

Library

Date: 20090316

File: 566-02-1276

Citation: 2009 PSLRB 33



Public Service  
Labour Relations Act

Before an adjudicator

BETWEEN

SHANNON MELANSON

Grievor

and

DEPUTY HEAD  
(Correctional Service of Canada)

Respondent

Indexed as

*Melanson v. Deputy Head (Correctional Service of Canada)*

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

**Before:** John A. Mooney, adjudicator

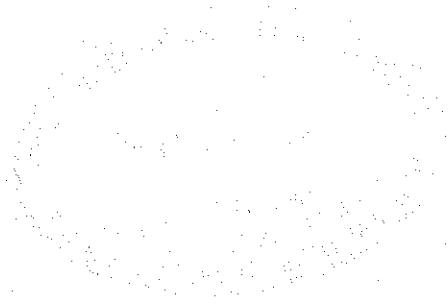
**For the Grievor:** John Mancini, Union of Canadian Correctional Officers — Syndicat des agents correctionnels du Canada — CSN

**For the Respondent:** Karl Chemsy, counsel and Adrian Bieniasiewicz, counsel

---

Heard at Moncton, New Brunswick,  
February 5 and 6 and December 9 and 10, 2008.





## REASONS FOR DECISION

---

### **I. Individual grievance referred to adjudication**

[1] Shannon Melanson ("the grievor") was a correctional officer at the CX-01 group and level with the Correctional Service of Canada ("the respondent") at the Atlantic Institution ("the institution"). According to the grievor's testimony, he was rejected on probation on January 11 or 12, 2007. According to the testimony of the warden of the institution, David Niles, the grievor was rejected on probation on January 12, 2007.

[2] On February 9, 2007, the grievor grieved his rejection on probation and asked to be reinstated in his position and to receive all benefits lost as a consequence of the termination of his employment. The grievance was presented up to the final level of the grievance process, but it was not dealt with to the grievor's satisfaction.

[3] The grievor's representative referred the grievance to adjudication. It was received at the Public Service Labour Relations Board ("the Board") on June 5, 2007, under paragraph 209(1)(b) of the *Public Service Labour Relations Act (PSLRA)*.

[4] In a letter to the Board dated December 6, 2007, the respondent's representative objected to the jurisdiction of an adjudicator to hear this grievance because it concerns a rejection on probation under the *Public Service Employment Act (PSEA)*. In a letter dated December 21, 2007, the bargaining agent submitted that the rejection was in fact a disciplinary measure. The Board advised the parties on January 2, 2008, that the issue of jurisdiction should be raised at the start of the hearing. The parties agreed at the start of the hearing that I should hear evidence and rule on the preliminary objection on jurisdiction.

[5] The grievor's bargaining agent is the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN) and the grievor was subject to the collective agreement between the Treasury Board (TB) and the UCCO-SACC-CSN for the Correctional Services group (Non-Supervisory and Supervisory), expiry date: May 31, 2002 (Exhibit G-17) ("the collective agreement").

### **II. Objection on admissibility of evidence**

[6] During the cross-examination of Mr. Niles and the examination-in-chief of the grievor, the grievor's representative wanted to ask them both a series of questions about a meeting that took place on May 30, 2007, between Mr. Niles and the grievor. Doug White, the regional vice-president of the bargaining agent was present at that

meeting, and so was Sami Johnson, the acting deputy warden. The respondent's representative raised two objections about the admissibility of those questions. I told the parties that I would hear their arguments on the admissibility of those questions, allow the grievor's representative to put his questions to Mr. Niles and the grievor, and reserve my decision on the matter.

#### **A. Submissions of the respondent on the admissibility of questions**

[7] The first objection of the respondent's representative was that the statements made by the persons present at the May 30, 2007, meeting were not relevant to the grievor's rejection on probation since that meeting occurred after the grievor's employment had been terminated.

[8] The second objection of the respondent's representative was that the statements made at the May 30, 2007, meeting are privileged and cannot be disclosed at an adjudication hearing because they were made in the context of the grievance process. The grievor's representative referred me to paragraph 74 of *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, in which the adjudicator wrote that:

*. . . [n]ormally, discussions during the grievance process are considered privileged and not admissible (see Brown and Beatty, Canadian Labour Arbitration, 3<sup>rd</sup> ed. at: 3:4342). It is important that discussions during the grievance process be protected from disclosure at a hearing in order to ensure that the parties feel free to explore all avenues for settlement. . . .*

#### **B. Submissions of the grievor on the admissibility of questions**

[9] With respect to the first objection of the respondent's representative, the grievor's representative replied that article 20 (Grievance Procedure) of the collective agreement (Exhibit G-17) provides that the grievor has the right to discuss the merits of his grievance with the respondent. The grievor's representative stated that the purpose of his questions was to better understand why the grievor was rejected on probation. The discussions did not centre on matters that occurred after the grievor's rejection on probation but on matters that occurred before that event.

[10] The grievor's representative argued that the statements made at the May 30, 2007, meeting are not privileged. The purpose of the meeting was to clarify

the reasons why the grievor was rejected on probation since the grievor had never been told why his employment had been terminated. The grievor's representative added that statements made at grievance hearings are routinely put into evidence at adjudication. He referred me to Brown and Beatty, *Canadian Labour Arbitration*, 4th ed. at paragraph 3:4342. The grievor's representative also referred me to *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*, [1979] 1 S.C.R. 311, for the proposition that the employer must act fairly in deciding to terminate a public servant's employment.

### C. Ruling on the admissibility of evidence

[11] After considering the arguments of both parties, I find that the respondent's second objection is well-founded. I have heard the evidence regarding the May 30, 2007, meeting, and it is clear to me that the purpose of that meeting was to discuss the grievance and to resolve it. As indicated in *Schenkman*, discussions during the grievance process are considered privileged and protected from disclosure at an adjudication hearing. The purpose of this privilege is to ensure that the parties feel free to explore all avenues for settlement, as Mitchnick and Etherington point out in *Labour Arbitration in Canada*, Lancaster House, 2006 (at page 98):

...

*The grievance procedure under a collective agreement is designed to give the parties an opportunity to address and resolve disputes at an early stage. In order to foster a full and frank exchange between the parties and to encourage settlement, arbitrators have generally recognized that discussions entered into pursuant to the grievance procedure are protected by the common law privilege attaching to settlement discussions. Evidence of such discussions is therefore generally inadmissible at an arbitration hearing. . . .*

...

[12] Therefore, I find that the statements made by the persons present at the May 30, 2007, meeting are privileged and that they cannot be disclosed at adjudication. Thus, I have disregarded that evidence.

[13] Although, as the grievor's representative pointed out, article 20 (Grievance Procedure) of the collective agreement (Exhibit G-17) does provide that the grievor has

the right to discuss the merits of his grievance with the respondent, this does not change the fact that the statements made during the grievance process are considered privileged and protected from disclosure at an adjudication hearing.

[14] Since I have accepted the respondent's second objection about the disclosure of the statements made at the May 30, 2007, meeting, there is no need for me to address his first objection, regarding that information's relevance.

### **III. Summary of the evidence**

[15] The grievor testified, and the respondent called one witness. The grievor filed 17 exhibits into evidence, while the respondent filed 12 exhibits.

[16] Mr. Niles testified for the respondent. He has been the warden of the institution since July 2005. Before that, he worked for one year as the deputy warden at the same institution.

[17] Mr. Niles explained that offenders sentenced to two years or longer are incarcerated in federal institutions. There are three security levels for federal institutions: minimum, medium and maximum. The institution is a federal maximum security institution located in Renous, New Brunswick. There are over 200 inmates. They are typically violent towards other inmates and staff. They are often engaged in intimidation or extortion of other inmates for money or drugs.

[18] Prison life in maximum security institutions is stricter than in minimum and medium security institutions. In medium security institutions, inmates are allowed to participate in recreational programs and have some freedom of movement. In maximum security institutions, the movement of inmates is much more restrained.

[19] At the institution, there are three units. Inmates are placed in a unit according to criteria related to risks and needs. All units have the same size and layout and are composed of 80 cells spread over 4 ranges, 2 upper ranges and 2 lower ranges. However, each unit operates very differently.

[20] Unit 1 houses the general population of inmates. This unit is populated by macho men, where ego is everything. They are the peacocks of the institution. For example, if an inmate in that unit is insulted, he feels compelled to defend his honour.

[21] Unit 2 is populated by inmates with special needs and inmates with social and intellectual deficits along with inmates considered to be informants by other inmates and inmates that are sex offenders. Those types of persons are not welcome in the general population of inmates found in Unit 1, and they could become prey if placed there. They generally need support from the institution.

[22] Unit 3 is dedicated to inmates who are segregated, whether voluntarily or involuntarily. The unit is populated by inmates who have committed violent acts in prison or who have intimidated, muscled or extorted other prisoners. Inmates that the general prison population cannot tolerate can also be sent to that unit.

[23] The institution has 300 employees, including 160 correctional officers. Other employees include parole officers, clerks, psychologists and technical staff.

[24] Mr. Niles described the work that correctional officers perform. There are four levels of correctional officers. Correctional officers at the CX-01 level are line staff. The grievor's position was at that level. The CX-01 correctional officers work largely in what are known as "static posts," that is, posts where the correctional officer is not in direct contact with inmates. They work, for example, at the control post, which is protected by glass. The correctional officer working at the control post at the CX-01 level controls movement within the unit. For example, he or she controls the doors and barriers of the unit. There are 10 barriers in each unit. There are other static posts, such as the gallery posts. There, correctional officers observe inmates in the prison yard and gymnasium.

[25] Mr. Niles explained that correctional officers at the CX-02 level are also line staff. Those officers work in what are known as "dynamic posts," meaning that they work on the floor. They have direct contact with inmates and interact with them. There are three or four officers at that level in each unit. They do the hourly rounds of the unit and ensure that everything is under control. They are the eyes and ears of the unit. They also respond to distress calls from inmates.

[26] Correctional officers at the CX-03 level are security intelligence officers. They give advice to the warden on security issues. There are two persons working at that level at the institution.

[27] Correctional officers at the CX-04 level are managers. They run units. They are in charge of around-the-clock day-to-day operations. Thirteen persons work at that level at the institution.

[28] Mr. Niles stated that the grievor was offered an indeterminate appointment at the institution on December 9, 2005, as indicated in the letter of offer of employment (Exhibit E-3). The grievor had previously followed an 11-week Correctional Officer's Training Program ("the training program") offered by the respondent.

[29] Mr. Niles explained that the probation period was 12 months. It did not include periods of leave with pay of more than 35 days. The grievor was on leave with pay from June 21, 2006 to July 25 of the same year, for a total of 35 calendar days, as indicated in the grievor's leave report (Exhibit E-4). Taking his leave with pay into account, his probationary period ended on January 15, 2007.

[30] Mr. Niles explained that the four main areas of concern with the grievor were his attendance record, his judgment being inappropriate for a correctional officer, his having an emotional outburst and his difficulty integrating within a team.

[31] The respondent's representative filed into evidence the grievor's letter of rejection on probation (Exhibit E-1). The grievor's representative objected to the filing of that letter on the grounds that it constituted hearsay evidence. The letter described events involving persons who were not present at the hearing. The respondent's representative replied that the grievor would have the opportunity to tender evidence to refute the contents of the letter. I ruled that I would accept the letter because it sets out to the reasons for which the grievor was rejected on probation which makes it relevant. It was open to the grievor to present evidence as to whether the facts referred to in the letter were true and accurate. In my view, that letter is not hearsay because it was not submitted for the truth of its content, but to explain why the employer made the decision it did. That letter, dated January 24, 2007, reads in part as follows:

*I regret to inform you that by the authority delegated to me through the provisions of Section 62(1) of the Public Service Employment Act, I hereby give you written notice of my decision to reject on probation your employment from your position as a Correctional Officer (CX-01), effective January 11, 2007.*

*In making my decision, I considered the following factors:*



- *I have serious concerns with your attendance record. Your absences and sudden departures leave holes in the roster which subsequently pose serious safety and security risks to both inmates and staff*
- *I have been made aware of incidents which suggest that your judgment is not appropriate for employment as a Correctional Officer*
- *You have openly demonstrated anger, aggression and frustration; such unpredictable behavior can not be tolerated*
- *You have difficulty integrating into a team environment which is a cause for concern given that teamwork is an integral part of dynamic security*

*Having considered all of the above, I have concluded that you are not personally suited to be employed as a Correctional Officer and consequently have no alternative but to reject you on probation.*

...

[32] Mr. Niles stated that the acting warden, Paul Bourque, met with the grievor on January 12, 2007, and told him that he was rejected on probation for those reasons. Mr. Niles was away from the institution at that time.

[33] Mr. Niles brought to my attention salient points of the key activities of the grievor's work description (Exhibit E-5, page 2):

**Key activities**

*Supervises, controls and monitors inmate movement and activities within and outside the institution; conducts counts and patrols.*

...

*Participates as a member of the unit correctional team and contributes input toward the development and implementation of unit programs.*

...

*Demonstrates professionalism in the performance of security duties to present a positive behavioural example to inmates and facilitate an environment conducive to the development of life skills.*

...

*Records observations of inmate movement and behaviour on specific activity records in order to keep supervisors informed.*

...

[34] Mr. Niles stated that a correctional officer at the CX-01 level must be capable of performing those duties. Most, but not all, of the duties are static. The first activity describes the bread and butter of the job. Conducting counts and controls is an essential part of the grievor's duties. It is also essential that a correctional officer be a member of the team, as indicated in the second paragraph above. A correctional officer must also have professional conduct, as indicated in the third paragraph. A correctional officer must also be vigilant in observing and recording what is taking place in the institution, as indicated in the fourth paragraph above.

[35] Mr. Niles pointed out that psychological effort is an important part of the grievor's duties, as indicated in the grievor's work description (Exhibit E-5, page 8):

...

*There is a requirement to remain calm, composed and professional during emergency situations in order to restore security and protect the safety of the public, staff, inmates, and the institution. Such situations may involve severe trauma, injury or death. It may be necessary to use lethal force against inmates in the interest of security. There is no control over the timing or frequency of such circumstances.*

...

[36] Mr. Niles testified that the work description also indicates that shift work is routine (at page 12). Shift work can have a negative impact on an employee's personal life.

[37] Mr. Niles explained that not all people are suited for the work of a correctional officer. A person needs strong character traits to cope with the negative, stressful and violent environment of a prison institution.

[38] Mr. Niles stated that what was important to him was not the amount of paid leave the grievor used but the manner in which the leave was used. The grievor lacked judgment in the manner in which he took his leave. The grievor was not managing his leave entitlements wisely. The grievor risked using up all his leave entitlements, and if

that had happened, the respondent would have had to terminate the grievor had he needed more leave.

[39] Mr. Niles testified that on June 12, 2006, he sent a memorandum to Monique McGrath, the regional director for workers' compensation claims for the respondent, to oppose a workers' compensation claim that the grievor had submitted (Exhibit E-7). The grievor submitted the claim after seeing an inmate (whom I will refer to as inmate "A" — I will refer to all inmates by a letter of the alphabet to protect their identities) in a suicide observation cell slash his arms with a razor blade on February 17, 2006. That type of behaviour is not uncommon among inmates. Mr. Niles thought that the grievor's claim was questionable. Inmate A's cell was 20 to 25 feet away from the grievor's control post. At the time of the incident, the grievor was well protected since he was in an attack-proof control post, and he watched the event on a small black-and-white closed-circuit television monitor. The grievor submitted his Report of Accident or Occupational Disease ("the workers' compensation claim") three months after the incident, on May 17, 2006 (Exhibit E-8). The workers' compensation claim indicates at paragraph 6 that the "[e]mployee was witness to numerous slashing incidents which involved blood spraying on walls during his shift. . . This caused post traumatic stress disorder" (Exhibit E-8). Mr. Niles was very surprised at the words that the grievor used to describe the incident. It was unusual that slashing incidents involved blood spraying onto walls. Mr. Niles specified that although it was not the grievor who wrote the description found at paragraph 6 of that workers' compensation claim (Exhibit E-8), it was the grievor who had described the incident to the person who wrote the report. The grievor also signed the report, therefore acquiescing to its content.

[40] Mr. Niles explained that every time an incident occurs, the institution produces an incident report that describes it. The report also contains the statements of the officers involved in the incident. After reading the grievor's workers' compensation claim of May 17, 2006, Mr. Niles asked for the incident report on inmate A's arm-slashing incident of February 17, 2006 (Exhibit E-8). In that incident report, which Ken L. St Germain completed on February 20, 2006, three days after the incident, Mr. St-Germain draws a different picture of the event. The summary of the incident report indicates that the inmate had a one-inch cut on each arm and that there was a "[s]mall amount of blood on the mattress."

[41] Mr. Niles pointed out that the statement of officer "E.M." (I have used initials for staff directly involved in incidents with inmates to protect their identities) in the incident report also indicates that there was a small amount of blood present on the mattress (Exhibit E-8). The statement that nurse "Y.R." wrote in the incident report on February 17, 2006, also does not mention blood spraying onto the walls (Exhibit E-8).

[42] It is because of this discrepancy that Mr. Niles wrote a memo to Ms. McGrath on June 12, 2006, to voice his opposition to the grievor's workers' compensation claim (Exhibit E-7). The memo points out that the grievor had an indirect and minor exposure to the slashing incident since it consisted of watching the actions of the inmate on a small black-and-white television monitor. In that memo, Mr. Niles also states that the grievor's statement that the incident involved blood spraying onto the walls vastly overstates the actual incident. The inmate had inflicted on himself a one-inch laceration on each arm. Mr. Niles added in his memo that the reports of the persons who examined the inmate all indicate that his injuries were superficial. Mr. Niles wrote that an ". . . indirect exposure to an inmate committing superficial self-injury is insufficient to constitute a bona fide claim of mental trauma" (Exhibit E-7).

[43] Mr. Niles wanted to refer me to the decision of the Workplace Health, Safety and Compensation Commission of New Brunswick ("the WHSCCNB"), which indicated whether the grievor's workers' compensation claim was allowed. The grievor's representative raised an objection as to the relevance of that decision. The respondent's representative stated that the WHSCCNB's decision was relevant to the reason for which the grievor was rejected on probation. I told the parties that I would take the objection under advisement. I agree that the WHSCCNB's decision is not relevant to the reason for which the respondent rejected the grievor on probation. Whether the grievor's claim was rejected or not has no direct bearing on the question of whether the grievor was rejected for employment-related reasons in this particular case. The WHSCCNB's decision might have been relevant if, for example, the grievor had been rejected for fraud and the claim was rejected by the WHSCCNB for the same reason, but that is not the situation in this case.

[44] Mr. Niles stated that in the last 3 years, there have been 203 workers' compensation claims submitted by the staff of the institution. When the respondent's representative asked Mr. Niles how many claims he had opposed, the grievor's representative objected to that question. The grievor's representative stated that the

respondent's representative was insinuating that the claim was false. The respondent's representative stated that the answer was relevant since it went to the reasons for which the grievor was rejected on probation. I stated that I would take the objection under advisement. I now rule that the question is not relevant to the matter at issue. The number of workers' compensation claims that Mr. Niles opposed is not relevant to the reasons for which the grievor was rejected on probation.

[45] Mr. Niles also pointed out that the grievor failed to report inmate A's arm-slashing incident when it occurred. The grievor reported the incident three months later which is contrary to standard procedure taught to aspiring employees at the training program that the grievor had taken before being hired. In that training program, students are told the importance of recording and documenting incidents that occur in the institution.

[46] Mr. Niles referred me to "Commissioner's Directive 568-1," which states that staff must provide a statement of their involvement in any security-related incident as soon as possible following the incident and before the staff member leaves the institution (Exhibit E-9, paragraphs 14 and 16). The importance of documenting incidents involving inmates is also stressed in the key activities of the grievor's work description, which provides that a correctional officer "[r]ecords observations of inmate movement and behaviour . . ." (Exhibit E-5, page 2).

[47] Mr. Niles testified that the grievor again submitted a workers' compensation claim on June 20, 2006, because of an incident that occurred with another inmate, inmate "B". In the grievor's claim, which he completed the day of the incident (Exhibit E-10), he wrote: "[u]pon restraining a inmate, I had my right knee behind the inmates leg applying presure and holding his feet with minimal force to restrain him [sic throughout]."

[48] Mr. Niles explained that when force is used against an inmate, all correctional officers must fill out a use-of-force report. Mr. Niles reviews all reports and gives his views on whether the correctional officer used appropriate force. Mr. Niles reviewed all the use-of-force reports about the June 20, 2006, incident for which the grievor filed a workers' compensation claim. Mr. Niles also viewed the video of the incident. The use-of-force reports and the video reveal that the incident involved inmate B assaulting an officer. This was done in plain sight of the officer in the control post. The latter called for help, and within seconds, there were four or more officers on the

scene. The officers brought the inmate to the ground and immobilized him. The grievor was one of the officers that responded to the call for assistance, but he was the last one to arrive on the scene. In Mr. Niles' view, the role of the grievor was relatively limited. The grievor applied his right knee behind the inmate's left leg and controlled the inmate's feet with his hands.

[49] Mr. Niles stated that on June 26, 2006, he wrote a memorandum to Ms. McGrath to oppose the grievor's workers' compensation claim (Exhibit E-10). Mr. Niles referred me to an excerpt of this memo, where he outlines his concern with respect to the claim:

...  
*... It is puzzling that, while other officers who had more direct participation in restraining and immobilizing the inmate sustained no injuries, officer Melanson managed to sustain an injury to his right knee as a direct result of the immobilized inmate pushing against officer Melanson's knee with his leg.*

...  
[50] Mr. Niles testified that the same day, before the incident described above, the grievor had another incident with another inmate, inmate "C". That incident is described in the grievor's workers' compensation claim of July 10, 2006 (Exhibit E-10). In that report, the grievor writes (at paragraph 6):

*In the mid morning a inmate brandished a mop stick as a weapon yelling he would kill someone if his property was not returned. Several officer's pined the Inmate against a wall in the attempt to restrain him. Myself and officer [name omitted] emmediatly grabbed a hold of the weapon and began to pull on it in an atempt to take it away from the inmate. Officer [name omitted] and I had to pull hard with repeaded motions as the inmate kept resisting with several other officer's on top of him trying to restrain him. We were successfull in taking the weapon away from the inmate. It was not until the next morning when I woke up that I noticed pain in my back with visible swelling.*

[Sic throughout]

[51] Mr. Niles stated that although these elements alone may not have convinced him to reject the grievor on probation, they were red flags that made him question the

grievor's suitability for the job. But there were other elements, as indicated in the rejection on probation letter. One of the other elements was an incident that occurred on November 6, 2006. The grievor had an emotional outburst while on duty. It was necessary to remove him from his post. At that point in the hearing, the grievor's representative objected to that line of testimony on the grounds that it was hearsay. The respondent's representative argued that the evidence was relevant since its purpose was not to prove the details of the incident but to prove what Mr. Niles knew of the incident. Mr. Niles' testimony establishes one of the reasons that he rejected the grievor on probation. I allowed the evidence because and it was relevant given that it touched on the reasons for which Mr. Niles rejected the grievor on probation. The evidence was only tendered as proof that Mr. Niles considered the incident in his decision to reject the grievor, not as proof the incident occurred in the way that the employer said it did.

[52] Mr. Niles explained that every morning when he arrives at the institution, he visits the correctional supervisor to check on what happened the previous night, to review the employment roster for the day and to look at the day's plans. The grievor's emotional outburst incident occurred on November 6, 2006, after normal working hours. When Mr. Niles came in the next morning, the correctional supervisor gave Mr. Niles a general description of the incident. Later that day, Mr. Bourque sent Mr. Niles a report from Tim Martin, the correctional supervisor in charge the night of the incident, that described the incident in more detail (Exhibit E-11). That report reads in part as follows:

*Cx1 Melanson came into the C.S office and brushed by CX1 Power and went to the back office. The writer noticed officer Melanson was wearing his frisk master gloves. Power left the office. Melanson asked if I was the only one who he could speak to, he was very agitated. Melanson claimed he needed to speak to someone before he exploded. He closed the office door . . . Melanson explained his personal problem. Melanson was extremely up set at this time, he was gritting his teeth, his face was red, he had his fists clenched, the writer was unsure of his intentions. The writer told Melanson I would contact an EAP REP for him. he was told to go to the briefing room. Melanson slammed the briefing room door, then the writer heard what sounded like furniture being kicked, then there was a loud thud and the windows in the briefing room rattled. The writer proceeds from the Correctional Supervisors office to the briefing room. The writer entered*

*the room and told him to calm down. Melanson then looked at the writer and said you have no compassion. . . .*

. . .

[Sic throughout]

[53] Mr. Niles added that Mr. Bourque told him that the grievor had asked to be relieved from his post before he did something that he did not want to do.

[54] The grievor met with the Employee Assistance Program officer and his union representative and was then relieved from his post and sent home. Mr. Niles stated that this incident raised concerns as to the grievor's suitability for his position.

[55] Mr. Niles testified that he was not aware at the time of that incident why the grievor was so upset. Mr. Niles learned later that it was because the grievor was informed while at work that his wife had been assaulted by a chiropractor. The assault had a sexual connotation. Mr. Niles stated that it was understandable that a person would be upset on learning such news. What concerned Mr. Niles is the extent of the grievor's reaction. The grievor had been confrontational with the supervisor and had threatened him. The grievor had also implied that he would hurt himself. The grievor's reaction was not normal. Correctional officers are expected to deal with unusual circumstances, including violent situations. The expectation for correctional officers is that, while they remain human beings, they can manage their emotions and respond to any event in a way that does not cause concern for the safety and security of themselves or of others. Mr. Niles stated that during his tenure as warden, he had seen employees experience significant personal trauma, including the death of a child and the death of a spouse. Those employees kept their emotions under control. When Mr. Niles compared the grievor's reaction to the reaction of those persons, Mr. Niles concluded that the grievor's reaction was unusually strong.

[56] Mr. Niles stated that these events brought him to question the grievor's suitability for his work. Correctional supervisors at the institution also asked Mr. Niles questions about the grievor's suitability. Even line staff told Mr. Niles that they had concerns for the well-being of the grievor and others. That was unusual. Wardens rarely receive comments directly from line staff.

[57] Mr. Niles testified that another element that he took into consideration in deciding to reject the grievor on probation was his work performance. Mr. Niles



referred me to the grievor's performance evaluation report for the period from September 1 to October 31, 2006, and specifically to the following comments of the grievor's supervisor, Mary Grace Traer (Exhibit E-12):

...

... Although questions are a necessary part of his position, Shannon questioned this supervisor and others supervisor to the point that he gives the impression that he has no confidence in his ability to do his job. He contacts the Correctional Supervisors to report observations, then questions as to what he should do. The reporting steps are all a part of His CTP training. He does not always work with the officers in the Unit. I have told him several times that he should not call the Correctional Supervisors office for every little thing. ;that he should be dealing with the Unit Staff, or the IMC officer, etc. An example of this is his calling to see if an inmate could go to work as he had missed the work up call. Shannon still has not demonstrated that he has taken responsibility for his leave. He was clearly counseled many times as to the pattern he was presenting and the fact that the year was still long and that he must govern his leave accordingly. He finds himself in situations where he has to leave work immediately or be at home. He demonstrates no patience when he has to leave work immediately and can not always be accommodated at that moment.. He has to be reminded that a replacement for him has to be found and this could take time. As a result of this, he has overbooked his Family Related Responsibility leave. He will ask the supervisors what he should do again no taking responsibility. He has been given other options, ie, shift exchange, but he seldom acts on this. The result being that he has very little leave left for the remaining time in this year demonstrating his not taking responsibility for his leave . . . His lack of confidence leads one to wonder if he has the maturity and judgment skills necessary in this line of work . . . Shannon does not work comfortably as a team player. He works mostly control posts by choice as he will ask to trade posts in order to work the controls. He does not allow himself many opportunities to work the dynamic interaction required of him with staff and inmates.

...

[58] In the Annex to the Performance Evaluation Report, his supervisor wrote the following:

...

b,d,i. Shannon will challenge inmates who infract upon the rules and regulations and submit offence reports, yet, it is noticed that 90% of these reports are issued from inside the confines of a glassed in control post. There are no attempts made towards an informal resolution. Shannon does not adequately demonstrate the dynamic security aspects that are essential in his role as a CX1. He rarely interacts with the officers on the Unit floors giving this writer concern that he doesn't seem to be accepted by his peers.

...

d. Shannon does not always react favourably to changes. Most times when officers request to change posts with another officer the request is permitted. On one particular shift, there was a Unit search being conducted. There were releases and transfers scheduled, plus officer training happening at the range, so in order to keep on track with all the confusion it was stated at the officer's briefing that no one would be permitted to change posts as it was too busy to be able to keep track of where everyone would be at certain times if needed. Shannon attempted three times to have a post change permitted not accepting the supervisors direction even when it was very clearly explained at the briefing why it would not be permitted to anyone. This is very frustrating to a supervisor who is busy organizing the dayshift and having to deal with an officer will interrupt to try to get what they want no matter what was already said.

...

... He requested annual leave and was informed that the allotted quota of hours was already taken. On route home he called to see if he could work 8 hours and have the last 4 hours annual. He was again informed that the quota was still full. He clearly was not interested in accepting anything until he heard what he wanted.

c. Shannon expressed that he would like to be a team member/player, yet he does not demonstrate this behaviour. He works mostly control posts and for the most part it is hard to determine if he has no confidence in his peers or himself as he calls the Correctional Supervisors for information or direction rather than working with his fellow officers in the Units/Floor, etc. He has been directed many times to work with the other officers yet has not demonstrated that he is following this direction.

...

[Sic throughout]

[59] Mr. Niles stated that this appraisal report reinforced his concerns about the grievor's suitability for his work, including the fact that he was not managing his leave entitlements wisely. Mr. Niles also referred me to the rating score in the grievor's performance evaluation report for the period from September 1 to October 31, 2006 (Exhibit E-12). The grievor did not meet several objectives for his work.

[60] In cross-examination, Mr. Niles testified that he never discussed the grievor's rejection on probation with him. Mr. Bourque informed the grievor on January 12, 2007, that his employment was terminated effective that same day. Mr. Niles was absent that week, so Mr. Bourque was the acting warden.

[61] Mr. Niles stated that the grievor's supervisor, Ms. Traer, had discussed the grievor's attendance record with Mr. Niles on several occasions. Mr. Niles added that the grievor could have met with his supervisor many times before his termination. Ms. Traer would have discussed with the grievor any concerns about his attendance.

[62] The grievor's representative referred me to an email Mr. Niles wrote to Mr. White on August 2, 2007 (Exhibit G-1). The respondent's representative objected to the filing of that evidence on the grounds that it was not relevant to the grievor's rejection on probation since it was sent after the grievor's termination of employment and was privileged since it related to discussions between the parties in the grievance process. The grievor's representative argued that it was relevant. I informed the parties that I would take the objection under advisement. I rule that the information is privileged and cannot be disclosed at adjudication because it was made in the context of the grievance process. The subject of the email is the resolution of the grievance.

[63] Mr. Niles stated that the grievor wrote in his workers' compensation claim that he suffered from Post Traumatic Stress Disorder (PTSD) as a result of the February 17, 2006, incident when he saw inmate A slash his arms. Mr. Niles stated that if such an incident caused the grievor such stress, perhaps he was not suited for employment as a correctional officer. That is why Mr. Niles contested the grievor's workers' compensation claim. Mr. Niles added that he did not think that the grievor took any time off after that incident.

[64] Mr. Niles testified that a one-inch cut on the arm could be bloody, but the reports he consulted indicated that there was a minimal amount of blood. The

correctional officers who attended the inmate did not report any spraying of blood on the walls, as did the grievor. Mr. Niles specified that he was not saying that the grievor lied, only that the grievor's statement in his workers' compensation claim did not corresponded to the reports filed by other correctional officers.

[65] The grievor's representative drew Mr. Niles' attention to the summary section of the incident report where Mr. St-Germain wrote that the inmate "slashed" his arms (Exhibit E-8). Mr. Niles pointed out that "slashed" was a colloquial term used in the institution. He added that there were numerous arm-slashing incidents in the institution. They did not necessarily involve blood spraying on the walls, and in this case, the incident report did not indicate that there was blood on the walls of the prison cell. In Mr. Niles' view, the grievor exaggerated the amount of blood found in the prison cell.

[66] Mr. Niles testified that the grievor took a one-month sick leave for the back injury incurred in the incident with inmate C.

[67] With respect to the knee injury referred to in the grievor's second workers' compensation claim, Mr. Niles explained that an inmate struck a correctional officer in the face. That incident was recorded on video, which Mr. Niles viewed. Several correctional officers came to the rescue and subdued the inmate. All was under control. The grievor responded at the end of the incident, after the fact. The grievor had a minor role in the incident because by the time he arrived, the inmate had already been subdued. None of the other correctional officers suffered an injury, just the grievor. The incident concerned Mr. Niles because the grievor's workers' compensation claim relating to that injury was filed soon after he filed his workers' compensation claim for inmate A's arm-slashing.

[68] In response to a question asked by the grievor's representative relating to that knee injury, Mr. Niles stated that the video was taken at a distance from the scene of the incident, so it was not possible to see what each correctional officer was doing. When the grievor's representative told Mr. Niles that he intended to prove that the grievor was not present at that scene, Mr. Niles answered that that may be so.

[69] Mr. Niles testified that it was the institution's policy to inform employees on probation of their performance in a timely manner, which was done in the grievor's case.

[70] The grievor testified. He began working at the institution in December 2005.

[71] The grievor explained why he had used most of his leave. His wife was from Newfoundland. When she arrived in Moncton, she could not find a family physician because of a shortage of physicians. His wife's parents lived in Moncton, but they were also not well. Thus, the grievor was the only person who could care for his wife in emergencies. The grievor's wife had difficult pregnancies. She had been sick since the premature birth of their first child. She had lost a second child, and her third pregnancy was difficult. Because the grievor's wife did not have a family physician, the only way to get help when she was sick was to bring her to the emergency department of the hospital. The grievor's absences were due in great part to the fact that he had to bring his wife to the hospital when she was sick.

[72] The grievor's representative filed into evidence several medical certificates and reports that establish that he brought his wife to the hospital several times, often on an emergency basis:

- A certificate from the Beauséjour Hospital indicates that the grievor went to its emergency department with his wife on April 2, 2006 (Exhibit G-3).
- A certificate from the Moncton Hospital indicates that the grievor went to its emergency department on October 15, 2006 (Exhibit G-4). The grievor had given that certificate to the respondent before his termination.
- A report from the Dr. Georges L. Dumont Regional Hospital, dated January 12, 2007, indicates that the grievor's wife attended the emergency and other units on nine occasions in February and March 2006 (Exhibit G-10).
- A report from the South-East Regional Health Authority dated January 16, 2007, indicates that the grievor's wife visited the Moncton Hospital on 10 occasions in March, April, August and September 2006 (Exhibit G-11).
- A report from the South-East Regional Health Authority, dated January 17, 2007, indicates that the grievor's wife visited the Moncton Hospital on 13 occasions in September, October, November and December 2006 (Exhibit G-12).

[73] The respondent's representative objected to the filing of the medical reports of January 12, 16 and 17, 2007 (Exhibits G-10, G-11 and G-12) on the grounds that they

were not relevant since they were produced after the grievor's termination. The grievor's representative, for his part, argued that they were relevant since they shed light on the reasons for the grievor's absences, and those absences were one of the reasons for which the grievor was rejected on probation. I told the parties that I would take the objection under advisement. After considering the arguments of both parties, I have decided that those documents should be admitted in evidence for the reasons put forth by the grievor's representative.

[74] The grievor's representative filed into evidence three medical certificates that indicate that he was treated at the Héritage Physiotherapy Clinic on June 28, 2006 (Exhibit G-6), July 10, 2006 (Exhibit G-8) and August 4, 2006 (Exhibit G-5). The grievor also submitted an undated certificate from the same clinic that indicates that the grievor was treated for a shoulder and upper back condition as well as a sprain to his right knee (Exhibit G-7). The grievor also submitted a medical certificate from his family physician that indicates that the grievor was under the physician's care from April 23 to April 26, 2006 (Exhibit G-9). The grievor added that he had remitted those five certificates to the respondent before his rejection on probation.

[75] The grievor described the arm-slashing incident that occurred on February 17, 2006. The grievor was at the control post. From his post, he could see the interior of the cells through a closed-circuit television. The only furniture in inmate A's cell was a mattress. The grievor saw inmate A go to the cell window and take a razor he had hidden there. The inmate was leaning against the wall. Inmate A began slashing his arms with the razor. The grievor informed the floor staff of what was going on, and the floor staff told the grievor to keep an eye on the inmate via the television and to inform them if he cut an artery. The grievor saw that blood was coming out of the inmate's wounds and that he was "putting blood" on the bed and the walls. It was a gruesome sight. No one entered the cell. Several staff members tried to speak to inmate A through the window in the cell's door asking him to stop slashing his arms. Inmate A was never removed from his cell.

[76] The grievor explained that after four hours at the control post, he was posted in another part of the institution adjacent to Unit 3. There, he was told that an inmate had tried to hang himself. It turned out to be inmate A. The prison staff had taken inmate A down. The grievor saw the staff bring inmate A out of Unit 3 on a backboard

with a collar and head blocks securing his head. The staff members were covered with blood.

[77] The grievor explained that he was not present at the incident where inmate B assaulted correctional officer "O.T." on June 20, 2006. That is the incident that Mr. Niles referred to in relation to the grievor's workers' compensation claim of the same day. Consequently, he was not in the video, contrary to what Mr. Niles contends. At that time, the grievor was at the Miramichi Regional Hospital because of an injury he suffered that day. The grievor's representative filed into evidence a certificate from Esther Keating of the Health Records Department of the Miramichi Regional Health Authority, which specifies that the grievor was treated at that hospital on June 20, 2006 from 15:40 to 17:15 (Exhibit G-16).

[78] The grievor explained that he had been involved in two incidents on June 20, 2006. In the morning, the grievor and correctional officer "R.H." conducted a search in inmate C's cell while the inmate was in the recreation yard. The grievor and officer R.H. took away items that did not belong to inmate C. When inmate C returned to his cell and found the items missing, he became aggressive. Inmate C took a four-and-a-half to five-foot-long mop handle and brandished it as a weapon, yelling that he would hurt someone if his belongings were not returned to him. Officer R.H. pushed inmate C against a wall. Other staff members arrived and secured inmate C. The officers and inmate C were on the ground, and the mop handle was under the inmate. The grievor and officer "D.B." pulled several times on the mop handle to dislodge it. Inmate C was then placed in segregation. The grievor felt back pains the next morning. Inflammation had set in in his back. He went to see the doctor to have his back examined, and the doctor sent him to the Héritage Physiotherapy Clinic.

[79] The grievor described the second incident that occurred on June 20, 2006. That incident involved a knee injury. Early in the afternoon, there was an altercation between officer R.H., officer "S.H." and inmate "D". Using force, Officers R.H. and S.H. pushed inmate D to the floor, held his hands and shoulders to the ground, and asked for help. The grievor and correctional officer "A.M." responded to the call. The grievor placed his knee on the back of inmate D's leg and applied pressure. The other officers placed shackles on inmate D's feet. The grievor filed a report of the incident.

[80] The same day, after that incident, the grievor had his leg examined by a nurse. When he straightened his leg, the nurse heard a "pop". The nurse brought the grievor

to the health facilities unit in the institution, wrapped his knee to support it and instructed him to file a workers' compensation claim for the knee injury. The nurse then sent the grievor to the hospital for an assessment of his knee. The grievor went to the hospital that afternoon. He was in the hospital at the time Mr. Niles thought he saw the grievor in the video of the incident with inmate B, as indicated in the medical certificate from the Miramichi Regional Health Authority already filed into evidence (Exhibit G-16). That same afternoon, the grievor saw officer O.T., the officer that was struck by inmate B, brought to the hospital in an ambulance. The officer accompanying officer O.T. told the grievor that inmate B had also been brought to the hospital.

[81] The grievor added that officers R.H. and S.H. filed workers' compensation claims following the incident with inmate D.

[82] The grievor then described the November 6, 2006 incident where he had asked to be relieved from his post. He had been working in a unit for dangerous offenders. He received a call from his wife, who was in Newfoundland for her grandmother's funeral. She was very emotional. She told him that she had been sexually assaulted by her chiropractor. The grievor was upset because it occurred during his wife's high-risk pregnancy of his third child. The grievor contacted Mr. Martin, the supervisor on duty that day, and asked to be relieved from his post as soon as possible. The grievor feared that something bad could happen because of his lack of judgment resulting from the distress he felt. The grievor was relieved from his post and met with Mr. Martin in his office. The grievor described to Mr. Martin the phone call he had received from his wife. Mr. Martin asked the grievor to wait for him in the briefing room. The grievor asked to see his union representative. The union representative came to see the grievor in the briefing room. Mr. Martin then sent the grievor home.

[83] A few days later in November 2006, Mr. Bourque called the grievor to his office. Ms. Traer was also present. Mr. Bourque gave the grievor a copy of the audio cassette of the conversation between him and his wife. Mr. Bourque said that he was not convinced of the "validity" of the comments made by the grievor's wife. Mr. Bourque added that he was not sure whether it was a planned attempt to get the grievor some time off. Mr. Bourque stated that the grievor's reaction following the phone call was uncalled for. Mr. Bourque added that if what the grievor described were true, he would forget the whole situation. Mr. Bourque placed the grievor on leave and asked that he be assessed by Health Canada to determine whether he had an anger problem.



[84] On December 6, 2006, Rene Morais, an occupational safety and health coordinator for the institution, wrote to Health Canada requesting a fitness-to-work evaluation for the grievor (Exhibit G-13). The grievor underwent the assessment. He received a letter from Dr. Frederic J. Maggio, Medical Officer, Health Canada, informing him that he was fit for work (Exhibit G-15). Although the letter is dated December 28, 2006, the grievor only received it in January 2007, when he returned to work.

[85] The grievor stated that he consulted a psychologist, Mr. Gino Frenette, when his wife was still in Newfoundland because he was not sure how to handle her emotional state. The grievor told Dr. Frenette that his wife had been assaulted by her chiropractor in Newfoundland. Dr. Frenette reported the incident to the Newfoundland and Labrador Chiropractic Board, as indicated in the letter of the president of that board, Dr. R.G. Bryans, dated January 8, 2007 (Exhibit G-14).

[86] The grievor testified that he met with Mr. Bourque on January 11 or 12, 2007. At that time, he had returned from leave. He had been on leave since November 2006. Mr. White had called him to the meeting. Mr. Bourque told the grievor that the purpose of the meeting was to inform him that he was being rejected on probation and that a letter explaining the reasons for his rejection would follow. The meeting lasted two or three minutes. The grievor was escorted out of the prison. The grievor received the letter by registered mail on February 7, 2007 (Exhibit E-1).

[87] In cross-examination, the grievor stated that he was aware that there was a probationary period of 12 months when he was hired since it is set out in his letter of offer of employment (Exhibit E-3).

[88] The grievor explained that he had followed an 11-week training program before he was hired. All potential correctional officers had to follow that course. During training, students learned what it is like to work in a prison institution. Students were given training in self-defence and in weapons. The trainers also explained the duties of correctional officers to the students. The grievor specified, however, that the training given in that course was geared to medium security prisons, since that is where most prisoners are sent. Life in a maximum security prison is different: the mobility of inmates is more restricted. Correctional officers are also better equipped in maximum security institutions since they have guns, rifles and pepper spray.

[89] The grievor stated that he did not give Ms. Traer the hospital records for his absences (Exhibits G-10, G-11 and G-12).

[90] When the respondent's representative asked the grievor whether the security of staff and inmates is compromised when one correctional officer leaves his or her post, the grievor answered that their security is not compromised since no officer leaves his or her post without being replaced. That has never happened. If an officer has to be replaced, management will find a replacement or ask officers to work overtime.

[91] The grievor confirmed that the correctional supervisor, Chris Brooks, wrote the description of the incident of inmate A slashing his arms found at paragraph 6 of the grievor workers' compensation claim (Exhibit E-8). Mr. Brooks wrote what the grievor told him. The grievor added that that report indicates, at page 2, that he declared that the information provided in that report is correct.

[92] The grievor testified that he did not go to see the inmate in his cell when he was in the control post. After 11:30, the grievor was assigned to an area outside Unit 3.

[93] The grievor's representative pointed out to the grievor that he left the control post at 11:30 but that the summary in the incident report (Exhibit E-8) completed by Mr. St-Germain indicates that at that time the nurse did not see any blood. It is only when the nurse returned at 13:50 that she saw blood. The grievor answered that the window to inmate A's cell was small, which could explain why the nurse may not have seen the blood. It could also be because inmate A was standing with his arms along his sides.

[94] The respondent's representative pointed out to the grievor that the summary in the incident report (Exhibit E-8) completed by Mr. St-Germain indicates that the inmate's arm-slashing incident was the cause of the grievor's PTSD. The grievor answered that it was not the slashing incident alone that caused the PTSD but the entire incident involving the inmate. That includes the fact that nobody went into the cell to take care of the inmate. The grievor would have given the inmate medical attention. That is what prison staff should have done.

[95] When asked under cross-examination whether any other correctional officer had filed a workers' compensation claim following inmate A's arm-slashing incident, the

grievor answered that he did not know if anyone did but that he did know that one officer involved in the incident did not return to work in the following month.

[96] With respect to the issue of why the grievor waited three months before completing a report on inmate A's arm-slashing incident, as required by paragraphs 14 and 16 of "Commissioner's Directive 568-1" (Exhibit E-9), the grievor answered that immediately after the incident, he had asked the floor staff if he should complete a report. The floor staff replied that he should not do so and that he should continue watching the incident on the closed-circuit television. They would take care of the rest. The grievor complied with their request because the last thing a probationary employee wants to do is single himself out with line staff. The grievor could not recall the names of those officers. Three months later, Mr. Brooks asked him to complete a report on the incident.

[97] The grievor admitted that he signed his performance evaluation report (Exhibit E-12). The grievor was on leave at the time and his supervisor, Ms. Traer, called him to her office to sign it. The grievor checked the box on page three of that report that indicates that he agrees with the assessment. The grievor admitted that, at that time, he was aware that Ms. Traer had concerns with his work performance.

[98] In re-direct, the grievor stated that Ms. Traer was always informed of the reasons for his leaves since he had to justify his leave requests to her.

[99] The grievor testified that one of the officers that left the institution with blood on his clothes after inmate A's arm-slashing incident was officer "J.G." That officer was shaken up by the incident and did not return to work. The grievor could not remember the name of the other officer. Management had to be aware of this since the officers were given overalls to go home in because of the blood on their clothes. The grievor assumed Mr. Niles, in particular, was aware of that fact since Mr. Niles testified that he knew about everything that happened in the institution.

[100] The grievor added that correctional officers often took leave because of stress.

[101] The grievor explained why he completed a workers' compensation claim about inmate A's arm-slashing incident three months after the incident occurred. The incident was the subject of a national investigation. Mr. Brooks suggested, three

months after the incident, that the grievor file a claim in case the investigators asked him for his version of the incident.

#### **IV. Summary of the arguments**

##### **A. For the respondent**

[102] The respondent submitted that I do not have jurisdiction over this matter because the grievor's employment was terminated while he was on probation. The grievor's letter of offer of employment, dated December 9, 2005, indicates that his start date was December 12, 2005 (Exhibit E-3). The grievor's letter of offer also states that his employment is subject to a 12-month probation period. Paragraph 61(1)(a) of the *PSEA* provides that the probation period is the period set out in the TB's regulations. The *Regulations Establishing Periods of Probation and Periods of Notice of Termination of Employment During Probation*, SOR/2005-375 ("the regulations on probation periods"), made by the TB, provide that the probation period for employees appointed on an indeterminate basis is 12 months. The grievor's letter of offer of employment and paragraph 2(2)(c) of the regulations on probation periods provide that the probation period does not include periods of leave with pay of more than 30 consecutive days. It is not in dispute that the grievor took more than 30 days' leave with pay. The grievor's probationary period, therefore, ended on January 16 or 17, 2007. Mr. Bourque, who was acting warden of the institution in the absence of Mr. Niles, met with the grievor on January 11 or 12, 2007, to inform him that he was rejected on probation, effective that day. The grievor was given pay in lieu of notice in accordance with subsection 62(2) of the *PSEA*. A letter followed on January 24, 2007, setting out in writing the reasons for the grievor's rejection on probation (Exhibit E-1).

[103] The respondent's representative pointed out that paragraph 211(a) of the *PSLRA* provides that an employee cannot refer to adjudication an individual grievance relating to any termination of employment under the *PSEA*. The grievor was rejected on probation in accordance with paragraph 62(1)(a) of the *PSEA*. In rejection on probation cases, the role of an adjudicator is to determine if the termination was made for employment-related reasons. If it was, the adjudicator does not have jurisdiction over the matter. The role of an adjudicator is not to put himself in the shoes of the employer and assess the validity of the termination or determine whether there was cause for the termination. The only way an adjudicator can overturn a decision to

reject an employee on probation is to decide that the rejection was a sham or a camouflage.

[104] The respondent's representative referred me to several cases about the employer's onus in rejection on probation cases and the jurisdiction of the adjudicator in such grievances. In *The Queen v. Ouimet*, [1979] 1 F.C. 55 (C.A.), the Federal Court of Appeal held that the employer in a rejection on probation grievance has only to establish that the grievor was rejected for employment-related reasons. The burden then shifts to the grievor, who must establish that the rejection was a sham or a camouflage. The Federal Court of Appeal added that the suitability of an employee is an acceptable basis for rejecting that employee on probation.

[105] The respondent's representative also referred me to *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), where the Federal Court of Appeal held at paragraph 18 that an adjudicator is not concerned with a rejection on probation as soon as there is evidence satisfactory to the adjudicator that the employer has acted in good faith in rejecting the employee on probation.

[106] In *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72, at paragraph 118, (upheld in *Chaudhry v. Canada (Attorney General)*, 2007 FC 389) the adjudicator held that the mere fact that an employee is advised at the start of his employment that he is on probation is sufficient warning that performance-related concerns can result in a rejection on probation. In the present case, the grievor's letter of offer of employment specifies that the grievor will be on probation for 12 months (Exhibit E-3). The grievor's performance evaluation report indicated that the respondent had concerns with the grievor's work performance (Exhibit E-12).

[107] The respondent's representative referred me to *Canada (Attorney General) v. Leonarduzzi* 2001 FCT 529, where at paragraph 37 the Federal Court held that in a rejection on probation grievance, the employer need only establish some evidence that the rejection was related to employment reasons and not for any other purpose. The same reasoning was followed by the adjudicators in *Ross v. Treasury Board (Correctional Services Canada)*, 2003 PSSRB 97; and *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33 (at paragraphs 64 to 66, 74 and 75).

[108] In *Boyce v. Treasury Board (Department of National Defence)*, 2004 PSSRB 39, the adjudicator held at paragraphs 54-56 that the reason to reject an employee on

probation does not have to be well-founded and that it only has to be related to employment. In *Chaudhry*, the adjudicator held at paragraph 119 that an adjudicator does not have jurisdiction to inquire into the merits of a decision to reject an employee on probation. At paragraph 76 of *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139, the adjudicator held that the employer did "... not need to prove that each and every one of its listed reasons for rejection on probation is well-founded; it only needs to show 'an employment related reason'..."

[109] The respondent's representative argued that the evidence establishes that the grievor was rejected on probation for employment-related reasons.

[110] The grievor's work performance is in itself sufficient reason to reject him on probation. His performance evaluation report, which the grievor signed and agreed to, indicates that he had many work-related problems (Exhibit E-12). It indicates, for example, that he did not meet many objectives.

[111] The grievor's outburst when his wife called him at work is another work-related reason to reject him on probation. He told Mr. Martin, in a threatening tone, to relieve him from his post since he did not know what would happen if he weren't relieved from his duties that day. The situation was serious because the grievor had access to firearms. That was another reason to end his employment.

[112] As to the grievor's attendance at work, Mr. Niles testified that it was the manner in which he used his leave that made Mr. Niles question his suitability.

[113] The grievor has the right to claim workers' compensation, but he filed three claims in three months. The respondent was justified in questioning the grievor's suitability for work as a correctional officer.

[114] The grievor's representative concluded by stating that the evidence shows that the grievor is not suited for work as a correctional officer. Since the grievor was rejected for employment-related reasons, I do not have jurisdiction to hear this grievance.

**B. For the grievor**

[115] The grievor's representative submitted that I had jurisdiction to hear this matter because the rejection of the grievor on probation was a sham. The respondent acted in bad faith in terminating his employment.

[116] The grievor's representative argued that relying on the grievor's attendance record to justify his termination is bad faith. The grievor had a right to the leave he took. All his leave was justified. There was no abuse in that regard. Relying on those absences is contrary to clause 37.01 of the collective agreement, which prohibits discrimination because of physical disability. The grievor's wife had health problems, and the respondent had to accommodate the grievor, who had to attend to his wife's medical needs.

[117] The grievor's representative argued that it was not true that the grievor's absences left holes in the employee roster. The grievor's testimony shows that a correctional officer cannot leave his or her post without being replaced. When an employee had to be absent, the respondent asked other employees to work overtime.

[118] The grievor's representative argued that the grievor had a right to file workers' compensation claims. With respect to the arm-slashing incident of inmate A, the respondent showed bad faith in reproaching the grievor for filing a workers' compensation claim. Inmate A mutilated himself and later tried to hang himself. Those were stressful events. Another correctional officer involved in that incident took a month of leave. Correctional officers are assaulted every day. PTSD is frequent among correctional officers. Furthermore, the grievor filed a workers' compensation claim for that incident at the request of staff at the institution. The respondent acted in bad faith by asking the grievor to file a workers' compensation claim and then terminating his employment for doing so.

[119] The evidence establishes that Mr. Niles made an error with respect to another of the grievor's workers' compensation claims. Mr. Niles thought that the grievor was not justified in making a claim for a knee injury because he saw a video of an incident with inmate B and concluded that the grievor's involvement in that incident was minor. However, the evidence establishes that the grievor was not even there. The medical certificate issued by the Miramichi Regional Health Authority establishes that, at that time, the grievor was at that hospital. The grievor did file a workers' compensation

claim for his right knee, but it was because of another incident. The reason he filed a claim is that the nurse that examined him heard a "pop" when the grievor stretched his leg and told the grievor to get medical attendance.

[120] The grievor's representative stated that Mr. Niles now relies on the grievor's performance evaluation report (Exhibit E-12). There are many things in the evaluation report that Mr. Niles testified about that are not in the grievor's letter of rejection (Exhibit E-1). For example, the evaluation report states that the grievor asks too many questions. That is not in the rejection letter.

[121] The grievor's representative concluded by saying that I had jurisdiction to hear this matter. The respondent acted in bad faith in rejecting the grievor on probation. The grievor's representative asked that I keep jurisdiction on the matters of corrective measures should I allow the grievance.

### **C. Respondent's reply**

[122] The respondent's representative argued that inmate A's February 17, 2006, arm-slashing incident could not have caused the grievor's mental trauma. The grievor did not go to inmate A's cell; therefore, he did not have direct contact with that inmate. The grievor's reaction to that incident caused Mr. Niles to question the grievor's suitability for the work of a correctional officer.

[123] The grievor was not penalized for filing three workers' compensation claims. The fact that he filed three claims in three months caused the respondent to doubt his suitability to do his work.

### **V. Reasons**

[124] The grievor has referred his grievance to adjudication pursuant to paragraph 209(1)(b) of the PSLRA, which reads as follows:

*209.(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*

...

*(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*



[125] The grievor was rejected on probation after almost a year of employment with the respondent (excluding periods of leave with pay of more than 30 consecutive days). The respondent's representative stated that the grievor was given pay in lieu of notice. The grievor did not dispute that he was on probation at the time of his rejection. Given this, the jurisdiction of an adjudicator in such a case is tightly circumscribed by both legislation and jurisprudence.

[126] Paragraph 211(a) of the *PSLRA* provides that an employee cannot refer to adjudication an individual grievance relating to any termination of employment under the *PSEA*:

*211. Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*

*(a) any termination of employment under the Public Service Employment Act. . . .*

[127] Rejection on probation is governed by section 62 of the *PSEA*. The relevant portions of that section read as follows:

*62. (1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*

*(a) the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the Financial Administration Act, or*

...

*and the employee ceases to be an employee at the end of that notice period.*

*(2) Instead of notifying an employee under subsection (1), the deputy head may notify the employee that his or her employment will be terminated on the date specified by the deputy head and that they will be paid an amount equal to the salary they would have been paid during the notice period under that subsection.*

[128] In *Penner*, the Federal Court of Appeal explained that the purpose of the probationary period is to assess the employee's suitability for employment. At paragraph 19, Marceau J. writes:

...

... As was said by Heald J. [[1977] 1 F.C. 91 (C.A.), *sub. nom. Attorney General of Canada v. Public Service Staff Relations Board*, at page 100], and approved by de Grandpre J. in his reasons in *Jacmain* (at page 37) "the whole intent of section 28 [now 62] is to give the employer an opportunity to assess an employee's suitability for a position. If, at any time during that period, the employer concludes that the employee is not suitable, then the employer can reject him without the employee having the adjudication avenue of redress. ...

...

[129] In *Leonarduzzi*, the Federal Court determined at paragraph 37 that the employer is not required to establish just cause but is only required to establish, through some evidence, that the rejection was related to employment and not for any other purpose:

...

... the employer need not establish a *prima facie* case nor just cause but simply some evidence the rejection was related to employment issues and not for any other purpose.

...

[130] In *Penner*, the Federal Court of Appeal at paragraph 14, adopted the following test, articulated by the adjudicator in *Smith v. Treasury Board (Post Office Department)*, PSSRB File No. 166-02-3017 (19771007):

...

*In effect, once credible evidence is tendered by the Employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes shuddering to a halt. ...*

...

[131] At paragraph 45 of *Leonarduzzi*, however, the Federal Court held that an adjudicator has jurisdiction over the matter if the grievor's termination is, in fact, "a sham or a camouflage" or made in bad faith and therefore not in accordance with section 28 (now section 62) of the *PSEA*. According to *Leonarduzzi*, once the employer has discharged its burden of demonstrating that the rejection was for an employment-related reason, the burden of proof shifts to the grievor to demonstrate that the employer's actions are "a sham or a camouflage" or made in bad faith. It is

important to note that the burden rests on the grievor to show bad faith; there is no requirement that the employer prove that it acted in good faith.

[132] Therefore, the main issue in this grievance is determining whether the grievor's employment was terminated for employment-related reasons, each of which was set out by the employer in its letter of rejection. Mr. Niles testified that the grievor was released from his employment for four reasons: his attendance record, his workers' compensation claims, his emotional reaction when his wife telephoned him at work to tell him that she had been sexually assaulted by a physiotherapist and his difficulty integrating within a team.

[133] Mr. Niles testified that he was concerned by the manner in which the grievor was using his leave entitlements. Mr. Niles' concern, and the concern of the grievor's supervisor as expressed in the grievor's performance evaluation report, was that the grievor was using up his leave entitlements too quickly, risking using them all up before the end of the year. If that were to happen, the grievor would have no leave left if he had to be absent from work. Mr. Niles did not question the validity of the grievor's use of his leave entitlements or contend that the grievor abused them in any way. In Mr. Niles' view, however, the grievor was not managing his leave wisely, which showed a lack of judgment. Therefore, the grievor may not be suited for work as a correctional officer. In the letter of rejection to the grievor, Mr. Niles writes that (Exhibit E-1):

...

*I have serious concerns with your attendance record. Your absences and sudden departures leave holes in the roster which subsequently pose serious safety and security risks to both inmates and staff*

...

[134] The grievor's performance evaluation report for the period from September 1 to October 31, 2006 raises the same concern (Exhibit E-12):

...

*... Shannon still has not demonstrated that he has taken responsibility for his leave. He was clearly counseled many times as to the pattern he was presenting and the fact that the year was still long and that he must govern his leave accordingly. He finds himself in situations where he has to*

*leave work immediately or be at home. He demonstrates no patience when he has to leave work immediately and can not always be accommodated at that moment.. He has to be reminded that a replacement for him has to be found and this could take time. As a result of this, he has overbooked his Family Related Responsibility leave. He will ask the supervisors what he should do again no taking responsibility. He has been given other options, ie, shift exchange, but he seldom acts on this. The result being that he has very little leave left for the remaining time in this year demonstrating his not taking responsibility for his leave. . . .*

...

[Sic throughout]

[135] The leave report (Exhibit E-4) and the medical certificates submitted by the grievor (Exhibits G-3 to G-12) establish that he was absent because of health issues and family-related responsibilities. The family-related leaves were mainly due to the grievor's wife having a high-risk pregnancy and the grievor having to bring her to the hospital several times.

[136] With all due respect, I fail to see the logic of Mr. Niles' reasoning in this matter. Sick-leave entitlements and family-related leave entitlements are there to be used if needed. Either the grievor has a right to those types of leave, or he does not. The respondent cannot reproach the grievor for using leave that he had a right to use. If I were to accept the respondent's argument, it would have a perverse effect on the working conditions of employees. New recruits on probation would hesitate to take sick leave while sick for fear that the employer would reject them for that reason. Sick leave should be used when a person is sick, if he or she has the right to sick leave. The same is true for family-related leaves: they should be used when needed if the employee has a right to them.

[137] The issue becomes whether the grievor's attendance record, and more specifically his use of sick leave and family-related leaves, are "employment-related" reasons for termination. It is in the narrow sense that absences from work are related to work. If I were to accept that narrow interpretation of "employment-related reasons," the result would be perverse. An employer could, for example, reject a person who exercised an employment-related right simply because there is a connection to the workplace. In my view the connection to the workplace must be "legitimate": the employer must establish a "legitimate" employment-related reason to

reject an employee on probation. This was in part the view expressed by the adjudicator in *Owens*. The adjudicator noted that the employer must demonstrate “legitimate” concerns to reject an employee on probation and that it cannot rely on “trivial” reasons:

...

[74] I now turn to the question of whether the employer's actions are “a sham or camouflage”. This part of the test is a very high standard or threshold for the grievor to meet. The employer has demonstrated legitimate concerns about Mr. Owens' performance and behaviour in the workplace. Unless those reasons can be characterized as trivial, in my view, the employer's decision cannot be said to be a sham or a camouflage. The reasons relied on by the employer in this case are not trivial, but are significant concerns about Mr. Owens' suitability for employment.

...

[Emphasis added]

[138] In *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119), the adjudicator noted that a decision to reject an employee on probation is not made in good faith if is “capricious” or “arbitrary”:

...

... if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without regard to the facts, and therefore not in good faith, then that decision is a nullity. ...

...

[139] Since the purpose of probation is to assess the employee's suitability for employment, in my view “legitimate” employment-related reasons are those related to the employee's suitability. The legitimate use of leave entitlements are not related to the employee's suitability for work. Therefore, in my view, the grievor's attendance record was not a legitimate reason to reject him on probation. If the reason an employee is rejected is not legitimate, it is tantamount to bad faith.

[140] I would like to add on this issue that there is no convincing evidence that the grievor's absences left “holes” in the roster, as Mr. Niles claims. I find the grievor's explanations much more convincing. He stated that when a correctional officer must

be absent, the institution finds a replacement or asks that correctional officers work overtime.

[141] Since I have decided that the respondent could not rely on the grievor's attendance record to reject him on probation, there is no need to address the grievor's argument that the respondent discriminated against him on the grounds of disability, contrary to clause 37.01 of the collective agreement, by relying on his absences to reject him.

[142] The second reason Mr. Niles gave to reject the grievor on probation was his workers' compensation claims. The letter of rejection on probation is more vague (Exhibit E-1):

...

*I have been made aware of incidents which suggest that your judgement is not appropriate for employment as a Correctional Officer*

...

[143] The respondent's representative did not argue that the grievor did not have the right to make the workers' compensation claims or that his claims were fraudulent. The respondent's representative submitted that the fact that the grievor made three workers' compensation claims in three months shows that the grievor may not be suitable for his work. The logic of that reasoning escapes me. The workers' compensation program is there to be used by employees if needed. Employees have a right to file a claim if they believe they are injured at work. The respondent cannot penalize the grievor for exercising his rights. Again, were I to accept the respondent's reasoning, recruits on probation who injure themselves at work would hesitate to avail themselves of the workers' compensation program for fear that it may be used against them. Rejecting the grievor for filing workers' compensation claims is not a legitimate reason for rejecting him on probation. In my view, it is tantamount to bad faith.

[144] I must add that, although the respondent's representative did not argue that the grievor misrepresented his workers' compensation claims, there is evidence that suggests that Mr. Niles thought so. Mr. Niles testified that, in his view, the grievor exaggerated his description of the blood found in inmate A's cell after the arm-slashing incident and exaggerated the severity of his injury to his right knee

during the incident with inmate B. Nothing turns on this, however, since I have already ruled that the respondent could not rely on the grievor's workers' compensation claims to reject him on probation.

[145] It is also interesting to note that Mr. Niles' decision to reject the grievor on probation for filing workers' compensation claims is somewhat flawed because it is based in part on an error. Mr. Niles thought that the grievor exaggerated the seriousness of an injury to his right knee in his workers' compensation claim for an injury he sustained on June 20, 2006, when he restrained an inmate (Exhibit E-10). Mr. Niles' belief is based mainly on the fact that he viewed the video of the incident with inmate B and saw that the grievor's involvement was minor. However, the evidence shows that the grievor was not in that video. The grievor was at the Miramichi Regional Hospital Emergency Department at that time, as indicated by his testimony and as corroborated by a certificate issued by the Health Records Department of that hospital (Exhibit G-16). That certificate specifies that the grievor was treated at that hospital on June 20, 2006, from 15:40 to 17:15. Mr. Niles himself admitted in his testimony that he could not see the officers clearly and that it was possible that the grievor was not the person he saw in the video. The fact that Mr. Niles made this error is not significant in this grievance, however, since I have decided that the respondent could not rely on the grievor's workers' compensation claims to justify rejecting him on probation.

[146] Before leaving this matter, I would like to note that the grievor filed a workers' compensation claim about inmate A's arm-slashing incident at the suggestion of Mr. Brooks and the workers' compensation claim for the injury to his right knee at the suggestion of a staff nurse. It therefore would seem unjust to reproach the grievor for following their suggestions. However, nothing turns on this since I have ruled that the respondent could not rely on the grievor's workers' compensation claims to reject him on probation.

[147] The third reason Mr. Niles gave in his testimony to justify the grievor's rejection on probation was the grievor's reaction when he received a phone call from his wife on November 6, 2006, informing him that she had been sexually assaulted by her physiotherapist. Following that call, the grievor asked to be relieved from his post. In the grievor's letter of rejection, Mr. Niles wrote (Exhibit E-1):

...

*. . . You have openly demonstrated anger, aggression and frustration; such unpredictable behavior can not be tolerated*

...

[148] In his report of the incident, Mr. Martin, the correctional supervisor on duty, describes the incident as follows (Exhibit E-11):

*CX1 Melanson came into the C.S office and brushed by CX1 Power and went to the back office. The writer noticed officer Melanson was wearing his frisk master gloves. Power left the office. Melanson asked if I was the only one who he could speak to, he was very agitated. Melanson claimed he needed to speak to someone before he exploded. He closed the office door . . . Melanson explained his personal problem. Melanson was extremely up set at this time, he was gritting his teeth, his face was red, he had his fists clenched, the writer was unsure of his intentions. The writer told Melanson I would contact an EAP REP for him. he was told to go to the briefing room. Melanson slammed the briefing room door, then the writer heard what sounded like furniture being kicked, then there was a loud thud and the windows in the briefing room rattled. The writer proceeds from the Correctional Supervisors office to the briefing room. The writer entered the room and told him to calm down. Melanson then looked at the writer and said you have no compassion. . . .*

[Sic throughout]

[149] Mr. Niles stated that a correctional officer must be able to sustain stress. He pointed out that psychological effort is an important part of the grievor's duties, as indicated in the grievor's work description (Exhibit E-5, page 8):

...

*There is a requirement to remain calm, composed and professional during emergency situations in order to restore security and protect the safety of the public, staff, inmates, and the institution. Such situations may involve severe trauma, injury or death. It may be necessary to use lethal force against inmates in the interest of security. . . .*

...

[150] According to Mr. Niles, the grievor overreacted, which was relevant to his suitability to work as a correctional officer. Although I am not convinced that this incident establishes that the grievor is not suited for his work, it is linked to his suitability for employment, and I cannot substitute my assessment of the grievor's



suitability for that of Mr. Niles or determine the reasonableness of that assessment. This was a legitimate employment-related reason for rejecting the grievor and there is no hint that the employer's focus on this was in reality a disguised opportunity to discipline him.

[151] The fourth reason Mr. Niles gave in his testimony to justify the grievor's rejection on probation was his difficulty integrating within a team. This is also reflected in the letter of rejection on probation:

...

*You have difficulty integrating into a team environment which is a cause for concern given that teamwork is an integral part of dynamic security*

...

[152] The need to work efficiently with a team is an important part of the work of a correctional officer. This is reflected in the key activities of the grievor's work description (Exhibit E-5, page 2):

**Key activities**

...

*Participates as a member of the unit correctional team and contributes input toward the development and implementation of unit programs.*

...

[153] There is evidence that the grievor had some difficulties working within a team. In the grievor's performance evaluation report for the period from September 1 to October 31, 2006, the grievor's supervisor, Ms. Traer, points out that the grievor does not always obey his supervisor's orders, tends to rely too much on his supervisors instead of his colleagues and does not work comfortably as a team player (Exhibit E-12, at page 1):

...

*... Although questions are a necessary part of his position, Shannon questioned this supervisor and others supervisor to the point that he gives the impression that he has no confidence in his ability to do his job. He contacts the Correctional Supervisors to report observations, then*

questions as to what he should do. The reporting steps are all part of His CTP training. He does not always work with the officers in the Unit. I have told him several times that he should not call the Correctional Supervisors office for every little thing. ;that he should be dealing with the Unit Staff, or the IMC officer, etc. . . His lack of confidence leads one to wonder if he has the maturity and judgment skills necessary in this line of work . . . Shannon does not work comfortably as a team player. He works mostly control posts by choice as he will ask to trade posts in order to work the controls. He does not allow himself many opportunities to work the dynamic interaction required of him with staff and inmates..

...

[154] At page 1 of the Annex to the Performance Evaluation Report, we find the following:

...

. . . Shannon does not adequately demonstrate the dynamic security aspects that are essential in his role as a CXI. He rarely interacts with the officers on the Unit floors giving this writer concern that he doesn't seem to be accepted by his peers.

...

d. Shannon does not always react favourably to changes. Most times when officers request to change posts with another officer the request is permitted. On one particular shift, there was a Unit search being conducted. There were releases and transfers scheduled,, plus officer training happening at the range, so in order to keep on track with all the confusion it was stated at the officer's briefing that no one would be permitted to change posts as it was too busy to be able to keep track of where everyone would be at certain times if needed. Shannon attempted three times to have a post change permitted not accepting the supervisors direction even when it what very clearly explained at the briefing why it would not be permitted to anyone. This is very frustrating to a supervisor who is busy organizing the dayshift and having to deal with an officer will interrupt to try to get what they want no matter what was already said.

[155] At page 2 of the Annex to the Performance Evaluation Report, paragraph e, the employer wrote:

...

... He requested annual leave and was informed that the allotted quota of hours was already taken. On route home he called to see if he could work 8 hours and have the last 4 hours annual. He was again informed that the quota was still full. He clearly was not interested in accepting anything until he heard what he wanted.

c. Shannon expressed that he would like to be a team member/player, yet he does not demonstrate this behaviour. He works mostly control posts and for the most part it is hard to determine if he has no confidence in his peers or himself as he calls the Correctional Supervisors for information or direction rather than working with his fellow officers in the Units/Floor, etc. He has been directed many times to work with the other officers yet has not demonstrated that he is following this direction.

[Sic throughout]

...

[156] The grievor's shortcomings in integrating into a team are legitimate employment-related reasons for rejecting the grievor on probation. As I have stated above, it is not my role to determine the reasonableness of Mr. Niles' assessment. As long as the reason is a legitimate employment-related reason, I cannot intervene.

[157] Mr. Niles pointed out that the grievor's performance evaluation report indicates that he did not meet several work objectives set for him. I must point out that the letter of rejection on probation does not mention this reason for rejecting the grievor on probation. I might also point out that the performance evaluation report covers a very short period (only two months). The grievor's failure to meet his work objectives is, however, an employment-related reason to reject him on probation. The issue becomes whether the employer is bound by the reasons set out in its letter of rejection. I need not decide this issue, however, since I have already decided that the employer had a legitimate employment-related reason to reject the grievance on probation i.e., his shortcomings in integrating into a team.

[158] The respondent also relied on the fact that the grievor waited three months to report inmate A's arm-slashing incident to justify his rejection on probation. I agree with the employer that the grievor should have filed a report, even though he was told by the floor staff of the institution not to file a report. The grievor should not have taken direction from the floor staff since they are not managers (they are CX-02

employees). He should have filed a report as his training had thought him to do and as required by paragraphs 14 and 16 of "Commissioner's Directive 568-1" (Exhibit E-9). That reason was also not mentioned in the letter of rejection. I need not rule on that isolated incident, however since, as I have said earlier, the employer had a legitimate employment-related reason to reject the grievance on probation i.e., his shortcomings in integrating into a team.

[159] The difficulty in this grievance is that two of the main reasons for rejecting the grievor are not legitimate employment-related reasons, while the other two reasons are legitimate. The grievor's use of his leave entitlements and his workers' compensation claims have nothing to do with his suitability to perform his work, but his emotional reaction and his difficulty integrating into a team are related to his suitability. In his testimony, Mr. Niles spent much more time on the grievor's workers' compensation claims than any other reason for rejecting the grievor, but I cannot assume from that that the other reasons are not important. In *Wright*, the adjudicator decided that in a rejection on probation case, the employer does not have to prove that each and every reason given for the rejection was well-founded:

...

[76] ... the employer does not need to prove that each and every one of its listed reasons for rejection on probation is well-founded; it only needs to show "an employment-related reason" (Leonarduzzi (supra)). ...

...

[160] I concur with that view. As long as the employer establishes a legitimate employment-related reason for rejecting an employee, an adjudicator cannot intervene. I therefore find that I do not have jurisdiction to hear this grievance because the respondent had employment-related reasons for rejecting the grievor on probation.

[161] The result would have been different if the legitimate employment-relations reasons were trivial or arbitrary. The grievor's shortcoming in reacting to stressful situations and his difficulty working with a team are not, however, trivial or arbitrary reasons to reject an employee on probation.

[162] The grievor pointed out that he was not officially warned during his probation period that he could be rejected on probation because of his shortcomings. In my view, as the adjudicator pointed out at paragraph 81 of *Wright*, the mere fact of being on

probation is sufficient warning that performance-related concerns could result in a rejection on probation.

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

*(The Order appears on the next page)*

**VI. Order**

[164] The grievance is dismissed for lack of jurisdiction.

March 16, 2009.

**John A. Mooney,  
adjudicator**