

Date: 20120113

File: 566-02-2737

Citation: 2012 PSLRB 5



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

Timothy Parsons

Grievor

and

**Deputy Head
(Department of National Defence)**

Respondent

Indexed as
Parsons v. Deputy Head (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Deborah M. Howes, Board Member

For the Applicant: Debra Seaboyer, and the grievor

For the Respondent: Karen Clifford, counsel; Mandy Hanlon

Heard at Winnipeg, MB
June 15 -17 and August 17, 2010

REASONS FOR DECISION

Application before the Board

[1] The grievor, Timothy Parsons, was a kitchen employee of the Department of National Defence (“the Department”) at CFB Shilo, Manitoba, until June 19, 2005. He grieved his rejection on probation. He referred his grievance to adjudication under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (the *Act*). He seeks reinstatement to an indeterminate position with no further probation.

[2] The Department raised a preliminary objection to the jurisdiction of the adjudicator to deal with the grievance. It asserted that section 211 of the *Act* does not permit the adjudication of an individual grievance relating to a termination that falls under the *Public Service Employment Act, S.C. 2003, c, 22, s. 12 - 13* (“the *PSEA*”).

[3] The grievor and his bargaining agent, the Public Service Alliance of Canada, said the adjudicator has jurisdiction because the Department acted in bad faith when it decided to reject the grievor on probation. The bargaining agent acknowledged that demonstrating bad faith or a sham by the employer was an onerous burden.

[4] This decision deals only with the preliminary matter of whether this adjudicator has jurisdiction to hear the merits of the grievance. While I heard the merits of the case, wrapped into the arguments on the preliminary matter, my decision on the preliminary matter makes it unnecessary to deal with the merits of the grievance.

Summary of the arguments

[5] The grievor denies engaging in the conduct alleged by the Department. He argues he was terminated after many years of employment because his superiors were unhappy that he had filed a complaint about the appointment process. He believes his complaint resulted in him receiving an offer of indeterminate position but that it was later held against him because of his audacity to challenge the Department for his indeterminate status. He requests I find that the Department acted in bad faith by ending his employment, which would be within my jurisdiction and allow me to hear the merits of his grievance. The particulars of the allegations of bad faith conduct or sham or ruse include the following:

- Retribution for the grievor having filed a complaint about his status, forcing the employer to grant him indeterminate status.

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- Using sole source information from a supervisor who did not like the grievor
 - A conspiracy to establish the grievor made gender or racial comments at a communications course.
 - A conspiracy, involving the civilian supervisor through the military chain of command to a Major, to terminate the grievor as retribution for a complaint the grievor filed against a Sergeant and a Warrant Officer.
 - The Department's failure to conduct a thorough investigation of any of the alleged misconduct or to obtain a response from the grievor.
 - Treating the grievor in a way that he was unable to progress.

[6] In support of his argument, the grievor relies on three cases:

- *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119)
- *Dhaliwal v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2004 PSSRB 109
- *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33

[7] The Department argues the grievor was a probationary employee and that it found him unsuitable for continued employment. The Department has an employment-related reason for rejecting the grievor during probation. As a result, I should not consider the merits of the grievance. The grievor engaged in inappropriate conduct towards his supervisor and others, and he expressed gender and racial remarks. Both actions exhibit conduct which breaches the *Values and Ethics Code for the Public Service* ("the Code"). The Department also argues this case requires me to assess witness credibility when weighing the evidence provided in support of both parties' arguments. In support of its argument, the Department relies on 17 cases:

- *Faryna v. Chorney*, [1952] 2 D.L.R. 354
- *Bilton v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 39

- *Raveendran v. Office of the Superintendent of Financial Institutions*, 2009 PSLRB 116
- *Rousseau v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 91
- *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33
- *Ondo-Mvondo v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 52
- *Dalen v. Deputy Head (Correctional Service of Canada)*, 2006 PSLRB 73
- *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139
- *Rai v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 54
- *Kagimbi v. Deputy Head (Correctional Service of Canada)*, 2010 CRTFP 67
- *Boyce v. Treasury Board (Department of National Defence)*, 2004 PSSRB 39
- *Lundin v. Canada Customs and Revenue Agency*, 2004 PSSRB 167
- *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33
- *Canada v. Leonarduzzi*, 2001 FCT 529
- *Altwasser v. Canada*, [1993] F.C.J. No. 495 (QL) (C.A.)
- *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.)
- *Jacmain v. Canada (Attorney General)*, [1978] 2 S.C.R. 15.

Reasons

Legislative and Jurisdictional Framework

[8] The Act sets out an adjudicator's jurisdiction in paragraph 209(1)(b). The grievor relied on that paragraph when he referred his grievance to adjudication. Paragraph 209(1)(b) states:

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...

[9] However, section 211 of the Act prohibits adjudicators from dealing with certain individual grievances, including terminations under the PSEA. Section 211 states:

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 ...

[10] Sections 61 and 62 of the PSEA enable the employer to establish a probation period for an employee and to reject the employee during probation. The sections read:

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.

[11] Section 211 of the *Act* has been interpreted many times by adjudicators and the Federal Court. The cases cited by the parties review all the relevant case law and summarize the points from those cases. I will not repeat the reviews done by previous adjudicators, but I will adopt and rely on the conclusions and analysis in those cases.

[12] The cited cases set out two legal principles that apply to an adjudicator's assessment of jurisdiction, and both apply to this case:

- i. First, the adjudicator must examine whether the termination was employment-related. The employer simply has to provide credible evidence that the rejection on probation related to employment issues or that it was dissatisfied with the suitability of the employee; it need not establish just cause.
- ii. Second, the adjudicator must examine whether the employer used probation as a sham or camouflage to hide another motive for the termination. The grievor bears the legal and evidentiary burden of establishing the employer's decision to terminate was not employment-related but was a camouflage or sham or was made in bad faith. This burden imposes a very high standard or threshold for the grievor to demonstrate the rejection was not employment-related.

Was the termination employment-related?

[13] The evidence overwhelmingly supports the finding that the Department had an employment-related reason for the rejection on probation. I received 36 exhibits, which included the offer of employment, the letter of termination, performance assessments,

emails, personal notes, the grievor's 2004 complaint, and other documents recording events and standards. The Department called three witnesses, and the grievor called three witnesses.

[14] Counsel for both parties urged me to make findings of credibility. When weighing the evidence, I did not find it necessary to comment specifically on credibility. The hearing occurred several years after the events at issue. The grievor and the grievor's witnesses testified from memory. They had not made and did not rely on any notes made contemporaneously with the events and I expect their memories were less detailed without notes or other documents to assist them. The Department's witnesses had the letters, emails and statements obtained while investigating some of the events at issue and, in one witness' case, notes made contemporaneously with those events. Since June 2005 the Department has been aware of the grievance; I expect it knew it should keep its records. For many of the key events or statements alleged to involve the grievor, the Department's witnesses provided detailed information while the grievor could not recall or did not believe that some of the events occurred as described. As a result, when disputes arose within the evidence (most often it was not a case of reconciling differing versions but of dealing with the grievor's denial or lack of recollection), I relied on the detailed information provided by the Department's witnesses as supported by the documentary evidence. I turn now to the specific findings of fact relevant to my conclusions.

[15] The grievor's employment with the Department spanned 16 years, during which he held casual positions, term positions and finally an indeterminate position. He held a variety of kitchen-related positions, most recently kitchen helper. On June 30, 2004, he was appointed to a term position for July 15, 2004 to December 14, 2004, with a 12 month probationary period. On December 13, 2004, the grievor was appointed to an indeterminate position, continuing on probation until July 14, 2005.

[16] On May 19, 2005 Major T. E. Hall terminated the grievor's employment during probation for the following reasons:

...

2. This action has become necessary as a result of your improper conduct, incompatibility with your colleagues and clients, and your continued unwillingness to correct your behaviour despite counselling. Management has made

numerous attempts to provide you with training, counseling and assistance over the last five months to improve your performance without success.

[17] Some of the concerns about the grievor's conduct and suitability came from Lillian Hollett, the grievor's civilian supervisor, who began working at CFB Shilo in September 2004. She had over 20 years' experience but none with the grievor. Ms. Hollett supervised a small staff that had been without a civilian supervisor for some years. She reported through the military chain of command to a sergeant, warrant officer, master warrant officer, captain, lieutenant and major.

[18] Ms. Hollett found the grievor a good worker, with good kitchen skills, regular attendance and his own ideas of how to do some of the work. She was not involved in the decision to offer him an indeterminate position. As a supervisor, she kept notes about events or incidents in the kitchen. She recorded a number of incidents involving the grievor. Considering both her evidence and the grievor's about these events, Ms. Hollett's evidence was more detailed and was supported by notes made contemporaneously with the events. I find the following events occurred as the supervisor recorded them.

- On November 26, 2004, the grievor raised his voice to Ms. Hollett and later apologized to her. The incident arose from a difference over what size to cut desserts. It resulted in a meeting with the Warrant Officer and Sergeant at which authority was clarified and the grievor was cautioned about listening to conversations that did not involve him. The same day, at a meeting between Ms. Hollett and the kitchen employees, the grievor challenged the communication flow from management to employees.
- On January 11, 2005, two casual employees reported that the grievor was watching them and that he told them he was watching them. On January 14, 2005 Lieutenant Godin, with Ms. Hollett observing, warned the grievor that it was not his role to watch other employees.
- On January 20, 2005, Ms. Hollett investigated a disturbance occurring between the grievor and a female employee. Ms. Hollett cautioned the grievor to not give directions to other employees, discussed his interactions with other employees and told him not to put that employee down because she handled stress differently than he did. The grievor responded "you women are all the same".

Ms. Hollett cautioned him that it was an inappropriate comment. She warned him his mouth would get him into trouble. He acknowledged he had been told as much.

- On January 28, 2005, the grievor argued with Ms. Hollett and raised his voice to her as she was walking away from him and continued to raise his voice even when she was standing across the room. The incident arose from the grievor asking her who could use the fax machine; he was inquiring for another employee. He also accused her of not posting a competition notice that affected the other employee. When the grievor raised his voice, other diners and staff were present. Ms. Hollett found his conduct embarrassing and unprofessional. The grievor did not apologize.
- On February 1, 2005, the grievor had a dispute with Ms. Hollett about the posting of the shift schedule. Chief Barley investigated and concluded the dispute arose from a lack of communication.

[19] On March 1, 2005, Ms. Hollett and Lieutenant Godin completed a probation period progress report for the grievor. Ms. Hollett evaluated the grievor as not meeting requirements or requiring improvement in working relationships, flexibility and adaptability, oral communication, and overall performance. They commented as follows:

... He has been argumentative and disrespectful to his co-workers and supervisor. He has also argued and yelled to his supervisor in front of other staff and customers on numerous occasions. He has been counselled on his shortcomings.

... has been sent on harassment awareness training and has been spoken to on several occasions about his inappropriate behavior [sic]. He will be given until 31 Mar 05 to show a substantial amount of improvement in his behavior behavior [sic]. He will be sent on communication training on 2 and 3 March 05 to assist him in improving his interpersonal skills.

On May 12, 2005, Lieutenant Godin completed a second progress report, with similar findings.

[20] Others also had concerns about the grievor's conduct and conveyed them to the grievor's superiors. On March 2 and 3, 2005 the grievor attended a communications course. The course leader, Ms. McFarlane, and one participant, a human resources

consultant Ms. McCutcheon, had concerns with the grievor's conduct during the course. (Ms. McCutcheon reported the incidents but did not testify.)

[21] At the course, Ms. McFarlane heard the grievor make disparaging references about women and minority groups, comments like women "deserve to be bowed to", "are like goddesses", "are much better than men". She felt his comments about women demonstrated a reverence for women that exceeded admiration; they made her uncomfortable. She observed other participants exhibit verbal and physical reactions to the grievor's comments. She asked the grievor not to view the exercises or course based on gender lines. She felt his comments did not represent public service values.

[22] One course exercise showed different decision-making styles and required participants to choose employees to send on a trip. The grievor said he would not send any employees of Middle Eastern descent because they would have trouble getting through security. She felt those comments also did not represent public service values and cautioned the grievor not to refer to gender, race or other human rights grounds. He appeared oblivious to the impact of his conduct and did not change his references.

[23] Lieutenant Godin conducted an investigation into the grievor's conduct at the course and concluded that the grievor made gender and racial comments and also made decisions in exercises based on gender and ethnic considerations. On April 13, 2005 Lieutenant Godin met with the grievor and his bargaining agent representative to inform the grievor of the recommendation to terminate his probation and to discuss some of the grievor's actions. They discussed his different behaviours, including his conduct at the course. The grievor suggested Lieutenant Godin was lying, denied the allegations and said someone else had been responsible for the comments made at the course. The grievor felt he had not been given a chance to respond to the specific comments. When Lieutenant Godin offered him the chance to explain, the grievor lost his temper, focused on the identity of those who had reported what happened, and accused Lieutenant Godin of judging him without knowing him.

[24] After receiving the information from his subordinates and reading the related documents, Major Hall met with the grievor in May 2005 before making his decision about the grievor's employment. The grievor attended with his bargaining agent representative. When Major Hall raised the topic of the comments made at the March 2005 course, the grievor said "coloured people, they're not like us". [The bargaining agent representative and the grievor could not recall such a remark but

Major Hall had a clear recollection, which I accept.] Major Hall observed that the grievor acted like he believed his own comments and showed no remorse for or insight into his inappropriate conduct.

[25] Major Hall was aware of the Department's expectation that employees will follow the *Code*, the "Canadian Forces Administrative Order on Racist Conduct" and the "Civilian Personnel Administrative Order on Standards of Conduct". He conveyed the Department's lack of tolerance towards an employee raising his or her voice, yelling at a supervisor, or making racist or gender comments. Major Hall found the grievor's actions towards Lieutenant Godin, during the investigation of the course incident, completely inappropriate. To Major Hall, personal suitability was important for kitchen employees because of the repetitive tasks, mundane work, and close proximity. He considered it a requirement for employees to get along with each other.

[26] In the end, Major Hall concluded the grievor displayed a pattern of inappropriate behaviour and communications shortcomings. On May 12, 2005 he decided, and the Base Commander concurred, to terminate the grievor's probationary employment.

Applying legislative and case law principles to the decision to terminate

[27] The Department must prove that it had a credible employment-related reason for terminating the grievor's probationary employment. This is not a case of just cause for dismissal. The Department does not have to prove on a balance of probabilities that it had cause to terminate the grievor. My role as adjudicator is not to substitute my decision for the employer's decision; my role is to examine the evidence supporting the reasons for the termination against the required grounds of an employment-related reason.

[28] It was undisputed that the grievor had been on probation. The evidence and my findings of the facts drawn from the evidence leads overwhelmingly to the conclusion that the Department met its onus; it had an employment-related reason to terminate the grievor during probation. Yelling at a supervisor is an employment-related reason. Calling a superior a liar is an employment-related reason, as is becoming angry with a superior. Making inappropriate gender or racist comments is an employment-related reason. I turn now to the allegations of bad faith or a sham by the Department.

Did the Department use probation as a sham or camouflage?

[29] The grievor asserts the Department's decision and reasons were a sham, a ruse or made in bad faith. I find the evidence does not support the factual conclusions urged on me by the grievor. The evidence shows no bad faith, sham or ruse. Rather, the grievor's case is better characterized as a response to a just cause analysis of the grounds of termination. As already stated, I am not applying a just cause analysis and am not empowered to substitute my decision for that of the Department which is presumed to have acted in good faith if it had an employment-related reason for the termination. The grievor had to bring sufficient evidence to establish that it was more likely that the Department had a different motive for the termination than the reasons stated in the termination letter.

[30] I now deal with the factual basis of each alleged aspect of bad faith or sham raised by the grievor, beginning with the following:

Retribution for the grievor having filed a complaint about his status forcing the employer to grant him indeterminate status

[31] There is no evidence that the grievor obtained his indeterminate position as a result of filing his complaint or of any retribution towards him related to his complaint. Three facts lead me to dismiss this allegation.

[32] First, the grievor did not seek an appointment to an indeterminate position as a remedy in his complaint, so it is difficult to draw a connection between his complaint and his appointment to an indeterminate position. On December 2, 2004 the grievor filed his complaint on the grounds that he felt his "personal suitability would [be] in question for any future employment." His term position was due to expire on December 14, 2004, which he knew from the notice he received on November 12, 2004. The remedies he sought in the complaint were a recognition of the Department's wrong doing, a halt to it using information about four specific events on his future performance assessments, and an improved work environment. The incidents identified in his complaint were:

- *An incident at the till about how to take payments involving the Warrant Officer and the grievor where the grievor says he was eventually proven correct but never received an apology.*

- *November 26, 2004 he raised his voice at Ms. Hollett and later apologized to her; this incident arose from a difference about the size to cut desserts.*
- *A follow up meeting with the Warrant Officer on November 26, 2004 where the Warrant Officer made damaging and hurtful statements to the grievor.*
- *December 1, 2004 where the Sergeant gave directions on using the till and implied the grievor would steal from the till.*

[33] Second, Major Hall, who decided to grant the grievor indeterminate status, made the decision because the grievor was eligible, there was an opening and it was the fair thing to do. He knew of the complaint and had referred it to the appropriate individual to process under the relevant policy. He testified that he was not influenced by the presence of the complaint. Nothing in the evidence raised suspicion of Major Hall's testimony. If Major Hall was not forced (by the complaint) to grant the grievor indeterminate status, he would not likely have sought retribution for something that did not affect him.

[34] Third, at the grievor's meeting with Major Hall in May 2005, the grievor made a racial comment, which was contrary to the Department's zero tolerance policy. His conduct demonstrated anew what Major Hall had learned from his management sources. It created an employment-related reason for terminating the grievor's probation that was independent of any consideration of the complaint.

[35] The grievor next alleged the following:

Using sole source information from a supervisor who did not like the grievor

[36] Ms. Hollett came to the worksite in September 2004 and had no prior experience with the grievor. She received a mixed welcome from the employees and knew they had been without a civilian supervisor for several years. She was a member of the same bargaining unit as the grievor and had limited authority. She would counsel and advise employees and try to resolve problems in the workplace. If unsuccessful, she would refer matters up the Department's chain of command. She had no input into the grievor's success in obtaining an indeterminate position or in the decision to end his probation. She provided some input into the probationary performance assessment in early 2005 but was not the final decision maker on its content or the consequences of the assessment. Ms. Hollett raised concerns about and noted incidents that involved

the grievor's conduct, but also acknowledged his strengths. Several of Ms. Hollett's concerns were reviewed or investigated by her superiors, which added additional information.

[37] Major Hall decided to grant the grievor indeterminate status and later terminated his employment. Major Hall received his information from at least four persons other than Ms. Hollett. She was not the sole source of his information. This allegation is unproven.

[38] The grievor next alleged the following:

A conspiracy to assert the grievor made gender or racial comments at a communications course

[39] The grievor's evidence confirms that he made racial comments at the March 2005 course although he provided an explanation for his comments. He provided a drawing that he made at the course and said he used the drawing to introduce himself at the course. The drawing shows him kneeling before a woman on a throne. It is a gender reference. It made the course leader uncomfortable. He denies making any other gender references but the balance of the evidence contradicts him. Mr. Kroeger, a witness for the grievor who attended the same course was not helpful because he was not in the same small group as the grievor at the course, did not recall or hear the grievor's introduction using the drawing, was not with the grievor at all times, and did not hear all the interactions between the grievor and the course leader. On the other hand, Ms. McFarlane had specific recall of the grievor's conduct and her reactions at the relevant time, and the documents obtained during the Department's investigation are consistent with her verbal version of the events. The information that Lieutenant Godin obtained and that Major Hall relied upon came from Ms. McFarlane and the grievor. There is no evidence of a conspiracy of any sort.

[40] The grievor's next allegation is as follows:

A conspiracy, involving the civilian supervisor through the military chain of command to a Major, to gain retribution for a complaint the grievor filed against a Sergeant and a Warrant Officer.

[41] There is no evidence of a conspiracy, only the grievor's assertion that one existed. At least five people made up the chain of command; all had differing periods

of acquaintance with the grievor. As his employment continued into January 2005, Ms. Hollett, Lieutenant Godin, Captain Keenan and Major Hall had the most significant interactions with the grievor. Those three officers were not named in the grievor's complaint and there is no evidence that supports a finding that they were motivated by it. Ms. Hollett was not aware of the complaint.

[42] I am also persuaded by the fact that Major Hall identified shortcomings with one of the persons named in the grievor's complaint, which further supports the finding that the grievor's complaint had no impact on the decision to terminate his employment. I find it unlikely that Major Hall would criticize the source of information on which he relied to make a decision.

[43] The grievor next alleged the following:

The Department's failure to conduct a thorough investigation of the alleged misconducts or to obtain a response from the grievor

[44] The evidence shows the Department conducted at least four reviews of alleged misconduct by the grievor and each time it provided him an opportunity to respond. The first misconduct involved the grievor raising his voice to Ms. Hollett during the dessert incident. The Sergeant and Warrant Officer spoke to both persons to seek their side of the story.

[45] The second misconduct involved the posting of the schedule in January 2005 and the interaction between Ms. Hollett and the grievor. Chief Barley investigated that incident in February 2005, spoke to both persons and other witnesses and recommended change by both individuals.

[46] The third misconduct involved the allegations of gender and racial comments made at the March 2005 course. Lieutenant Godin conducted the investigation to gather emails, statements and the evidence of Ms. McFarlane. Lieutenant Godin met with the grievor and his bargaining agent representative on April 13, 2005 to convey the information and to ask for the grievor's input. The grievor was more interested in who made the allegations than in responding to them.

[47] The fourth misconduct involved Major Hall's meeting with the grievor before he finalized his decision about the grievor's probation. Major Hall offered the grievor the chance to address all his conduct. The meeting occurred with the grievor's bargaining

agent representative present. I already found the grievor made a racial remark at that meeting.

[48] These four examples prove that investigations occurred and the grievor was given opportunities to respond. They contradict any allegation of bad faith arising from an improper investigation. I find there is no merit to this allegation.

[49] The grievor's final allegation is as follows:

Treating the grievor in a way that he was unable to progress.

[50] The grievor asserts he was constantly watched or under the microscope at work, which was unusual in his career. He believed that, after his lengthy service, he was past such a level of scrutiny.

[51] The 12-month probation period he was required to fulfill created the opportunity and obligation for the Department to examine his work and his suitability in the same way it would for any new person that might become an indeterminate employee in the federal public service. The grievor presented no evidence to show that the Department's practice or policy was to lower the standard of review for former casual or term employees. His expectation of a manner of treatment is not sufficient. The evidence shows and I find that the Department provided the grievor with notices of concerns, feedback on how to improve, support through courses and encouragement at different times. All this persuades me that the Department treated the grievor in a way that was intended to help him progress. There is no evidence of bad faith or a ruse.

Applying legislative and case law principles to the allegation of bad faith or a sham or ruse

[52] The case law states that the grievor bears the burden of proving that the employer's decision involved bad faith or a sham or a ruse. This burden requires more than an allegation or contradiction of the reasons raised by the employer. The grievor must bring sufficient proof to establish it is more likely that the employer's stated employment-related reasons are not the real reasons for the termination. Here the grievor failed to bring such proof. He believes there was another motive, but his belief alone is not sufficient. He attempts to contradict the evidence about the events substantiating the Department's grounds for termination but is unsuccessful. He

disagrees with the Department's conclusions, but is unable to meet the threshold for proving his contrary assertion. As a result, the defence of bad faith or a sham or a ruse must fail.

Conclusion

[53] This case fits squarely into the legal principles drawn from the *Act* and the cited case law. I conclude that section 211 of the *Act* prohibits the grievor's case from being heard at adjudication because it involves a termination under the *PSEA*. The termination was a rejection on probation for employment-related reasons without any evidence of bad faith, a sham or a ruse. As a result, I have no jurisdiction to hear the merits of the grievance.

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

(The Order appears on the next page.)

Order

[55] I am without jurisdiction to hear this grievance and order the file closed.

January 13, 2012

**Deborah M. Howes
Adjudicator**