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*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

SAMEH BOSHRA

Grievor

and

**DEPUTY HEAD
(Statistics Canada)**

Respondent

Indexed as
Boshra v. Deputy Head (Statistics Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: [Renaud Paquet, adjudicator](#)

For the Grievor: [Paul Champ, counsel](#)

For the Respondent: [Karl Chemsy, counsel](#)

Heard at Ottawa, Ontario,
June 7 to 10, 2010, January 10 to 12, 2011, and June 1, 2011.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Sameh Boshra (“the grievor”) was working at Statistics Canada (“the deputy head” or “the respondent” or “the employer”) as an analyst in a position classified at the ES-03 group and level. On July 10, 2009, he grieved a one-day disciplinary suspension imposed on him by the respondent (File 566-02-3226). On July 31, 2009, the grievor was rejected on probation. He grieved that rejection, alleging that it was an act of retaliation because he had filed grievances, a human rights complaint and an access to information request (File 566-02-3229).

[2] The grievor received the employer’s final-level grievance replies on October 2, 2009, and referred both grievances to adjudication on October 29, 2009. On October 26, 2009, the grievor, pursuant to subsection 210(1) of the *Public Service Labour Relations Act* (“the Act”), notified the Canadian Human Rights Commission (CHRC) that he was raising an issue involving the *Canadian Human Rights Act*. On November 12, 2009, the CHRC informed the Public Service Labour Relations Board that it did not intend to make submissions on this grievance.

II. Summary of the evidence

[3] The employer called Karen Mihorean, Sylvie Michaud, Josée Bégin and Anil Arora as witnesses. At the time of the grievances, all the witnesses were working for Statistics Canada. Ms. Mihorean was Director of the Income Statistics Division, Ms. Michaud was Director General of Education, Labour and Income Statistics, Ms. Bégin was Assistant Director of the Income Statistics Division, and Mr. Arora was the Assistant Chief Statistician for Social, Health and Labour Statistics. The employer adduced 36 documents in evidence. The grievor testified. He also called Sean Dolan as a witness. At the time of the grievance, Mr. Dolan was an analyst at Statistics Canada, and his workstation was a few feet away from the grievor’s workstation. The grievor adduced 33 documents in evidence.

A. Probationary period

[4] The grievor joined the federal public service on November 26, 2007. He was appointed to an indeterminate full-time position at Statistics Canada at the ES-02 group and level. The grievor was hired under the ES Recruitment and Development Program (RDP). The employer informed him that he would be on probation for the duration of that program. The employer adduced in evidence the *Regulations*

Establishing Periods of Probation and Periods of Notice of Termination of Employment During Probation, SOR/2005-375 (“the *Regulations*”). According to the *Regulations*, the duration of the probationary period for an employee who is recruited under a program like the ES RDP is the duration of the training or 12 months, whichever is longer. The grievor did not challenge the fact that he was still on probation when he was terminated. He did not claim that he was not paid or given notice. Rather, the grievor alleged that the decision to terminate his employment was made in bad faith.

[5] The objective of the ES RDP is to oversee the development and training of newly hired employees. Each new employee belongs to a division headed by a director. The grievor belonged to the Income Statistics Division, which was headed by Ms. Michaud when the grievor was hired. Ms. Mihorean replaced Ms. Michaud on April 1, 2008. Had the grievor successfully completed the ES RDP, he would have been assigned to his home division. Under the ES RDP, the role of the home director is to assist the recruit in choosing assignments, establish training needs for the new recruit, oversee the performance of the recruit and present justification for promotions. If the recruit is assigned to another division, the role of the host division is to oversee the assignment and approve training during the assignment. Under the ES RDP, recruits are promoted after 12 months depending on their performance. The ES RDP is headed by a director. When the grievor was a recruit, the director was Carole Fraser.

[6] Generally, there are three assignments of an average duration of eight months each. Assignments should align with the performance factors in the recruit’s performance evaluation. There are written, formal assignment agreements that are worded like a contract. The parties to the agreement are the home division, the host division and the recruit. The agreement can be changed only with the consent of all the parties. The practice is that agreements are observed, as signed.

[7] The grievor’s first assignment was with the Census Subject Matter Program. He reported to Eric Olson. The assignment started in November 2007, and ended on October 10, 2008. Mr. Olson wrote a performance evaluation for that assignment. The grievor met all the requirements of the assignment and exceeded expectations for motivation. All the comments written in the evaluation were positive. The employer recommended that the grievor be promoted to the ES-03 group and level. The grievor was promoted in February 2009. Shortly before promoting the grievor, Ms. Mihorean wrote to Ms. Bégin that the grievor should be promoted “while keeping an eye on him.”

During cross-examination, Ms. Mihorean did not remember why she wrote that comment regarding the grievor's promotion.

[8] The grievor's second assignment was with the Public Sector Statistics Division. He reported to Claude Vaillancourt. The assignment started on October 13, 2008, and ended on June 14, 2009. Mr. Vaillancourt wrote a recruit evaluation for that assignment. The grievor met all the requirements of the assignment and most of the comments in the evaluation were positive. However, there were a few areas in which the grievor needed to improve. Mr. Vaillancourt wrote that the grievor's work was mostly individual work. He added that the grievor's communications with the other team members were brief, and the grievor could have expressed his ideas and opinions more fully. Mr. Vaillancourt also criticized the grievor for not having respected the hierarchy on an issue involving his participation in a training course. For development opportunities, Mr. Vaillancourt suggested that the grievor take courses to help him be more engaged at work and be a more effective team player, because teamwork was an essential part of the work. He also wrote that courses in conflict resolution, teamwork and people management would be beneficial to the grievor. The grievor did not agree with Mr. Vaillancourt's views on the areas in which he needed to improve. Those issues had never been raised with him before. On June 24, 2009, there was a meeting between Mr. Vaillancourt, the chief of the section and the grievor to discuss his concerns. The grievor refused to sign his appraisal; however, it was signed by the employer representatives on June 30, 2009.

[9] As he neared the end of his second assignment, the grievor began to look for his third assignment. He was interested in analytical work. The grievor found an assignment himself. On June 16, 2009, he started an assignment with the Economic Analysis Group in the Business and Trade Statistics field. He was to work with Jean Bosco Sabuhoro on a feasibility study for producing indicators that would help answer several questions related to integrative trade. The assignment was supposed to end in February 2010. Mr. Sabuhoro completed the assignment description form and sent it to an ES RDP program coordinator. That coordinator sent the form to Ms. Mihorean for approval. On June 12, 2009, Ms. Mihorean approved the assignment with the remark that she wanted the grievor to have an opportunity to work in a team environment.

[10] In late June 2009, when Ms. Michaud learned about the grievor's third assignment, she asked Ms. Mihorean to find out more about its content. In early July

2009, Ms. Mihorean talked to a representative of the host division. They decided to meet with Ms. Michaud. Ms. Michaud found that that third assignment was not appropriate for the grievor because it would not help him address weaknesses identified in the performance appraisal for his previous assignment. Ms. Michaud wanted an assignment that involved teamwork. She felt that there were operational requirements in the grievor's home division and that an assignment could be offered in his home division.

[11] On July 14, 2009, Ms. Michaud contacted the grievor to discuss changing his assignment, as well as to discuss his performance. The meeting took place at 11:30 on July 15, 2009. Ms. Michaud informed the grievor that, starting on July 20, 2009, his third assignment would be changed. The grievor would report to Gioia Campagna at the Survey of Household Spending. Ms. Michaud also told the grievor that she had some concerns regarding his personal suitability as a recruit. Later the same day, Ms. Michaud wrote to the grievor, urging him to respect the hierarchy and procedures, communicate in a respectful manner at all times, cooperate with colleagues and supervisors, follow the supervisor's instructions and seek clarification before escalating issues, attend meetings organized by management and arrive on time, and seek approval before taking leave. In that letter, Ms. Michaud informed the grievor that a failure to meet those expectations in regard to personal suitability could result in his being rejected on probation. At 16:13 on July 15, 2009, after Ms. Michaud had met with the grievor, she sent him an email message informing him that she was upholding her decision to change his assignment.

[12] At 07:07 on July 16, 2009, the grievor asked Ms. Michaud to meet with him for coffee that day. Ms. Michaud agreed and met the grievor at 10:00 in the cafeteria of the building where they both worked. At 17:24 the same day, Ms. Michaud wrote to the grievor, informing him that she was upholding her decision to change his assignment and that he was to report for his new assignment at the Survey of Household Spending on July 20, 2009. She warned him that if he did not report for that assignment, she would have no choice but to take appropriate action. At 08:09 on July 17, 2009, the grievor wrote to Ms. Michaud. He objected to her decision to change his assignment. He also asked for leave without pay starting on Monday, July 20, 2009. He also wrote that he did not intend to report for the proposed reassignment and that he would not be at work on July 20, 2009. At 12:22, Ms. Michaud informed the grievor that his request for personal leave was denied and that he was to report for his new assignment on the

morning of July 20, 2009. Failure to report to work would be considered insubordination. At 15:21, the grievor replied to Ms. Michaud that he would obey her order and report for his new assignment on July 20, 2009. On July 17, 2009, he filed a grievance to challenge the decision to change his assignment.

[13] On July 20, 2009, the grievor reported for his new assignment. One week later, at 09:27 on July 27, 2009, his supervisor asked him, for the week starting that day, to provide her with an outline of how he planned to do certain comparisons between the 2001 and 2007 data, to see his assumptions for matching the categories, since there were two different types of data code sets. At 09:36, the grievor replied in writing that he could not start working on that until the matter of his assignment had been clarified, since it would otherwise be assumed that he had agreed to the assignment, which he had not. The grievor also talked to his supervisor to explain the situation in more detail. He testified that his supervisor said that it was fine. He spent the rest of the day preparing for a grievance hearing. Ms. Bégin testified that Ms. Campagna told her that she was concerned that the grievor was refusing to do his work. At 13:20 the same day, Ms. Bégin wrote to the grievor to tell him that she had been informed that he was refusing to perform the duties assigned to him by his supervisor. She told him that he was expected to perform the duties assigned to him and that a refusal to perform the duties assigned to him would constitute insubordination and lead to disciplinary action.

[14] On the morning of July 28, 2009, the grievor attended a hearing with Mr. Arora for grievances that he had previously filed. After having dealt with the grievances, the discussion turned to the grievor's new assignment. Mr. Arora asked if the grievor was refusing to accept his assignment and if he was performing the duties assigned to him. Mr. Arora testified that the grievor told him that he would not do the work assigned to him on July 27, 2009, by his supervisor, and that he was not receptive at all to the new assignment. Mr. Arora testified that he encouraged the grievor to perform the duties assigned to him by his supervisor. At 15:30 the same day, Mr. Arora wrote to the grievor to tell him that he did not have time to give him feedback, as they had agreed at the meeting, with regard to the status of specific duties assigned to him. Mr. Arora wanted to make sure that there was no ambiguity in the instructions given to the grievor. Mr. Arora did not get back to him. The grievor testified that he went for a job interview on July 29, 2009. At 14:42 on July 30, 2009, the grievor wrote to Mr. Arora to ask for feedback. Mr. Arora did not reply. In cross-examination, Mr. Arora testified that

he did not have time to get back to the grievor. He also testified that he had not agreed that the grievor could stay at his desk and do nothing. According to Mr. Arora, it was quite the opposite.

[15] On July 31, 2009, Mr. Arora informed the grievor of his decision to terminate the grievor's employment during the probationary period. In the termination letter, Mr. Arora wrote that the grievor lacked the personal suitability to successfully meet the requirements of the ES RDP. Mr. Arora referred to the meeting on July 15, 2009, with Ms. Michaud during which those weaknesses were discussed. He also referred to the grievor's refusal to perform the duties of his new assignment effective July 20, 2009. Mr. Arora stated that the grievor's lack of cooperation with his supervisors and his rejection of their authority indicated an unwillingness to meet the standards of the RDP.

[16] Mr. Arora testified that he consulted with the employer's human resources specialists and spoke with Ms. Mihorean, Ms. Michaud, Ms. Bégin and Ms. Campagna before making the decision to terminate the grievor's employment.

B. Locker room incident

[17] The grievor rode his bike to work on a regular basis. On August 7, 2008, he stayed late at work because his supervisor was not there and there was work to be completed. He was in the locker room at approximately 17:50, changing from his work clothes to his bike clothes. A female security employee came in while the grievor was undressed, saw him and quickly left. The grievor did not hear her coming or knocking on the door. The grievor composed himself, went to the security desk and asked that an incident report be completed. The employee at the desk said that he did not know how to write a report because it was only his second day at work.

[18] The grievor's privacy had been violated and he was very upset about it. He testified that he is a Coptic Christian from a very conservative background. He felt totally humiliated because a female employee had seen him undressed. The grievor had serious concerns about the incident and did not want it to happen again. He did not want to face that female employee again. On August 11, 2008, Jacques Thibodeau, Chief of Departmental Security, wrote to the grievor to assure him that that type of incident would not happen again and that it was accidental. The grievor asked for more clarification and was highly dissatisfied with the answers from Mr. Thibodeau.

Among other things, no assurance was given to the grievor that the female security officer would no longer work in the same building as he. Moreover, Mr. Thibodeau did not seem to take the incident seriously. To Mr. Thibodeau, the female security officer had done nothing wrong; the grievor was simply at the wrong place at the wrong time. On August 26, 2008, the grievor filed a grievance asking the employer to establish a clear policy with respect to protecting human dignity and to ensure that he would have no further contact with that female security officer. The grievance was dismissed at every level of the grievance procedure.

[19] On October 14, 2008, the grievor attended the second-level hearing of his grievance on the locker room incident. The following day, he received at his personal email address an anonymous email from a so-called “James Tee” that read as follows: *“If I were you, I would cease what you are doing. Your career will be negatively affected. A friend.”* The grievor sent a request to info@phonebusters.com to see if they could trace the author of the email. He thought that it might be linked to his grievance, because he had only used his personal email account once and it was related to his grievance. Phone Busters suggested that the grievor raise the issue with his union.

[20] The grievor adduced in evidence several documents obtained through an access to information request. Some of those documents are in relation to exchanges of information among the employer’s representatives regarding the incident on August 7, 2008, the grievance filed on August 26, 2008, and the actions to be taken by the employer to fix the problem. The grievor also adduced in evidence a grievance that he had filed on June 15, 2009, challenging the way in which the employer had investigated his grievance dated August 26, 2008, and claiming that, as a result, his legal and human rights had been violated.

C. One-day suspension

[21] On July 8, 2009, Ms. Mihorean imposed on the grievor a one-day suspension to be served on June 10, 2009. Ms. Mihorean imposed that suspension because she believed that the grievor’s behaviour was inappropriate during a discussion that he had had on May 21, 2009, with Michelle Costello, an employee of the Data Access and Control Services Division. According to Ms. Mihorean, the grievor repeatedly interrupted Ms. Costello, speaking loudly and aggressively and making the following threat: “Something big will happen tomorrow.”

[22] The employer adduced in evidence the notes taken by a labour relations officer who had met Ms. Costello during the investigation. According to those notes, the grievor spoke loudly to Ms. Costello, was aggressive, interrupted her and threatened her with the remark “Something big will happen tomorrow.” Neither the labour relations officer nor Ms. Costello testified at the hearing.

[23] The grievor adduced in evidence the document that he had submitted to the employer on June 15, 2009, as a rebuttal to Ms. Costello’s complaint. He denied that he had been threatening or intimidating or aggressive with her. The grievor did not deny using the word “big” or “bigger”, but explained that it referred to his pursuing the issue that he had with Ms. Costello and her lack of cooperation in providing him with information. The grievor might have said that he would escalate the matter to the CHRC and might have mentioned that in that sense something bigger could happen. However, he denied having made any threat against Ms. Costello.

D. Other evidence adduced at the hearing

[24] The grievor adduced in evidence some email messages regarding a job opportunity with Human Resources and Skills Development Canada (HRSDC). On July 30, 2009, a manager from the HRSDC sent a message to the grievor to inform him that his hiring was simply awaiting the Director General’s approval. The grievor had already passed an interview and was told that he would get the position for which he had applied. The manager wrote in a second email message the same day that the grievor would be located in office 053 and that he would start work on August 17, 2009.

[25] On August 5, 2009, the HRSDC manager withdrew the offer to the grievor. He told the grievor that the offer was being withdrawn for budgetary reasons. After that, the grievor applied for other positions, but he testified that he was blocked at the reference level.

[26] The grievor made requests under the *Access to Information Act* to better understand why he was being refused jobs for which he believed he was qualified. He obtained the information on February 15 and 17, 2011. Given that I had not issued my decision yet, the grievor asked me to reopen this hearing, which had concluded on January 12, 2011, so that he could adduce some of the new information in evidence. I agreed to reopen the hearing and consider the documents if they were relevant to the

case and if the grievor had not known of their existence before the initial hearing ended on January 12, 2011. The employer objected to the reopening of the hearing and the introduction of new documents. Neither the employer nor the grievor called the authors of those documents to testify at the hearing.

[27] On an unknown date, the Public Service Commission called Linda Howatson-Leo for an employment reference regarding the grievor. She refused to give a reference because the grievor had never reported to her and she had never been asked to be his reference. On June 28, 2010, Jeff Bowlby from the HRSDC also contacted Ms. Howatson-Leo. She again refused to give a reference, because the grievor had not reported to her directly. She suggested that Mr. Bowlby speak with Ms. Mihorean. The grievor signed an affidavit stating that he reported directly to Ms. Howatson-Leo from November 2007 to July 2008. However, the rest of the evidence shows that the grievor never reported directly to Ms. Howatson-Leo, but reported to Mr. Olson, who then reported to her. The grievor also worked on a few projects with her.

[28] On July 2, 2010, Mr. Olson gave a reference to Mr. Bowlby. In the reference report, Mr. Bowlby wrote that Mr. Olson had told him that the grievor needed some encouragement or prodding in terms of the required work, that there were some issues in terms of his work and that there were some issues when the grievor interacted with individuals outside the group. Mr. Bowlby also wrote that, when Mr. Olson was asked to provide the name of a person who would be in a good position to serve as a reference, Mr. Olson gave Ms. Mihorean's name. The remainder of the reference was fairly positive. On a scale of 1 (poor) to 5 (excellent), the grievor was rated 3.3 by Mr. Olson. Mr. Olson also indicated that, overall, he would be happy to have the grievor work in his group again. However, for the grievor, that assessment from Mr. Olson was not as positive as the one that Mr. Olson had written at the end of the grievor's first assignment as a recruit.

[29] The grievor adduced in evidence an email conversation dated September 2, 2009, between Martin Lemire from Statistics Canada and Christine Hébert from the HRSDC. From the tone of the emails, the two persons seem to know each other fairly well. Mr. Lemire asked Ms. Hébert if there was an employee named Sameh Boshra working at the HRSDC. Ms. Hébert answered that she could not find anybody with that name at the HRSDC. Mr. Lemire wrote back that the rumour at Statistics Canada was that the grievor had found a job at the HRSDC. However, he had

been fired from Statistics Canada for a number of reasons. Therefore, he wrote, if the rumour was true, people at Statistics Canada would be surprised. Mr. Lemire asked Ms. Hébert to keep that information confidential. Ms. Hébert answered that that was crazy. She did not think that people got fired in the public service. She wondered how the grievor could get a job at the HRSDC after being fired from a job in the public service. She thought that an employee's employment record followed the employee from one department to another. Mr. Lemire answered that, to get fired, an employee needed to "help himself." He added that he also believed that the record followed the employee from one department to another. That is why he had difficulty believing the rumour.

III. Summary of the arguments

A. For the employer

[30] The adjudicator has no jurisdiction to hear this grievance, because the grievor's employment was terminated during his probationary period. Terminations on probation fall under the *Public Service Employment Act (PSEA)*, and an adjudicator does not have jurisdiction to intervene. Section 62 of the *PSEA* gives the employer the right to impose a probationary period and reject an employee during that period. Section 211 of the *Act* does not permit the referral to adjudication of a grievance dealing with termination of employment under the *PSEA*.

[31] The jurisdiction of the adjudicator is limited to determining whether or not the employer's decision to terminate the grievor was employment-related. If the employer has satisfied that burden, the grievor must prove that the employer's decision to terminate the grievor while on probation was a sham or camouflage, or was made in bad faith.

[32] The grievor was hired on November 26, 2007, and was informed that he would be on probation for the duration of the ES RDP. When he was terminated on July 31, 2009, he had not completed the program and was still on probation. The grievor knew that he was still on probation. That is not in dispute.

[33] The employer terminated the grievor for the employment-related reasons set out in the termination letter dated July 31, 2009. The grievor was informed that the decision to terminate his employment during his probationary period was the result of the employer's dissatisfaction as to his personal suitability and his refusal to perform

the duties of his last assignment effective July 20, 2009. The grievor's lack of cooperation with his supervisors and his rejection of their authority indicated an unwillingness to meet the standards of the RDP. Those were the reasons for which the employer terminated the grievor's probation.

[34] Based on the evidence adduced at the hearing, the employer met its burden of justifying its termination of the grievor on probation. The employer acted in good faith toward the grievor at all times, including during the process that led to the termination. The grievor presents the theory that the employer terminated him because he filed grievances and complaints. There is no evidence to support that theory. The employer did not terminate the grievor because he complained or grieved, but because it was not satisfied as to his personal suitability.

[35] The evidence also justifies the employer suspending the grievor for one day in July 2009. When Ms. Mihorean made the decision to discipline the grievor, she had Ms. Costello's version and the grievor's version of what happened in the telephone conversation between them. Ms. Costello's version was clear: the grievor was aggressive toward her; he interrupted her and threatened that something big would happen the following day. The grievor provided his version in writing. He was unclear on what had been said. Ms. Mihorean believed Ms. Costello and, considering what happened, was fully justified in imposing a one-day suspension.

[36] The issue of the grievor's employment reference being provided by Mr. Olson but not by Ms. Howatson-Leo is irrelevant to the two grievances referred to adjudication. It does not involve the employer's representatives who were involved in disciplining or terminating the grievor. Moreover, no witness was called to testify as to the truth of the content of the documents. Furthermore, those documents are double hearsay.

[37] The employer refers me to *Morin v. Treasury Board (Fisheries and Oceans Canada)*, 2004 PSSRB 168; *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529; *Boyce v. Treasury Board (Department of National Defence)*, 2004 PSSRB 39; *Bilton v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 39; *Rousseau v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 91; *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.); *Chaudhry v. Canada (Attorney General)*, 2007 FC 389; *Porcupine Area Ambulance Service and Canadian Union of Public Employees, Local 1484*, (1974) 7 L.A.C. (2d) 182; *Ondo-Mvondo v. Deputy Head (Department of Public*

Works and Government Services), 2009 PSLRB 52; *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72; and *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33.

B. For the grievor

[38] The grievor argues that the employer has not met its burden of justifying its decision to impose a one-day suspension on the grievor in July 2009. The grievor provided an explanation of what happened during the telephone conversation with Ms. Costello. The employer did not adduce any evidence to contradict his explanation. The grievor testified that he was not threatening, aggressive or intimidating with Ms. Costello when he spoke to her on the phone on May 21, 2009. Furthermore, he adduced in evidence the document that he had submitted to the employer during the disciplinary investigation. The contents of that document are consistent with the grievor's testimony. The employer did not produce any direct evidence of what happened during the telephone conversation. It could have called Ms. Costello as a witness, but it chose not to.

[39] The grievor acknowledges that he was on probation when he was terminated. Therefore, his burden is to establish that the termination was done in bad faith. Bad faith is always difficult to prove with direct evidence because it is a state of mind. It must instead be inferred from the evidence presented. Until seven weeks before his termination, the grievor was meeting all the standards of his position. Suddenly, he became unsuitable. That change in the employer's view of the grievor has nothing to do with his performance; it has to do with the fact that he had filed complaints and grievances.

[40] The locker room incident deeply upset the grievor. He wanted to understand what had really happened and make sure that it would not happen again. The employer did not take the grievor's concerns seriously. It failed to guarantee that that type of incident would not happen again. It was not sensitive to the grievor's values and beliefs, and treated him lightly and in bad faith. The employer started to take action only after the grievor filed a complaint with the CHRC. The anonymous email received by the grievor shows that there was antipathy against him because he had raised those concerns. At the time, the grievor had received only one performance appraisal, and it was very positive. However, Ms. Mihorean had told Ms. Bégin to keep an eye on the grievor. That had nothing to do with his work. Rather, it was an

indication of the employer's bad faith. To the employer, the grievor had become a complaining employee rather than somebody raising a valid concern.

[41] In June 2009, at the end of his second assignment, the grievor received his second performance appraisal. It included negative comments that had not been raised or discussed with him prior to that time. Those comments came as a total surprise to the grievor.

[42] The grievor found his third assignment himself and the employer approved it. Later, in July 2009, the employer's senior officials became interested in the grievor's assignment. That coincided with the grievor raising new grievances. The employer decided, against all rules and past practices, to change the grievor's third assignment. The employer ignored its own assignment agreement and practices, and acted against the grievor's will, without consulting him. It did not write an assignment agreement for the modified third assignment. There was no evidence adduced at the hearing to show that there was an emergency that forced the employer to act as it did. The grievor was treated in bad faith. The employer was not honest about its reasons for changing the grievor's assignment. The real reason is that it wanted to watch the grievor closely and have the home director assess his last assignment.

[43] The employer believed that the grievor was a troublemaker because he exercised his rights. The employer acted in bad faith by changing the third assignment. It wanted to create conditions for the grievor to fail. In the first week of the last assignment, the grievor did do some work. The employer's allegation that the grievor was refusing to do the work assigned to him was for the week of July 27, 2009, which was the second week of the assignment. On July 27, 2009, the grievor said that he would not perform the duties assigned to him, and his supervisor replied that that was fine with her. The grievor met with Mr. Arora the next morning, and they talked about the grievor's dissatisfaction with the assignment. Mr. Arora told the grievor that he would get back to him later that day. On July 29, 2009, the grievor went for a job interview. On July 30, 2009, the grievor sought an answer from Mr. Arora. The following day, without any further discussion, Mr. Arora informed the grievor that he was terminated. Obviously, that is not transparent behaviour. It is an act in bad faith.

[44] During the hearing, the employer did not present any direct evidence from the people who had supervised the grievor or who had worked with him. The employer's only witnesses were from senior management. Those people had dealt with the grievor

only in the context of his grievances. The adjudicator must draw an adverse inference from it. Had the grievor's former supervisors testified, they might have contradicted the version brought forward by their superiors.

[45] The grievor asks me to accept the evidence adduced at the continuation of the hearing on June 1, 2011, because it is relevant to the case and the grievor did not have it in his possession at an earlier stage in the process. That evidence supports the argument that the employer acted in bad faith toward the grievor. Ms. Howatson-Leo supervised the grievor but, when it was time to give a reference on him, she refused and instead referred the person to Ms. Mihorean. That was bad faith on her part. As well, Mr. Olson gave a reference that was not as positive as his assessment of the grievor in the formal performance appraisal that he had written. Why did he change his position on the grievor's performance? The only thing that had changed after Mr. Olson supervised the grievor was that the grievor was legitimately challenging the employer. Mr. Olson's change of position is also bad faith on the part of the employer.

[46] The adjudicator should allow the termination grievance. The employer did not terminate the grievor for legitimate performance reasons. It terminated him because he challenged the employer on certain issues that were important to him. The employer acted in bad faith.

[47] The grievor refers me to *Professional Institute of the Public Service of Canada v. Canada (Attorney General)* (2005), 22 E.T.R. (3d) 238; *Ethier v. Canada (Royal Canadian Mounted Police (RCMP) Commissioner)*, [1993] 2 F.C. 659 (C.A.); *Steele*, [2001] B.C.L.R.B.D. No. 77; *Complex Services Inc. v. Ontario Public Service Employees Union, Local 278*, [2005] O.L.A.A. No. 209; *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109.

IV. Reasons

[48] On July 10, 2009, the grievor grieved a one-day disciplinary suspension imposed on him by the respondent (File 566-02-3226). On August 12, 2009, the grievor grieved his rejection on probation and alleged that that was an act of retaliation because he had filed grievances, a human rights complaint and an access to information request (File 566-02-3229). I will deal first with the suspension grievance, and then with the termination grievance.

A. One-day suspension

[49] The employer had the burden to prove that, on a balance of probabilities, the grievor committed the offences for which he was suspended. More specifically, the employer had to prove that, on May 21, 2009, the grievor repeatedly interrupted Ms. Costello, spoke loudly to her, used an aggressive tone of voice and threatened that something big would happen the following day, and that such behaviour warranted being disciplined.

[50] Ms. Mihorean testified that those things occurred. However, she was not there when it happened. A labour relations officer interviewed Ms. Costello after the alleged incident. The officer's report of that interview was adduced in evidence. However, the officer was not called to testify at the hearing. Ms. Costello, who had directly witnessed the grievor's behaviour, was also not called to testify. Even if hearsay evidence could be admitted at a grievance adjudication hearing, it would not have the weight to replace direct evidence, especially when direct evidence might be available. The employer did not give any explanation as to why Ms. Costello was not called to testify.

[51] However, the grievor did testify. His version of the incident was not contradicted by any direct evidence from the employer. The grievor adduced in evidence a document that he had submitted to the employer to defend himself. He was examined and cross-examined on the content of that document. He denied that he had been threatening or intimidating or aggressive with Ms. Costello. He also denied having threatened her, but acknowledged indirectly that some of his comments could have been misinterpreted by Ms. Costello.

[52] Given the nature of the evidence adduced by the parties at the hearing, I find that the employer has failed to meet its burden of proving that the grievor committed a misconduct on May 21, 2009. The employer did not submit any direct evidence that it was justified in imposing a suspension on the grievor.

B. Termination on probation

[53] The grievor acknowledged that he was on probation when the employer rejected him. He had not completed the ES RDP and, according to the *Regulations*, he was on probation. That point is not contested by the grievor. As well, the grievor does not claim that he was not paid or given notice. The following provisions of the *PSEA*

apply to this case. The provisions authorize the employer to establish a probationary period for an employee and dismiss the employee while on probation:

...

61. (1) A person appointed from outside the public service is on probation for a period

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

...

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. . . .

...

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

...

[54] Section 211 of the *PSLRA* does not permit the referral to adjudication of a grievance against a rejection on probation under the *PSEA*. The part of section 211 of the *PSLRA* that is relevant to this case reads as follows:

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

[55] A probationary period is a period of time within which an employer has the opportunity to assess the suitability of an employee for continued employment. In *Penner*, the Federal Court of Canada referred to “. . . a *bona fide* dissatisfaction as to suitability.” In *Tello*, the adjudicator determined that, within the actual framework of the *Act* and the *PSEA*, the employer’s burden is limited to establishing that the

employee was on probation, that the probationary period was still in effect at the time of termination and that notice or pay in lieu has been provided. According to the employer's *Guidelines for Rejection on Probation*, the letter of termination of a probationary employee should set out the reason for the decision to terminate employment. In my opinion, that letter should include some details on the *bona fide* dissatisfaction as to the suitability of the probationary employee for the job.

[56] In the termination letter dated July 31, 2009, the employer informed the grievor that it was ending his probationary period and terminating him because he lacked personal suitability, refused to do the duties of his last assignment and failed to cooperate with his supervisors. The employer clearly expressed to the grievor its *bona fide* dissatisfaction as to the suitability of the grievor for the job. At the hearing, the employer went further and adduced evidence to support what it alleged in the termination letter. That evidence came mostly from the testimony of Mr. Arora, Ms. Michaud and Ms. Bégin and also from the documents adduced at the hearing.

[57] One might speculate that the employer was not happy that the grievor filed several grievances and complaints. The employer might have found it disturbing at times. However, no evidence was adduced at the hearing to support that speculation. Mr. Arora based his decision on the documentation that was provided to him and on the discussions that he had had with Ms. Michaud and Ms. Bégin. He concluded that the grievor was not suitable for the job, mostly because of his refusal to perform the duties assigned to him and his lack of cooperation with his supervisors. None of the evidence adduced at the hearing would lead me to believe the bad faith theory alleged by the grievor. It is not bad faith for an employer to take action against an employee who refuses to perform the tasks of his assignment. The grievor has tried to convince me that there was some confusion in the employer's orders to execute the tasks assigned to him. I do not believe that. With the exception of part of the grievor's testimony, the rest of the evidence goes the other way. The employer's instructions were clear, the grievor received verbal and written orders and requests to perform his duties, and he refused to perform them during his last week of employment.

[58] The grievor has asked me to draw an adverse inference from the fact that the employer did not call the grievor's former supervisors to testify at the hearing. The employer did not need to call those people to testify, because the evidence it presented at the hearing was sufficient to establish that the grievor was terminated while on

probation. I did not need to hear how satisfied or unsatisfied Mr. Olson, Mr. Vaillancourt or Ms. Campagna were with the grievor's performance. My role is not substitute my judgment for that of the employer.

[59] The grievor argues that the employer acted in bad faith, and the real reason for the termination was that the grievor had filed grievances and complaints. The grievor bears the burden of showing that the termination was a contrived reliance on the *PSEA*. He has not met that burden.

[60] The locker room incident may, as the grievor alleged, have been poorly handled by the employer. However, that is not the question before me. Even if true, that would not be enough to establish that the employer acted in bad faith by terminating the grievor. The employer might have been late in informing the grievor that it was not fully satisfied with some of his abilities; however, that is not acting in bad faith.

[61] Moreover, Ms. Mihorean was not acting in bad faith when she wrote a note to keep an eye on the grievor, and Ms. Michaud was not acting in bad faith when she decided to change the grievor's last assignment and not follow the employer's normal procedure to do it. Within the limits of the law and the collective agreement, the employer has the right to manage the workplace. Part of that right is the right to make decisions on how to train, develop and assign employees in a way that is in the employer's best interest. At the time, Ms. Michaud felt that it was in the best interest of the employer and the grievor to unilaterally terminate the grievor's assignment and replace it with a new assignment. The way in which Ms. Michaud did that might not have been in line with the employer's normal practice (see paragraph 6), but no evidence was adduced at the hearing to convince me that her decision was tainted by bad faith. To the contrary, it appears to me that she acted for logical reasons, out of legitimate employer concerns.

[62] I accept the evidence adduced on June 1, 2011, since most of it was not known by the grievor when the January 2011 hearing took place and because it is relevant to the bad faith theory put forward by the grievor. However, although the evidence is relevant to the grievor's theory, it does not prove that there was bad faith. It merely shows that: (1) Mr. Olson gave an employment reference that was slightly less positive than his prior written assessment of the grievor's performance; (2) Ms. Howatson-Leo refused to give an employment reference because the grievor had not reported directly to her; and (3) Mr. Lemire used email to gossip with Ms. Hébert about the grievor. The

grievor concludes from those documents that the employer acted in bad faith against him. I do not agree, and those documents do not provide any proof of his allegation. As well, the grievor has not established that he lost an employment opportunity with the HRSDC in August 2009 because of the employer's negative reference. Even if he did, that would not lead me to conclude that the employer acted in bad faith in rejecting him.

[63] The evidence adduced at the hearing lead me to conclude that the employer rejected the grievor on probation because it had a *bona fide* dissatisfaction with his suitability for the position he occupied. A rejection on probation is a termination under the *PSEA* . Section 211 of the Act does not permit the referral to adjudication of a grievance dealing with any termination of employment under the *PSEA*. Consequently, I do not have jurisdiction to look at the grievance dealing with the grievor's rejection on probation (File 566-02-3229), and the grievance must be rejected.

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

(The Order appears on the next page)

V. Order

[65] The grievance in PSLRB File No. 566-2-3226 is allowed in part. I order the employer to reimburse the grievor for one day of pay and benefits.

[66] The grievance in PSLRB File No. 566-2-3229 is denied.

July 27, 2011.

**Renaud Paquet,
adjudicator**