

**Date:** 20140114

**File:** 566-03-8321

**Citation:** 2014 PSLRB 4



*Public Service  
Labour Relations Act*

Before an adjudicator

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BETWEEN

**KOUASSI AGBODOH-FALSCHAU**

Grievor

and

**CANADIAN NUCLEAR SAFETY COMMISSION**

Employer

Indexed as

*Agbodoh-Falschau v. Canadian Nuclear Safety Commission*

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** Renaud Paquet, adjudicator

***For the Grievor:*** Himself

***For the Employer:*** Léa Bou Karam, counsel

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Heard at Ottawa, Ontario,  
January 6 and 7, 2014.  
(PSLRB Translation)

**I. Individual grievance referred to adjudication**

[1] Kouassi Agbodoh-Falschau was Senior Internal Auditor at the Canadian Nuclear Safety Commission (“the employer” or CNSC). He was dismissed on October 4, 2012. The employer submitted that he was dismissed for incompetence. In his grievance, Mr. Agbodoh-Falschau alleged that his dismissal was discriminatory and unjustified and that it was a reprisal for other grievances he had filed earlier. On March 15, 2013, Mr. Agbodoh-Falschau referred his grievance to adjudication under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (“the Act”), i.e., for a disciplinary action that resulted in a termination, demotion, suspension or financial penalty.

[2] Mr. Agbodoh-Falschau had already referred his grievance to adjudication on February 28, 2013, under paragraph 209(1)(d) of the *Act*. The Registry of the Public Service Labour Relations Board (“the Registry”) returned his documents to him given that the employer is not among the separate agencies designated under that paragraph. On March 25, 2013, the Registry acknowledged receiving the March 15, 2013, referral to adjudication of Mr. Agbodoh-Falschau’s grievance and advised him that he would first have to notify the Canadian Human Rights Commission (CHRC) if he intended to raise a human rights issue at adjudication. He did not provide a notification to the CHRC and did not raise any such issues at the adjudication hearing of his grievance.

[3] Before the hearing, the employer objected that an adjudicator did not have jurisdiction to hear the grievance given that Mr. Agbodoh-Falschau challenged his dismissal for incompetence, which he could not do at adjudication under the *Act*. According to the employer, the provisions in subparagraph 209(1)(c)(i) and paragraph 209(1)(d), which are about adjudicating grievances challenging dismissals for incompetence, do not apply in this case, given that Mr. Agbodoh-Falschau did not work in the core public administration and that the employer is not a separate agency as referred to in paragraph 209(1)(d) of the *Act*.

**II. Summary of the evidence**

[4] Mr. Agbodoh-Falschau testified. He also called Thomas Tobin to testify. For a few months in 2009 and 2010, he was Mr. Agbodoh-Falschau’s immediate supervisor. The employer called Marc Leblanc to testify. Mr. Leblanc was the CNSC secretary. He made the decision to dismiss Mr. Agbodoh-Falschau. The parties adduced 36 documents in evidence.

[5] Mr. Agbodoh-Falschau is an accountant by training. He was hired as the CNSC's senior internal auditor on October 19, 2009. From his hiring until the end of January 2010, Mr. Agbodoh-Falschau reported to Mr. Tobin, who testified that he was fully satisfied with Mr. Agbodoh-Falschau's performance when he supervised him. His work was always done well, and his conduct at work was exemplary. Mr. Tobin rehired Mr. Agbodoh-Falschau at the government entity where he is currently working. He is completely satisfied with Mr. Agbodoh-Falschau's performance.

[6] After Mr. Tobin left the CNSC, Mr. Agbodoh-Falschau worked under the direct supervision of Serge Campeau and Diane Lapierre and under the direction of Joe Anton, Director of Audit, CNSC. The documentary evidence adduced at the hearing and Mr. Leblanc's testimony revealed that Mr. Anton did not share Mr. Tobin's opinion of Mr. Agbodoh-Falschau's output and performance at work.

[7] On November 15, 2010, Mr. Anton met with Mr. Agbodoh-Falschau to discuss his performance from April 2010 to November 2010. The employer's practice at that time was to conduct verbal and relatively informal performance appraisals, which was done with Mr. Agbodoh-Falschau. However, after the fact, on August 4, 2011, Mr. Anton wrote an account of that meeting held eight months earlier. On May 25, 2011, Mr. Anton met with Mr. Agbodoh-Falschau again to discuss his performance for the 2010-2011 fiscal year. On August 4, 2011, Mr. Anton wrote an account of that meeting after the fact. Both accounts reported the positive aspects of Mr. Agbodoh-Falschau's performance as well as areas in which improvement was needed.

[8] On August 4, 2011, Mr. Anton also wrote a letter to Mr. Agbodoh-Falschau, reiterating a series of points that Mr. Anton asked him to improve in his performance. Mr. Agbodoh-Falschau acknowledged that he had been given those documents dated August 4, 2011, but he disagreed with the criticisms of him since, in his view, they were subjective comments that were not based on objective, concrete and measurable criteria.

[9] In October 2011, Mr. Anton gave Mr. Agbodoh-Falschau an action plan aimed at improving his performance. The action plan included a meeting between Mr. Agbodoh-Falschau and his supervisor, Ms. Lapierre, every two weeks. Mr. Anton said that he was still dissatisfied with Mr. Agbodoh-Falschau's performance, and on November 21, 2011, he sent him a letter, reminding him of their earlier discussions

and stating that if Mr. Agbodoh-Falschau did not meet the requirements of his position at a satisfactory level, he could be demoted or dismissed for incompetence.

[10] On June 13, 2012, Mr. Anton met with Mr. Agbodoh-Falschau and shared his appraisal of his performance for 2011-2012. In the written report adduced at the hearing, he noted that Mr. Agbodoh-Falschau had made progress but that his work did not satisfy the requirements of his position. On July 11, 2012, Mr. Anton informed Mr. Agbodoh-Falschau in writing that he was dissatisfied with his performance. Mr. Anton also stated that if Mr. Agbodoh-Falschau did not meet the expectations of his position at a satisfactory level before September 30, 2012, he would be demoted or dismissed for incompetence.

[11] On October 4, 2012, Mr. Leblanc dismissed Mr. Agbodoh-Falschau for incompetence. In his testimony, Mr. Leblanc explained that he based that decision on the information on file, reports completed by Mr. Anton and discussions he had with Mr. Anton about Mr. Agbodoh-Falschau's performance. Mr. Leblanc testified that he had a very good relationship with Mr. Agbodoh-Falschau, describing it as a professional friendship. In reply to a related question, he stated that he had not acted for disciplinary reasons. According to him, it was solely a matter of unsatisfactory performance.

[12] Mr. Agbodoh-Falschau acknowledged receiving the several documents about his performance that the employer adduced in evidence. He also acknowledged that the employer shared its concerns about his performance with him, in particular starting in summer 2011. However, he did not agree with the employer's appraisal of his performance, which, according to him, had been entirely satisfactory.

[13] Mr. Agbodoh-Falschau adduced in evidence documentation setting out the employer's policy with respect to performance appraisals. The policy states that performance is to be evaluated based on clearly established and easily measurable work objectives. In Mr. Agbodoh-Falschau's opinion, the employer never respected those aspects of the policy.

[14] Mr. Agbodoh-Falschau also criticized the employer for failing in its duty to give him regular feedback about his work, for not following up on the action plan that had been prepared and for not responding to the weekly reports he submitted each week, starting in summer 2012.

[15] Mr. Agbodoh-Falschau believes that the employer had disciplinary intentions. Its decision in November 2010 to retract the 30-minute flexibility he had with respect to when his work hours started and finished and its refusal to grant him his pay increment in October 2011 also contributed to his belief that the employer wanted to punish him. On the matter of the pay increase, Mr. Leblanc explained that the employer's refusal was based on Mr. Agbodoh-Falschau's unsatisfactory performance.

[16] Mr. Agbodoh-Falschau testified that the employer began isolating him in 2011 and that it did not give him clear expectations with specific performance objectives. In December 2011, he filed two grievances challenging his performance appraisal and alleging that the employer was harassing him. It was agreed that the grievances would be referred to mediation, which did not result in resolving the grievances. The employer never responded to the two grievances after that.

### **III. Summary of the arguments**

#### **A. For Mr. Agbodoh-Falschau**

[17] Mr. Agbodoh-Falschau claimed that he was dismissed for disciplinary reasons. It was clear to him that his performance appraisals, some of which were completed after the fact, were not accurate. The employer acted in bad faith and then tried to camouflage a disciplinary dismissal under the pretext of unsatisfactory performance. Mr. Agbodoh-Falschau affirmed that he never had performance problems in any of the jobs he held before or after his time working with the CNSC.

[18] The employer never communicated clear performance objectives to Mr. Agbodoh-Falschau and therefore failed to respect its own performance management policy. Furthermore, the action plans that were prepared were not followed up, and the employer did not give Mr. Agbodoh-Falschau any feedback on the weekly reports he submitted, starting in summer 2012. That is proof of the employer's bad faith and of the argument that they were disciplinary measures, especially given that the employer did not deign to respond to the grievances filed in December 2011.

[19] Mr. Agbodoh-Falschau asked me to allow the grievance and to order the employer to pay him financial compensation. In support of his arguments, he referred me to the following decisions: *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64, *Nnagbo v. Treasury Board (Public Works and Government Services Canada)*, 2001

PSSRB 1, and *Gauthier v. Deputy Head (Department of National Defence)*, 2013 PSLRB 94.

#### **B. For the employer**

[20] The employer reiterated its objection that an adjudicator did not have jurisdiction to hear this grievance because it involves a dismissal for incompetence. According to the employer, subparagraph 209(1)(c)(i) and paragraph 209(1)(d) do not apply in this case since Mr. Agbodoh-Falschau was not working in the core public administration and since the employer was not one of the separate agencies as referred to in subparagraph 209(1)(c)(i) of the *Act*.

[21] The employer denied dismissing Mr. Agbodoh-Falschau for disciplinary reasons. The evidence demonstrated that Mr. Agbodoh-Falschau had performance issues. Mr. Anton informed Mr. Agbodoh-Falschau of that many times at meetings. On November 21, 2011, the employer sent him another letter, once again asking him to improve his performance and notifying him that his inability to satisfy the expectations of his position could lead to a demotion or to dismissal for incompetence. On July 11, 2012, given that his performance had not improved, the employer again wrote to Mr. Agbodoh-Falschau to inform him that time that if his performance did not improve to a satisfactory level by September 30, he would be demoted or dismissed for incompetence. As the employer was still not satisfied with Mr. Agbodoh-Falschau's performance, it decided to dismiss him on October 4, 2012.

[22] In support of its arguments, the employer referred me to the following decisions: *Wong v. Deputy Head (Canadian Security Intelligence Service)*, 2010 PSLRB 18, *Reddy v. Office of the Superintendent of Financial Institutions*, 2012 PSLRB 94, *Canada (Attorney General) v. Frazee*, 2007 FC 1176, *Financial Transactions and Reports Analysis Centre of Canada v. Boutziouvis*, 2011 FC 1300, and *Morissette v. Treasury Board (Department of Justice)*, 2006 PSLRB 10.

#### **IV. Reasons**

[23] Mr. Agbodoh-Falschau argued that he was dismissed for disciplinary reasons. The employer argued that it was in fact a dismissal for incompetence. I must begin by dealing with this question. If the dismissal was disciplinary, I will need to determine whether the employer was entitled and was justified to dismiss Mr. Agbodoh-Falschau. If I find that he was dismissed for incompetence, I will uphold the employer's objection

that an adjudicator does not have jurisdiction to hear this grievance, given that it involves a dismissal for incompetence.

[24] Subsection 209(1) of the *Act* restricts my jurisdiction to grievances of dismissal for incompetence involving employees in the core public administration and employees whose employer is one of the separate agencies referred to in paragraph 209(1)(d) of the *Act*. The CNSC is not one of those separate agencies. Subsection 209(1) of the *Act* reads as follows:

*209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*

*(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*

*(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*

*(c) in the case of an employee in the core public administration:*

*(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or,*

*(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or*

*(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*

...

*(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).*

[25] Mr. Agbodoh-Falschau argued that his dismissal for incompetence was disguised discipline. In *Boutziouvis*, at paragraph 58, the Court affirms that the concept of disguised discipline necessarily entails "... that an employer has engaged in a

camouflage, shame [sic] or ruse to make a termination appear to be something it was not.”

[26] I carefully reviewed the evidence submitted to me, and absolutely nothing in it would lead me to conclude that the employer camouflaged anything or that it attempted to deceive anyone to conceal a disciplinary measure when it dismissed Mr. Agbodoh-Falschau for incompetence. In no way does that mean that I find that Mr. Agbodoh-Falschau was incompetent. It simply means that the evidence convinced me that the employer dismissed him because it was of the opinion that he was incompetent. My role in this case is not to determine whether the employer or Mr. Agbodoh-Falschau was right on the issue of incompetence but rather to decide whether that is the real issue before me.

[27] Mr. Agbodoh-Falschau mentioned that the employer did not respect its own performance management policy. He also asserted that his work objectives were not clear and that the employer did not always provide feedback on his completed work. If the *Act* gave me the power to consider the fairness of a dismissal for incompetence by the employer, Mr. Agbodoh-Falschau’s points as advanced would be entirely relevant to such a determination, but that is not the issue.

[28] Contrary to what Mr. Agbodoh-Falschau suggested, the employer’s possible lack of rigour with respect to performance management and appraisal in no way means that the dismissal was disciplinary. I do not see any causal relationship in it. Nor do I see any such relationship between on the one hand the fact that the employer did not respond to two grievances and denied a pay increase based on performance problems and, on the other, a dismissal for disciplinary reasons.

[29] In general, the case law indicates that an employer’s intention is central to determining whether a disciplinary measure is at issue. No fact submitted to me could lead me to believe that the employer intended to discipline Mr. Agbodoh-Falschau. Furthermore, Mr. Leblanc testified that he had a good relationship with Mr. Agbodoh-Falschau, who did not contradict that assertion in any way.

[30] Therefore, nothing in the evidence would lead me to believe that the employer acted for disciplinary reasons. Although I am sensitive to Mr. Agbodoh-Falschau’s recriminations about how the employer managed his performance and evaluated him, I cannot conclude as a result that disciplinary measures were imposed. In addition, it



would appear that Mr. Agbodoh-Falschau did not find that disciplinary measures had been imposed until the Registry returned his documents of February 28, 2013, when he referred his grievance against his dismissal for incompetence to adjudication. Although his grievance seemed to refer to retaliatory measures, only after he was informed that he could not refer such a grievance to adjudication did he directly allege that he had been subject to a disciplinary dismissal.

[31] The facts in this case differ significantly from those in the decisions to which Mr. Agbodoh-Falschau referred me. In *Gauthier*, the evidence showed that the employer had taken a disciplinary approach from the beginning so that the employee would correct her improper conduct. Ultimately, it changed its approach. That is not so in this case. In *McMullen*, the issue was whether the initial grievance involved disciplinary measures and not whether the employer's decision was disciplinary. In *Nnagbo*, the grievance challenged a termination for incompetence and did not involve a disguised disciplinary measure, as alleged by Mr. Agbodoh-Falschau. Therefore, I do not have jurisdiction to hear this grievance.

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

*(The Order appears on the next page)*

**V. Order**

[33] I order the file closed.

January 14, 2014.

PSLRB Translation

**Renaud Paquet,  
adjudicator**