Date: 20111223

File: 566-02-2883

Citation: 2011 PSLRB 145

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

SYLVIE DOUCET

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Doucet v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: Guylaine Bourbeau, Public Service Alliance of Canada

For the Respondent: Anne-Marie Duquette, counsel

Heard at Montreal, Quebec,
September 7 and 8, 2011, and by written submissions of May 13 and 21, 2010.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] Sylvie Doucet ("the grievor" or "the employee"), began working for the Correctional Service of Canada (CSC or "the employer") on September 7, 2004 as a laundry instructor at level GS-LAS-05 in the CORCAN division of the Leclerc Institution. After three years of on-call temporary work, she was one of three candidates appointed through a competition. She received a letter of offer for a permanent position beginning on May 14, 2007.

[2] On February 18, 2008, the employee was terminated on probation for non-compliant conduct under the CSC's *Standards of Professional Conduct* and *Code of Discipline*. The incidents occurred in 2004 and 2005, when the grievor was an on-call temporary employee. On February 27, 2008, she filed a grievance challenging her termination, which was dismissed at the third level of the grievance process on April 14, 2009. That led to the referral to adjudication on May 20, 2009.

[3] On April 21, 2010, the employer disputed the jurisdiction of an adjudicator to hear a grievance against a termination on probation, citing extensive case law in support. The bargaining agent claimed on the employee's behalf that the employer acted in bad faith by terminating her for incidents that occurred several years before the termination and that the employer did not sufficiently train her before she was appointed to a permanent position.

[4] During the hearing, the parties requested that I rule on the sole issue of whether the employer could have founded its decision on events that occurred before the employee was hired. Therefore, this decision only addresses the issue of whether the employer could have founded its decision on incidents that occurred before the grievor was hired as an indeterminate employee.

II. Gilles Turcotte's testimony

[5] Gilles Turcotte was, at the time of the employee's termination, the regional director of the CORCAN program for Quebec, one of the five administrative regions in Canada. He held the position between 2000 and 2003 and then in 2008-2009 before retiring. He had eight program units under his direction. Mr. Turcotte testified that the CORCAN is a special operating agency of the CSC, with a workforce composed of federal offenders from medium- and maximum-security institutions. The CORCAN provides those individuals with an opportunity to learn work skills likely to help them

reintegrate into the general population on their release from a federal institution. The purpose of the workshops, among others, is to manufacture products, such as office furniture, and to teach certain trades. The program of which the employee was part was the laundry service, which served 37 seniors' residences in greater Montreal. The laundry is open every day from 07:00 to 22:00 and operates as a private business. It teaches regular work habits to individuals who have never been in the workforce.

[6] The laundry service at Leclerc Institution comprises 122 inmates and about 20 employee instructors who train inmates to operate a laundry. Since he did not work on-site but in the regional office in Laval, Mr. Turcotte did not directly supervise the laundry instructors and relied on an assistant warden from the institution. Mr. Turcotte shared the responsibility of managing the laundry employees with the institution's warden. The warden was responsible for institutional security, and Mr. Turcotte was responsible for the trades. Leclerc Institution management investigated the grievor's conduct that led to her termination.

[7] Mr. Turcotte explained that each CSC employee has a work description outlining their assigned duties and their responsibilities for institutional security. It must be signed on hiring. Local management is responsible for training new employees. Laundry employees are not armed but have means of self-protection. Mr. Turcotte submitted a work description into evidence and testified that it applied to the grievor. As a replacement, the grievor had the same duties as regular employees and, in principle, should have had the same training as they did.

[8] Mr. Turcotte pointed out that one aspect of inmate supervision is not part of the work description; it involves public safety. Inmate supervision is very strict, to prevent breaches in institutional security. The new employee orientation includes general training by a supervisor on the first day of work and refers to the importance of colleagues' physical integrity. It is followed by mandatory training sessions.

[9] Mr. Turcotte decided to terminate the employee after learning, in November 2007, of two incidents that took place before she was hired as a permanent employee.

[10] The first incident involved a five-month correspondence with an inmate incarcerated at Leclerc Institution. The employee used a post office box under an assumed name to do it.

[11] In the second incident, the employee agreed to bring a piece of jewellery to an inmate's spouse. Since jewellery is not permitted in the institution, she was presumed to have transported a piece of jewellery outside the institution that had been brought in illegally.

[12] Mr. Turcotte based his decision to terminate the employee on the summary of the investigation of a security intelligence officer of the institution, Richard Frereault, which was submitted into evidence.

[13] Mr. Turcotte felt that the findings of the investigation showed a lack of judgment on the employee's part as far as institutional security and CSC values are concerned. Mr. Turcotte testified that he would terminate any employee displaying similar conduct, whether or not the employee was on probation. He found it particularly reprehensible that the employee opened a post office box under an assumed name, which he believes demonstrated her intention to hide her actions from the employer.

[14] Mr. Turcotte found it irrelevant that the incidents occurred three years before the employee was appointed to a permanent position, while she had only temporary status. The bond of trust had been broken. That was irreversible, since an inmate could again pull her in. Moreover, she had become a risk for smuggling weapons or drugs. Mr. Turcotte testified that incidents involving personal contact with an inmate are as reprehensible as those associated with a criminal record. The CSC neither hires anyone with a criminal record nor retains employees who violate its security procedures. Termination is immediate.

[15] Mr. Turcotte testified that he did not find it credible that the employee did not receive training about institutional security before obtaining her permanent status. He stated that she must have received initial training, just as he did when he joined the CSC as an officer. Given the dangerous environment in which CSC employees work, everyone, without exception, receives initial training that addresses the consequences of relationships with inmates. The fact that the employee had only just begun her job when the incidents occurred does not justify such a blatant lack of judgment. Mr. Turcotte testified that, given that lack of judgment, he assumed that other similar incidents took place without his knowledge.

[16] In cross-examination, Mr. Turcotte explained that the employee received several contracts before obtaining permanent status. He said that she would have likely signed a work description like all other CSC employees when she was hired for both contract and permanent employment. However, he could not be certain because he did not work at Leclerc Institution. He testified that security at the institution is also a matter of common sense. Mr. Turcotte was convinced that the employee signed a standard contract for each period of temporary work because such a document ensures that an employee is paid.

[17] Mr. Turcotte admitted that he did not meet with the employee before terminating her. He based his decision on Mr. Frereault's report and on her admissions. The dates of the incidents were not important to him.

[18] When asked whether he had considered the mitigating circumstances, Mr. Turcotte responded that, when someone behaves as the employee did, there can be no mitigating circumstances. According to Mr. Turcotte, the piece of jewellery was considered contraband, and she was one step from becoming a mule. In his opinion, the regret that she expressed was not a mitigating circumstance; nor was her outstanding work performance. She was terminated for her lack of judgment and not because of her performance. Mr. Turcotte admitted that he did not read the report prepared by the grievor's supervisor about the decision to terminate her.

III. Grievor's testimony

[19] The grievor testified that she currently works at a chiropractic clinic. Between two CSC contracts, she worked as a letter carrier for Canada Post and, before that, as a secretary for 20 years in her father's company.

[20] When the grievor began as a part-time laundry instructor in September 2004, she had a 125-day contract. In September 2005, all contracts were reduced to 90-day periods as of January 2006. She obtained a permanent job in 2007. She explained that she received no training, other than a session on supervising inmate work.

[21] The grievor testified that she did not receive a copy of the work description that the employer submitted in evidence. The document does not bear her signature. When she was hired as a temporary employee, and for each contract renewal, she signed a standard two-page contract. She received a letter of offer, which she signed when she was hired as a permanent employee. She then began a training session over several

days in October 2007 on CSC security, the code of ethics and behaviour to avoid with inmates.

[22] The grievor admitted that she exchanged three or four letters with an inmate over a few months and that the correspondence ended in March or April 2005. The inmate asked to write to her because he did not want to confide in anyone inside the institution. At that time, the grievor was going through a difficult separation and had begun a new job without much moral support. She did not see harm in a man and a woman corresponding. She did not believe or understand that the correspondence could affect CSC security. At a close friend's suggestion, she opened a post office box under an assumed name so that the inmate would not know her home address and so that she would not receive the correspondence at home.

[23] The grievor said that another inmate overheard that she would be travelling to Pointe-aux-Trembles. He asked her if she would bring a chain of sentimental value to his spouse, who lived there. She agreed as a favour to the inmate. The spouse offered her money, but she turned it down. She testified that nearly all inmates in the laundry wear some sort of jewellery. A third inmate called her at home to ask if she would be interested in maintaining a telephone relationship. She told him to never again call her at home.

[24] The grievor testified that, after receiving the training, she realized that the incidents involving the correspondence and the jewellery were against the CSC's code of ethics. She stated that she felt so ashamed that she did not dare tell anyone about it because she was afraid of being judged by her colleagues if they found out what she had done.

[25] The grievor was questioned about her vulnerability. She stated that she had to oversee the work, instruct inmates, and ensure cleanliness and safety. She spent six hours in the laundry with them every day. They all had stories to tell, and she tried to show empathy by joking with them a little. Since she did not receive training on refraining from personal contact with inmates, she did not realize that exchanging correspondence with an inmate or delivering a piece of jewellery could have consequences for the institution's overall security. She testified that, since her separation, she has learned to control her emotions and her vulnerability.

[26] The grievor explained the circumstances of the investigation into the correspondence incident in 2007. Her friend, who suggested that she open a post office box, kept the letters that the grievor received. That friend asked her several times to recommend her for a temporary position with the CSC, which she eventually obtained. She applied for a permanent position at the same time as the grievor. The grievor obtained a position; her friend did not. In the meantime, an inmate offered the grievor $500 to visit him in the trailers reserved for inmates during conjugal visits. She refused. The inmate continued to hound her, so she prepared an offence report against him. Since the friend did not obtain a permanent position and knew of the information in the offence report, she told the CSC of one of the letters exchanged in 2004-05. The letter was submitted to the institution's preventive security section. An investigation was conducted, and the grievor was terminated.

[27] On the evening on which the grievor was terminated, her supervisor met with her and, following their conversation, immediately prepared a report explaining that she was an outstanding employee and that she did not receive security training before obtaining her permanent status.

[28] In cross-examination, the grievor admitted to opening a post office box under a false name. She also admitted that the inmate's letter that was submitted to the employer alluded to an intimate relationship but explained that her letters were more reserved. She explained that the exchange was between a man and a woman and not between her and the CSC. She admitted that she experienced a moment of vulnerability that she later very much regretted. She stated that she would never do something like that again.

[29] The grievor acknowledged signing a declaration about the CSC's *Standards of Professional Conduct* when the CSC hired her in 2004. She stated that she was asked to sign a document hastily, that she was not given time to read it and that she did not receive a copy of it. When she asked for a copy, she was told that she had to discuss her concerns with her supervisors. She stated that she received a copy of the CSC's *Standards of Professional Conduct* and that she read the *Code of Discipline* only when she was hired, specifically during her training as a permanent employee.

IV. Summary of the arguments

A. For the employer

[30] The employer maintains that, since *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, an employer's burden of proof for justifying a termination on probation has been considerably reduced.

[31] The employer has only to prove that a probation was in effect and that the dismissal occurred during that period. The burden is then reversed, requiring the grievor to prove that the termination was not related to the probation and that it was a sham.

[32] In this case, the grievor was on probation when she was terminated. Nothing in the *Public Service Labour Relations Act* (*PSLRA)* prevents the employer from considering prior facts when deciding whether an employee has the necessary qualifications to hold a position. No case law is to the contrary. In *Tello*, the adjudicator upheld the termination, taking into account grounds for termination that were unrelated to work.

[33] In the grievor's case, the facts were discovered only during the probationary period, and the employer did not wait to act upon this information. The grievor was not terminated for her performance, but instead, for her conduct and lack of judgment outside her work. Maintaining a relationship of trust with the employee is a determining factor in the employment relationship. The CSC cannot afford to keep a potentially vulnerable employee. No training can replace a lack of judgment.

[34] The employer maintains that the grievor received proper training on joining the CSC that addressed the very situation in which she found herself. Since the facts were admitted, there is no sham. Although the punishment might seem severe, the adjudicator's role is not to rule on its severity.

[35] By corresponding with an inmate and by delivering jewellery, the grievor placed herself in a vulnerable position. She tarnished the CSC's image. Through her lack of judgment, she betrayed the employer's trust. Her conduct was also reprehensible in that she opened a post office box under a false name and in that she did not report her actions after receiving training. That makes two lapses in judgment. This is not a

matter of training but of "common sense," a personal attribute that is not acquired at work. This is not a camouflage. There was a legitimate reason for the termination.

[36] In support of its position, the employer cites the following decisions: *Attorney General of Canada v. Penner*, [1989] 3 F.C. 429 (C.A.); *Attorney General of Canada v. Leonarduzzi*, 2001 FCT 529; *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (T.D.)(QL); *Boshra v. Deputy Head (Statistics Canada)*, 2011 PSLRB 97; *McMath v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 42; and *Gannon v. Treasury Board (National Defence)*, 2002 PSSRB 32 (overturned for other reasons in 2004 FCA 417).

[37] In rebuttal, the employer argues that the supervisor who prepared the observation report was not called as a witness, and consequently, the report's contents cannot be used as evidence. The employer maintains that the decisions cited by the grievor are not relevant in this case because there was no error in procedural fairness. The employer considered the grievor's version of the facts and met with her. No circumstance can mitigate conduct that subjects an employee to immediate termination, whether or not the employee is on probation.

[38] The employer maintains that the training issue is irrelevant to whether an adjudicator has jurisdiction in this case. As long as there is no evidence of camouflage, a sham or bad faith, the merits of the decision cannot be reviewed.

[39] The employer requests that I allow the objection and that I dismiss the grievance.

B. <u>For the grievor</u>

[40] The grievor maintains that the employer's right to terminate an employee on probation is restricted and that it must consider the principles of fairness and natural justice. The employer must not draw an arbitrary conclusion.

[41] The grievor testified that she was a contract employee from 2004 and that she received no training, no work description nor a copy of the *Code of Discipline* before obtaining her permanent status. She trained inmates, an unusual clientele, and worked with them daily, to the extent that they became almost like colleagues. She is guilty of a moment of sympathy.

[42] The grievor does not deny the facts. She admitted the jewellery incident before the employer reproached her for it. The incidents held against her took place in 2004 and 2005, outside the probationary period. The report prepared by her supervisor states that she met all the performance objectives and that she had a good relationship with other employees. After she completed her training, the employer had no complaints about her.

[43] No evidence supports Mr. Turcotte's claim that temporary employees receive training on the codes of ethics or discipline. The employer did not produce any work contract before the letter of offer of permanent employment. The documents submitted were signed by others.

[44] The employer's decision was arbitrary because Mr. Turcotte did not consider mitigating facts, including the employee's upright conduct since receiving permanent status and the excellent quality of her work. Just because an employee is on probation does not mean that the employer can get away with anything. The same standards apply to all employees — in other words, the employer must consider the situation in its entirety.

[45] The grievor submits that it is not a matter of a camouflage but of a gap in training, which is the employer's responsibility. The alleged incidents are relatively trivial compared to those in *Gannon*. Without giving its employee the necessary training, the employer cannot blame the employee for what it terms a lack of common sense.

[46] In support of her position, the grievor cites the following decisions: *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109, and *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139.

[47] The employee requests that I dismiss the employer's objection.

V. Reasons

[48] I emphasize that, at the beginning of the hearing, the parties asked me to rule solely on the preliminary issue of whether the incidents that occurred before the grievor was hired could have been considered when evaluating the probationary period. The parties stated that no case law could shed light on this matter. In this case, the employer submitted its arguments primarily on the merits of the termination

during probation. The grievor argued that she was unaware of the rule forbidding personal contact with an inmate when the two incidents occurred.

[49] To be relevant to evaluating the probationary period, a rule must, in my opinion, be unambiguously and clearly communicated to the employee.

[50] The *Code of Discipline* states the following:

> . . .
>
> *An employee has committed an infraction, if he or she:*
>
> . . .
>
> *c. enters into any kind of personal or business relationship not approved by his or her authorized superior with an offender or ex-offender, or the offender's or ex-offender's friends or relatives. . . .*
>
> . . .

[51] That rule is set out in the *Code of Discipline*, updated in 2007, which was submitted in evidence. However, I have no evidence of previous versions or of the rule's wording when the grievor was hired temporarily and on call on September 4, 2004, because the employer produced no such evidence.

[52] The work description for a launderer that contains a declaration referring to compliance with the CSC's *Standards of Professional Conduct* and that was submitted in evidence was not signed by the grievor but by another employee. Moreover, it is dated January 25, 2002, two years before the grievor was hired on an on-call temporary basis. Therefore, it is not convincing proof that she received the work description and that she signed the declaration.

[53] The declaration signed by the grievor that she complied with the CSC's *Standards of Professional Conduct*, signed on September 7, 2004, indicates that it is the first page of seven. The six pages attached to the declaration were not produced. The employer stated that there were no copies of the six pages. The employer submitted into evidence a copy of the *Code of Discipline*, a nine-page document dated March 30, 1994, and a copy of the electronic version of the CSC's *Standards of Professional Conduct*, an eight-page document updated on February 28, 2007. Neither document contains six pages. Therefore, neither could be the document attached to the employee's declaration of September 7, 2004. Thus, it is impossible to determine from

the employer's documents whether the rule that required the grievor to refrain from any personal contact with an inmate was part of the CSC's *Standards of Professional Conduct* in 2004.

[54] The grievor maintained that she did not receive any training about the rule forbidding personal contact with an inmate and that she did not find out that her conduct violated the CSC's *Standards of Professional Conduct* and the CSC's *Code of Discipline* until she took a training session after becoming an indeterminate employee. The grievor's testimony is supported by Mr. Beauchamp's report, who wrote the following:

> [Translation]
>
> . . .
>
> *As far as security is concerned, an officer must have three months of training before setting foot in a federal penitentiary. However, instructors are thrown into the action with manipulators and smooth-talkers overnight, without training.*
>
> ***Instructors receive only five days of training at the Staff College, after holding a term position and often several years after becoming permanent. Temporary employees do not receive any training; they are vulnerable.***
>
> *A senior manager once said that Corcan was the poor child of the Service in terms of training, even though they have the same custody and control responsibilities as officers.*
>
> *In my opinion, Ms. Doucet is the victim in all this* ***since she had received no training at the time of the incident.*** *It has already been four years (2004). She clearly made an error in judgment and is fully aware of it.*
>
> . . .
>
> [Emphasis added]

[55] Mr. Turcotte testified that, to ensure payment, a contract is signed for each period of employment, with a declaration of compliance with the CSC's *Standards of Professional Conduct*, similar to the September 7, 2004 declaration. Through its counsel, the employer admitted during the hearing that it had not kept, or at least that it could not find, a copy of the contracts for term employment with the grievor's

declaration of compliance. The employer argued that, even though she received no training, it was a matter of judgment for a person working in a correctional setting.

[56] The grievor's testimony was not contradicted. Moreover, Mr. Beauchamp's statement indicates that she did not receive the training described by Mr. Turcotte. In its argument, the employer argued that I should not consider the content of that statement because Mr. Beauchamp did not testify. I dismiss that objection because the employer's counsel did not challenge the submission of that statement when the grievor testified. In such circumstances, if I were to not consider Mr. Beauchamp's statement, I would also have to dismiss Mr. Frereault's statement, because he did not testify, and his report is the basis for the employer's decision to terminate the grievor. Furthermore, the document signed by Mr. Beauchamp is the employer's document, drafted on its form.

[57] Aside from an explanation of the need to include such a rule in the *Code of Discipline*, it is a gratuitous assertion that the grievor, as a launderer, had to possess the necessary knowledge to not have personal contact with an inmate. The evidence did not persuade me that the rule to refrain from any personal contact with an inmate is obvious. Consequently, there is no convincing proof that the rule was clearly communicated to the grievor before the incidents occurred.

[58] The issue of an employee's conduct before being hired was addressed twice under the former *Public Service Staff Relations Act* (*PSSRA*) (repealed in 2005). Both adjudicators found that the wrongful events that preceded each employee's hiring were irrelevant because the employers could have learned of them before the employees were hired.

[59] In *Hartley v. Treasury Board (Solicitor General)*, PSSRB File No. 166-02-17326 (19880308), a correctional officer informed the employer during his pre-employment interview that he had run into problems with the law. After a brief check, the employer did not find anything. Some time later, the employer discovered his criminal record and terminated him on the spot. The adjudicator found that the grievor had not lied or misled the employer. Moreover, he showed impressive rehabilitation. The adjudicator revoked the termination because the employer did not establish grounds for dismissal. The adjudicator gave the employer the choice of either reinstating the grievor or compensating him with three months of pay.

[60] In *Anonsen v. Treasury Board (Department of Transport),* PSSRB File No. 166-02-17193 (19871222), the grievor was a commercial pilot. Before being hired, he had been criticized for failing to follow certain directives administered by the Department of Transport. However, his pilot status had not been revoked. The grievor was terminated for not declaring those failings in pre-employment discussions. The adjudicator found that the employer could have discovered the conduct for which the grievor had been criticized before hiring him and that the termination was a disciplinary measure rather than for an employment-related reason. However, the adjudicator ruled that the grievor had lost the employer's trust and ordered six months of compensation instead of reinstatement.

[61] To understand the reasoning of the adjudicators in those cases, the nuances of the arbitral case law as it existed at those times must be explained. Just like the *PSLRA*, the *PSSRA* provided that an adjudicator did not have jurisdiction to hear the grievance of an employee terminated on probation. However, arbitral case law developed, particularly after *Tighe* (PSSRB File No. 166-02-15122), a distinction between a termination for disciplinary reasons and a termination for cause, that is, for unsatisfactory performance. In short, if the employer's reason for terminating the employee during the probationary period was disciplinary, the grievance was adjudicable. If it was for just cause, the grievance was not adjudicable.

[62] That distinction ceased to exist when the *Public Service Employment Act* (*PSEA*) came into force, as its section 62 provides that the employer can terminate an employee on probation for any employment-related reason.

[63] In *Hartley*, the adjudicator decided that the employer had not given the grievor a chance to prove that he had properly discharged his duties because he was terminated two weeks after he was hired. Therefore, he found that the termination was disciplinary. In *Anonsen*, the adjudicator studied the issue of whether the termination for prior offences was a disciplinary ground. In the absence of evidence that the grievor did not have the qualifications for the job, the adjudicator found that the termination was disciplinary.

[64] In this case, the distinction between a termination on probation for disciplinary reasons and a termination for cause is of no use to me in deciding the quality of the employee's termination. However, I note that, in *Hartley* and *Anonsen*, the adjudicators examined the relevance of the evidence with respect to the employees' performances

during their probations and the knowledge that the employers could have had of the incidents before hiring each grievor. That leads me to consider the principle of the relevance of the incidents to the employer's decision to terminate the grievor.

[65] In this case, the grievor had been employed by the CSC for nine months. During that time, she had to demonstrate that she had the necessary qualifications for the position. My role as an adjudicator is to determine whether the evaluation method was fair and reasonable (see, for instance, *Hotel Fort Garry v. Canadian Brotherhood of Railway, Transport and General Workers* (1993), 33 C.L.A.S. 544, and the analysis by Brown and Beatty, *Canadian Labour Arbitration*, at para 7:5020). The following quote, taken from *United Electrical Workers v. Square D Co. Ltd.* (1955), 6 L.A.C. 289, on page 292, explains the principle well:

> *An employee who has the status of being "on probation" clearly has less job security than an employee who enjoys the status of a permanent employee. One is undergoing a period of testing, demonstration or investigation of his qualifications and suitability for regular employment as a permanent employee, and the other has satisfactorily met the test. The standards set by the company are not necessarily confined to standards relating to quality and quantity of production, they may embrace consideration of the employee's character, ability to work in harmony with others, potentiality for advancement and general suitability for retention in the company. Although it is apparent that any employee covered by the agreement can be discharged for cause at anytime, the employment of a probationer may be terminated if, in the judgment of the company prior to the completion of the probationary period, the probationer has failed to meet the standards set by the company and is considered to be not satisfactory.*

[66] In this case, the employee's excellent work was not contradicted. She submitted in evidence two documents signed by two different supervisors, who attested to her qualifications for the job. The first is a performance report for May 5 to December 3, 2007. Raoul Leblanc, her supervisor, made the following comments:

> [Translation]
>
> . . .
>
> *Ms. Doucet works effectively and properly manages the time she has to complete all production for the items to fold.*
>
> *She adapts very well to the unexpected.*

> *She is cooperative and understanding.*
>
> *She also feels comfortable working alone or in a group.*
>
> *She maintains a high rate of production efficiency.*
>
> *She not only meets but also surpasses her objectives.*
>
> *She replaces the assistant manager effectively and without notice.*
>
> *She listens to the inmates and advises them on laundry procedures and operations.*
>
> . . .

Mr. Leblanc notes that the employee exceeded all four position objectives at level 4.

[67] The second is an observation report prepared by the employee's supervisor, Sylvain Beauchamp, on January 30, 2008. The supervisor describes in detail his interview with the employee then adds his comments on her performance, as follows:

> [Translation]
>
> . . .
>
> *She states that she has invested much into her job and has demonstrated that she is a good employee. She worked hard to secure a place on the team and to earn everyone's respect, something she is very proud of. She also finished the past year with over three hundred (300) overtime hours, put in to meet our operational needs.*
>
> *Ms. Doucet not only meets but also exceeds her performance objectives, according to the assistant manager in her sector.*
>
> *She directs, supervises and disciplines inmates with discretion and maintains a high level of efficiency in her sector. Exceptional production and punctuality are easily achieved.*
>
> *In terms of interpersonal relationships with the employees of the small 1 & 2 AB population, i.e., all the POs, CMs and officers, everyone says that she is a wonderful employee, in all the departments in the institution.*
>
> [The names of the six employees have been withheld.]
>
> *Through her attentive listening and keen observation skills, she participated in a number of observation reports about the introduction and trafficking of drugs, which proved to have conclusive and positive results for the SIOs.*

> *In my opinion, the employer unfortunately has some, surely involuntary, responsibility in this case and several others, because, in the past year,* ***two (2) temporary employees were tricked by inmates due to a blatant lack of experience and training. Following Ms.*** **[name withheld]*'s most recent incident, all employees from the Corcan division unanimously complained of the situation during a meeting.***
>
> . . .
>
> *I have been a manager for two years now and have been asked repeatedly to show understanding, tolerance and patience; I have been told that the CSC's strength lies in our employees. I think that it would be worthwhile to consider the mitigating circumstances by supporting the employee, because let's not forget that, for the past 4 years, she has been a model employee and an example of professionalism through her hard work.*
>
> . . .

[68] I heard Mr. Turcotte's testimony that the employee could no longer be trusted and his declaration that surely other similar incidents occurred that were not brought to his attention. I find those concerns unfounded. Aside from Mr. Turcotte's opinion that the rules of ethics are a matter of "common sense," there is no evidence that the grievor's conduct compromised the institution's security or that there were repeat incidents. She conducted herself with integrity since she was hired as an indeterminate employee, and her performance was beyond reproach. Clearly, the past incidents did not adversely affect her performance during probation or tarnish the employer's reputation.

[69] Furthermore, just as in *Hartley* and *Anonsen*, the employer could have found out about the grievor's past conduct by, for instance, asking the right questions during a pre-employment interview or asking if she had anything to declare before offering her permanent employment. The employer could have decided at that time whether or not to hire her. If, after her declaration, the employer were to find out about the incidents, it could have claimed a lack of openness at the moment of hiring to justify its decision to terminate the employee during probation.

[70] In light of the circumstances in this case, I believe that the employer could not take into consideration the two previous incidents because the rule to refrain from personal contact with an inmate had not been clearly communicated and, because

there is no evidence, proves that the grievor was presumed to have known that rule. I find that, in this case, the incidents are irrelevant to her conduct while on probation. Consequently, the incidents that occurred before May 14, 2007 cannot be used against her to decide the success of her probation.

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

(The Order appears on the next page)

VI. Order

[72] I declare that the employer cannot take into account the incidents from before May 14, 2007 when assessing the employee's success during her probation.

[73] I remain seized of this matter to determine the actions to be taken about the grievance, but I give the parties 30 days as of the date of this decision to reach an agreement in that regard. Should an agreement not be reached, a hearing will be held to hear the parties.

December 23, 2011.

PSLRB Translation

Michele A. Pineau,
adjudicator