Date: 20180703

File: 566-02-8856

Citation: 2018 FPSLREB 55

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

STEVEN GILL

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Gill v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Himself

For the Respondent: Cristina St-Amant-Roy

Heard at Edmonton, Alberta,
March 13 to 16, 2018.
(Written submissions filed April 20 and May 4, 22 and 29, 2018.)

I. Individual grievance referred to adjudication

[1] Steven Gill ("the grievor") was employed by the Treasury Board with the Correctional Service of Canada ("CSC") as a correctional educator, classified in the Education and Library Science group, level 1 (ED-EST-01), in the CSC's Prairie Region at the Edmonton Institution in Edmonton, Alberta.

[2] On September 18, 2012, the employer terminated the grievor's employment by rejecting him on probation. On October 3, 2012, he filed a grievance, which stated as follows:

> ***DETAILS OF GRIEVANCE***
>
> *I disagree with the teaching evaluation which was used for my dismissal from the Education department at Edmonton Institution*
>
> ***CORRECTIVE ACTION REQUESTED***
>
> *To conduct an accurate evaluation*
>
> *To reinstate me back into the Educational Department at Edm.* [*sic*] *Institution*

[3] The grievor waived the first-level grievance hearing. The grievance was denied at both the second and final levels of the grievance process. The replies at those levels state as follows:

> [Second-level reply, dated November 19, 2012:]
>
> . . .
>
> *Treasury Board's policy on "Regulations establishing periods of probation and periods of notice of termination of employment during probationary periods" states that the probationary period does not include any period of leave with pay of more than 30 consecutive days. You took consecutive leave from January 6, 2012 up to and included [sic] February 15, 2012. Therefore, in accordance with this policy your probationary period was extended from August 8, 2012 until September 18, 2012.*
>
> *On September 18, 2012 you were advised of the decision to reject on probation your employment from your position as Teacher, Edmonton Institution. This decision was made in accordance with Section 62(1) of the* Public Service Employment Act *and you were provided with the reasons for*

> *this decision. . . .*
>
> . . .
>
> [Final-level reply, dated June 20, 2013:]
>
> . . .
>
> *You were terminated while on probation in accordance with Section 62 of the* Public Service Employment Act*. . . .*
>
> . . .

[4] On August 1, 2013, the grievor referred his grievance to the Public Service Labour Relations Board ("the PSLRB") for adjudication under s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *PSLRA*").

[5] The employer objected to the jurisdiction of an adjudicator to hear the grievance on the ground that s. 211 of the *PSLRA* does not allow referring a grievance to adjudication about any termination made under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*").

[6] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; "the *PSLREBA*") was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the PSLREB") to replace the PSLRB and the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 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 s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[7] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *PSLREBA* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

[8] The grievor's employment was also governed in part by the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("the PSAC") for the Education and Library Science group that was signed on March 1, 2011, and that expired on June 30, 2014, ("the collective agreement").

[9] From the date of the grievance until October 26, 2017, the grievor was represented by the PSAC.

[10] The hearing in this matter was originally scheduled to take place between October 31 and November 3, 2017, in Edmonton. On October 27, 2017, at the grievor's request, it was postponed, and a pre-hearing teleconference ("PHC") was scheduled for October 31, 2017.

[11] During the PHC, the grievor suggested that he might advance more allegations with respect to his termination. The employer objected to any such advancement. The Board determined that it would wait and see what if any new or different allegations he would put forward and stated that the employer would be entitled to respond to them before a ruling would be made.

[12] The parties also discussed rescheduling the hearing dates. A number of potential dates were canvassed, and the parties agreed to March 13 to 16, 2018, in Edmonton. They were asked to confirm the suitability of these dates the following day by email, and on November 9, 2017, the Board confirmed that the hearing would take place on those dates, in Edmonton.

[13] In a series of emails sent on January 30, 2018, the grievor forwarded to counsel for the employer 15 additional allegations, without any details, about his termination of employment, as follows:

. . .

1. *Dismissal by Camouflage & due to Mental Health leading to a poor performance evaluation*
2. *Systematic Discrimination at CSC*
3. *Sexual Harassment & Assault*
4. *Ignoring 2 Compliants filed by me to Sherry: Sexual Harassment*

> 5. *Entrapment by Sherry & Rose*
>
> 6. *Pay Discrimination*
>
> 7. *Breaking a legally binding Employment Contract dually signed by both parties with an illegal pay reduction.*
>
> 8. *Not letting me accept a position at Corcan as Assistant Manager but letting others accept it.*
>
> 9. *Discrimination in pay based on other school districts for years of education & experience.*
>
> 10. *Not recognizing teacher/Admin experience at Canadian Federal First Nations Schools & schools overseas such as UK & a Canadian school in China for salary & pay grid purposes.*
>
> 11. *Failure to pay wages in a timely fashion as per contract, every 2 weeks. As long as almost 2 months delayed*
>
> 12. *Failure to send someone home on a sick day despite on-site Doctors & Nurses telling you to go home.*
>
> 13. *Discrimination against someone with a disability, visual.*
>
> 14. *Institutional Racism*
>
> 15. *Toxic Work Environment*
>
> [*Sic* throughout]

[14] On March 2, 2018, in a 10-page response, the employer responded to those allegations, in essence stating that the grievor had never raised these issues in any grievance and that he should not be permitted to raise them at this late juncture. In this respect, it relied on *Burchill v. Canada (Attorney General)*, [1980] F.C.J. No. 97 (QL) (C.A.), *Baranyi v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 55, and *Shneidman v. Canada (Attorney General)*, 2007 FCA 192.

[15] On March 9, 2018, the grievor replied to the employer's response, in essence providing details of his 15 additional allegations.

II. Interlocutory issue raised during the hearing

[16] At the start of the hearing on March 13, 2018, in its opening statement, the employer advised that it would call five witnesses. In his statement, the grievor said that he would testify and likely call three witnesses.

[17] The employer started its case first. After two-and-a-half days, I had heard evidence from three of its five witnesses. At this juncture, the parties asked to hear the testimony of two of the grievor's witnesses out of order, given their time constraints, and then to return and hear the employer's final two witnesses. I agreed.

[18] Also at this juncture, just before hearing the testimony of the grievor's two witnesses, I raised with the parties, based on the evidence presented, a concern that there might be an issue about whether the grievor had actually been terminated from his employment during the probationary period. I asked the parties to consider this issue over the lunch break and told them that we would discuss it upon our return because it would change the character of the hearing. At this point, a day-and-a-half of the scheduled hearing week remained.

[19] Upon returning from lunch, both parties stated that they did not want to adjourn the hearing despite the issue I had raised and that they wished to continue to present evidence.

[20] In addition, the employer asked that the issue of whether the grievor's employment was terminated outside the probationary period be addressed in writing after the hearing week was over. This immediately led to a discussion of a further issue: if the termination of the grievor's employment was done outside the probationary period, where did it leave the parties? The grievor was terminated from his employment and has not worked for the employer since September 18, 2012, or close to six years. The employer said that it would make an alternative argument or application; namely, it terminated him for cause under the *Financial Administration Act* (R.S.C., 1985, c. F-11; "the *FAA*"), which it stated it was entitled to do.

[21] I advised the parties that at that point, the issue was not whether there had been sufficient evidence to terminate the grievor for cause. Instead, it was, if the termination occurred outside the probationary period, could the employer alter the basis for it? I reminded the employer that it had referred me to *Burchill* in its opening submission when addressing its objection to the grievor adding new allegations to his grievance.

[22] On the basis of the discussions with the parties, an agreement was reached in the writing for a schedule for the submissions, as follows:

- The employer was to provide its written submissions on or before April 20, 2018.
- The grievor was to provide his written submissions on or before May 4, 2018.
- The employer was to provide any reply submissions on or before May 11, 2018.

[23] The hearing continued for the balance of the week. By the week's end, the employer had called five witnesses and completed its evidence, and the grievor had called two of his witnesses and had testified in chief, but he had not been cross-examined.

[24] As of April 20, 2018, due to what appeared to be a misunderstanding, the employer had only made its written submissions on the issue of the probationary period timeline. As such, the timelines were extended to allow the employer to complete its written submissions by May 4, 2018, the grievor to complete his by May 14, 2018, and the employer to reply by May 22, 2018.

[25] On May 14, 2018, the grievor requested an extension of his deadline from that day to Monday, May 21, 2018, which was granted. However, since May 21 was a statutory holiday, the grievor was given until Tuesday, May 22, 2018, to deliver his submissions. The employer was required to provide any reply by the following Tuesday, May 29, 2018. On May 22, 2018, the grievor requested a further extension of one day, which was granted. Therefore, the employer's deadline to reply was also extended by one day, to Wednesday, May 30, 2018.

[26] I will set out only those facts that are germane to the following two issues:

1. Was the grievor's employment terminated while he was on probation?
2. If not, could the employer change the basis for his termination?

III. Summary of the evidence

A. Legislation and regulations

[27] Section 61(1)(a) of the *PSEA* states as follows:

> ***Probationary period***
>
> ***61(1)*** *A person appointed from outside the public service is on probation for a period*
>
> > ***(a)*** *established by regulations of the Treasury Board in respect of the class of employees of which that person is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act *. . . .*

[28] The probationary period is 12 months, as established by the *Regulations Establishing Periods of Probation and Periods of Notice of Termination of Employment During Probation* (SOR/2005-375; "the probationary *Regulations*"). Section 2(2) states as follows:

> ***2 (2)*** *The probationary period does not include any period*
>
> > ***(a)*** *of leave without pay;*
> >
> > ***(b)*** *of full-time language training;*
> >
> > ***(c)*** *of leave with pay of more than 30 consecutive days; or*
> >
> > ***(d)*** *during which a seasonal employee is not required to perform the duties of the position because of the seasonal nature of the duties.*
>
> [Emphasis added]

B. The collective agreement

[29] Article 2 of the collective agreement defines "leave" as the ". . . authorized absence from duty by an employee during his or her regular or normal hours of work", and it defines "day of rest" as follows:

> *. . . in relation to a full-time employee means a day other than a holiday on which that employee is not ordinarily required to perform the duties of his or her position other than by reason of the employee being on leave or absent from duty without permission . . . .*

[30] Article 14 of the collective agreement deals with leave with or without pay for bargaining agent business. Subject to operational requirements, an employee is to be granted leave with pay for the following:

- attending hearings with respect to complaints made to the Board under ss. 157, 186(1)(a) and (b), 186(2)(a)(i) and (2)(b), 187, 188(a),

189(1), and 190(1) of the *Act* if the employee is a complainant or is acting on behalf of another bargaining unit employee who is making a complaint;

- participating in applications for certification and representations and interventions with respect to applications for certification when called as a witness by the Board, an employee, or the bargaining agent;
- attending hearings before the Board when called as a witness in adjudication proceedings; or
- attending meetings in the grievance process if the employee is a grievor.

[31] Article 19 of the collective agreement deals with sick leave with pay. Clause 19.01, in both the English and French versions, states that an employee shall earn sick leave credits at the rate of 9.375 hours for each calendar month in which the employee receives pay for at least 75 hours.

[32] Article 20 of the collective agreement deals with vacation leave with pay.

[33] The English version of clause 20.02 states in part as follows:

> ***20.02*** *For each calendar month in which an employee has earned at least seventy-five (75) hours' pay, the employee shall earn vacation leave credits at the rate of:*
>
> *(a) nine decimal three seven five (9.375) hours until the month in which the anniversary of the employee's eighth (8th) year of service occurs if the employee is in the ED or EU Groups;*
>
> . . .

[34] The French version of clause 20.02 in part as follows:

> ***20.02*** *Pour chaque mois civil pour lequel il ou elle a touché au moins soixante-quinze (75) heures de rémunération, tout employé-e acquiert des crédits de congé annuel à raison de :*
>
> *a. neuf virgule trois cent soixante-quinze (9,375) heures jusqu'au mois où survient son huitième (8e) anniversaire de service si l'employé-e fait partie du groupe ED ou EU;*

. . .

[35] Article 21 of the collective agreement sets out the days of the year that are designated paid holidays, which are also recognized as statutory holidays and are days on which employees are normally not required to work and, depending on meeting certain conditions, for which they are paid. The rules are different for shift workers who may have to work on a designated paid holiday; however, the grievor did not fall into that category.

[36] Article 22 of the collective agreement sets out the following other types of leave with or without pay:

- 7.5 hours (1 day) of leave with pay per fiscal year for volunteer work for a charitable or community organization or activity;
- 7 calendar days of bereavement leave with pay, which theoretically could be 5 normal working days, or 37.5 hours;
- up to 22.5 hours (3 days) of leave with pay for travel related to a death;
- maternity leave without pay;
- parental leave without pay;
- leave without pay for family care;
- leave without pay for personal needs;
- leave without pay for the relocation of a spouse;
- up to 37.5 hours (5 days) of leave with pay for family related responsibilities;
- unlimited leave with pay to be available for jury selection, to serve on a jury, or by subpoena or summons to attend as a witness in any proceeding, such as the following:
    - in or under the authority of a court of justice or before a grand jury,

- before a court, judge, justice, magistrate; or coroner,
- before the Senate or House of Commons of Canada or a committee of the Senate or House of Commons other than in performing the duties of the employee's position,
- before a legislative council, legislative assembly, or house of assembly or any committee of one of those authorized by law to compel the attendance of witnesses before it, and
- before an arbitrator or umpire, or a person or body of persons authorized by law to make an inquiry and to compel the attendance of witnesses before it;

- leave with pay for an injury on duty for such a period as the employer may reasonably determine when a claim has been made pursuant to certain specified legislation (federal or provincial);
- leave with pay when an employee participates in a personnel selection process, including an appeal process;
- leave with pay for other reasons;
- leave without pay for other reasons; and
- 7.5 hours (1 day) of leave with pay for personal reasons.

[37] Article 23 of the collective agreement deals with leave for educational purposes and largely details provisions for leave without pay. However, it does contain a provision for leave with pay for writing an examination, if one is scheduled during the employee's normal working hours.

[38] Article 44 of the collective agreement deals with the work year and hours of work for the ED-EST sub-group and EU group and states as follows:

> ***Correctional Service of Canada***
>
> ***44.11***
>
> *(a) An employee in the Correctional Service of Canada shall be on a twelve (12) month work year. The work*

> *day shall be seven decimal five (7,5 [sic]) hours or such lesser period as the Employer may schedule. The work week shall be from Monday to Friday and between the hours of 7:00 hours and 18:00 hours and no employee shall be assigned work hours other than between these hours and on these days, except by the written consent of the employee concerned. Notwithstanding the above, an employee may voluntarily accept, hours of work between 7:00 hours and 22:00 hours following a request from the Employer.*
>
> . . .

C. The grievor's absences from work and accumulating and using vacation and sick leave credits

[39] In this decision, I shall use the term "vacation leave credits" to refer to any vacation leave with pay credits and the term "sick leave credits" to refer to any sick leave with pay credits.

[40] Between August 2011 and September 2012, and at the time of the hearing, Shelly Sealy was the chief of education for the Alberta corridor for the CSC and had been the grievor's direct supervisor during that time, in his CSC employment. Her office was located at Bowden Institution, which is approximately half-way between Calgary and Edmonton. She reported directly to the warden of that institution, which is the position with delegated authority for correctional educators.

[41] Between August 2011 and September 2012, and at the time of the hearing, Nancy Shore was Assistant Warden of Operations at Bowden Institution. At the time of the termination of the grievor's employment, she was Acting Warden at that institution.

[42] At the time of the hearing and at the time relevant to the grievance, Sherry Lynn Leslie was a program manager with the CSC at the Edmonton Institution. Her duties and responsibilities included overseeing all rehabilitation, leisure, and anger management programs as well as inmate pay and employment there. She functionally oversaw the institution's education department. She stated that she was responsible for tracking the correctional educators' attendance and supplies and for handling concerns about education issues with respect to the department's operation within the institution.

[43] There was no evidence that Ms. Leslie supervised the grievor with respect to his substantive work responsibilities; nor was there any evidence that she participated in his performance evaluation. In her testimony, she stated that she had not been involved in the decision to terminate his employment.

[44] At the time of the hearing, Bradley Sass was Acting Warden at Edmonton Institution for Women. In 2011-2012, he was Assistant Warden of Interventions ("AWI") at Edmonton Institution, and his duties and responsibilities included programming, segregation, chaplaincy, mental health, indigenous issues, and education. Mr. Sass stated that as the AWI, he would have provided functional supervision for the education program at the institution, but that supervising substantive duties had been Ms. Sealy's responsibility.

[45] There was no evidence that Mr. Sass supervised the grievor with respect to his substantive work responsibilities; nor was there any evidence that he participated in the grievor's performance evaluation. In his testimony he stated that he was not involved in the decision to terminate the grievor's employment.

[46] On July 19, 2011, the grievor received a letter from the CSC offering indeterminate employment as a correctional educator at the Edmonton Institution effective August 9, 2011. The offer was subject to a probationary period of twelve months, from the date of appointment. The grievor accepted the offer on July 27, 2011.

[47] Based on a start date of August 9, 2011, the parties' position was that the 12-month probationary period, as set out in the probationary *Regulations*, would end on Wednesday, August 8, 2012.

[48] During the course of the hearing, evidence was put forward with respect to the grievor's absences from work, which included oral testimony from him and Ms. Sealy along with emails and other documents, including a document that the employer had created that was identified as "Gill, Sukhraj (Steven) Leave Report" ("the leave report summary"). Ms. Sealy identified that Human Resources had prepared it.

[49] The leave report summary disclosed the following about the grievor, which occurred from August 9, 2011, to January 6, 2012:

- he accumulated both vacation leave credits and sick leave credits for the months of August, September, October, November, and December 2011 at the rate of 9.375 hours per month each for vacation leave and sick leave;

- as of November 2011, he had accumulated 37.50 hours (or 5 days) each of sick leave and vacation leave credits;

- he used three days of sick leave totalling 22.5 hours in November 2011, thus reducing his sick leave credits as of the end of that month to 15 hours, or 2 days;

- as of the end of November 2011, his vacation leave credits remained unchanged;

- he earned another 9.375 hours each of vacation leave and sick leave credits for the month of December 2011; and

- as of December 2011, he had accumulated 46.875 hours (or 6.25 days) of vacation leave credits and 24.375 hours (or 3.25 days) of sick leave credits.

[50] The evidence disclosed that on January 5, 2012, at the end of his working day, the grievor left the workplace and went on leave due to an illness. He did not return to work until February 16, 2012. Between January 6 and February 16, 2012, he missed 29 workdays. There were 41 days between January 6 and February 16, 2012, including weekends.

[51] Entered into evidence was an email chain dated January 26, 2012, between the grievor, Ms. Leslie, and Ms. Sealy, which reads as follows:

> [Ms. Sealy to Ms. Leslie, at 8:39 a.m.:]
>
> . . .
>
> *With regards to Steven Gill, we need in writing his wishes so that we can action further.*
> *As he has accrued 5.5 sick days to date and 10 vacation days, we have an option available to aid in his continuance of pay:*
> *1) Use accrued sick days which would account for January 6, 9, 10, 11, 12, 13(am)*

> *2) Use accrued vacation days which would account for 13(pm), 16, 17, 18, 19, 20, 23, 24, 25, 26 and 27 (am)*
> *3) Advance sick leave to cover to the end of the month (confirmation of what date that may be as it is anticipated approximately Feb 6 based on the information received that he has been admitted for a month).*
>
> . . .
>
> [Ms. Leslie forwarded Ms. Sealy's 8:39 a.m. email to the grievor at 12:45 p.m.:]
>
> . . .
>
> *Please read the email below regarding possible leave choices for you to request. This will have to be email [sic] back to me or Shelly Sealy so that we can have the proper authority sign it off for you.*
>
> . . .
>
> [The grievor responded to both Ms. Leslie and Sealy at 9:00 p.m.:]
>
> . . .
>
> *I would like the options used in the order in your e-mail: 1, 2, and 3.*
> *Sick days, then vacation day, and then cover to end of month via short term sick leave advance . . . .*
>
> . . .

[52] Entered into evidence was a leave form filled out on the grievor's behalf that Ms. Sealy had approved that shows a request for uncertified sick leave from 8:00 a.m. on January 6, 2012, until noon on January 13, 2012, for a total of 5.5 days.

[53] The leave report summary disclosed that the grievor was away from work on vacation all day on each of June 15, 18, 19, and 29, 2012, and for 3.75 hours (a half-day) on June 26, 2012, for a total of 33.75 hours.

[54] The grievor testified that in July 2012, he took a trip overseas and was away from work from Thursday, July 12, 2012, until Thursday, July 26, 2012, for a total of 10 workdays or 75 hours, which the documentary evidence corroborated.

[55] The grievor also testified that upon his return, he became ill and was off work July 30 and 31, 2012, and from August 1 to 13, 2012, which the documentary evidence

corroborated. August 6, 2012, was a statutory holiday.

[56] The evidence disclosed that the grievor had originally received a note from his doctor certifying him to be off work due to illness from July 30, 2012, up to and including August 20, 2012, which was a total of 15 working days. When it was determined that the grievor did not have sufficient sick leave credits to cover these days, he obtained a new certificate from his doctor certifying him fit to return to work on August 13, 2012. The evidence disclosed that the grievor did not return to work on August 13 but on August 14, 2012.

[57] On September 17, 2012, the grievor received an invitation to a meeting scheduled for the following morning at 11:00 a.m. At this meeting, Ms. Sealy provided him with the September 18, 2012, letter of termination, authored by Ms. Shore, the relevant portions of which state as follows:

. . .

> *You were provided with a letter of employment dated July 19, 2011. This letter advised you that* "You will be on probation for 12 months from the date of your appointment, not including any time spent on leave without pay or leave with pay in excess of 30 consecutive days. Your probationary period will continue with any subsequent appointments or deployments until the complete probationary period has been served. If you have a disability that requires job accommodation, the date of your appointment for probation purposes only, is considered to be the date on which the necessary accommodation is made." *You took consecutive leave from January 6, 2012 up to and including February 15, 2012. As such, your probationary period was extended by an equivalent length of time. The end date of your probation period was extended from August 8, 2012 until September 18, 2012.*
>
> . . .
>
> *I regret to inform you that by the authority delegated to me through the provisions of Section 62(1) of the* Public Service Employment Act, *I hereby give you written notice of my decision to reject on probation your employment from your position as Teacher, Edmonton Institution, effective September 18, 2012.*
>
> *In making my decision, I have reviewed the essential qualifications for your position and have considered that you have been afforded all mandatory training and have been provided with additional coaching and mentoring for the*

> *past 10 months to address issues with your work performance. Your inability to effectively perform your duties as a Teacher with the Correctional Service of Canada is evident in reviewing your education plans you developed for students, in reviewing your student reports you have written and by the lack of responsibility and accountability you have demonstrated as an educator. You were continually made aware of the specific expectations of a Teacher with the Correctional Service of Canada. Although you were provided with extensive mentoring, ongoing guidance and coaching you have not demonstrated you have the ability to perform your duties effectively as a Teacher with the Correctional Service of Canada.*
>
> *As a result, management has a complete lack of confidence that you can effectively and professionally carry out your duties as an employee of the CSC. After careful consideration I have concluded that I have no alternative but to reject you on probation.*
>
> . . .

[58] Neither documentary nor oral evidence was provided to indicate if and when the grievor was advised prior to September 18, 2012, that the employer took the position that the end of the probationary period had changed from August 8, 2012, to September 18, 2012.

[59] The leave report summary also showed as follows:

- Between January 6 and 12, 2012, the grievor was on certified sick leave for 37.5 hours; however, it also stated he was on extended leave".
- On January 13, 2012, he was on certified sick leave for 4.0 hours and on vacation leave for 3.5 hours;
- Between January 16 and 26, 2012, he was on vacation;
- On January 27, 2012, he was on uncertified sick leave for 3.5 hours and on vacation leave for 4.0 hours;
- Between January 30 and February 3, 2012, he was on certified sick leave for 37.5 hours;
- Between February 6 and 15, 2012, he was on certified sick leave for 60 hours;

- Between July 12 and 17, 2012, he was on vacation for 26.25 hours.
- On October 3, 2012, an entry was made for July 17 to 25 for 48.75 hours, which stated, "Leave Without Pay Other", and also said, "chg a/l to LWOP [change annual leave to leave without pay]; overused credits for 2012/13.

[60] The leave report summary also has two entries on October 3, 2012. One shows 26.25 hours identified as "Sick Leave Adjustment", and the notes state, "changed s/l [sick leave] from last fiscal yr to sick LWOP [leave without pay]. The other also shows 26.25 hours identified as "Sick without pay", and the notes state, "advanced for Feb. 10 (3.75) + Feb 13-15 (22.5).

[61] Despite Ms. Sealy's oral evidence, her email exchanges with the grievor, and his oral testimony that he was away from July 31 to August 14, 2012, there is no reference to that absence in the leave report summary.

IV. Summary of the arguments

A. For the employer

1. Was the grievor terminated within the 12-month probationary period?

[62] The grievor started his employment with the CSC on August 9, 2011. He was on leave from January 6 to February 15, 2012 (41 calendar days). As the employer was unable to assess him during that period, the end of the probationary period was extended from August 8 to September 18, 2012 , based on s. 2(2)(c) of the probationary *Regulations*.

[63] The probationary period provides a reasonable time frame and an adequate opportunity for managers to assess whether an employee is a good fit for a given job. At the same time, it allows employees to demonstrate their competencies and suitability for jobs.

[64] Section 2(2) of the probationary *Regulations* states that the probationary period does not include any period having the following:

> ***2 (2)*** *…*
>
> ***(a)*** *of leave without pay;*

> ***(b)*** *of full-time language training;*
>
> ***(c)*** *of leave with pay of more than 30 consecutive days; or*
>
> ***(d)*** *during which a seasonal employee is not required to perform the duties of the position because of the seasonal nature of the duties.*

[65] The probationary *Regulations* are under the mandate of the Treasury Board of Canada Secretariat, and their enabling statute is the *PSEA*. Section 16 of the *Interpretation Act* (R.S.C., 1985, c. I-21) provides that "[w]here an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power."

[66] In the *PSEA*, the notion of a day refers to a calendar day, with the exception of s. 50, which specifically refers to working days for casual employment. Had the legislator wanted to refer to "working day" in interpreting the probationary *Regulations*, it would have specified so, as it did at s. 50 of the *PSEA*.

[67] It is presumed that the ordinary meaning of legislation is the meaning intended by the legislature. In the absence of a reason to reject it, this meaning is binding.

[68] The *Concise Oxford Dictionary*, 10th edition, defines "period" as "a length . . . of time". Plain language indicates that the ordinary meaning of "consecutive" is periods of time or events that happen one after another, without interruption. Additionally, that dictionary defines "day" as "[e]ach of the twenty-four-hour periods, reckoned from one midnight to the next, into which a week, month, or year is divided . . .".

[69] The ordinary meanings of the terms "period", "consecutive", and "day" refer to an unbroken sequence of calendar days. The ordinary meanings of the terms used in the probationary *Regulations* do not directly or indirectly introduce the concept of "working day" or "business day". Therefore, s. 2(2)(c) of those regulations suggests that "30 consecutive days" applies to an unbroken sequence of calendar days. This interpretation is consistent with the scheme of those regulations as a whole.

[70] The established probationary periods are defined in terms of calendar time, not working time.

[71] The reference to "30 consecutive days" in s. 2(2)(c) of the probationary *Regulations* refers to calendar days. The word "days" means "calendar days", in the

absence of contrary indications, which is consistent with statutory interpretation principles. Therefore, the grievor was rejected on probation within the probationary period.

[72] The probationary *Regulations* establish a probationary period of 12 months and make no distinction between employees working full- or part-time schedules during such a probation. Therefore, regardless of whether a probationary employee works 3 or 5 days per week, his or her probation will expire after 12 months. If the probationary *Regulations* were strictly concerned with time worked, it would be expected that full- and part-time employees would have probationary periods of different lengths (in calendar time).

[73] Interpreting s. 2(2)(c) of the probationary *Regulations* as requiring an absence of 30 consecutive working days before extending a probationary period departs from the structure of the main provision establishing such periods, and it produces absurd results.

[74] For example, a part-time employee working 3 days per week would have to be absent with pay for 10 consecutive weeks before his or her probation could be extended, while a full-time employee working 5 days per week would need to be absent for only 6 weeks. As a result, the part-time employee, about whom the employer has less information on which to base a decision about continuing his or her employment, would have to be away from work for a longer portion of his or her probationary period than a full-time employee, in both absolute and proportional terms, before the parties could benefit from an extension. That would potentially create a distinction between two categories of employees that does not exist in the probationary *Regulations*.

[75] The Board applied s. 2(2)(c) of the probationary *Regulations* in a similar fact situation. In *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33, the grievor in that case was appointed on December 9, 2005, under a 12-month probationary period. He went on leave with pay from June 21 to July 25, 2006, for a total of 35 calendar days. The adjudicator found that the probationary *Regulations* refer to calendar days and concluded that the probationary period had terminated 35 calendar days later, on January 12, 2007, instead of on December 8, 2006. Based on a standard schedule, it is not possible to have a period of 30 working days in a period of

35 calendar days.

[76] Moreover, arbitrators in other jurisdictions have followed a similar interpretation of the duration of a probationary period in which "consecutive days" were interpreted as "calendar days". In *Children's Aid Society of Cape Breton v. C.U.P.E., Local 3010*, 1998 CarswellNS 552, the collective agreement required a probationary period of ". . . sixty (60) consecutive days of active service with the employer." The Arbitrator concluded that had the parties intended the probationary period to be 60 working days, they should have written it expressly. The adjudicator held as follows:

> *The word "days", when unqualified, usually denotes calendar days rather than working days. When "days" is qualified by the word "consecutive", there is an even stronger presumption that the reference is to calendar days and there are no cases to which I have been directed or have been able to find where "consecutive days" has been construed to me as "consecutive working days."*

[77] In *Royal Canadian Mint v. Public Service Alliance of Canada*, 1975 CarswellOnt 1467, in the context of a collective agreement interpretation with a similar wording as the probationary *Regulations*, the Arbitrator adopted the employer's position that 90 consecutive days refers to 90 consecutive calendar days.

[78] The employer also referred me to Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th edition, and to *Public Service Alliance of Canada v. Regina Airport Authority*, 2001 CanLII 37839.

[79] It maintained that the grievor's rejection on probation was timely, and it conformed with the interpretation of the probationary *Regulations*.

2. Can the employer change the basis for the termination?

[80] In the event that I find that the termination of the grievor's employment was done outside the probationary period, he was terminated for unsatisfactory performance, because he was unable to effectively perform his duties as a teacher with the CSC.

[81] Section 12(1)(d) of the *FAA* provides that the deputy head has the authority to terminate the employment of an employee because his or her performance is unsatisfactory.

[82] Unlike grievances about rejection on probation, adjudicators have jurisdiction to determine grievances about termination due to unsatisfactory performance, subject to the limits imposed by s. 230 of the *Act*. An adjudicator cannot substitute his or her opinion for that of the employer with respect to the assessment of a grievor's performance.

[83] The employer then set out the criteria under the jurisprudence with respect to adjudicators' limited jurisdiction under s. 230 of the *Act* when dealing with grievances against terminations of employment for the non-disciplinary cause of unsatisfactory performance. In this respect, the employer referred me to *Reddy v. Office of the Superintendent of Financial Institutions*, 2012 PSLRB 94, *Kalonji v. Deputy Head (Immigration and Refugee Board of Canada)*, 2016 PSLREB 31 (upheld in 2018 CAF 8), *Raymond v. Treasury Board*, 2010 PSLRB 23, *Williams v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 39, and *Forner v. Deputy Head (Department of the Environment)*, 2014 PSLRB 95 (upheld in 2016 FCA 136).

[84] Finally, the employer set out the facts it was prepared to rely on to establish that the grievor had been terminated for cause, namely, unsatisfactory performance.

B. <u>For the grievor</u>

[85] The grievor submitted 34 pages of written submissions, which do the following:

- ignore the questions I raised with respect to determining the probationary period and whether the employer could change the basis for the termination;
- refer to documents and facts that are not in evidence; and
- misstate both the oral and documentary evidence that was submitted.

[86] As the submissions are not helpful with respect to the issues I have to decide, I have not summarized them.

C. <u>The employer's reply</u>

[87] The employer submitted that the grievor's submissions improperly relied on claims and documents that were not introduced at the hearing and that were outside the scope of the adjudication. Written submissions are not a second chance to testify

but are an opportunity to provide a concise statement of a party's position on a specific subject. In this respect, the employer referred me to *Arora v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15654 (FC).

[88] The employer submitted that in the written submissions process, the grievor made comments and submissions that were mere assertions and conjecture and not part of the record or relevant to the grievance.

[89] The grievor made submissions and allegations that in essence breached the rule in *Browne v. Dunn*, (1893) 6 R. 67, H.L.

[90] The grievor also made serious unfounded allegations of perjury.

V. Reasons

A. The process issue

[91] On the first page of his submissions, the grievor referenced a binder he had submitted at the hearing, which was marked as G-1 for identification purposes. In the covering email accompanying his submissions, he objected to the employer's brief of documents (marked as E-1 for identification purposes) being admitted into evidence and G-1 not being admitted.

[92] At the outset of the hearing, I explained the hearing process to the grievor, including the rules of evidence and how documents are proved and entered as evidence.

[93] Both counsel for the employer and the grievor each had provided four copies of their respective document briefs, one each for themselves, one for each other, one each for me, and a copy for the witnesses to use. When I asked if they consented to all the documents in the others' brief being admitted into evidence without objection, both indicated that they did not. That being the case, to expedite the hearing process, both briefs were marked only for identification purposes, and the parties were instructed that only those documents that in the course of the hearing I determined were evidence would actually be admitted into evidence.

[94] G-1 is a blue 3-ring binder that contains 31 tabs and 2 inches of documents. When the grievor was cross-examining the employer's first witness, it became obvious that the four versions of G-1 were all different in that they did not have the same

documents located in the same places. Due to this problem, the hearing proceeded on the basis that any document from G-1 that was to be made an exhibit would, once located by everyone, be removed from the binder, and if I determined that it would be entered into evidence, it would be marked as an exhibit. As of the hearing's adjournment, 10 exhibits had been entered into evidence from the blue binder and had been marked as Exhibits G-2 to G-11.

B. Was the grievor terminated within the probationary period?

[95] It is not uncommon for a grievance to be filed against a termination of employment that was done under s. 62(1) of the *PSEA*, which is often referred to as "a rejection on probation". With such grievances, grievors face a significant hurdle because the Board (as did its predecessors the PSLREB, PSLRB, and Public Service Staff Relations Board) does not have jurisdiction over terminations effected under the *PSEA*. Section 211 of the *Act* states as follows:

> ***211*** *Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*
>
> > ***(a)*** *any termination of employment under the* Public Service Employment Act*; or*
> >
> > ***(b)*** *any deployment under the* Public Service Employment Act*, other than the deployment of the employee who presented the grievance.*

[96] Section 209 of the *Act* sets out the Board's jurisdiction with respect to referrals to adjudication of individual grievances. Section 209(1)(b) gives it jurisdiction over terminations of employment for misconduct. Section 209(1)(c)(i) gives it jurisdiction over terminations made under s. 12(1)(d) of the *FAA* for unsatisfactory performance or under s. 12(1)(e) of that Act for any reason that does not relate to a breach of discipline or misconduct.

[97] The initial question in many of these types of cases is about jurisdiction. The grievance is filed. It is dealt with at the different levels of the grievance process and is eventually referred to the Board for adjudication. Then, the employer takes the position that under s. 211 of the *Act*, the Board has no jurisdiction on the basis that the termination was made under s. 62 of the *PSEA*.

[98] For s. 211 of the *Act* to apply, the termination of employment must have been done under the *PSEA*; if not, it could not have been a termination under s. 62 of the *PSEA*.

[99] Although usually not in dispute, the first question that needs to be answered is the following: When did the probationary period end? This is important because the basis for the termination was s. 62(1) of the *PSEA*. It is against this employer action that the grievor has taken the step of filing the grievance, which dictates the process that will be followed. The process in such cases was largely the same until the decision was rendered in *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134.

[100] Before *Tello*, the process for rejection-on-probation grievances proceeded with the employer establishing a valid employment-related reason for rejecting the employee on probation. *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529 at para. 42, sets out as follows, citing *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (F.C.A.) at 438:

. . .

> *. . . In* Smith *(Board file 166-2-3017), adjudicator Norman is straightforward:*
>
> *In effect, once credible evidence is tendered by the Employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes shuddering to a halt. The adjudicator, at that moment, loses any authority to order the grievor reinstated on the footing that just cause for discharge has not been established by the Employer.*
>
> [Emphasis in the original]

[101] Before *Tello*, once the employer had established the valid cause for rejection, the jurisprudence held that ". . . the burden of proof then 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* [emphasis in the original]" (see *Leonarduzzi*, at para. 45).

[102] *Tello* slightly altered the jurisprudential landscape. That case held that in such hearings before the Board (or its predecessors), grievances filed by employees terminated under the *PSEA*'s probationary provisions no longer required that the

employer establish a valid employment-related reason for the rejection on probation. It merely had to establish that a grievor had been terminated within the probationary period, it had provided a termination letter that set out the reason for the termination, and it had paid the grievor, in lieu of notice. At that point, the burden shifts to the grievor to show that the employer's reliance on the *PSEA* was contrived, a sham, or a camouflage (see *Tello*, at para. 112).

[103] The entire grievance process, including the referral to adjudication to this Board or to one of its predecessors and the burden of proof and tests to be met, has been founded in how the employee was terminated.

C. Calculating the end date of the probationary period

[104] Section 5(1) of the *FAA* created the Treasury Board. Section 7(1)(e) states that the Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it. The Treasury Board's powers with respect to human resources management are set out in more detail in ss. 11 through 13.

[105] Section 26(1)(c) of the *PSEA* states that the Treasury Board may, in respect of organizations named in Schedule I or IV to the *FAA*, make regulations (which are the probationary *Regulations*) establishing periods of probation for the purposes of s. 61(1) and notice periods for the purposes of s. 62(1) of the *PSEA*.

[106] The CSC is an organization named in Schedule IV to the *FAA*.

[107] Section 61(1) of the *PSEA* states that a person appointed from outside the public service is on probation for a period established by the probationary *Regulations* in respect of the class of employees of which that person is a member, in the case of an organization named in Schedule I or IV to the *FAA.*

[108] Section 62(1) of the *PSEA* states that while an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of the notice period established by the probationary *Regulations.*

[109] The probationary period for the class of employee within which the grievor belonged is 12 months. Those 12 months do not include those periods set out in ss. 2(2) and 3 of the probationary *Regulations*.

[110] "Month" is not defined in the *Act*, the *PSEA*, or the probationary *Regulations*. However, it is defined in s. 35(1) of the *Interpretation Act* as follows: "***month*** means a calendar month [emphasis in the original]".

[111] Again, the *Concise Oxford Dictionary* defines "month" as follows: "Each of the twelve named periods into which a year is divided. A period of time between the same dates in successive calendar months. A period of 28 days or four weeks."

[112] Section 2(2) of the probationary *Regulations* states that the probationary period does not include any of the following periods:

> ***2 (2)*** *. . .*
>
> ***(a)*** *of leave without pay;*
>
> ***(b)*** *of full-time language training;*
>
> ***(c)*** *of leave with pay of more than 30 consecutive days; or*
>
> ***(d)*** *during which a seasonal employee is not required to perform the duties of the position because of the seasonal nature of the duties.*

[113] Section 3 of the probationary *Regulations* states that the probationary period for a disabled employee who requires accommodation begins on the day on which the necessary accommodation is made.

[114] The probationary *Regulations* have no provision that would enable the employer and an employee to agree to a different probationary period; nor may the employer unilaterally extend or reduce one at will. It is a specific period, as prescribed by the probationary *Regulations*.

[115] The employer's position is that when calculating under s. 2(2)(c) of the probationary *Regulations* the time that is not included in the probationary period, the phrase ". . . of leave with pay of more than 30 consecutive days . . ." means any period of time that includes leave with pay in excess of 30 days, and the entire time is not included in the calculation of the probationary period. Its argument largely rested on

"30 consecutive days" from that section as being calendar days. It argued that there is a distinction between calendar days and working days and that the word "days" in s. 2(2)(c) means calendar days. It submitted that unless a word modifies "days", such as "working", which would distinguish the days from non-working days, "consecutive days" means calendar days.

[116] While I accept and agree with the employer's submission that the probationary period is to be for a reasonable time, to be used as an adequate opportunity for managers to assess whether an employee is a good fit for a job and to allow employees to demonstrate their competencies and suitability for their jobs, I disagree with the employer's interpretation of s. 2(2)(c) of the probationary *Regulations*.

[117] The purpose of ss. 2(2) and 3 of the probationary *Regulations* is to define the time frame of a probationary period. Those provisions simply state the time that does not count as part of that 12-month period.

[118] Section 2(2)(c) of the probationary *Regulations* must be read in context with the balance of the rest of those regulations and with the collective agreement.

[119] To understand what s. 2(2)(c) means, it is easier to consider what it does not mean. That is accomplished by considering what certain words and phrases mean in the context of s. (2)(2) and its effect on the probationary period.

[120] It is clear from a review of ss. 2(2) and 3 that not all leave is to be exempt from calculating the probationary period. A simple comparison discloses that all leave without pay shall not be included when calculating the probationary period. However, only some leave with pay shall be exempted. The question becomes determining which leave with pay to include or not include in the calculation.

[121] Section 2(2) uses the terms "leave with pay" and "leave without pay", which are not defined in the probationary *Regulations*, the *PSEA*, or the collective agreement. However, although "leave" is also not defined in the probationary *Regulations* or the *PSEA*, it is defined in the collective agreement, as the ". . . authorized absence from duty by an employee during his or her regular or normal hours of work".

[122] While "leave with pay" and "leave without pay" are not defined, simply put, an employee can be on leave (an authorized absence from work) and either receive pay for that leave or not receive pay for it.

[123] An employee's normal hours of work are defined in the collective agreement. In the context of the grievor's employment, they were 7.5 hours per day, 37.5 hours per week, Monday through Friday.

[124] The leave that an employee receives, either with or without pay, is either set out in the relevant collective agreement for the bargaining unit the employee is in or, if the employee is not in a bargaining unit, set out in the terms and conditions of employment detailed in Treasury Board or separate employer policies.

[125] In the collective agreement governing the grievor, sick leave was governed by article 19. The English and French versions of clause 19.01 provide that all employees covered by it shall earn sick leave credits at the rate of 9.375 hours per calendar month, provided that the employee receives pay for at least 75 hours in that calendar month.

[126] In the collective agreement governing the grievor, vacation leave was governed by article 20. The English version of clause 20.02 of the collective agreement provides that all employees covered by it shall earn vacation leave credits at the rate of 9.375 hours per month, provided that the particular employee has **earned** at least 75 hours' pay in a particular calendar month. However, the French version of clause 20.02 is worded slightly differently than the English version is. It is worded similarly to both the English and French versions of clause 19.01, as it states that an employee shall earn vacation leave credits at the rate of 9.375 hours per month provided that the particular employee **receives** pay for at least 75 hours in a calendar month. The effect of this discrepancy would mean that an employee would gain leave credits on a statutory holiday under the French interpretation, since pay on those days is still received, though not technically earned.

[127] While these differences between the English and French versions of clause 20.02 of the collective agreement could impact on the calculation of vacation leave credits, for reasons that shall be set out later in this decision, the difference is not relevant.

[128] While both vacation leave credits and sick leave credits accrue on the basis of either being paid for at least 75 hours of pay per month or earning pay for at least 75 hours per calendar month, other types of leave with pay set out in the collective agreement (for the most part in article 22) are fixed by virtue of the employee simply being a member of the bargaining unit and of his or her terms and conditions of

employment being governed by the relevant collective agreement.

[129] Under articles 22 and 23 of the collective agreement are the following other types of leave with pay that an employee is entitled to take during the course of a year:

- bereavement leave, which can be of up to 5 days (37.5 hours);
- travel for bereavement leave, which can be up to 3 days (22.5 hours);
- volunteer leave of 1 day (7.5 hours);
- personal leave of 1 day (7.5 hours);
- leave for family-related responsibilities, which can be of up to 5 days (37.5 hours);
- leave with pay for court-related duties, which is not capped;
- injury-on-duty leave, which is not fixed and that the employer determines as reasonable;
- personnel selection leave, which is not fixed; and
- examination leave, taken to write examinations.

[130] The collective agreement also provides for other types of leave, albeit without pay.

[131] If the probationary period is 12 months (as it was for the grievor), depending on how those 12 months are calculated, an employee can certainly work a minimum of 75 hours in, or receive pay for 75 hours in, the 12 calendar months that encompass the 12 months of probation. If that employee does meet the conditions precedent in the collective agreement for calculating vacation leave and sick leave credits (clauses 19.01 and 20.02) in each of the 12 calendar months of probation, then over the course of those 12 months, the employee will earn 112.50 hours (or 15 working days of 7.5 hours) of paid sick leave and vacation leave credits.

[132] If an employee has used all his or her sick leave credits, the employee can use vacation leave credits to cover other sick days for which he or she has no sick leave credits. The same is not true for using sick leave credits merely to extend a vacation

when the employee has insufficient vacation leave credits.

[133] In addition to the 15 days of vacation leave with pay and 15 days of sick leave with pay that during a 12-month probationary period an employee could take, based on article 22 of the collective agreement, depending on if that employee experienced a death in the family that required travel and had matters that required him or her to be off for family responsibility related reasons, another 15 days of leave with pay. An employee is also entitled to one personal leave day with pay and one day of volunteer leave with pay. This totals a potential of 47 days of leave with pay during the 12-month probationary period that an employee can take. It does not take into account the employee being required to attend court or a hearing before a tribunal (such as this one) or any other potential valid reasons that the employer and bargaining agent have agreed will be covered by leave with pay.

[134] In the employer's interpretation and argument, an employee (like the grievor) who was away 29 working days (41 total days from the first day of absence to the last) would have his or her probationary period extended by 41 days, even if the employee took those 29 working days as leave with pay. However, that same employee could have taken the 47 days of leave with pay over the same 12-month period but in such a manner that his leave would never be more than 30 consecutive calendar days. In that situation, the employee would actually miss more workdays but would not have his or her probationary period extended. This not only makes no sense, it is also absurd, as I will demonstrate below.

[135] By using the employer's interpretation of "consecutive days" to mean calendar days, a probationary employee could be away from the workplace on leave with pay at almost exactly the same time as another employee, where the first employee is away less working days but has the probationary period extended by 30 days and the other employee has been away more working days and does not have it extended, based simply on whether the employee's last day of work was a Friday or a Monday.

[136] To illustrate this absurdity in the employer's argument that more than 30 consecutive days means calendar days, I will use the calendar month of January 2012 as an example. For an employee who worked Friday, January 6, but then was off work starting the Monday (January 9) and was away for 30 consecutive days, the first calendar day off would have been Saturday (January 7). Thirty consecutive

calendar days would end on Sunday, February 5, meaning that if the employee returned to work on Monday, February 6, he or she would have been away for 30 consecutive days and would have his or her probationary period extended by 30 days. In this scenario, the employee missed only 20 working days.

[137] If that scenario is altered by one working day, then that employee could be away 22 consecutive working days in January 2012 in the same time frame and would not have his or her probationary period changed. Thus, if his or her last day of work was Monday, January 9, the first day off would be Tuesday, January 10. Twenty-two working days would end on Wednesday, February 7; therefore, if he or she returned to work the next day, February 8, the probationary period would not be extended by 30 days, because he or she was away only 29 consecutive calendar days. This illustrates the absurdity of the employer's suggested interpretation.

[138] The employer's interpretation of and argument on the meaning of s. 2(2)(c) of the probationary *Regulations* do not take into account the meaning of the word "leave", which is defined in the collective agreement as an authorized absence from duty by an employee during his or her regular or normal hours of work. Saturdays and Sundays are relevant to calculating leave with or without pay only if those days are part of an employee's regular or normal hours of work; otherwise, they are days of rest.

[139] By wording s. 2(2) of the probationary *Regulations* in the manner that it did, the Treasury Board anticipated that its new employees, who are subject to a probationary period, could and perhaps would take some leave with pay for vacation, if they become ill and unable to work, to deal with family related responsibilities such as a sick child, or to deal with a death in the family, and perhaps, they would take some other types of leave, if the appropriate situation revealed itself. It is clear from the wording of s. 2(2)(c) of the probationary *Regulations* that taking leave with pay would not necessarily entail extending the probationary period. It is equally clear that taking leave without pay, after the ordinarily available paid sick and vacation leave had been exhausted, would extend it.

[140] It is equally clear from the wording of s. 3 of the probationary *Regulations* that disabled employees who require accommodation shall not have the period counted in which they had to do their jobs without the accommodation. This not only makes

perfect sense, it also aligns with the employer's argument that the probationary period is there to provide a reasonable period in which to assess new employees and to give them a reasonable period in which to demonstrate their competencies and suitability. It would not be fair or reasonable to assess new employees who require accommodation on their performance when they have not been provided the accommodation they require to do the work.

[141] As the employer's interpretation of what s. 2.2(c) of the probationary *Regulations* leaves us with absurd results, it could not possibly be what that section means.

[142] The employer in its argument referred me to *Melanson*, in support of its position that consecutive days, means calendar days. It is clear that in *Melanson* the adjudicator merely accepted that the grievor was still within the probationary period and as such did not explore in any meaningful way what s. 2(2)(c) of the probationary *Regulations* means. It merely focuses on whether there was a justification for the termination of employment.

[143] In sum, therefore, when reading s. 2.2(c) of the probationary *Regulations* in the context of the rest of that section and the probationary *Regulations*, it means that when an employee who is on probation has taken 30 consecutive days of leave with pay, any leave with pay that the employee takes after those 30 consecutive days of leave with pay is not considered part of the probationary period, and every day taken after those 30 consecutive days of leave with pay is added to the end of the probationary period.

[144] However, this does not end the inquiry. The grievor was absent from work not only on leave with pay but also on leave without pay, which, on the basis of s. 2(2)(a) of the probationary *Regulations*, would have extended his probationary period. The questions that now have to be answered are the following: When exactly did his probationary period end? Was he terminated within it?

D. <u>Calculating the grievor's probationary period</u>

[145] The grievor never was on full-time language training (s. 2(2)(b) of the probationary *Regulations*); nor was he a seasonal employee (s. 2(2)(d)) or considered disabled and requiring job accommodation (s. 2(3)). As such, his 12-month

probationary period, as set out by the probationary *Regulations*, could potentially by extended by the days he took as leave without pay (s. 2(2)(a)) or as leave with pay of more than 30 consecutive days (s. 2(2)(c)).

[146] The grievor was away from work due to illness for a total of 29 working days in January and February 2012 and took time off work in each of May, June, July, and August 2012. While some of that time off work would have been either vacation or sick leave with pay, the balance of it would have been leave without pay.

[147] Thus, if the grievor was not on paid leave for more than 30 **consecutive** days over the course of the year, the exclusion in s. 2(2)(c) is never triggered and consequently, the 12-month probationary period can only be extended by any leave without pay that was taken during the year.

[148] The following is undisputed evidence:

- the grievor's probationary period started on August 9, 2011;
- the employer and grievor believed that the last day of his probation, if it had not been extended, was August 8, 2012;
- the employer had determined that the probationary period was extended until September 18, 2012, for a total of 41 days;
- the employer determined the 41-day extension to the probationary period by counting the total number of days between the grievor's last day of work in January 2012, January 5, and his first day back at work in February 2012, February 16, and adding those 41 days starting on the first day after August 9, 2012;
- the employer terminated the grievor's employment on Tuesday, September 18, 2012, at 11:00 a.m., when he was at work;
- the letter of termination dated September 18, 2012, stated that Ms. Shore, as the acting warden of Bowden Institution, decided through the authority delegated to her by the provisions of s. 62(1) of the *PSEA* to reject the grievor on probation from his employment, effective that same day;

- the grievor was a day worker who worked 7.5 hours per day, Monday to Friday, or 37.5 hours per week, and he had a half-hour unpaid lunch break and two 15-minute paid breaks each workday; and

- between August 8 and September 18, 2012 (including September 18, 2012), there were 28 working days and one statutory holiday, Labour Day (September 3, 2012).

[149] The employer counted every day from the first day the grievor was off work, Friday, January 6, 2012, and it included every day (including Saturdays and Sundays) until the last day he was away from work, February 15, 2012. Of those 41 days, 29 were working days, 6 were Saturdays, and 6 were Sundays.

[150] As set out earlier, with respect to both sick leave and vacation leave with pay, if the grievor fulfilled the conditions precedent set out in clauses 19.02 and 20.02 of the collective agreement for each of the 12 calendar months between August 2011 and July 2012 (depending on whether the English or French version is followed), then over the course of those 12 months, he would have earned 112.50 hours (15 workdays of 7.5 hours) of both paid vacation leave credits and sick leave credits.

[151] Entered into evidence was the grievor's leave summary, which sets out the types of leave he was entitled to, had earned, and had taken. While it is clear that the leave summary is not entirely accurate, it does indicate the following:

- on September 15, 2011, the employer credited the grievor 9.375 hours of vacation leave credits for the months of August, September, October, November, and December 2011 and January, February, and March 2012, for a total of 75 hours (10 days);

- on May 12, 2012, it credited him 9.375 hours of vacation leave credits for the months of April, May, June, July, and August 2012, for a total of 46.875 hours (6.25 days);

- on September 15, 2011, it credited him 9.375 hours of sick leave credits for the months of August and September 2011, and after that, on the 15th days of October, November, and December 2011 and January, February, and March 2012, it credited him 9.375 hours of sick

leave credits for those months, for a total of 75 hours (10 days);

- on May 12, 2012, it credited him 9.375 hours of sick leave credits for the months of April and May 2012, and after that, on the 15th days of June, July, and August 2012, it also credited him 9.375 hours of sick leave credits for each month, for a total of 46.75 hours (6.25 days); and

- the grievor took 3 days of sick leave on November 10, 14, and 17, 2011, for a total of 22.5 hours.

[152] As of November 1, 2011, the grievor would have actually accumulated only 28.125 hours (3.75 days) of sick leave credits. By using 22.5 hours (3 days), he would have reduced his sick leave credits to 5.625 hours (0.75 of a day). However, as of the end of November 2011, he would have earned a further 9.375 hours, bringing his sick leave credits up to 15 hours (2 days). While the employer had credited him with 75 hours (10 days) of vacation leave credits on September 15, 2011, as of the end of November 2011, as per the collective agreement, he would have actually accumulated only 37.5 hours (5 days) of vacation leave credits.

[153] As of January 6, 2012, the grievor had not taken any vacation leave, and as such, he would have accumulated 46.875 hours (6.25 days) of vacation leave credits. He would also have accumulated sick leave credits for both November and December 2011, thus bringing his total sick leave credits up to 33.75 hours (4.5 days). The accumulated total of vacation and sick leave credits that he had accumulated and had not used as of January 6, 2012, was 80.625 hours (10.75 days).

[154] On January 26, 2012, in an email exchange, the grievor, Ms. Sealy, and Ms. Leslie discussed options on how to apply the leave credits to the grievor's ongoing absence from work. In that exchange, he confirmed that he wanted the employer to use his accrued sick leave credits to cover the first days of his time off work, accounting for January 6, 9, 10, 11, and 12 and the morning of January 13, 2012, and then the 10 days of vacation leave credits. After that, he confirmed that he wanted an advance of sick leave with pay to cover any remaining time he was away. At that time, he and Ms. Sealy were contemplating February 6, 2012, as his return-to-work date.

[155] Since the grievor had worked or had been paid for January 2 through 5, 2012, since he used the remaining 33.75 hours (4.5 days) of sick leave credits (which is what

he actually had as of December 31, 2011), and since the parties agreed to use the vacation leave credits and apply them to the days he was absent in January 2012 (to January 26, 2012), he would have earned a further 9.375 hours of sick leave credits for January 2012. He could also have applied them to his time absent from work in January 2012. This would bring the total sick leave credits available for him to use to 43.125 hours (5.75 days) as opposed to the 5.5 days that Ms. Sealy identified in the January 26, 2012, email exchange. Therefore, as of January 26, 2012, if the 5.75 days of sick leave credits and then the 10 days of vacation leave credits he had in his vacation leave bank are applied, it would cover all his days absent from work from January 6, 2012, up to and including January 26, 2012, leaving him with 0.75 of a day (5.625 hours) of sick leave credits remaining.

[156] The grievor continued to be absent from work until February 16, 2012, which was a total of 14 more working days, for which he could have been either advanced sick leave credits and vacation leave credits or those days would have been considered leave without pay. Fourteen working days equals 105 hours. As the grievor still had 5.625 hours of sick leave credits, he needed a further 13.25 days or 99.375 hours of leave credits to ensure that the remaining period of absence to February 16, 2012, would be considered leave with pay.

[157] The grievor's probationary period was scheduled to end on August 8, 2012. Therefore, between February 1 and August 8, 2012, based on clause 19.01 of the collective agreement, he could not have earned sufficient sick leave credits to cover the remaining 99.375 hours he was absent. He could have earned them only for the months of February through July 2012, because the last day of his probation was August 8, 2012. Six months at 9.375 hours per month equals 56.25 hours (assuming that he worked or received pay for 75 hours per month on a going-forward basis). That would leave a balance of 43.125 hours that would remain leave without pay. However, this time could have been made up by applying vacation leave credits, which he would also have accumulated on a going-forward basis.

[158] The grievor returned to work on February 16, 2012. That was a leap year, so February had sufficient working days until the end of the month for him to accumulate 9.375 hours of sick leave credits. He worked through March, April, May, and June 2012, and as such, he would have earned sick leave credits in all those months. Therefore, based on the evidence, as of June 30, 2012, he would have accumulated another

46.875 hours (6.25 days) of sick leave credits for the months of February through June 2012.

[159] If I interpret clause 20.02 as it is set out in the French version of the collective agreement, the grievor would have received vacation leave credits for both January and February 2012. If I read that clause as it is set out in the English version, the grievor might not have accumulated vacation leave credits for at least 75 hours in each of January and February 2012 because, while he was on leave (albeit paid), it could be argued that he did not earn pay for 75 hours. Therefore, at this juncture, I will leave those 18.75 hours (2.5 days) out of the equation.

[160] The evidence disclosed that the grievor worked sufficient hours in March, April, May, and June 2012 to earn another 37.5 hours (5 days) of vacation leave credits. However, the vacation leave credits from March would have already been used when the employer applied them to the days the grievor was absent in January and February of 2012, (as it had advanced them to him as of September 2011). Therefore, as of June 30, 2012, he would have accumulated only 28.125 hours (3.75 days) of vacation leave credits.

[161] The evidence disclosed that in May and June, the grievor did the following:

- took a half-day (3.75 hours) of vacation on May 3, 2012;
- took all of June 15, 18, 19, and 29 off, for a total of 30 hours (4 days); and
- took a half-day (3.75 hours) of vacation on June 26, 2012.

[162] The grievor testified that he took a trip overseas in July. The documentary evidence confirmed that he was away from work from Thursday, July 12, until Friday, July 27, 2012, which accounts for the 10 working days (75 hours) that he was absent from work.

[163] The evidence confirmed that upon his return to Canada, the grievor fell ill and was absent from work sick from Monday, July 30, through Tuesday, August 14, 2012. From July 30 until August 8, 2012, or 7 working days (52.5 hours), he was absent from work. From August 8 to 14, 2012, he was absent for a further 3 working days (22.5 hours).

[164] The evidence is silent as to what happened on Thursday and Friday, July 26 and 27, 2012, so I assume that the grievor was at work those days. That being the case, he would have received pay for 75 hours in July 2012, therefore satisfying the condition precedent in clause 19.01 of the collective agreement, and he would have accumulated a further 9.375 hours of sick leave credits.

[165] The evidence discloses that the grievor earned pay for only 67.5 hours in July 2012, from working only 9 days (July 3, 4, 5, 6, 9, 10, 11, 26, and 27). July 2, 2012, was a statutory holiday. If I interpret clause 20.02 as it is worded in English, he might not have accumulated vacation leave credits for July because he did not meet the 75-hour threshold. If I interpret that clause as it is worded in French, he did accumulate vacation leave credits for July because he met the 75-hour threshold as the July 2 statutory holiday accounted for a further 7.5 hours to give him the required 75 hours. Again, given this discrepancy, I will leave the July vacation leave credits (9.375 hours) out of the equation.

[166] If I take all the leave-with-pay credits that the grievor accumulated from February to July 30, 2012, not including the vacation leave credits I have left out of the equation for January, February, and July 2012 (28.125 hours or 3.75 days), the grievor earned the following:

- 61.875 hours (8.25 days) of sick leave with pay credits; and
- 28.125 hours (3.75 days) of vacation leave with pay credits.

[167] The evidence disclosed that on January 26, 2012, the grievor and Ms. Sealy had discussed that for the January-February 2012 period in which he was away, the employer would advance him sick leave with pay credits to be applied towards that absence, and then his vacation leave credits would be applied to it. If I apply the total amount of sick leave and vacation leave credits (90 hours or 12 days) towards his absence that remained unpaid in the January-February period, it would account for the days absent from January 27 until February 13, 2012.

[168] As of August 8, 2012, the grievor would have had no sick leave or vacation leave credits left for the following days on which he was absent from duty on authorized leave:

- 15 hours (2 days) of absence due to illness on February 14 and 15, 2012;
- 37.5 hours (5 days) of absence due to vacation in May and June 2012;
- 75 hours (10 days) of absence due to vacation in July 2012;
- 15 hours (2 days) of absence due to illness in July 2012; and
- 37.5 hours (5 days) of absence due to illness in August 2012.

[169] These hours amount to a total of 24 days.

[170] The grievor's last day of probation was supposed to be August 8, 2012. As of that day, he was left with no sick leave or vacation leave credits to apply against 24 days of absence. As he was on authorized leave on those days, they were leave without pay. Therefore, his probationary period would not include these 24 days of leave without pay.

[171] If I applied all the potential sick leave and vacation leave credits that the grievor accumulated per the collective agreement to his absence from work in January and February 2012, it would amount to only 27 consecutive days of leave with pay. Therefore, s. 2(2)(c) of the probationary *Regulations* would not be invoked to render any further days of leave with pay not included in the probationary period.

[172] As for s. 2(2)(a), those additional 24 working days would have to be added, starting with the first day after what was supposed to be the last day of his probationary period: August 9, 2012. However, the grievor was still sick and absent from work on August 9, 10, and 13, 2012; therefore, the additional 24 days would not be added until his return to work on August 14, 2012. The 24th working day from August 14, 2012, including that day, would be September 17, 2012, which would be the final day of his probationary period. By terminating him on September 18, 2012, the employer did so outside the probationary period set out in the *PSEA*.

[173] As set out earlier in these reasons, I had left out of the calculation vacation leave credits for January, July, and August 2012 (which total 28.125 hours or 3.75 days). If I interpret the phrase ". . . has earned at least seventy-five (75) hours' pay . . ." in clause 20.02 of the collective agreement to mean the same as ". . . il ou elle a

touché au moins soixante-quinze (75) heures de rémunération . . .” in the French version of the same clause, this would reduce by 3.75 days the 24 leave-without-pay days. Therefore, it would add only 21.25 days to the probationary period. Reducing that period’s extension would still mean that the grievor was terminated outside of that period and thus not under s. 62 of the *PSEA*.

E. Can the employer change the basis of the termination?

[174] The employer could not terminate the grievor while he was on probation under s. 62(1) of the *PSEA*. Yet, that is the reason that the employer declared to the grievor for the termination, on September 18, 2012. He in turn based his grievance of October 3, 2012, on this purported basis for the termination.

[175] As I had envisioned that there might be a chance that the employer terminated the grievor outside the probationary period, I raised it with the parties at the hearing at the same time as I raised the potential issue that the termination was not done within the probationary period. I stated that in addition to written submissions on whether he was terminated within the probationary period, I would also accept submissions on whether the employer could alter the grounds for termination, if he was indeed terminated outside the probationary period.

[176] In its written submissions, the employer invited me to consider that it could have terminated the grievor’s employment for unsatisfactory performance because he was unable to effectively perform his teacher duties with the CSC. It submitted that it has the authority under the *FAA* to terminate an employee, which can be done for disciplinary or other reasons, including an inability to carry out the functions of his or her position.

[177] In support of its position, the employer set out several potential facts that would support the alternative argument that the grievor’s alleged poor performance would justify terminating him for unsatisfactory performance. In response, the grievor made submissions with respect to some facts that were adduced about his performance; they largely denied or disputed the employer’s position.

[178] Both the employer’s and the grievor’s submissions in this respect were premature, as the hearing had yet to be completed. When the week scheduled for the hearing ended, it still had not completed. While the employer had closed its case,

the grievor was still in the midst of testifying, and he potentially had more evidence to bring forward.

[179] The arguments that both parties made with respect to the substance of the grievor's performance are relevant only once the preliminary question is answered, which is whether, if the grievor was not terminated under the *PSEA*, at this stage, the employer could change the basis for terminating his employment.

[180] The employer is quite right that it does have authority under the *FAA* to terminate an employee's employment for disciplinary or other reasons, such as unsatisfactorily performing the duties of his or her position. However, in September 2012, it chose not to terminate the grievor under the *FAA* but instead under s. 62(1) of the *PSEA*.

[181] The PSLREB addressed this question in *Heyser v. Deputy Head (Department of Employment and Social Development)*, 2015 PSLREB 70 at paras. 158 to 164 ("*Heyser 1*"*)*, where the Adjudicator stated the following:

> ***158*** *In numerous decisions under the* Public Service Staff Relations Act *(R.S.C. 1985, c. P-35) and the* PSLRA*, adjudicators have found that employers are bound by the grounds on which they rely at the time of a termination and that they should not be permitted to rely on new grounds at adjudication. This is what the employer attempted, since it relied solely on the revocation of the grievor's reliability status as the basis for terminating her employment.*
>
> ***159*** *Further, the employer maintained throughout the grievance procedure that its decision to terminate the grievor was not disciplinary but administrative. Both grievances filed by the grievor stated the following: "I am grieving the revocation of my security clearance status and termination of employment." The first grievance challenged a disciplinary action resulting in termination; the second grievance alleged a violation of article 17 (Discipline) of the collective agreement. The employer's final-level decision to both grievances was as follows:*
>
> > I find that the employer has not violated Article 17.02 of the PA collective agreement since no disciplinary action was taken in this matter. The employer carried out a review and reassessment of your reliability status. The holding of reliability status is required as a condition of employment. Since you no longer meet this requirement, your employment was terminated in accordance with

the *Financial Administration Act*.

160 *The employer bore the onus of establishing that the reasons for which it terminated the grievor's employment were legitimate at the time it made its decision. From the outset, the employer characterized the termination of the grievor's employment as non-disciplinary. All the evidence it presented was in support of that position. In its rebuttal argument, the employer submitted that there was no evidentiary basis to the allegation that it chose the path of revoking the grievor's reliability status to avoid scrutiny at adjudication. Furthermore, it maintained that there was no indication that it treated the grievor's actions as worthy of discipline.*

161 *At adjudication, the employer attempted to change the grounds it had relied upon for the termination throughout the process. It would have been unfair to the grievor, and contrary to the rules of natural justice, to allow the employer to argue that her termination was disciplinary in the event that it failed to prove that the termination resulted from a non-disciplinary action. The employer made a strategic decision to revoke the grievor's reliability status instead of pursuing the disciplinary process. Therefore, I find that the grievance in PSLREB File No. 566-02-8831 will be allowed.*

162 *As corrective measures, the grievor sought the reversal of the revocation of her reliability status and reinstatement without loss of pay and benefits. The employer's third and final-level decision contained the following:*

. . .

> . . . You are also seeking reversal of the revocation of your reliability status, cessation of discrimination, implementation of accommodation measures upon return to work, and $40,000 damages for pain and suffering.

. . .

163 *Save for the reversal of the revocation of her reliability status, these remedies were not specified in the grievances; nor did the grievor pursue them at adjudication. Accordingly, I need not deal with them.*

164 *Finally, although I have found that the evidence has shown that the conditions required to revoke the grievor's reliability status were absent at the time of Mr. Boyd's decision and that the consequential termination of her employment, not being for cause, constituted a contrived reliance on the* FAA*, a sham or camouflage, this did not*

> *clothe the employer's decision as a disciplinary action. As such, the grievance bearing PSLREB File No. 566-02-8832, alleging a breach of Article 17 (Discipline) of the collective agreement, will be dismissed as the provisions of that article were not triggered.*
>
> [Emphasis added]

[182] The employer had *Heyser 1* judicially reviewed. The Federal Court of Appeal dismissed the application in *Canada (Attorney General) v. Heyser*, 2017 FCA 113 ("*Heyser 2*"). On the issue of the employer changing the basis upon which it terminated the grievor's employment, the Court stated at paragraphs 77 and 78 as follows:

> *[77] It is my view that if the revocation is justified on the basis of the relevant policies then the resulting termination was for cause. In other words, as is the situation here, when the employer terminates an employee on non-disciplinary grounds, i.e. because the employee has lost his or her reliability status, the Board must determine whether the revocation leading to the termination is justified. If so, the employer has shown that the termination was made for cause. If the employer is unsuccessful in demonstrating that the revocation was based on legitimate grounds, then there is no cause for the termination and the employee, as the adjudicator so ordered in this matter, must be reinstated.*
>
> *[78] In such a scenario, it is not open, as I indicated earlier, for the employer to change its tack, as the employer attempted to do before the Board, and assert that the termination should be considered, in the alternative, as having been made on disciplinary grounds so as to allow the employer to argue that if termination is not the proper sanction, then some lesser sanction is in order.*
>
> [Emphasis added]

[183] At paragraph 54 of *Heyser 2*, the Court referred to a similar case, *Bergey v. Canada (Attorney General)*, 2017 FCA 30, in which it stated as follows:

> *[54] In* Bergey v. Canada (Attorney General)*, 2017 FCA 30 (*Bergey*), one of the questions at issue was whether the adjudicator had jurisdiction under paragraph 209(1)(*c*) of the Act to determine whether there existed grounds justifying the revocation of Ms. Bergey's reliability status as part of her assessment of whether the employer had cause for termination, when the termination was based on the loss of the requisite reliability status. In the opening paragraph of her reasons for the Court, Madam Justice Gleason put the question as follows:*
>
> *This appeal concerns the breadth of protection from*

> *termination without cause provided to employees under the* Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the* PSLRA*) and the ability of public service employers to choose to terminate employees for security-related reasons and thereby shield their termination decision from review for cause.*

[184] The facts in all the *Heyser* and *Bergey* cases involved employees terminated from their federal public service positions because they lost their reliability status. They lost their jobs not because of discipline for misconduct or for unsatisfactory performance but because they had lost their reliability status and thus no longer possessed that required condition of employment. All of those cases were referred to the Board for adjudication under s. 209(1)(b) of the *Act*, and alleged that the terminations were disguised discipline. In those cases, the employer's position was that an adjudicator under the *Act* was without jurisdiction to hear them, as the employer had had cause for the terminations under s. 12 of the *FAA*.

[185] This case has similarities with those involving the loss of reliability status, which have underlying facts that led to that loss. The underlying facts with respect to both *Bergey* and *Heyser* were actions by the grievors in those cases that could have warranted the employer disciplining them for misconduct. However, the employer did not discipline them; instead, it chose to use those underlying facts to revoke their reliability status and then terminate their employment on the basis of them no longer meeting a condition of employment.

[186] In *Heyser 1*, during the hearing, the employer attempted to make the alternative argument that it could rely on the underlying actions as being sufficient to discipline Ms. Heyser and that terminating her employment was appropriate discipline for the alleged acts of misconduct, or, at the very least, as being sufficient to warrant some disciplinary measure. It is clear from both the decisions of the Adjudicator in *Heyser 1* and of the Federal Court of Appeal in *Heyser 2* that the employer, having chosen the path of least resistance, cannot, if those grounds and arguments are not supportable, change its position and change tack in the midst of a hearing.

[187] This concept of law is not new. In *Burchill*, the Federal Court of Appeal dealt with the issue of changing the basis of a grievance during the grievance process. In that case, the question dealt with during the grievance process was whether Mr. Burchill had indeterminate status or tenure despite accepting a term position.

The Court pointed out that that question was determinable in the grievance process but that it could not be referred to adjudication. When he lost his grievance at the final level, Mr. Burchill attempted to refer it to adjudication on the basis that he had been discharged from his employment for disciplinary reasons, which the Court held he could not do.

[188] The concept in *Burchill* applies equally to the employer. It is certainly both unfair and prejudicial to the grievor when, more than six-and-a-half years after it terminated his employment, he has to try to defend against allegations of which he was not fully made aware, and he was not required to address when moving his grievance forward through the grievance and adjudication processes.

[189] By relying on s. 62 of the *PSEA*, the employer chose to ". . . shield [its] termination decision from review for cause" (as stated in *Bergey*). In bringing his grievance forward, the grievor was led to believe that the course of action he had to take and the burden of proof he had to meet was that the employer's actions had been a sham, a camouflage, or in bad faith.

[190] Therefore, now, some six-and-a-half years later, the employer, after stating that it terminated his employment under s. 62 of the *PSEA*, cannot change tack and allege that his performance was unsatisfactory and that it terminated him under s. 12 of the *FAA*. The employer could have chosen to terminate him for unsatisfactory performance under the provisions of the *FAA*. It did not. Had it done so, back in 2012, the grievor would have known the facts and documents to gather and the witnesses to speak to, so that he could be in a position to address that specific action and those specific facts.

[191] The test that the parties have to meet to address a termination for unsatisfactory performance is much different than establishing that the employer was engaged in a sham, a camouflage, or bad faith by relying on s. 62 of the *PSEA*.

[192] Therefore, I find that the employer has terminated the grievor without cause.

[193] As these issues of jurisdiction and law arose during the course of the hearing, and neither party has had an opportunity to address the remedy, I shall remain seized of this matter to address that issue.

[194] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[195] I have jurisdiction to hear this matter.

[196] The grievance against the termination of the grievor's employment is allowed.

[197] I shall remain seized of this matter to deal with a remedy.

[198] The grievor shall immediately provide to the employer, if he has not already done so, the following documents:

- all his T-4s for the taxation years 2012 to 2017;
- all his notices of assessment from the Canada Revenue Agency for the taxation years 2012-2017;
- all his income tax return files for the taxation years from 2012 through 2017;
- a list of all the jobs he applied for since being terminated in September 2012; and
- a list of all jobs he has held since being terminated in September 2012.

July 3, 2018.

John G. Jaworski,
a panel of the Federal Public Sector Labour Relations and Employment Board