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Public Service Labour Relations Act



Before the Public Service Labour
Relations and Employment Board

BETWEEN

LUCIE GAGNÉ

Applicant and Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Respondent and Employer

Indexed as

Gagné v. Canadian Food Inspection Agency

In the matter of an application for an extension of time referred to in paragraph 61(b) of the *Public Service Labour Relations Regulations* and in the matter of an individual grievance referred to adjudication

Before: Catherine Ebbs, a panel of the Public Service Labour Relations and Employment Board

For the Applicant and Grievor: Sylvain Lallier, counsel

For the Respondent and Employer: Pierre-Marc Champagne, counsel

Heard at Montreal, Quebec,
December 3 to 5, 2014, and January 12 to 14, 2015.
(PSLREB Translation)

I. Introduction

[1] Lucie Gagné, the grievor, started her career with the federal public service in 1992. Until January 2010, she was a fair-labelling practices and food safety inspector (a position classified at the EG-04 group and level) at the Canadian Food Inspection Agency (“the employer”), a separate agency as defined in the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*).

[2] The employer submitted that in 2006, it began raising concerns with the grievor about her performance. It tried to help her achieve her objectives, but her performance remained unsatisfactory. In January 2010, the employer’s deputy head (“the deputy head”) demoted her due to her unsatisfactory performance. Under paragraph 12(2)(d) of the *FAA*, a deputy head of a separate agency may “... provide for the ... demotion to a position at a lower maximum rate of pay, of persons employed ...” by that agency “... for reasons other than breaches of discipline or misconduct”.

[3] The grievor filed a grievance form with the employer on March 16, 2010. She maintained that her performance was never unsatisfactory. Given that the decision being grieved was a demotion for unsatisfactory performance within the meaning of paragraph 12(2)(d) of the *FAA*, the grievance was presented directly to the final level of the grievance process, in accordance with the collective agreement between the employer and the Public Service Alliance of Canada. The collective agreement expired on December 31, 2011. On September 23, 2010, the employer denied the grievance.

[4] The Public Service Labour Relations Board (“the former Board”) received the grievor’s reference to adjudication on November 2, 2010.

[5] 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 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 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365

to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[6] A hearing into this matter was held on December 3 to 5, 2014, and January 12 to 14, 2015.

[7] In addition to the evidence and arguments on the merits, the parties raised the following preliminary issues:

- They disagreed as to the appropriate scope of the grievance.
- The employer submitted that the Board did not have jurisdiction because the grievance was filed late, which the grievor denied.
- Were the Board to conclude that the grievance was filed late, the grievor requested an extension of time to file the grievance.

[8] The parties first presented evidence about two preliminary questions, the timeliness of the grievance and the grievor's request for an extension of time. They then presented evidence on the merits, agreeing that evidence on the preliminary issues would also be considered in the analysis of the merits. The parties agreed that the employer would present its evidence and arguments first at both steps.

[9] The employer called the following two witnesses:

- André Lambert was the inspection manager at Montreal East in 2006 and 2007; during that period, the grievor's supervisors reported to him. In May 2007, Mr. Lambert was promoted to chief inspector at Montreal East, and in that capacity, he made the decision to demote the grievor.
- Dr. Sylvain St-Hilaire became the inspection manager at Montreal East in 2007. The grievor's supervisors reported to him from that time. Dr. St-Hilaire recommended to Mr. Lambert that the grievor be demoted.

[10] The grievor was originally represented by the bargaining agent. However, it withdrew its representation, and at the hearing, the grievor was represented by counsel. She testified on her own behalf and did not call any other witnesses.

[11] For the reasons set out later in this decision, I make the following findings:

- The grievance referred to adjudication was about the grievor's demotion for unsatisfactory performance, and therefore, her argument that the demotion was a disciplinary measure was not at issue before the Board.

- The grievor presented her grievance at the final level beyond the time limit specified in the collective agreement.
- In the interest of fairness, the Board extends the time limit for presenting the grievance.
- The grievance is denied on the merits.

II. Scope of the grievance

[12] At the start of the hearing, the grievor indicated that she would present two arguments. First, she submitted that the demotion for unsatisfactory performance was unreasonable and added that it constituted a disciplinary measure within the meaning of paragraph 209(1)(b) of the *PSLRA*.

[13] The employer objected to the grievor arguing before the Board that the demotion was a disciplinary measure. It noted that she was attempting to advance an argument that she had not made in the internal grievance process. It also referred to her reference to adjudication form, in which she described the decision giving rise to the grievance as relating to paragraph 209(1)(d) of the *PSLRA*, which refers to a demotion or termination "... for any reason that does not relate to a breach of discipline or misconduct."

[14] In response, the grievor submitted that the reference to adjudication form was a procedural requirement that did not limit what she could argue at the hearing.

[15] When an employee presents a grievance on certain grounds, that employee cannot refer the matter to adjudication on grounds different from those that formed the basis of the initial grievance (*Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.)).

[16] In her grievance, presented on March 16, 2010, the grievor made no mention of the argument that the demotion was a disciplinary measure. Furthermore, when she referred the matter to adjudication, she specified that the grievance was related only to paragraph 209(1)(d) of the *PSLRA*, which states the following:

(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.

[17] The grievor's argument that the demotion constituted a disciplinary measure

changed the nature of the grievance, and in accordance with the *Burchill* principle, I find that that argument is outside the scope of the grievance. It would not be fair to permit the grievor to expand the scope of the grievance hearing at the last minute to include factors that had not already been raised.

III. Time limit issue

[18] Under clause 17.02 of the collective agreement, employees who feel that they have been treated unjustly or who consider themselves aggrieved by any action or inaction of the employer in matters other than those arising from the classification process are entitled to present a grievance. Under clause 17.05 of the collective agreement, employees must send their grievances to their immediate supervisors or local officers-in-charge, who in turn will forward them to the employer representatives authorized to deal with grievances.

[19] Under clause 17.10 of the collective agreement, a grievance must be presented "... not later than the thirty-fifth (35th) calendar day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance."

[20] On January 15, 2010, the grievor, accompanied by her bargaining agent representative, met with Mr. Lambert and a human resources officer. Mr. Lambert testified that at that meeting, he informed the grievor orally about the decision to demote her and asked her for her preferences with respect to a position classified at a lower group and level (EG-03). However, according to the grievor, the meeting was held only to discuss options in the event that it was decided to demote her.

[21] On January 19, 2010, the grievor emailed Mr. Lambert, stating as follows:

[Translation]

Following the January 15, 2010, meeting with the employer's representative at which its decision was submitted, which was:

-Choose from these positions:

Meat hygiene: Slaughterhouse 129

Meat hygiene: Slaughterhouse 39-D

or

Another proposed EG-03 position in Montreal East

...

[22] On January 27, 2010, Mr. Lambert sent the grievor letter informing her about the decision to demote her and about her right to present a grievance. According to her, it was the first time she learned of the demotion decision.

[23] On January 31, 2010, the grievor sent a letter to Mr. Lambert in which she stated that she did not agree with the decision to demote her or the process that had been followed. She wrote the following:

[Translation]

...

First, I would like to inform you that I completely disagree with your decision to proceed with my demotion. As such, be informed that I will exercise all recourse set out in the collective agreement to challenge this decision and properly assert all my rights.

...

[24] On March 16, 2010, the grievor filled out a grievance form and presented it to the employer.

[25] On September 23, 2010, the employer denied the grievance on the basis that it had been filed late. It repeated that position in its reply to the grievor's reference to adjudication.

[26] For the following reasons, I find that the grievance was not filed within the prescribed time limits.

[27] The employer's demotion decision was conveyed to the grievor orally on January 15, 2010. In my view, her email of January 19, 2010, in which she acknowledged that the employer's "decision" had been presented at the meeting, confirms that she understood that the employer had decided to demote her. Clause 17.10 of the collective agreement is clear. The grievor had 35 days from the day on which she was first notified, either orally or in writing, of the decision giving rise to the grievance. Thus, she had until February 19, 2010, to present her grievance. The letter dated January 27, 2010, merely confirmed the demotion decision.

[28] The grievor pointed out that her January 31, 2010, letter constituted a grievance in accordance with the *PSLRA* and the collective agreement because she advised the employer that she disagreed with the demotion decision and put it on notice that she intended to exercise her recourse rights.

[29] The grievor indicated in her letter to the employer that she would do the following: “[translation] ... exercise all recourse set out in the collective agreement to challenge this decision and properly assert all my rights.” She further stated: “[translation] ... I am simply stating my decision to abide by your instructions while preserving my rights.” The letter reads as follows in full:

[Translation]

Subject: Your letter dated January 27, 2010

Sir,

By this I acknowledge receiving your January 27, 2010, letter, according to which you proceeded with my demotion due to my inability to meet the requirements of the level EG-04 SAPC inspector position. Thus, you proceeded with a demotion to an EG-03 position in the Fresh Fruits and Vegetables Program. To that letter you attached an “offer of indeterminate employment” to hold position number 9243 in the Fresh Fruits and Vegetables Section in the Montreal East office.

First, I would like to inform you that I completely disagree with your decision to proceed with my demotion. As such, be informed that I will exercise all recourse set out in the collective agreement to challenge this decision and properly assert all my rights.

I also wish to inform you of my disagreement with how you proceeded with the demotion. Your letter suggests that I accept the demotion imposed by the employer and that I will accept a new job offer. Yet, it would be false to claim that the demotion was determined with my consent. If I chose another position, it is certainly because of your decision, which has proven unchangeable.

In other words, I had to be demoted, and I had the opportunity to choose from several lower-level positions. In the circumstances, I accepted the instructions that the employer outlined to assign me to position 9243 in the Fresh Fruits and Vegetables Section. Thus, I plan to follow your instructions to be assigned to the position of fresh produce program inspector. As such, as indicated in your January 27,

2010, letter, I will report to Éric Jubinville's office on February 8 to begin my new assignment.

However, please note that my decision to conform to your instructions cannot at any time be considered as an acceptance of your decision to proceed with my demotion.

Given the preceding, you will understand that I will not sign documents that state that I accept a new job offer. On the contrary, I believe that your decision-making process is one-sided. Thus, you will understand that I am simply stating my decision to abide by your instructions while preserving my rights.

Sincerely,

[30] The evidence showed that the letter was sent to the appropriate employer representative as well as to the grievor's bargaining agent representative and that they both received it. As a result, the grievor maintained that she met the 35-day time limit set out in the collective agreement, whether the time ran from January 15, 2010, the meeting date, or from January 27, 2010, the date of the letter.

[31] I do not accept that the grievor's letter constituted a grievance. It was simply a notice that she intended to exercise her rights to object to the demotion at some time in the future.

[32] It must be noted that when she referred the grievance to adjudication, the grievor did not mention her January 31, 2010, letter as her grievance. Instead, she indicated that her grievance was the document presented on March 16, 2010.

[33] In support of her argument that her January 31, 2010, letter constituted her grievance, the grievor cited clause 17.07 of the collective agreement, which states as follows: "A grievance of an employee shall not be deemed to be invalid by reason only that it is not in accordance with the form supplied by the Employer." However, in her case, the issue was not only that her January 31, 2010, letter was not submitted on the proper form but also that it clearly indicated that she intended to exercise her recourse options only in the future, which was insufficient to be considered a grievance.

[34] The grievor further submitted that section 63 of the *Public Service Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") prevents the employer from objecting to the breach of the time limit. According to that provision, a grievance may be rejected on the basis that it was presented late only if it was rejected at a lower

level for the same reason.

[35] As indicated earlier, the grievance was presented directly at the final level. The final-level decision clearly states that the grievance was denied because it was untimely. However, the grievor pointed out that when her bargaining agent representative gave her grievance to the employer's representative, the employer's representative stated that it was untimely but accepted it and added that "[translation] everyone makes mistakes, and from time to time, we also exceed the deadlines." The grievor submitted that that remark demonstrated that the employer had effectively waived the timeliness issue and insisted that the Board show flexibility when interpreting the procedural provisions of the collective agreement and the *PSLRA*.

[36] Irrespective of any comment that the person who received that grievance form might have made, the employer was clear — the grievance was denied because it was filed late. The person who made the comment when the grievance was filed was not the ultimate decision maker, and that person's words did not constitute the employer's decision on the grievance.

[37] Therefore, I conclude that the grievance was presented at the final level beyond the time limit specified in the collective agreement.

Request for an extension of time

[38] At the hearing, the grievor requested that if the Board were to find that her grievance was presented after the deadline, it would grant her an extension of time within which to present it so that it could be heard on the merits.

[39] The Board's authority to extend the time within which to present a grievance or refer a matter to adjudication is found in section 61 of the *Regulations*, which states as follows:

61 Despite anything in this Part, the time prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of a grievance at any level of the grievance process, the referral of a grievance to adjudication or the providing or filing of any notice, reply or document may be extended, either before or after the expiry of that time,

(a) by agreement between the parties; or

(b) in the interest of fairness, on the application of a party, by the Board or an adjudicator, as the case may be.

[40] *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1 at para. 75, indicates that based on the prevailing jurisprudence, the following criteria are to be considered when deciding whether to grant an extension of time:

...

- *clear, cogent and compelling reasons for the delay;*
- *the length of the delay;*
- *the due diligence of the grievor;*
- *balancing the injustice to the employee against the prejudice to the employer in granting an extension; and*
- *the chance of success of the grievance.*

...

[41] The grievor provided the following information:

- Between January 31 and February 28, 2010, she tried to complete the grievance form as completely and accurately as possible.
- At the beginning of March 2010, she had to take leave to travel to another city to take care of a family member who was recovering after a major operation. It all happened suddenly, with little notice, and she left immediately after the employer verbally granted her leave.
- At first, she asked for a week of leave but then had to ask for an additional week, which was granted.
- During her leave (from March 2 to 14, 2010), she attended to the needs of her family member.
- She returned to work on March 15, 2010, and immediately completed the grievance form, signed it, and presented it to the employer.
- The employer also did not respect a time limit in that it took a little over six months to make its final-level decision.

[42] The grievor submitted that she had clear and convincing reasons to justify the delay. Furthermore, there was evidence of reasonable diligence on her part in that she completed and presented the grievance as soon as she returned to work. She pointed out that there was no prejudice to the employer because the delay was very short.

[43] The employer maintained that the Board should deny the extension of time request. It noted that the time limit prescribed in the collective agreement represents a consensus that the employer and the bargaining agent reached; as such, it should be respected.

[44] The employer took the position that the grievor did not show reasonable diligence by not filing the grievance within the time limit particularly because she had to complete only a short form. In its view, her reason, a sickness in the family, was neither clear nor compelling.

[45] The Board has the discretionary power to extend the time limit for presenting a grievance at any level of the grievance process “in the interest of fairness”, under paragraph 61(b) of the *Regulations*.

[46] The former Board determined in *Cloutier v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 31 at para. 13, that requests to extend timelines should be allowed sparingly, as follows:

[13] ... Although paragraph 61(b) of the Regulations allows that time limit to be extended, such applications are allowed sparingly so as not to destabilize the labour relations scheme created by the Act and the agreement between the parties.

[47] It is well established that the five *Schenkman* factors inform the Board’s analysis of whether fairness requires that it grant an extension of time. In each case, it examines the factors in the context of the particular facts and then determines the weight to give to each factor. As stated as follows in *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 81 at para. 51:

[51] These criteria are not always given equal importance. The facts of a given case will dictate how they are applied and how they are weighted relative to each other. Each criterion is examined and weighed based on the factual context of the case under review. In some instances, some criteria may not be relevant or the weight may go to only one or two of them.

[48] In a more recent case on extension-of-time requests, *Apenteng v. Treasury Board (Canada Border Services Agency)*, 2014 PSLRB 19 at para. 88, the former Board explained further how the criteria apply to the analysis, as follows:

[88] The inquiry is fact driven and based on the underlying

principle of section 61 of the Board Regulations: what is “in the interests of fairness.” Flowing from this, there are no presumptive calculations or thresholds in the Schenkman criteria that pre-empt a decision maker from considering whether, in the interests of fairness, an extension of time ought to be granted.

[49] After considering the evidence and applying the *Schenkman* factors, I grant the request to extend the time limit to present the grievance at the final level.

[50] I find that the grievor presented clear, cogent, and compelling reasons to justify the delay. She clearly intended to grieve from the start and believed in good faith that the time limit ran from January 27, 2010, the date of the letter. Therefore, she counted on having 35 days from January 27, 2010, to present her grievance. However, that period was cut short unexpectedly by an event that was out of her control when she was called away with little notice to care for a close family member recovering after a major operation.

[51] As for the *Schenkman* factors, I find that the delay in this case was considerably shorter than other delays in some of the submitted decisions. I further find that it did not cause prejudice to the employer with respect to preparing and presenting its arguments. On the other hand, the grievor would be prejudiced by not having the opportunity to present her case, which on its face is not frivolous or vexatious. The decision being grieved is a demotion for unsatisfactory performance, which is a serious measure by the employer that had significant consequences for the grievor.

[52] Based on all the facts, I find that it is in the interest of fairness to grant the extension of time in this case.

IV. Merits

Background

[53] The grievor occupied a fair-labelling practices and food safety inspector position. She joined the employer in 1997, the year of its creation. She had performed similar duties since joining the federal public service in 1992.

[54] The primary duties of the grievor’s inspector position, classified at the EG-04 group and level, were as follows:

- plan, organize, and conduct inspections and investigations;

- identify potential consumer food product problems and issues, notify program officers, and obtain and implement technical advice and guidance;
- inspect and evaluate facilities and control systems dealing with food products to ensure their safety and quality;
- analyze the results of inspections and investigations, outline key issues, and provide recommendations;
- enforce compliance with legislative provisions;
- investigate merchant and consumer complaints and referrals from other departments;
- obtain food samples for analysis, and record and explain results;
- validate labelling;
- provide advice on demand; and
- ensure the proper management of product recalls.

[55] When carrying out inspections, inspectors deal with retailers and producers. The position demands tact and the ability to persuade others. Some inspections are part of prevention programs, while others are in response to complaints received from consumers or competitors.

[56] With respect to prevention programs, inspectors have the time to plan activities. However, they cannot plan as carefully for other tasks, such as responding to complaints.

[57] During an inspection, an inspector performs several tasks, including the following:

- reviewing the files of the company, exporter, etc.;
- preparing all required material;
- conducting an on-site inspection;
- carrying out the inspection in accordance with the applicable directives;
- preparing an inspection report; and
- following up.

[58] In addition to inspections, inspectors take food samples, which involves travelling to a site, purchasing the product at issue, taking the sample using proper methods, packaging the sample, and ensuring its safe delivery to a laboratory. Different rules have to be followed, depending on the type of food sample.

[59] Inspectors also have a number of administrative duties.

[60] Inspectors must enter data into the following two computer systems:

- the Incident Management System (IMS), in which an inspector opens a file for each inspection and inputs all actions taken until the file is closed; and
- the Operations Planning Module (OPM), in which the inspector inputs monthly all activities carried out as well as the hours spent on each activity. The inspectors note the hours on a sheet of paper and submit them regularly.

[61] Management consults the databases when it plans resources usage. If inspectors do not respect the deadlines for entering data into the computer systems, then management could make decisions based on inaccurate data.

[62] Inspectors also maintain paper files. When an inspection is finished, the inspector makes sure the file is complete and sends it for filing. If that is not done, the information will not be available to other inspectors, who may need it.

Before fiscal year 2006-2007

The employer's evidence

[63] The grievor served as an acting supervisor from September 15, 2005, to March 31, 2006; she reported directly to Mr. Lambert. He indicated that during that period, she displayed good judgment and drew on her lengthy experience and extensive knowledge. However, he told her that she needed to learn to work faster. He concluded that he had enjoyed working with her.

The grievor's evidence

[64] The grievor's performance reviews for fiscal years 2001-2002, 2002-2003, and 2004-2005 were positive and mentioned no concerns. During that time, she had two supervisors.

[65] In 2003-2004, the grievor's performance was not evaluated. During that year, she moved to a different office, where she remained up to the date of her demotion. She stated that she was able to adapt to her new work environment.

[66] As part of her evaluation in 2004-2005, the employer indicated that the grievor

had almost achieved the objective of “[translation] reducing processing times (approximately 25%) for work orders.”

[67] In 2005-2006, Mr. Lambert completed a positive performance review about the grievor’s time as an acting supervisor. She was then offered a supervisor position but refused it because she preferred being an inspector.

Fiscal year 2006-2007

The employer’s evidence

[68] In 2006-2007, the grievor had two supervisors, Catherine Beauregard and Stephanie Frechette, both reporting to Mr. Lambert. Neither Ms. Beauregard nor Ms. Frechette testified at the hearing.

[69] In December 2006, the grievor’s supervisors were concerned about her performance and started to copy the manager when they emailed the grievor reminders. Mr. Lambert affirmed that he rarely received copies of emails that a supervisor sent to an employee. In this case, the grievor’s supervisors did so to inform him of the steps taken to help the grievor better attain her work objectives and respect established deadlines.

[70] In December 2006 and January 2007, the supervisors wrote a number of emails reminding the grievor to complete certain late tasks. Deadlines were set for some tasks, while extensions were granted for others. The tasks included completing files and handing them in for filing, remitting OPM sheets, conducting follow-ups in files, and entering information into the IMS. On one occasion in December 2006, a colleague asked the grievor for an update on a certain file, which she did not do until the end of January 2007.

[71] On February 8, 2007, at her supervisors’ request, Mr. Lambert met with the grievor. They discussed her delays carrying out her duties, her work organization, and her communications with team members and in particular with her supervisors. He suggested some approaches that she could adopt to improve her performance. At the end of the meeting, Mr. Lambert’s opinion was that the grievor understood the problem and that she had the required motivation to better achieve the employer’s objectives.

[72] After the February 8, 2007, meeting, the employer gave the grievor the

opportunity to take some training sessions.

[73] In February and March 2007, the supervisors continued to email the grievor, copying Mr. Lambert, about certain tasks that should have been completed.

[74] Ms. Frechette, Ms. Beauregard, and Mr. Lambert signed the 2006-2007 performance evaluation. The supervisors stated that the grievor helped others, had a good attitude, and involved herself in the team. However, they also noted that she had a number of performance problems, including the following:

- not being punctual;
- not completing her files, in spite of numerous meetings with and notices from her supervisors; and
- not meeting the objective of two outings per week.

[75] The supervisors indicated that they had raised the problems with the grievor both in writing and at monthly meetings. They added, “[translation] ... an effort must absolutely be made at this level for the next fiscal year, 2007/2008.”

[76] The grievor did not request a review of her 2006-2007 performance evaluation.

[77] In the 2006-2007 evaluation, the supervisors also wrote the following:

[Translation]

The staff shortage, departures, and assignments of some employees to other positions in the organization did not allow last fiscal year's performance objectives to be achieved....

[78] According to the adduced evidence, in 2006-2007, the office where the grievor worked had 64 funded positions that could have been filled, of which 50 were already staffed and 14 were vacant.

[79] Mr. Lambert affirmed that when a staff shortage occurs, supervisors alter priorities and objectives. In his opinion, all staff equally felt the effects of any staff shortage.

The grievor's evidence

[80] The grievor worked in a team of approximately 15. However, a staff shortage occurred, which led to the remaining inspectors having a greater workload. For the

grievor, it meant that she had to set priorities to manage her tasks.

[81] After Ms. Beauregard and Ms. Frechette arrived as her supervisors, the inspectors began to be pressured to meet their objectives.

[82] The grievor was surprised when she was called to meet with Mr. Lambert alone on February 8, 2007. At that time, her team was experiencing some challenges. Mr. Lambert spoke to her about the delays in her work, but vaguely. However, she was comfortable at the meeting and was always open to suggestions on how she could improve.

[83] The grievor was given her 2006-2007 performance evaluation in June 2007. She understood the expectations but felt that it was not necessary to treat every case as urgent. She did not recall if she had monthly meetings with her supervisors or received email reminders about her delays, although she stated that it was possible. She did not ask for a review of the 2006-2007 evaluation out of respect for her supervisors' authority, but she did not agree with the negative conclusions.

[84] The grievor considered that administrative tasks such as remitting OPM forms, entering information into the IMS, and completing paper files and sending them for filing were not an important part of her work. The more important tasks were planning inspections, travelling to sites, consulting, carrying out investigations in accordance with the employer's directives, reaching findings, and performing follow-ups.

[85] Inspectors were expected to agree to be on call certain weeks of the month, to ensure that someone was available to handle urgent cases. The grievor presented a table showing 10 names, including hers, and dates on which inspectors were on call between January 1, 2007, and January 28, 2008. It showed that she was on call for seven weeks and two Fridays in that period.

[86] The grievor attempted to argue via the table that her team had an inspector shortage during the relevant period. However, the table did not demonstrate her allegation. It lists 10 names and their on-call days but no details as to where the people named worked or if others worked with them but were not named in the table. Furthermore, the grievor did not present the table to the employer's witnesses for their comments as to whether it proved that a shortage of inspectors existed.

Fiscal Year 2007-2008

The employer's evidence

[87] From April to June 2007, the grievor's supervisors continued to send her email reminders to complete late tasks. They also met with her to discuss her performance.

[88] In July 2007, a colleague was assigned to work with the grievor to help her close her files. During that period, the grievor did not travel and received no new files.

[89] From August 2007 to March 2008, the supervisors sent several email reminders to the grievor ordering her to complete certain late tasks and to correct inconsistencies in certain files. In November 2007, Ms. Beauregard emailed Ms. Frechette about her concerns that the grievor was not accounting for all her working hours.

[90] In December 2007, the employer took away some of the grievor's files and assigned her to gather food samples.

[91] Mr. Lambert explained that a team of inspectors had a number of different tasks to complete. Taking food samples was a less-complicated task and was often assigned to inspectors with less experience or who were having difficulty doing other activities.

[92] At the end of 2007, Dr. St-Hilaire became the lead manager at Montreal East. He stated that he and Ms. Frechette discussed the grievor's situation and consulted a human resources officer to find out what kind of interventions they could offer the grievor. From that point, Dr. St-Hilaire received copies of the supervisors' emails to the grievor.

[93] Ms. Frechette and Dr. St-Hilaire signed the grievor's 2007-2008 performance evaluation. Ms. Frechette included a list of activities the grievor had been involved in over the fiscal year. She noted that the grievor continued to have difficulty meeting deadlines. She also stated that in December 2007, because very little work had been completed in her files, the grievor was reassigned to gather food samples for the last three months of the fiscal year as well as to complete her files and administrative tasks. The grievor did not ask for a review of the 2007-2008 evaluation.

[94] The grievor informed her supervisors in May 2008 that she had gathered a total of 183 food samples from November 2007 to March 2008, which were for two different projects.

The grievor's evidence

[95] The grievor had a heavy workload in 2007-2008.

[96] The grievor filled out her OPM forms and always remitted them, although sometimes she was late. The supervisors had shortened the deadline for the inspectors to hand them in. When she expected she would be late, she advised the secretary who gathered the sheets and entered the information into the OPM system.

[97] The grievor stated that because of her priorities, certain tasks were performed late, but she specified that she did not carelessly leave files incomplete. In addition, if an IMS file were closed in error, correcting it was very difficult, and therefore, the grievor and others waited a short while to make sure files were completed. She stated that what the supervisors considered delays were actually the result of her planning and grouping like tasks together. She also stated that administrative tasks were not an important part of her job.

Fiscal Year 2008-2009

The employer's evidence

[98] In August 2008, the grievor submitted expense reimbursement claims that dated from November 2006 to July 2008. Mr. Lambert and Dr. St-Hilaire explained that submitting a claim for the reimbursement of expenses from an earlier fiscal year was problematic because the employer does not make provisions in its budget for such late claims.

[99] In other emails, the supervisors reminded the grievor to complete late tasks. In some cases, they also asked her to correct inconsistencies and errors, such as misfiling or not including inspection notes in a file.

[100] Dr. St-Hilaire was kept informed about the grievor's performance and her supervisors' actions. He was concerned that the grievor was not meeting the priorities set by her supervisors. And he was concerned that she was not getting enough work done, given the number of days she took to do it, which led him to believe that she was not accounting for all her work hours.

[101] On November 10, 2008, Dr. St-Hilaire met with the grievor, her bargaining agent representative, Ms. Frechette, and a human resources officer. Dr. St-Hilaire discussed

with the grievor his concern that she was showing no performance improvement. He asked her what accommodation the employer could provide. She answered that she wanted to change her office location, which was done. Dr. St-Hilaire gave her until November 28, 2008, to develop a plan; during that period, no new files were assigned to her.

[102] Dr. St-Hilaire met again with the grievor, her bargaining agent representative, Ms. Frechette, and a human resources officer on December 1, 2008. The grievor reported on what she had done since the last meeting. She was then given a list of tasks to finish before January 8, 2009. According to Dr. St-Hilaire, those tasks should have taken 14 days to complete; he gave the grievor 20 days to complete them.

[103] Another meeting took place on January 8, 2009, with Dr. St-Hilaire, the grievor, and her bargaining agent representative. The grievor explained that she could not complete all her tasks because of an unexpected training session and because of difficulties arranging meetings. Dr. St-Hilaire pointed out that he was concerned by the fact that she was not able to account for all her work hours. Again, he asked her if she needed help, and she replied that she did not. He also reminded her of the importance of communicating with her supervisors and of keeping them informed as to what she was doing and whether she needed assistance. She was given a list of tasks to complete in January. At that meeting, the grievor stated that she was carrying out her duties in a professional manner, and she questioned the need for the meetings.

[104] The grievor advised her supervisor that she had completed the January tasks. She then started to work on late files.

[105] Ms. Frechette and Mr. Lambert signed the 2008-2009 performance evaluation. In it, Ms. Frechette wrote the following:

[Translation]

Lucie has much difficulty completing tasks asked of her within reasonable deadlines. For about the last three years, several options were tried to allow her to catch up on the numerous delays that had accumulated in her work. Inspections to be done in different labelling and safety projects, complaints to be resolved, availability for the on-call schedule, and reminders are all an SAPC inspector's regular duties. Lucie was not asked to do those different tasks over a period sufficient for her to complete her several late files. She was also offered help from other inspectors as well as the

option of redoing certain training she had already taken. Despite all those attempts, Lucie's performance remains insufficient. Finally, we asked her to resume an SAPC inspector's regular duties and offered her close supervision to help her accomplish her work. Monitoring is currently underway, and the situation will be evaluated when she returns from vacation.

[106] The grievor requested that Mr. Lambert revise her evaluation. He met with her, the supervisors, and the lead manager. He concluded that the procedure that the supervisors followed was fair and that the concerns noted in the performance evaluation were founded.

The grievor's evidence

[107] The grievor's opinion was that her performance was exceptional in 2008-2009. She had been overloaded with work; thus, it was normal that she completed some administrative tasks late. The amount of food samples that she took in that period was 10 times more than the amount inspectors normally took per year.

[108] Taking food samples was simple but important work. In 2007, the grievor met with the laboratory chief and then prepared a detailed food sample taking guide for inspectors.

[109] The grievor stated that taking food samples involves travelling to a site, taking a sample, carefully following the directives so that the sample is appropriate for analysis, and liaising with the laboratories. The work is very precise; taking a food sample could involve up to three hours of work. However, her adduced evidence showed that she could take multiple food samples in a single day.

[110] The grievor presented the following information about the work she had accomplished:

- In one project, her office had to take 122 food samples, of which she took 97, which she explained was a disproportionate number compared to her colleagues. However, in cross-examination, she acknowledged that she took the 97 food samples in 24 days in the period from May 2008 to February 2009.
- In May and June 2008, she completed eight inspections, each one taking a minimum of one day plus time for administrative tasks.

- On July 7 and 8, 2008, she completed tasks for a detailed screening project.
- She took 10 food samples in 6 days from August 27 to October 15, 2008.
- She carried out four inspections from January 21 to March 11, which took her four days to complete.
- She took eight food samples from August 28 to October 15, 2008.

[111] The grievor also presented a document that showed that she had taken 76 food samples for a Health Canada project from November 9, 2007, to January 10, 2008. She affirmed that the employer was not aware of that significant amount of work.

[112] In cross-examination, the grievor acknowledged that the evidence confirmed that the employer was aware of her work on the Health Canada project. In addition, she acknowledged that although the document covered a 3-month period, it showed that the 76 food samples were taken in 7 days. She had taken up to 10 food samples in a single day. She explained that the document did not show the full three months of work. However, in addition to the days noted, time would have been spent preparing expense reimbursement claims for the work.

[113] The employer informed the grievor that it would give her less work so that she could catch up on her files. She stated that in spite of what she was told, it did not happen.

[114] The grievor tried to explain that she was not responsible for the delays, which were part of the nature of the work. There were many reasons that a file needed to remain open. If any action was left outstanding, the file could not be closed, and the administrative work could not be completed.

[115] As for the expense reimbursement claim that the grievor presented a year late, she explained that she did not know she could claim reimbursement of the expenses. Furthermore, the amount was not significant.

Fiscal year 2009-2010

The employer's evidence

[116] Dr. St-Hilaire met with the grievor, her bargaining agent representative, and a human resources officer on May 7, 2009. He told her that her productivity was lower than her colleagues'. And she had shown a bad attitude three times. Again, he asked her to explain why she was having difficulties and whether she needed anything from

the employer. She responded by repeating comments she had already made.

[117] Dr. St-Hilaire advised the grievor that her colleagues were starting to complain about her lack of productivity. He expressed doubts about her capacity to carry out the work of an employee in a position classified at the EG-04 group and level. He asked her to reflect on whether she needed help or had any solutions to bring up and how she viewed her future.

[118] Dr. St-Hilaire met with the grievor, her bargaining agent representative, and a human resources officer on May 13, 2009. The grievor affirmed that she felt trapped by the process, and she considered that her performance was excellent. She told Dr. St-Hilaire that he was being manipulated by her supervisors. He again expressed doubts about her capacity to carry out the work required of an employee in a position classified at the EG-04 group and level. He then accepted a plan proposed by the grievor's bargaining agent representative. It was agreed that the grievor would complete her late files in the next eight weeks and that she would submit a written report at the end of each week. Under the plan's framework, she also had to plan her weeks by having discussions with a supervisor at the beginning and end of each week.

[119] On May 15, 2009, Ms. Frechette sent a written communication to Dr. St-Hilaire in which she expressed her concern that the grievor would not acknowledge that she had performance problems. Dr. St-Hilaire replied that even if it were true, it was their responsibility to continue to take appropriate measures, such as the period of intensive supervision.

[120] On May 25, 2009, Dr. St-Hilaire met with the grievor and her bargaining agent representative. He expressed disappointment that when they agreed that the grievor would complete all her files in eight weeks, she had not told him that for part of that time, she would be on leave. The grievor assured Dr. St-Hilaire that nevertheless she would be able to finish her files before her leave.

[121] On June 8, 2009, Ms. Frechette sent the grievor a written communication to inform her that her tasks for the week had not been completed. Ms. Frechette added the following:

[Translation]

If you fail to meet these objectives without a valid reason, we

will be required to take administrative or other measures. In effect, the supervision from which you currently benefit aims to correct your unsatisfactory performance, and failing to respect the established deadlines will be interpreted as bad faith on your part; consequently, more severe measures will be imposed.

[122] On June 11, 2009, Dr. St-Hilaire met with the grievor, Ms. Frechette, and the grievor's bargaining agent representative. At that meeting, the grievor stated that she would finish the assigned work on time, but she did not.

[123] In July 2009, Ms. Frechette sent a number of emails to the grievor, with copies to Dr. St-Hilaire. In each email, Ms. Frechette advised the grievor of problems with her files, including not making electronic copies of labels, not filing correctly, not entering information into the IMS on time, not keeping her files up to date, and not closing files and sending them for filing, and of actions recorded on her OPM sheet that could not be verified.

[124] Two more meetings were held, on August 10 and 25, 2009, with Dr. St-Hilaire, the grievor, her bargaining agent representative, and Patrick Blondeau, the acting lead manager. The grievor had not completed her tasks, and Dr. St-Hilaire repeated that the employer was questioning her ability to carry out the duties of a position classified at the EG-04 group and level. She did not explain her difficulties but indicated that for some files, she was waiting for responses from companies.

[125] At a meeting on September 15, 2009, Dr. St-Hilaire gave the grievor a letter in which he informed her that her performance was still unsatisfactory. He set out the actions taken by the employer, which included the period of intensive supervision and the many meetings with him. He informed her that the employer believed that she was not capable of carrying out the duties of a position classified at the EG-04 group and level. He added that she had misled it about her files. He then indicated that if no improvement occurred in the future, the employer would have to take measures that could include demotion or termination. He gave her 10 days to consider her next steps.

[126] Dr. St-Hilaire explained that he took those measures because none of the employer's efforts had worked, and no new plan was identified. The grievor did not have a heavier workload than her colleagues. In fact, the employer had reduced her workload to give her time to finish her files. Dr. St-Hilaire had concluded that the grievor was not capable of carrying out the duties of a position classified at the EG-04

group and level.

[127] A meeting was scheduled for September 25, 2009. On that date, the bargaining agent representative advised the employer that the grievor would not attend because she did not feel comfortable and that in her view, the 10 days given to her at the September 15 meeting had consisted of working days, and therefore, the time limit had not expired. Dr. St-Hilaire went to the grievor's office and told her he wanted to meet with her. However, she refused.

[128] By email that same day, Dr. St-Hilaire advised the grievor that her attitude had been disrespectful and unacceptable. He informed her that she did not understand the seriousness of her situation and that she was not interested in keeping her position. He then told her that he would consider his options.

[129] Dr. St-Hilaire told the grievor that he would meet with her and her bargaining agent representative on October 7, 2009. She refused to attend.

[130] Ms. Frechette and Mr. Lambert signed the grievor's performance evaluation for 2008-2009. Ms. Frechette stated that the grievor had great difficulty completing her tasks in a reasonable time, even after three years of receiving extra help and having periods in which she was relieved of a number of duties normally assigned to inspectors.

[131] Mr. Lambert met with the grievor on November 25, 2009, to discuss her performance evaluation for 2008-2009 because she had asked for a review. He then met with Ms. Frechette and Dr. St-Hilaire. He determined that the comments noted in the evaluation were justified.

[132] Mr. Lambert recalled that either at the November 25, 2009, meeting or at another one, the grievor had given him a book of documents showing all the work that she had done over a certain period. He indicated that she did not agree with the objectives set for her and believed that her supervisors were not aware of all the work that she had done.

[133] In late 2009, Dr. St-Hilaire recommended to Mr. Lambert demoting the grievor because she did not seem capable of satisfactorily carrying out the duties of a position classified at the EG-04 group and level, even after three years of being monitored and after the employer's extra help.

[134] Mr. Lambert met with the grievor on January 15, 2010, and advised her that it had been decided to demote her to a position classified at the EG-03 group and level.

[135] On January 19, 2010, the grievor emailed Mr. Lambert, indicating the position classified at the EG-03 group and level that she preferred.

[136] On January 27, 2010, Mr. Lambert sent a letter to the grievor confirming her demotion.

[137] On January 31, 2010, the grievor sent a written communication to Mr. Lambert, indicating that she completely disagreed with the demotion and that she would exercise her recourse rights. However, in the meantime, she would hold the position classified at the EG-03 group and level.

[138] Mr. Lambert's opinion was that the process followed to try to help the grievor meet the established goals was fair and equitable. By all means, the employer tried to ensure that she complied with requirements and that she made every effort to allow her to sufficiently carry out her duties. Mr. Lambert stated that he had never been involved in a file in which the employer had made such an effort to help an employee. The employer opted to demote the grievor instead of dismissing her in recognition of her good attitude, experience, and capacity for reflection.

[139] Dr. St-Hilaire affirmed that he and the grievor's supervisors supported her in different ways, including providing training, having colleagues help her, implementing measures to free up time for her to complete files, giving her examples of work done by others, extending time limits, relieving her of on-call duty, holding frequent meetings, with some including the bargaining agent representative, and introducing a period of intensive supervision.

[140] Dr. St-Hilaire stated that the employer provided the grievor a level of support that he had not witnessed in any other situation. He affirmed that she did not acknowledge that she had shortcomings. Nevertheless, it was his duty and that of her supervisors to take measures to help her meet the objectives of her position.

The grievor's evidence

[141] According to the grievor, her performance over the years did not change. She was diligent and organized, was collaborative, and had good work habits.

[142] The grievor affirmed that she did not talk often with her supervisors but that she probably had meetings with them. She explained to her supervisors that the delays were not her fault but rather were part of the nature of the work. She believed that the objectives set for her had not been realistic. She added that she respected her supervisors and that she always acted professionally and in the employer's best interests. She refused to be pressured such that she would make errors.

[143] In her meetings with Dr. St-Hilaire, the grievor accepted the objectives out of respect for authority and tried to explain that the nature of the work meant that delays could occur that would be out of her control.

[144] At her meeting with Mr. Lambert on November 25, 2009, she showed him documents setting out all the work she had done in 2008-2009, which included carrying out inspections as well as gathering food samples. She indicated that she had done as much as or more than any other inspector.

[145] In cross-examination, the grievor made the following points:

- When she was assigned the objective to reduce the time for completing each file, she worked to meet it, but it did not change the nature of her work.
- She had trouble remitting her OPM sheets on time because the supervisors had shortened the deadline.
- Although she could not recall meeting with her supervisors, she presumed that some meetings had taken place.
- She respected Ms. Frechette and followed her directions, but delays occurred because she had to establish priorities.
- Sometimes, the deadlines were unrealistic.
- The delays remitting the OPM sheets were short and did not cause prejudice to the employer.
- She spoke with her supervisors only when necessary for her work, and she did not always advise them of delays.
- Her supervisors had less experience than the grievor did and did not always understand the nature of the work.
- The supervisors made judgments too quickly.
- The grievor received all the emails her supervisors sent her advising her of her shortcomings, but she did not remember all the meetings.

- She did not agree with the negative comments in her 2006-2007 evaluation; she believed that the supervisors exaggerated events, did not value her work, and changed the reality.
- She worked to the best of her abilities, which matched those of her colleagues.
- She was not at fault for the delays in her files.
- Her supervisors did not acknowledge that her workload in 2008-2009 had been exceptionally high.
- Although the employer indicated that it reduced her workload, it was not really true, because tasks taken from her would be returned to her eventually.
- Her work environment changed from one in which employees worked independently to one that was based on unrealistic deadlines.
- Her supervisors were trying to discredit her.
- The supervisors pitted new inspectors against seasoned inspectors.

Arguments on the merits

For the employer

[146] Since the parties agreed that the employer would present its evidence first, they also agreed that it would be the first to present arguments.

[147] Section 230 of the *PSLRA* limits the power to review a decision to demote an employee because of unsatisfactory performance. The Board cannot substitute its opinion for the employer's. Instead, it must determine if the deputy head's evaluation that the employee's performance was unsatisfactory was reasonable. That analysis must be focused on the process leading to the determination of unsatisfactory conduct and in particular should consider the following four criteria:

- Did the employer act in good faith?
- Was the employee subject to appropriate performance standards?
- Did the employer clearly communicate the performance standards to the employee?
- Did the employee receive the tools, training, and mentoring required to meet the performance standards?

[148] The grievor had good intentions but did not seem capable of maintaining a pace

of work appropriate for a position classified at the EG-04 group and level. She carried out certain tasks well but did not complete the work in her files in a timely manner. Problems were noted with closing files, filing, following up, and communicating with superiors. She prioritized other tasks over those her supervisors asked her to do, even after receiving written reminders. She also suggested that the administrative duties were not important.

[149] Much had changed in the grievor's workplace since 2001, including new supervisors, a shortened deadline to remit OPM sheets, more technology, and an emphasis on reducing the time taken to carry out tasks. She was resistant to change and insisted that her supervisors did not understand the nature of an inspector's work.

[150] The evidence did not support the grievor's claim that she had had an exceptionally high workload. On the contrary, the evidence showed that the work that she recorded did not match up with the hours taken to do it. In addition, no evidence supported her allegation of a shortage of inspectors from 2006-2007 to January 2010.

[151] The adduced evidence showed that for over three years, the employer set clear expectations and took measures to help the grievor meet them, including reducing her workload, holding regular meetings, offering training opportunities, having a colleague help her, and instituting a period of more intensive supervision. The employer acted in good faith and valued the grievor, as shown by its decision to demote her rather than terminate her employment. The employer recognized that it was unpleasant for her to be subject to more intensive supervision; however, that does not constitute proof of bad faith.

[152] The employer's conclusion of unsatisfactory performance was shared not only by the supervisors but also by Mr. Lambert and Dr. St-Hilaire.

For the grievor

[153] According to the grievor, although section 230 of the *PSLRA* limits the Board's jurisdiction, it is not limited to examining the process that was followed, as the employer suggested. It must also look at the reasonableness of the employer's decision that the grievor's performance was unsatisfactory.

[154] The grievor submitted that she had carried out a complicated mandate since 1992 and that no concerns were noted about her professional capacities. The problems

that the employer noted concerned only administrative duties (missing deadlines and delays closing files and submitting them for filing), which were far from the most important facets of her job. The employer did not demonstrate that she was incapable of carrying out the duties of her position. Furthermore, she demonstrated that her delays completing administrative tasks were due to her having a heavy workload because of a personnel shortage. And she showed that in certain cases, the supervisors asked her to close files that could not be closed because some actions still needed to be taken on them.

[155] The grievor submitted that Mr. Lambert and Dr. St-Hilaire did not have a sufficient understanding of an inspector's work and noted that the employer did not call her two supervisors to testify. As a result, the Board had no evidence from employer representatives with direct knowledge of her situation.

[156] The grievor further pointed out that the employer did not show that its process was reasonable. It presented isolated incidents that did not show that she had a chronic problem meeting deadlines. For example, although she had submitted a travel expense reimbursement claim after a fiscal year ended, there was no established procedure for submitting such claims, and thus, the delay caused minimal prejudice to the employer.

[157] The supervisors exaggerated the importance of the grievor's delays remitting the OPM information, which were due in part to the supervisor's shortening the deadline from 10 to 4 days after the end of each month. The grievor consulted with the secretary who processed the OPM information to make sure her delays did not cause problems. She then prioritized other tasks.

[158] Although there is no proof of bad faith, the supervisors' concerns were about minor tasks and should not have been used as a basis for the decision that the grievor's performance was unsatisfactory. The Board should find that the employer's decision did not meet the reasonableness test. It should order the grievor reintegrated to the position classified at the EG-04 group and level retroactive to January 27, 2010, with no loss of salary and all other financial benefits.

Employer's response

[159] The employer submitted that the grievor's shortcomings were serious in that the delays entering information and closing files meant that management and

colleagues were missing up-to-date information.

V. Analysis

General principles

[160] An employee of a separate agency referred to in subsection 209(3) of the *PSLRA* may file a grievance about a demotion for unsatisfactory performance and refer it to adjudication (paragraph 209(1)(d) of the *PSLRA*).

[161] In this case, the employer is a separate agency referred to in subsection 209(3) of the *PSLRA* (see *Public Service Labour Relations Act Separate Agency Designation Order* (SOR/2005-59)). An adjudicator examining such a grievance has limited jurisdiction under section 230, which provides as follows:

230 In the case of an employee in the core public administration or an employee of a separate agency designated under subsection 209(3), in making a decision in respect of an employee's individual grievance relating to a termination of employment or demotion for unsatisfactory performance, an adjudicator or the Board, as the case may be, must determine the termination or demotion to have been for cause if the opinion of the deputy head that the employee's performance was unsatisfactory is determined by the adjudicator or the Board to have been reasonable.

[162] The adjudicator's authority in cases in which section 230 of the *PSLRA* applies is described in *Mazerolle v. Deputy Head (Department of Citizenship and Immigration)*, 2012 PSLRB 6 at para. 125, as follows:

125 ... The reasonableness of the employer's assessment of performance is the issue that an adjudicator must examine, not the reasonableness of the decision to terminate or demote. The consequence, as noted in Raymond, is that I am limited to one of two conclusions. Either the assessment that the grievor's performance was unsatisfactory was reasonable, or it was not. If it was reasonable, I must find that there was cause, and I then cannot interfere with the decision to terminate the grievor's employment. If it was not reasonable, the termination will be overturned. No other conclusion is possible.

[163] In *Raymond v. Treasury Board*, 2010 PSLRB 23 at para. 131, the adjudicator listed the following criteria as relevant to the analysis of whether the deputy head's negative assessment of the employee's performance was reasonable:

131 ... I do not see how it would be possible to find that it was reasonable for a deputy head to consider the performance of one of his or her employees unsatisfactory if the evidence showed the following:

- the deputy head or the supervisors who assessed the employee's performance were involved in a bad faith exercise;
- the employee was not subject to appropriate standards of performance;
- the employer did not clearly communicate the standards of performance to the employee that he or she was required to meet; or
- the employee did not receive the tools, training and mentoring required to meet the standards of performance in a reasonable period.

[164] The employer submitted that section 230 of the *PSLRA* restricts the Board to analyzing the deputy head's conclusion of unsatisfactory performance by applying only the *Raymond* factors. In other words, the Board is limited to determining only whether the process followed was reasonable and fair.

[165] The grievor pointed out that the Board's analysis had to look not only at the reasonableness of the process followed but also at the conclusion. That position is consistent with the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, which examined the definition of reasonableness and provided direction in that respect as follows:

[47] ... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[166] Thus, in its review of the reasonableness of the deputy head's judgement, the Board must consider not only the factors in the decision-making process that are affected by the decision, such as those specifically set out in *Raymond*, but also whether the decision falls within the range of possible and acceptable outcomes with respect to the facts and law. As stated in *Forner v. Deputy Head (Department of the*

Environment), 2014 PSLRB 95 at para. 183, “[t]he SCC has defined what reasonableness means in a broad or theoretical sense, and *Raymond* assists in understanding what it means in the context of the *Act*.”

[167] Ms. Beauregard, Ms. Frechette, Mr. Lambert, and Dr. St-Hilaire agreed that the grievor’s performance was unsatisfactory from 2006-2007 to 2010. The same shortcomings were noted consistently over that period and included her not completing files, not entering information into the IMS in a timely way, not remitting the OPM sheet in a timely way, and not respecting her supervisors’ directives. She also indicated tasks she did that could not be verified, did not communicate with the supervisors, did not account for all her work hours, and did not recognize that the concerns were valid. And according to other evidence, she was late with other tasks, such as replying to a colleague and remitting an expense reimbursement claim.

[168] According to the employer, the grievor was not accounting for all her work hours. Dr. St-Hilaire raised that concern with her in her bargaining agent representative’s presence. He told her that the tasks she said she was completing were insufficient in terms of the time she was taking to complete them.

[169] Although the grievor submitted that she respected authority, she consistently either ignored or was unable to follow clear directions from her supervisors. She affirmed that the fact she was late completing administrative duties was an insufficient basis on which the employer could conclude that overall, her performance was unsatisfactory. According to her, administrative tasks were of minor importance and therefore were of low priority for her. However, she had to execute those tasks, which was clearly noted in the document entitled “[translation] Generic Work Description”, which listed as one of the key activities of her position “[translation] maintaining databases and electronic files.” In the same document, the first characteristic under “Responsibility” reads as follows:

[Translation]

Entering into databases (e.g., SPRINT, IMS) complaints, investigation and inspection results, and sampling data, to make them accessible to managers at the Office of Food Safety and Recall, to colleagues, and to specialists and program officers.

[170] Furthermore, the employer explained that having the databases up to date was

important as management used them for resource allocation and planning, and other inspectors used them when carrying out research for their own cases. The grievor showed that she was unable to complete those tasks in a timely way.

[171] The grievor discounted the supervisors' opinions about her performance; according to her, they lacked experience and did not understand the nature of the work. However, the evidence showed that Mr. Lambert and Dr. St-Hilaire, the persons to whom the immediate supervisors reported, were also of the view that the grievor's performance was unsatisfactory.

[172] The grievor submitted that the testimonies of Mr. Lambert and Dr. St-Hilaire should be given no weight and that Ms. Frechette and Ms. Beauregard should testify. However, I find that the employer's evidence was sufficient to establish its case, for the following reasons:

- It provided ample documentary evidence that indicated the concerns of the grievor's immediate supervisors over a period of more than three years.
- The documentary evidence also indicated the actions they took to inform the grievor about those concerns and to provide her with additional support and supervision.
- The documentary evidence was supported by the testimonies of Mr. Lambert and Dr. St-Hilaire who, as the supervisors' managers, had direct knowledge of the situation from the information the supervisors provided to them and because they were copied on correspondence to the grievor and met with her.
- The grievor acknowledged that she received the written communications and that she met with her immediate supervisors, Mr. Lambert, and Dr. St-Hilaire at meetings.
- The grievor did not question the supervisors' credibility. Instead, she questioned their competence and their knowledge of the nature of the work.
- For a number of the incidents noted in the supervisors' emails, the grievor submitted that the delays were out of her control. It would have been helpful to hear from the supervisors on that subject. Nevertheless, even if I accept the grievor's explanations, a good number of other examples exist of shortcomings that more than justify a finding that her performance was unsatisfactory.

[173] The grievor pointed out that her workload, particularly in 2007-2008 and 2008-2009, was exceptionally heavy, and because of that, she could not get administrative tasks done on time. However, the evidence that she presented about it was inconclusive.

[174] The grievor provided documentation about the following work that she completed:

- 2007: Sometimes, she was on call. However, no information was provided about whether those on-call periods led to files being opened that she had to complete.
- 2008-2009: She took 97 food samples for the 2008-2009 Fair Labelling Practices Program Food Composition and Economic Fraud Analytical Program Project on 24 different days over 8 months from May to the end of January.
- 2008: She carried out 8 inspections in May and June.
- 2008: She took 10 food samples in 6 days from August 27 to October 15 for 2 projects.
- 2008: She performed 2 screenings.
- 2008: She carried out 2 inspections and took 3 food samples.
- 2009-2010: She took 76 food samples over 6 days for a Health Canada project.
- 2009: She carried out 4 inspections from January to March.
- 2009: She took 10 food samples from August to October.

[175] According to the grievor, each food sample could take up to three hours of work. She also stated that an inspection could take one or two days. Screening tasks took one half-day each.

[176] The evidence was confusing about how much time was needed to take a food sample. Initially, the grievor stated that taking a food sample could take up to three hours. However, her documentary evidence showed that she regularly was able to take multiple food samples in a single day. She explained that additional time was then needed for other activities, such as travelling, following up, and completing expense reimbursement claims.

[177] Comparing the grievor's time estimates with the documentary evidence she

presented leads me to conclude that the evidence shows that she performed a number of different tasks over the years, but that does not prove that she had an excessive workload in that period.

[178] I find that the facts support the deputy head's conclusion that the grievor's performance was unsatisfactory. Over a period of three years, she showed that she was unwilling or unable to carry out all the duties of her position. She significantly underestimated the seriousness of her shortcomings by describing them as being only about being late completing minor administrative tasks. They also included the fact that she did not follow her supervisors' directions and did not communicate with them, even after being told many times about the importance of that aspect of her work. Those facts show that the deputy head's judgement was reasonable.

[179] Are there other factors to consider, including those listed in *Raymond*, which raise questions about the reasonableness of the deputy head's judgement?

[180] There is no evidence of bad faith on the part of the employer. For over three years, Ms. Frechette, Ms. Beauregard, Mr. Lambert, and Dr. St-Hilaire tried to help the grievor satisfactorily meet her objectives. Both Mr. Lambert and Dr. St-Hilaire indicated that they had never been involved a case in which so much assistance was given to an employee.

[181] The grievor pointed out that the employer's expectations were unreasonable; however, the evidence showed otherwise. She did not prove that her workload was so excessive that she was unable to meet the expectations set for her. Furthermore, the areas in which it was determined that she was having difficulty were all properly within the description of an inspector's responsibilities. In 2009, work plans were developed in cooperation with her and her bargaining agent representative as well as a human resources officer, and none of them, including the grievor, expressed any concerns that the objectives were unreasonable. Evidence also showed that the employer displayed flexibility and that it extended deadlines when appropriate.

[182] The employer clearly and frequently communicated its expectations to the grievor. The evidence included numerous emails and reports of meetings in which the supervisors set out specific expectations as to tasks that needed to be completed with precise timelines. Likewise, when Mr. Lambert and Dr. St-Hilaire met with the grievor, they also clearly explained the problem areas and suggested ways that she could

improve her performance. In the series of meetings that Dr. St-Hilaire had with her, next steps were clearly set out, and the grievor agreed to every step.

[183] The evidence included numerous examples showing the employer offering the grievor tools, training, and mentoring to help her meet her objectives, such as the following:

- training opportunities;
- regular meetings with the supervisors;
- a period in which a colleague helped her and no new files were assigned to her;
- periods in which she was assigned less work or in which she was assigned less-complicated tasks;
- a period of intense supervision developed by the employer, the bargaining agent representative, and the grievor that included work plans, regular meetings, and regular feedback; and
- regular reminders of tasks assigned to her that needed to be completed.

[184] The evidence also showed that at times, when the employer asked the grievor if she needed more assistance, she did not accept it. In particular, Dr. St-Hilaire asked her more than once if there were reasons that he did not know of that could explain her performance problems and if the employer could provide anything to her to help. She made no request other than to be moved to a different office, which was done immediately.

[185] I find that the grievor did not show the existence of other factors, including those set out in *Raymond*, which would raise questions about the finding that the deputy head had reasons to conclude that her performance was unsatisfactory.

VI. Conclusion

[186] For over three years, the employer clearly conveyed to the grievor that her performance was lacking. It gave her clear directions on how to correct the shortcomings, and in good faith, it provided her with training sessions and several types of assistance. The areas of unsatisfactory performance were not insignificant, as the grievor contended. They involved key issues, particularly not following her superiors' directions, not meeting her objectives, and not communicating with her supervisors as well as not completing administrative tasks in a timely way.

[187] The grievor submitted that the employer erred when it found her performance unsatisfactory because the shortcomings were about minor matters and because she performed well in other respects. As stated earlier in this decision, I do not accept that the shortcomings were insignificant. However, I do agree that the deputy head recognized that the grievor's performance was satisfactory in some areas — for that reason, it decided to demote her rather than terminate her employment.

[188] Therefore, I find that the deputy head's conclusion that the grievor's performance was unsatisfactory was reasonable, and as a result, the grievance is denied.

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

(The Order appears on the next page)

VII. Order

[190] The Board extends the time limit for presenting the grievance.

[191] The grievance is denied on the merits.

January 25, 2016.

PSLREB Translation

**Catherine Ebbs,
a panel of the Public Service Labour
Relations and Employment Board**