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*Public Service Staff
Relations Act*

Before a grievance adjudicator

BETWEEN

DOMINICK MORIN

Grievor

and

**TREASURY BOARD
(Department of Fisheries and Oceans)**

Employer

Indexed as
Morin v. Treasury Board (Department of Fisheries and Oceans)

In the matter of a grievance referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act, R.S.C. (1985), c. P-35

REASONS FOR DECISION

Before: Sylvie Matteau, grievance adjudicator

For the Grievor: Kim Patenaude-Lepage, counsel

For the Employer: Karl G. Chemsy, counsel

Heard at Quebec City on October 20, 2004,
at Gaspé from October 4 to 7, 2005, and
at Ottawa on January 10 and 11, 2006.
(P.S.L.R.B. Translation)

Grievance referred to adjudication

[1] Dominick Morin (the “grievor”) is contesting the termination of his employment effective July 25, 2001, alleging that it is a disguised disciplinary measure and that the employer acted in bad faith.

[2] The grievor referred his grievance to adjudication on May 8, 2002 and asked that he be kept apprised of a decision by the Canadian Human Rights Commission (CHRC) on a complaint that he had filed with it. On September 16, 2003, the CHRC directed the grievor, pursuant to paragraph 41(1)(a) of the *Canadian Human Rights Act*, to exhaust the grievance procedure. The parties to the grievance then turned to the Board’s mediation services, but without reaching a settlement of this matter. On June 30, 2004, the grievor requested that the case be scheduled.

[3] The employer raised preliminary objections on the first day of the hearing, that is October 20, 2004. One of these objections pertained to the grievor’s employee status. The employer considered that the grievor was still on probation at the time of the termination of his employment, while the grievor claimed that his probationary period had ended several months earlier. According to the grievor, the employer had confirmed this status in writing. The grievance therefore should have been dealt with accordingly. The parties agreed to clarify this question before filing their evidence on the merits of the grievance. The evidence was thus heard solely on this aspect of the case and the decision 2004 PSSRB 168 was rendered on this subject. That decision confirms that the grievor was on probation when his employment was terminated.

[4] The parties were not available for a resumption of the hearing until October 2005.

[5] The employer maintained its preliminary objection as to the grievance adjudicator’s jurisdiction as, in its opinion, the grievor’s rejection on probation was due solely to circumstances related to his employment. It argues that the grievance adjudicator has no jurisdiction to decide whether the rejection of an employee on probation took place in accordance with subsection 28(2) of the *Public Service Employment Act*, R.S.C. (1985), c. P-33. According to the grievor, the termination of his employment constitutes a disguised disciplinary dismissal, which means that the grievance adjudicator has jurisdiction. This objection was taken under advisement pending the filing of the evidence on the merits of the grievance.

[6] The employer called two witnesses. The grievor testified on his own behalf.

[7] 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”).

Summary of the evidence

[8] The grievor, a seasonal employee, started working at the Department of Fisheries and Oceans in March 1999. At that time he was assigned to Ste-Anne-des-Monts. He explained that the work environment was very difficult there. There was a great deal of conflict in the office and people did not speak to one another. A fishery officer had just committed suicide. The grievor’s personal situation was difficult because his family lived close to Grande-Rivière many kilometres away. He asked to be transferred there for the 2000 employment season and also asked if he could participate in the *Fishery Officer Career Progression Program* (the “program”) to reach the GT-03 group and level quicker. This request was denied and the grievor had to proceed through the normal channels to the GT-02 group and level.

[9] Vincent Malouin, area manager for Gaspé since April 4, 2001, testified at length about the program and the circumstances surrounding the grievor’s rejection on probation. He mentioned having known the grievor since 1998. He described the hierarchical structure of the department in the Gaspésie-Bas St-Laurent area from position up to that of fishery officer. The witness also stressed that a fishery officer is also a peace officer under the *Criminal Code*.

[10] The program was established because the work of a fishery officer at the GT-03 group and level requires a significant amount of training. The grievor explained that Alain Duguay, who was on duty at Grande-Rivière, had been designated to monitor his training and career progression but that he was not qualified to be an employment monitor. Furthermore, the grievor had to travel outside his work hours to meet with Mr. Duguay to complete the required documents. According to the grievor, this was nothing but a formality. Mr. Duguay had never worked with him and was of no assistance to him in terms of training. The employer acknowledged that this monitoring had failed the grievor.

[11] The employer thought of a remedial plan for the grievor when it noted some serious deficiencies in his work performance. The plan was implemented to help the grievor meet the requirements of the statement of qualifications for his position thus enabling him to perform his work in accordance with the necessary standards and skills, within a clearly defined framework, as he had not received adequate supervision.

[12] Mr. Malouin explained the particular aspects of the work of a GT-03 fishery officer. These officers work very closely to clients, as their offices are decentralized according to operational requirements. They are the department's eyes and ears with the clients. Mr. Malouin noted that the employer looks for GT-03 fishery officers who are highly reliable and who can work independently. Fishery officers at the GT-03 group and level work at isolated locations, either alone or in pairs. Because their duties involve the enforcement of legislation and regulations, they must have a good knowledge of the latter and be able to adapt and respond appropriately in all circumstances. They must have good judgment.

[13] According to Mr. Malouin, the work of a GT-03 fishery officer is highly specialized and draws on a set of special skills. Therefore, training of GT-01 and GT-02 fishery officers represents a significant investment on the department's part. These officers are supervised up to the point where they achieve the level of autonomy and reliability essential for a GT-03 fishery officer.

[14] Mr. Malouin then explained that a car accident was the initial incident involving the grievor that was brought to his attention in April 2000. The accident automatically triggered an internal investigation under the department's code of conduct, to which all fishery officers are subject, because the grievor's blood alcohol level on that occasion exceeded the legal limit.

[15] Mr. Malouin commented on the questions that the grievor's actions raised in the wake of that accident. The grievor was accused of failing to inform his supervisor as soon as he was charged with a criminal offence. He was also criticized for driving a department vehicle a few days after the accident, on or around April 14, 2000, while his driver's license was subject to an administrative suspension under paragraph 202.4 of Quebec's *Highway Safety Code*.

[16] A meeting took place with the grievor and the representative of his bargaining agent on April 18, 2000. The purpose of the meeting was to obtain the grievor's

version of the accident and of the incidents up to April 14, 2000. A report of this meeting was prepared that same day and contained the grievor's version of the facts in question-and-answer format (Exhibit E-5).

[17] The grievor stated that this meeting had lasted approximately two hours and that Mr. Malouin had asked him whether he had an alcohol-related problem. The grievor stated that he told him without hesitation that he did. It was at that point that Mr. Malouin suggested that he use the services of the Employee Assistance Program, which he did.

[18] On April 20, 2000, the grievor was advised that, as a result of the alleged violations of the fishery officers' code of conduct, a committee would be formed to conduct a more thorough investigation and that he was to be suspended for the duration of that investigation (Exhibit E-6). On April 25, 2000, the grievor wrote a letter of apology. He explained that at the time, he had not understood the implications of his actions and undertook not to repeat them (Exhibit E-8).

[19] The grievor met with psychotherapist Madeleine Rioux three times for a total of 2 hours and 30 minutes on May 1, 11 and 26, 2000 (Exhibit G-20). He also stated that he had attended a number of Alcoholics Anonymous meetings.

[20] In the meantime, on May 15, 2000, the investigation committee presented its findings and recommendations regarding the alleged violations of the fishery officers' code of conduct (Exhibit E-9). Its investigation pertained to the above-mentioned criticisms of the grievor for driving the department's vehicle while his driver's licence was suspended and for failing to inform his supervisor of the situation.

[21] After reviewing the circumstances, the testimony of various people, the case law and the standards of the department and of Treasury Board, the investigation committee found that one of the following three disciplinary measures could be applied:

1. forfeiture of pay for a period of 10 working days;
2. forfeiture of pay for a period of between 10 and 20 working days;
3. rejection on probation.

[22] The investigation committee recommended that the grievor be asked to forfeit 10 days' pay on the basis of Treasury Board and departmental directives regarding

such cases and the case law. The committee's recommendation was also based on the grievor's disciplinary record, which was unblemished. It should be noted that the committee also took into account the fact that the immediate supervisors at the time had not properly supervised the grievor.

[23] The investigation committee also proposed that a number of other measures be taken against the grievor. In addition to forfeiture of pay, the committee recommended that the probation period be extended and that a rigorous remedial plan be implemented to establish conditions of proper conduct. It also suggested that, in accordance with the program, an employment monitor be assigned to the grievor. It further recommended that the employer remind the grievor about the Employee Assistance Program and offer its services to him and that it encourage him to adopt a more appropriate attitude and to improve his work performance. Moreover, the committee recommended that if the grievor were found guilty of impaired driving and that his driver's license were to be suspended, the employer suspend the grievor without pay during the period in question.

[24] The investigation committee further recommended that, after reviewing its report, the employer conduct another investigation concerning other alleged deficiencies on the grievor's part with regards to his expense accounts, his weekly reports, his notebooks and his punctuality. Lastly, the committee recommended that disciplinary measures be taken immediately against the grievor for insubordination because he had not appeared at the investigation, despite the employer's clear request.

[25] Mr. Malouin was mandated to conduct a complementary investigation. The grievor was thus informed that his suspension would be extended during this second investigation. Mr. Malouin coordinated verifications of the grievor's expense accounts, overtime, weekly reports from August 15, 1999 to April 15, 2000, the vehicle logs, various anomalies pertaining to the safety equipment, telephone calls in the evening during the period when the grievor was residing at the department's Ste-Anne-des-Monts office, sick leave, attendance reports and allegations of being continually late for work. Mr. Malouin also verified the discrepancies between the grievor's notebook and the overtime reports, expense accounts and weekly reports. Lastly, Mr. Malouin verified with the grievor's supervisor that the grievor had lived at the office for a period of time.

[26] The findings from these various verifications were recorded in a report and were presented to the grievor on May 31, 2000. At that time he had an opportunity to present his version of the facts and to justify himself on each of the nine points for which findings were recorded (Exhibit E-10).

[27] Mr. Malouin explained the importance of some of the points that were raised. For example, in his opinion, it is essential that fishery officers be meticulous in keeping their notebooks. Given that fishery officers are often called to testify in court, this tool enables them to establish time lines and to give detailed testimony. Significant breaches were also noted with regards to the storage of ammunition, firearms and other items. The grievor acknowledged that he had stored his service weapon without unloading it, had failed to lock up a magazine full of ammunition that was used for practice, and had left an [translation] “active AOC can” in his desk drawer without locking it, all contrary to normal procedure.

[28] Finally, the investigation found that the grievor had claimed 7.5 hours of overtime on October 9, 1999, when he had allegedly performed only four hours of work, and had claimed 10 hours of overtime on October 10, 1999, when he had allegedly worked only his regular hours. It was further noted that the grievor had been absent on sick leave for seven days without obtaining a medical certificate and without having submitted a form to that effect.

[29] During the meeting of May 31, 2000, Mr. Malouin informed the grievor that the employer considered his deficiencies to be significant. He informed him that the file would be sent to the regional level for a decision and that disciplinary measures were being considered along with the possibility of imposing a remedial plan under which the grievor would be returned to his position at Ste-Anne-des-Monts.

[30] According to Mr. Malouin, the grievor had said he was very open to the remedial plan and appeared to be very interested in it. The grievor also testified that this was the case. Mr. Malouin explained to him the impact that the plan would have on his career progression and the possible consequences if he failed to adhere to it.

[31] On June 20, 2000, Mr. Malouin issued to the grievor two disciplinary notices dated June 19, 2000. The first notice entailed a one-day suspension, to take effect on May 18, 2000, because of his failure to appear before the investigation committee on April 28, 2000, despite the employer’s clear request (Exhibit E-11(a)). The second

disciplinary notice entailed a 20-day suspension, from April 20 to May 17, 2000, as a result of his driving following an administrative suspension of his driver's licence (Exhibit E-11(b)). These notices also informed the grievor that similar actions in future would lead to more stringent disciplinary measures up to and including dismissal.

[32] Mr. Malouin stated that he had explained to the grievor that the employer was taking the situation seriously and was willing to help the grievor address the deficiencies that had been identified. The latter could be placed in two different categories. The first pertained to standards of conservation and protection and the second to the department's administrative standards. Mr. Malouin then gave the grievor a draft of the remedial plan. The plan included a description of various components of the grievor's work as well as clear objectives that he would have to meet.

[33] A third disciplinary notice was issued to the grievor, dated July 6, 2000. The notice entailed an eight-day suspension, from May 19 to 30, 2000 (Exhibit E-11(c)). The notice pertained to serious breaches identified during the complementary investigation, which the grievor described as examples of [translation] "nonchalance" and which involve inappropriate keeping of notes and reports as well as habits with regards to equipment referred to as [translation] "on continuous strength". The grievor was also informed that he would be given a copy of the remedial plan. The regional director signed this third disciplinary notice and concluded by reminding the grievor that any recurrence of such conduct could lead to more stringent sanctions up to and including dismissal. Mr. Malouin explained that when he gave the grievor these three disciplinary notices, he explained their contents and scope.

[34] The grievor stated that he had not wanted to file a grievance against these disciplinary measures because he had been afraid. According to him, he had no choice but to accept them. He was afraid that other more stringent measures would then be imposed on him.

[35] Mr. Malouin explained the remedial plan suggested to the grievor (Exhibit E-12(a)). The document identified the points to be addressed as well as the measures proposed to that effect. The objective of each measure is indicated therein. The document also provided a box where the supervisors and the grievor could write their comments and evaluations. That way, they could also make regular comments on how the plan was progressing. The plan also provided for training on the handling of

firearms. The grievor took this training from June 20 to 24, 2000 and passed the exams related to it.

[36] The first component of the plan applied to the period from July 17 to August 13, 2000 (Exhibit E-12(b)). The grievor received it on July 17, 2000. A second component covers the period from October 16 to December 22, 2000 (Exhibit E-12(c)). The grievor received it on October 13, 2000.

[37] The grievor explained that Mr. Malouin had informed him on June 20, 2000 that he could consult a Montreal physician regarding treatment for his alcoholism. He immediately agreed. However, this initiative never came up again. The grievor believed it was not up to him to take the initiative on this undertaking as it was imposed on him. Instead, he waited for a follow-up on these events.

[38] Mr. Malouin testified that on June 20, 2000 he had raised the possibility of the grievor's consulting a physician with the Department of Health in Montreal. He discussed this option with the grievor again after he returned from a three-week secondment to the Lower North Shore. At the time when Mr. Malouin again tried to assess the grievor's interest in such a consultation, the grievor replied that he did not have a problem and did not require any consultation.

[39] Mr. Malouin stated that the remedial plan for the period from July 17 to August 13, 2000 did not raise any problems, and the grievor concurred with that statement. The plan was thus extended until December 2000. Andrew Rowsell, the grievor's supervisor at that time, monitored the plan. Mr. Malouin explained that the plan was not in place from August to October 2000 because of events that required a great deal of attention, including those in Burnt Church, New Brunswick. Furthermore, Mr. Rowsell had to be away and it was the holiday period. In fact, the plan was not implemented again until October 2000.

[40] According to Mr. Malouin, deficiencies with regards to certain absences started showing in October 2000. On October 13 and 16, 2000, applications for compensatory time off were submitted, but the grievor did not have any compensatory leave credits. Subsequently, on December 8 and 18, 2000, the grievor took leave that seemed questionable.

[41] On December 7, 2000, the grievor allegedly asked Mr. Rowsell for leave to meet with his financial institution on December 8, 2000. Mr. Rowsell was in a meeting and could not approve the request. The grievor contacted Daniel Perron of the Quebec regional office and requested leave because he had an appointment with his doctor on December 8, 2000 – in other words, for a reason that was different from the one given to Mr. Rowsell. At management's request, the grievor allegedly provided a medical certificate by fax. However, the grievor was unable to prove that he had faxed the certificate.

[42] The grievor explained that he had asked Mr. Rowsell and Mr. Perron for leave and had given the same reason. He could not explain why Mr. Perron had given only one reason in his report to Mr. Rowsell. The grievor stated that he had informed both managers that he had to see the doctor and would take the opportunity to go to a financial institution at the same time.

[43] On December 18, 2000, the grievor failed to report for a mandatory training workshop on first aid. Fishery officers must be certified in the techniques that were taught at that workshop. He did not notify his supervisors of his absence. Mr. Malouin and Mr. Rowsell, who were present at the workshop, noticed that the grievor was absent. Mr. Rowsell attempted to contact him but unsuccessfully.

[44] On December 19, 2000, the grievor went to the training workshop but was asked to leave immediately by the instructor because he had not attended the beginning of the workshop and would therefore be unable to obtain his certification. Mr. Malouin thus called a meeting with the grievor at noon the same day.

[45] Mr. Malouin asked the grievor to give reasons for his absence and his failure to notify his supervisors of it. The grievor indicated that he had to go to a medical clinic because he had been injured during a hockey game the previous weekend. The grievor had no explanation as to why he had failed to notify his supervisors. Also, he did not have a medical certificate in his possession.

[46] Mr. Malouin then informed the grievor that, because of these incidents and other deficiencies noted during the previous months, his case would have to be re-evaluated and that there might be disciplinary consequences. Mr. Rowsell confirmed both the content of that meeting and the information communicated to the grievor. He

also confirmed that the grievor had said he had been injured during a hockey game the previous weekend.

[47] Mr. Malouin stated that he suspected the grievor was having personal difficulties. He asked him two or three times whether he was having financial, alcohol or drug problems. Each time the grievor allegedly denied having any problems. Mr. Malouin stated that he had nonetheless referred him to the Employee Assistance Program. This suggestion had been made in a letter dated June 9, 2000 and during the meetings of June 20 and July 17, 2000. Mr. Malouin also asked the grievor's co-workers and other supervisors to inquire about this.

[48] Mr. Rowsell stated that he also suspected that the grievor was having problems. He inquired about this on two occasions; the grievor allegedly replied that he was not. Mr. Rowsell further noted that during the grievor's three-week placement at Blanc Sablon a Sureté du Québec officer informed him that the grievor and another fishery officer had been driving too fast in the village. The officer gave Mr. Rowsell a warning, and Mr. Rowsell took it upon himself to reprimand the two fishery officers in question. The grievor acknowledged this incident, but indicated that he was not the one driving.

[49] On January 9, 2001, in Quebec City, Mr. Malouin and Mr. Rowsell met with Lucie Aubain, Martine Demers and Christianne Perron, of the regional human resources branch. The purpose of the meeting was to discuss the problem with the grievor's performance, as noted in the last portion of the remedial plan, in order to take stock of the situation. Mr. Malouin indicated that it was ultimately decided to look into the allegations pertaining to the incidents of October and December 2000 and to re-evaluate how the grievor could continue pursuing his career at the department.

[50] In January 2001, Mr. Malouin coordinated this evaluation. Mr. Malouin reported on his findings and presented an analysis of the grievor's case since August 1999 when he was hired until January 2001 (Exhibit E-18).

[51] Mr. Rowsell checked with American Express, who had notified the employer that the grievor's account had been outstanding for a year. He was then informed that the credit card company was planning to engage in legal proceedings to recover the debt. The grievor stated that he had incurred these expenses when he was at the Grande-Rivière office. He subsequently had financial problems and declared bankruptcy. This amount was reportedly included in the bankruptcy.

[52] Mr. Malouin contacted the grievor on February 2, 2001 to inform him of his findings and his recommendations, as discussed with him on December 19, 2000. The grievor had completed his employment season on December 22, 2000 and was to resume work in late February 2001.

[53] At the same time, Mr. Malouin learned that the grievor had been arrested a second time for impaired driving. It was possible that his driver's licence would be suspended again and that he would spend time at a treatment centre. Although his new employment season had not started, the grievor left several messages with various managers to inform them of the situation. He was to return to work on February 26, 2001, but that date was postponed indefinitely, at the grievor's request (Exhibit E-17).

[54] Mr. Malouin's report relates the employer's concerns regarding various categories of duties and responsibilities identified in the statement of qualifications for fishery officers at the GT-01 group and level. The report recommends that the grievor be rejected on probation effective April 1, 2001. Mr. Malouin said he had met with the grievor and Mr. Rowsell in Ste-Anne-des-Monts on March 6, 2001 to inform the grievor of the recommendation made at the regional level. It was clearly indicated to him at that time that the recommendation entailed a rejection on probation. Mr. Rowsell testified to that effect.

[55] The grievor stated that, when his supervisors explained to him that they were recommending that he be rejected on probation, he had understood that he would be placed on probation again, believing at the time that his probation was already completed. For him this was simply a step backwards and not a termination of employment.

[56] Mr. Malouin's recommendation was followed up on and confirmed through a letter dated July 25, 2001 (Exhibit E-19). That letter that is the object of this grievance. Mr. Malouin maintains that the rejection of the grievor on probation is based on his case as a whole and is in response to the problem with his performance. Mr. Malouin believes that the department has done everything possible to help the grievor resolve the problem with his performance. The grievor had clear instructions, but did not follow them.

[57] According to Mr. Malouin, the grievor's second arrest for impaired driving and his admission to the Le Pavillon Chaleurs Inc. treatment centre had no effect on the

recommendation to reject him on probation. The events in question occurred after his report had been written and, as they were outside the period of his analysis, they were not relevant to the decision that had to be made.

[58] The grievor maintains otherwise and notes that he had informed the employer of his financial problems in a letter dated September 27, 2000 (Exhibit E-20). In that letter he asked to be reassigned to Grande-Rivière to be closer to his family. In cross-examination, Mr. Malouin acknowledged that the work environment at Ste-Anne-des-Monts was difficult because of the restructuring of the department's offices and the tragic events that had taken place there, one of the fishery officers having committed suicide.

[59] Mr. Malouin also acknowledged that, contrary to the terms and conditions of the program, the grievor did not have an employment monitor in 2000 (Exhibit E-4). He also agreed that during his second employment season the grievor had not undergone an evaluation every three months, contrary to what the program prescribed.

[60] Mr. Malouin explained that two fishery officers at Ste-Anne-des-Monts had started their training at the same time as the grievor. At that time, the resources were such that it was not unusual for fishery officers at the GT-01 and GT-02 group and level not to have an employment monitor assigned to them. The field supervisors performed the employment monitor duties. The other two fishery officers participated in the program and were promoted to the GT-03 group and level. The grievor was not promoted, given his difficulties during this period.

[61] The grievor stated that he saw the program as a mere formality. The supervisors were not present and they completed the documents in a highly random manner, without making the necessary verifications with the fishery officers and without assisting them in any way.

Summary of the arguments

Employer's arguments

[62] The employer argues that I should find that the grievance before me is not adjudicable as it is contesting the grievor's rejection on probation for reasons related to his employment and his competence. There is no evidence of a cover-up or subterfuge that would give jurisdiction to a grievance adjudicator.

[63] Although a grievance adjudicator is justified in considering the circumstances surrounding a rejection on probation in determining whether it has jurisdiction, there is clear and abundant case law that sets out in detail the criteria for such an analysis. The case law has also established that the burden of proof rests with the employer, the latter having to demonstrate that the rejection on probation is employment-related. However, this task does not require that the employer determine a valid reason for the rejection.

[64] Once this burden has been met, there is a reverse onus, and the grievor must demonstrate that the rejection on probation is in reality a cover-up or a deception. This is a very heavy burden for the grievor, who must establish in a clear and convincing manner that there is bad faith on the employer's part and that the employer is manoeuvring to reject him.

[65] In this instance, the grievor has argued that the real reason for his rejection on probation is related to his admitted alcohol problem, a prohibited ground of dismissal, in respect of which he filed a complaint before the CHRC. The grievor is thus basing his grievance on two arguments: the subterfuge and the employer's inability to help him overcome his performance difficulties as a result of his personal problems, including his alcoholism.

[66] In April 2000, in the wake of the grievor's serious breaches related to the first car accident, the employer decided to impose a disciplinary measure. It had to choose between a disciplinary measure and rejection on probation, as decided in *Canada (Attorney General) v. Penner*, [1989] 3 F. C. 429 (C.A.). The employer made this choice on the basis of some of the grievor's circumstances. It should be noted that the disciplinary investigation focused on the latter's conduct in his employment, and not on the fact that he had been arrested for impaired driving.

[67] The employer then acknowledged a certain lack of supervision and a difficult acting situation. The grievor did not have an employment monitor and some disturbing incidents had taken place at the office. The employer thus decided to give the grievor a second chance. However, it also decided to supervise him closely and to implement a remedial plan.

[68] From that point on, the grievor had very little flexibility with respect to his behaviour. This was true with respect to the demonstration of his competence and his

judgment as a fishery officer and, more specifically, a peace officer. His training was monitored even closer as of that time. The remedial plan had clearly identified his weaknesses and his deficiencies.

[69] According to Mr. Malouin's testimony, it was quite clear that this was the grievor's last chance to prove that he had the skills and the qualifications needed to perform the duties of his position. There was no ambiguity about the fact that a failure to adhere to this remedial plan could mean his rejection. The elements of this plan are clearly related to performance of the duties and responsibilities of the grievor's position.

[70] The grievor was also advised during the meeting of December 19, 2000 that his misconduct of the night before was unacceptable, that a more in-depth investigation would be conducted into any other breaches or misconduct, and that he would be informed of any resulting decision, up to and including the termination of his employment. The employer notes that at that time the grievor's alcohol problem, which dated back to April 2000, was no longer an issue. It was the matter of the grievor's competence in terms of his judgment and reliability that was of concern to the employer.

[71] According to the employer, the grievor's credibility is a factor to be considered in the analysis of this case. This factor is relevant in assessing the discrepancy in the testimony and in evaluating the grievor's credibility in connection with the investigations and throughout his probation. It is also relevant in understanding the opinion that the employer formed regarding the grievor's unreliability. The employer noted a fair number of contradictions in the grievor's testimony as well as in the evidence, including the nature of the documents that the grievor adduced at the hearing. A fishery officer does in fact require a very high degree of reliability and transparency towards both the employer and the public as well as towards other law enforcement authorities.

[72] With regards to the grievor's alcoholism, the only evidence that the grievor adduced consisted of a certificate from Pavillon Chaleurs Inc., along with a report on his stay there (Exhibit G-18). No evidence was adduced in support of a diagnosis of alcoholism, and the fact that he was arrested in a state of intoxication on two occasions is not conclusive evidence that he has an alcohol-related problem. According to the employer's witnesses, the grievor has always denied having such a problem.

[73] The employer argues that it has proven that the reasons for the rejection of the grievor on probation are related to his incompetence and his attitude towards the duties and responsibilities of a fishery officer. There is no evidence of bad faith or deceit on the employer's part when it made the decision to reject the grievor on probation. The employer's objection should therefore be allowed.

[74] In support of its position, the employer submits the decision in *Penner, supra*; *Canada (Attorney General) v. Leonarduzzi*, 2001 F.C.T.D. 529; *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33, *Ross v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 97; *Lundin v. Canada Customs and Revenue Agency*, 2004 PSSRB 167; *Wright v. Treasury Board, (Correctional Service of Canada)*, 2005 PSLRB 139.

Grievor's arguments

[75] The grievor argues that the employer acted in bad faith in deciding to reject him on probation. A grievance adjudicator would therefore have jurisdiction to award his reinstatement, retroactive to July 25, 2001. He notes that the evidence has established through the supporting material (Exhibits E-30 and E-9) that he did not receive the appropriate follow-up or training before the incident of April 2000 or after that. It therefore cannot be found that he was unable to perform his duties.

[76] The employer admitted that the grievor did not have an employment monitor, contrary to the terms and conditions of the program. The evidence also showed that the grievor's field training log had not been filled out properly (Exhibit G-14). The grievor himself had to travel to meet with Mr. Duguay at the Grande-Rivière office, while Mr. Duguay was not an employment monitor and had never worked with the grievor.

[77] When a remedial plan was presented to the grievor, he welcomed it enthusiastically. He testified that he was happy with this follow-up and that in fact everything was going well. The employer had nothing negative to say about him before December 18, 2000. The grievor also noted that he never received the remedial plan for the period from October to December 2000. It was completed after the employment season was over, on December 22, 2000.

[78] The grievor also stated that the employer's argument that he used his alcoholism as an excuse is ludicrous. It is not easy to admit to such a problem and even harder to talk about it.

[79] When he was arrested a second time for impaired driving, the grievor immediately informed the employer, even though his new employment season had not yet started, as he had been criticized for failing to do so the first time. He immediately signed up for treatment at Pavillon Chaleurs Inc. He was therefore shocked to receive the letter of February 2, 2001 informing him of the breaches of the remedial plan from October to December 2000.

[80] The grievor commented on the credibility of his testimony and his actions. He noted that the incidents in question had occurred some four years before the hearing. He maintains that the criticisms made of him after December 19, 2000 were never shared with him and that he never had an opportunity to defend himself.

[81] The grievor further notes that the employer acknowledged failures in its follow-up and training in its report of May 29, 2000 and also acknowledged his alcoholism when it was suggested that he meet with a Health Canada physician. In the report filed as Exhibit E-18, in which Mr. Malouin recommends that the grievor's employment be terminated, a number of references are made to his alcoholism and its impact on the employer's decision. Therefore, this is not exclusively a matter of the skills and qualifications needed to perform the duties of his position as a fishery officer.

[82] Contrary to what the employer maintains, it has been established that the grievor has an alcohol problem. The grievor admitted this. The report from Pavillon Chaleurs Inc. proves that he participated in a program at a treatment centre (Exhibit G-18). Mr. Malouin testified that he suspected that the grievor had an alcohol problem. He recommended the Employee Assistance Program a number of times. Furthermore, he stated that he had asked other employees about the grievor's alcoholism. The grievor alleges that the evidence indicates that he had a problem with alcoholism or at least that the employer suspected that he did. It is for that reason that he rejected the grievor on probation.

[83] The grievor thus argues that the evidence shows conclusively that the employer acted in bad faith. The grievance adjudicator's jurisdiction is established. The grievor

is asking to be reinstated in his position as of August 25, 2001, with no loss of salary or benefits.

[84] In support of his position, the grievor submits the decisions in *Leonarduzzi*, supra; *Dekoning v. Treasury Board (Employment and Immigration Canada)*, PSSRB files 166-02-22971 and 149-02-129 (1993) (QL); *Holden v. Canadian National Railway Co.*, [1990] F.C.J. No. 419 (C.A.), and *English v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 72.

Employer's response

[85] The employer maintains that it has always been very transparent with respect to the grievor's breaches and follow-up. It was for that reason that it did not reject him on probation after the serious misconduct of April 2000. The employer had also been transparent in its evaluation of the grievor's skills and qualifications. It had not allowed him to participate in the program, unlike his two colleagues.

[86] Lastly, the employer notes that, in contrast with *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109 and *Dekoning*, supra, this case has not established that the grievor possesses the skills and abilities needed to properly perform the duties of his position as a fishery officer; quite the contrary.

Reasons

[87] The employer dismissed the grievor while he was on probation (2004 PSSRB 68). The employer argues that it rejected the grievor on probation, pursuant to subsection 28(2) of the *Public Service Employment Act*, R.S.C. (1985), c. P-33, and that I have no jurisdiction to entertain the grievance before me. The grievor claims that the termination of his employment constitutes a disguised disciplinary dismissal. Under paragraph 92(1)(b) of the former *Act*, a grievance adjudicator has jurisdiction to entertain a grievance pertaining to a termination of employment.

[88] I must begin by ruling on the objection raised by the employer as to the grievance adjudicator's jurisdiction. The Federal Court held in *Leonarduzzi*, supra, that a grievance adjudicator has jurisdiction to determine whether a termination of employment in fact constitutes a rejection on probation. The initial burden of proof rests on the employer, which must adduce a minimum of evidence establishing that the reason for the termination of employment is related to the employee's

employment. When such evidence has been filed, the onus is then reversed and the employee must establish that the employer acted in bad faith or that the reasons given in support of the termination constitute a subterfuge.

[89] The employer's letter of July 25, 2001 that informed the grievor of his rejection on probation cited reasons that seemed essentially to be disciplinary in nature. However, the letter refers to a warning issued to the grievor and calling upon him to adopt more rigorous behaviour, failing which more stringent measures could be taken, up to and including the termination of his employment. The employer interpreted his violations of the code of conduct for fishery officers as an indication that he was unable to perform his duties as a fishery officer and that he had been lax in doing so. At the hearing, the employer thus made an effort to establish that the grievor's performance had been insufficient in relation to the objectives that had been set for him.

[90] Furthermore, the case before me indicates that the responses given at the second and final levels of the grievance procedure refer specifically to the problems with the grievor's competence and performance. As the parties discussed the grievor's inadequate performance and personal suitability in the context of the grievance procedure, I find that the grievance referred to adjudication is no different from the one that was dealt with in the grievance procedure.

[91] The evidence of the grievor's performance difficulties submitted by the employer, along with the supporting testimony and reports, has established that the grievor was rejected on probation for reasons related to his inability to perform the duties of the position. A remedial plan was in fact imposed on the grievor and served as an alternative training plan. The objectives he was to meet were clearly set out therein. The plan was developed in accordance with his specific needs. Therefore, the grievor was very tightly supervised at that time.

[92] These elements are related to the grievor's employment, and a grievance adjudicator need not substitute his own judgment for that of the employer in these circumstances, unless the grievor is able to establish that the employer acted in bad faith or that the reasons for the rejection on probation that the employer raised constitute a subterfuge.

[93] The Federal Court of Appeal held in *Penner*, supra, that a grievance adjudicator has no jurisdiction to rule on whether a decision to reject an employee was appropriate or founded once the adjudicator is satisfied that the impugned decision was based on dissatisfaction felt in good faith with the employee's suitability.

[94] It is trite law that bad faith cannot be assumed, but must be shown. The grievor failed to adduce any evidence that would allow me to find on a balance of probabilities that the employer acted in bad faith. *Penner*, supra, also indicated that an employer is free to choose whether to impose disciplinary measures or to reject an employee on probation as long as, once again, it is acting in good faith. The fact that the conduct is subject to disciplinary measures alone does not constitute evidence that the termination of employment is in fact a disciplinary measure.

[95] The grievor claims that the reasons that the employer has given in support of its decision to reject him on probation constitute a subterfuge, and that the employer really dismissed him because it suspected he had an alcohol problem. Here again, the grievor has failed to meet his burden of proof. Although it is established that the employer suspected that the grievor was experiencing problems with alcohol, the evidence before me does not allow me to find on a balance of probabilities that the employer terminated his employment for that reason. Moreover, the grievor did not establish that he has an alcohol problem.

[96] On the basis of the evidence and the testimony before me, I find that the reasons for the employer's decision to reject the grievor on probation are related to the grievor's employment. The grievor has failed to establish on a balance of probabilities that the employer acted in bad faith or used a subterfuge to reject him on probation. In light of the case law, I allow the employer's objection and dismiss the grievance for lack of jurisdiction.

[97] I therefore issue the following order:

Order

[98] The grievance is dismissed.

March 24, 2006.

P.S.L.R.B. Translation

**Sylvie Matteau,
grievance adjudicator**