**Date:** 20121127

**File:** 566-02-5700

**Citation: 2012 PSLRB 126**

*Public Service*
*Labour Relations Act*

Before an adjudicator

BETWEEN

**AMY SMITH**

Grievor

and

**DEPUTY HEAD**
**(Correctional Service of Canada)**

Respondent

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

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** Kate Rogers, adjudicator

***For the Grievor:*** Andrea Tait, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

***For the Respondent:*** Martin Desmeules, counsel

Decided on the basis of written submissions,
filed August 20 and September 10 and 17, 2012.

## I. Individual grievance referred to adjudication

[1] Amy Smith ("the grievor") was a correctional officer, classified CX-02, employed by the Correctional Service of Canada ("the employer") at the Edmonton Institution for Women ("the Institution") in Edmonton, Alberta. She was hired effective August 17, 2010, and her employment was terminated by way of rejection on probation on April 19, 2011.

[2] On May 27, 2011, the grievor filed a grievance, which reads as follows:

. . .

> *I grieve the employer for the basis under which I was rejected on probation from EIFW. The factors considered for this basis include instances that I was not counseled [sic] on nor given direction or mentorship that would allow me an opportunity to improve my performance.*

. . .

[3] The grievance was referred to adjudication on August 4, 2011, in the absence of a final-level decision from the employer. On September 12, 2011, the employer filed an objection to the jurisdiction of an adjudicator to hear the matter on the grounds that the grievance concerns a termination of employment under the *Public Service Employment Act* (*PSEA*), enacted by sections 12 and 13 of the *Public Service Modernization Act*, S.C. 2003, c. 22. The employer stated that, as there were valid, employment-related reasons for the rejection on probation, the grievance should be dismissed without a hearing.

[4] The employer also contended that the grievance should be dismissed without a hearing on the ground that it was not transmitted to the final level of the grievance process within the time limits specified in the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (expiry date: May 31, 2010**)** for the Correctional Services Group bargaining unit.

[5] On December 13, 2011, the employer withdrew its objection based on timeliness but maintained its objection that the termination of employment was not one over which an adjudicator has jurisdiction.

[6] Although a pre-hearing conference was scheduled for December 2011, it was not held, and the grievor's representative advised the Registry on January 12, 2012 that she expected to withdraw the grievance from adjudication and that, therefore, she saw no need to participate in a rescheduled pre-hearing conference. However, it became apparent after several months that the grievance would not be withdrawn.

[7] After reviewing the file, I determined that, given the representations already on file, the objection to jurisdiction could be decided on the basis of written submissions according to a schedule arranged with the parties.

## II. Objection to jurisdiction

### A. For the employer

[8] The employer contended that the grievor's termination of employment was a rejection on probation pursuant to subsection 62(1) of the *PSEA*. It presented uncontested documentary evidence that demonstrated that the grievor was appointed to a position as a correctional officer, classified CX-02, at the Institution, effective August 17, 2010. Her appointment was subject to a 12-month probationary period, which would have expired on August 16, 2011. On April 19, 2011, the grievor was rejected on probation. She was given two weeks' pay in lieu of notice.

[9] The grounds for the rejection on probation were set out in full in the letter of termination, dated April 19, 2011. According to the employer, the grievor was absent without leave on February 28, 2011. On January 19, 2011, the grievor is alleged to have tried to enter the Institution with a paring knife in her lunch bag and to have become argumentative when told she could not bring the knife into the Institution. Also on January 19, the employer contended that the grievor admitted during a disciplinary hearing that she did not follow the instructions given to her about the confidentiality of the disciplinary process. On January 14, 2011, the grievor is alleged to have used vulgar and abusive language toward her supervisor, for which she was given a two-day financial penalty. On January 4, 2011, the grievor is alleged to have ignored instructions from a supervisor about shift changes. On October 12, 2010, an observation report submitted to the employer stated that the grievor, on two separate occasions, tried to obtain drugs to control pain from the Health Care Unit. Finally, the employer alleged that, on September 26, 2010, the grievor failed to respond to radio transmissions directed to her and that, when confronted, she reacted inappropriately.

[10] The employer argued that a grievance against a rejection on probation pursuant to subsection 62(1) of the *PSEA* is not adjudicable under the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act.* As noted by the employer, subsection 62(1) of the *PSEA* provides as follows:

> ***62.*** *(1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*
>
> (a) *the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act, *or*
>
> (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.*

[11] The employer also noted that paragraph 209(1)(*b*) of the *PSLRA* provides as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> . . .
>
> *(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> . . .

[12] Section 211 of the *PSLRA* clarifies that nothing in section 209 should be construed as allowing the referral to adjudication of a grievance about a termination under the *PSEA:*

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

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

[13] Citing *Tello v. Deputy Head (Correctional Service of Canada),* 2010 PSLRB 134, the employer noted that a probationary employee can be terminated with notice for any reason. The only requirements are that the employee be within the probationary period and that he or she receive notice or pay in lieu of notice. It is not necessary for the employer to establish cause for the rejection on probation, once the statutory requirements have been met. Provided that the termination letter sets out the grounds for the rejection on probation, the employer is not required to prove them. The employer also cited *McMath v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 42, and *Stamp v. Deputy Head (Treasury Board)*, 2012 PSLRB 73.

[14] Although a rejection on probation must be a legitimate exercise of the deputy head's discretion, the onus is on the grievor to establish that it is a sham or a camouflage. The employer argued that the standard that the grievor must meet is extremely high. The grievor must establish that the rejection on probation was for reasons that had nothing to do with her suitability for the job. Only when the employer's concerns about an employee's suitability can be said to be trivial will it be found that the rejection was a sham or a camouflage. In support of that principle, the employer cited *Maqsood v. Treasury Board (Department of Industry),* 2009 PSLRB 175, and *Owens v. Treasury Board (Royal Canadian Mounted Police),* 2003 PSSRB 33.

[15] The employer stated that adjudicators do not have jurisdiction to inquire into the adequacy of the reasons for a rejection on probation. Provided that there is an employment-related reason for the rejection, the employer will have satisfied the requirements for the rejection on probation. One employment-related reason for dissatisfaction with an employee's performance is sufficient; there need not be multiple reasons. Furthermore, an adjudicator cannot substitute his or her assessment of the employee's suitability for the job for the employer's assessment. The employer cited: *Canada (Attorney General) v. Penner,* [1989] 3 F.C. 429 (C.A.); *Canada (Attorney General) v. Leonarduzzi,* 2001 FCT 529; *Salib v. Canadian Food Inspection Agency,* 2010 PSLRB 104; *Ducharme v. Deputy Head (Department of Human Resources and Skills Development),* 2010 PSLRB 136; *Dyck v. Deputy Head (Department of Transport),*

2011 PSLRB 108; *Chaudhry v. Treasury Board (Correctional Service of Canada),* 2005 PSLRB 72; *Melanson v. Deputy Head (Correctional Service of Canada),* 2009 PSLRB 33; *Bilton v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 39; *Tarasco v. Deputy Head (Department of Citizenship and Immigration),* 2009 PSLRB 101; and *Boyce v. Treasury Board (Department of National Defence)*, 2004 PSSRB 39.

[16] The employer argued that, in this case, the evidence proved that the grievor was on probation, that the employer had seven employment-related reasons for being dissatisfied with her suitability and that she received pay in lieu of notice. Even if the grievor could establish that she was not provided with guidance or mentorship so that she could have improved her performance, it would not prove that the rejection on probation was a sham or a camouflage. The grievor was rejected on probation for employment-related reasons. Therefore, an adjudicator is without jurisdiction to hear this grievance.

[17] The employer reiterated these arguments in the rebuttal it filed on September 17, 2012, noting that the grievor did not present any facts to support her contention that the rejection on probation was a sham or a camouflage.

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

[18] The grievor argued that, although section 211 of the *PSLRA* does not permit an employee to refer to adjudication a grievance against a rejection on probation, if the rejection was not done in accordance with the provisions of the *PSEA,* an adjudicator may take jurisdiction. The grievor stated that the employer did not have any legitimate reasons related to her suitability to reject her on probation and, therefore, acted in bad faith. Furthermore, the grounds relied on by the employer to support the rejection on probation were a sham or a camouflage.

[19] The grievor did not explicitly deny the factors set out in the employer's termination letter but instead provided some explanation and context for the incidents that it listed. She acknowledged that she had been absent without leave on February 28, 2011 but stated that it was a single occurrence. She acknowledged that she attempted to bring a paring knife into the Institution in her lunch bag on January 19, 2011 but stated that, as soon as she was told that it was not permitted, she complied with the employer's instructions. She stated that, on January 4, 2011, a shift-change issue arose, but she noted that her shift changes were approved and that

she had waited two days before submitting further requests for shift changes. She acknowledged that she approached the Health Care Unit to obtain medication to control her back pain but said that she did so to avoid having to leave her shift early because of pain as it would have been difficult for the employer to find a replacement. She also stated that, in the eight months of her employment, the employer never provided her with a performance evaluation report.

[20] The grievor argued that the two disciplinary offences relied on in the grounds for rejection on probation should not be considered. She stated that, because she was already penalized for those offences, using them to support rejection on probation is double jeopardy. She cited *Tello* at paragraph 116 in support of that point.

[21] The grievor argued that the employer never directly addressed with her some of the concerns set out in the rejection on probation letter. For example, she pointed out that the employer's documents show that, although it alleged that she responded inappropriately when told that she must answer radio transmissions, the issue of her alleged inappropriate response was not raised with her. Similarly, the grievor stated that the employer's documents do not refer to any discussion following her attempt to bring a paring knife into the Institution. The grievor alleged that the employer's failure to address those issues and to provide her with a performance appraisal meant that she was not given an opportunity to improve her performance. She argued that that demonstrates that the employer acted in bad faith.

[22] The grievor argued that no demonstrable evidence was adduced of her inability to perform her duties. The grounds set out in the employer's letter were single incidents that were addressed and corrected. Accordingly, the grievor argued that she should be reinstated and compensated for all lost wages and benefits.

## III. Reasons

[23] This is a grievance against a rejection on probation made under section 62 of the *PSEA*. There is no dispute that the grievor was a probationary employee or that she received pay in lieu of notice. The grounds for the rejection were set out in detail in the letter of termination dated April 19, 2011.

[24] The grievor did not challenge in any meaningful way the incidents that the employer relied upon in the letter of termination. Instead, she argued that, for some of the incidents, she received no counselling or guidance, that, for others, she had already

been disciplined and that, therefore, it would be double jeopardy for the employer to rely on them to support a rejection on probation. She also argued that she did not receive a performance appraisal, which deprived her of an opportunity to improve or correct any performance deficiencies. She contended that the employer's failure to give her an opportunity to improve her performance and to demonstrate her suitability for the job proved that it acted in bad faith.

[25] Section 211 of the *PSLRA* clearly provides that a termination of employment made under the *PSEA* is not adjudicable. Therefore, rejection on probation, which is a termination of employment made under section 62 of the *PSEA*, is not adjudicable. However, the employer cannot use rejection on probation to avoid adjudication. The purpose of a probationary period is to allow the employer to assess an employee's suitability for a position. If there is no valid dissatisfaction with an employee's suitability, then rejection on probation would be improper. As held as follows in *Tello,* at paragraph 110:

> *[110] If a deputy head terminates the employment of a probationary employee without any regard to the purpose of a probationary period – in other words, if the decision is not based on suitability for continued employment – that decision is one that is arbitrary and may also be made in bad faith. In such a case, the termination of employment is not in accordance with the new* PSEA*.*

[26] In this case, the employer identified a number of concerns with the grievor's suitability for continued employment. They included, for example, the fact that she was absent without leave on one occasion, that she was insubordinate on two occasions, for which she was disciplined, and that she attempted to obtain prescription drugs for pain from the Institution's Health Care Centre. The grievor did not dispute the facts of those incidents.

[27] The employer also identified other incidents in which an element of its concern was its assessment that the grievor either responded inappropriately or that she became argumentative. For example, the employer alleged that the grievor failed to respond to a radio transmission. When it was raised with her, she is alleged to have responded inappropriately. Similarly, the employer alleged that the grievor was argumentative when told that she could not bring a paring knife into the Institution. The grievor disputed that allegation. In her submissions, she stated that she complied immediately with the instructions that she was given. However, she did not explicitly

deny that she responded inappropriately when the employer raised with her the requirement to answer radio transmissions. Instead, in her submissions, she merely noted that the employer did not at that time raise with her any concerns about the appropriateness of her response. Since this grievance was argued by way of written submissions, I cannot resolve any factual disputes between the parties. However, it is not necessary to resolve these factual differences because the grounds for the rejection on probation arose from the employer's dissatisfaction with the grievor's suitability and were not contested by the grievor in any meaningful way.

[28] The grievor bore the burden of establishing that the rejection on probation was a contrivance designed to avoid adjudication and that the employer's dissatisfaction with her suitability was not made in good faith. However, in essence she argued that the grounds relied on by the employer were trivial or that they should not have been considered because she had already been penalized for them. Furthermore, she contended that the employer's failure to conduct a performance appraisal proved that it acted in bad faith.

[29] I do not believe that the grievor established that the employer acted in bad faith or that its reliance on the grounds given for the rejection on probation was a contrivance. As noted as follows in *Maqsood,* at paragraph 38:

> *[38] . . . that is a very difficult standard for the grievor to meet. It requires the grievor to demonstrate not simply that a different judgment might have been made but that the employer was merely constructing the employment-related rationale to disguise motives that had nothing to do with the grievor's suitability for the job.*

[30] Any of the incidents identified by the employer could reasonably give rise to concerns about an employee's suitability. The fact that the grievor was absent without leave only once does not change the fact that she was absent without leave, which would legitimately give rise to concerns about her suitability for continued employment. The fact that the employer had already disciplined her for insubordination does not mean that it could not consider her disciplinary record when assessing her suitability for continued employment. That does not amount to double jeopardy, any more than it is double jeopardy to take into account prior discipline when assessing a new penalty: see *Rousseau v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 91.

[31] The grievor contended that the fact that the employer failed to provide her with a performance assessment during her probationary period proved its bad faith. In the circumstances of this case, I do not agree. Although there might be circumstances under which the failure to provide an employee with sufficient training and guidance before assessing performance could amount to bad faith, this is not such a case. The grievor should not need a performance appraisal to tell her that being absent without leave or being insubordinate, for example, was not acceptable conduct in the workplace. In any case, the failure to provide her with a performance appraisal does not alter the fact that the employer had legitimate reasons to be dissatisfied with her suitability and to reject her on probation; nor does it support an allegation of bad faith.

[32] The employer assessed the grievor's behaviour during her probationary period and determined that, for a number of reasons, she was not suitable for continued employment as a correctional officer. The grievor did not satisfy me that there was any bad faith on the part of the employer that could lead me to the conclusion that its grounds for the rejection on probation were a contrivance, a sham or a camouflage designed to avoid adjudication. Given those facts, I must conclude that I am without jurisdiction to hear this grievance against the grievor's rejection on probation.

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

*(The Order appears on the next page)*

## IV. Order

[34] The objection to jurisdiction is allowed.

[35] I order this file to be closed.

November 27, 2012.

**Kate Rogers,**
**adjudicator**