit would end two weeks later on September 26, 2003 (Exhibit E-53). This was the first time the grievor was advised that her assignment would be terminated.

[106] On October 1, 2003, Ms. Morissette met with Mr. Beveridge (Exhibit E-58). She was accompanied by a union representative. According to the grievor, the possibility of a settlement was not discussed at that meeting. Ms. Morissette did, however, contact her employer on October 6, 2003, to discuss settlement options (Exhibit E-59).

[107] Following the October 1, 2003, meeting, Ms. Morissette worked in the Fine Recovery Unit until October 14, 2003, and then worked with Jane Hansen, a union representative in the conflict resolution sector. Her letter of termination (Exhibit E-1) was delivered to her by hand on October 28, 2003, while she was in Ms. Hansen's office.

[108] Under cross-examination, Ms. Morissette acknowledged that she had received appropriate training and asserted that she had been able to do her work from time to time. She believes that she was "badly" judged by her supervisors in the Department.

[109] The grievor agreed that she was in a situation of conflict throughout her tenure in the Department, but then, she "didn't go to work to make friends". Ms. Morissette stated that the constant state of confrontation she was in resulted from a belief many people had that she had "cheated" to get into the Department. She wondered whether a conspiracy existed "to get her".

[110] When asked why Mr. Williams would prepare a memo concerning a meeting that never took place (Exhibit E-51), Ms. Morissette stated that Mr. Williams was quite capable of lying and fabricating false documents.

[111] Ms. Morissette maintained that Ms. Barry laughed at her and tore up documents in front of her more than once, although those events are not recounted in the document supporting her harassment grievance (Exhibit G-6).

[112] The grievor suggested that these allegations would be found in a report prepared by an outside counsel who had been asked to investigate Ms. Morissette's complaints (Exhibit E-60). Ms. Morissette was given half an hour to review the report and find the references to Ms. Barry's conduct. No such references were found.

[113] Even though the employer believes that Ms. Morissette cannot perform as a legal secretary, she believes that she could return to the Department of Justice and succeed. Eventually, however, if she did go back "it might be better or it might be worse".

Arguments

[114] The parties were asked to prepare written submissions. They are as follows.

For the employer

1. *It is the employer's position that it has met its obligations and has established cause to terminate the grievor's employment for non-disciplinary reasons, pursuant to FAA 11(2)(g).*

2. *The employer's authority to terminate the employment of an employee for non-disciplinary reasons is derived from paragraph 11(2)(g) of the Financial Administration Act which read, at the relevant times, as follows:*

(...)

(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of section 7 to 10,

(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part.

(...)

3. *Subsection 11(4) which is also relevant provides:*

(...)

Disciplinary action against, and termination of employment or demotion of, any person pursuant to paragraph 2(f) or (g) shall be for cause.

4. *In Nnagbo¹, Chairperson Tarte concluded:*

¹ Nnagbo v. Treasury Board (Public Works and Government Services Canada) (166-02-30045).

... in cases of termination for cause due to incompetence, the employer must show:

- that it has acted in good faith;*
- that it has set appropriate standards of performance which were clearly communicated to the employee;*
- that it gave the employee the necessary tools, training and mentoring to achieve the set standards in a reasonable period of time;*
- that it warned the employee in writing that failure to meet the set standards by a reasonably set date would lead to termination of his employment, and finally,*
- that the employee has failed to meet these standards.*

The employer has rephrased these obligations in its Treasury Board Manual, referred to earlier, and added to the list the duty to explore alternative solutions before an employee is terminated or demoted for cause.

Nnagbo v. Treasury Board (Public Works and Government Services Canada) (166-02-30045)

5. These principles are essentially the same as those found in the Treasury Board Guidelines for Non-Disciplinary Demotion or Termination of Employment for Cause (Exhibit E-4).

Credibility of witness testimony

6. Before embarking upon a review of the above principles, the employer wishes to touch upon issues of credibility. The employer submits that in situations where the testimony of the grievor and that of the employer's witnesses are not in accord, that the employer's testimony should be preferred, as the grievor's credibility is questionable in certain respects. The following examples explain the employer's position.

7. The grievor testified that the July 9, 2003, meeting with Eugene Williams did not occur. When asked, during cross-examination, whether she was suggesting that Eugene Williams fabricated the occurrence of this meeting, (along with the corresponding two-page memo), the grievor replied that "he could have done it". This is an unbelievable accusation.

8. In her direct examination, the grievor testified that Clare Barry tore up a document that had to be re-done and laughed. The grievor testified to the same effect during her

cross-examination. However, her harassment complaint against Clare Barry made no mention of such an incident. This was despite numerous specific allegations made by the grievor (E-60), all of which were unfounded. When questioned, the grievor could not explain why she did not include this incident in her harassment complaint. It is the employer's submission that it is because the incident never actually occurred.

9. The grievor testified that management provided her the work description (E-35 and E-54) electronically. This is in direct conflict with the testimony of Suzanne Poirier and Marie-Claire Parisien to the effect that it was an older work description and an electronic version was not available. This is why they asked the grievor to type it.

10. The above examples cannot be explained away by faulty memory, the grievor was adamant in regard to her testimony, despite the evidence to the contrary.

Expectations were made clear to the grievor

11. The employer recognized that, while the grievor did have secretarial training, she was new to government when she began in the Criminal Law Branch (CLB) on August 28, 2000. While performance issues were identified and discussed early on, management initially considered that they were related to the grievor's "learning curve".

12. In each of the assignments, discussions took place with the grievor to explain her duties and management's expectations of her. In essence, her duties included: arranging meetings, filing, logging correspondence, preparing travel authorities and expense claims, using software such as Caseview and ICON and RIMS.

13. Goals and objectives and expectations were established, discussed and provided to the grievor throughout her employment. (See for example, E-7, E-25, E-37 (Appendix 2B) and E38.)

14. The grievor accepted these goals and objectives and never questioned them as unreasonable.

The grievor was provided considerable training, and on-the-job coaching

15. When the grievor began her employment in the CLB, another administrative staff member (Jeannette Walker) was assigned to assist the grievor in understanding the office procedures, how to prepare travel authorities and expense claims etc. She was also provided training in areas such

MS Word, PowerPoint, Excel, hospitality claims and travel claims (see for example E-26 and E-26).

16. During the Francophonie assignment, Marie-Claire Parisien provided on-the-job coaching to assist the grievor with her daily activities.

17. During the Fine Recovery assignment, Nadia Normand worked very closely with the grievor. A desk manual, with checklists, was prepared to clearly outline the office procedures (E-55). The Caseview manager, Marilyn Garley, provided training on software.

18. When the grievor identified training she needed, it was provided. For example, during the meeting between the grievor and Eugene Williams on April 24, 2003, the grievor identified that she needed more training on closing files. This training was provided. (E-46)

19. However, it is also important to note that on more than one occasion, the grievor was specifically asked if she required additional training in order to adequately perform her work, to which she answered in the negative. (E-39, E-45, E-52)

20. There can be no doubt that the employer went to great lengths in providing extensive assistance and training to the grievor in order to assist her in her work.

Performance issues identified and discussed regularly. All performance reports were negative

21. The evidence established that performance issues were identified and discussed with the grievor on numerous occasions. Clare Barry and Nadia Normand testified that issues were brought to her attention on an almost daily basis, in order that the grievor could correct her errors.

22. Management spent a tremendous amount of time meeting, informing and discussing with the grievor her performance issues. See for example E-7, E-9, E-11, E-13, E-18, E-29, E-33, E-34, E-39, E-43, E-44 E-45, E-46, E-48, E-49, E-50, E-51, and E-52. This clearly demonstrates that management was doing everything it could to raise and address the performance issues. However, the grievor's performance did not improve.

23. Samples of the grievor's errors were introduced (E-13, E-35, E-36, E-37, E-54 and E-56).

24. The grievor's formal appraisals were negative (E-17 and E-24), and two of her assignments were ended (E-24 and E-53).

25. The grievor confirmed in her own testimony that no management representative had positive things to say about her work.

26. The grievor would sometimes blame others for her errors, but would seldom deny that her performance was poor. The employer witnesses testified that she, and her union representative (when in attendance) would often say very little during performance meetings. This was true even during the October 1, 2003, meeting with Tom Beveridge when he advised the grievor and her union representative that the department was considering terminating her employment. (E-58, testimony of Tom Beveridge)

Type of performance issues

27. The evidence established that the grievor's performance shortcomings were remarkably consistent during her various assignments. These included:

- lack of attention to detail, not proof-reading her work
- inability to retain information and to follow instructions
- persistent mistakes in the preparation of documents, travels claims, etc.
- inability to maintain effective interpersonal relationships

28. Suzanne Poirier and Marie-Claire Parisien confirmed that the above shortcomings led to the decision to end the Francophonie assignment early.

29. Eugene Williams testified that what was equally troubling to management was that the grievor could perform her work for short periods of time. Inevitably, however, these same problems would re-appear. It would be unreasonable for an employer to have to continue to employ a person indefinitely that could only adequately perform her duties on an erratic basis.

30. There were only three employees running the Fine Recovery program and the grievor's poor performance significantly impacted the work of the other two. The testimony of both Eugene Williams and Nadia Normand was that the grievor was brought into that unit because they were swamped and required a secretary to assist with the workload.

31. However, not only did the grievor not help improve with the workload, her lack of performance, in fact, made things much worse. Her errors ended up creating significantly more work for others (see E-37, E-48, and E-56).

32. Nadia Normand testified that she herself was close to a “burn-out” because of having to work with the grievor and she advised Eugene Williams that she would leave the unit, if the grievor continued to work there. Eugene Williams testified that Nadia Normand was the “core” of the Fine Recovery program. Given all of the circumstances, it was simply not reasonable to continue the grievor’s assignment; it was therefore ended on September 26, 2003. (E-53)

Difficulty maintaining interpersonal relationships

33. In addition to the problems performing her duties, the evidence was clear that the grievor had interpersonal difficulties with just about everyone she worked with. As examples, there were conflicts with Clare Barry, William Corbett, Jeanette Walker, Brad Allison, François Bonin, Nadia Normand, and Claudine Girault.

34. A harassment complaint and grievances were filed against some of the above. All of the allegations contained therein were concluded to be unfounded. (E-19, E-30, E-32 and E-60)

35. Some of these conflicts resulted in management having to change the reporting relationship and/or work assignment of the grievor.

36. The grievor was assessed by Health Canada, who, on January 28, 2003, recommended that she not work with Clare Barry (E-57, testimony of Tom Beveridge).

37. Suzanne Poirier testified that the grievor isolated herself and did not make efforts to get along with her co-workers.

38. The evidence showed that the grievor could not get along with her colleagues or her superiors. It is simply incredible that no matter where the grievor worked, conflict occurred. The grievor would often take a very adversarial approach with her colleagues and superiors. The grievor did not deny that there was conflict.

39. The grievor even testified that she was experiencing difficulty with her many union representatives and that she had to contact the President of the union as some officials did not want to deal with her.

40. Therefore, not only was the grievor’s performance unsatisfactory, but her lack of interpersonal relationships

made her situation even worse making it virtually impossible for the grievor to work anywhere within the department.

Good faith of management and the grievor's personal problems

41. There was no evidence that the employer did not act in good faith. To the contrary, the employer made substantial efforts in attempting to assist the grievor to improve her performance.

42. Management initially provided some leeway to the grievor in recognition that, although she had experience as a secretary, she was new to government work. The grievor was provided with different assignments so that she would have an opportunity to "start fresh" and be able to prove her competence. Unfortunately, the grievor failed in that regard.

43. The employer was aware of the personal problems the grievor was experiencing. The evidence demonstrated that the grievor did discuss the issues with colleagues and supervisors on a very regular basis. The employer was compassionate with the grievor in regard to dealing with these issues. It advised her of its EAP. It provided liberal time-off (sometimes without charging the absences to her leave banks). It provided allowances in regard to her performance problems and reviews so as not to add to her stress level (testimony of Clare Barry). Suzanne Poirier testified that she was sympathetic to grievor initially when she would speak to her about her problems, but eventually, she would cut her off, as it was impacting on the grievor's work.

44. The employer recognizes that, at times, employees will experience personal difficulties that will negatively impact on their work performance. It has support mechanisms in place, such as the EAP, to assist. However, these performance issues cannot continue indefinitely and, at the end of the day, an employee is ultimately required to consistently and satisfactorily perform her duties for which she is being paid.

The "warning issue"

45. The employer recognizes that in usual circumstances, it is required to warn an employee that failure to perform satisfactorily would lead to termination of employment.

46. It also acknowledges that no such "final" warning was provided in this case. That notwithstanding, the evidence did establish that the grievor was fully aware that management considered her performance unsatisfactory for a considerable period of time. For both the Francophonie and

Fine Recovery assignments she was warned that if her performance did not improve, the assignment would end, which ultimately occurred in both circumstances.

47. However, a review of the case law on this point would indicate that the warning requirement is not absolute and that in certain unusual circumstances, where such a warning would serve no useful purpose, no warning is required to justify cause for the termination of employment.

48. It is the employer's submission that this is an example of such an unusual case. A review of the Dansereau² decision supports this view. While this case dealt with a termination of employment under the Public Service Employment Act (as it then read), the employer argues that its principles are equally relevant to terminations of employment for incompetence under the Financial Administration Act.

49. In Dansereau, the employee was a firefighter at the Dorval Airport for nine years when he was promoted to crew chief. Up until September 1985, all of his performance reviews indicated that he had met all requirements of the job. In 1986, there was a tragic death in his family. He was absent from work from February 1, 1987 to March 24, 1988 due to a criminal charge upon which he was acquitted. When he returned to work in March 1988, he was assigned non-supervisory duties. In May of 1988, he resumed his duties as captain and was not warned that his performance was inadequate. In June 1988, however, he received three unsatisfactory performance reports dating back to the period beginning September 1985. The employer notified the employee that it was recommending his demotion, which was ultimately changed to a recommendation to dismiss him. In November 1988 his performance appraisal indicated that he had met the standard for a firefighter, but not the crew chief.

50. Décary J.A. concluded at paragraph 30:

I therefore conclude on this point for the purposes of the case at bar that when an employee who has performed the same duties for several years consistently receives satisfactory performance reports and is not the subject of any serious criticism by his employer, a presumption results that he has the necessary competence to perform the said duties and, in the absence of unusual or urgent circumstances, the employer cannot dismiss him for incompetence without telling him of the mistakes he is alleged to have made, without giving him an opportunity to correct them and without indicating to him the risk of

² Dansereau v. Canada (Public Service Appeal Board), [1991] 1 F.C. 444, A-144-90.

dismissal he runs if they are not corrected. Of course, each case will be decided on its own merits and the type of warning and period for correction will vary depending on the circumstances. [emphasis added]

51. The above quotation recognizes that the warning rule can be relaxed in certain circumstances and that the type of warning will vary depending upon the circumstances.

52. The fact situation in Dansereau is significantly different than the instant case. Here, the grievor was not a long service employee. She had worked for the employer for only about three-and-one-half years at the time of her termination. She did not consistently receive satisfactory performance reports. In fact the exact opposite is true, not a single employer witness provided positive performance reviews and the grievor acknowledged this. Throughout her entire period of employment, her performance was deficient and management brought this to the grievor's attention. The grievor could not have been presumed that she had the competence to perform her job.

53. Dansereau also suggests that the type of warning and period of correction will vary depending upon the circumstances. In the grievor's situation, she was warned that assignments would end if her performance did not improve. Despite these warnings, there was no improvement.

54. It is the employer's submission that, in the unusual circumstances of this case, a final warning would have served no useful purpose. Tom Beveridge testified that in his honest opinion he did not see any realistic chance of improvement. There was a consistent pattern of incompetence. No one had good things to say about the grievor's performance. She was provided a variety of assignments with different supervisors and different colleagues and yet no improvement was observed.

55. The grievor had difficulties with duties such as typing, logging correspondence, travel and hospitality claims, use of software such as RIMS, Caseview and ICON, etc. While extensive training and coaching was provided, it was ultimately up to the grievor to pay attention to details and proof read her work. These duties are common to all secretarial and administrative positions within the department. If she could not perform these duties in all of her previous positions, it was reasonable to conclude that she would not be able to perform these same, or similar, duties in any other position, even with further warnings.

56. Tom Beveridge was faced with a difficult situation in September of 2003. Against the above backdrop, he had an

employee whose assignment in the Fine Recovery Unit was about to end. Knowing of the performance issues, it was clear she could not be assigned elsewhere. Therefore, she would have to return to her substantive position in the CLB. However, he was also aware of the conflict between the grievor and Clare Barry, which resulted in harassment charges. He was also aware that Health Canada recommended against returning the grievor to the CLB. He therefore concluded that the only possible course of action was to terminate the grievor's employment and that any further warning would not help the situation. The grievor herself questioned, in a September 12, 2003, e-mail (E-61), whether it would be a good idea to return to the CLB after the Fine Recovery assignment ended.

57. In conclusion on the "warning" issue, the employer argues that this is one of those unusual circumstances where a final warning is not required in order to establish cause for the termination of employment. Clearly, it would have been preferable to issue such a warning, but, in examining this case as a whole, its absence is not fatal to the employer's case and is not a breach of the warning principle enunciated in *Nnagbo*.

Effect of the Gannon decision

58. Chairperson Tarte requested that the parties make submissions on whether the Gannon³ decision was applicable to the grievor's case, given that the former dealt with discipline, while the latter deals with incompetence (non-discipline).

59. While the employer does not agree with the Gannon decision, it recognizes that the adjudicator is bound by it. It was ultimately decided on the basis of s. 11(4) of the FAA, which requires that all terminations of employment must be "cause". It is the employer's interpretation that this would apply to both disciplinary and non-disciplinary cases. Consequently, it cannot be distinguished on that basis and therefore the decision applies equally to the instant case.

60. However, given the employer's position that there was cause for the termination, the issue of payment in lieu of reinstatement does not arise in this case.

Conclusion

61. This was a difficult case of an employee that simply was not able to perform the duties required of her. The employer has acted in good faith at all times, has clarified the work expectations to the grievor, has provided significant training

³ *Gannon v. Canada (Attorney General)*, 2004 FCA 417.

and coaching and ample opportunity to the grievor to improve her performance. The grievor's performance never improved. Despite giving the grievor the benefit of the doubt and in full consideration of the personal problems that she was dealing with, it came to a reasonable conclusion that no change would occur, even with further warning.

62. Other options were considered. She was provided various assignments. At the end, management concluded that no other assignments would help, since her deficiencies were related to duties common to all secretarial and administrative positions. The grievor was provided an opportunity to resign with a negotiated severance package (E-58, testimony of Tom Beveridge), but she never pursued this option.

63. It is the employer's position that it has shown great patience in trying to assist the grievor to perform at a satisfactory level and that it has met its obligations in establishing cause for the grievor's termination of employment.

64. It is further submitted that if the grievor were reinstated, the situation would be no different than it was before her termination and that there is no reasonable hope that she can perform satisfactorily. The grievor herself admitted in cross-examination that things "could be worse" if she was reinstated.

65. For all of the above reasons, the employer requests that the grievance be denied.

[Sic throughout]

For the grievor

1). It is the grievor's position that the employer has not met its obligations and has not established cause to terminate the grievor's employment for non-disciplinary reasons, pursuant to paragraph 11(2)(g) of the Financial Administration Act.

2). The principles established in Nnagbo¹ must be proven in order to uphold cases of termination for cause due to incompetence. Chairperson Tarte concluded:

In cases of termination for cause due to incompetence, the employer must show:

-that it has acted in good faith;

¹*Nnagbo v. Treasury Board (Public Works and Government Services Canada) (166-02-30045).*

- that it has set appropriate standards of performance which were clearly communicated to the employee;
- that it gave the employee the necessary tools, training and mentoring to achieve the set standards in a reasonable period of time;
- that it warned the employee in writing that failure to meet the standards by a reasonably set date would lead to termination of his employment, and finally,
- that the employee has failed to meet these standards.

The employer has rephrased these obligations in its Treasury Board Manual, referred to earlier, and added to the list the duty to explore alternative solutions before an employee is terminated or demoted for cause.² [Emphasis added]

3). These principles are also found in the Treasury Board Guidelines for Non-Disciplinary Demotion or Termination of Employment for Cause (Exhibit E-4).

4). It is the grievor's position that these principles were not followed by the employer. Specifically, appropriate standards of performance were not always clearly communicated to the grievor and the grievor was never warned in writing that failure to meet the set standards by a reasonably set date would lead to termination of her employment and given a last chance to meet these standards.

Credibility of witness testimony

5). In its submissions, the employer argues that in situations where the testimony of the grievor is in contradiction with the employer's witnesses, the employer's testimony should be preferred. The employer argues that the grievor's credibility is questionable in certain respects and presents examples to explain its position.

6). It is our position that the grievor testified truthfully and to the best of her knowledge.

Expectations and performance standards not always clearly communicated to the grievor

7). The grievor was hired on a casual basis on August 28, 2000 as a SCY-03 (Exhibit 6). She had no previous experience within the federal government. Jeannette Walker,

²*Ibid.*, para. 53-54.

another administrative staff member, was assigned to train the grievor and assist her in understanding office procedures (Exhibit E-7).

8). While duties were discussed and errors pointed out, clear goals and objectives were not always clearly communicated. The grievor testified that specifically within the Fine Recovery Unit, she received training from two different employees who would give her different answers to her questions and who were often too busy with their own work to answer her questions.

9). Goals and objectives were not established during her time with the Federal Prosecution Service from August 28, 2000 to October 27, 2001.

10). The grievor accepted an assignment with the Francophonie Division in the Department of Justice beginning October 27, 2001. While she was advised what tasks she would be performing, once again, goals and objectives were not established at the beginning of her assignment.

11). Following the end of her assignment with the Francophonie Division on January 25, 2002, the grievor returned to the Federal Prosecution Service where on January 28, 2002, she was given a list of objectives (Exhibit E-25). However, she accepted an assignment with the Tax court beginning February 18, 2002 and these objectives no longer applied (Exhibit E-31).

12). The one time the grievor was given clear objectives in writing at the beginning of an assignment was with the Fine Recovery Unit after she requested them (Exhibit E-37 (Tab 2b)). She was also given a task list at the same time (Exhibit E-37 (Tab 2b)). At the employer's request, the task list and objectives were given to the grievor in the presence of a union representative, despite the fact that the assignment with the Fine Recovery Unit was supposed to be a "fresh start".

Performance issues not always clearly identified and addressed

13). During her time with the Federal Prosecution service, concerns about the grievor's performance were not brought to her attention. Clare Barry, Senior General Counsel and Director of the Criminal Law Section testified that she could not recall expressing any concerns to the grievor about her performance except to point out specific errors and request their correction.

14). The first time the grievor was ever advised that there were issues with her performance was on July 27, 2001 when the employer provided the grievor with her first and only PREA. Despite the fact that the employer checked the "Unable to assess" category of the PREA form, the employer expressed concern about the grievor's inconsistency, her interpersonal skills and teamwork. However, the employer also stated that it was expected that her performance would improve with more experience (Exhibit E-17).

Personal Situation

15). During a great deal of her employment with the federal government the grievor was under severe personal stress. In April 2001, she separated from her husband and was arrested for allegedly assaulting her husband. She had to leave the matrimonial home and was staying in a woman's shelter. It is therefore not surprising that there were performance issues both before and after this time.

16). A court date was scheduled for January 10, 2002 for the hearing related to the assault charge. The grievor was advised on November 30, 2001 by Suzanne Poirier that there were performance issues and she would be subject to a one month probationary period failing which, her assignment would be terminated (Exhibit E-34). She was advised on January 11, 2002, the day after the assault charges were withdrawn, that her assignment was terminated. Once again, it is not surprising that there were performance issues during her last month with the Francophonie Division.

17). On February 24, 2002, the grievor suffered serious injuries in an accident and was on leave until July 4, 2002 when she returned to work in the Victims Issues and Policy Divisions. This assignment was terminated after three months and the grievor was sent home until a fitness to work evaluation could be done (Exhibits G-7 and G-8). The grievor was sent to a psychologist, a psychiatrist and to a doctor for a fitness to work assessment. This forced leave lasted four months until she began her assignment with the Fine Recovery Unit.

18). The grievor was still experiencing personal problems when she went to work for the Fine Recovery Unit on February 20, 2003. She was told, however, that she could not discuss these problems at work as the work in this unit was quite stressful (Exhibit E-38).

Lack of warning

19). The employer failed to warn the grievor in writing that the failure to meet set standards of performance by a

reasonably set date would result in the termination of her employment. This is acknowledged by the employer.

20). The grievor was never even advised orally that she would be terminated should her performance fail to improve. She was told by Suzanne Poirier that her assignment with the Francophonie Division would be end if her performance did not improve (Exhibit E-34). The consequence would be a return to her substantive position with the Federal Prosecution Service.

21). At the end of her assignment with the Victim's Issues Division on October 4, 2002, the grievor was told she was being sent home until a fitness to work evaluation could be done by Health Canada. There was no indication that the employer was considering a termination of employment.

22). The grievor returned to work on February 20, 2003 with the Fine Recovery Unit. During her time in the unit, the grievor was never advised either orally or in writing that her employment would be terminated. Once again, she was advised by her supervisor that should her performance fail to improve, her assignment would be terminated.

23). The first time the issue of termination was raised with the grievor was on October 1, 2003 in a meeting with Tom Beveridge when he advised her orally that termination for incompetence was a possibility (Exhibit E-58). She was never advised, orally or in writing that she would be terminated if her performance did not improve. Despite this failure to adequately warn her, the employer terminated her employment almost two months later on November 26, 2003.

24). The employer argues in paragraph 47 of its submissions, that "the warning requirement is not absolute and that in certain unusual circumstances, where such a warning would serve no useful purpose, no warning is required to justify cause for the termination of employment."

25). The employer relies on the Federal Court of Appeal's decision in Dansereau³ in support of its position.

26). The grievor submits that there are no unusual or urgent circumstances in this case which would justify a relaxation of the warning rule in this case. The only unusual circumstance is that the employer failed to follow the principles recognized in Nnagbo and in its very own policy.

27). The employer waited two months before advising the grievor that her employment was terminated. The employer

³Dansereau v. Canada (Public Service Appeal Board), [1991] 1 F.C. 444 (F.C.A.).

could have, during this time, given her a final written warning and a last chance to improve her performance, but they did not. In fact, the grievor was denied the benefit of the applicable principles and employer's own policy.

28). A final warning given to the grievor that her employment with the federal government would be terminated should she fail to improve her performance could have served as the catalyst to an improvement. Eugene Williams testified that the grievor could perform the work for short periods of time but problems would reappear. The threat of termination could have served a useful purpose in this case. That is why the procedure is in place, which the employer signally failed to respect.

Effect of the Gannon⁴ decision

29). The grievor agrees that the adjudicator is bound by the Federal Court of Appeal's decision in Gannon. This decision was based on subsection 11(4) of the FAA which provides that termination of employment for disciplinary reasons or for non-disciplinary reasons must be for cause. There is therefore no distinction to be made and the Gannon decision applies in this case.

Conclusion

30). This is a case where an employee was moved from assignment to assignment during a period in her life where she was going through a very difficult personal situation. At the very least, the grievor should have had the benefit of the employer's own policy and been given a final warning and a final chance to improve her performance and demonstrate that she could perform satisfactory work in a consistent manner.

31). For all of the above reasons, the grievor requests that the grievance be allowed and the grievor reinstated with full compensation.

32). In the event that this grievance is allowed, the grievor submits that the adjudicator should remain seized of this matter in order to rule on the issue of compensation if the parties cannot agree on this matter.

[Sic throughout]

⁴Gannon v. Canada (Attorney General), 2004 FCA 417.

Reply of the employer**Paragraphs 7 through 12 - Expectations and performance standards not always clearly communicated to the grievor**

1. The evidence demonstrated that the grievor was aware of what the employer expected from her. She clearly understood what her duties entailed and what her objectives were. The evidence established that the grievor never questioned or disagreed with her objectives. The expectations and objectives were sufficiently communicated to the grievor.

Paragraphs 13 through 14 - Performance issues not always clearly identified and addressed

2. Ms. Barry's testimony was that initially she recognized that the grievor's performance issues were likely due to the fact that she was new to government and was still learning the job. However, Ms. Barry did testify that she noticed several problems with the grievor's performance very early on and that she pointed these out to her "if not daily, then every couple of days." Her testimony was to the effect that, at least at first, she did not treat this as a case of incompetence. Rather, she gave the grievor the benefit of the doubt and time to learn the job.
3. The grievor's statement at paragraph 14 that "the first time the grievor was ever advised that there were issues with her performance was on July 27, 2001", is not borne out by the evidence. Performance concerns and deficiencies were being raised with the grievor long before that date. Examples of this can be found in E7 (December 12, 2000 meeting with the grievor and Jeannette Walker), E9 (February 27, 2001, meeting between the grievor and Clare Barry dealing with concerns about travel claims), and E13 (examples of the grievor's errors dated as early as April 17, 2001).
4. Clearly, the grievor was aware long before July 27, 2001, that there were concerns regarding her performance.

Paragraphs 15 through 18 - Personal situation

5. It is not disputed that the employer was aware that the grievor was experiencing personal problems. The evidence demonstrated that the employer was extremely compassionate and patient with the grievor's performance issues in recognition of the personal stress she was experiencing.

6. In paragraph 16 the grievor links her performances deficiencies to her personal situation during early January 2002. It must be noted that the task given to the grievor around this time was a simple and straightforward task of retyping a work description (E35 and E54). The grievor was specifically told that there was no due date and no urgency to complete the work. The grievor accepted the task and raised no concern that she was not able to complete the work because of her personal situation or for any other reason for that matter. Despite all of this, her work on this particular task was far less than satisfactory. (Testimony of Suzanne Poirier and Marie-Claire Parisien)
7. The grievor's statement in paragraph 18 that "She was told, however, that she could not discuss these problems at work [Fine Recovery Unit] ..." mischaracterizes the evidence. Eugene Williams testified that he was aware of the grievor's personal challenges before she joined his unit as she had previously approached him for advice in regards to a police investigation matter. As a result, he chose to clarify his expectations of the grievor in regards to discussing her personal circumstances with other employees. His comments in section #2 "Office Protocol" of his March 3, 2003, memorandum (E38) reflects his rationale for raising this with the grievor. His action in this regard was more than reasonable.

Paragraphs 19 through 28 - Lack of warning

8. The employer acknowledges that it did not warn the grievor that her employment could be terminated if her performance did not improve. However, when looked at as a whole, the grievor had to have known that management had no confidence in her ability to perform her duties. No management representative had positive reviews of her work. Assignment after assignment had ended early due to her poor performance, despite being warned that improvement was required. The grievor acknowledged in her own testimony that most of her supervisors did not think well of her work
9. In regards to paragraph 23, Tom Beveridge did advise the grievor at the October 1, 2003, meeting that her employment was in jeopardy. The grievor never returned to work after this meeting. Management had advised her to stay at home while further investigation took place. Management considered the situation carefully and examined whether yet another assignment elsewhere would be feasible. It was ultimately concluded that, given her shortcomings, she could not perform in any position within the department. Management also put forward a settlement option to the grievor, which, in

the end, was not pursued. All of these efforts took some time and it was not until November 26, 2003, that management informed the grievor of its decision to terminate her employment.

- 10. The employer reiterates its position that this is an unusual case where it is clear on the evidence that a final warning would have served no useful purpose. Despite being warned on more than one occasion that her performance must improve, the grievor failed each time and her assignments were consequently ended early. There was no reasonable prospect that further warnings or further chances would result in the grievor improving her performance. The employer was extremely patient with the grievor and had exhausted all efforts at trying to help her.*
- 11. Even at the adjudication hearing, the grievor provided no hope that her performance would be satisfactory were she to be reinstated. She actually testified that things could be worse.*
- 12. The evidence demonstrated a clear and consistent pattern of performance deficiencies throughout the grievor's various assignments. Tom Beveridge and Eugene Williams testified that the grievor had demonstrated that she could not satisfactorily perform the basic duties that are common to all secretarial/support staff positions (i.e. Caseview, ICON, typing, proofreading). Management therefore came to a reasonable and fair decision that the grievor was not competent to not perform in any other position and that any final warning would be futile.*
- 13. It is argued that the instant case demonstrates precisely the "unusual circumstances" that the Court referred to in Dansereau¹, in which the warning requirement can be varied, while still finding that "cause" exists for the termination.*

Conclusion

- 14. It remains the employer's position, that it has adhered to the Nnagbo² and Dansereau (supra) principles and has demonstrated cause for the termination of the grievor's employment.*
- 15. For all of the above reasons, the employer again requests that the grievance be denied.*

¹ *Dansereau v. Canada (Public Service Appeal Board)*, [1991] 1 F.C. 444, A-144-90.

² *Nnagbo v. Treasury Board (Public Works and Government Services Canada)* (166-02-30045).

Reasons

[115] The employer has submitted that the grievor's performance during her three and one-half years with the Department of Justice was consistently unsatisfactory. Although the evidence adduced clearly points in that direction, I am nevertheless troubled by the fact that the employer offered Ms. Morissette, during her short stint with the Department, casual employment, a one-year determinate appointment, indefinite status with probation, and finally full indefinite status. It boggles the mind that an employer would offer full indeterminate status to an employee it now alleges was incompetent throughout most of her employment at the Department of Justice.

[116] I am convinced the employer gave Ms. Morissette appropriate guidance and training as well the necessary tools to achieve minimum standards which were clearly communicated to her. The extensive training and guidance provided by the employer to the grievor appears to have served no useful purpose.

[117] Where the grievor's evidence conflicts with the well-documented evidence presented by the employer's witnesses, I accept the latter without reservation.

[118] At times during her testimony, Ms. Morissette was extremely precise, remembering exact words spoken more than three years ago. In many other instances, however, she was extremely vague. Ms. Morissette's inability or unwillingness to recall several meetings for which the employer's witnesses had detailed contemporaneous notes speaks volumes about her lack of credibility as a witness. It defies credulity to assert, as the grievor did, that the employer fabricated evidence as part of a conspiracy to discredit her. Other than Ms. Morissette's gratuitous and self-serving assertions, there is absolutely no evidence that the employer fabricated evidence to discredit the grievor, or that it had any reason to do so.

[119] Ms. Morissette does not seem to appreciate the level of incompetence she routinely displayed while working at the Department of Justice. It may be that her serious marital problems at the time affected her ability to perform satisfactorily. It is also possible, although doubtful, that the jolt of a written final notice would have prompted Ms. Morissette to clean up her act and perform at a level that would have been acceptable to the employer.

[120] The employer, however, failed to give Ms. Morissette a proper warning that termination might ensue if she did not improve.

[121] In situation such as this, an employer must show:

- that it has acted in good faith;
- that it has set appropriate standards of performance which were clearly communicated to the employee;
- that it gave the employee the necessary tools, training and mentoring to achieve the set standards in a reasonable period of time;
- that it warned the employee in writing that failure to meet the set standards by a reasonable set date would lead to a termination of employment, and finally,
- that the employee has failed to meet the standards within the set period of time.

[122] These obligations imposed on the employer in cases of incompetence are set out in *Nnagbo v. Treasury Board (Public Works and Government Services Canada)* 2001 PSSRB 1. They are also contained, although not as precisely, in the employer's own guidelines for termination and demotion for cause (Exhibit E-4). An employer must, in a case such as this one, meet all of the obligations set out in *Nnagbo (supra)*.

[123] Here, the employer failed miserably with regard to the most basic rule of fairness which requires that an unsatisfactory employee be given a clear written warning of the consequence of not meeting communicated standards within a reasonable period of time.

[124] The employer's failure to give any notice to Ms. Morissette that her employment would be terminated if she did not perform adequately within a reasonable period of time renders her termination invalid and leaves me no choice but to reinstate the grievor in her position at the Department of Justice.

[125] The employer has shown no unusual or exceptional circumstances which would convince me to derogate from the application of the normal rules.

[126] Quite the contrary, the employer continued to employ Ms. Morissette when it could easily not have given her a term appointment, allowed that term employment simply to run its course, or reject her while she was on probation. The employer's

sloppy management and its disregard for a very basic rule of fairness in employment are the reasons it finds itself in this unfortunate situation.

[127] The absence of a clear final written notice to Ms. Morissette leaves me with some doubt as to how she would have reacted had the notice in fact been given. Would such a sword of Damocles, hanging over her head, have prompted the grievor to finally perform satisfactorily? I do not know. The onus was on the employer to show that a final warning would serve no purpose and they have failed to do so. Given that Ms. Morissette was, at times, able to perform her work satisfactorily and the fact that the employer continued her employment when it had no obligation to do so, I must give her the benefit of the doubt.

[128] Had I come to the conclusion that Ms. Morissette was irremediably incompetent and that no amount of time would allow her to perform satisfactorily, I would have given her three month's salary to compensate for the employer's lack of notice. In such a case, the principles set out in *Gannon (supra)* would not apply since I would have reached the conclusion that termination was appropriate. *Gannon (supra)*, as I understand it, applies in situations where an adjudicator finds that a termination of employment was not justified. In such cases, reinstatement with or without a lesser penalty is obligatory. In this case, I simply cannot speculate as to the grievor's level of performance had the employer given Ms. Morissette the required written notice.

[129] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[130] Ms. Morissette is to be reinstated into her position at the Department of Justice without loss of pay or benefits.

February 1, 2006.

**Yvon Tarte,
adjudicator**