Date: 20130121

File: 566-02-4053

Citation: 2013 PSLRB 6

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ATAUR RAHMAN

Grievor

and

DEPUTY HEAD
(Department of Indian Affairs and Northern Development)

Respondent

Indexed as
Rahman v. Deputy Head (Department of Indian Affairs and Northern Development)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Stephan J. Bertrand, adjudicator

For the Grievor: Valérie Charette, Professional Institute of the Public Service of Canada

For the Respondent: Caroline Engmann, counsel

Heard at Iqaluit, Nunavut, and Toronto, Ontario,
May 29 to June 1 and August 27, 2012.

I. Individual grievance referred to adjudication

[1] Ataur Rahman ("the grievor") was hired by the Department of Indian Affairs and Northern Development, also known as Indian and Northern Affairs Canada ("the respondent" or INAC) in Iqaluit, Nunavut, as an environmental scientist, a position classified PC-03, effective January 28, 2008. The grievor was subsequently rejected on probation in 2009 and grieved the termination of his employment.

[2] The respondent raised three preliminary objections before the hearing. First, it suggested that the grievance was untimely because it was filed outside the applicable 25-day time limit, and therefore, I lacked jurisdiction to hear the matter on its merits. In response, the grievor suggested that the grievance was timely and that the rejection on probation was invalid since it occurred outside the prescribed 12-month period. Second, the respondent suggested that I also lacked jurisdiction because the grievance pertains to the termination of a probationary appointment made under the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (*PSEA*), which cannot be referred to adjudication under the *Public Service Labour Relations Act* (*PSLRA*), S.C. 2003, c. 22, s. 2. Third, the respondent suggested that the grievor could not base his grievance on article 43 of the applicable collective agreement, which deals with sexual harassment, as that article does not grant substantive rights to employees. However, at the hearing, the respondent withdrew that objection.

[3] I reserved my decisions on the two remaining preliminary objections and indicated to the parties that I would hear all the evidence, including the evidence that supported their respective positions on the merits.

II. Summary of the evidence

[4] During the hearing, I heard the testimonies of the following witnesses: the grievor, Michael Nadler, Regional Director General, Nunavut Regional Office, INAC, Jennifer MacIsaac, a housing and relocation coordinator, Charlotte Lamontagne, an environmental assessment coordinator who worked under the grievor, Robyn Abernethy-Gillis, the grievor's supervisor, and Emmanuel Atiomo, a manager of environment planning in the INAC's Winnipeg Regional Office.

[5] The grievor was appointed to an indeterminate PC-03 environmental scientist position on January 28, 2008 in Iqaluit, Nunavut. As indicated in his letter of

employment, his appointment to the public service was subject to a 12-month probationary period.

[6] According to the grievor, his rejection on probation had little to do with his work performance or his suitability for his appointed position but rather amounted to retribution from his immediate supervisor, Ms. Abernethy-Gillis, for refusing to accept her repeated sexual advances. He added that his rejection was also motivated by discrimination.

[7] The grievor indicated that all was well at the workplace until April 15, 2008. On that day, during a conversation with Ms. Abernethy-Gillis, which took place in her office and during which she revealed her marital problems, she allegedly grabbed the grievor's face and kissed him forcefully on the lips. The grievor testified that he was very shocked by his supervisor's behavior and that he immediately pulled away from her and told her that he was committed to his wife and children. According to the grievor, Ms. Abernethy-Gillis did not appreciate his reaction and told him to "watch out." In cross-examination, the grievor admitted that, although he considered Ms. Abernethy-Gillis' action an assault on his person, he did not report the incident to anyone until after he was terminated, approximately 10-months later.

[8] During her testimony, Ms. Abernethy-Gillis denied discussing her marital problems with the grievor and referred to the kissing incident as pure fabrication and a falsehood. She indicated that she was repulsed and shocked by the grievor's accusations. She added that, on April 15, 2008, a meeting took place in her office with both the grievor and Ms. Lamontagne present. According to her, she was never alone with the grievor in her office at that time, and the window blinds in her office, which separate it from the common areas, always remain partially open so that she is visible and available to her staff. Ms. Abernethy-Gillis added that she had few interactions with the grievor between February and May 2008 and that she had no real need to supervise his work, as he was new in the position and in the process of familiarizing himself with the work environment. Only in May 2008 did she begin to establish work objectives for him.

[9] The grievor's family joined him in Iqaluit at the end of April 2008 but stayed only for approximately three weeks. The grievor alleged that, on May 23, 2008, Ms. Abernethy-Gillis commented on the departure of his family and expressed her expectation that he spend "some personal time" with her, which later in his testimony

he described as a close and personal relationship. The grievor indicated that he advised her that it was impossible for him to take part in such a relationship. At that time, Ms. Abernethy-Gillis allegedly threatened the grievor that, unless he complied with her requests for personal time, she would make things very difficult for him in Iqaluit and would eventually make sure that he failed his probationary period. The grievor stated that he still continued to refuse what he described as an immoral proposal. When asked in cross-examination to explain the meaning of personal time and to specify the words used by Ms. Abernethy-Gillis, the grievor indicated that she allegedly had asked him to "come and sleep with [her]" and that she wanted them to "enjoy sex together and have a good time."

[10] Each of those allegations were categorically denied by Ms. Abernethy-Gillis when she testified. She accounted for her entire day and could not recall ever being alone with the grievor on May 23, 2008. She recalled mentioning, although not on that day, that his probationary period would be used to assess his suitability for the position but denied ever threatening to use it against him in any way, shape or form. She indicated that, contrary to what the grievor alleged, she always fostered a work environment that welcomed new employees and their families and that the grievor was no exception to that practice.

[11] According to the grievor, Ms. Abernethy-Gillis informed him on June 3, 2008 that she was leaving her husband and that she would be moving into a house near his so that they could spend more personal time together in a more discreet manner. He testified that he again turned her down and that she again threatened to destroy his career. When she testified, Ms. Abernethy-Gillis acknowledged that, as a result of her marital difficulties, she was forced to find temporary staff housing and agreed to move into a dwelling on Green Row, where the grievor also resided, simply because it was the only federal housing unit available in the downtown core at that time. She added that she learned that she would be residing in the same vicinity as the grievor only on June 12, 2008, when her housing arrangements were made, and denied orchestrating the move to gain proximity to the grievor to have personal time with him, an allegation she once again depicted as entirely false and fabricated.

[12] The grievor testified that, at or about the same time, he wanted to attend a meeting in Toronto in connection with a special-needs education plan assessment for his youngest child. However, Ms. Abernethy-Gillis allegedly told him that unless he

agreed to spend some personal time with her on a regular basis, she would not approve his leave request. According to him, he was prevented from attending the meeting because he refused Ms. Abernethy-Gillis' proposal, which allegedly led to her denying his leave request. That meeting was ultimately rescheduled to a later date, in September 2008. The grievor filed no formal leave request in evidence in support of that allegation. Ms. Abernethy-Gillis denied the grievor's allegation and provided the following clarification. She acknowledged initially refusing his leave request because it was made only two days before its proposed start date and because the grievor had known the purpose of the leave for some time. Ms. Abernethy-Gillis added that, after consulting with her human resources department and reviewing the applicable collective agreement, she changed her mind and granted the leave request at least two days before the scheduled meeting date. She was subsequently told that, by then, all flights out of Iqaluit were full and that the grievor had been unable to book a flight in time for the meeting.

[13] According to the grievor, Ms. Abernethy-Gillis made more advances and threats on July 3, 2008 before she left on a business trip to Ottawa, all of which he turned down. The grievor also indicated that, at that time, Ms. Abernethy-Gillis called him a "Bangladeshi brown bagger" and that she threatened to use her influence with the Royal Canadian Mounted Police (RCMP) to make his life miserable in Iqaluit. On her return from Ottawa, Ms. Abernethy-Gillis allegedly warned the grievor that she would visit his house if he did not visit hers to spend personal time with her. According to the grievor, that prompted him to ask a friend to stay with him. The grievor produced no independent witness or documentary evidence in support of those allegations. He did not disclose the name of his friend. When she testified, Ms. Abernethy-Gillis denied the grievor's allegations and stated that she never uttered or even heard of such a racist slur before the grievor mentioned it. She also denied using her previous tenure with the RCMP, or that of her father, to threaten the grievor. She had worked as a dispatcher for a short period and had no influence with that police force.

[14] The grievor also testified that the INAC's housing and relocation coordinator, Ms. MacIsaac, gave him a very hard time during July and August 2008 about issues related to his relocation to Iqaluit and insinuated that Ms. Abernethy-Gillis had directed Ms. MacIsaac to act that way. However, in cross-examination, the grievor indicated that he was not suggesting that Ms. MacIsaac acted improperly, agreed that he had no evidence to support his allegation that Ms. Abernethy-Gillis directed

Ms. MacIsaac to give him a hard time and that he was only making assumptions. Both Ms. Abernethy-Gillis and Ms. MacIsaac denied the allegation when they testified. In addition, Ms. MacIsaac provided detailed explanations of the efforts she put into ensuring that the grievor was provided with adequate housing and that he was reimbursed the appropriate relocation costs. She filed a number of documents in support of her testimony and was not cross-examined. Mr. Nadler confirmed her testimony and indicated during his testimony that he met with the grievor to go over relocation cost issues with him and to ensure that he repaid moneys he had received for the relocation of his family and for which no expenses had been incurred.

[15] The grievor indicated that he fell ill in early October 2008 while visiting his family in Toronto and that, upon his return, his supervisor again threatened him that, unless he agreed to spend some personal time with her, she would consider his sick leave request as unauthorized leave. At the same time, Ms. Abernethy-Gillis allegedly threatened the grievor that, unless he visited her at her house within one week, she would put in place performance action plans that he would be unable to achieve. The grievor added that, since he refused to visit Ms. Abernethy-Gillis at her house, he was called into a work-plan meeting on October 20, 2008 and was told that he was being punished for not showing up and that further action plans would be put in place if he continued to reject her advances. According to him, there were no problems with his performance, and no work-plan meeting was warranted.

[16] When she testified, Ms. Abernethy-Gillis denied the grievor's allegations and provided a different version of events. According to her, she expressed some concerns with the grievor's way of requesting and reporting his leave request on that occasion because he failed to notify her of his absences from work on October 2 and 3, 2008 and requested leave only on his return to work. She also clarified that, because the grievor had insufficient sick leave credits, he was informed that part of his absence would have to be submitted as leave without pay. Ms. Abernethy-Gillis referred to a number of exhibits in support of her position on the leave issue. As for the action plan issue, Ms. Abernethy-Gillis testified that it had nothing to do with the grievor's fabrications and everything to do with his performance. According to her, the grievor's performance was not at an acceptable level and it became imperative to develop a plan that would provide for concrete deliverables, support methods, time frames for the completion of tasks and determinations of any required learning resources. Ms. Abernethy-Gillis acknowledged that she resorted to scheduling weekly

work-progress meetings but only because it had become obvious to her that the grievor did not appear to comprehend the tasks expected of him and that he showed little, if any, progress on his assignments, despite repeated attempts on her part to better his performance so that he could meet the demands of her work unit. Once again, Ms. Abernethy-Gillis referred to and filed a number of documents in support of her position, including employee performance management forms, action plans and email exchanges.

[17] According to the grievor, weekly work-plan meetings took place after October 20, 2008. On each occasion, Ms. Abernethy-Gillis reiterated her immoral proposal and threats, which he repeatedly declined, which in turn allegedly led to additional tasks being imposed upon him, especially in the beginning of December 2008. On December 16, 2008, Ms. Abernethy-Gillis allegedly warned the grievor that he was being given one final chance to accept her proposal, failing which she would take drastic action against him. Ms. Abernethy-Gillis denied making such threats but admitted that, because the work had been rapidly developing in her division since October 2008, additional tasks had to be assigned to the grievor but that none was extensive.

[18] The grievor testified that, during a meeting he attended on December 17, 2008 with Ms. Abernethy-Gillis and Mr. Nadler, Ms. Abernethy-Gillis raised several performance issues about tasks that had been assigned to him on October 22 and November 7, 2008, in a manner that humiliated him. After Mr. Nadler left, Ms. Abernethy-Gillis allegedly met with the grievor alone and warned him that, unless he accepted her proposal to spend personal time at her house, things would get worse. Since they did not address all the outstanding issues during the December 17, 2008 meeting, the three of them agreed to reconvene the next day and on the day after that (December 18 and 19, 2008). According to the grievor, he was further grilled about his performance and was humiliated during those two meetings and was subjected to more threats and proposals from Ms. Abernethy-Gillis shortly afterward.

[19] Ms. Abernethy-Gillis denied all the grievor's allegations during her testimony. According to her, the grievor's statements of coercion, threats and humiliation were grossly fabricated. She indicated that the meetings were necessary because the grievor was not following her directions, and the tasks assigned to him in October and November 2008 were not progressing at an acceptable rate. She wanted her directorate

supervisor, Mr. Nadler, to attend, so that she could benefit from a different perspective and from his assistance as she worked through her challenges with the grievor. Ms. Abernethy-Gillis felt that five major areas of concern needed to be addressed during those meetings, including the grievor's supervisory duties, his understanding of his role, his understanding of the INAC's mandate, his communication skills with clients and staff, and his understanding of the INAC's policies, procedures and practices. Her expectation was that she would see concrete results and progress by January 21, 2009. The discussions were followed by an email exchange between the grievor and Ms. Abernethy-Gillis, which she reviewed and commented on during her testimony. Mr. Nadler corroborated Ms. Abernethy-Gillis' testimony on those issues when he testified. He referred to the grievor's reaction to management's intervention as defensive and adversarial. As for the first area of concern, Ms. Lamontagne testified that the grievor provided her with no guidance or supervision and that he communicated poorly with her, using demeaning and condescending tones.

[20] The grievor stated that, when he returned from the 2008 Christmas holidays, on December 29, 2008, Ms. Abernethy-Gillis once again propositioned him. He responded that his Muslim faith prevented him from spending personal time with a woman other than his wife, which allegedly prompted Ms. Abernethy-Gillis to call him a "Muslim fanatic." Ms. Abernethy-Gillis also denied that allegation and indicated that she always respected the grievor's religious needs and that she never denounced them in a derogatory manner. She added that she allowed the grievor to adjust his work schedule in September 2008 to allow him time to practice his Ramadan prayer and that his work schedule was further adjusted weekly throughout the calendar year, to respect his weekly prayer schedule.

[21] The grievor also indicated that, on December 30, 2008, Ms. Abernethy-Gillis assigned him more tasks, which he was asked to complete by January 21, 2009. That same day, Ms. Abernethy-Gillis allegedly told him that the additional work was assigned as retribution for his refusal to accept her proposals, all of which she categorically denied during her testimony.

[22] Another meeting between the grievor, Ms. Abernethy-Gillis and Mr. Nadler took place on January 22, 2009. Mr. Nadler expressed to the grievor that he had concerns about the grievor's misunderstanding of fundamental issues related to specific tasks assigned to him and about his inability to produce deliverables in a timely fashion.

Both Mr. Nadler and Ms. Abernethy-Gillis indicated that no improvement in the grievor's performance was apparent by then.

[23] The grievor testified that, on Friday, January 23, 2009, Ms. Abernethy-Gillis again threatened him that, unless he accepted her proposal for personal time by the weekend, something horrible would occur the following week. He informed Ms. Abernethy-Gillis of an employment opportunity he was looking into with the INAC Manitoba Regional Office, but she allegedly told him that, unless he fulfilled her desires, she would interfere with his plans. Ms. Abernethy-Gillis denied meeting the grievor on that day and indicated that the incidents in question never occurred and once again were mere fabrications on the grievor's part.

[24] The grievor testified that, on January 26, 2009, he was summoned for a meeting with Ms. Abernethy-Gillis and Mr. Nadler, which was to take place in the late afternoon of January 27, 2009. However, shortly before then, the grievor fell ill and left the office for the hospital, where allegedly he was treated. He subsequently advised his supervisor that he would be on sick leave until January 30, 2009, which was a Friday, meaning that he would not return to the workplace until the following Monday, February 2, 2009. The grievor also testified that, in the afternoon of January 28, 2009, Mr. Nadler called him at home. According to the grievor, the two of them briefly conversed about his health and agreed to meet in person on his return to the office on February 2, 2009. Mr. Nadler's recollection of those events differed considerably. According to Mr. Nadler, the purpose of the meeting scheduled for January 27, 2009 was to advise the grievor that he was being rejected on probation. However, since the grievor failed to attend the meeting, his rejection letter was mailed to him on that same day. Mr. Nadler indicated that he attempted to use registered mail but was informed by the Iqaluit post office that the grievor had only a general delivery address. Mr. Nadler also indicated that he attempted to hand-deliver the letter to the grievor's home address but was unsuccessful, as nobody answered the door. After numerous attempts to reach the grievor by telephone, Mr. Nadler finally succeeded in the afternoon of January 28, 2009. Mr. Nadler testified that he informed the grievor that a letter had been mailed to him the previous day, that he should retrieve it immediately from the post office, that the letter pertained to his dismissal and that the grievor should contact him once he reviewed it. Mr. Nadler also indicated that he faxed a copy of the grievor's termination letter to his bargaining agent representative on that same day. In cross-examination, the grievor confirmed that there is no door-to-door

mail delivery in Iqaluit and that he was unable to dispute what Mr. Nadler was told at the Iqaluit post office.

[25] The grievor also confirmed that shortly after speaking to Mr. Nadler on January 26, 2009, he contacted Mr. Atiomo of the INAC's Winnipeg office to confirm his willingness to accept a term position there, that he informed him that a deployment or secondment would not be possible from Iqualuit and that he provided a Toronto address and phone number as contact information.

[26] When the grievor returned to work on February 2, 2009, Ms. Abernethy-Gillis hand-delivered him a copy of his rejection letter and informed him that the original copy had been mailed to him on January 27, 2009. Ms. Abernethy-Gillis allegedly laughed at the grievor and told him that his career was over and that she would provide a bad reference to anyone who sought one from her. Despite her actions, she allegedly offered to rescind the letter of rejection, which was signed by her director general, if the grievor agreed to spend some personal time with her, which he refused to do. When she testified, Ms. Abernethy-Gillis denied those allegations and indicated that the grievor's rejection on probation was based on his performance and suitability for the position and for no other reason. According to her, he never met the deadlines for the tasks assigned to him, his deliverables were significantly deficient in terms of quality and content and were typically a cut-and-paste of another person's work, and he never followed her feedback for improvement. She made it clear to the grievor that his tasks were being evaluated as part of the probationary period, that the evaluation was the final step of the hiring process and that suitability for the position for which he had been hired would be determined during the probationary period. Ms. Abernethy-Gillis stated that she had legitimate concerns about the grievor's performance and suitability for the position and that his allegations of sexual harassment and discrimination amounted to nothing more than a sick, fabricated story. During his testimony, Mr. Nadler expressed the same concerns and position about the grievor's work performance.

[27] On March 9, 2009, the grievor filed this grievance, in which he sought reinstatement and damages. He indicated that he made several attempts to secure employment after his rejection on probation and that he was eventually offered and accepted an EC-06 term position with the INAC's Yellowknife Regional Office on

February 15, 2010. However, due to funding issues, his term was not renewed, and he has been unemployed since then.

[28] During his testimony, the grievor confirmed that, before his termination, he never reported Ms. Abernethy-Gillis' conduct to anyone, that he did not keep a journal or any other type of contemporaneous notes of the events, that he never recorded any conversation with her, and that none of the events occurred in the presence of another person. He also admitted in cross-examination that he spoke with Mr. Nadler in private on a few occasions during fall 2008 but that he never raised Ms. Abernethy-Gillis' behavior with him. He also admitted that he spoke with a representative of the National Branch of his bargaining agent in October 2008 but that he did not report the alleged sexual harassment. Mr. Nadler confirmed that he met with the grievor one-on-one on at least two occasions during fall 2008 and that he received no mention of any impropriety on the part of Ms. Abernethy-Gillis.

III. Summary of the arguments

A. For the grievor

1. Timeliness and validity of the rejection on probation

[29] The grievor first argued that his rejection on probation was invalid because he was notified of it after the probationary period had expired. According to him, since he began his employment with the INAC on January 28, 2008, his rejection had to be communicated to him by no later than January 27, 2009. However, the grievor also acknowledged that he was on leave without pay for two days in October 2008, a fact that was established through Exhibit 10, and that, accordingly, his probationary period should have been extended, meaning that it should be considered as having ended on January 29, 2009. The grievor suggested that, since he was notified of his rejection on probation only on February 2, 2009, it was invalid, as it was communicated to him after the probationary period ended.

[30] The grievor suggested that he could not recall being informed of his rejection on probation on January 28, 2009 and that, in any event, he could not have been duly informed of his rejection on that day, as was alleged by Mr. Nadler in his testimony, because he was on sick leave and therefore could not fully appreciate the meaning of their discussion. No independent evidence was filed by the grievor in support of his argument.

[31] As for the timeliness of the grievance, the grievor argued that the fact that his representative was provided with a copy of the rejection on probation letter on January 28, 2009 did not constitute proper notification to him. He added that, since he was personally notified of his rejection only on February 2, 2009, the filing of his grievance on March 9, 2009 was timely, as it fell within the 25-day deadline prescribed by the applicable collective agreement.

2. Merits

[32] I have not reproduced the grievor's argument in its entirety, as most of it consisted of a reiteration of the evidence, which I have already summarized. In essence, the grievor argued that he was subjected to sexual harassment from his immediate supervisor, Ms. Abernethy-Gillis, from April 15, 2008, when she allegedly kissed him forcefully on the mouth, until his termination, during which time she repeatedly made sexual advances to him and threatened to make his life and tenure at the INAC miserable. According to the grievor, his repeated refusals of her proposals are the true and only reason he was rejected on probation.

[33] The grievor suggested that his reluctance to speak out about what he qualified as an unbearable situation, which, according to him, stemmed from his religious beliefs, ought not to be held against him. It should be noted that he led very little evidence in support of that argument.

[34] The grievor argued that, as conveyed through his testimony, the facts clearly established that he was never made aware of any improper behaviour on his part or genuine work performance deficiencies, which made it impossible for him to correct his behaviour or to improve his performance. According to him, he performed well and addressed all the shortcomings he was made aware of in a timely fashion, despite the respondent's failure to provide him with appropriate tools and coaching.

[35] The grievor suggested that the evidence also clearly established that his termination was a contrived reliance on the *PSEA*, a sham or a camouflage and that the true basis for terminating him was his refusal to accept his supervisor's sexual advances.

[36] Finally, the grievor suggested that he was not offered a position in Manitoba and that his term in Yellowknife was not extended because the respondent interfered with those processes. Again, no credible evidence was led in support of that argument.

B. For the respondent

1. Timeliness and validity of the rejection on probation

[37] The respondent argued that the grievance was untimely. According to the respondent, Mr. Nadler informed the grievor that he was being terminated on January 28, 2009 during a telephone conversation, but the grievor filed his grievance only on March 9, 2009, after the 25-day period to file one had expired.

[38] The respondent contended that, although the grievor denied being notified of his termination on January 28, 2009, Mr. Nadler's version of the events was to be preferred for a number of reasons, including the fact that Mr. Nadler signed the letter of rejection the previous day, faxed it to the grievor's representative, visited the local post office and attempted to deliver the letter to the grievor at his home, without success. The respondent also suggested that the grievor's actions on that day are indicative of someone aware that his employment had come to an end, including that he did not deny speaking to Mr. Nadler on the phone that day, that he communicated with Mr. Atiomo of the INAC's Winnipeg office shortly after to confirm his willingness to accept a term position there, that he informed Mr. Atiomo that a deployment or secondment would not be possible from Iqaluit, and that the contact information he provided at that time consisted of a Toronto address and phone number.

[39] The respondent added that the grievor's evidence that he was too sick to understand what Mr. Nadler was telling him on January 28, 2009 is simply not credible, especially given the number of emails the grievor wrote that day and their contents.

[40] The respondent also argued that, were I not to agree that the grievor was properly notified of his rejection on probation on January 28, 2009, nevertheless, I should find that the notification that took place on February 2, 2009, which is not in dispute, was provided to the grievor within the probationary period. According to the respondent, for the same reason that the grievor's two days of leave without pay must be added to the probationary period, which the grievor admitted to in his submissions, the three days of sick leave during which he was incapacitated and away from the office between January 28 and February 2, 2009 must also be added to the probation

period, which would result in a probationary end date of February 3, 2009. The fact that the three days of sick leave in question were taken on the last days of the probationary period, according to the respondent, should weigh in favour of its position, as it ought not to bear the brunt of being unable to contact an employee who is temporarily incapacitated and unavailable. In essence, the respondent contended that the probationary period should be deemed halted as of the afternoon of January 27, 2009, when the grievor left on sick leave, and that it should be deemed resumed on February 2, 2009.

[41] The respondent argued that the evidence clearly established that the grievor was duly notified of his rejection on probation within the probationary period and that his grievance was untimely. Relying on section 211 of the *PSLRA*, the respondent further argued that I had no jurisdiction to adjudicate a grievance about an employee who was rejected on probation under section 62 of the *PSEA* unless the basis for the termination was a sham or camouflage, something that the grievor failed to establish.

2. Merits

[42] Again, I have not reproduced the respondent's argument on the merits in its entirety for the same reasons I referred to earlier in my decision. To be fair to the parties' representatives, this is a fact-rich case.

[43] The respondent argued that it met its burden of establishing that the grievor was on probation and that the probationary period was still in effect at the time of the termination. It argued further that the grievor failed to discharge his burden of establishing a contrived reliance on the *PSEA* or that a sham or a camouflage existed and that the evidence filed by the parties in fact authenticated the respondent's *bona fide* dissatisfaction with the grievor's suitability for the position.

[44] The respondent submitted that it is not my role to second-guess its assessment of the grievor's suitability, especially if none of its actions can be perceived as tainting that assessment.

[45] The respondent argued that the grievor's evidence was not credible and that it should be given no weight. It referred me for guidance to the test established by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, and to other more recent decisions that applied that test. Quoting from *Faryna*, the

respondent suggested that ". . . the real test of the truth of the story of a witness in such a case must be in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." The respondent also referred me to the Supreme Court of Canada's decision in *F.H. v. McDougall*, 2008 SCC 53, and, quoting from paragraph 44, suggested that ". . . the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred."

[46] The respondent contended that the evidence clearly established that its actions were motivated by nothing other than a *bona fide* dissatisfaction with the grievor's suitability for the position to which he was appointed in 2008. It referred me to numerous email exchanges between the grievor and Ms. Abernethy-Gillis about the grievor's work performance, work objectives, action plans and the witnesses' evidence of numerous meetings attended by the grievor, Ms. Abernethy-Gillis and Mr. Nadler that, according to the respondent, were entirely about the grievor's work performance.

IV. Reasons

A. Timeliness and validity of the rejection on probation

[47] According to the grievor, the respondent had until January 29, 2009 to notify him that he was being rejected on probation. Although he did not dispute that he and Mr. Nadler spoke by phone on January 28, 2009, he denied being notified of his rejection and argued that the rejection is *de facto* invalid. He did not submit any further arguments as to how that invalidity should be interpreted or applied in my determination, nor did he submit any jurisprudence on the issue. On the other hand, Mr. Nadler testified that, during that conversation, he notified the grievor of his termination, that he advised him that a letter to that effect and dated January 27, 2009 had been mailed to him, and that he had faxed a copy of the letter to the grievor's representative shortly after their conversation. However, in light of my findings, it is a moot point.

[48] On balance, I prefer the evidence of Mr. Nadler on that issue for a number of reasons, including that he signed and mailed the letter of rejection on the previous day, that he faxed a copy of it to the grievor's representative that day after speaking to the grievor, that he went to the local post office to obtain a valid address for the grievor, and that he attempted to deliver the letter to the grievor at his home, without success. Given those actions, it is more likely than not that he also notified the grievor

of his termination during the January 28, 2009 telephone conversation. It even seems inconceivable that Mr. Nadler would go through such efforts and not mention the rejection during the phone call. In addition, I agree with the respondent's suggestion that the grievor's actions on that day cast doubts as to his alleged unawareness that his employment had come to an end, including that he never denied speaking to Mr. Nadler on that day, that he communicated with Mr. Atiomo shortly afterward to confirm his willingness to accept a term position in Manitoba, that he informed Mr. Atiomo that a deployment or secondment would not be possible from Iqaluit, and that the contact information he provided consisted of a Toronto address and phone number. It is also worth noting that the grievor's position in Iqaluit was indeterminate and yet he was prepared to accept a term position elsewhere on January 28, 2009.

[49] As for the grievor's suggestion that he could not have been duly informed of his rejection on probation on January 28, 2009 because he was on sick leave and could not fully appreciate the content of the discussion, I noted that he appeared to be able to write several coherent emails to Ms. Abernethy-Gillis and Mr. Atiomo on that same day. No medical evidence was lead to prove the grievor's contention and I reject his allegation on this point.

[50] For those reasons, I conclude that the grievor was notified of his rejection on probation on January 28, 2009. Even were that not so, I would nevertheless consider what transpired on February 2, 2009 as proper notice within the probationary period. I agree with the respondent that a respondent ought not to be penalized for being unable to notify an employee of his or her rejection on probation when that employee is on certified sick leave and unavailable for all intended purposes. Such circumstances, especially when the employee's absence occurs during the last days of the probationary period, ought not to prevent a respondent from proceeding with a rejection on probation. That said, my reasons should not be read to mean that any sick leave taken within a probation should not count toward the calculation of the probationary period.

[51] Therefore, I find that the rejection on probation was communicated to the grievor within the prescribed time limit and that its notification was valid for all intended purposes.

[52] I also find that the grievance is untimely, as it was filed outside the prescribed 25-day period. The applicable collective agreement provides that a grievor may file a

grievance to the first level of the grievance procedure no later than on the 25th day after the date on which the grievor was notified or on which he or she first became aware of the action or circumstances giving rise to the grievance. Both parties agreed that the interpretation to be given to "a day" in the circumstances of this case is a working day, meaning that, if the grievor was notified of his termination on January 28, 2009, he was required to file his grievance by no later than March 4, 2009, and that, if he was notified on February 2, 2009, his grievance was to be filed by no later than March 9, 2009.

[53] Since I have determined that the grievor was informed of his termination on January 28, 2009, he was required to file his grievance by no later than March 4, 2009, which he did not do. It is also worth noting that the grievor did not seek an extension of time within which to file his grievance. However, that point, in light of my ruling on the merits of his grievance, also becomes moot.

[54] Therefore, I conclude that I do not have jurisdiction to hear this grievance as it was not properly referred to adjudication. Despite that, in the event that I have erred in my determination that the grievance was untimely, I will now turn to its merits.

B. Merits

[55] The grievor was a public service employee, and as such, his employment relationship was subject to the statutory framework of the *PSEA*, the *PSLRA* and the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*).

[56] Section 62 of the *PSEA* deals with rejections on probation and reads as follows:

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

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

[57] The jurisdiction of an adjudicator in cases such as this can be found in sections 209 and 211 of the *PSLRA*, which provide in part as follows:

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

[58] For terminations of employment other than terminations under the *PSEA*, the authority of a deputy head stems from section 12 of the *FAA*, which provides in part the following:

> ***12.*** *(1) Subject to paragraphs 11.1(1)(*f*) and (*g*), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*
>
> *. . .*
>
> *(*c*) establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties;*
>
> *(*d*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory;*
>
> *(*e*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct . . . .*

. . .

> *(3) Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)*(c)*, (*d*) or (*e*) or (2)*(c) *or (*d*) may only be for cause.*

[59] I agree with the respondent's contention that, although the Public Service Labour Relations Board ("the Board") does not have jurisdiction to deal with rejections on probation, it has jurisdiction in the limited circumstance when the basis of the termination is unrelated to the suitability of the employee and is a sham or a camouflage. The jurisprudence of the Board and of the federal courts is clear on that point.

[60] The current pivotal case dealing with rejection on probation is *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134. The key excerpts of that decision can be found at paragraphs 110 to 112, in which the adjudicator states the following:

> ***110*** *If a deputy head terminates the employment of a probationary employee without any regard to the purpose of a probationary period — in other words, if the decision is not based on suitability for continued employment — that decision is one that is arbitrary and may also be made in bad faith. In such a case, the termination of employment is not in accordance with the new* PSEA*.*
>
> ***111*** *In my view, the change between the former* PSEA *and the new* PSEA*, when viewed in the context of the recent jurisprudence of the Supreme Court of Canada on the appropriate approach to public employment, does not significantly alter the substance of the approach that adjudicators should take to grievances involving the termination of a probationary employee. However, the omission of the words "for cause" in section 62 of the new* PSEA *does change the burden of proof requirements. The burden of proof on the deputy head has been reduced. The deputy head's burden is now limited to establishing that the employee was on probation, that the probationary period was still in effect at the time of termination and that notice or pay in lieu has been provided. The deputy head no longer has the burden of showing "cause" for the rejection on probation. In other words, the deputy head does not have the burden of establishing, on a balance of probabilities, a legitimate employment-related reason for the termination of employment. . . . The grievor bears the burden of showing that the termination of employment was a contrived reliance*

> *on the new* PSEA*, a sham or a camouflage. If the grievor establishes that there were no legitimate "employment -related reasons" for the termination (in other words, if the decision was not based on a bona fide dissatisfaction as to his suitability for employment:* Penner *at page 438) then the grievor will have met his burden. Apart from this change to the burden of proof, the previous jurisprudence under the former* PSEA *is still relevant to a determination of jurisdiction over grievances against a termination of a probationary employee.*
>
> ***112** . . . A termination of employment not based on a bona fide dissatisfaction as to suitability (or for no legitimate "employment-related reason") would be a contrived reliance on the* PSEA*, a sham or a camouflage.*

[61] As I indicated earlier, I am satisfied that the grievor was on probation at the time of his termination and that the probationary period was still in effect when he was terminated. That means that I must determine whether the grievor discharged his burden of establishing, on balance, a contrived reliance by the respondent on the *PSEA* or that his termination was a sham or a camouflage.

[62] This case involves the classic "he said, she said" scenario and therefore raises the usual credibility issues. Having considered all the evidence, I do not find the grievor's evidence, as presented to me and particularly the story he depicted during his testimony, to be in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in the circumstances. I found the grievor's evidence underhanded, unbelievable, improbable and self-serving. I simply cannot conclude that the events depicted by the grievor and involving Ms. Abernethy-Gillis are more likely than not to have occurred. For example, to suggest that, on February 2, 2009, Ms. Abernethy-Gillis offered to rescind the letter of rejection on probation, a decision made by her director general a few days earlier and that she had no delegated authority to make, let alone rescind, is highly improbable. Not only would that have discredited her director general, it would have caused the utmost embarrassment to him and to her. Another example of the grievor's credibility being seriously cast in doubt is his allegation that Ms. Abernethy-Gillis and Ms. MacIsaac conspired to make his life miserable and his relocation to Iqaluit difficult. In cross-examination, the grievor conceded that he had no evidence to support that claim, that he was only making assumptions and that he had no issues with Ms. MacIsaac's actions or behaviour when she handled his relocation.

[63] On the other hand, I found Ms. Abernethy-Gillis' testimony credible. Although she appeared genuinely disturbed by the grievor's accusations, nevertheless, she presented her evidence in a clear, consistent and forthright manner.

[64] Accusations of sexual harassment are serious and can have immeasurable effects and consequences on the person accused of such wrongful behaviour. That is why such accusations must be supported by more than gratuitous and self-serving statements and require clear, cogent and compelling evidence, none of which the grievor led in this case.

[65] According to the grievor's testimony, he was threatened as early as May 28, 2008 that, if he did not accept his supervisor's sexual advances, he could be rejected on probation. Yet, he did not report it to anyone, allegedly out of fear for his safety, which he validated by raising the fact that Ms. Abernethy-Gillis' father had previously worked for the RCMP in Iqaluit and that she also had worked in the past for the RCMP as a dispatcher. I do not find that validation credible. The grievor provided no independent evidence that Ms. Abernethy-Gillis threatened to use the RCMP for that purpose or that exposing her would have jeopardized his personal safety in Iqaluit. In addition, Ms. Abernethy-Gillis' father had been retired for many years and, at that time, was residing in Ottawa, Ontario. The grievor gave me no reasons to conclude that it was remotely reasonable for him to fear for his personal safety during that period. In addition, no independent witnesses or documents supported his allegation.

[66] In my appreciation of the evidence, I could not discount the fact that, before his rejection on probation, the grievor did not report the alleged repeated wrongful behaviour of his supervisor, which he often qualified as immoral acts during his testimony, to anyone who could possibly have corroborated his statements, not even to a friend, a family member or a bargaining agent representative. He did not keep a journal or any other type of contemporaneous notes of what he described as disturbing and immoral behaviour by his supervisor. He did not record any of his conversations with Ms. Abernethy-Gillis, even though the threats and improper conduct were allegedly occurring regularly. He never wrote her an email or a letter requesting an end to her unwelcome behaviour. No independent witnesses or documents were introduced to corroborate any of the grievor's statements or to support the serious accusations he was making against his supervisor. In essence, the grievor is asking me to accept his version of the facts and to reject that of

Ms. Abernethy-Gillis. However, after carefully reviewing the documentary evidence and considering the testimonies of the witnesses, I am simply unable to grant his request. The grievor did not meet his burden of establishing that, on balance, Ms. Abernethy-Gillis in fact sexually harassed him and that his refusal to engage in an intimate relationship with her led to his rejection on probation. He also failed to establish that she acted in a discriminatory manner towards him and that Mr. Nadler's decision to reject him was discriminatory. His arguments, as reflected earlier in this decision, do not mention discrimination. Other than the alleged two racial slurs, which Ms. Abernethy-Gillis categorically denied, the evidence did not even remotely establish that the grievor's rejection was based on his race, national or ethnic origin, colour, religion, or any other prohibited ground.

[67] Not only did the grievor fail to establish a contrived reliance by the employer on the *PSEA* or that his termination was a sham or a camouflage, the evidence established that the respondent expressed, over an extensive period, apparently legitimate concerns about the grievor's work performance and his overall suitability for the position. The documentary evidence clearly shows that Ms. Abernethy-Gillis had legitimate concerns about the grievor's work performance, that she communicated those concerns to him, as well as her expectations, and that she tried to provide some direction to him. Ultimately, both Ms. Abernethy-Gillis and Mr. Nadler felt that too many aspects of the grievor's performance fell short of meeting management's expectations. Having considered all the available evidence, I have no reason to believe that Ms. Abernethy-Gillis' motivation or that of Mr. Nadler in rejecting the grievor were based on anything but the grievor's performance and his suitability for his position.

[68] During his testimony, the grievor often disputed the assessment of his performance and offered explanations to validate his accomplishments. The fact that he did not agree with how Ms. Abernethy-Gillis and Mr. Nadler assessed his performance is not relevant to the determination I must make. My role is not to substitute my own assessment for theirs. As long as their assessment was not based on a contrived reliance on the *PSEA*, was not a sham or camouflage, and was not based on discriminatory factors, I have no authority to intervene. A review of the evidence simply did not support the grievor's proposition that he was rejected on probation for reasons unrelated to his work performance and suitability.

[69] I conclude that the grievor failed to discharge his burden of establishing a contrived reliance on the *PSEA*, a sham or a camouflage and that the evidence filed by the parties revealed a *bona fide* dissatisfaction on the part of the respondent as to the grievor's suitability for the position he occupied before his termination. Therefore, I do not have jurisdiction over this grievance.

[70] I also find that, since the grievor presented no cogent evidence in support of his claim of discrimination against the respondent and did not refer to it in his arguments, his allegation of discrimination is without foundation.

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

(The Order appears on the next page)

V. Order

[72] I order the file closed.

January 21, 2013.

Stephan J. Bertrand,
adjudicator