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Citation: 2012 PSLRB 11

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

LYNE BRASSARD

Grievor

and

DEPUTY HEAD
(Department of Foreign Affairs and International Trade)

Respondent

Indexed as
Brassard v. Deputy Head (Department of Foreign Affairs and International Trade)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Linda Gobeil, Vice-Chairperson

For the Grievor: Herself

For the Respondent: Michel Girard, counsel

Heard at Ottawa, Ontario,
November 21, 2011.
(PSLRB Translation)

Individual grievance referred to adjudication

[1] Lyne Brassard, the grievor, was an administrative assistant in a term position with the Department of Foreign Affairs and International Trade ("the employer") from January 6, 2009 to August 31, 2009. On May 27, 2009, the grievor notified her employer that she would be leaving her job on June 10, 2009. On May 29, 2009, the employer dismissed her on probation. On July 21, 2009, the grievor filed the following grievance:

> [Translation]
>
> *On May 26, 2009, I submitted my notice of resignation to Foreign Affairs and International Trade Canada (FAITC), as Fisheries and Oceans Canada had offered me a job starting soon, in June 2009. I gave my FAITC supervisor (JLO) two weeks' notice, and he said, "Thank you." On May 29, 2009, he gave me a notice of termination of employment with the FAITC. I was confused and did not understand why.*
>
> *On May 26, 2009 - I gave my notice (two weeks).*
>
> *On May 29, 2009 - I received a notice of termination of employment.*
>
> *I asked to be reinstated into my position or to receive compensation for the damages suffered.*

[2] On August 18, 2009, the grievor referred her grievance to the Public Service Labour Relations Board ("the Board"). She requested that her grievance be heard in Ottawa in French.

[3] On September 17, 2009, the employer submitted that the grievor had been dismissed on probation due to unsatisfactory performance. The employer maintained that the grievor's grievance was not timely because it was filed after the 25 days provided for in the collective agreement. It further maintained that the referral to adjudication before the Board was premature since the grievance had not been submitted to the internal levels of the grievance process before being referred to adjudication.

[4] On January 15, 2010, in a letter to the Board, the grievor's counsel challenged the employer's allegations and submitted that her dismissal was not founded. An application for an extension of time was also made in the letter, which reads as follows:

[Translation]

Introduction

We are counsel for the grievor, Lyne Brassard.

We received your letter dated December 21, 2009, requesting submissions from our client about the preliminary objections of the Treasury Board of Canada Secretariat, on behalf of the Department of Foreign Affairs ("the Employer").

In its response, the Employer alleges that Ms. Brassard's complaint before the Public Service Labour Relations Board ("PSLRB") is premature as her grievance has not been heard at any level of the grievance process. The Employer also maintains that Ms. Brassard's grievance is untimely.

Nature of the complaint

This case deals essentially with Ms. Brassard's dismissal by her Employer following her submission of a notice that she was resigning to take another job. Ms. Brassard submits that the dismissal was wrongful and that the Employer retaliated against her when it learned that she would be leaving to take another job in a different department. On a number of occasions during her employment, Ms. Brassard disagreed with her supervisors' directives about abuses of expense accounts.

Due to Ms. Brassard's expressed positions, her Employer was dissatisfied with her, and thus, three (3) days after she submitted her resignation notice, it gave her a letter indicating that she was dismissed, effective immediately.

Her dismissal by the Employer prevented the new department for which she was supposed to work from being able to honour its employment agreement with her.

Issue of timeliness

The Employer dismissed Ms. Brassard on May 29, 2009. On July 10, 2009, she learned that the new department could not honour its initial agreement due to her dismissal by the Employer. Therefore, on July 21, 2009, she filed a grievance with Ms. St-Hilaire of the Employer's human resources department. On July 22, 2009, to fulfill her obligation to follow up on her grievance, she sent the grievance to her union representative, in accordance with clause 18.08 of the collective agreement (see attachments).

Clause 18.15 of the collective agreement states that a grievor

can file a grievance within 25 days following the date on which he or she learns of the actions or circumstances giving rise to the grievance.

Ms. Brassard acknowledges that her grievance was filed outside the period prescribed by the collective agreement, in other words, twenty-eight (28) days after than the period set out in the collective agreement. However, she maintains that she acted with due diligence, which justifies extending the time limit.

Section 63 of the P.S.S.R.B. Regulations and Rules of Procedure allows for an extension of the time to file a grievance under a collective agreement at the entity's discretion. To determine whether an extension should be ordered, the adjudicator must examine the grounds for the delay, the duration and any prejudice that could be caused to the parties.[1]

In this case, had Ms. Brassard's new employer not rescinded their agreement (due to her Employer's reprisals and dismissal), Ms. Brassard would not have had to file the grievance in question. When she was informed of the circumstances of why her new employer could not honour the terms of the agreement (including her refusal to follow directions, contrary to her Employer's policies), she took all the necessary actions to file her grievance. Her grievance was filed eleven (11) days after her new employer informed her on July 10, 2009 that it refused to honour the terms of the previous agreement between the parties.

Under the circumstances, it is reasonable to conclude that the delay was incurred in good faith and that the Employer suffered no prejudice as a result. Instead, Ms. Brassard risks suffering great prejudice if the case is dismissed due to a time limit of only 20 or so days, especially since Ms. Brassard could pursue no other appropriate recourse.

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[1]*Rattew (149-2-107)*

Finally, Ms. Brassard maintains that the nature of her complaint and her wrongful dismissal by the Employer is a "whistleblower" situation. Furthermore, her refusal to follow her supervisors' directions, which were against the Employer's policies, cannot be considered a failure to perform her duties. Therefore, Ms. Brassard submits that the chances of the grievance being allowed are good and that a thorough review by the appropriate entity is likely required.

Premature grievance

As indicated above, Ms. Brassard's grievance was sent to the Employer on July 21, 2009. The Employer did not send her any official response to the grievance; nor did it inform her of the deadlines or of the procedure for filing a grievance. Under the circumstances, the Employer should have exercised some diligence, as it could not have assumed that it was dealing with an employee who was experienced or "knowledgeable" with the grievance process. Rather than fulfilling its obligation to guarantee that Ms. Brassard's grievance would be processed, the Employer ignored it.

Therefore, when Ms. Brassard received no response from the Employer, she erroneously referred the grievance to adjudication out of fear that her rights had been extinguished. Even then, the Employer failed to fulfill its obligation to process Ms. Brassard's grievance. Instead, it made formal submissions indicating that the case should be dismissed because it was premature.

All that time, Ms. Brassard represented herself, without assistance from the union that represented her.

Ms. Brassard now realizes that the grievance that she filed should have been heard at the different levels (under the collective agreement) instead of being referred directly to adjudication. Once again, her error was made in good faith and did not cause any prejudice to the parties.

Ms. Brassard also submits that the PSLRB should suspend this reference (until notified otherwise by the parties) and urge the Employer to return her grievance to the first level so that she can pursue the appropriate mechanisms to have her case heard.

Alternatively, Ms. Brassard submits that the PSLRB should dismiss her reference to adjudication without prejudice to her right to file her grievance again at the first level of the dispute resolution process.

The PSLRB has the authority to remedy technical shortcomings[2] *and should exercise that authority in this case because, if Ms. Brassard's grievance cannot be heard at the levels indicated in the collective agreement or later by the PSLRB, she will suffer a great injustice.*

> *Should the PSLRB require further details of any of the information presented, we will be pleased to provide them. Also, please indicate whether the PSLRB would like oral representations of these submissions.*
>
> *Sincerely,*
>
> *Chantal Beaupré*
>
> _____
>
> [2]*Enns v. Treasury Board (Correctional Service of Canada), 2004 PLSRB 171*

[5] On February 4, 2010, the employer reiterated its position on its preliminary objections in a letter to the Board, which reads as follows:

> [Translation]
>
> *Dear Madam:*
>
> *Further to your letter dated December 2, 2009, in which you notified the parties that the objections will be dealt with by way of written submissions, the following is the respondent's position in this case.*
>
> *Here are the facts as we understand them:*
>
> *On January 6, 2009, Ms. Brassard was offered a term appointment to a position as an administrative assistant (AS-1) at Foreign Affairs, effective from January 6, 2009, to August 31, 2009 (attachment). On a number of occasions, Ms. Brassard's supervisor informed her that her performance was poor and that she could be dismissed on probation.*
>
> *On May 27, 2009, Ms. Brassard left a note in her supervisor's mailbox, indicating that her last day of work would be June 10 (attachment). That week, Ms. Brassard made two serious mistakes in her work, and management decided to dismiss her on probation as of May 29, 2009. Her resignation letter of May 27 had no bearing on management's position.*
>
> *Ms. Brassard filed her grievance on July 21, 2009 and informed management on July 27, 2009 that her union representative, Andrée Lemire, would follow up on her grievance. On December 1, 2009, Ms. Lemire contacted the department to inform them that she had closed her file and that she believed that the grievance was abandoned. In the meantime, Ms. Brassard decided to accept a position at Fisheries and Oceans.*

In its letter of September 17, 2009, the Employer raised two preliminary objections that we will address separately:

UNTIMELY GRIEVANCE:

The Employer believes that Ms. Brassard's grievance is untimely because it was not filed within the periods set out in clause 18.15 of the PA collective agreement, namely, within 25 days following the date on which she was informed or learned of the action or circumstances giving rise to her grievance against her dismissal on probation. She filed her grievance on July 21, 2009, but her Employer had informed her on May 29, 2009 of her dismissal on probation; she confirms that date in her grievance. Therefore, her grievance is untimely.

This objection about the deadlines for filing a grievance is being made for the first time, as there was no internal grievance hearing, even though the Employer was fully prepared to hold a grievance hearing. Therefore, the Board is the first opportunity that the Employer has had to object to the deadlines.

Ms. Brassard did not provide clear, cogent or compelling reasons to justify her delay to file a grievance. Not only is her grievance untimely, she also did not submit an application for an extension of time. However, we will nonetheless comment on the chances of success of such a request.

Five criteria must be considered when determining whether an extension of time should be granted (Schenkman 2004 PSLRB 1):

- *clear, cogent and compelling reasons for the delay;*
- *the length of the delay;*
- *the due diligence of the grievor;*
- *balancing the injustice to the grievor against the prejudice to the employer in granting an extension; and*
- *the chances of success of the grievance.*

Although the delay is not excessive, as a unionized employee, Ms. Brassard should have immediately contacted her union representative when she received her letter of termination, to obtain advice. In fact, only when she found out in July 2009 that she would not receive another term position with the Department of Fisheries and Oceans did Ms. Brassard decide to file her grievance against Foreign Affairs.

In this case, the grievance's chance of success is the most important consideration. Ms. Brassard was a term employee on probation, whose employment term would have ended anyway on August 31, 2009, at the latest, in other words, at

> *the end of her term. The department found out only in July 2009 that she wanted to resign to accept a position elsewhere in the public service.*
>
> *PREMATURE REFERENCE OF GRIEVANCE TO ADJUDICATION:*
>
> *Ms. Brassard filed her grievance on July 21, 2009 and signed its referral to adjudication on August 17, 2009. The PSLRB acknowledged receiving it on August 26, 2009.*
>
> *In her letter of January 15, 2010, Ms. Brassard's counsel indicated that she realized that her grievance had been referred to adjudication prematurely. Given that fact, the Employer requests that the grievance be dismissed and that the file be closed.*
>
> *Finally, the requested remedies, namely, reinstating Ms. Brassard in her position at Foreign Affairs and paying her damages, cannot be granted by an adjudicator because she was a term employee.*
>
> *For those reasons, the Employer respectfully requests that its two preliminary objections be allowed and that the grievance be dismissed as a result.*
>
> *Sincerely,*
>
> *Patrick Brunet*
>
> *Employer's representative*

Decision

[6] The hearing of the grievance against the dismissal on probation and the application for an extension of time was initially to be held on August 16 to 18, 2010, in Ottawa.

[7] However, the grievor's counsel informed the Board on March 31, 2010 that she was unavailable between August 16 and 18, 2010, as she was on maternity leave. The employer agreed to the postponement request.

[8] After consulting the parties, the Board informed them on May 13, 2010 that the hearing of the grievance against the dismissal on probation and the application for an extension of time was scheduled for December 13 to 15, 2010.

[9] On August 19, 2010, the grievor's counsel informed the Board that she would no longer be representing the grievor.

[10] Further to a letter from the Board dated August 23, 2010, the grievor indicated that she wished to continue with the proceedings, that she would represent herself from then on and that any correspondence should be sent to her personal address.

[11] On November 16, 2010, the Board reiterated to the parties that the hearing of the grievance against the dismissal on probation and the application for an extension of time would be held from December 13 to 15, 2010, in Ottawa.

[12] On November 17, 2010, the employer's counsel informed the Board that the employer was also challenging the adjudicator's jurisdiction to hear and rule on the grievor's grievance on the grounds that the dismissal occurred on probation pursuant to subsection 62(1) of the *Public Service Employment Act* (*PSEA*) and that section 211 of the *Public Service Labour Relations Act* ("the *Act*") does not permit any termination of employment under the *PSEA* to be referred to adjudication.

[13] In response to the employer's letter dated November 17, 2010, the grievor replied as follows on December 1, 2010:

> [Translation]
>
> *This is further to the correspondence of November 17, 2010 from Patrick Brunet and that of November 18, 2010 from the Board.*
>
> *Statement of my reasons:*
>
> ***1**.- An employee on probation can file a grievance against a termination of employment if the employee can demonstrate that the employer acted in bath faith or that its conduct was arbitrary or abusive, or for reasons unrelated to the employee's employment;*
>
> ***2**.- By dismissing me, in spite of the letter of resignation that I submitted two days earlier, Stephen de Boer demonstrated bad faith and acted arbitrarily;*
>
> ***3**.- My grievance is sufficiently eloquent to encompass those allegations;*
>
> ***4**.- Furthermore, the offer of employment that I received from Fisheries and Oceans Canada left me with undetermined employment status, while my actual status on the day on which I was terminated was that of a permanent employee;*
>
> ***5**.- Jurisdictional issues cannot be resolved through written*

> *submissions. A hearing is required to resolve this issue and to determine the merits of my grievance.*
>
> *Lyne Brassard*

[14] On December 3, 2010, the grievor requested a postponement to January 2011 of the hearing to be held from December 13 to 15, 2010, on the grounds that she wished to obtain legal advice and representation and that she had yet to obtain the documents that she had requested under the *Access to Information Act*.

[15] On December 6, 2010, the employer challenged the grievor's request for a postponement on the grounds that one had already been granted in April 2010 at the request of the grievor's counsel and that the grievor had known that she was no longer represented by counsel since August 2010.

[16] On December 6, 2010, the Board informed the parties that the grievor's request to postpone the hearing was denied and that the parties were summoned for a pre-hearing teleconference on December 7, 2010.

[17] That same day, the employer confirmed its availability for a teleconference on December 7, 2010. On December 6, 2010, the grievor emailed the Board the following:

> [Translation]
>
> *I am not available for a telephone call; nor am I available to attend the hearing on December 13 and 15.*

[18] On December 7, 2010, the Board sent a letter to the parties confirming that the hearing of the grievor's grievance would be held as scheduled, from December 13 to 15, 2010, and reiterating the caution that appeared on the notice of hearing dated November 16, 2010, namely, the following:

> [Translation]
>
> *. . . if you do not appear at the hearing . . . the adjudicator may rule on the matter in light of the evidence and submissions made before her at that time without further notice to you.*

[19] On December 7, 2010, the grievor contacted the Board to ask whether the teleconference could be held on December 8 or 9, 2010 and informed the Board that she had a medical certificate to justify postponing the hearing.

[20] On December 8, 2010, after receiving no response from the grievor as to the time at which she wanted to hold the teleconference, the Board again contacted the parties to schedule the pre-hearing teleconference for December 9, 2010.

[21] Following the teleconference on December 9, 2010, the Board postponed the hearing scheduled for December 13 to 15, 2010 on the grounds that the grievor could not attend the hearing for medical reasons. The grievor submitted to the Board a copy of a medical certificate dated December 7, 2010 as supporting evidence.

[22] The Board informed the parties on June 16, 2011 that the hearing would be held from November 21 to 23, 2011 and that those dates were considered final.

[23] On October 5, 2011, the Board informed the parties that the employer refused to participate in mediating this case. Nonetheless, it suggested holding a pre-hearing conference. On October 10, 2011, the grievor declined the pre-hearing conference and suggested mediation.

[24] On October 12, 2011, the Board informed the parties that a pre-hearing conference would be held on the parties' choice of October 27 or 28 or November 9, 2011.

[25] On October 12, 2011, the grievor responded that she was unavailable on those dates. She did not provide an alternative date or any reason that she could not attend on those dates.

[26] On October 18, 2011, the Board officially informed the parties that the hearing of the grievance and the application for an extension of time would be held from November 21 to 23, 2011. The notice of hearing was sent by email and by priority mail to the last address provided by the grievor.

[27] The grievor contacted the Board on October 20, 2011 to inquire about the status of her case and to reiterate that she was unavailable for a pre-hearing conference.

[28] That same day, the Board informed the parties that a pre-hearing conference to discuss the conduct of the hearing scheduled for November 21 to 23, 2011, would be held on November 9, 2011. The notice was sent to the grievor by email as well as registered mail.

[29] The grievor informed the Board on October 26, 2011 that she had not received the notice by registered mail and that the email that she received did not contain an attachment. On October 26, 2011, the Board resent the grievor an email with the letter of October 21, 2011, summoning the parties to a pre-hearing conference on November 9, 2011.

[30] On October 27, 2011, Canada Post confirmed delivery to the grievor of the letter of October 21, 2011.

[31] The grievor did not attend the pre-hearing conference on November 9, 2011 and provided no justification. The employer's representatives attended.

[32] The Board sent the following letter to the parties on November 10, 2011:

> [Translation]
>
> ***Subject:*** ***Referral to adjudication and application for extension of time - Lyne Brassard***
>
> *This is further to my letter of October 21, 2011. The parties were summoned to appear at a pre-hearing conference in person on November 9, 2011, at 08:30. The grievor did not attend and did not provide a reason justifying her absence.*
>
> *Under the circumstances, the hearing scheduled for November 21 to 23, 2011, in Ottawa will proceed as scheduled. The parties must be prepared to proceed on the objections raised by the employer and on the merits of the case.*
>
> ***Please also note that, if you do not appear at the hearing or at any potential resumption of the hearing, the adjudicator may rule on the matter in light of the evidence and submissions made before her at that time without further notice to you.***
>
> . . .
>
> [Emphasis in the original]

[33] On November 10, 2011, the grievor forwarded to the Board a copy of her email dated October 12, 2011, in which she indicated that she would be unable to attend the pre-hearing conference.

[34] On November 15, 2011, Canada Post informed the Board that the grievor had

not claimed the letter of November 10, 2011, sent to the parties by priority mail.

[35] On November 15, 2011, the Board once again sent the grievor the notice of hearing scheduled for November 21 to 23, 2011, by email and by priority mail. On November 17, 2011, Canada Post informed the Board that the grievor still had not claimed the notice of hearing sent on November 15, 2011 and indicated that the addressee did not live at the specified address.

[36] On November 17, 2011, the Board sent the grievor an email requesting her new address. The grievor did not respond to the Board's request.

Hearing of November 21, 2011

[37] The hearing began as scheduled at 09:30 on November 21, 2011, before the employer's representatives but in the grievor's absence. At my request, the hearing was adjourned at 10:00 for a final attempt to reach the grievor. A Board Registry Officer left a telephone message for the grievor and sent her an email urging her to contact the Board's Registry immediately. The grievor still has not contacted the Board.

[38] Since the grievor had been informed many times of the hearing date, and since she did not provide a reason justifying her absence, I decided to continue the hearing and to dispose of the grievance and the application for an extension of time on the basis of the employer's submitted evidence.

Employer's preliminary objections

[39] At the hearing, the employer reiterated its three objections. First, the employer's counsel argued that the grievance is untimely because it was filed after the 25 days provided for in clause 18.15 of the collective agreement signed between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services group (expiry date: June 20, 2014). Counsel maintained that the grievor had been informed of her dismissal on probation on May 29, 2009 and that her grievance was filed on July 21, 2009, after the prescribed 25 days.

[40] The employer's counsel referred me to the Board's decision in *Grouchy v. Deputy Head (Department of Fisheries and Oceans),* 2009 PSLRB 92, at para 44, which sets out the five criteria to assess when deciding whether an application for an extension of time should be granted. The employer's counsel reviewed the five criteria

set out in *Grouchy* and indicated that the weight to be given to each of the criteria depends on the context.

[41] According to the employer's counsel, the grievor did not provide any justification for the delay; nor did she demonstrate diligence in this matter. Counsel added that, considering the "chances of success of the grievance" criterion, one must yield to the evidence that, given the applicable law and the facts that gave rise to the grievance, the chances of success of the grievance are very slim.

[42] The employer's counsel also maintained that the only reference to the grievance's tardiness is in the letter from the grievor's counsel, dated January 15, 2010. The letter indicates that, at that time, the grievor's union representative requested that the grievance be put on hold. However, according to the employer's counsel, even the request from the union representative was untimely, as it was made after the grievance had been filed.

[43] The employer's counsel also raised another preliminary objection, about the premature reference to adjudication, since the grievor's grievance was not submitted to the different internal levels of the grievance process. The employer's counsel referred me to *Brown v. Deputy Head (Department of Social Development),* 2008 PSLRB 46, at para 26, as well as to *Laferrière v. Deputy Head (Canadian Space Agency),* 2008 PSLRB 53. He also submitted that sections 209 and 225 of the *Act* are clear about the legislator's intention that grievances first be referred to the internal levels of the grievance process before they can be referred to adjudication. He further maintained that the issue in this case is more than a flaw in form or procedure.

[44] Finally, as the third objection to my jurisdiction, the employer's counsel submitted that the evidence would demonstrate that I do not have jurisdiction to rule on this grievance because it is about a dismissal on probation and that paragraph 211(*a*) of the *Act* does not permit any termination of employment under the *PSEA* to be referred to adjudication.

Summary of the employer's evidence

[45] The employer had one witness testify and adduced six documents into evidence.

[46] Stephen de Boer testified for the employer in English.

[47] Mr. de Boer stated during his testimony that he joined the public service in 2005 and that he is currently Director General, Climate Change, at Environment Canada. In May 2009, he was Director, Law of the Sea and the Environment, at the Department of Foreign Affairs and International Trade. He was responsible for advising the government and his department on issues of international law. He managed a team of 11 lawyers and 2 administrative assistants.

[48] On January 6, 2009, a letter of offer for a term contract was sent to the grievor. The contract was from January 6 to August 31, 2009. Mr. de Boer indicated that he and two of his colleagues interviewed the grievor and that they offered her the position. Mr. de Boer explained that it was a "rotational position" that was to be held by a "rotational employee" from his department. However, since no departmental employee was available at that time, Human Resources authorized recruiting an external employee for a term appointment. The idea was that, at the end of the term, a rotational employee would become available for the position. Mr. de Boer also indicated that the grievor reported directly to him.

[49] Mr. de Boer adduced in evidence an email that he sent to the grievor on March 24, 2009, summarizing certain problems that he and some of his employees had with her performance. Mr. de Boer indicated that, before sending the email, he and his two assistants met with Ms. Brassard to try to resolve the situation.

[50] Mr. de Boer stated during his testimony that the grievor did not have team spirit and that she did not take advice meant to help her make travel arrangements. Most of her work involved making reservations, and she had received relevant training. The grievor did not follow advice about processing protected documents. She rarely spoke to others and did not inform her colleagues of her activities.

[51] Specifically, Mr. de Boer referred to an incident during which the grievor, contrary to his instructions, cancelled his trip to Toronto. That error cost the department an additional $130. Mr. de Boer mentioned another incident involving travel reservations in which a plane ticket that according to the grievor should have cost $3500 ultimately cost $6400, to the surprise of Mr. de Boer and his assistant directors. Mr. de Boer mentioned another incident in which the grievor purchased a plane ticket to Paris without his consent. The department had to change it, which led to additional costs.

[52] In addition to other travel reservation incidents, Mr. de Boer referred to a situation in which the grievor sent a protected document to a private residence by regular mail, contrary to procedure.

[53] Mr. de Boer mentioned an incident that occurred when the grievor was asked to replace an absent colleague. She left early that day without notifying her supervisor.

[54] On April 20, 2009, Mr. de Boer emailed the grievor again, referring to his email of March 24, 2009, in which he reminded her that her performance was being monitored and that she was still on probation.

[55] Mr. de Boer stated during his testimony that, on May 28, 2009, he found a note in his inbox from the grievor dated May 27, 2009, informing him that June 10 would be her last day with the branch. The email reads as follows:

> [Translation]
>
> *Dear Sir:*
>
> *Please note that my last day with the JLO Division will be June 10, 2009.*
>
> *Best regards,*
>
> *Lyne Brassard*

[56] Mr. de Boer indicated that the grievor never provided him more information than in the email of May 27, 2009. He also indicated that, after speaking with several individuals in human resources, he decided to dismiss her on probation effective May 29, 2009, with two weeks' severance pay. In response to a question about the reasons that prompted him to terminate the grievor's contract when she had already resigned, Mr. de Boer said that the note of May 27, 2009 was not very clear. Moreover, due to the difficulties that he and his staff had had with the grievor, he wanted to be sure that she would not remain an employee of the department. Mr. de Boer stated that he was not aware of her possibility of working at the Department of Fisheries and Oceans.

[57] Mr. de Boer indicated that he gave the grievor a letter dated May 29, 2009, informing her of her dismissal on probation due to unsatisfactory performance. The letter informed her that she would cease to be an employee of the department as of May 29, 2009 and that she would be entitled to severance equivalent to two weeks of

pay.

Summary of the arguments

[58] According to the employer's counsel, Mr. de Boer's testimony clearly showed that the grievor was advised several times that the employer had problems with her performance. The grievor's letter of resignation had no bearing on the employer's decision to terminate her employment for unsatisfactory performance. The employer was never informed of potential employment for the grievor in another department.

[59] The employer's counsel also submitted that the dismissal on probation was subject to section 62 of the *PSEA*, which gives the employer the right to impose a probationary period on an employee. The employer's counsel also referred me to section 211 of the *Act*, which states that a termination of employment under the *PSEA* cannot be referred to adjudication.

[60] According to the employer's counsel, my jurisdiction is limited to covering a dismissal done as a subterfuge or made in bad faith. In this case, the grounds for dismissal were clearly employment related. There was no subterfuge or bad faith. The employer's evidence clearly showed that the grievor was dismissed for an employment-related reason, namely, unsatisfactory performance. The grievor was notified that her performance would be assessed and was reminded that she was on probation. The employer's decision was justified.

[61] The employer's counsel referred me to the Board's decisions in *Tello v. Deputy Head (Correctional Service of Canada),* 2010 PSLRB 134; *Dyck v. Deputy Head (Department of Transport),* 2011 PSLRB 108; and *McMath v. Deputy Head (Correctional Service of Canada),* 2011 PSLRB 42.

Reasons

[62] I must decide the merits of the employer's preliminary objection to my jurisdiction. The employer raised the following three objections about my jurisdiction as the adjudicator to hear the grievor's grievance:

- The grievance was filed more than 25 days after the date on which the grievor was informed of her dismissal on probation, contrary to clause 18.15 of the applicable collective agreement.

- The grievance was not referred to the internal levels of the grievance process, contrary to sections 209 and 225 of the *Act*.

- I do not have jurisdiction over a decision made under the *PSEA* to dismiss the grievor on probation pursuant to sections 62 of the *PSEA* and 211 of the *Act*.

[63] There is no doubt that the grievance was filed more than 25 days after the date on which the grievor learned of her dismissal. The grievor was dismissed on May 29, 2009, and her grievance was filed on July 21, 2009. The 25-day time limit should be calculated from the date on which the employer terminated the employment, in other words, May 29, 2009. The grievor's counsel also admitted in her letter of January 15, 2010 that the grievance was untimely and, although counsel applied for an extension of time, no evidence was submitted to justify that extension. Therefore, the grievance and the application for an extension are dismissed.

[64] Although I have already disposed of the grievance and the application for an extension, I will also address the employer's two other preliminary objections.

[65] The evidence shows that the grievor's grievance was not referred to all the internal levels required before being referred to adjudication.

> ***225.*** *No grievance may be referred to adjudication, and no adjudicator may hear or render a decision on a grievance, until the grievance has been presented at all required levels in accordance with the applicable grievance process.*

[66] Section 225 of the *Act* is clear, meaning that the grievor's grievance must also be dismissed for that reason.

[67] Finally, the employer submitted that I do not have jurisdiction because the dismissal occurred during probation. The employer's evidence showed that the grievor was hired for a term position of six months from January 6, 2009, to August 31, 2009. The employer's witness testified to a number of shortcomings in the grievor's work performance. She made several errors that had financial impacts, in spite of receiving training. Mr. de Boer also testified that the grievor had problems working with her colleagues and that procedures about work hours and handling classified documents caused problems.

[68] The evidence also indicated that the grievor was informed that her work was

being assessed and that she was reminded that she was on probation.

[69] Finally, it was shown that the grievor decided to leave her job on June 10, 2009 and that, although the employer decided to dismiss her on probation on May 29, 2009, she was paid until June 10, 2009.

[70] The following provisions of the *PSEA*, which were the employer's basis for dismissing the grievor on probation, allow the employer to impose a probationary period on and to dismiss an employee:

> ***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*; or*
>
> *(*b*) determined by a separate agency in respect of the class of employees of which that person is a member, in the case of an organization that is a separate agency to which the Commission has exclusive authority to make appointments.*
>
> *Effect of appointment or deployment*
>
> *(2) A period established pursuant to subsection (1) is not terminated by any appointment or deployment made during that period.*
>
> *Termination of employment*
>
> ***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*
>
> *(*b*) the notice period determined by the separate agency in respect of the class of employees of which that employee is a member, in the case of a separate agency to which the Commission has exclusive authority to make appointments,*

> *and the employee ceases to be an employee at the end of that notice period.*
>
> *Compensation in lieu of notice*
>
> *(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.*

[71] Section 211 of the *Act* does not permit a decision made under the *PSEA*, such as a dismissal on probation, to be referred to adjudication. That section 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 *. . . .*
>
> . . .

[72] I have jurisdiction in this case as an adjudicator only if I am convinced that the grievor's dismissal on probation was made arbitrarily or in bad faith. I do not have jurisdiction to decide whether the employer had sufficient grounds to dismiss her.

[73] The evidence submitted by the employer showed that the reason for the dismissal on probation was employment related and that it was motivated by the grievor's unsatisfactory performance, namely, her errors and her attitude toward the work team. No evidence was adduced that the employer acted arbitrarily or in bad faith. The employer proved that the decision to dismiss the grievor was based on unsatisfactory performance. Under the circumstances, I do not have jurisdiction to hear or dispose of this grievance.

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

(The Order appears on the next page)

Order

[75] The grievor's grievance is dismissed for lack of jurisdiction.

[76] The application for an extension of time is also dismissed.

[77] I order the files closed.

January 26, 2012.

PSLRB Translation

Linda Gobeil,
Vice-Chairperson