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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

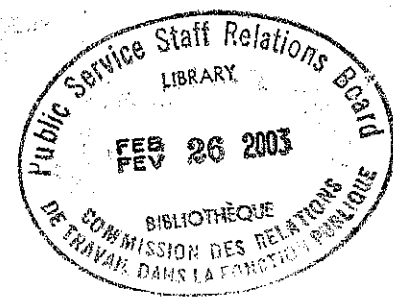
MARK SPURRELL

Grievor

and

OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Employer



Before: D.R. Quigley, Board Member

For the Grievor: Steve Eadie, Professional Institute of the Public Service of Canada

For the Employer: Richard Fader, Counsel

Heard at Toronto, Ontario,
January 7 and 8, 2003.



DECISION

[1] On August 20, 2003, the Professional Institute of the Public Service of Canada (PIPSC) referred to adjudication a grievance concerning the rejection on probation of Mark Spurrell, a senior supervisor (RE-5) in the Financial Institutions Group at the Office of the Superintendent of Financial Institutions (OSFI).

[2] Counsel for the employer introduced four exhibits and called two witnesses; the grievor's representative introduced two exhibits and called one witness: the grievor.

[3] Both representatives made brief opening statements; they both agreed that OSFI is a separate employer governed by the *Public Service Employment Act (PSEA)* and its regulations. It was also agreed that the employer met its obligation with respect to the notice period for the rejection on probation and that the grievor had received four weeks' notice.

FACTS

[4] Wing-Haan Tam has been a manager (RE-6) at OSFI for the last seven years. Prior to joining the Public Service, Ms. Tam worked at Imperial Life Insurance and at the Bank of Montreal for a total of 14 years. She is a chartered management accountant (CMA) and holds a Master of Business Administration (MBA).

[5] Ms. Tam was the grievor's direct supervisor at the relevant time and she reported to Calvin Johansson, the Director of the Financial Institutions Group.

[6] Ms. Tam testified that two senior supervisors reported directly to her, one of whom was the grievor, and her portfolio would include six to seven financial institutions. Each of the two senior supervisors would be assigned three or four of these financial institutions and provide continuous contact, conduct an analytical review of risk profiles of the institutions, develop risk assessments and summary risk matrix of the institutions, conduct meetings, draft reports and correspond with the institutions in a timely manner with minimum corrections to reports.

[7] Ms. Tam testified that when the grievor would be up to his full capabilities in the senior supervisory position, he would lead on site examinations, as a lead examiner perform on site reviews of institutions; as well he would be responsible for coordinating activities, scheduling meetings and conducting on site reviews of institutions.

[8] She also stated that, as a new employee, the grievor would meet with her concerning specific issues or if he needed more direction.

[9] Ms. Tam stated that the grievor's employment was terminated on April 19, 2002, and it was Mr. Johansson who made that decision. Her involvement in that decision was to provide feedback to Mr. Johansson on areas where the grievor needed improvement and report any observations she had made.

[10] Ms. Tam identified Exhibit E-1, the letter sent to the grievor on June 22, 2001 from Mr. Johansson offering him an indeterminate appointment at the RE-5 level. The letter states in part:

...Also, in accordance with the Public Service Employment Act and Regulations (Section 28), the first 12 months of continuous employment is the probationary period.

...

The terms and conditions governing your employment will be the Public Service Terms and Conditions of Employment Regulations and the applicable collective agreement...

[11] The grievor accepted and signed the letter of offer on June 25, 2001, and started working at OSFI on August 7, 2001.

[12] Ms. Tam testified that, as the grievor was a new employee and from the private sector, she assigned him seasoned team members and he was asked to perform routine tasks. During her first meeting with the grievor, she presented him with two options: she could assign him tasks with a high level of direction and leave it to him to complete the review areas if they needed to be corrected or changed, or she could provide him with detailed direction and "hold him by the hand". The grievor replied that he preferred the first option and Ms. Tam indicated that she had stated to the grievor that that would be her choice, as well.

[13] Ms. Tam described OSFI's "Goal Commitment Document" (Exhibit E-2), which she had reviewed with the grievor. The document sets out the goals, objectives, responsibilities, priorities and the code of conduct for which the grievor would be accountable. The grievor acknowledged receipt of this document by signing a copy on August 30, 2001.

[14] Ms. Tam stated that she was leaving on holidays at the beginning of September 2001 and a few days before her vacation, possibly the Wednesday or Thursday, she assigned the grievor a work package. On the Friday, he indicated to her that the work requested had been completed, which she found very surprising. He also indicated that he wanted to take the afternoon off and that he would like to begin working a compressed workweek. Ms. Tam advised him that, since she needed to review the compressed workweek policy with him and since he had only been employed with OSFI for three weeks, she needed time to evaluate his work. She ended the conversation by indicating that she would review his request in the near future.

[15] Ms. Tam stated that when she returned from vacation, the work she had assigned to the grievor had not been completed. She called the grievor into a meeting and asked him to explain why the tasks were not completed. He responded: "I didn't have enough time. There was not enough information. I needed to browse the Internet and I went on a number of training courses."

[16] Ms. Tam testified that, although OSFI encourages training courses for its employees, it also expects employees to be responsible for any tasks assigned to them. She indicated as well that she expected that, as a senior supervisor, the grievor would have informed Mr. Johansson, who authorized the training, that he had tasks to complete.

[17] Ms. Tam summarized numerous meetings and incidents she had with the grievor as follows.

[18] Ms. Tam had a meeting with the grievor where she informed him of the importance of deadlines and of respecting timelines. She also indicated to him that there were other team members and another senior supervisor he could talk to if he experienced any problems. She stated as well to the grievor that the amount of time spent browsing the Internet was not necessary for the majority of work the grievor was assigned. The witness also stated that she informed Mr. Johansson of her meetings with the grievor.

[19] Ms. Tam referred to an incident where the grievor had been assigned to perform a reconciliation of return for the Canadian Deposit Insurance Corporation (CDIC). The grievor advised her that he had had a problem with the institution but had resolved it, although he was concerned about his legal responsibilities in performing

reconciliation. She attempted to explain that there were a number of ways to perform reconciliation; however, he had to be able to justify his assessment. The grievor did not appreciate her answer and asked her the same question four times, at which point Ms. Tam became annoyed and said to him: "I will not answer the same question again." Ms. Tam stated that even though she was annoyed, she understood that the grievor was a new employee, was anxious and was looking for a level of comfort. She therefore gave him the benefit of the doubt with respect to his aggressive behaviour.

[20] Ms. Tam also recalled another incident where the Vice-president of Internal Audit ING., Karen Dalton, personally complained to her about the grievor's aggressive behaviour and his intimidation of one of her employees. Ms. Tam met with the grievor to remind him of OSFI's regulations regarding the conduct of employees. She then met with Mr. Johansson to discuss what seemed to be a series of events where the grievor's behaviour was not conducive to the role OSFI played. Mr. Johansson was concerned, as he himself had also noticed the grievor's aggressive behaviour while he was conducting an orientation session that the grievor also attended. Ms. Tam assured Mr. Johansson that she would meet with the grievor again and review OSFI's "Goal Commitment Document" (Exhibit E-2).

[21] When Ms. Tam met with the grievor, she specifically addressed the following five issues:

1. accountability for completing work in a timely manner, both individually and as part of the team;
2. an expectation that each person would apply his/her full knowledge and skills, share ideas and take the initiative to make the team as effective as possible;
3. professional conduct on the part of employees;
4. respect for established supervisory deadlines, comments by due dates and prompt advice if dates were not going to be met;
5. clear drafting of management reports and other correspondence with institutions, within an appropriate time and requiring minimal revision.

[22] Ms. Tam advised the grievor that knowledge took time to develop and, if he was in need of help, he should either discuss it collectively with the team or with her personally. She also revisited the option of a high-level direction or a detailed level of direction; the grievor again confirmed his initial choice. As well, during this meeting, the compressed workweek policy was again raised by the grievor. Ms. Tam advised him that she needed more time to evaluate his work but they could revisit the issue in a couple of months. She also indicated that she understood he had a family and, if he needed time off for family-related issues, he was entitled to five family-related days pursuant to the collective agreement. The grievor did not say much or ask a lot of questions during this meeting; therefore, the next day Ms. Tam sent him an e-mail (Exhibit G-1) summarizing the areas of concern they had discussed.

[23] Ms. Tam recalled another incident where the grievor made comments in a public place with respect to financial institutions. She met with him later in her office and directed him to review OSFI's code of conduct.

[24] Ms. Tam also mentioned another instance where the grievor and another team member conducted an on site review and their information was crucial for a panel review presentation she was to give. She sent an e-mail to the grievor requesting the information but did not receive anything. The session notes were in three areas the grievor had been asked to complete, none of which had been completed. When Ms. Tam asked him his opinion about the deadline, he did not reply; in fact, he could not or would not give her an estimate on when she could expect the required work, which she considered a person in a junior position could have completed.

[25] The last incident Ms. Tam related was when she and the grievor attended a wrap-up meeting with Mr. Johansson. Prior to Mr. Johansson's arrival, a confrontation occurred between her and the grievor because he wanted to change drafts on office guidelines on compliance. She explained to the grievor that the documents were only drafts and the changes were insignificant. When Mr. Johansson met with them, the grievor brought the matter up again. Finally, Mr. Johansson indicated that he concurred with Ms. Tam's reasoning and advised the grievor to observe the collective decision made. Mr. Johansson made note of the grievor's attitude and behaviour.

[26] Ms. Tam testified that in April 2002 she moved to another area of OSFI, a move she had requested some time earlier in order to expand her knowledge of larger institutions. Since she would no longer be the grievor's direct supervisor, a meeting

was held with the grievor's new manager, Chuck Reynolds, Mr. Johansson and Gina Dimanis, OSFI's Human Resources Manager. Ms. Tam stated that it was at this meeting, on April 19, 2002, where she had a two-page summary of areas where the grievor needed improvement, that other complaints came to light. Ms. Dimanis indicated there had been complaints from other co-workers about the grievor's attitude and behaviour, as well as his disruptiveness during an internal OSFI course. It was also at this meeting that they assessed the grievor's work history and their observations of his attitude and behaviour. There was a general feeling that the grievor was not suitable for employment at OSFI; however, Mr. Johansson would make the final decision as to whether or not to reject the grievor on probation.

[27] During cross-examination, the grievor's representative asked Ms. Tam if she had heard of these complaints from co-workers and if she had expressed them to the grievor. Ms. Tam replied: "I don't remember if I talked to the grievor or not." She stated it was not the complaints from co-workers as much as "we collectively agreed during this meeting that the grievor's work performance, his aggressive behaviour, lack of professionalism displayed, a consistent pattern, which we did not feel was conducive to OSFI's image. The decision to reject the grievor on probation was at the direction of Mr. Johansson."

[28] When asked by the grievor's representative if it would not be reasonable for the grievor, who had had complaints made against him, to be given a chance to defend himself, Ms. Tam agreed. However, she stated that the complaints were not as serious as the other issues that were brought to the grievor's attention through a series of meetings they had, but his behaviour continued. In fact, during and after the meetings, the grievor made little or no comment with respect to the issues she raised.

[29] Calvin Johansson has been employed in the Public Service for 15 years and is the Director of the Financial Institutions Group. He has three managers, including Ms. Tam, reporting directly to him.

[30] Mr. Johansson testified that he was involved in the hiring process for the grievor and it was he who made the decision to reject the grievor on probation. At a formal meeting, he presented and read to the grievor the April 19, 2002 letter terminating Mr. Spurrell's employment. The letter states as follows (Exhibit E-3):

On behalf of the Office of the Superintendent of Financial Institutions, I regret to advise you of our decision to terminate your employment during the probationary period. In lieu of notice, you will be provided with four weeks salary.

This action is necessary because you have not been able to demonstrate the level of performance required for the Senior Supervisor position. A number of discussions with your Manager for the purposes of providing feedback and direction have failed to result in any significant improvement in performance.

[31] Mr. Johansson further stated that in no way was this a disciplinary termination of employment, but rather a rejection on probation. He stated that the authority to do so has been delegated to him by the Deputy Minister pursuant to the PSEA. The decision to reject the grievor was made following consultations with Ms. Tam and Ms. Dimanis. As well, the rationale he used was based on the following:

- (1) the grievor's continuing problem of conducting himself in a unprofessional manner;
- (2) the grievor's work performance and timeliness of required tasks; and
- (3) problems of a continuous nature with team members and others at OSFI.

[32] Mr. Johansson stated he witnessed the grievor's aggressive behaviour when he (Mr. Johansson) was delivering an orientation to new employees on supervisory framework. The grievor kept asking the same question, which Mr. Johansson answered several times, but the grievor was not satisfied with the response. Mr. Johansson noticed his tone and took note of the grievor's display of aggressiveness.

[33] Mr. Johansson related the incident referred to by Ms. Tam where the grievor was alleged to have been disruptive during a training course. He talked with the Director of Training, Russell Yeoman, who confirmed that the grievor had displayed inappropriate aggressive behaviour during the question period.

[34] Mr. Johansson confirmed that he approved the training courses requested by the grievor but stated he had informed the grievor that he would do so providing the grievor had the time and it would not affect his work requirements. The grievor

assured him it would not but, as it turns out, he did not complete his assignments. Mr. Johansson stated that he relies on a person's honesty and professionalism; therefore, at the time he approved the grievor's training courses. Also, the grievor was spending an inordinate amount of time on the Internet and Ms. Tam had counselled the grievor several times about this usage.

[35] With respect to the grievor's work performance and timeliness, Mr. Johansson stated he relied on Ms. Tam, who worked with the grievor every day and knew his work habits, to inform him on what steps she had taken to improve the grievor's performance. In fact, Ms. Tam and Mr. Johansson met on several occasions.

[36] Mr. Johansson concluded by stating that he, Ms. Tam and Ms. Dimanis discussed the possibility of the grievor being successful at OSFI. However, after deliberating over the matter, Mr. Johansson decided to reject the grievor on probation.

[37] During cross-examination, Mr. Johansson confirmed that he had talked personally to Mr. Yeoman, Director of Training, who confirmed that the grievor had been disruptive and aggressive during a training session. He admitted, however, that he had not talked to co-workers and others who had complained about the grievor.

[38] The grievor's representative adduced from Mr. Johansson that OSFI does not have a policy or procedures for employees on probation and that the grievor had not received a formal appraisal, as employees on probation are not entitled to one until they have completed one year of employment. However, Mr. Johansson stated that the manager in this case, Ms. Tam, gave the grievor personal feedback but just not in a formal document.

[39] Mr. Johansson agreed during cross-examination that an employee should be advised of anyone who complained about him/her and the basis for the complaint. He agreed as well that the grievor's poor performance was not put in writing but stated that Ms. Tam met with the grievor, discussed the "Goal Commitment Document" (Exhibit E-2) with him several times and the essence of the second meeting was put in writing (Exhibit G-1).

[40] Mr. Johansson also stated that regulators at times need to make their point with financial institutions, although if they run into resistance, confrontation is not the answer. The alternative is to seek assistance from a manager or come to see him personally.

[41] In conclusion, Mr. Johansson indicated that he had discussed the grievor's attitude, behaviour and his work assessments with Ms. Tam, Mr. Yeoman, Ms. Dalton and Ms. Dimanis. Coupled with his own observations of the grievor, he made the decision that OSFI was not "the right fit" for the grievor and therefore rejected him on probation.

[42] The grievor, Mark Spurrell, stated that he accepted an offer of employment with OSFI on June 25, 2001, and started working on August 7, 2001. Prior to joining OSFI, he worked for the Bank of Nova Scotia for 10 years in various positions. He described his duties while employed at the Bank of Nova Scotia and introduced into evidence, through his representative, his résumé (Exhibit G-2).

[43] Mr. Spurrell testified that Mr. Johansson was pleased with his résumé and he was positive about the grievor starting to work at OSFI. The grievor compared his position while at the Bank of Nova Scotia to his job as a senior supervisor (RE-5) and defined the move as a lateral one. The grievor stated that he found the private sector to have a more open management style, where candid discussions occurred and one could question management and ask probing questions in order to be well prepared for any issues that might arise.

[44] The grievor stated that at OSFI management frowned on probing questions; the deadlines given would be pushed, then suddenly changed, and this occurred quite frequently. As well, the mood was tense and at times secretive.

[45] The grievor went on to state that, although there was a steep learning curve, he felt he had the skills to do the job and was very eager to learn.

[46] The grievor confirmed that Ms. Tam was his direct supervisor. He indicated, however, that they never really interacted with each other except at team meetings. He stated that when he would ask her difficult questions, which were related to his job, she would sometimes get back to him and sometimes she would not. He stated that he basically learned the job from his co-workers; they informed him that Ms. Tam's

management style was to not ask questions, just do it her way. He also discovered shortly after his arrival that three other persons who worked for Ms. Tam all transferred out of OSFI.

[47] He also stated that he did not believe it fair that his employment was terminated with no appraisal or written comments on his personal file. He indicated that he had the required skills for the job at OSFI. As well, he was not aware of any complaints made by his co-workers, either in writing or orally, and he only heard about these complaints after his employment was terminated.

[48] The grievor confirmed that neither Mr. Johansson nor Ms. Tam ever spoke to him about any complaints from co-workers. He also indicated that at no time was it expressed, either orally or in writing, that his attitude and/or behaviour had put his job on the line. His reports were timely and at no time did he break confidentiality rules or display aggressive behaviour. He tried to change and comply with work procedures once he was told about them.

[49] During cross-examination, the grievor admitted that he did not feel that Mr. Johansson had a hidden agenda or that the termination of his employment was for disciplinary reasons.

ARGUMENTS

For the Employer

[50] Counsel for the employer submitted that this case is a rejection on probation. The grievor's employment was terminated pursuant to section 28 of the PSEA, which states:

28.(1) An employee who was appointed from outside the Public Service shall be considered to be on probation from the date of the appointment until the end of such period as the Commission shall establish by regulation for that employee or any class of employees of which that employee is a member.

Idem

(1.1) A probationary period established pursuant to subsection (1) is not terminated by any appointment or deployment of the employee made during the period.

- (2) *The deputy head may, at any time during the probationary period of an employee, give notice to the employee that the deputy head intends to reject the employee for cause at the end of such notice period as the Commission may establish for that employee or any class of employees of which that employee is a member, and the employee ceases to be an employee at the end of that period.*

[51] Counsel also referred me to the relevant provision of the *Public Service Staff Relations Act (PSSRA)*. Section 92 states:

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

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

(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or

(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or

(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(a), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.

(3) *Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the Public Service Employment Act.*

[52] Counsel for the employer argued that the facts of this case demonstrate that it is not a disciplinary matter but a rejection on probation pursuant to section 28 of the PSEA. There was no hidden agenda; the grievor was on probation and for the reasons stated by Mr. Johansson and Ms. Tam, it was decided the grievor was not a "good fit" at OSFI.

[53] Counsel concluded by stating that, as stated in the letter of offer, the grievor knew that he was on probation. Mr. Johansson, who had the delegated authority to do so, subsequently rejected him on probation with four weeks' notice.

[54] Counsel for the employer referred me to the following cases: *Canada (Attorney General) v. Leonarduzzi*, [2001] F.C.J. No. 802; *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225; *Tipple and Her Majesty the Queen in Right of Canada as represented by the Treasury Board*, Federal Court File No. A-66-85; *Canada (Attorney General) v. Penner (C.A.)*, [1989] F.C.J. No. 461 and *Brownrigg* (Board file 166-2-27623).

For the Grievor

[55] The grievor's representative asserted that, although perhaps not malicious in intent or made in bad faith, the employer overlooked certain areas of its responsibilities. Mr. Johansson might not have known his obligations to establish cause for the rejection on probation, which has not been proven at this hearing, and this constitutes bad faith.

[56] The grievor left a job he had held in the private sector for over 10 years to join OSFI. His testimony, which was uncontested, described OSFI as a closed, rigid and secretive organization. There is no doubt that the grievor made mistakes; that is the nature of an employee on probation. Being sceptical in nature and questioning management on issues are the result of his private sector background.

[57] If OSFI wished to salvage the relationship, it could have, at a minimum, put its concerns in writing and the grievor would thus be aware of his shortcomings. There is no doubt that there was a communication problem and misunderstandings between

the grievor and Ms. Tam. Ms. Tam had never previously supervised an employee on probation in the Public Service. As well, there were no guidelines or procedures in effect at OSFI to assist her in supervising a probationary employee; there were no criteria used to assess the grievor.

[58] The grievor's representative argued that the employer acted arbitrarily and as the grievor was an employee on probation, he had less protection in the system than a full-time indeterminate employee. An employee on probation needs a system in place that lets him/her know what expectations the employee is not fulfilling.

[59] As well, the employer never gave the grievor an opportunity to defend himself against the complaints from his co-workers, which created a culminating effect and disallowed him knowledge on why his employment was terminated. This termination of employment was arbitrary because OSFI has no standards or policies; no performance appraisals for employees on probation are prepared and it has no management training for supervisors of such employees.

[60] The grievor's representative concluded by stating that the employer did not apply a fundamental issue of fairness and the grievor suffered the loss of his employment because the employer relinquished its duty of fairness and this constitutes bad faith.

[61] The grievor's representative referred me to the following cases: *Re Abex Industries Ltd. and United Food & Commercial Workers' Union, Local 173W* (1995), 48 L.A.C. (4th) 353; *Leger* (Board file 166-8-10850); *Re Brampton Hydro Electric Commission and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada), Local 1285 et al.*, [1993] O.J. No. 2553; *Sargeant* (Board file 166-2-15499); *Small v. Canada (Minister of Fisheries and Oceans)*, [1985] F.C.J. No. 617; *Jacques Vachon v. The Queen in Right of Canada as represented by the Deputy Minister of the Department of National Health and Welfare*, [1982] 2 F.C. 455; *Nicholson v. Haldimand Norfolk (Regional) Police Commissioners*, [1979] 1 S.C.R. 311, *Hartley* (Board file 166-2-17326); *Canada (Attorney General) v. Matthews*, [1997] F.C.J. No. 1692 and *Tighe* (Board file 166-2-15122).

REASONS FOR DECISION

[62] The first issue to be addressed is the appropriate standard to be applied to a termination of employment of an employee on probation. I note that, as there is an absence of any adduced evidence in the relevant collective agreement, the standard that has been generally adopted is one of "unsuitability" or "being unsatisfactory".

[63] The next issue I have to determine is whether I have jurisdiction to entertain this grievance, particularly in light of subsection 92(3) of the PSSRA. The decision of Lemieux, J. of the Federal Court, Trial Division, in *Leonarduzzi (supra)* sets out the principles to be applied when considering such a matter. In that regard, Lemieux J. states, at paragraph 37 of his decision:

...the employer need not establish a prima facie case nor just cause but simply some evidence the rejection was related to employment issues and not for any other purpose.
[Emphasis added]

[64] At paragraph 42, Lemieux J. says:

The respondent submits that the employer must make a prima facie case that the grievor was terminated for just cause. This is not so. A distinction must be made between an employment related reason and "just cause".

[65] Lemieux J. then goes on to consider the decision of the Federal Court of Appeal in *Penner (supra)*, where Marceau J.A. endorsed the approach taken by the adjudicator in the *Smith* decision (Board file 166-2-3017) and expressed the opinion that it was the only one the legislation supports. Marceau J.A. expressed that approach in the following terms, at page 438 of the *Penner* decision:

...adjudicators have...accepted that they had no jurisdiction to inquire into the adequacy and the merit of the decision to reject, as soon as they could satisfy themselves that indeed the decision was founded on a real cause for rejection, that is to say a bona fide dissatisfaction as to suitability.
[Emphasis added]

[66] In denying the application for judicial review, Lemieux J. states, at paragraph 45 of his decision:

However, as I see it, the adjudicator required only that the employer demonstrate the rejection was for an employment-related reason i.e. a dissatisfaction with the suitability of the employee and, as such, was acting in accordance with the provisions of the PSEA....

[67] Once the employer has done so, then the burden of proof shifts to the grievor to demonstrate that the employer's actions are in fact a sham or a camouflage, and therefore not in accordance with section 28 of the PSEA.

[68] In *Re Corporation of District of Maple Ridge and Canadian Union of Public Employees, Local 622* (1989), 15 C.L.A.S. (50), the arbitrator stated:

Even if we accept the argument that the Grievor was not informed of the standards expected, this case raises the question of whether or not the Employer is required to inform probationary employees of standards which do not specifically relate to the job in question. We think not. An Employer is not obligated to advise probationary employees that they are expected to demonstrate a positive attitude towards their employment or that they are expected to get along with their fellow employees under the terms of this agreement every person who accepts employment enters knowingly into a probationary period. Such a person, by necessity, must be aware that during this period he or she is being scrutinized by the employer to assess his or her "suitability". Common sense suggests, in those situations, that a prospective candidate for tenured employment must not only perform according to the production standards of the job but must not be found to be wanting in such matters as general conduct, attitude and ability to get along well with other employees. In these circumstances there is no duty imposed upon the employer to so advise probationary employees. [Emphasis added]

[69] Turning to the facts of this case, Mr. Johansson's decision to reject the grievor on probation was supported by Ms. Tam, who testified that she had given the grievor the "Goal Commitment Document" (Exhibit E-2) upon his arrival at OSFI and after noticing some shortcomings with respect to his attitude and work habits, she met with him to review the said document.

[70] Ms. Tam also testified that she sent the grievor an e-mail (Exhibit G-1) to highlight and reinforce the issues and areas in which she wished to see improvement. She relayed a number of issues and concerns at this hearing, which she had discussed with the grievor: timeliness of reports, professional conduct and the grievor's

consistent display of aggressive behaviour. However, the grievor did not improve either his attitude or his work habits to an acceptable level.

[71] Mr. Johansson testified that he was aware of the grievor's work performance and attitude through a number of meetings he had with Ms. Tam. He also personally witnessed the grievor's behaviour during an orientation session he conducted and Mr. Yeoman, who himself was a recipient of this behaviour from the grievor, confirmed it, as well.

[72] Mr. Johansson testified that OSFI does not prepare performance appraisals for employees on probation until they have completed one year of employment. He also confirmed that there is no policy or standards in place; however, he testified that the termination of employment was not disciplinary in nature but a rejection on probation.

[73] I have no reason to disbelieve that this was the case. The grievor and his representative have failed to convince me otherwise.

[74] Exhibit E-1, the letter of offer, clearly states that "...in accordance with the Public Service Employment Act and Regulations (Section 28), the first 12 months of continuous employment is the probationary period." The decision to reject the grievor on probation was made by Mr. Johansson, who had been delegated that responsibility by the deputy head. The rejection on probation was nine months into the 12-month probationary period.

[75] In the letter advising the grievor that his employment was terminated during the probationary period (Exhibit E-3), Mr. Johansson stated that, in lieu of notice, the grievor would be provided with four weeks' salary, thereby meeting the requirements of the *PSEA Regulations* probation and notice periods.

[76] I am convinced that the employer rejected the grievor on probation and not as a result of discipline. Mr. Johansson confirmed this during his testimony and, in fact, the grievor himself stated during cross-examination that he did not feel that Mr. Johansson had a hidden agenda or that his employment was terminated for disciplinary reasons.

[77] Relying on the principles enunciated in the decision of Lemieux J in *Leonarduzzi (supra)*, I am satisfied that the employer has established that the decision to reject the grievor on probation was "for an employment-related reason, i.e. a dissatisfaction with

the suitability of the employee". As the grievor has failed to establish that the termination of his employment was a sham or camouflage, I have no jurisdiction to inquire into the matter further. The grievance is therefore dismissed for want of jurisdiction.

[78] However, I would be remiss if I did not suggest that it would be advisable for the employer, perhaps through consultation with the bargaining agent, to develop a quarterly interim probationary performance appraisal system. I believe that a process that links the "Goal Commitment Document" (Exhibit E-2) with the performance appraisal would better serve the employer and the employee by confirming in writing the employee's shortcomings and also any strength the employee has demonstrated in that timeframe.

**D.R. Quigley,
Board Member**

OTTAWA, February 24, 2003.

