

Date: 20140107

Files: 566-02-5803 and 5804

Citation: 2014 PSLRB 1



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

MODIBO TOGOLA

Grievor

and

**TREASURY BOARD
(Shared Services Canada)**

Employer

Indexed as
Togola v. Treasury Board (Shared Services Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Linda Gobeil, adjudicator

For the Grievor: Michel Morissette, counsel

For the Employer: Léa Bou Karam, counsel

Heard at Québec, Quebec,
August 13 to 16, 2013.
(PSLRB Translation)

I. Individual grievances referred to adjudication

[1] Shared Services Canada (“the employer”) hired Modibo Togola (“the grievor”) for successive terms beginning in April 2007. His initial employment contract was renewed, with modifications, many times. On March 17, 2010, the employer told Mr. Togola that given his unsatisfactory performance, his last fixed-term employment contract would not be renewed after March 31, 2010. Mr. Togola is of Black origin.

[2] On September 1, 2011, the grievor referred a grievance to adjudication, under section 209 of the *Public Service Labour Relations Act* (“the Act”), contesting the employer’s decision.

[3] On October 25, 2011, the employer objected to my jurisdiction to hear the grievance on the grounds that the grievor had not been subjected to any of the measures referred to in paragraphs 209(b) and (c) of the Act. It pointed out that the grievor’s employment contract had simply not been renewed after March 31, 2010. The employer claimed that its decision not to renew Mr. Togola’s contract was made in accordance with the provisions of the contract and the terms of section 58 of the *Public Service Employment Act* (“the PSEA”). In response, the grievor’s representative argued that I had jurisdiction in this case since the employer’s grounds were discriminatory, and under the applicable collective agreement, an adjudicator has jurisdiction to hear a grievance based on a discriminatory decision.

[4] Since the grievor alleged in his grievance that he had been a victim of discrimination, notice of his grievance was sent to the Canadian Human Rights Commission (CHRC). On September 13, 2011, the CHRC notified the parties that it did not intend to submit comments in this case.

[5] The applicable collective agreement is between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group, which expired on June 20, 2011 (“the collective agreement”).

II. Summary of the evidence

[6] It should be noted that at the start of the hearing, the grievor’s counsel indicated that he would waive the grievor’s request for reinstatement as a remedy.

A. Background

[7] For the period relevant to this grievance, it is not disputed that Mr. Togola was hired under an external hiring process for a fixed term, namely, from April 2, 2007, to November 28, 2007, as a clerk classified at the CR-04 group and level. His employment contract was then renewed twice, from September 28, 2007, to December 21, 2007, and from December 21, 2007, to January 25, 2008. He was then employed as a service delivery agent, classified at the PM-02 group and level, from February 11, 2008, to September 26, 2008. That employment contract was then renewed three times, from September 27, 2008, to February 13, 2009, from February 8, 2009, to March 31, 2009, and from March 31, 2009, to October 30, 2009. Mr. Togola was then demoted to a CR-04 position from November 1, 2009, to December 31, 2009. That contract was renewed from December 31, 2009, to March 31, 2010. On March 17, 2010, the employer notified him that his contract would not be renewed beyond March 31, 2010.

[8] In his testimony, Mr. Togola stated that a few years before the April 2007 employment contract, he worked for the employer for a term, from October 2003 to March 2004. The grievor testified that after being hired on contract by the Department of Supply and Services, he returned to the employer at its request, for another term contract, ending in October 2005.

B. Grievor's evidence

[9] Mr. Togola testified that problems with the coordinator, Marlyn Bertrand, started when he began working for the employer in April 2007. According to the grievor, Ms. Bertrand ignored him and stopped speaking to him after an alleged incident at a Christmas party before 2007. He felt isolated. However, he testified that he was apparently told that everything was going well at a performance appraisal meeting in 2007, which both Ms. Bertrand and the manager, Ms. Deslandes, attended.

[10] The grievor testified that despite that assurance, Ms. Bertrand continued to be cold and distant with him. Mr. Togola stated that during that period, he did not have access to the same work tools as other employees and that he was required to consult with resources on some matters, even though his work quality was good and he did not need such consultations. Mr. Togola also stated that when his co-workers went on training in April 2007, he was not allowed to go on the pretext that he did not require it.

[11] Mr. Togola stated that in February 2008, he was successful in a staffing process for a term position, classified at the PM-02 group and level. Michel Lord trained him for the position. Mr. Togola affirmed that Mr. Lord informed him after he had completed the training that his evaluation was positive. The grievor testified that after that training, he and his co-workers had to have their files reviewed for quality by a team leader, Marc Labrecque, who was very unpleasant. According to the grievor, Mr. Labrecque's instructions differed from what they had learned in training. According to Mr. Labrecque, Mr. Togola achieved a rate of 4%; however, during the training, Mr. Lord's opinion was that 95% of the grievor's examined files were done well. Mr. Togola stated that Mr. Labrecque stopped reviewing his files in April 2008. Then, Louis-Charles Tremblay became Mr. Togola's new team leader, while Christine Bourget was in charge of reviewing the quality of his files from then on.

[12] According to Mr. Togola, Ms. Bourget was much more sympathetic toward him than Mr. Labrecque had been. According to the grievor, the results of Ms. Bourget's reviews were excellent (Exhibit G-5). He stated that Ms. Bourget apparently told him that everything was fine when they met at Café Suprême. The grievor testified that despite those good results, files were assigned to him differently than they were to his co-workers. He stated that they were free to choose their own files, while files were assigned to him. He testified that Ms. Bertrand decided the files to assign to him, while Mr. Tremblay was his team leader.

[13] Mr. Togola also testified that he was the only person having all his files reviewed. His co-workers' files were not systematically reviewed.

[14] The grievor said that he met with his team leader, Mr. Tremblay, in August 2008, who told him that everything was fine; no areas of improvement were mentioned.

[15] In addition, Mr. Togola said that in September 2008, unlike his co-workers, he did not receive the "[translation] options review" training. According to him, he was apparently denied that training because he was not up to speed on part of the bill, which he stated was incorrect. A meeting was held to discuss why he could not take the training. He attended, along with Ms. Deslandes, Ms. Bertrand, Mr. Tremblay and his union representative, Patricia Icart. Mr. Togola indicated that Ms. Icart apparently said that not inviting him to the training seemed like racism, to which the managers allegedly replied that instead, they were trying to help him.

[16] In October 2008, Lise Richard took over reviewing the grievor's files. According to him, she was satisfied with his work.

[17] The grievor stated that he was on sick leave from November 2008 to December 15, 2008. He returned to work on January 6, 2009. He explained that he was then assigned to a team in charge of processing "[translation] straightforward" files. However, his office was physically located next to co-workers, who were handling "[translation] file reviews." As a result, he was cut off from meetings at which the discussions were specifically about issues related to his work. He explained that his team leader, Mr. Tremblay, wanted to monitor him, which explained why his office was not located with those of his co-workers in "[translation] straightforward" file processing.

[18] Mr. Togola explained that in January 2009, when he went to pick up some files from the office of his team leader, Mr. Tremblay, he saw his personnel file lying on the desk. The grievor noted that it contained a copy of an email from Mr. Tremblay to Ms. Deslandes. Mr. Tremblay's email recommended dismissing the grievor for poor performance, based on Mr. Labrecque's evaluation.

[19] The grievor testified that Ms. Richard still reviewed the quality of his work at that time. She felt that his performance was satisfactory. According to Mr. Togola, Ms. Richard left in May 2009. She apparently told him that management wanted to "[translation] impose things" on her that were related to the grievor, which she would have refused. Mr. Togola also testified that another reviewer, Nancy Bernier, also stopped reviewing the quality of his work after a month because she did not want to do the things she was asked to do with respect to him. Neither Ms. Richard nor Ms. Bernier testified at the hearing.

[20] Mr. Togola testified that when he returned to work on August 24, 2009, after his second paternity leave, Sonia Vézina, the new director, Ms. Bertrand and Pierre Gosselin, his supervisor, met with him to tell him that he would no longer be classified at the PM-02 group and level but at the CR-04 group and level. They explained to him that the demotion was due to errors in his files. According to Mr. Togola, he had no choice but to accept the demotion from PM-02 to CR-04, or he would have lost his job. He testified that in September 2009, management implemented a performance improvement plan for him (Exhibit E-1, tab 6). Richard Belleau was to follow up with him on the plan.

[21] All the grievor's CR-04 work was still reviewed in its entirety. Mr. Belleau was assigned to verify the grievor's files.

[22] Mr. Togola testified that he raised that he felt harassed with Alain Gagné, Director, Regional Operations Centre for Old Age Security, on August 28, 2009. Mr. Gagné apparently told him that members of the management team had discussed him and had chosen to demote him from PM-02 to CR-04 instead of terminating his employment contract. Mr. Togola filed a harassment complaint against Ms. Deslandes, Ms. Bertrand, Mr. Tremblay and Ms. Vézina on September 11, 2009 (Exhibit G-2). The complaint was dismissed on October 15, 2009 (Exhibit G-3). Mr. Togola stated that, meanwhile, his employment contract, which was scheduled to end in October 2009, was extended until December 2009 and then from December 2009 to March 31, 2010.

[23] On January 18, 2010, Mr. Togola met with Mr. Gosselin to discuss his evaluation. It was decided to continue with an additional improvement plan (Exhibit E-1, tab 9). Nathalie Racine and Michèle Gendron were to follow up with him on the plan. He testified that the follow-ups were difficult because of changes to those involved and because the instructions and objectives changed from one person to another.

[24] According to Mr. Togola, in his evaluation for January 25 to 29, 2010, the results showed that 98% of the time, his files had no monetary errors, and that 80% of the time, they had no procedural errors.

[25] The grievor testified that on February 22, 2010, he met with Mr. Gosselin, Mr. Belleau and Ms. Noël to discuss the evaluations made by Ms. Racine and Ms. Gendron, in their absence. At the meeting, Mr. Gosselin, Mr. Belleau and Ms. Noël told him that only 59% of his files were free of procedural errors. According to Mr. Togola, that data was questionable, since he had always followed Mr. Belleau's advice and instructions about the procedures to follow.

[26] Mr. Togola asserted that he received Mr. Gosselin's letter, dated March 17, 2010, in Mr. Gagné's presence. It informed him that his employment contract would not be extended beyond March 31, 2010. He said that he was paid until April 16, 2010. He also said that his contract not being renewed had affected him; it had caused him to lose his self-confidence and to feel humiliated and disgraced. He had to be treated for depression, and he had required medication. He did not find another job until October 2012. He maintained that he had been harassed in the workplace.

[27] Lucie St-Hilaire also testified for the grievor. She retired from the federal public service in February 2010, with 33 years of service. She never was a manager.

[28] Ms. St-Hilaire met the grievor in 2003. She was classified at the PM-02 group and level at that time, and Mr. Togola was part of her team; he was a co-worker. She acknowledged later becoming friends with him. According to her, there were really no performance objectives at that time; everything was somewhat vague and was left to the analysts' judgment. In her opinion, the analysts did not always agree among themselves as to what constituted an error.

[29] Ms. St-Hilaire testified that in 2003 she had to review the quality of the files that the grievor prepared and that he was one of the best analysts and one of the first whose files became no longer in need of review.

[30] Ms. St-Hilaire stated that in her 33 years of service, to her knowledge, never had an analyst's files been subjected to systematic review. She testified that Mr. Belleau apparently once confided in her that he did not know why he had to continue reviewing Mr. Togola's files.

[31] Ms. St-Hilaire stated that she left her job but that she returned to it in 2008 as an advisor, classified at the PM-02 group and level. For a short two-week period in July 2008, she was responsible for reviewing the files of some employees, including those of Mr. Togola. On that point, she testified that all went well concerning the grievor's files and that even if some minor procedural errors occurred from time to time, they did not affect the clients. Ms. St-Hilaire stated that she likely reviewed more than 40 of Mr. Togola's files. In her opinion, the grievor's performance was superior to that of the other employees.

[32] Ms. St-Hilaire testified that while she was reviewing files, she overheard Mr. Labrecque talking with some employees. The way Mr. Labrecque addressed them made her blood run cold. She affirmed that Mr. Labrecque was even more curt and rude in his dealings with Mr. Togola.

[33] Ms. St-Hilaire said that no one knew why the grievor's files were being reviewed systematically. In her opinion, it was discrimination. In her testimony, she agreed that some of the stories circulating were based on gossip. However, she stated that she had never witnessed a contract being terminated for performance issues.

C. Employer's evidence

[34] Mr. Gagné testified for the employer. He retired from the federal public service in May 2011. At that time, he was the director of the processing centre for the Quebec region.

[35] Mr. Gagné said that he joined the Québec office as its director in June 2009 and that he had about 260 employees reporting to him. Mr. Gagné affirmed that when he arrived, the Québec office had performance issues, both qualitative and quantitative, with respect to application processing. Therefore, he worked on improving results by identifying the reasons for the delays and by implementing more effective processes. Mr. Gagné indicated that objectives for the quality and quantity of files processed were set based on standards established by headquarters.

[36] Mr. Gagné testified that on his arrival, he made a point of getting to know all the employees, which was how he got to know Mr. Togola. Mr. Gagné said that it was important to him to be close to his employees, that he knew them all by name and that he took the time to visit with them.

[37] Mr. Gagné testified that he was advised of the grievor's performance issues shortly after his arrival in August 2009. He stated that although Mr. Togola had received all the training needed to do his job, his performance was still not good enough. Mr. Gagné stated that any training beyond what the grievor had already received would not have been helpful because before moving on to other levels of training, employees need to first master the basic information, which Mr. Togola had not done. Plus, he never had to process files he had not been trained to process. Mr. Gagné testified that after consulting with the managers, it was decided that Mr. Togola required special attention to help him achieve his objectives.

[38] Mr. Gagné testified that although Mr. Togola was not performing at a PM-02 level, he decided to keep him in his organization. Mr. Gagné explained that management had already invested a great deal in the grievor and that Mr. Gagné and his managers preferred to continue to try to help the grievor improve his performance.

[39] Mr. Gagné testified that he obtained the grievor's assent before demoting him to the CR-04 group and level (Exhibit E-1, tabs 7 and 8). Mr. Gagné related that by the month of August 2009, it was clear that the grievor could not perform a PM-02's

duties. Therefore, he was demoted to the CR-04 group and level in August 2009. The grievor's appointment to the CR-04 group and level took place in October 2009 (Exhibit E-1, tab 7). Mr. Gagné indicated that despite the demotion, he decided to continue paying the grievor at the PM-02 group and level until his employment contract expired in October 2009. Mr. Gagné testified that in September 2009, given the grievor's performance issues, he had to choose between letting him go and giving him another chance. Since management had already invested in the grievor's training and since he was a pleasant and personable employee, management decided to keep him on but to monitor him more closely. According to Mr. Gagné, a work and improvement plan was provided to the grievor in September 2009. Mr. Gagné stated that the plan was discussed with Mr. Togola first and that he agreed to its terms and conditions and signed it (Exhibit E-1, tab 6). In cross-examination, Mr. Gagné acknowledged that he was not present when Mr. Togola signed the work plan but that the grievor was accompanied by his union representative. Mr. Gosselin was also present. Mr. Gagné added that although the grievor had worked as a CR-04 in the past, an improvement plan was deemed necessary because he had not performed those duties for some time. Management wanted to make sure he had all the work tools he needed.

[40] Mr. Gagné clarified that in September 2009, Mr. Gosselin was Mr. Togola's new supervisor in his CR-04 position and that Mr. Belleau was the person responsible for regularly reviewing Mr. Togola's work. Mr. Gagné indicated that the expectations for the grievor's work were laid out in the September 2009 work plan and that the plan provided for gradual increases in file complexity. Thus, according to Mr. Gagné, expectations were minimal in September 2009, but by November 2009, the complexity of the files assigned to Mr. Togola increased (Exhibit E-1, tab 6, p. 2). Mr. Gagné stated that the September 2009 work plan outlined the minimum objectives that Mr. Togola had to achieve. According to Mr. Gagné, those minimum objectives were the same for all employees. However, in Mr. Togola's case, as he had performed the duties as a CR-04 in the past, the work should have been easier for him than for new employees. Mr. Gagné testified that in November 2009, other employees who had started in September 2009 with the same performance objectives as the grievor had exceeded them (Exhibit E-1, tab 17, Appendix H).

[41] Mr. Gagné testified that Mr. Togola seemed to be performing quite well from September to December. However, at the end of December 2009, management noted

that problems were still present with productivity and that there had been delays. Mr. Gagné said that he wanted to give the grievor yet another chance. He decided to extend his employment contract from December 31, 2009, to March 31, 2010. Mr. Gagné added that an additional and complementary work plan was implemented for the grievor and that the grievor signed it (Exhibit E-1, tab 9).

[42] Mr. Gagné testified that in March 2010, however, management decided to not extend Mr. Togola's contract beyond March 31, 2010, and that the grievor was advised on March 17, 2010, of his contract not being renewed (Exhibit E-1, tab 10). Mr. Gagné explained that he concluded as much after noting that the results were still not satisfactory, although two work plans had been implemented and several supervisors and reviewers had worked with him and had noted performance gaps. Mr. Gagné indicated that he had regular discussions with Mr. Gosselin and Ms. Noël, the team leader, about Mr. Togola's performance. He maintained that even when he did not directly supervise Mr. Togola, he kept up to date about his performance. Mr. Gagné testified that Mr. Gosselin provided him with reports on Mr. Togola's performance. Mr. Gagné affirmed that not only did he consult Mr. Gosselin and Ms. Noël, but also that he examined the qualitative and quantitative data for the grievor's files (Exhibit E-1, tabs 12, 16 and 17). According to Mr. Gagné, while the quality of Mr. Togola's work was more satisfactory, the files were less complex, and productivity was still an issue. In cross-examination, Mr. Gagné affirmed that he did not verify the details or calculate the data with respect to Mr. Togola's performance but that he validated the results with his managers.

[43] Mr. Gagné testified that he was present with Mr. Gosselin on March 17, 2010, when the letter to not renew the grievor was provided to and read to him to explain the reasons his for the lack of a renewal. Mr. Gagné indicated that until the end, he had hoped that, with coaching, he could keep Mr. Togola in the employer's service, but he had to accept that despite all the efforts, performance issues persisted, and that as the manager in charge, he ultimately had to provide a service to the public and therefore ensure that his employees had the necessary competence. In cross-examination, Mr. Gagné admitted that Mr. Togola's performance seemed to have improved in October 2009 with respect to quality, which was why Mr. Togola's contract was extended past the month of October. Mr. Gagné clarified that he still hoped that things would improve in the future, but that did not happen. Mr. Gagné affirmed that the fact

that Mr. Togola was of Black origin had no impact on his decision and that in his organization, all employees were treated equally, regardless of their ethnic origins.

[44] Mr. Gagné also admitted being informed that the grievor had filed a harassment complaint against other co-workers (Exhibit G-2). Mr. Gagné said that he had asked that the complaint be processed. It was determined unfounded. However, according to him, management acted on the recommendation for mediation. He added that the grievor knew that, in August 2009, which was before the harassment complaint was filed on September 11, 2009, his performance had issues and that an improvement plan was coming. Mr. Gagné also admitted that other employees' files, with the exception of new employees, were not reviewed unless problems were identified.

[45] Mr. Gosselin also testified for the employer. He is currently the manager of services for security processing for the employer, and has been since April 2009. He has 33 years of service with the employer. During the period at issue, Mr. Gosselin was the service delivery manager for initial Old Age Security applications. He held that position from June 2009 to March 2011.

[46] Mr. Gosselin explained that from 2009 to 2011, he managed a group of 60 employees, including 57 employees classified CR-04, and 3 managers. He pointed out that a CR-04's duties do not vary greatly from one person to another; they are basically the same. His team's job is to receive initial applications for Old Age Security benefits from the public as well as applications for the Guaranteed Income Supplement and the Survivor Allowance. His team's CR-04s process those applications. About 1.1 million Canadian citizens use their services every year.

[47] Mr. Gosselin indicated that Mr. Togola was added to his team in September 2009 at Mr. Gagné's request, who would have asked him, in collaboration with the operations consultants and advisors, to develop a work plan to review the quality of Mr. Togola's work and to help him perfect his knowledge.

[48] Mr. Gosselin testified that his intention was for Mr. Togola to join the team and work like everyone else. He clarified that Mr. Togola had worked as a CR-04 before. Mr. Gosselin testified that, therefore, he offered to let the grievor choose who would review his files but that Mr. Togola preferred to leave the choice up to Mr. Gosselin.

[49] Mr. Gosselin indicated that an operations advisor is sometimes designated as a reviewer when an employee needs additional help in doing the job. In the grievor's case, Mr. Gosselin clarified that although he was not a new employee because he had performed CR-04 duties in 2008, nevertheless, Mr. Togola needed help to do his work.

[50] Mr. Gosselin affirmed that in September 2009 he prepared the work plan (Exhibit E-6) with the operations advisor, Mr. Belleau, and Mr. Togola's supervisor, Ms. Noël, to then present it to Mr. Togola. Mr. Gosselin indicated that he had discussed the plan with the grievor, who made a suggestion as to how to compile the data, which Mr. Gosselin accepted. He affirmed that Mr. Togola agreed to the work plan and that he signed it (Exhibit E-1, tabs 6 and 18, p. 1). Mr. Gosselin indicated that the work plan was clear that if no improvement were shown, the contract would be terminated on November 30, 2009.

[51] Mr. Gosselin indicated that Mr. Togola's circumstances were considered when assigning files to him and that initially, the level of quality and productivity expected from Mr. Togola was lowered to the same level as that expected from new employees, despite the fact that Mr. Togola had worked as a CR-04 before.

[52] Mr. Gosselin testified that Mr. Togola was closely supervised and that he was given plenty of feedback from September 2009 to December 2009. He indicated that he took notes on his several interactions with the grievor during that period (Exhibit E-1, tab 18).

[53] Mr. Gosselin testified that the work and improvement plan provided that if the grievor did not meet productivity and quality expectations by the end of October 2009, his employment contract would end as scheduled on October 31, 2009. Mr. Gosselin indicated that for the period in question, the grievor met all expectations for a new employee, which were the minimum objectives specified in the work and improvement plan (Exhibit E-1, tab 6, p. 2). Under the circumstances, Mr. Gosselin indicated that management decided to extend Mr. Togola's employment contract until November 30, 2009. However, he pointed out that from October 2009 on, the grievor had to meet all the requirements of his CR-04 position in terms of file processing quality and quantity, even though management decided to give him simpler tasks than the others.

[54] Mr. Gosselin testified that on November 30, 2009, despite the follow-up and dedicated efforts, some performance issues still existed, especially in terms of productivity (Exhibit E-1, tabs 14, 15 and 18, p. 2 to 5 and 6). Mr. Gosselin emphasized that the follow-up meetings that he attended with Mr. Togola and his supervisor, Mr. Belleau, always went well. Mr. Togola had the opportunity to explain the results, and sometimes, his supervisors went over some of the data again, for his benefit.

[55] Mr. Gosselin testified that on November 30, 2009, he decided to renew the grievor's contract because he still believed that the grievor would eventually meet his objectives. Mr. Gosselin indicated that management decided to give the grievor another chance, so it extended his employment contract to December 31, 2009.

[56] In his testimony, Mr. Gosselin mentioned that he was informed that the grievor had filed a harassment complaint against certain members of his former team in September 2009. Mr. Gosselin indicated that, however, the grievor decided not to pursue mediation for his complaint (Exhibit E-1, tab 15).

[57] Mr. Gosselin testified that on December 30, 2009, management noted that Mr. Togola was still having problems with file analysis and that the performance appraisal failed to establish that he had met quality and quantity expectations, despite some follow-up and meetings with him (Exhibit E-1, tab 18, p. 8). Mr. Gosselin confirmed that he was still hopeful that the grievor would improve, despite everything. In January 2010, he decided to implement an additional work and improvement plan, with a specific schedule. He clarified that that additional work plan, covering January 2010 to March 31, 2010, contained several dates for updates and that the grievor accepted and signed it. In addition, the plan provided that unless quality and productivity expectations were met, the grievor's employment contract would not be renewed after March 31, 2010 (Exhibit E-1, tab 9).

[58] In February 2010, given his knowledge of and his involvement with the grievor's case, and after discussions with Mr. Belleau and Ms. Racine and Ms. Gendron, both of whom were involved in Mr. Togola's case in January and February 2010, as well as with the manager, Ms. Laflamme, Mr. Gosselin became convinced that the grievor's contract should not be renewed. He indicated that he also considered the report prepared by Mr. Belleau, Ms. Racine and Ms. Gendron, which outlined Mr. Togola's performance issues (Exhibit E-1, tab 16).

[59] Mr. Gosselin testified that he then prepared a report in which he evaluated Mr. Togola's work in light of the follow-up and the work plans of September 2009 and January 2010. He then concluded that Mr. Togola's performance had not improved, despite the work plans, the follow-up and Ms. Noël's advice on how to organize his office (Exhibit E-1, tab 17). Mr. Gosselin testified that he validated the data in the report himself. He clarified that he prepared the report from notes he made on the day in question or on the next day (Exhibit E-1, tab 18).

[60] Mr. Gosselin testified that he submitted his report to Mr. Gagné in February 2010. In it, he concluded that Mr. Togola was unable to meet the performance objectives, both qualitative and quantitative, required to do his job (Exhibit E-1, tab 12). Mr. Gosselin affirmed that the fact the grievor was of Black origin had no influence on the way he was treated and that everything was done to help him succeed. Mr. Gosselin pointed out that other employees, namely, those mentioned in Exhibit E-17, achieved set objectives and had no issues with the quality of their files or their productivity. As for training for the grievor, Mr. Gosselin indicated that he had denied Mr. Togola's request to attend training on the Old Age Security basic pension because the grievor did not process that type of application and had enough work to do. Mr. Gosselin did not want to add to his workload.

[61] In cross-examination, Mr. Gosselin indicated that co-workers in Operations provided him with Mr. Togola's performance data and that he did not review Mr. Togola's files but that Mr. Belleau, Ms. Racine and Ms. Gendron did. Mr. Gosselin testified that he validated the data with others, such as Mr. Belleau. Mr. Gosselin admitted to some errors in Mr. Togola's performance data, for example, in Exhibit E-1, tab 11. In addition, for the week of October 5, 2009, the quality percentage should have been 96%, not 99%. Mr. Gosselin also admitted that the comments in the right-hand column of Exhibit E-1, tab 11, for January 4, 2010, should not have indicated "[translation] repeated errors in procedure," since the preceding column showed a 100% success rate for procedure.

[62] Mr. Gosselin also indicated that the team leader distributed files to all employees; they did not retrieve files on their own.

[63] Mr. Gosselin clarified that the objectives to be reached were established based on national standards that apply to all employees. Although he was not personally

involved in gathering data about Mr. Togola, he did validate the figures. He is quite familiar with the process, as he was once a processing agent.

[64] Mr. Gosselin also affirmed that Ms. Bertrand was not involved in the process of not renewing Mr. Togola's contract, as she was not part of their business line.

III. Summary of the arguments

A. For the grievor

[65] Mr. Togola's counsel stated that from his hiring in 2003 until 2007, the grievor had no issues at work. Everything went well, and his contracts were always renewed. Management even tracked him down to offer him a contract while he was working for another department.

[66] According to Mr. Togola's representative, things began to unravel in 2007 when issues arose between the grievor and his supervisor, Ms. Bertrand, and with Mr. Labrecque, who behaved abusively towards employees whose work he reviewed.

[67] Mr. Togola's counsel maintained that the grievor was successfully promoted to the PM-02 group and level from February 11, 2008, to September 26, 2008.

[68] Mr. Togola's counsel maintained that starting then, the employer discriminated against the grievor by insisting that an operations advisor review all his files. According to Mr. Togola's counsel, Mr. Togola was the only person subject to such reviews. It constituted relentless pursuit of him, given that one of Mr. Togola's reviewers, Ms. Bourget, and then Ms. Bernier, apparently stated that she did not understand why the grievor was subject to the reviews because his work was done well. Mr. Togola's counsel argued that Ms. St-Hilaire's testimony along with the remarks made by the grievor's representative, Ms. Icart, clearly prove that management doggedly pursued Mr. Togola.

[69] The grievor's counsel submitted that in addition to being the only one subject to having his work systematically reviewed, the grievor had also been denied training that was offered to other employees. In addition, he was physically separated from the rest of his team members, which made it difficult for him to be involved in certain files because he was not kept up to date. Finally, he pointed out that the employer's

explanation was not satisfactory and that I should conclude that the grievor was isolated from the others simply so that Mr. Tremblay could monitor him more closely.

[70] For Mr. Togola's counsel, the grievor signing a document confirming that he accepted the demotion from the PM-02 group and level to the CR-04 group and level should not be held against him as proof of consent. According to the grievor's representative, the grievor did not have a choice. Had he not agreed, he would have been fired.

[71] Mr. Togola's counsel accepted that neither Mr. Gagné nor Mr. Gosselin discriminated against the grievor. However, according to him, those who conducted the reviews and the operations advisors who gave Mr. Gosselin the information discriminated against Mr. Togola. According to the grievor's counsel, the fact that those individuals did not testify proves that the employer has something to hide.

[72] Counsel for the grievor argued that the onus is on the employees who personally reviewed Mr. Togola's work and who prepared certain tables outlining his errors to explain the data and comments made about Mr. Togola's performance. According to him, the fact that neither Mr. Gosselin nor M. Gagné prepared or compiled that information makes this a case of hearsay, and the employer should not have relied on that information to decide to not renew the grievor's employment contract past March 2010. On that point, the grievor's representative argued that the evidence demonstrated errors in the tables about Mr. Togola's performance, specifically in Exhibit E-1, tab 11, which proves that the data on which Mr. Gosselin and Mr. Gagné based their decision was erroneous. Along those same lines, Mr. Togola's counsel reiterated that those who reviewed the grievor's work, Mr. Belleau, Ms. Racine and Ms. Gendron, did not testify. Consequently, I should not put much stock in them (Exhibit E-1, tab 16). In addition, according to the grievor's counsel, while the employer mentioned Mr. Togola's repeated errors, no list of those supposed errors was created.

[73] Mr. Togola's counsel also maintained that there is no proof that the other employees met the employer's objectives or that they were treated the same as he was.

[74] As for the applicable legislation and case law, the grievor's counsel reiterated that he was not asking that the grievor be returned to his job. He contended that section 19 of the collective agreement, along with paragraph 226(1)(g) of the *Act* and

paragraph 53(2)(e) and section 53 of the *Canadian Human Rights Act (CHRA)*, apply in this case.

[75] According to Mr. Togola's counsel, discrimination can be subtle. He then directed my attention to the definition of the term "discrimination" in *LaBranche v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2010 PSLRB 65.

[76] Mr. Togola's counsel argued that this is clearly a case of discrimination. Other employees were never subject to systematic reviews, as was Mr. Togola. In addition, the grievor was denied training, was isolated from his team members, was the only one assigned files and was the only one required to follow coaching plans. He pointed out that those elements and the fact that Mr. Togola is of Black origin should lead me to conclude that this is a *prima facie* case of discrimination, which reverses the burden of proof. The grievor's counsel argued that the onus is on the employer to demonstrate that it acted reasonably and in good faith.

[77] Mr. Togola's counsel referred me to the decisions in *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68, and in *Stringer v. Canada (Attorney General)*, 2013 FC 735.

[78] As for the requested remedy, Mr. Togola's counsel argued that it was demonstrated that the grievor encountered difficulties between August 2009 and March 2010. Not only did he lose his job, but also he had health issues that required medication, had no self-confidence and had difficulty finding work. In light of that, Mr. Togola's counsel requested that I award the grievor \$20 000 under paragraph 53(2)(e) of the *CHRA*. In support of his request, Mr. Togola's counsel referred me to *Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15, and to *Pepper v. Deputy Head (National Defence)*, 2008 PSLRB 71.

B. For the employer

[79] The employer's counsel reiterated that I did not have jurisdiction to hear this grievance because it involves an employment contract not being renewed and that the employer did not discriminate against Mr. Togola. According to her, this situation is not covered under paragraphs 209(1)(b) or (c) of the *Act*. Section 19 of the collective agreement, which covers discrimination, states that the onus is on the grievor to prove

that the employment contract was not renewed because of discrimination, which he did not do.

[80] According to the employer's representative, this is purely and simply a case of a contract not being renewed, as set out in subsection 58(1) of the *PSEA*, over which an adjudicator has no jurisdiction. According to the employer's counsel, since this is not a termination of employment under section 209 of the *Act*, this termination of employment should be contested before the Federal Court under subsection 58(1) of the *PSEA*. According to her, I had jurisdiction to hear this grievance only if I were persuaded that the grievor was a victim of discrimination. For the employer's counsel, there was no proof of that. She referred me to *Ikram v. Canadian Food Inspection Agency*, 2012 PSLRB 4, *Medeiros v. Treasury Board (Department of Foreign Affairs and International Trade) and Deputy Head (Department of Foreign Affairs and International Trade)*, 2012 PSLRB 104, and *Dansereau v. National Film Board and Pierre-André Lachapelle*, [1979] 1 F.C. 100 (QL)(C.A.).

[81] The employer's counsel argued that the onus was on the grievor to provide *prima facie* evidence that he was a victim of discrimination based on his race. According to the employer's representative, that evidence was not provided. She referred me to *Souaker v. Canadian Nuclear Safety Commission*, 2009 PSLRB 145.

[82] According to the employer's counsel, the grievor had to establish that he is a member of a protected group, that the employer treated him differently and that there was a link between him being part of a protected group and that different treatment. However, according to the employer's representative, the grievor did not successfully link the fact that he is of Black origin and the fact that his contract was not renewed. There was no direct proof linking Mr. Togola's race and his contract not being renewed. The employer's counsel argued that for that reason, I should dismiss the grievance, given that the onus was on the grievor to provide *prima facie* evidence that his Black origin and the lack of a renewal were linked, which he did not do.

[83] The employer's counsel clearly demonstrated that the grievor had performance issues, which is why his contract was not renewed. According to her, Mr. Gagné based his decision solely on the grievor's performance. She maintained that the grievor had even admitted that neither Mr. Gagné nor Mr. Gosselin had discriminated against him. Therefore, according to her, clearly, no evidence supports the grievor's allegations.

[84] The employer's counsel pointed out that the situation before 2009 and the harassment complaint filed in 2009 are not relevant to this case and that that harassment complaint is not the subject of the grievance.

[85] The employer's counsel maintained that contrary to what the grievor brought forward, all new employees' files were reviewed, and it was difficult to compare the grievor's case to those of other employees who did not have performance issues. As for the grievor's allegation that files were assigned to him, unlike the others, the employer's counsel argued that Mr. Gosselin testified that files were distributed to everyone the same way.

[86] For the employer's counsel, the onus is on management to ensure that an employee meets performance objectives, and an adjudicator does not have jurisdiction to determine management's required level of satisfaction. According to her, I cannot substitute my judgment for that of the managers, with respect to the required performance level. The employer's counsel submitted that the grievor had to meet the objectives, which arose from a national standard, and that the objectives were clearly communicated to him. In addition, according to the employer's counsel, the grievor was warned many times, through work support plans (Exhibit E-1, tabs 6 and 9) or during meetings with the employer, that his contract would not be renewed without improvement. The fact that the employer still extended the contract several times showed its goodwill. I should not reproach the employer for giving the grievor many chances.

[87] The employer's counsel maintained that, by voluntarily signing the work plans, the grievor acknowledged that he had performance issues (Exhibit E-1, tabs 6 and 9). In addition, his union representative was present when the first work plan was signed on September 28, 2009 (Exhibit G-2, page 14).

[88] The employer's representative pointed out that the evidence demonstrated that both Mr. Gagné and Mr. Gosselin gave the grievor every chance. According to her, Mr. Gagné and Mr. Gosselin demonstrated that they were well informed of Mr. Togola's situation and that it is not realistic to expect that managers in the public service prepare statistical tables themselves. The employer's representative maintained that conclusions cannot be drawn from the fact that the reviewers and operations advisors did not testify. According to her, no evidence was provided to contradict their reports and data.

[89] As for the \$20 000 remedy that the grievor requested, the employer's counsel argued that it was a term contract and that no evidence supported pain and suffering justifying a lump-sum payment of \$20 000. According to her, it was not disputed that the employer paid the grievor two weeks' salary after March 31, 2010. Under the circumstances, a sum of \$20 000 is in no way justified.

IV. Reasons

[90] There is no dispute that this is a case of an employment contract not being renewed upon its expiry on March 31, 2010. That final employment contract was the last in a series of more-or-less consecutive term contracts.

[91] My opinion is that in a case such as this, in which employment was terminated because a contract was not renewed under section 58 of the *PSEA*, in principle, I do not have jurisdiction to hear the grievance, unless the grievor can prove that he was a victim of discrimination. If so, then I have jurisdiction under subsection 209(1) and paragraph 226(1)(g) of the *Act* to hear the grievance. Thus, I concur with the adjudicator's conclusions in *Medeiros*, who had to hear two grievances, one of which involved a contract not being renewed, and the other, an issue of discrimination:

34. I agree with the employer that I do not have jurisdiction to hear grievances that simply contest the non-renewal of a term contract. In such cases, the grievor's employment contract expired, and the employer did not renew it. I do not have jurisdiction to question or rescind that decision by virtue of the terms of the Act and of the PSEA under normal circumstances. The relevant provisions of the Act and of the PSEA are the following:

...

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;

...

[from the PSEA]

...

58. (1) Subject to section 59, an employee whose appointment or deployment is for a specified term ceases to be an employee at the expiration of that term, or of any extension made under subsection (2).

...

35. *The evidence clearly shows that the grievor was a term employee. His term expired on May 10, 2010. Those two facts are not in dispute. There was no argument from the grievor that the employer's decision was disciplinary or that he was terminated under paragraph 12(1)(d) of the Financial Administration Act, R.S.C. 1985, c. F-11. On that basis, I would normally have no jurisdiction to hear the first grievance, which challenged the employer's decision to not renew the grievor's term contract. That is consistent with Dansereau and Belmar. However, I have jurisdiction to consider the grievances on the basis of the argument that the decision not to renew the grievor's term was made in bad faith and was discriminatory.*

[92] In this case, on the balance of probabilities, did Mr. Togola's employer discriminate against him? If so, I have jurisdiction to hear the grievance; if not, I do not have jurisdiction.

[93] After an in-depth review of the alleged facts and applicable law, my response is in the negative. In this case, I believe that the employer did everything in its power to help the grievor meet neutral objectives. In my opinion, in this situation, the managers demonstrated significant patience. But, after many attempts, they had to make a difficult decision, namely, to not renew Mr. Togola's employment contract.

[94] To persuade me, the grievor had to *prima facie* establish that he was a victim of discrimination. Were that so, the employer would then have had to prove that its actions were motivated on one hand by a desire to help the grievor improve his performance and on the other hand by a desire to provide sound management.

[95] Basically, the grievor argued that until 2007, except for incidents involving Ms. Bertrand and Mr. Labrecque, his performance was not an issue. However, the employer then went after him, imposed a demotion from the PM-02 group and level to the CR-04 group and level, denied him training, imposed files on him when other employees were able to choose theirs, systematically reviewed his work — which was

not done for other employees — and subjected him to supervised work plans. He also stated that the employer's witnesses were not those who directly noted his performance issues and that the tables that the employer submitted contained errors.

[96] The employer's evidence demonstrated that Mr. Togola indeed had performance issues with the quality and quantity of files he produced and that those issues started before August 2009. The evidence clearly proved that when Mr. Gagné arrived in June 2009, performance standards were established for all employees, including Mr. Togola. It should also be noted that reading the documents he submitted demonstrates that he had performance issues (Exhibit G-5).

[97] The evidence also demonstrated that Mr. Togola had difficulty meeting the objectives set by the employer and that the employer had to put measures in place to guide the grievor, with the goal of helping him improve his performance. First, Mr. Togola was demoted to a position classified at the CR-04 group and level, but his salary remained at the PM-02 group and level until the end of his contract. Mr. Togola pointed out that he did not agree with the demotion. However, nothing in the evidence indicated that he did not agree with the measure when it was implemented. No complaint, grievance or email demonstrated his opposition to the demotion. In my opinion, if the grievor did not believe he had performance issues, he would have opposed the demotion in some way. Mr. Togola's files were closely reviewed by Mr. Belleau and then by Ms. Racine and Ms. Gendron. At this point, I should point out that Mr. Gosselin allowed the grievor to choose who would review his work. Mr. Togola never, in any fashion, indicated that Mr. Belleau, Ms. Racine and Ms. Gendron were racist in their approach or that they had a discriminatory attitude toward him. In addition, the grievor's representative acknowledged that neither Mr. Gagné nor Mr. Gosselin discriminated against Mr. Togola. When Mr. Gagné and Mr. Gosselin testified, I noted that they spoke empathetically about the grievor. In addition, the grievor never stated that Mr. Gagné or Mr. Gosselin made discriminatory statements about him; nor did the individuals reviewing his work (Exhibit E-1, tab 15, email from Mr. Togola) or anyone else in the office.

[98] In terms of the grievor's performance issues, the employer persevered and provided him with two very detailed improvement plans (Exhibit E-1, tabs 6 and 9). I note that the grievor agreed with the contents of the plans. Once again, if he did not agree that there were performance issues, why did he sign the improvement plans,

which are very clear in their purposes? In addition, I note that they were not the first plans. In fact, by his own admission, the grievor stated that he asked Mr. Tremblay to provide him with a support plan in October 2008. He also asked that someone new review his files, once again demonstrating that he recognized that he was having performance issues (Exhibit G-2, page 9).

[99] Mr. Togola's counsel maintained that the grievor was pressured to sign the work plans; otherwise, he would have lost his job. I was not convinced. Mr. Togola already filed a harassment complaint in the past. He knew that remedies were available to him. In addition, it was demonstrated that a union representative accompanied Mr. Togola to the meeting in September 2009, when the work plan was signed.

[100] The grievor maintained that unlike the others, all his files were reviewed, and he was not permitted to choose his files. Mr. Gosselin pointed out that every new employee's files were reviewed and that Mr. Togola's performance was such that he required supervision even though he had already done CR-04 work. I am satisfied with Mr. Gosselin's explanation, who demonstrated generally that the employer took a real interest in providing the grievor with proper supervision, instead of leaving him to his own devices. As for distributing files, Mr. Gosselin was very clear when he explained that every employee's files were distributed by team leaders and that employees did not choose which files they worked on.

[101] In this case, the grievor's arguments were based primarily on the fact that his contract was not renewed subsequent to his managers' discriminatory actions. However, I note that the evidence that the grievor presented at the hearing did not include any specific actions by a team leader, reviewer or operations advisor who was directly or indirectly involved in the files. The grievor's allegations were always directed at the managers as a whole; no specific individuals were accused of racism or discrimination. I acknowledge that the grievor testified that he had issues with Ms. Bertrand after a Christmas party incident and that he had issues with Mr. Labrecque. However, I note that the evidence showed that Ms. Bertrand was involved with Mr. Togola's files before 2009 and that the so-called incident at the Christmas party involving Ms. Bertrand was not mentioned in any communications from that time, in the complaint that the grievor filed in 2009 or in personal notes (Exhibit G-2). In addition, Mr. Gosselin affirmed that Ms. Bertrand was not involved in not renewing the grievor's contract because she was not part of the management team

that made the decision, and no link was established between her and those who made the decision. In Mr. Labrecque's case, he also reviewed the grievor's files and was part of the team before 2009; the grievor and Ms. St-Hilaire both acknowledged that Mr. Labrecque had been difficult with all employees. However, it was not proven that Ms. Bertrand and Mr. Labrecque's actions were discriminatory or racist. Additionally, neither Ms. Bertrand nor Mr. Labrecque was involved in the decision to not renew Mr. Togola's contract.

[102] The grievor's counsel also pointed out that the employees who compiled the data on Mr. Togola's work, those who did not testify, discriminated or were racist. Mr. Togola's counsel also maintained that the employer's evidence was based on hearsay because Mr. Gagné and Mr. Gosselin did not collect the grievor's performance data.

[103] To begin, I would like to note that I was impressed by the testimonies of Mr. Gagné and Mr. Gosselin. They established that they did everything in their power to keep Mr. Togola on staff. I do not agree with the argument from the grievor's counsel that the employer's evidence was lacking because Mr. Gagné and Mr. Gosselin did not collect the grievor's performance data. The evidence clearly demonstrated that Mr. Gagné, and in particular Mr. Gosselin, followed up with the grievor, reviewed the data provided by the reviewers and operations advisors, and verified the information. I must point out that that Mr. Gagné and Mr. Gosselin were personally involved in Mr. Togola's case in an exceptional way, considering their other functions as managers. Not only did they demonstrate a real desire to see the grievor succeed, but also they always treated him with respect and empathy. Mr. Gagné and Mr. Gosselin did everything they could to help Mr. Togola succeed. They gave Mr. Togola many chances. They gave him the benefit of the doubt many times and renewed his contracts (Exhibit E-1, tab 9). Given those facts, I have no difficulty concluding that Mr. Togola did not demonstrate that he was a victim of discrimination and that his contract not being renewed was completely attributable to his recurring performance issues. The evidence clearly demonstrated that the grievor had difficulties meeting his objectives. In addition, he acknowledged that he did not meet those objectives when he asked for an improvement plan (Exhibit G-2, page 9), accepted the demotion (Exhibit E-1, tab 7) and signed the two improvement plans (Exhibit E-1, tabs 6 and 9).

[104] As for the grievor's argument that the tables prepared by those reviewing his files had errors and that, consequently, the importance of the employer's evidence was diminished, I must point out that those errors did not influence me because they are insignificant and inconsequential. In addition, one of the errors was advantageous to the grievor (Exhibit E-1, tab 11, October 5, 2009). Given the amount of data to compile, it is possible that it would have some errors; however, given the small number of errors and their nature, they have no effect on the nub of the matter.

[105] The grievor's counsel insisted that the employees who did not testify acted in a racist manner. Once again, the only people who had strained relationships with the grievor were Ms. Bertrand and Mr. Labrecque. However, as mentioned earlier, those individuals were clearly not part of the team of managers and reviewers in charge of Mr. Togola's files in August 2009, and they were not involved in the decision to not renew his contract. In addition, although I acknowledge that the grievor and those individuals might have some differences, it was not established that they discriminated against him. The onus was on the grievor to demonstrate that he was a victim of discrimination, which he did not do.

[106] I acknowledge that discrimination can be insidious and devious and that it can be very subtle. However, there is no evidence in this case that leads me to convincingly conclude that discrimination or racism was involved. Nothing in the evidence provided by the grievor, on the whole or in part, leads me to conclude that he was a victim of discrimination. In my opinion, the employer is entitled to and must assess an employee according to objective standards that are devoid of prejudice, particularly prejudice based on an individual's race. That was so in this case. Before deciding not to renew the employment contract, the employer set clear objectives, coupled with supervision, effected a demotion and prepared support plans complete with follow-up meetings with many different people. Given the lack of *prima facie* evidence, I cannot conclude that the grievor was a victim of discrimination. Simply because the employer did not renew an employment contract did not mean that discrimination occurred. Clear performance objectives were set for the grievor; the employer did everything possible to try to help him. He had many chances and was warned multiple times that unless his work performance improved, his contract would not be renewed. The onus was on the grievor to provide *prima facie* evidence of discrimination, which he did not do.

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

(The Order appears on the next page)

V. Order

[108] The grievance is dismissed, and I order that files 566-02-5803 and 5804 be closed.

January 7, 2014.

PSLRB Translation

**Linda Gobeil,
adjudicator**