

Date: 20151209

File: 566-02-7427

Citation: 2015 PSLREB 94



Public Service Labour Relations Act

Before an adjudicator

BETWEEN

PHILIPPE D'AOUST

Grievor

and

**DEPUTY HEAD
(Department of Public Works and Government Services)**

Respondent

Indexed as

D'Aoust v. Deputy Head (Department of Public Works and Government Services)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Steven B. Katkin, adjudicator

For the Grievor: Himself

For the Respondent: Léa Bou Karam, counsel

Heard at Ottawa, Ontario,
December 8 to 11, 2014.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Philippe D'Aoust ("the grievor") was employed by Public Works and Government Services Canada ("the respondent" or "the employer") as an information officer at the CR-05 group and level in its Consulting, Information and Shared Services Branch located in Ottawa, Ontario. The employer's letter of offer of an indeterminate appointment dated September 23, 2010, which he signed on September 29, 2010, stated that his employment would begin effective October 4, 2010, and that he was subject to a probationary period of 12 months, in accordance with section 61 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

[2] By a letter from the employer dated April 4, 2011, the grievor was informed that he had been rejected on probation pursuant to subsection 62(2) of the *PSEA* and that his employment was terminated on payment of salary to the end of the following month, in lieu of notice.

[3] On May 11, 2011, the grievor filed a grievance contesting the termination of his employment and seeking reinstatement. He referred his grievance to adjudication as a disciplinary action resulting in termination pursuant to paragraph 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*).

[4] The employer raised a preliminary objection to an adjudicator's jurisdiction to hear and determine this matter, in which it submitted that the grievor's employment was terminated in accordance with the *PSEA*.

[5] The applicable collective agreement is that for the Program and Administrative Services Group concluded between the Treasury Board and the grievor's bargaining agent, the Public Service Alliance of Canada (the "union"), which expired on June 20, 2011.

[6] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a

grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that Act read immediately before that day.

[7] During the hearing, both parties presented oral testimony and documentary evidence in French and in English. In view of this, at the conclusion of the hearing, I inquired of the parties whether they had a preference as to the language of the original decision, given that all the Board's decisions are translated. Both parties informed me that they would be satisfied with a decision in either language.

II. Summary of the evidence

A. For the employer

[8] At the outset of the hearing, counsel for the employer indicated that the employer would establish that the grievor had been rejected while on probation and that following the grievor's testimony, it would decide whether to call reply evidence.

[9] The letter terminating the grievor's employment (Exhibit E-2) was signed by Renzo A. Benocci, who at the relevant time was the director of the employer's Canadian Industrial Security Directorate (CISD). The letter set out the following reasons for the termination:

...

This is further to the review of concerns relating to your conduct at work in the context of your probationary period.

The review and your admission have confirmed that you engaged in inappropriate behaviour towards a female colleague. The review also confirms that you continued to attempt to develop a romantic relationship with this female colleague despite her requests for you to stop and that you persisted in doing so contrary to the verbal and written instructions issued to you by your management.

...

[10] Mr. Benocci stated that he managed approximately 195 employees and that he had 4 managers reporting directly to him, including Mélanie LeBlanc, who was responsible for the personnel security screening division. Among the supervisors reporting to Ms. LeBlanc were Diane Guilbault and Lynne Fournier. The grievor

reported to Ms. Fournier, and his female colleague (“the co-worker”) reported to Ms. Guilbault.

[11] In the fall of 2010, Ms. LeBlanc made Mr. Benocci aware that the grievor had initiated unwanted attention towards a female co-worker. She was having discussions with the two employees and had told them that this conduct had to cease. Mr. Benocci felt that the matter was being handled.

[12] Subsequently, further reports were made of the grievor’s conduct, which had escalated to the point that Mr. Benocci took additional measures. He directed that the two employees be separated on different floors of the office building. He further directed that the grievor be instructed not to communicate with the co-worker and that if he required documents for work purposes, arrangements were to be made to bring them to him. Mr. Benocci said this was done to avoid coincidental contact between the employees and to avoid the grievor being accused of orchestrating encounters with the co-worker. He was aware that the supervisors were instructing the grievor to stay away from the co-worker and to avoid taking risks. Mr. Benocci said these arrangements were satisfactory to him so long as the employees followed the directions they had been given. He had heard of allegations made by the co-worker in a police report, but he never received confirmation of that.

[13] In March 2011, Mr. Benocci learned that the grievor had sent a dozen roses to the co-worker’s desk, to which was attached a note (Exhibit E-1) that read in part as follows:

[translation]

Guess who [name of co-worker] you were my friend. Contact me, yes, it's me. The one that takes risks for you ... still single in case others say otherwise.

[14] Mr. Benocci said that this contact was unwanted and, after reading the note, consulted labour relations advisors. The grievor was rejected on probation because he had been insubordinate in failing to follow management’s directives and because he had engaged in inappropriate behaviour in the workplace.

[15] In cross-examination, Mr. Benocci stated that the grievor’s actions were work-related as they took place on the employer’s premises during work hours.

[16] When asked by the grievor whether he was aware that the grievor had known the co-worker's father in years past or that the co-worker needed a kidney donation, Mr. Benocci replied that he had no knowledge of the grievor's or the co-worker's personal information.

[17] Mr. Benocci was cross-examined about a meeting held in March 2011, at which he had allegedly spoken about Tasers and during which the grievor had expected to be fired publicly. Mr. Benocci did not recall such a meeting and asserted that he would never have fired an employee publicly. Concerning Tasers, Mr. Benocci said that as director of the CISD, he would have referred to those devices as an example of equipment he could provide to staff.

[18] When asked whether he had reviewed the grievor's personnel file before making his decision, Mr. Benocci replied in the affirmative and added that he did not dispute that the employer might have lost a good employee.

[19] Mr. Benocci said that he did everything in his power to stop the grievor's unwanted attention. He gave strict instructions to the managers on how to stop the grievor's actions. He stated that the grievor's note to the co-worker that accompanied the roses he had delivered to her had crossed the line.

B. For the grievor

[20] The grievor's evidence was a blend of oral testimony and written statements. With respect to the latter, he filed two documents: the first was dated October 16 and November 17, 2010, and the second was dated February 8, 2011 (Exhibit G-1, Tab 20), each containing the grievor's version regarding certain events. Although titled "affidavit," these documents were not sworn statements. A separate document of some 60 pages titled "Detailed affidavit" was sworn before a Commissioner for Oaths on August 14, 2012. This document consisted primarily of a refutation of the co-worker's allegations, which he substantially repeated in oral testimony. The employer did not object to the grievor entering the three documents into evidence. As for the co-worker's allegations, they were contained in an unsigned handwritten statement (Exhibit E-5) in the form of an alleged police report that was entered into evidence during cross-examination of the grievor without objection by him. The co-worker did not testify.

[21] I pause here to say a word regarding the evidentiary weight to be attached to the co-worker's unsigned statement and the grievor's responses, which I note were provided to the employer during its investigation and which formed part of the background of its decision to reject the grievor on probation. Again, I note that these documents were entered into evidence without objection or qualification by either the grievor or the employer. The grievor's written statements, whether in affidavit form or not, were entered into evidence by the grievor himself and were direct rebuttals to the co-worker's statement. Further, the grievor's testimony largely consisted of a reiteration of the statements he had made earlier in these documents. In this case, I am not required to find the truth regarding the events in question. Rather, it is my role to decide whether or not the employer's actions are in fact a bona fide rejection on probation or whether they are in reality disguised disciplinary action, a sham or camouflage. In order to do so, I need not decide on what in fact occurred, but only need to decide whether the rejection on probation was a *bona fide* exercise of the employer's authority under the *PSEA*. The co-worker's statement and the grievor's statements in response were provided to the employer at the time of the events in question and form the backdrop to the action it took. In this sense, I do not need to decide which parts of the statements I believe and which I do not, as my role is to decide whether or not the employer reasonably and in reality proceeded to reject the grievor on probation.

[22] The grievor was initially placed with the employer as a call centre agent through a placement agency effective April 1, 2009, and worked in the same location after the employer hired him, effective October 4, 2010. He said that while with the placement agency, Ms. Guilbault supervised and trained him.

[23] The grievor said that Ms. Guilbault arranged for the co-worker to share his workspace and that that is when he began emailing her. He said that a colleague had told him to be careful but that he did not understand what that meant. He referred to an email containing an image of an arched bridge, which, when zoomed in, showed a couple engaging in a sex act on one of the arches (Exhibit E-4). When he opened it, the co-worker saw it and asked that he send it to her, which she then forwarded to other colleagues. He said that he had not searched for it on the Internet but that a former manager had sent it to him. He also referred to another email containing an image of deer copulating, which again the co-worker requested that he forward to her. He said that employees regularly sent each other emails with jokes and images.

[24] The grievor said that on one occasion, in the context of a workplace social activity, Ms. LeBlanc requested that employees bring photographs of themselves taken when they were younger. The grievor stated that it was at this point that he realized that he knew the co-worker's father from his archery club.

[25] According to the grievor's statement dated October 16, 2010, the co-worker had told the grievor that her birthday was in October, during hunting season. The grievor referred to this statement and testified that the co-worker had told him that she was not going hunting and so would be alone on her birthday. The grievor said that he offered to take her hunting for a day, to be followed by dinner in a restaurant. The co-worker was supposed meet him at his home, and they were then to go to his cottage, where he was to provide her the proper attire. In his written statement, the grievor said that he made a copy of his house key and offered it to the grievor, which she did not accept. The statement also indicates that the co-worker never showed up at his house. In testimony, he said that Ms. Guilbault intervened and that this was the reason why the co-worker did not go to his house.

[26] The grievor testified that Ms. Guilbault was a friend of the co-worker's mother and that she always controlled her. He alleged that on one occasion, while the co-worker was away from their workspace, he saw Ms. Guilbault place a box of condoms in the co-worker's purse. He testified that he did not say anything to Ms. Guilbault.

[27] The grievor said that approximately one week after he had obtained an indeterminate position in October 2010, he overheard Ms. Guilbault and the co-worker in conversation outside his workspace. He stated that the co-worker asked Ms. Guilbault, "Could Phil lose his job?" and that Ms. Guilbault replied, "Don't worry - he's resourceful and will find his way out of it."

[28] The grievor said he wondered what they had been saying, and when the co-worker returned to their workspace, while she was still standing, she put her hand on his shoulder and said, "Don't worry." When she sat down, he asked her what was going on, and she replied, "Sorry Phil - I'll do anything to get an indeterminate position."

[29] The grievor referred to an email he sent her the same day, October 5, 2010, inviting her to a restaurant for "wings" night. She replied the same day that it was

inadvisable to go out with colleagues as it could harm her career and that he should not take it personally (Exhibit G-1, Tab 3). The co-worker's statement alleged that in response to her email reply, the grievor had called her a "damned liar" (*hostie de menteuse*) and that later that day, he had called her "chicken shit" for refusing his invitation. He admitted to having made the "chicken shit" comment but stated he had not said it in an aggressive way. He testified that he did not recall having called her a "damned liar".

[30] The grievor said that around that time, he observed that the co-worker began holding the lower part of her body. He went to see Ms. Guilbault and asked her what the co-worker's problem was. According to him, Ms. Guilbault replied that if he wanted to date his co-worker, he would have to donate a kidney to her. If he consented, he would be given a significant promotion, which would involve a transfer. He said he was speechless, and he returned to his workspace. He said that because an immediate family member had had a life-threatening disease, he was aware of the potential consequences. He said that he eventually decided to donate a kidney to the co-worker. He testified that he was taking a risk by donating a kidney and that was why he used the word "risks" in the note that accompanied the flowers he sent to the co-worker.

[31] In his statements, the grievor said that at that time, he was awaiting a delivery of firewood and that he had asked a neighbour to cut and split the wood, since a kidney donor can lift only 20 pounds after such an operation. He also stated that he purchased a new bed in anticipation of the event. Following this, the grievor said he went to see another manager, Jennifer Green, and told her what Ms. Guilbault had said to him. He believed she said she would look into it.

[32] The grievor said that he and the co-worker were separated in the workplace. At first they remained on the same floor, but in different locations. Later, they were located on different floors.

[33] The grievor said that in October 2010, the co-worker received three calls on her personal mobile phone while she was in his workspace. He could hear only her side of the conversation, but on each of the first two calls, she exclaimed, "You want to kidnap me!" On the third call, the grievor told the co-worker to hang up. He said he mentioned it to Ms. Guilbault.

[34] The grievor emailed the co-worker on October 4, 2010, and asked her to meet him at Starbucks the next morning between 06:00 and 06:15 to discuss something with her (Exhibit G-2). The co-worker replied, asking what he wished to discuss. He replied as follows concerning a nightmare he had had about her: “[translation] When we dream of things we don’t want to see we call that a nightmare. Be there darling [sic].”

[35] During October 2010, the grievor had a performance review with Ms. Green. He said he entered her office and sat in a chair. According to him, Ms. Green was wearing a summer dress, which he found unprofessional. He said Ms. Green locked the door and told him, “Phil, I have to sleep with someone before I get married.” He said he was taken aback by that, and he changed the conversation back to his review.

[36] On October 22, 2010, the grievor received an email from Ms. LeBlanc convening him to a meeting that morning. Ms. Guilbault, Ms. Green and the co-worker also attended. The grievor said that the co-worker was tearful and trembling and that, from a sheet of paper, she read that she was not interested in him.

[37] The grievor said that as he had been separated from the co-worker, he asked Ms. Fournier about her health. She replied that he should not worry about her health, as she would take care of herself. He told Ms. Fournier that he was prepared to be a kidney donor for the co-worker, as he believed she had a health problem. During his testimony, he said this had been an error on his part, as he might have been the victim of a sting.

[38] After their workspaces had been separated, the grievor attempted to maintain contact with the co-worker via email on November 29 and December 10, 2010 (Exhibit G-1, Tab 27). In the first email, he wrote that she should not hesitate if she wished to speak with him. In the second, he wrote that he did not feel well, missed her and needed her by his side, at least at work. He asked her to give him a chance to get out of the mess he found himself in (*de m’en sortir*) and reminded her that she had his telephone number.

[39] Concerning the roses, the grievor said that he regularly brought roses from his garden to the co-worker, which she accepted. He also gave her a vase, which had belonged to his grandmother. He said that the co-worker participated in exchanges with him. As an example, he said that she once told him she had a tattoo. He told her

he did not believe her, and he said that on the next day, she wore jogging pants and lowered them to show him a tattoo, which he described as tribal.

[40] The grievor said that nothing physical had occurred between him and his co-worker. She was not afraid of him and had accompanied him shopping during lunch.

[41] The grievor confirmed that on January 4, 2011, he attended a meeting with Ms. Fournier, a union representative and another individual acting as the note-taker. As set out in the summary of the meeting (Exhibit G-1, Tab 15), the grievor was told that labour relations would investigate the matter. He was directed to avoid all contact with the co-worker, and under no circumstances was he to leave the second floor, where his workspace was located. If he required office supplies, which were located on the third floor, he was to ask a supervisor to retrieve them. He was not to attempt to obtain news of the co-worker, either directly or indirectly. To avoid contact, the co-worker's workspace was relocated, and her work hours were changed. If he failed to comply with the restrictions, he could have been suspended.

[42] On January 31, 2011, the grievor received an email from Eve Nadeau, a senior labour relations advisor in the employer's human resources branch, with Ms. LeBlanc also indicated as a recipient, to which were attached three documents, including an alleged police report containing a statement written by the co-worker, with appendices (Exhibit G-1, Tab 16).

[43] In the email, Ms. Nadeau said she was gathering facts about incidents concerning the grievor's conduct toward the co-worker between September and December 2010, and she requested that he provide a written explanation in response to the allegations contained in the alleged police report. After his explanation was received, he was to be convened to a meeting with Ms. Nadeau to provide his comments on the conclusions of the investigation. While the email referred to fact finding, it also stated that depending upon the results of the investigation, he might be subject to rejection on probation or discipline.

[44] The grievor said that he was convened to Ms. LeBlanc's office, where she handed him a copy of the alleged police report and told him to sit down and read it. He said that she seemed to find the situation humorous. He noticed that while it was on an Ottawa Police Service witness statement form, the report did not bear a reference

number; nor was it signed. When he inquired as to what the document was, he said that she smiled and said that she was used to firing people. She directed him to respond to the allegations in the document.

[45] At this point, I wish to provide context to the admission into evidence of these documents. Ms. Nadeau's email, addressed to the grievor, to which was attached the co-worker's unsigned statement, was first entered into evidence by the grievor during his evidence-in-chief. He prepared a written response to the allegations contained in the statement, which he also introduced during his evidence-in-chief. During his testimony, the grievor repeated orally his written responses to each of the allegations. A hard copy of the co-worker's unsigned statement was put to him during his cross-examination, to which he did not object, and it was entered into evidence as Exhibit E-5. I informed the parties that this exhibit could not be characterized as a police report but rather as an unsigned written statement by the co-worker, and accordingly, I entered Exhibit E-5 as such.

[46] The grievor said he later saw a human resources manager in the building lobby with the Chief of the Ottawa Police Service, to whom she handed a brown envelope. The grievor deduced that the envelope likely contained documents concerning the issue with his co-worker.

[47] Responding to the allegations, the grievor stated that he had known the co-worker since 2009, when she was located in another section of the same floor. At that time, he was alone in his workspace. She would visit him every morning, as she had to collect documents. She would sit with him, and they would share a bagel.

[48] The co-worker's statement alleged that when she began sharing the grievor's workspace, he would compliment her on her attire and appearance. Eventually, his comments became vulgar, such as when she wore a roll-neck sweater, alluding to her chest, he said it was too bad he could not see anything. In response to this allegation, the grievor testified that she wore revealing clothing to work and that she paraded in front of his workspace daily, seeking his comments. According to both his testimony and his written statement, if he commented that an item of her clothing did not look right, she would purchase a new item during her lunch break and ask him if he found it to his liking and whether it looked good on her. The grievor stated that during this period, he had no idea that she was the daughter of a man he knew from his archery club. The employer later moved her into his workspace.

[49] One of the co-worker's allegations was that the grievor's obsessive behaviour made her uncomfortable in his presence, and she avoided personal conversations with him so as not to be harassed. The statement alleged that he multiplied his requests to meet her outside work. It referred to an email he had sent her on July 29, 2010, on a personal matter, asking if she were single or married. She alleged that she was upset by such a request coming from a man more than twice her age and replied by email that she had not yet met her "prince charming," by which she intended to exclude the grievor. He acknowledged sending that email and said that on one occasion, the co-worker told him that she had thought about him over the weekend and had missed him. According to him, if he ignored her, she would tap him on the shoulder and begin a conversation. When she went to the washroom, she would tell him she would be right back and would touch his shoulder. He stated that her conduct, her way of looking at him and her eyes were not those of an individual who feels harassed.

[50] The co-worker's statement also alleged that on July 30, 2010, the grievor emailed her an invitation to his cottage. He testified that he and the co-worker talked about his cottage and that he had simply invited her there.

[51] Concerning the image of the couple on the arched bridge, the co-worker's statement alleged that she found it suggestive and considered it an invitation from the grievor. He stated that it was the first and only image he had sent to two male colleagues while working at the call centre. The co-worker had been sitting next to him when he opened the attachment, and he told her to check it out. She then requested that he forward it to her. He said that in 1998, a former manager of his had sent that attachment to him. He said that similar images circulated within the department, including some sent by supervisors.

[52] The co-worker's statement contained an allegation that the grievor had, in October 2001, asked her to meet him at Starbucks. The grievor addressed this allegation and testified that he wanted to speak with her privately about a dream he had had about her. In that dream, he saw an image of her crying; everyone was searching for her, and an attempt would be made to abduct her. In the dream, he also had lost his job. He said that on the previous Friday, as she left work, he told her to be careful.

[53] Ms. Leblanc asked the grievor about this dream at the October 22, 2010, meeting. In response, he had recounted it and told those present that during the

dream, when he entered his home, he found the co-worker there, covered in blood (*ensanglanté*). The grievor testified that he had misspoken during the meeting and that he had meant “in tears” (*en sanglots*). He testified that during the meeting, an image of his daughter came to mind, which caused the confusion between the terms. He said that at one time, his daughter had fallen off her bike and had scraped her face on gravel. She returned to the house with her face covered in blood and later required treatment for the scarring. The grievor stated that his co-worker was aware of this incident as he had sent photos of his daughter to her.

[54] The grievor testified that the events in his dream did in fact occur. He said that the co-worker had told colleagues that someone had tried to lure her to his vehicle in a shopping centre parking lot. He did see the co-worker in tears at the October 22, 2010, meeting. A colleague told him that they were looking for the co-worker because they had not received documents from her on time. Lastly, the grievor did lose his job.

[55] On Friday, October 15, 2010, the grievor asked his co-worker to call him at home that evening. Unbeknownst to him, she told Ms. Guilbault, who advised her to call him and make it clear she was not interested in a relationship. Ms. Guilbault asked the co-worker to call her following her conversation with the grievor. She did so, at 19:15.

[56] As set out in his written statements, during the October 15, 2010 telephone call, the grievor told the co-worker that he had been single for a long time and that he cared for her deeply, and he asked her to be his girlfriend. According to him, she replied that it was not advisable to date colleagues. He told her that if she changed her mind or found herself in trouble to come to his house, no matter what time it was.

[57] On Monday, October 18, 2010, Ms. Guilbault asked the grievor to accompany her outside the office building. She asked him whether he knew why she wished to speak with him, to which he replied that he was not stupid. She told the grievor to think of his age and to cease inviting the co-worker to his home. She told him that the “flirting or whatever” with the co-worker had to stop, or she would become involved. Ms. Guilbault told him that the co-worker’s mother had been looking for her, to which he responded that she never came to his house. He testified that he understood that he was to stop talking to the co-worker “or else.” He felt his employment was at risk.

[58] In his statement, the grievor said that he was single and a homeowner with a 15-year-old daughter and that no law prevents a man from offering a 24-year-old woman shelter in a private residence. He asserted that he never presented a threat to anybody at work.

[59] The grievor said that on occasion, he and the co-worker would have lunch at IKEA. On October 21, 2010, the grievor invited her to lunch there but was told that she was meeting Ms. Guilbault. He told the co-worker to “[translation] blow off” (*flush la*) Ms. Guilbault. According to him, upon her return, the co-worker told him that Ms. Guilbault had introduced her son to her for the purpose of dating him and that she did not want to.

[60] In his written statements, the grievor asserted that the co-worker’s conduct in the vicinity of men was inappropriate, that she sought attention through her sexuality and that she created situations that victimized single male co-workers.

[61] The grievor stated that when the co-worker was transferred out of their workspace, she said that they would continue to exchange emails. He said that he sent her three emails after he had been directed not to communicate with her. He said they were intended to show that he felt no animosity toward her.

[62] In December, the grievor telephoned Ms. Guilbault at her home. He asked why he and the co-worker had been separated and was told that the co-worker did not have feelings for him as he might have thought.

[63] In cross-examination, the grievor said that after he and the co-worker were located on different floors, he on the second and she on the fifth, at first, he went to retrieve supplies on the fifth floor, but that afterwards, supplies were brought to him so that he would not have to go to the fifth floor.

[64] Concerning the October 22, 2010, meeting, the grievor stated that the co-worker appeared very nervous, and he did not believe it when she told him she was not interested in him.

[65] With respect to the image of the couple on the arched bridge, the grievor said that the co-worker viewed the email on her monitor. He stated that she looked at such images more often than he did and that she would tell him to look at them.

[66] The grievor acknowledged that Ms. Guilbault lectured him about the difference in age between him and the co-worker. He was referred to his statement that he had a tendency to look at his co-worker's cleavage and that he told her it was fine but not too much (Exhibit G-1, Tab 20). He said that when she stood up, her chest was at his eye level, so he would look at her cleavage. He said that she seemed to find that amusing and that on one occasion at IKEA, she had drawn his attention to a woman with an ample bust.

[67] The grievor said that he cared about the co-worker, that he owned a five-bedroom house and that she had told him that she paid substantial rent to her mother.

[68] The grievor reiterated that concerning his dream, he meant to say the word "in tears" (*en sanglots*) instead of "covered in blood" (*ensanglanté*).

[69] When asked whether his statement in his filed documents (Exhibit G-1, Tab 20) that he was guilty of having fallen for the co-worker meant that he was in love with her, he at first said that "fallen for" could have many meanings. He said that he cared for her but that he was not in love. He stated that the co-worker never gave him the impression that he should leave her alone.

[70] The grievor was referred to an email addressed to him from Ms. Fournier and dated March 21, 2011, which reiterated previous instructions to avoid any contact with the co-worker (Exhibit E-6). The very next day, he sent her roses.

[71] In his re-examination, the grievor said that concerning his age, the co-worker was aware of it, as she had searched for and found his records. He told her that his age was only a number.

[72] Concerning his testimony that he believed his file was given to the Chief of the Ottawa Police Service, the grievor said that it occurred the day after he had submitted his written explanations to the co-worker's allegations.

[73] As for having invited the co-worker to his cottage, the grievor said that as she told him she would like to go, he gave her its coordinates. He also stated that he did not recall having called her a "damned liar" when she refused his invitation to supper on wings night.

C. Employer's reply evidence

[74] Ms. Guilbault was the supervisor of quality assurance in the employer's personnel security services from March 2001 to December 2013. She was the grievor's supervisor from April 2009 to August 2010 and supervised the co-worker from October 2010 to January or February 2011. Ms. LeBlanc was Ms. Guilbault's manager.

[75] Ms. Guilbault said she first learned of the co-worker's problems with the grievor on October 5, 2010, when the co-worker approached her and informed her that he wanted to date her. She was not interested but did not wish to hurt his pride. Ms. Guilbault advised her to make her lack of interest clear to the grievor and asked whether she wished her to intervene. The co-worker replied that she would take care of the matter herself.

[76] On October 11, 2010, the co-worker spoke to the grievor. He seemed to understand, and he apologized. On Friday, October 15, 2010, the co-worker returned to Ms. Guilbault and told her that while she had thought the grievor had understood, he had asked her to call him at his home that evening. Ms. Guilbault advised her to call him and to make her position clear to him, following which she should call Ms. Guilbault to tell her what happened. Ms. Guilbault said that it was not a directive to the co-worker but rather advice. The co-worker agreed.

[77] The co-worker called Ms. Guilbault the same evening and told her that the grievor had not gotten the message. Ms. Guilbault offered to get involved and said she would speak to the grievor the following Monday. On Sunday morning, Ms. Guilbault received a telephone call from the co-worker's mother asking whether anyone in the workplace would deal with the matter. Ms. Guilbault told her that there had not been an official intervention to date but that she would speak to the grievor the next day.

[78] On Monday, October 18, 2010, Ms. Guilbault asked the grievor to accompany her outside the building, as she did not have a closed office. She asked him whether he knew why he was there, to which he replied that he was not stupid and that it was due to the Friday evening phone call. He told her that it was not his fault and that the co-worker had done everything she could to make him fall in love with her. Ms. Guilbault asked him what he was doing in view of the age difference and told him the co-worker was not interested in him, had never been and never would be. Ms. Guilbault said she was merely repeating what the co-worker had told her.

[79] Ms. Guilbault told the grievor that he had just attained indeterminate employment status and that he should not risk it. He replied that other employees worked in the same workspaces and dated. He said that he wanted the co-worker to live with him and that she would be well taken care of. He repeated that he was in love with her.

[80] Ms. Guilbault told the grievor that she wished him no harm and that his work was very good. She told him that if he promised to immediately stop his advances toward the co-worker and treat her only as a colleague, the matter would remain between them, and she would not go to management. He agreed.

[81] The same day, Ms. Guilbault spoke to her team leader, off the record, and informed him of the situation, as she felt that someone in management should be aware.

[82] On October 20, 2010, Ms. LeBlanc called Ms. Guilbault to her office and told her that she was aware of the situation because the grievor had told Ms. Green about it, as he had felt threatened by Ms. Guilbault. Ms. Guilbault then told Ms. LeBlanc about her conversation with him.

[83] On October 22, 2010, Ms. Guilbault went to Ms. LeBlanc to convene an urgent meeting that same day with the interested parties to avoid any “he said - she said.” Ms. LeBlanc convened the meeting via email (Exhibit G-3). The grievor, the co-worker, Ms. Green, Ms. LeBlanc and Ms. Guilbault attended. Ms. Guilbault stated that she, Ms. Green and Ms. LeBlanc did not prepare for the meeting in advance.

[84] At the outset of the meeting, the grievor stated that he had a right to a lawyer. Ms. Guilbault agreed and said that the meeting would not proceed. He demurred and said that he meant that he had rights.

[85] Ms. LeBlanc then told the grievor to stop bothering the co-worker via email or verbally and to keep communications to business matters. He then recounted a dream he had had in which the co-worker had been searched for and had arrived at his home covered in blood (*ensanglanté*). He used the words “[translation] full of blood.”

[86] It was apparent to Ms. Guilbault that the grievor was worried about the co-worker, and he said that she was ill and unhappy. He also said that she was no angel and that she had done everything she could to have him fall in love with her. She

always smiled and was in a good mood. Ms. Guilbault said that they tried to make him understand that the co-worker's disposition was the same with everyone, male or female.

[87] During the meeting, the co-worker looked the grievor in the eye and told him that he should understand that she never loved him, did not love him and never would, and that he was 49 and she was 24 years of age. Ms. LeBlanc and Ms. Green repeated the same to the grievor, and Ms. Green asked him whether he understood and whether he realized that if he persisted, the co-worker could bring charges against him and even accuse him of sexual harassment. Ms. Green asked whether there was something the grievor did not understand, and if so, she would explain it to him. She added that he had just attained indeterminate status, that he was on probation and that he should not jeopardize his position.

[88] Ms. Guilbault believed that it was during the following week that the co-worker was moved to the workspace next to hers. After the move, the co-worker forwarded the arched bridge and the deer emails to her. Ms. Guilbault said that the emails had circulated to others, that she told the co-worker that they had been sent before the co-worker had spoken to the grievor and that matters had been settled. Ms. Guilbault did not get involved with those emails.

[89] Ms. Guilbault said that the co-worker had given her a copy of her written statement contained in the form of an alleged police report. Ms. Guilbault contacted Ms. Nadeau in labour relations because she believed management was not doing enough in the circumstances. She felt that the situation was becoming bitter and that it should not deteriorate further. On November 1, 2010, she and the co-worker met with Ms. Nadeau for advice on how to settle the matter. Ms. Nadeau suggested that Ms. Guilbault file a complaint, which she did not wish to do at that time, as she hoped the matter would be settled. She then informed Ms. LeBlanc of her meeting with Ms. Nadeau.

[90] On December 3, 2010, the grievor called Ms. Guilbault at her home, and she agreed to speak with him. He said he was not well and was sad, as he wanted to have contact with the co-worker. He said he loved her and that with her smile she had done everything she could to make him fall in love with her. He said he was ready to marry her so that no one could harm her. Ms. Guilbault said that the grievor was sincere. She mentioned the age difference between them and told him he deserved happiness with

someone his own age. She told him that the co-worker was not interested in him other than as a colleague, to which the grievor replied that that was untrue, and he blamed Ms. Guilbault for the co-worker's lack of interest in him. Ms. Guilbault told him she had nothing to do with that and that the co-worker was uneasy with him, felt harassed and was afraid of him. Before ending the conversation, Ms. Guilbault asked the grievor if he was all right and said she did not wish him harm. She wanted him to stop bothering the co-worker, to which he said he would try.

[91] At this point in her testimony, Ms. Guilbault became emotional and stated that at that time, she had reached the end of her rope, and she asked management to remove her from her involvement in the situation. Ms. LeBlanc and Ms. Fournier began to deal with the matter.

[92] On February 1, 2011, the grievor came to Ms. Guilbault's office and stated that he had to speak with her. He was not supposed to see her because she was uncomfortable with him. Nevertheless, she agreed to speak with him, and they went to the kitchen for privacy. The grievor told her that he had received the co-worker's statement, to which he had been instructed to respond, and that he did not know what to do. He said that up to that day, he would have given the co-worker a key to his house.

[93] The grievor told Ms. Guilbault that he was shocked and that it was the first time he had heard of the allegations in the statement. She told him that she had made him aware of them during their conversation on October 18, 2010. He was also made aware at the meeting of October 22, 2010. She added that Ms. Fournier had told him several times via email that he was not to have any contact with the co-worker and that they had been separated at work because of his continued attempts to contact her.

[94] When asked whether she had introduced the co-worker to her son for the purpose of dating him, Ms. Guilbault emphatically denied that that had occurred and provided reasons to substantiate her assertion.

[95] When asked how the co-worker came to be located in the grievor's workspace, Ms. Guilbault said that although the co-worker was on her team, she had been located on the other side of the floor, due to a space shortage. When she was eventually relocated, it was not at the grievor's request; nor did Ms. Guilbault decide where she would be moved.

[96] Concerning the issue of the co-worker's kidneys, Ms. Guilbault said she had no knowledge of that and that she first heard of it from the grievor. She then spoke with the co-worker and told her that it had come to her attention that she required a kidney transplant. The co-worker's reaction was one of incredulity; she said, "Absolutely not!" Ms. Guilbault said that at one point, the co-worker had experienced a urinary tract infection.

[97] Ms. Guilbault was then asked when she had most recently purchased condoms. She reacted with high indignation and exclaimed, "Never!" She said she did not understand the context of the question. She was asked when was she last in possession of a package of condoms, and replied, "Never in my life!"

[98] Ms. Guilbault said she did not recall having a conversation with the co-worker during which she told her the grievor could lose his job. She denied ever having said that the grievor was resourceful and that he would find his way out of the situation.

[99] Ms. Guilbault said it was possible that she had emailed the co-worker, congratulating her on good work, as she did so for several employees. Asked whether she had also told the co-worker that she was on the path to attaining indeterminate status, Ms. Guilbault said she had no involvement in that process, as an employee must apply to a competition to attain that status.

[100] The grievor asked Ms. Guilbault whether during his telephone call to her residence, she noticed he was seeking help and was inebriated. She replied that she noticed he was crying and that he asked for help. She did not know whether he was inebriated, which he did not mention during their conversation. He did mention that he was sad.

[101] Ms. Guilbault asserted that she was not aware that Ms. LeBlanc had confirmed to the grievor in the presence of others that the co-worker had previously had an operation on her kidneys.

[102] When asked whether other incidents had arisen in the workplace involving the co-worker and other employees, Ms. Guilbault said all she knew was that the co-worker had friends at work who took part in activities outside work.

[103] Ms. Guilbault was then asked whether she had put a box into the co-worker's purse. She emphatically denied it and said she would never go into another person's

purse, not even her daughter's, as a purse is private to a woman. She added, with the workplace situation being so tense, did the grievor think she would have added fuel to the fire?

III. Summary of the arguments

A. For the employer

[104] The employer objected to my jurisdiction to hear and determine this grievance. It submitted that as established by the evidence, the grievor was on probation, was paid in lieu of notice and was terminated for employment-related reasons. The employer was not required to show cause. It further submitted that a single employment-related reason is sufficient to justify a rejection on probation.

[105] The employer submitted that to clothe me with jurisdiction, the grievor had to demonstrate that its decision was not based on a *bona fide* dissatisfaction as to his suitability for employment and that it amounted to a contrived reliance on the *PSEA*, a sham or a camouflage.

[106] According to the employer, the evidence showed that supervisors and management had given the grievor clear directions concerning contact with the co-worker. It referred to Ms. Guilbault's discussion with him on October 18, 2010, and to the October 22, 2010, meeting, which both the grievor and the co-worker attended. It also referred to the restrictions imposed on him at the meeting of January 4, 2011, and reiterated in Ms. Fournier's email to him dated March 21, 2011 (Exhibit E-6).

[107] The employer referred to the grievor's note that accompanied the flowers he sent to the co-worker in March 2011, which stated that he was taking a risk. The employer submitted that the grievor's testimony that the risk referred to his offer to donate a kidney to her is not commensurate with the rest of the note, in which he stated he was still single. According to the employer, that was an act of insubordination, which was sufficient to justify his rejection on probation.

[108] The employer submitted that the grievor's assertion that he was not in love with the co-worker contradicts the evidence. The employer referred to his October 4, 2010, email (Exhibit G-2), asking the co-worker to meet him at Starbucks, including the words, "Be there darling." The employer also pointed to the grievor's statement in Exhibit G-1, Tab 20, concerning the telephone conversation with the co-worker on

October 15, 2010, during which he admitted that he was guilty of having fallen for her. The employer submitted that the grievor's credibility must be assessed against the evidence as a whole, according to the factors set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).

[109] The employer emphasized that the grievor confirmed that during the telephone conversation with the co-worker on October 15, 2010, she told him she was not interested in dating a colleague. He testified that he did not believe what the co-worker said to him during the October 22, 2010, meeting was the truth and that management had orchestrated the scenario.

[110] According to the employer, the grievor confirmed that after October 22, 2010, he and the co-worker did not speak and that she did not exchange emails with him, even though he pursued contact with her.

[111] The employer submitted that the issue in this matter is not the grievor's work performance but rather his conduct in the workplace. It advanced that to justify a rejection on probation, it is not necessary to establish a pattern of misconduct but that a single incident suffices. It argued that the concept of suitability for employment includes appropriate behaviour in the workplace. The employer submitted that in this matter, the evidence exceeded the burden of proof required of an employer in rejection on probation cases.

[112] In support of its arguments, the employer cited the following decisions: *Premakanthan v. Deputy Head (Treasury Board)*, 2012 PSLRB 67; *Sved v. Deputy Head (National Parole Board)*, 2012 PSLRB 16; *Cornejo Ruiz v. Deputy Head (Department of Foreign Affairs and International Trade Canada)*, 2012 PSLRB 44; and *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134.

B. For the grievor

[113] The grievor submitted that his position is that set out in all his written documentation and that his version is supported by all the exhibits he filed.

[114] Concerning Ms. Guilbault's testimony, the grievor stated that with respect to the box of condoms, it was not in her best interests to admit that she had placed the box in the co-worker's purse. As for the kidney donation, he said that it was not in

Ms. Guilbault's best interests as a supervisor to admit that the co-worker required such a donation.

[115] In support of his arguments, the grievor relied on *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9, and *Seager v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-28549 (19990115).

IV. Reasons

[116] Before addressing the issues raised by the grievance, I wish to comment on the documentary evidence presented in this matter. The co-worker did not testify. However, save for the letters of offer of employment and rejection on probation, as well as the note from the grievor accompanying the flowers he sent to the co-worker, which Mr. Benocci introduced, all the remaining documentary evidence was entered by or through the grievor. At no time during the hearing did he object to the introduction of that evidence.

[117] The principles governing the jurisdiction of an adjudicator appointed under the *PSLRA* in cases of rejection on probation were set out in *Premakanthan* as follows:

44 The jurisdiction of an adjudicator appointed under the PSLRA in cases of rejection on probation is governed by well-established legal principles, which are covered in Jacmain, Penner and Leonarduzzi, and more recently in Tello. First, a deputy head may reject an employee at any time while on probation, without having to show cause, as long as notice or payment in lieu of notice is provided. That is specifically stipulated by section 62 of the PSEA as follows:

62. (1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of

(a) the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the *Financial Administration Act* ...

...

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

(2) Instead of notifying an employee under subsection (1), the deputy head may notify the employee that his or her employment will be terminated on the date specified by the deputy head and that they will be paid an amount equal to the salary they would have been paid during the notice period under that subsection.

Second, paragraph 211(a) of the PSLRA excludes from adjudication a termination under the PSEA, as follows:

211. Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to

(a) any termination of employment under the *Public Service Employment Act*; or

...

As a result, an adjudicator has jurisdiction over a rejection on probation that has not been made under the PSEA but that is a contrived reliance on the PSEA, a sham or a camouflage. Third, the purpose of a probationary period is to allow a deputy head to evaluate an employee's suitability to perform the duties of his or her position. Therefore, where an employee establishes that the rejection on probation is not based on a bona fide dissatisfaction with his or her suitability to perform the duties of his or her position, an adjudicator has jurisdiction over the employee' [sic] termination.

[118] There is no dispute that the grievor was rejected on probation during his 12-month probationary period and that he received pay in lieu of notice, in conformity with subsection 62(2) of the *PSEA*.

[119] The employer's reasons for terminating the grievor's employment, set out earlier in this decision, are reproduced as follows for convenience:

...

This is further to the review of concerns relating to your conduct at work in the context of your probationary period.

The review and your admission have confirmed that you engaged in inappropriate behaviour towards a female colleague. The review also confirms that you continued to attempt to develop a romantic relationship with this female colleague despite her requests for you to stop and that you persisted in doing so contrary to the verbal and written instructions issued to you by your management.

...

[120] This is a case about personal relationships in the workplace. On the evidence, normal exchanges between colleagues turned into a case of the grievor becoming interested in the co-worker and pursuing a romantic relationship with her despite the fact that she told him that his feelings were not reciprocated and were unwanted. Contrary to the employer's instructions to cease such behaviour, the grievor nevertheless persisted in his pursuit of the co-worker in the workplace, trying to advance what appears to have been an obsession.

[121] On October 4, 2010, the grievor emailed the co-worker, asking her to meet him the next morning at Starbucks to discuss something. When she responded by email several minutes later asking what he wished to discuss, he replied that it was about a nightmare he had had about her, and he ended with "Be there darling." Ms. Guilbault testified that the next day, the co-worker approached her and informed her that the grievor wanted to date her but that she was not interested. It was at this point that management became aware of the grievor's behaviour in the workplace. She advised the co-worker to make that clear to him. Ms. Guilbault stated that on October 11, 2010, the co-worker told her that she had spoken to the grievor and that he seemed to have understood and had apologized.

[122] During their telephone conversation of October 15, 2010, the grievor asked the co-worker to be his girlfriend. She replied that it was not advisable to date colleagues. When she spoke with Ms. Guilbault following that conversation, the co-worker told her that the grievor had not gotten the message that she was not interested in him.

[123] On October 18, 2010, Ms. Guilbault made clear to the grievor that the co-worker had no interest in him whatsoever. She told him to stop his behaviour with the co-worker or she would become involved. She also told him that he had just attained indeterminate status and that he should not jeopardize it. The grievor testified that he understood he was to stop talking to the co-worker and that he felt that his employment was at risk.

[124] Ms. LeBlanc convened the October 22, 2010, meeting on that same day, at Ms. Guilbault's request; she testified that no advance preparation was done for that meeting. Ms. LeBlanc directed the grievor to cease bothering the co-worker by email or verbally and to restrict his communication with her to business matters. The co-worker

told him that she was not interested in him. Ms. Green told him that he had attained indeterminate status, was on probation and should not jeopardize his position. He testified that he did not believe it when the co-worker told him she was not interested in him.

[125] The employer subsequently placed the grievor and the co-worker in separate workspaces. In spite of having been instructed not to, he emailed her on November 29 and December 10, 2010, seeking to establish contact. Between these dates, he called Ms. Guilbault at her home on December 3, 2010, and told her that he loved the co-worker. She again told him that the co-worker was not interested in him and that she felt harassed by and was afraid of him. The grievor maintained, in cross-examination, that it was untrue that the co-worker had no interest in him and he blamed Ms. Guilbault, accusing her of being controlling of the co-worker.

[126] On January 4, 2011, the grievor attended a meeting with Ms. Fournier and a union representative, at which he was informed that labour relations was investigating the situation with the co-worker. He was then given strict directives to avoid all contact with the co-worker, as set out in the meeting summary in Exhibit G-1, Tab 15, failing which he could face a suspension. These directives were reiterated in an email Ms. Fournier sent him, dated March 21, 2011. On March 22, 2011, the grievor sent flowers to the co-worker at the workplace, accompanied by a note that stated that he was aware he was taking a risk by contacting her and that he was still single.

[127] The evidence clearly demonstrates that the employer reasonably believed the grievor's behaviour in the pursuit of a romantic liaison with the co-worker was unwanted. He chose not to accept this and persisted with his conduct, despite clear instructions from management. He interpreted his relationship with the co-worker through a distorted lens, and certain parts of his testimony were so disconnected from reality as to venture into the realm of fantasy. I refer to the following three examples.

[128] First, the grievor asserted that Ms. Guilbault told him that the co-worker required a kidney donation and that if he wanted to date her, he should donate a kidney to her. If he did so, he would be given a significant promotion and a transfer. Ms. Guilbault denied that and testified that it was from the grievor that she first learned that the co-worker required a kidney. When she asked the co-worker whether that was the case, the co-worker's reaction was one of incredulity. It is inconceivable that a supervisor or manager would make such a statement to an employee. I believe

Ms. Guilbault's emphatic denial because she testified that she had not been aware whether the co-worker required a kidney donation until the grievor mentioned it to her and she was not cross-examined on the issue of the kidney donation. Furthermore, I found Ms. Guilbault to be credible for the reasons set out in paragraph 131 of this decision.

[129] Second was the grievor's assertion that he saw Ms. Guilbault place a box of condoms in the co-worker's purse while she was away from her desk. Ms. Guilbault was not in the hearing room during the grievor's testimony. When asked during examination-in-chief when she had last purchased or had possessed a box of condoms, her indignation at even being posed such a question was evident.

[130] Third was the grievor's statement that Ms. Guilbault wanted to introduce her son to the co-worker for dating purposes, which she emphatically denied.

[131] I found Ms. Guilbault to be a most credible witness. Her reactions to questions concerning the co-worker's alleged need for a kidney transplant, the grievor's allegations that she had put a box of condoms in the co-worker's purse and that she wished her son to date the co-worker were emotional and sincere. Her evidence on these points demonstrates on a preponderance of probabilities that the grievor's evidence on those matters has no basis in fact. Her evidence taken as a whole shows that while she was concerned that the grievor's conduct was putting his newly-acquired indeterminate status in jeopardy and told him so, she also made it clear to him that his conduct toward the co-worker was inappropriate. The grievor's assertion that Ms. Guilbault undermined his relationship with the co-worker does not stand when weighed against her testimony. When a conflict arises between the grievor's testimony and that of Ms. Guilbault, I prefer that of Ms. Guilbault.

[132] The grievor's entire case and argument were devoted to insisting that he had not in fact committed any act that was disciplinable. He denied that he had harassed the co-worker and alleged that in this case he was himself the victim of some kind of plot, either on the part of the co-worker so that she could obtain an indeterminate position, or on the part of Ms. Guilbault as a result of her friendship with the co-worker's mother. He had admitted to having "fallen for" his co-worker but in both his written statements and in his oral testimony he denied that he had been guilty of harassment in any way.

[133] I find, based on the grievor's own written statements and his testimony, that the employer had grounds on which it could have disciplined the grievor but chose not to. This does not, however, transform his release on probation into disguised discipline or establish that the employer acted in bad faith (*Ricard v. Deputy Head (Canada Border Services Agency)*, 2014 PSLRB 72). Just because an employee could be disciplined for culpable behaviour does not mean that the employer cannot choose to reject that employee on probation rather than impose discipline.

[134] Unless there is evidence that the decision to reject the grievor on probation was disguised disciplinary action, a sham or camouflage, or perpetrated in bad faith, this Board has no jurisdiction. The employer has established that the grievor was released from his employment while on probation following numerous attempts to deal with what it reasonably believed to be his problematic behaviour at work. It established reasonable grounds, based on uncontradicted evidence, which supported its assessment that the grievor was not suitable for employment with it. Despite written and oral warnings to not contact his co-worker, the grievor nonetheless displayed a lack of judgment and disregard for the employer's instructions such as to render him unsuitable for continued employment. In his written statements and even in his testimony during the hearing, the grievor did not appear to understand that his feelings toward the co-worker were unwanted. He testified that during the October 22, 2010 meeting the co-worker appeared very nervous and he did not believe it when she told him she was not interested in him. He also stated that the co-worker never gave him the impression that he should leave her alone. This evidence alone was in my view sufficient for the employer to conclude that the grievor was unsuitable for continued employment and left it no option but to reject him on probation.

[135] It is clear that as follows from *Tello* at para 127, the employer is correct in arguing that the grievor bears the burden of establishing that the employer rejecting him on probation constituted disguised discipline, a sham or camouflage, or perpetrated in bad faith.

[136] As the grievor did not establish that the decision to reject him on probation was arbitrary since the employer had advanced clear and uncontroverted reasons for the decision which it took, he bore the burden of demonstrating that the termination of his employment was a sham or camouflage. As noted by the Federal Court of Appeal in another context (*Dansereau v. Canada* (1990), [1991] 1 F.C. 444 (CA), at page 462), bad

faith cannot be presumed and an employee seeking to provide evidence of bad faith “... has an especially difficult task to perform ...”

[137] In this matter, the issue is not the grievor’s work performance but his conduct in the workplace. I agree with the employer’s argument that the concept of suitability for employment includes appropriate behaviour in the workplace. An employer has an obligation to take all reasonable steps to ensure that its workplace is free of harassment. The employer met that obligation in this case. It directed the grievor on several occasions both verbally and in writing to cease his behaviour toward the co-worker and to avoid all contact with her. It also physically separated their workspaces. Nonetheless, he persisted in his unwanted conduct. He must bear the responsibility for his behaviour.

[138] I find that the employer met its burden of proving that the grievor was rejected on probation for a valid employment-related reason.

[139] The burden was on the grievor to prove that, on a balance of probabilities, the employer did not possess a *bona fide* dissatisfaction with his suitability to perform the duties of his position or that the rejection on probation was a contrived reliance on the PSEA, a sham or a camouflage.

[140] The grievor failed to discharge that burden. He presented no evidence to suggest any such contrived reliance, camouflage or sham. No evidence or argument suggested that the rejection on probation was for any reason other than an employment-related one. Accordingly, I find that I do not have jurisdiction to hear this grievance.

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

(The Order appears on the next page)

V. Order

[142] I order this file closed.

December 9, 2015.

**Steven B. Katkin,
adjudicator**