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Citation: 2014 PSLRB 81



*Public Service Labour
Relations Act*

Before an adjudicator

BETWEEN

MARC-ANDRÉ BERGERON

Grievor

and

CANADIAN SECURITY INTELLIGENCE SERVICE

Employer

Indexed as

Bergeron v. Canadian Security Intelligence Service

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Marie-Lise Desrosiers, counsel

For the Employer: Karl Chemsî, counsel

Heard at Montreal, Quebec,
March 31 to April 4 and August 11 to 13, 2014.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] Marc-André Bergeron (“the grievor”) was an intelligence officer with the Canadian Security Intelligence Service (“CSIS” or “the employer”). Mr. Bergeron was hired in that position on January 6, 2003, and terminated on October 2, 2007, three months before the end of his five-year probationary period. On October 16, 2007, Mr. Bergeron filed a grievance against his termination, which he claimed was unfair and contrary to CSIS policies. The employer dismissed Mr. Bergeron’s grievance; he referred it to adjudication on January 17, 2008.

[2] The CSIS is a separate employer. By exception, labour relations at the CSIS are not subject to the *Public Service Labour Relations Act* (“the Act”), except for grievance adjudication. Under section 8 of the *Canadian Security Intelligence Service Act*, the CSIS establishes its own procedures respecting the conduct and discipline of its employees. Intelligence officers are not unionized, but they may be represented by their employee association during the grievance process.

[3] The employer terminated Mr. Bergeron on the grounds that he did not have the skills required of a CSIS intelligence officer. The essentials of the October 2, 2007, termination letter read as follows:

[Translation]

...

This is pursuant to the performance evaluation report for September 5, 2006, to January 6, 2007, and to the special evaluation reports for January 7, 2007, to May 7, 2007, and for May 8, 2007, to September 8, 2007.

Those evaluations were done to measure your performance and allow you to correct your shortcomings. However, despite all the assistance and the many opportunities that you were given to improve, your performance remains below the Service’s standards. Thus, I conclude that you do not have the skills required of a CSIS intelligence officer. Consequently, and in accordance with CSIS policy HUM-407, paragraph 7.3, I regret to inform you of the termination of your employment during the probationary period, effective today. However, you will be paid until October 5, 2007.

...

[4] The job offer letter, dated December 10, 2002, stated that Mr. Bergeron would be on probation for a period of five years, i.e., for the duration of the Intelligence Officer Career Progression program (IOCP). The job offer letter indicated that the IOCP includes an initial 14 weeks of training, a 3-year assignment to headquarters and a 5-week investigator course, followed by a transfer to a position at a regional office. Mr. Bergeron signed the offer letter on December 10, 2002, indicating that he accepted all its terms.

[5] At the hearing, the employer objected to an adjudicator's jurisdiction to hear Mr. Bergeron's grievance on the grounds that his employment was terminated during probation for employment-related reasons. I took the employer's objection under reserve and heard evidence on the termination and grievance.

[6] The grievance was heard for the first time at adjudication. In *Bergeron v. Canadian Security Intelligence Service*, 2011 PSLRB 103, the adjudicator allowed the grievance and revoked the termination. The employer filed an application for judicial review before the Federal Court, which allowed it and referred the grievance back to a different adjudicator to be decided in accordance with the Court's reasons (see *Canada (Attorney General) v. Bergeron*, 2013 FC 365). I will return later on to the Court's decision and reasons.

II. Summary of the evidence

[7] For national security reasons, the names of witnesses and persons involved in this grievance have been protected, except those of Mr. Bergeron and of the person who signed the termination letter.

[8] The employer called Michel Coulombe, "AB," "CD," "EF" and "GH" as witnesses. Mr. Coulombe signed the termination letter. At that time, he was the director general of the CSIS's Quebec Region. From 2003 to 2007, AB was an assistant section head and a section head. From 2004 to 2005, he supervised Mr. Bergeron. From 2002 to 2006, CD was operational sections supervisor. He supervised Mr. Bergeron from early 2005 to July 2006, apart from a few weeks in early 2006 when Mr. Bergeron was in training. EF held a supervisor position from 1999 to 2011. He supervised Mr. Bergeron from September 5, 2006, to October 2, 2007. From July 2006 to December 2008, GH was a section head at the Montreal office. At that time, he was responsible for three operational modules, including the one EF supervised in which Mr. Bergeron worked.

[9] Mr. Bergeron testified. He also called “JK” as a witness, who worked at the CSIS from 2002 to 2010. When Mr. Bergeron’s employment was terminated, JK was the regional representative for the association that represented intelligence officers.

[10] In addition to the testimonial evidence, the parties filed a large quantity of documents, including several employer human resources policies, Mr. Bergeron’s performance evaluations and a large number of emails about his work. In my summary of the evidence, I will address only the essential elements when dealing with the grievance before me. I will first present the evidence about CSIS human resources policies and procedures. I will then successively summarize the evidence for each of Mr. Bergeron’s performance evaluation periods.

A. The CSIS’s human resources policies

[11] The employer tendered as evidence several of its human resource policies and procedures, including an employee conduct policy (HUM-201); the 2003 and 2007 versions of the breaches of conduct and disciplinary measures policy (HUM-205); the 2001 and July 18, 2007, versions of the performance evaluation program (HUM-306); the 2002 and July 18, 2007, versions of the procedures for performance evaluations (HUM-306-1); the appointments policy (HUM-406); the June 2003, December 2003, January 2006 and March 2006 version of the recruitment policy (HUM-407); the 2002 and 2007 versions of the grievance policy (HUM-502); and other policies about classified information, sick leave, Internet use and Internet accounts.

[12] According to the performance evaluation program (HUM-306), supervisors must establish a work plan with each employee that reflects work objectives and expected performance levels. They must also regularly discuss performance with each employee. Employees must also discuss their performance with their supervisors. Annual formal performance evaluations are conducted around hiring date anniversaries. The program states that supervisors can take notes during the year for performance evaluation purposes. They then either destroy those notes or attach them to each employee’s performance evaluation report. The July 2007 version of the program also states that if the overall average evaluation rating obtained by an employee is less than 2.5, the supervisor’s notes are to be kept for at least one year after the evaluation report is prepared.

[13] The HUM-306 program states that employees are evaluated based on the objectives set at the start of the year and on the qualifications for their positions and those of the organization. For each element evaluated, employees receive a mark from 1 to 4, with a mark of 1 indicating that they unequivocally do not meet expectations, 2 indicating that they must make progress to meet requirements or objectives, 3 indicating that they fully meet the requirements and have met all objectives, and 4 indicating that they have continuously exceeded objectives and requirements.

[14] The HUM-306 program states that the performance level required for all CSIS employees is a minimum overall average rating of 2.5. It also states that a mark of less than the overall average of 2.5 does not meet the set standards and may result in termination due to unsatisfactory performance. According to the 2002 version of the program, employees may appeal to a review committee if their general average is less than 2.5. According to the 2007 version of the program, employees with a general average of less than 2.5 can instead file a grievance.

[15] According to the program, a notice of shortcomings can be issued to employees whose performance does not meet the established performance level and who do not improve after being subjects of special reports. A special report must be prepared, among other things, when an employee may be terminated or demoted for inadequate performance.

[16] The 2002 version of the HUM-306-1 procedures for performance evaluations sets out the details that must be included in a notice of shortcomings, such as facts about the employee's weaknesses, measures to be taken to improve performance, and a statement that other measures may be taken, including termination, if the employee's performance does not improve. The July 2007 version adds certain other clarifications. According to the 2002 version, the notice of shortcomings is to be preceded by at least one special evaluation report, while the July 2007 version indicates that it is to be preceded by at least two special reports. The HUM-306-1 procedures also state that the initial version of an evaluation report is to be given to the employee so that he or she can provide comments. The evaluation is discussed during a meeting with the employee. Once completed, the evaluation report is forwarded to the human resources branch.

[17] Policy HUM-407, about recruitment, states that all intelligence officers who participate in the IOCP are subject to a five-year probation. During the probationary

period, employees may be judged unsuitable for the duties of their positions due to substandard performance, poor quality of work or bad attitudes. The director general can then decide to reject the employee if efforts to help him or her improve are unsuccessful. Mr. Bergeron testified that he understood that he was on probation for five years and that he knew what it meant.

[18] Policy HUM-502, about grievances, encourages employees to discuss their concerns informally. When the issues raised are not resolved satisfactorily, employees may file grievances. They are then entitled to representation from someone appointed by the association of CSIS non-unionized employees. Mr. Bergeron testified that he was aware of recourse that could be used in the event of a disagreement with the employer. JK, the association's regional representative from 2006 to 2008, stated that disputes between officers and the employer are settled amicably after discussion, without the need to file grievances. In his opinion, employees abstain from filing grievances because of no legal basis to support them and because they generally fear that filing a grievance or challenging a performance evaluation will compromise their careers. JK's opinion is that the employer looks very poorly on grievance filings.

[19] For dealing with this grievance, there seems no need to comment on or summarize the other policies that the parties adduced in evidence.

B. Mr. Bergeron's performance

[20] Over the 57 months in which Mr. Bergeron worked for the CSIS, it formally evaluated his work performance 7 times and carried out 2 other evaluations after he participated in the new officers' training in 2003 and in the investigators' training in 2006. During those two training sessions, the employer concluded that Mr. Bergeron met all established training objectives. However, it stated in the 2006 training evaluation that he had to improve his interview techniques, judgment and self-confidence.

[21] In the following paragraphs, I will summarize the evidence presented to me for each of Mr. Bergeron's performance evaluation periods.

1. April 11, 2003, to January 6, 2004

[22] After his initial training period, Mr. Bergeron was assigned to an analyst position with the Analysis and Production Branch at CSIS headquarters. He met all

work objectives and fulfilled all expectations. He obtained a rating of 3 for achieving objectives, for each key qualification and for those related to the position and the organization.

[23] In his testimony, Mr. Bergeron briefly explained the work he did during this period. The employer called no witnesses to comment on Mr. Bergeron's performance during this period.

2. January 6, 2004, to January 6, 2005

[24] During the first two months of this period, from January 6, 2004, to March 7, 2004, Mr. Bergeron remained in the same position that he held during the preceding period. His supervisor at that time wrote two paragraphs in the section for supervisor's comments. He expressed complete satisfaction with Mr. Bergeron's performance. AB completed the rest of the evaluation; he supervised Mr. Bergeron from March 8, 2004, to January 6, 2005. In addition, he was the only one who assigned the ratings in the evaluation report.

[25] For this evaluation, Mr. Bergeron obtained a rating of 2 for meeting work objectives. He met 2 of 10 objectives, while receiving "partially met" or "to be improved" for the other 8. For essential qualifications and those related to the position or organization, Mr. Bergeron obtained an overall average of 2.3. In his comments, AB wrote that Mr. Bergeron needed to make efforts in communication, self-confidence, professionalism, planning, analysis, and, primarily, judgment. He also wrote that the evaluation was to be interpreted as a severe warning. To support his comments, AB provided some examples of situations in which shortcomings appeared in Mr. Bergeron's performance. He reiterated some of those examples in his testimony.

[26] Mr. Bergeron did not challenge that performance evaluation by appealing to the review committee. However, he wrote in the employee's comments section that he found it severe, and he provided certain clarifications. He explained in his testimony that the unit in which he worked at that time was extremely busy and that he worked on very important security files. AB confirmed those statements but indicated that the situation was the same for all the analysts in the section, most of whom were relatively new to the CSIS. He also testified that he spoke to Mr. Bergeron several times to help him improve his performance. He added that, in his many years of supervising employees, he had never assigned an overall average rating of less than 2.5.

Mr. Bergeron admitted that AB had already advised him of his shortcomings at work and that he spoke to him right away if problems with his performance arose.

3. January 17, 2005, to April 5, 2005

[27] Given the poor results from the preceding evaluation, the employer decided that Mr. Bergeron's performance would be re-evaluated three months later in a special performance evaluation. In fact, the evaluation was for a period of slightly more than three months after January 17, 2005, the date on which a new supervisor, CD, assumed his position. Mr. Bergeron was absent for a few weeks during this period due to a vacation and a death in the family.

[28] Before his departure from the section where Mr. Bergeron worked, AB prepared a work plan for Mr. Bergeron, for him to meet the necessary requirements. CD prepared a special evaluation of Mr. Bergeron's performance based on the results achieved for that plan.

[29] Of the six established work objectives, Mr. Bergeron achieved three and partially achieved the other three. He obtained an overall average rating of 2.6. He obtained a rating of 3 for 6 of the 10 required qualifications but a rating of 2 for the other 4, i.e., judgment, self-confidence, planning, organizing, and reasoning and analysis. The supervisor, CD, noted in the evaluation that Mr. Bergeron had improved his performance but that shortcomings still needed correcting for him to be a fully functional intelligence officer. CD also wrote that he trusted that Mr. Bergeron could achieve his full potential over the next few months. AB, who became the supervisor's, CD's, superior, wrote that he approved CD's evaluation and that Mr. Bergeron needed more consistency in his work quality and more thoroughness.

[30] Mr. Bergeron signed the report and indicated that he agreed with the elements it raised. He testified that CD spoke to him directly when CD noted shortcomings in his work. CD told him of his dissatisfaction, and discussions with CD helped him improve his work performance.

4. April 6, 2005, to December 6, 2005

[31] This was an annual evaluation following the special evaluation of early April 2005. CD prepared it. Mr. Bergeron continued to report to CD throughout 2005.

[32] Of the 10 established work objectives, Mr. Bergeron achieved 5 and partially achieved the other 5. He obtained an overall average rating of 2.5. He obtained a rating of 3 for 5 of the 10 required qualifications but obtained a rating of 2 for the other 5, i.e., judgment, professionalism, knowledge of duties, communication, and reasoning and analysis. The supervisor, CD, noted that, after two years in an operational module, Mr. Bergeron still had some shortcomings in his work and a certain inconsistency in his work quality. He also wrote that Mr. Bergeron needed to improve in the areas of judgment, analysis, communication and professionalism. He illustrated his statements with examples.

[33] Mr. Bergeron wrote in the report that its contents were the subjects of meaningful discussions with his superiors. He stated that, overall, he was satisfied with the ratings given to him, except the ratings of 2 for communication and for reasoning and analysis. He also expressed his opinion on CD's examples, with which he did not completely agree.

5. September 5, 2006, to January 6, 2007

[34] A gap of almost nine months exists between the evaluation prepared in December 2005 and the one examined in this section. First, from January 9, 2006, to February 24, 2006, Mr. Bergeron took the investigator's course, for which he was evaluated (see paragraph 20). At the end of the investigator's course, he returned to work at headquarters as an analyst in the same position he held before his investigator training. He remained in that position until mid-June 2006 and reported to CD. No performance evaluation was prepared for those roughly four months. Then, in early July 2006, after a period of annual leave, Mr. Bergeron was transferred to an investigator position in Montreal. An investigator then supervised him. That person was an acting supervisor until August 31, 2006, and wrote a few lines in the evaluation report ending on January 6, 2007, listing only the duties Mr. Bergeron carried out in July and August 2006.

[35] EF was assigned to the Montreal office as a section supervisor beginning on September 5, 2006. His section included two analysts and five investigators, including Mr. Bergeron. Shortly after his arrival, he met with each employee. He presented his general expectations and told the investigators that he wanted to see them carrying out interviews in the field. When he checked Mr. Bergeron's personnel file, EF found that no work objectives had been established for him since his arrival at the Montreal

office, as he had reported to an acting supervisor until then. Thus, EF, GH (the team leader) and Mr. Bergeron agreed on October 11, 2006, to set three specific work objectives for the few months that remained in the performance evaluation period.

[36] EF testified that he found that Mr. Bergeron did not have an intelligence officer's requirements. His ability to gather facts, his judgment and his thoroughness were questionable. EF testified that he regularly advised Mr. Bergeron of the shortcomings that he noted in his work. In September 2006, EF told him that his production was insufficient. On September 25, 2006, EF also asked Mr. Bergeron to email his work objectives to him each week. Mr. Bergeron tendered as evidence what he sent to EF each week. According to Mr. Bergeron, EF gave him very little feedback on what he sent each week from September 2006 to September 2007.

[37] Mr. Bergeron partially met two of the three established work objectives and did not meet the third. He obtained an overall average rating of 2.4, receiving three ratings of 3 and 8 ratings of 2. In the report text, EF provided examples to illustrate why he had assigned ratings of 2 for judgment, initiative, professionalism, knowledge of duties, planning and organization, reasoning and analysis, and investigative techniques. GH, who was then EF's immediate supervisor, stated that he agreed with the performance ratings assigned to Mr. Bergeron.

[38] The evaluation report indicates that Mr. Bergeron expressed interest in a transfer to British Columbia to join his spouse. EF recommended that he remain in Montreal for at least one more year. EF also recommended that Mr. Bergeron take training on managing his work time.

[39] In the section provided for that purpose, Mr. Bergeron indicated that he did not agree with EF's evaluation of his performance and that he considered it too severe and very incomplete. However, he did not challenge that evaluation with the review committee. He complained that most of his work was not mentioned; nor were the initiatives and efforts made in December 2006. He also complained that no mention was made of the positive elements of his work and that the verbal comments he made following the draft evaluation were ignored. At the hearing, he testified that he was not advised in advance of the negative points in the evaluation report. He also testified that no concrete measures were taken to help him improve his performance, that he received very little feedback and that he was not coached. Mr. Bergeron stated that he

had not had a good relationship with EF. However, he had had a good relationship with his other supervisors and with GH.

6. January 7 to May 5, 2007

[40] Since Mr. Bergeron received an overall average rating of less than 2.5, the employer decided to subject him to a 3-month special evaluation, which would have had to be completed in early April 2007. However, that date was pushed back a month due to Mr. Bergeron's sick leave from February 15 to March 13, 2007.

[41] As planned, Mr. Bergeron received external training on managing time and priorities. At the end of the preceding evaluation period, the employer had set three objectives for Mr. Bergeron for the three-month special evaluation. Two of them were not met, but the third was. Mr. Bergeron received an overall average rating of 2.3, receiving 4 ratings of 3, 7 of 2, and 1 of 1, for judgment. In the report text, EF provides examples to illustrate why he assigned ratings of 2 for initiative, professionalism, team spirit, knowledge of duties, planning, organizing and investigative techniques. He also explained why he assigned a rating of 1 for judgment.

[42] GH, who was still EF's supervisor, wrote two full pages of comments in Mr. Bergeron's performance evaluation. He noted that he met with Mr. Bergeron on June 8, 2007, one month after the end of the evaluation period, to discuss his performance with him. At that time, he told the grievor that his performance was unsatisfactory and that he needed to improve, or a notice of shortcomings would be issued to him, and if the situation continued after that notice, measures would be taken, including possible termination. He concluded his written comments by noting that he supported EF's evaluation and that he expected Mr. Bergeron to make the efforts required to achieve the established work objectives. GH also refused to grant Mr. Bergeron a pay increase.

[43] Mr. Bergeron noted in the report that he found it unfortunate that it contained only one positive sentence. He noted that some events were poorly addressed or poorly explained. He did not agree with some of EF's comments or examples used to justify the ratings. However, he did not challenge the evaluation before the review committee. He testified that it was the first time that EF had advised him of some of the negative criticisms in the evaluation report and that the report's content did not

accurately reflect the work that he had done. Mr. Bergeron's opinion was that he was treated unfairly.

[44] After receiving the first version of the evaluation report, Mr. Bergeron testified that he submitted several comments to have changes made to the report. EF then agreed to remove a negative comment that was unfounded, but he also removed a very positive comment about Mr. Bergeron's performance.

[45] In the evaluation, Mr. Bergeron reiterated his interest in a transfer to British Columbia to join his spouse. His request was refused. GH explained to him that employees are not normally transferred before completing two years in their positions and that operational needs did not justify a transfer. In addition, the grievor's performance did not allow granting his request.

7. May 8, 2007, to September 8, 2007

[46] Given that Mr. Bergeron obtained an overall average rating of less than 2.5, the employer decided to subject him to a 3-month special evaluation, which was modified to 4 months to reflect the holiday period. However, the evaluation report was not issued until October 2, 2007, the date on which Mr. Bergeron was terminated.

[47] At the end of the preceding evaluation period, the employer set five objectives for Mr. Bergeron for the special evaluation. One of them was partially met, while the other four were not. Mr. Bergeron obtained an overall average rating of 2.2, receiving 6 ratings of 3, 2 of 2 and 4 of 1. In the report text, EF provides examples to illustrate why he assigned ratings of 1 or 2 for judgment, professionalism, team spirit, knowledge of duties, reasoning and analysis, and investigative techniques. EF testified that he took notes during the evaluation period but that he destroyed them after preparing the report.

[48] The reviewing supervisor wrote that Mr. Bergeron seemed to understand the seriousness of the situation in the last evaluation and that he expected considerable improvement on his part. He also wrote that Mr. Bergeron was unable to differentiate between fact and fiction and to report information as presented, which is essential in an intelligence service.

[49] GH wrote that Mr. Bergeron did not meet the established objectives in the last two special evaluation reports. That led him to conclude that the grievor's present and

past performance no longer allowed him to participate in the IOCP, the training program for new officers, and that, since he was on probation for the duration of the IOCP, he recommended the grievor's termination. GH acknowledged that the employer did not issue a notice of shortcomings to Mr. Bergeron. He testified that he saw no improvement in the grievor's performance after the earlier special evaluation and that he could not continue that way. He explained that he opted for two special evaluations instead of one followed by a notice of shortcomings. GH testified that, in all his years with the CSIS, he never saw a case like Mr. Bergeron's and that the decision to terminate him was not made lightly.

[50] Contrary to what was done in the other evaluations, Mr. Bergeron was not sent a preliminary copy of the report, and he was not invited to comment on the report, which was given to him in an envelope when he was terminated. Therefore, he was unable to write comments and sign the report. In addition, the report was not sent to the human resources branch and signed by someone from that branch.

[51] Mr. Bergeron testified that he did not agree with the contents of this evaluation. However, he did not file a grievance to challenge its contents. He stated that, during that period, he had little interaction with EF. According to him, EF apparently had even told him that he was on the right path.

[52] Mr. Coulombe, the regional director at that time, wrote in the report that Mr. Bergeron did not meet CSIS standards and that he had decided to terminate the grievor. Mr. Coulombe testified that he made that decision based on all the performance evaluations conducted for Mr. Bergeron, which demonstrated that he had shortcomings in several areas of his work. According to Mr. Coulombe, Mr. Bergeron did not have the qualities required of an intelligence officer.

[53] The meeting in which Mr. Bergeron was terminated lasted only about 15 minutes. Mr. Bergeron testified that he was very surprised when he was told of his termination. He did not expect it in any way.

III. Summary of the arguments

A. For the employer

[54] The employer noted that in 2013 FC 365, the Federal Court quashed the adjudicator's decision in 2011 PSLRB 103. The Court found that the adjudicator erred

in law, which influenced her interpretation of the facts. The Court examined those facts, evaluated them and issued a decision on them. According to the Court, the employer terminated Mr. Bergeron for employment-related reasons.

[55] The employer reiterated its objection to an adjudicator's jurisdiction to deal with this grievance, which is about a termination during probation. Nothing in the *Act* allows referring such a grievance to adjudication. The adjudicator's jurisdiction is limited to ruling on a grievance about a disciplinary measure that resulted in a termination, demotion, suspension or financial penalty.

[56] During a probationary period, the employer has the prerogative to monitor an employee and determine if that employee is suitable to the position. For an intelligence officer, that period lasts five years because it involves complex work that implicates national security. The employer does not need to justify its decision to terminate an employee. It need only present minimal evidence that the grounds for termination were employment-related. Once that is done, the burden of proof rests on the employee, who must then demonstrate that the employment-related grounds were only a sham or a camouflage or were invoked in bad faith.

[57] The employer noted that Mr. Bergeron knew that he was on probation and that he should have known that his employment was at risk if performance problems arose. All the supervisors for whom he worked noted shortcomings in his performance. In January 2005, he received a rating of less than 2.3; the employer could have terminated him but decided to give him another chance. In subsequent evaluations, Mr. Bergeron's performance barely improved, and the employer continued to note shortcomings.

[58] After the last evaluation and the review of the grievor's file, Mr. Coulombe found continuing was no longer worth it and decided to terminate Mr. Bergeron. He concluded that Mr. Bergeron was not suited to the position.

[59] The employer acknowledged that it did not issue Mr. Bergeron a notice of shortcomings. According to the employer, its policy does not require it to but instead gives it discretion to. Moreover, the policy's spirit is that employees not be surprised and that they be advised of shortcomings, to correct them. Mr. Bergeron was advised of his shortcomings on several occasions. When Mr. Coulombe decided to terminate

Mr. Bergeron, he was convinced that Mr. Bergeron had had the opportunity to improve and that a notice of shortcomings would not have changed anything.

[60] The employer referred me to the following decisions: *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72; *Chaudhry v. Canada (Attorney General)*, 2007 FC 389; *Chaudhry v. Canada (Attorney General)*, 2008 FCA 61; *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.); *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529; *Canada (Treasury Board) v. Rinaldi* (1997), 127 F.T.R. 60; *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109; *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33; *Boyce v. Treasury Board (Department of National Defence)*, 2004 PSSRB 39; *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33; *Bilton v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 39; *Archambault v. Canada Customs and Revenue Agency*, 2003 PSSRB 28; *Archambault v. Canada (Canada Customs and Revenue Agency)*, 2005 FC 183; *Canada (Attorney General) v. Basra*, 2008 FC 606; *Canada (Attorney General) v. Frazee*, 2007 FC 1176; *Dalen v. Deputy Head (Correctional Service of Canada)*, 2006 PSLRB 73; *Rousseau v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 91; *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139; *Parsons v. Deputy Head (Department of National Defence)*, 2012 PSLRB 5; *Raveendran v. Office of the Superintendent of Financial Institutions*, 2009 PSLRB 116; *Ondo-Mvondo v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 52; *Jacmain v. Canada (Attorney General)*, [1978] 2 S.C.R. 15; and *Olson v. Canada (Attorney General)*, 2008 FC 209.

B. For Mr. Bergeron

[61] Mr. Bergeron did not challenge the duration of the five-year probationary period. He also did not challenge the employer's suggested interpretation that the adjudicator does not have jurisdiction to intervene in its decision to terminate an employee during probation in situations in which the decision had employment-related grounds. However, he noted that the adjudicator must ask himself whether the employer's decision was made in bad faith or if it was a camouflage or sham.

[62] Mr. Bergeron arrived at the Montreal office in early July 2006, and EF arrived in early September 2006. From September 2006 to September 2007, Mr. Bergeron submitted objectives and results for his work to EF every week. In return, EF provided him with very little feedback, contrary to what he should have done as a supervisor.

[63] Mr. Bergeron argued that his termination was tainted by the employer's bad faith and that it did not follow its own policies. During the evaluation from January to May 2007, he asked that certain unfounded negative comments be removed. The employer did so, but it also removed an important positive comment. From May 2007 to September 2007, EF told Mr. Bergeron that everything was going well. He did not regularly discuss the grievor's performance with him. However, the performance evaluation that he prepared was negative and resulted in the grievor's termination. That evaluation did not respect the employer's policies. It was not submitted to Mr. Bergeron in advance so that he could provide his comments. It was not discussed with him. No work plan was made. The employer did not help Mr. Bergeron as it should have and as it states in the termination letter. Contrary to policy, EF did not keep the notes he had made during the evaluation period, which raises a significant transparency problem. Finally, the human resources branch did not sign the evaluation report.

[64] The employer's policies state that a notice of shortcomings indicating the employee's weaknesses and the measures to be taken to improve performance must be sent to the employee who is experiencing performance problems. Two special evaluation reports are supposed to precede such notice. If performance does not improve after the notice, the employee can be terminated. Mr. Bergeron noted that the employer did not respect that procedure in any way. He never received a notice of shortcomings, contrary to the policy and to what GH wrote in the May 2007 evaluation report. The employer waived its discretionary authority to issue or not issue a notice of shortcomings.

[65] All the employer's breaches of its own policies translate into bad faith on its part and justify the adjudicator's jurisdiction to deal with Mr. Bergeron's grievance and to overturn his termination.

[66] Mr. Bergeron referred me to the following decisions: *Archambault (2003)*; *Archambault (2005)*; *Rousseau*; *Raveendran*; *Dhaliwal*; *Fell v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 2; *Matthews v. Canadian Security Intelligence Service*, PSSRB File No. 166-20-27336 (19970305); *Canada (Attorney General) v. Matthews*, [1997] F.C.J. No. 1692 (T.D.)(QL); *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119); *Labrèche v. Treasury Board (Department of External Affairs)*, PSSRB File Nos. 166-02-19920 and 19986 (19901213); and *Slattery v.*

Communications Security Establishment, Department of National Defence, PSSRB File No. 166-13-17850 (19900312).

IV. Reasons

[67] The case law is unanimous on this issue. Adjudicators do not have jurisdiction to rule on the fairness of a termination effected during probation. Their jurisdiction is limited solely to grievances filed for the reasons listed in subsection 209(1) of the Act, which 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.

[68] Mr. Bergeron is not covered by a collective agreement (209(1)(a)). No mention is made in his grievance or in the adduced evidence that any disciplinary action was taken against him (209(1)(b)). Finally, the CSIS is not part of the core public administration (209(1)(c)) and is not a separate agency designated under paragraph 209(1)(d), cited earlier. Thus, based solely on those points, an adjudicator does not have jurisdiction to hear his grievance about being terminated during probation.

[69] That lack of adjudicator jurisdiction does not mean that the adjudicator must necessarily refuse to examine the facts surrounding the termination under the principle that form should not prevail over substance. Just because the employer calls it a termination during a probation does not mean that it actually is a case of termination during probation. The employer might have acted in bad faith, used a sham or camouflaged another form of termination (see *Leonarduzzi*).

[70] An employer that alleges that it terminated an employee during probation does not need to convince an adjudicator that its decision was fair. It need only produce a minimum of evidence that its decision was related to the employment and not to something else. On that point, the Court stated the following in *Leonarduzzi*:

...

[42] The respondent submits the employer must make a prima facie case that the grievor was terminated for just cause. This is not so. A distinction must be made between an employment related reason and "just cause". In Canada (Attorney General) v. Penner, [1989] 3 F.C. 429 (F.C.A), a case involving the jurisdiction of the Board to hear a grievance of a probationary employee terminated for cause under section 28 of the PSEA. Marceau J.A. stated at page 438:

Other adjudicators have adopted quite a different attitude and accepted that they had no jurisdiction to inquire into the adequacy and the merit of the decision to reject, as soon as they could satisfy themselves that indeed the decision was founded on a real cause for rejection, that is to say a bona fide dissatisfaction as to suitability. In Smith (Board file 166-2-3017), adjudicator Norman is straightforward:

In effect, once credible evidence is tendered by the Employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes shuddering to a halt. The adjudicator, at that moment, loses any authority to order the grievor reinstated on the footing that just cause for discharge has not been established by the Employer. [emphasis mine]

[43] Justice Marceau held it was the view Adjudicator Norman expressed above which was the only one authorized by the Supreme Court of Canada's decision in Re Jacmain v. Attorney General (Canada) et al., [1978] 2 S.C.R. 15 and the only one the legislation really supports.

[44] Had the adjudicator demanded the employer demonstrate just cause for dismissal, I would have concluded a jurisdictional error since such a requirement would be

contrary to a plain reading of the applicable legislation as viewed in Penner, supra.

...

[Emphasis in the original]

[71] Once the employer demonstrates employment-related grounds for terminating an employee, the burden of proof then falls on the employee to demonstrate that the termination was a sham or camouflage or was made in bad faith (see, among others, the Federal Court's decisions in *Archambault* or *Bergeron*). Applying that same logic to this case, the Federal Court stated the following in *Bergeron*, at para 41:

[41] If CSIS has indeed established an employment-related reason through the testimony of Mr. Coulombe, who decided to dismiss the respondent on the basis of repeated unsatisfactory performance evaluations, the onus shifts back to the respondent to prove that CSIS acted in bad faith or used a camouflage or sham in terminating his employment during the probationary period. However, the respondent's evidence was presented in support of the argument that his termination was unjust. That was not the respondent's burden; what he needed to demonstrate was that his termination was a camouflage or a sham, or had been carried out in bad faith (Owens, above).

[72] As the Federal Court suggested in *Bergeron*, I will examine, in order, whether the employer had employment-related grounds to terminate Mr. Bergeron during his probation and then whether its decision was made in bad faith or was a sham or a camouflage.

A. Was the termination during probation done for an employment-related reason?

[73] The employer presented coherent and consistent evidence that it had not been satisfied with Mr. Bergeron's performance and that that was why it terminated him before the end of his probationary period. The evidence showed that it had employment-related reasons.

[74] Mr. Coulombe decided to terminate Mr. Bergeron based on all the performance evaluations conducted about him that demonstrated that he had shortcomings in several aspects of his work. According to Mr. Coulombe, Mr. Bergeron did not possess the qualities required of an intelligence officer. In the termination letter, Mr. Coulombe indicated that his decision was based on the last three performance evaluations, while

in his testimony, he indicated instead that he had reviewed all the evaluations. That detail in no way makes me question the sincerity of Mr. Coulombe's testimony that his opinion was that shortcomings existed in Mr. Bergeron's work that would justify terminating him.

[75] Apart from the first performance evaluation, for April 2003 to January 2004, the employer noted fairly significant shortcomings in Mr. Bergeron's performance for each evaluated period.

[76] From January 2004 to January 2005, Mr. Bergeron met only 2 of 10 work objectives. He received an average rating of 2.3, which is less than the minimum average rating of 2.5 that the employer required. AB testified that in his years of supervising employees, he has never assigned an overall average rating lower than 2.3. Mr. Bergeron could have asked a review committee to review his evaluation, but he did not. Certainly, based on the evidence, the CSIS looked down on filing grievances or, in this case, requesting reviews. However, the fact remains that Mr. Bergeron could have used those recourses for that period and for the others in which he received unsatisfactory evaluations.

[77] After the January 2005 evaluation, the employer conducted a special evaluation in April 2005. Mr. Bergeron then received an overall rating of 2.6, barely above the minimum rating of 2.5. CD then noted that Mr. Bergeron still had shortcomings to correct to be fully functional as an intelligence officer.

[78] In the December 2005 evaluation, Mr. Bergeron received an average rating of 2.5, which was the CSIS's minimum requirement to avoid a special evaluation. He obtained a rating of 3 for 5 of the 10 required qualifications but obtained a rating of 2 for the other 5, i.e., judgment, professionalism, knowledge of duties, communication, and reasoning and analysis. It must be remembered that a rating of 2 means that an employee must make progress to achieve the employment objectives. CD noted that Mr. Bergeron still had shortcomings in his work and that he needed to improve his judgment, analysis, communication and professionalism.

[79] Mr. Bergeron's performance was not evaluated for approximately nine months after the December 2005 evaluation. Then he was evaluated for the four months ending January 6, 2007. Mr. Bergeron received an overall average rating of 2.4, with shortcomings noted in the areas of judgment, initiative, professionalism, knowledge of

duties, planning and organization, reasoning and analysis, and investigative techniques. GH, who was then EF's immediate supervisor, stated that he agreed with the performance ratings assigned to Mr. Bergeron. Mr. Bergeron indicated that he did not agree with the evaluation and that he considered it severe and very incomplete. However, he did not challenge that evaluation before the review committee.

[80] After the January 2007 evaluation, the employer conducted a special evaluation in May 2007. Mr. Bergeron then received an overall rating of 2.3, which was still below the minimum rating of 2.5. He then received ratings of less than 3 but received a rating of 2 in the areas of judgment, initiative, professionalism, team spirit, knowledge of duties, planning and investigative techniques. GH added to EF's comments about his dissatisfaction with Mr. Bergeron's performance. Mr. Bergeron indicated that he did not agree with the report. He could have asked the review committee to review his evaluation, but he did not.

[81] In September 2007, the employer conducted another special evaluation for a period of four months, due to leave during the holiday period, to reflect absences in May 2007. Mr. Bergeron received an overall average rating of 2.2, receiving ratings of less than 3 for judgment, professionalism, team spirit, knowledge of duties, reasoning and analysis, and investigative techniques. GH concluded that Mr. Bergeron's performance no longer allowed him to participate in the IOCP and recommended that the grievor be terminated because he was on probation. He testified that saw no improvement in Mr. Bergeron's performance after the earlier special evaluation. He also testified that, in all his years with the CSIS, he had never seen a case like Mr. Bergeron's. Mr. Bergeron did not have the opportunity to include his comments in the evaluation report, which he received only on termination. Mr. Bergeron testified that he did not agree with that evaluation but that he did not file a grievance to challenge it.

[82] The employer was not fully satisfied with Mr. Bergeron throughout almost his entire probation. After January 2004, over a period of three years, excluding the nine months for which no evaluation was made, the overall average of the 6 performance evaluations for Mr. Bergeron never achieved an average rating of 3, which is assigned to an employee who fully meets requirements. In addition, of those 6 evaluations, 3 were special evaluations.

[83] In summary, the evidence revealed that the employer was not satisfied with Mr. Bergeron's performance. Clearly, the employer demonstrated that the grounds for terminating Mr. Bergeron during probation were related directly to employment. The employer was not satisfied with several aspects of his performance and advised him as much formally in writing on several occasions, as part of the many evaluations of his performance.

B. Did the employer act in bad faith or use a sham or camouflage?

[84] Mr. Bergeron submitted that his termination was tainted by the employer's bad faith and that it did not follow its own policies. According to him, in his last year of employment, EF gave him very little feedback and did not regularly discuss his performance with him. Allegedly, EF said that everything was going well, but he prepared a negative evaluation, which led to the grievor's termination. Contrary to existing policies, that evaluation was not submitted to Mr. Bergeron in advance and was not discussed with him. EF did not keep his notes from the evaluation period, and the human resources branch did not sign the evaluation report. In addition, Mr. Bergeron did not receive a notice of shortcomings, contrary to policy and to what GH wrote in the May 2007 evaluation report. According to Mr. Bergeron, all those employer breaches of its own policies translate to bad faith on its part.

[85] I agree in part with Mr. Bergeron that the employer ignored some aspects of its own policies. However, I do not find that it acted in bad faith and even less that the termination during probation was a sham or a camouflage of another reason for the termination. As set out in the case law, good faith is assumed, and bad faith must be proved (see *Rousseau*, among others). It was not proved in this case.

[86] It is certainly possible that EF did not give Mr. Bergeron much feedback during his last year of employment. I do not find any bad faith by him or by the employer. The employer provided feedback to Mr. Bergeron on numerous occasions after January 2004, including, among others, in the six performance evaluations that were submitted to him and in which he was advised of his shortcomings. On reviewing the evidence, there is no doubt that Mr. Bergeron was aware that the employer was not satisfied with his performance.

[87] It is true that the employer did not issue a notice of shortcomings to Mr. Bergeron in October 2007 and that it decided instead to terminate him, thus

moving in a direction different from what GH had told him in the May 2007 evaluation. GH testified that he saw no improvement in Mr. Bergeron's performance and that he could not continue that way. Therefore, he changed his mind and recommended that Mr. Coulombe terminate Mr. Bergeron. Must that be considered bad faith? In light of the remaining evidence, I believe that GH and Mr. Coulombe acted in good faith. They decided to immediately terminate Mr. Bergeron's employment rather than give him another chance to improve his performance.

[88] In fact, based on the case law about terminations during probation, the employer could have ended Mr. Bergeron's employment after each of his performance evaluations as of January 2005, as it was unsatisfied with certain aspects of his work on each of those occasions. It was not necessary to complete two special evaluations and in addition to issue a notice of shortcomings.

[89] I have carefully studied each decision that Mr. Bergeron submitted to me. I find it important to distinguish this case from some of those decisions.

[90] In *Matthews*, the employer, also the CSIS, terminated the employee under its workforce adjustment policy. The employee claimed that it was a disguised disciplinary measure. The adjudicator found that the employer did not respect its own policies and procedures in any way. Based on all the evidence, he found that the employer acted in bad faith by arbitrarily getting rid of the employee under the pretext of a layoff and that, in fact, the employee had been terminated for disciplinary reasons. This case is a termination during probation. No evidence leads me to believe that the employer would have attempted to camouflage a disciplinary termination.

[91] In *McMorrow*, the adjudicator found that he had jurisdiction because the employer acted in bad faith by determining that the employee should have been terminated before the investigation that it requested was completed. Unlike in this case, the employee in *McMorrow* was not terminated during probation due to unsatisfactory performance but for disciplinary reasons. The employer decided to terminate the employee before it even received his version of the facts about the issue that could have been subject to disciplinary action.

[92] In *Dhaliwal*, the employer terminated the employee for a reason other than unsatisfactory performance, unlike in this case. Mr. Dhaliwal was terminated due to his use of sick leave and family leave, and the employer did not give him the opportunity

to explain why he took such leave. In addition, the employer approved, in advance, the leave that the employee was entitled to under the collective agreement. The facts in this case are completely different.

[93] In *Labrèche*, the adjudicator determined that the termination during probation was made in bad faith and that it amounted to a “discharge pure and simple.” The employer did not question the employee’s competency, ability or actions during his normal working hours. Instead, it did not accept that he could not work all the overtime asked of him. Thus, he became an “. . . undesirable whom it was necessary to get rid of.” The adjudicator found that the termination was made in bad faith and that it was a disciplinary discharge. The facts in this case are very different, and nothing in the evidence suggests the camouflage of a disciplinary discharge.

C. Conclusion

[94] The evidence revealed that Mr. Bergeron was on probation when he was terminated. He knew that he was on probation for five years until January 2008, and he knew what it meant. The employer was not satisfied with his performance and so advised him on numerous occasions in his performance evaluations. It did not believe that he had what was required to be an intelligence officer, and it terminated him.

[95] Certainly, the employer did not respect its own procedures in certain ways or, contrary to what GH had indicated, issue a notice of shortcomings to Mr. Bergeron. Nothing in the evidence leads me to believe that, by doing so, the employer acted in bad faith. Nor does anything in the evidence indicate to me that the employer used the termination during probation as a sham or a camouflage for another ground for termination. Nor did Mr. Bergeron submit that argument.

[96] For all of the above reasons, given that I do not have the jurisdiction to hear this grievance, I make the following order:

(The Order appears on the next page)

V. Order

[97] I order the file closed.

September 9, 2014.

PSLRB Translation

**Renaud Paquet,
adjudicator**