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Citation: 2012 PSLRB 94

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

KELLY REDDY

Grievor

and

OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Employer

Indexed as
Reddy v. Office of the Superintendent of Financial Institutions

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Stephan J. Bertrand, adjudicator

For the Grievor: Himself

For the Employer: Karen L. Clifford, counsel

Heard at Toronto, Ontario,
January 24 to 27, 2012.
Supplementary submissions filed on July 5, 13, and 24 2012.

I. Individual grievance referred to adjudication

[1] Kelly Reddy ("the grievor") was employed by the Office of the Superintendent of Financial Institutions ("the employer" or OSFI) as a capital markets analyst, a position classified at the RE-05 group and level. His employment was terminated by the employer on June 3, 2010 for unsatisfactory work performance.

[2] On June 24, 2010, the grievor filed a grievance in which he alleged that the employer was unfair and unreasonable in finding his performance unsatisfactory and requested reinstatement into his position. Dissatisfied with the employer's response at the final level of the grievance process, he referred his grievance to adjudication on November 2, 2010, under subparagraph 209(1)(*c*)(i) of the *Public Service Labour Relations Act* ("the *Act*"). At the hearing, the employer suggested that, since the OSFI was a separate employer, the grievance should have been referred under paragraph 209(1)(*d*), to which the grievor agreed. The grievor appeared to fully understand that although his grievance pertained to his termination for unsatisfactory performance, it also dealt with a separate employer and therefore could not be founded on subparagraph 209(1)(*c*)(i).

[3] Assuming that a grievance is properly referred to adjudication to the Public Service Labour Relations Board ("the Board"), the role of an adjudicator in a case involving a termination for unsatisfactory performance is defined in section 230 of the *Act*, which provides as follows:

> ***230.*** *In the case of an employee in the core public administration or an employee of a separate agency designated under subsection 209(3), in making a decision in respect of an employee's individual grievance relating to a termination of employment or demotion for unsatisfactory performance, an adjudicator must determine the termination or demotion to have been for cause if the opinion of the deputy head that the employee's performance was unsatisfactory is determined by the adjudicator to have been reasonable.*

[4] The employer raised a preliminary objection to my jurisdiction under section 230 of the *Act*. It argued that, if I determined that its opinion that the grievor's performance was unsatisfactory was reasonable, I would exhaust my jurisdiction and would be unable to further examine the matter.

[5] No other jurisdictional objections or preliminary issues were raised by the parties at the hearing.

II. Confidentiality of the evidentiary material

[6] At the outset of the hearing, the employer raised concerns over the confidentiality of much of the documentary evidence it intended to file in support of its position because it contained information about the affairs of financial institutions and their employees. The employer sought an order allowing it to file its documentary evidence with the names of financial institutions and any identifiers blacked out. The employer further sought that the documents be sealed. In making its request, the employer relied on section 22 of the *Office of the Superintendent of Financial Institutions Act,* R.S.C., 1985, c. 18 (3rd Supp.) ("the *OSFIA*"), which is worded as follows:

> ***22.*** *(1) Subject to subsection (3), the following information, and any information prepared from it, is confidential and shall be treated accordingly:*
>
> *(*a*) information regarding the business or affairs of a financial institution, foreign bank, bank holding company or insurance holding company or regarding persons dealing with any of them that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament;*
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> . . .
>
> *(2) Nothing in subsection (1) prevents the Superintendent from disclosing any information … if the Superintendent is satisfied that the information will be treated as confidential by the agency, body or person to whom it is disclosed.*
>
> . . .

[7] Although the grievor expressed the view that any references to financial institutions or their affairs would be of little value to third parties given that such information was outdated, he nevertheless did not oppose the employer's request.

[8] The importance of keeping financial information confidential is well recognized. The statutory provision quoted earlier clearly emphasizes the importance attached by Parliament to keeping such records confidential, subject of course to certain principles

about their disclosure. Notwithstanding the grievor's position and the fact that he has not sought such disclosure, it is well recognized that the onus rests upon a person or entity seeking to deny public access to and publicity of judicial or quasi-judicial proceedings and records to prove that special circumstances justify departure from the fundamental constitutional principles of "open court" and freedom of expression.

[9] A person or entity seeking to limit the openness of judicial or quasi-judicial proceedings must satisfy the so-called "Dagenais/Mentuck" test which is described in the judgment of the Supreme Court of Canada in *Toronto Star Newpapers Ltd. v. Ontario*, 2005 SCC 41, as follows:

> *[26] The Dagenais test was reaffirmed but somewhat reformulated in Mentuck, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:*
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> *(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and*
>
> *(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [para. 32]*
>
> *[27] Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be real, substantial, and well grounded in the evidence: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).*

[10] Those decisions and others that have followed have suggested that the "Dagenais/Mentuck" test ought to be applied to all discretionary judicial and quasi-judicial actions or decisions that may limit the publicity of proceedings in any case and at any stage of those proceedings, and that it also ought to apply to requests for access to exhibits, a corollary to the open court principle.

[11] I considered the parties' submissions on this issue and came to the conclusion that the "Dagenais/Mentuck" test has been met in this case and that the risk of

disclosing information that must be treated as confidential is real, substantial and well grounded in the evidence.

[12] Accordingly, I ordered that the employer's documentary evidence could be filed in the following manner:

(i) The names of financial institutions and any identifiers could be blacked out by the employer before filing documents containing such information.

(ii) The names of individuals, other than OSFI employees, could be blacked out by the employer before filing documents containing such information.

(iii) An unredacted copy of the blacked-out documents would be made available to the grievor and myself for verification or for authenticity purposes and would be returned to the employer at the conclusion of the hearing.

(iv) The blacked-out documents introduced as exhibits at the hearing would be sealed and returned to the employer after the expiry of the period for judicial review or of any judicial review proceedings.

III. Summary of the evidence

[13] The employer called two witnesses, Mate Glavota and Douglas Sannuto. The grievor testified on his behalf and did not call any witnesses.

A. Mr. Glavota

[14] Mr. Glavota is Director of Capital Markets with the OSFI, a position he has held since January 2010. He was previously a senior capital markets analyst.

[15] Mr. Glavota provided an overview of the OSFI's mandate, which consists of (1) supervising institutions and pension plans to determine whether they are in sound financial condition and meet minimum plan-funding requirements and whether they comply with their governing statutory and supervisory requirements; (2) advising institutions and plans in the event of material deficiencies and requiring management, boards or plan administrators to take the necessary corrective measures expeditiously or taking such measures itself; (3) advancing and administering a regulatory framework that promotes the adoption of policies and procedures designed to control

and manage risk; and (4) monitoring and evaluating system-wide or sectoral issues that could negatively impact institutions.

[16] Mr. Glavota added that the mission of a capital markets analyst was to safeguard depositors, policyholders and pension plan members from undue loss and to contribute to public confidence in a competitive financial system. Accordingly, capital markets analysts are responsible for identifying and analyzing industry and company-specific risks and mitigating factors, developing approval plans and associated supervisory plans that are consistent with the OSFI's risk-based framework, monitoring institutions' operations and financial conditions, ensuring that on-site reviews are carried out in an effective manner, identifying industry trends and practices, escalating key or critical issues that impact the OSFI's mandate, making appropriate, value-added recommendations to institutions, and maintaining an effective follow-up and intervention process.

[17] According to Mr. Glavota, a capital markets analyst's work is often very time sensitive, in great part because financial markets move rapidly and so do the associated risk factors. Therefore, meeting deadlines was extremely important. He added that acting professionally and providing sound analysis were fundamental elements of the job.

[18] Mr. Glavota indicated that the grievor commenced his employment with the OSFI on March 16, 2009 under his supervision and that his appointment was subject to a one-year probation. Because the position required good structured writing, specific training on that topic was offered to and taken by the grievor in May 2009. It consisted of a two-day structured writing course, which provided the participants with a structured framework designed to help them put their thoughts on paper, from organizing their thoughts to expressing sound conclusions. The participants were also provided with written and electronic materials that could be consulted later as required.

[19] Mr. Glavota also reviewed other behavioural and technical training that had been provided to the grievor, including a three-day supervisory framework course in June 2009, which provided the participants with tools to assess and rate financial institutions with respect to their risk factors by using a risk matrix designed to assign an overall rating commonly used by the Capital Markets Risk Assessment Services

(CMRAS) group. Again, the grievor was also provided with written materials that he could consult later as required.

[20] Mr. Glavota testified that the CMRAS group, which consisted of approximately 15 employees, worked on many projects at once and that it fostered a team approach in which everyone was expected to complete his or her tasks on time and seek input from and provide it to colleagues.

[21] Mr. Glavota, who was working in close proximity to the grievor, initially assigned him a number of projects and provided general guidance. He did not monitor the grievor's performance too closely during the first few months because he wanted to allow him some time to adjust to his new work environment, undergo the required training and learn from his peers. However, at the end of June 2009, Mr. Glavota was asked by his director, Mr. Sannuto, to provide more coaching and mentoring to the grievor, as there were concerns about the pace at which he was working. Mr. Glavota started to take a more active role by giving the grievor more feedback, suggestions and guidance. He went through his personal calendar for the period of June 29, 2009 to November 27, 2009 and outlined the nature and purpose of the 56 meetings he had with the grievor during that period. He explained that, whenever the grievor failed to meet an expectation or failed to submit work that was due, an "x" was placed beside the specific meeting entry. A total of nine "x" marks can be found in Mr. Glavota's calendar for that period, which he reviewed in detail during his testimony.

[22] Mr. Glavota indicated that he had many concerns with the grievor's quality of work, work effort and availability at the work site, all of which were brought to his attention during those meetings. He added that the grievor submitted work that was incomplete and far below expectations, which resulted in Mr. Glavota spending more time mentoring the grievor and sometimes doing the work himself. Mr. Glavota indicated that, although he explained the grievor's shortcomings to him and how he needed to improve, no improvements were noticed in subsequent assignments, as the grievor continued to miss deadlines and submit poor-quality work and was regularly absent from his workstation. Mr. Glavota stated that he frequently warned the grievor that he needed to improve the quality of his analyses, to condense his findings and to provide conclusions in a succinct manner but that all his feedback and mentoring seemed to fall on deaf ears. According to Mr. Glavota, the grievor had been provided

with the necessary tools to meet the employer's expectations and to submit satisfactory work but did not apply them. On that point, Mr. Glavota referred me to the structured writing training course, to its materials and to his own mentorship.

[23] By the end of October 2009, Mr. Glavota became extremely frustrated with the grievor's lack of improvement and effort and met with his director, Mr. Sannuto, to inform him of the situation and to seek guidance from him. Mr. Glavota was told to continue to work closely with the grievor while ensuring that the CMRAS projects were completed on time. Mr. Sannuto also told him that he would take a personal interest in the grievor and that he would shortly start meeting with him regularly. By that point, Mr. Glavota was relying less and less on the grievor's work and was either drawing on other resources or doing it himself.

[24] According to Mr. Glavota, the grievor continued on the same path in November 2009 and no improvements were seen in the quality of his work or in his attitude. The grievor was not receptive to Mr. Glavota's feedback and responded defensively, both verbally and in his emails. The grievor refused to work with his colleagues and to have his work vetted by them before sending it for general distribution, something that all his peers did as a common practice, according to Mr. Glavota. That was still an issue in March 2010, which prompted Mr. Glavota to remind the grievor in writing that his work needed to be vetted in advance. Mr. Glavota indicated that it was unusual for him to document such events, as he preferred to communicate with his colleagues and subordinates face to face.

[25] Mr. Glavota added that he remained hopeful that the grievor would eventually improve and become a productive member of his group but that, despite being provided with adequate training, more than usual mentoring and many opportunities to improve the quality of his work, the grievor never significantly improved.

[26] In cross-examination, Mr. Glavota clarified that, although he was not responsible for the grievor's mid-year performance review that was signed on October 8, 2009, he nevertheless should have alerted Mr. Sannuto, who was responsible for conducting the review, of the many performance deficiencies he had detected over the previous three months.

B. Mr. Sannuto

[27] Mr. Sannuto is Managing Director of Capital Markets and Risk Assessment Services with the OSFI, a position he has held since January 2010. He was previously Director of Capital Markets, the position now held by Mr. Glavota.

[28] Mr. Sannuto was directly involved in hiring the grievor. He was the chair of the selection committee of the staffing process that the grievor applied for and ultimately was his hiring manager. What initially caught Mr. Sannuto's eye was the grievor's experience in internal audits, his educational background and the fact that he had taken a financial analyst's course. Mr. Sannuto was confident that the grievor was a good fit for his CMRAS group.

[29] According to Mr. Sannuto, the most important competency for the grievor's analyst position was analytical thinking.

[30] On June 8, 2009, Mr. Sannuto met with the grievor and provided him with the OSFI commitment document form, which set out the grievor's goals for the 2009-2010 review period. Mr. Sannuto went through the document in great detail and answered the grievor's questions. The grievor expressed no concerns. It was explained to him that the document would be used at year-end to assess his achievements and competencies. It was also made clear to him during that meeting that he reported to Mr. Glavota on a day-to-day basis but that Mr. Sannuto was his direct manager. When asked whether his superior at that time, Chris Elgar, had any involvement in setting out the grievor's goals, in assessing his performance or in supervising his work, Mr. Sannuto responded that Mr. Elgar had no such involvement and that those responsibilities rested exclusively with him, with the exception of supervising the grievor, which he shared with Mr. Glavota.

[31] Serious concerns about the grievor's performance were brought to Mr. Sannuto's attention only at the end of October 2009, when Mr. Glavota met with him to advise him of significant deficiencies. Mr. Sannuto indicated that he had not been aware of the deficiencies, especially not in June 2009, when the commitment form was explained to the grievor, or in early October, when the mid-year performance review was conducted.

[32] Upon being informed of the grievor's performance deficiencies, Mr. Sannuto decided to take on the responsibility of coaching him, something he had often done for other employees in the past. He began to meet with the grievor late in fall 2009.

[33] At first, Mr. Sannuto met with the grievor informally and kept no records of their discussions. However, he became concerned with the grievor's lack of improvement and started to keep records of his daily meetings with the grievor in January 2010, with the objective of improving the grievor's work performance and attitude, as what he was observing was consistent with the concerns that Mr. Glavota had raised in late October 2009.

[34] Despite Mr. Sannuto by that time providing the grievor with daily feedback and coaching, it became obvious to him that the grievor was not achieving the goals set out in the commitment form. His work consistently lacked structure, failed to synthesize the relevant data and provided little, if any, conclusions or recommendations.

[35] Mr. Sannuto went through his record of his meetings with the grievor from January 25, 2010 to February 10, 2010 in detail, outlining the nature and purpose of those meetings. During that period, he met with the grievor on 12 different occasions, sometimes more than once a day.

[36] On February 2, 2010, during one of his meetings with the grievor, Mr. Sannuto warned him that, if he failed to dramatically improve the quality of his work and to meet expectations, he could be terminated. According to Mr. Sannuto, the grievor reacted defensively by attempting to bolster the quality of his work.

[37] On February 4, 2010, Mr. Sannuto asked the grievor whether he felt he was being provided with clear direction, coaching and feedback. The grievor responded affirmatively. Mr. Sannuto then offered to reduce the grievor's caseload, hoping that it would lead to some improvement, but the grievor declined that offer.

[38] On February 9, 2010, Mr. Sannuto met with the grievor to go over the contents of his performance appraisal. Some of the key points discussed included the grievor handing in incomplete and incorrect work, missing meetings and project deadlines without notice, requiring an unusual number of revisions to his work that were not always reflected in the final versions, and regularly being absent from his desk for long periods. Although the grievor took notes during the meeting, which he filed as an

exhibit at the hearing, he did not, according to Mr. Sannuto, rebut any of the observations and criticisms in his performance appraisal. The grievor even refused to take a copy of the performance appraisal with him. As a result, he later sent the grievor an electronic copy of the appraisal.

[39] On February 10, 2010, Mr. Sannuto met with the grievor again and filled out a probation checklist form, which the grievor signed during that meeting. That checklist concluded that the grievor's probationary period had not been successfully completed. Although the grievor had had some time to reflect on the previous day's performance appraisal and on Mr. Sannuto's observations and criticisms, he once again did not challenge them.

[40] On March 19, 2010, Mr. Sannuto sent an electronic copy of the final version of the performance appraisal to the grievor. When asked why he did not reject the grievor while on probation, something he could have done before March 16, 2010, Mr. Sannuto indicated that he was not willing to give up on him at that point and that he wanted to give him another chance to improve.

[41] Although Mr. Sannuto continued to meet with and coach the grievor after his probation period expired, he observed the same deficiencies in the grievor's performance, without any significant improvements. The grievor's work consistently lacked structure and continued to be late. He became non-responsive and began spending less time at his desk. Mr. Sannuto met with the grievor on 10 occasions in April 2010 and on 5 occasions in May 2010. According to him, no significant improvements were recorded during that period, despite ongoing feedback and coaching. Clearly, the grievor was not progressing to an acceptable standard, as far as Mr. Sannuto was concerned.

[42] On June 3, 2010, Mr. Sannuto terminated the grievor's employment with the OSFI for unsatisfactory performance.

C. <u>The grievor</u>

[43] The grievor, who has a strong financial background, joined the OSFI on March 16, 2009. At the hearing, he strongly disagreed with the performance deficiencies observed by Messrs. Glavota and Sannuto and filed a list of engagements he had worked on during his tenure at the OSFI. However, no evidence about the

nature or results of the engagements were presented to me. The grievor believed that he had added value to the CMRAS group and that he had contributed to its success.

[44] Much of the grievor's testimony focused on what he referred to as bullying by Mr. Glavota and on Mr. Sannuto's bad faith conduct. The first act of bullying happened in a meeting in May or June 2009, during which Mr. Glavota allegedly shouted at the grievor and went on a tirade for several minutes in front of nine other colleagues. In his testimony, Mr. Glavota denied acting in that fashion. Mr. Sannuto indicated that he was never made aware of such actions. No independent witness was called by the grievor to substantiate this event.

[45] The second bullying act allegedly occurred during a break at the structured writing training session in May 2009 during which Mr. Glavota unexpectedly uttered to the grievor, "You're fired… just kidding." In his testimony, Mr. Glavota denied making the remark. Mr. Sannuto indicated he was never made aware of the remark. No independent witness was called by the grievor to substantiate this event.

[46] The third bullying act occurred in a meeting in late June 2009, during which Mr. Glavota allegedly asked the grievor to vacate his chair and then proceeded to sit on it and rub his behind on it several times. Again, Mr. Glavota denied it during his testimony, Mr. Sannuto indicated he was never made aware of it and no independent witness was called by the grievor to substantiate it.

[47] In cross-examination, the grievor admitted that he never reported the bullying to anyone at the OSFI until September 2010, months after he had been terminated and after he had filed his grievance. He also agreed that the grievance makes no mention of any bullying.

[48] According to the grievor, Mr. Glavota never raised any concerns with him about his performance and never identified any deficiencies during his tenure at the OSFI. He added that Mr. Sannuto noted no performance deficiencies in his mid-year performance review, which was signed on October 8, 2009.

[49] The grievor stated that he started to meet with Mr. Sannuto only in November 2009 and that he met with him only once in November 2009 and once more in December 2009. The grievor suggested that his relationship with Mr. Sannuto changed after he attended a job interview with another department in December 2009,

which allegedly angered Mr. Sannuto. Mr. Sannuto denied it when he testified, as he had always encouraged employees to seek advancement opportunities. Another important change in the workplace, according to the grievor, was the departure of Mr. Elgar, which resulted in Mr. Sannuto being promoted to the position of Managing Director and Mr. Glavota being promoted to the position of Director. However, the grievor led no evidence as to how those organizational changes resulted in a significant change of behaviour by Messrs. Glavota and Sannuto. In addition, the evidence established that Mr. Elgar left the OSFI as early as June 2009.

[50] The grievor stated that, by the end of January 2010, Mr. Sannuto had become very critical of his work during their meetings and that he had requested the grievor to report his daily hours of work, which the grievor found cumbersome. One of Mr. Sannuto's criticisms was about the grievor's lack of participation in group discussions. When he testified, the grievor suggested that Mr. Glavota's bullying was the cause of his low participation rate, as he feared doing anything in Mr. Glavota's presence, but admitted in cross-examination that he never reported Mr. Glavota's alleged conduct to Mr. Sannuto.

[51] Although the grievor recalled meeting with Mr. Sannuto on February 9, 2010 to go over his performance appraisal and being told that he had not achieved many of his commitment goals, he claimed that he was never provided with a copy of the appraisal. Mr. Sannuto's testimony on that issue was that the grievor refused to take a copy of the performance appraisal at the February 9 meeting, which was why he later sent the grievor an electronic copy. Although the grievor took notes during the meeting and met with Mr. Sannuto the next day, he admitted not requesting a copy of his performance appraisal or responding to its content, which he confirmed he was well aware of.

[52] The grievor also alluded to three other events involving Mr. Sannuto that, according to the grievor, established bad faith on Mr. Sannuto's part. The first was about computer bags missing from the grievor's cubicle space that allegedly disappeared shortly after Mr. Sannuto entered the grievor's cubicle to clean it. Mr. Sannuto's testimony was that he had warned the grievor on several occasions to tidy his office space and that he eventually took it upon himself to do it for the grievor. He denied removing, stealing or throwing away the grievor's computer bags and added that he had encouraged the grievor to go to the supply room and request as

many computer bags as he needed. No independent witness was called by the grievor to substantiate any portion of this event.

[53] The second event was when the grievor was told to move to an enclosed office away from his colleagues for a time in May 2009. When he testified, Mr. Sannuto indicated that the grievor was sick and coughing very loudly, therefore disrupting his colleagues, who occupied the nearby cubicles. He told the grievor to go home, but he refused. He then asked the grievor to move temporarily to a vacant enclosed office located approximately 10 feet away from the grievor's cubicle, still in proximity to his peers but in a closed environment, with the hopes of keeping the grievor's noisy cough to a minimum. After two weeks, the grievor returned to his cubicle. Mr. Sannuto's version was corroborated by Mr. Glavota during his testimony.

[54] The third event was Mr. Sannuto's refusal to pay the grievor's professional fees after they were submitted in mid-May 2010. Mr. Sannuto's testimony was that, although he had reimbursed those fees for the grievor the previous year, he was, at the time of the request, in the process of re-evaluating the grievor's performance. Since the decision to terminate him was made shortly after that, he ultimately decided to not authorize the payment of the fees for the upcoming year, since the grievor was no longer employed with the OSFI.

[55] In cross-examination, the grievor made a number of admissions, as follows:

- that he received the training listed in his career planning and development form (Exhibit E-1, Tab 29) and that he never requested any additional training during his tenure at the OSFI;

- that he received the OSFI commitment document form, which set out his goals and responsibilities, on June 8, 2009 and that Mr. Sannuto reviewed the document with him;

- that he was not able to challenge or contradict the meeting entries in Mr. Glavota's calendar;

- that, although unsure as to whether certain meetings with Mr. Glavota had in fact taken place, he was confident that he met with Mr. Glavota at least 35 times between June 29, 2009 and November 27, 2009;

- that Mr. Glavota discussed expectations for the deliverables of several projects during those meetings and imposed deadlines for them;
- that his work was not perfect and required improvements;
- that he reviewed his performance appraisal with Mr. Sannuto on February 9, 2010 and was made aware of its content;
- that he never requested clarifications from Mr. Sannuto about the content of the performance appraisal;
- that he was provided with an opportunity to comment on the content of the performance appraisal and never did;
- that he never requested a copy of the appraisal;
- that he never reported the bullying events or the bad faith events to anyone before his termination; and
- that he never filed a harassment complaint against either Mr. Glavota or Mr. Sannuto.

IV. Summary of the arguments

A. For the employer

[56] The employer argued that its authority to terminate an employee whose performance is deemed unsatisfactory stems from section 13 of the *OSFIA* and section 12 of the *Financial Administration Act,* R.S.C., 1985, c. F-11.

[57] The employer submitted that, although this grievance could have been referred to adjudication under paragraph 209(1)(*d*) of the *Act*, section 230 imposes a strict intervention framework on an adjudicator seized of such a grievance and that, if the employer's opinion that an employee's performance was unsatisfactory is found reasonable, then the adjudicator must find that the termination was for cause and cannot intervene.

[58] According to the employer, the evidence clearly established the following:

- that the standards of performance were clearly communicated to the grievor;

- that the standards of performance that applied to the grievor were appropriate;
- that the grievor received tools, training and mentoring, sufficient and adequate to allow him to meet the standards of performance in a reasonable period; and
- that the senior managers and supervisors who assessed the grievor's performance did so in good faith.

[59] The employer submitted that the grievor failed to demonstrate his ability to apply analytical thinking and judgment as was required of him, which represented fundamental skills for the position he held, and that its assessment that that failure rendered the grievor's performance unsatisfactory was reasonable.

[60] The employer argued that the grievor failed to meet his burden of establishing bad faith. It suggested that there was no evidence that Messrs. Glavota and Sannuto were biased against him or that they were unfair in their review of his performance appraisal. In addition, the employer submitted that many indicators of good faith, which must be presumed, are apparent from the evidence, including the fact that Mr. Sannuto hired the grievor, that both Mr. Glavota and Mr. Sannuto were motivated to see him succeed, and that the grievor's performance was measured against concrete goals that had been communicated to him a year before his termination.

[61] The employer suggested that, although the grievor could have been under no illusion that it was satisfied with his performance as of November 2009, he nevertheless made no effort to correct the numerous performance deficiencies that had been brought to his attention, especially following his year-end performance appraisal, which he never bothered to respond to or to address in any meaningful manner.

[62] According to the employer, the grievor was provided with both significant technical training as well as ongoing informal training through the coaching and mentorship of Messrs. Glavota and Sannuto. The grievor never raised any issues with his training or lack of it; nor did he ever request additional training.

[63] The employer suggested that Mr. Sannuto's 15 meetings with the grievor in April and May 2010 provided him with an opportunity to make an informed decision as to whether the grievor would be able to raise his performance to an acceptable

standard in the future and that his assessment that the grievor would not was reasonable in the circumstances.

[64] The employer urged me to follow and apply the tests and principles laid out in the following Public Service Labour Relations Board decisions: *Raymond v. Treasury Board*, 2010 PSLRB 23, *Plamondon v. Deputy Head (Department of Foreign Affairs and International Trade)*, 2011 PSLRB 90, and *Mazerolle v. Deputy Head (Department of Citizenship and Immigration)*, 2012 PSLRB 6.

B. For the grievor

[65] The grievor's arguments were succinct. In essence, he argued that Messrs. Glavota's and Sannuto's observations were arbitrary, not objective and illogical and that they were based on factors completely unrelated to his work responsibilities. The last point was clearly demonstrated, according to the grievor, by Mr. Glavota's bullying and by Mr. Sannuto's bad faith conduct. He added that the two men were biased and that they conspired to set him up for failure.

[66] The grievor suggested that, since the February 2010 year-end performance appraisal differs significantly from the mid-year performance review of October 2009, it must therefore be found arbitrary and illogical, given the short time that passed between them.

[67] The grievor urged me to not follow the principles set out in *Raymond, Plamondon* and *Mazerolle,* arguing that the adjudicators that decided those cases clearly misinterpreted the true meaning of section 230 of the *Act.*

[68] The grievor also argued that, since he received no written warning that he could be terminated if his performance failed to improve, the termination could not stand.

[69] The grievor relied on *Byfield v. Canada Revenue Agency*, 2006 PSLRB 119, and *Morissette v. Treasury Board (Department of Justice)*, 2006 PSLRB 10.

V. Post-hearing submissions

[70] A few months after the hearing concluded, I identified another potential jurisdictional issue under subsection 209(3) of the *Act*, which could impact my decision making. For ease of reference, I will reproduce section 209 in its entirety. It reads 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*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> *(*c*) in the case of an employee in the core public administration,*
>
> *(i) demotion or termination under paragraph 12(1)(*d*) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*
>
> *(ii) deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*
>
> *(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*
>
> *Application of paragraph (1)(*a*)*
>
> *(2) Before referring an individual grievance related to matters referred to in paragraph (1)(*a*), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*
>
> *Designation*
>
> *(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(*d*).*
>
> [Emphasis added]

[71] I subsequently sought additional written submissions from the parties with respect to the following two questions:

> *1) To the parties' knowledge, had the Office of the Superintendent of Financial Institutions been designated, by*

> *order of the Governor in Council, for the purposes of paragraph 209(1)(d)?*
>
> *2) If not, can an employee of a separate agency that is not designated under subsection 209(3) refer to adjudication an individual grievance to the Public Service Labour Relations Board if the grievance in question is related to a termination for any reason that does not relate to a breach of discipline or misconduct?*

A. For the employer

[72] The employer's submissions were succinct. With respect to my first question, it suggested that the OSFI had not been designated by order of the Governor in Council for the purposes of paragraph 209(1)(*d*) of the *Act*.

[73] With respect to my second question, the employer took the position that I was without jurisdiction because the oral and written evidence presented at the hearing clearly established that the ground for termination was for reasons other than discipline or misconduct and because the grievor had failed to raise and establish that the termination was a sham or camouflage. According to the employer, that means that paragraph 209(1)(*d*) of the *Act* cannot be engaged, and therefore, I am without jurisdiction under that paragraph. It also noted that prior jurisprudence addressed analogous wording under the Board's former legislation and determined that, in the case of a separate employer, the jurisdiction of an adjudicator only existed if the actions in question were disciplinary in nature.

B. For the grievor

[74] The grievor's submissions were lengthy and contained many facts that had not been presented or argued at the hearing.

[75] With respect to my first question, the grievor confirmed that he was unable to find any evidence to support that the OSFI had been designated by order of the Governor in Council for the purposes of paragraph 209(1)(*d*) of the *Act*.

[76] With respect to my second question, the grievor suggested that his grievance form, which had been filed under subparagraph 209(1)(*c*)(i) of the *Act*, might have been filled out incorrectly. He provided unsolicited evidence supporting a new position that insinuated that he originally meant to ground his grievance form on paragraph 209(1)(*b*).

[77] The grievor essentially argued that, since paragraph 209(1)(*b*) of the *Act* was engaged in this case, it mattered not whether the OSFI was designated by an order of the Governor in Council. He presented new evidence that had not been canvassed by either party at the hearing and cited new jurisprudence that focused exclusively on disguised discipline in the context of rejection on probation cases. According to the grievor, the existence of bullying and of bad faith conduct, as well as other actions of the employer that had not been previously tendered into evidence, supported disguised discipline on the part of the employer.

C. The employer's reply

[78] The employer submitted that the grievor's suggestion that the matter be re-characterized as a referral under paragraph 209(1)(*b*) of the *Act* could not apply in this case since the evidence had clearly established that no discipline had been rendered, disguised or otherwise.

[79] According to the employer, the grievor failed to discharge his burden of establishing that the employer's letter of termination constituted an imposition of discipline. The employer added that no evidence had been led by the parties at the hearing that suggested that the grievor had engaged in misconduct that would have warranted discipline or that there was some other motive, other than the stated reason for termination, for discharging the grievor.

VI. Reasons

A. The jurisdictional issue

[80] Having considered the evidence and the arguments presented by the parties, as well as their respective additional written submissions, I conclude that I do not have jurisdiction over this matter, as it was not properly referred to the Board under section 209 of the *Act*.

[81] As stated, the grievor referred his grievance to adjudication in November 2010 and identified subparagraph 209(1)(*c*)(i) of the *Act* as the provision under which his grievance was being referred. That provision deals with the demotion or termination of an employee in the core public administration for any reason that does not relate to a breach of discipline or misconduct. At the outset of the hearing, the grievor agreed with the employer's suggestion that, since the OSFI was a separate employer, he was

not an employee in the core public administration, and his grievance should have been referred to adjudication properly under paragraph 209(1)(*d*). The grievor's most recent suggestion that he actually meant to refer his grievance under paragraph 209(1)(*b*) is disingenuous and does not concord with the evidence and arguments that were presented during the course of the hearing.

[82] In any event, paragraph 209(1)(*b*) of the *Act* is not engaged in these circumstances, as this grievance deals with the termination of an employee for reasons that do not relate to a breach of discipline or misconduct. The employer's June 3, 2010 letter of termination plainly stated that the grievor was unable to demonstrate the level of performance required of his position. In addition, the evidence and arguments presented by the parties at the hearing clearly showed that this matter pertained to a termination of employment for unsatisfactory performance. There was no evidence of disguised discipline or of a sham or camouflage.

[83] The grievor's attempts to provide unsolicited evidence in his additional written submissions were improper and could not be given any consideration. In addition, his suggestion that he might have filled out his grievance form incorrectly is inconsistent with his preliminary statements on that subject at the hearing, during which he agreed with the employer's proposition that it ought to have been filed under paragraph 209(1)(*d*) of the *Act*. It is also inconsistent with the evidence he led at the hearing. The grievor did not raise disciplinary or misconduct issues at the hearing. His recent attempts to recharacterize the alleged bullying events and bad faith conduct of Messrs. Glavota and Sannuto as disguised disciplined were both unpersuasive and not credible. Even had the grievor alleged disguised discipline in his grievance form or during the course of the hearing, which he did not, the evidence presented at the hearing by the parties simply did not support a case of disguised discipline.

[84] This means that the grievance could be referred to adjudication only under either paragraph 209(1)(*c*) or (*d*) of the *Act*. Since the OSFI is a separate employer, only paragraph 209(1)(*d*) could be engaged. However, since no evidence was presented to suggest that the OSFI has been designated by order of the Governor in Council under subsection 209(3), paragraph 209(1)(*d*) could not be engaged in these circumstances, and the grievor's grievance could not have been referred to adjudication before this Board. I can conclude only that this grievance was not properly referred to adjudication and that I lack the necessary jurisdiction to deal with it.

[85] In the event that I am found to have erred in the conclusion that the grievance was not properly referred to adjudication, I will address the merits of the grievance, as initially argued by the grievor.

B. The merits of the grievance

[86] When examining a termination of employment for unsatisfactory work performance, an adjudicator's jurisdiction is constrained by section 230 of the *Act*. That provision imposes a strict intervention framework on the adjudicator seized of a grievance that challenges an employer's decision to terminate an employee under such circumstances. For ease of reference, I will again reproduce section 230, which provides as follows:

> ***230.*** *In the case of an employee in the core public administration or an employee of a separate agency designated under subsection 209(3), in making a decision in respect of an employee's individual grievance relating to a termination of employment or demotion for unsatisfactory performance, an adjudicator must determine the termination or demotion to have been for cause if the opinion of the deputy head that the employee's performance was unsatisfactory is determined by the adjudicator to have been reasonable.*

[87] Since it was proclaimed in force in 2005, section 230 of the *Act* has been considered in *Raymond, Plamondon* and *Mazerolle*. All three decisions came to the same conclusion about the scope of an adjudicator's intervention. The adjudicator's role is to determine whether it was reasonable for the employer to deem the employee's performance unsatisfactory and not whether the decision to terminate was reasonable. If the employer's assessment that the employee's performance was unsatisfactory was reasonable, I must find that the termination that ensued was for cause, and I cannot interfere with that decision, as my jurisdiction is exhausted. The termination can be overturned only if the employer's unsatisfactory assessment was not reasonable. No other conclusion is possible. For example, I cannot substitute my own opinion for that of the employer with respect to the assessment of the employee's performance. As recognized by the adjudicator in *Raymond*, at paragraph 123, ". . . the employer is in a better position than the adjudicator to assess the quality of an employee's performance, whom it sees perform on a daily basis." Similarly, I cannot substitute my own opinion for that of the employer with respect to the assessment of the termination measure and impose a penalty that I consider more appropriate.

[88] Therefore, the scope of my intervention is limited to answering this single question: Was it reasonable, based on the evidence adduced by the parties, for the employer to deem the performance of the employee in question unsatisfactory?

[89] To answer that question, I must first determine how the term "reasonable" should be defined in this context. I am guided as follows by the adjudicator's comments at paragraphs 49 to 51 of *Plamondon*:

> ***49*** *As the employer argued in* Raymond, *the adjudicator's role is comparable to a higher court sitting in judicial review that examines the reasonableness of submitted decisions. Therefore, under section 230 of the* Act, *an adjudicator should intervene only if the employer's performance assessment is unreasonable within the meaning given to that concept in the context of a judicial review. The Supreme Court of Canada commented as follows about the meaning of the reasonableness of a decision at paragraph 47 of* Dunsmuir v. New Brunswick, *2008 SCC 9:*
>
> > [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. . .
>
> ***50*** *Therefore, I must decide whether, based on the evidence adduced, the employer's conclusion that Mr. Plamondon's performance was unsatisfactory was one of the possible acceptable conclusions to which it could have arrived. That does not mean that it could not have arrived at a different conclusion but rather that the conclusion was possible. To conclude that the conclusion or decision was reasonable, it must have been justified and made transparently and intelligibly.*
>
> ***51*** *I agree with the adjudicator in* Raymond *that an assessment of an employee's performance apparently made in bad faith, arbitrarily or in a discriminatory manner, or in*

> *a manner unrelated to the position, cannot be deemed reasonable. . . .*

[90] Second, I must determine the criteria against which the reasonableness of the employer's assessment of the grievor's performance should be measured. I am guided as follows by the adjudicator's comments at paragraphs 131 of *Raymond*:

> ***131*** *… I do not see how it would be possible to find that it was reasonable for a deputy head to consider the performance of one of his or her employees unsatisfactory if the evidence showed the following:*
>
> - *the deputy head or the supervisors who assessed the employee's performance were involved in a bad faith exercise;*
> - *the employee was not subject to appropriate standards of performance;*
> - *the employer did not clearly communicate the standards of performance to the employee that he or she was required to meet; or*
> - *the employee did not receive the tools, training and mentoring required to meet the standards of performance in a reasonable period.*

[91] I will now return to the facts of this case to determine whether Mr. Sannuto's assessment that the grievor's performance was unsatisfactory was reasonable.

[92] Between April 30, 2009 and July 15, 2009, the grievor was provided with seven different behavioural and technical training sessions, as well as related materials. During his tenure at the OSFI, he also had access to more experienced colleagues for support and assistance, as well as to the ongoing coaching and mentorship of Messrs. Glavota and Sannuto.

[93] The grievor did not deny being provided with a copy of his commitments in June 2009, reviewing the document with Mr. Sannuto and being told that he would be assessed against those goals at year-end. There is also no doubt that he understood the employer's performance expectations and that the commitments were closely connected to his job description.

[94] Between June 29, 2009 and November 27, 2009, the grievor met with Mr. Glavota on 56 occasions. The purpose of most of those meetings, according to

Mr. Glavota, was to bring certain deficiencies to the grievor's attention, to provide guidance and assistance to him, and ultimately to improve the quality of his work through coaching and mentoring. Between January 25, 2010 and February 10, 2010, the grievor met with Mr. Sannuto on several occasions for the same purposes.

[95] The grievor received a very negative performance appraisal in February 2010 and was warned that failing to improve his performance could lead to termination. Yet, he refused to take a copy of his appraisal, refused to provide any responding comments although urged to by Mr. Sannuto, subsequently became less engaged with Mr. Sannuto and made no concrete efforts to improve his performance. At the hearing, the grievor did not challenge the content of the performance appraisal in any meaningful way.

[96] In addition, the grievor failed to provide me with any compelling evidence that even suggested that Messrs. Glavota and Sannuto were biased against him or that they acted inappropriately in their review of his performance appraisal. No document or independent witness supported either the bullying by Mr. Glavota or the bad faith conduct of Mr. Sannuto. Not a single hint of evidence was presented to me supporting a conspiracy between the two men designed to set the grievor up for failure. Nor does anything in the evidence lead me to conclude that Messrs. Glavota and Sannuto acted in bad faith or even with animosity toward the grievor. Rather, the evidence suggests that both men approached the tasks of coaching and mentoring the grievor with nothing other than diligence and a sincere desire to help him succeed.

[97] Therefore, I agree with the employer's suggestion that the following elements have clearly been established by the evidence:

- that the standards of performance were clearly communicated to the grievor;
- that the standards of performance that applied to the grievor were appropriate;
- that the grievor received tools, training and mentoring sufficient and adequate to allow him to meet the standards of performance in a reasonable period; and
- that Messrs. Glavota and Sannuto assessed the grievor's performance in good faith.

[98] The preponderance of the evidence established that Messrs. Glavota and Sannuto, who successively supervised the grievor in 2009 and 2010, both observed deficiencies in his performance. The evidence further established that the deficiencies that each observed were of the same nature and were related to the grievor's failure to demonstrate his ability to apply analytical thinking and judgment, which were skills fundamental to the position. The evidence does not allow me to conclude that the observations of Messrs. Glavota and Sannuto were arbitrary, not objective or illogical, or that they were based on elements completely unrelated to the grievor's work responsibilities. Both men clearly articulated the elements of dissatisfaction and the deficiencies observed in the grievor's performance by giving concrete examples supported by documentary evidence.

[99] As for the grievor's argument that his termination cannot stand because he was not provided with a written warning before it was imposed, there is no such requirement under the current state of the law and the grievor provided no statutory or jurisprudential basis for his assertion. In any event, I find that the grievor was well aware, after 68 meetings in 8 months, all of which pointed out specific deficiencies in his work, that his employment was in jeopardy and that his discharge came as no surprise.

[100] In determining my jurisdiction, I must be guided by the language of the *Act*, which is clear. As I have already stated, section 230 stipulates that, if I find that the employer's opinion of the grievor's work performance was reasonable, I have no other option but to find that it had cause to terminate the grievor's employment. I am in full agreement with the adjudicator's comments at paragraph 154 of *Mazerolle* that "there are no other elements in that equation."

[101] In light of the evidence, I believe that it was reasonable for the employer to deem the grievor's performance unsatisfactory. It is certainly one of the possible acceptable conclusions that it could have arrived at in the circumstances. Therefore, I must find that the termination of his employment was for cause, which in turn means that his grievance against the termination must be dismissed.

[102] In conclusion, I find that I do not have jurisdiction over this matter, as it was not properly referred to the Board under section 209 of the *Act* and that, if I am found to have erred in reaching this conclusion, I find that the termination of the grievor's employment was for cause and that his grievance must be dismissed.

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

(The Order appears on the next page)

VI. Order

[104] The grievance is dismissed.

September 12, 2012.

Stephan J. Bertrand,
adjudicator