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*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

STELLA YEO

Grievor

and

DEPUTY HEAD

(Department of Employment and Social Development)

Respondent

Indexed as

Yeo v. Deputy Head (Department of Employment and Social Development)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Abudi Awaysheh, Public Service Alliance of Canada

For the Respondent: Joel Stelpstra, counsel

Heard at Vancouver, British Columbia,
February 12 to 15 and August 7 and 8, 2019.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Stella Yeo, was employed as a payment services officer (PSO) with the Department of Employment and Social Development (“the employer”). She alleged that the termination of her employment based on her performance was grossly unfair and unreasonable and that it was an act of bad faith by the employer, given that she had been allowed to carry out only a portion of the duties of her substantive position for a period of five years (from 2008 to 2012) without it expressing any concerns. Only in 2012 did the employer advise her that she was not meeting performance expectations.

[2] Between late 2013 and spring 2014, the grievor was required to complete a series of 4 performance action plans (PAPs) that lasted 14 weeks. At that point, she was told that if she could not perform all the duties of her position, her continued employment with the employer was at risk. When she was unable to meet the employer’s expectations, her employment was terminated, which it claimed was for cause, due to her unsatisfactory performance.

[3] The grievor alleged that her termination was an act of bad faith on the part of the employer and that it was a sham, as the employer sought to eliminate positions to meet its cost-reduction targets during the period in which the “Deficit Reduction Action Plan” (DRAP) was in effect.

II. Summary of the evidence

[4] In general, the situation that gave rise to the grievor’s plight can be described as follows. It will be discussed in more detail later in this decision.

[5] The employer hired the grievor as a PSO (classified PM-01) in its office in Burnaby, British Columbia, in October 2008. The job she was to perform required her to complete two phases of training and monitoring, during which she was to perform the tasks required of her level, which was the payment of employment insurance benefits.

[6] She received the level 1 phase 1 (L1P1) training and completed the monitoring portion of it by December 2008. With that level, she was able to carry out only L1P1 work. In May 2009, she successfully completed the level 1 phase 2 (L1P2) training but

not its monitoring portion. As a result, she continued to carry out only L1P1 work. In October 2009, she successfully completed her probationary period.

[7] According to her, the grievor continued to carry out L1P1 work until January 2011 with no indication from the employer that her performance was not acceptable. In January 2011, she was again sent for L1P2 training, which she again passed. However, once again, she failed to complete the monitoring portion. As a result, again, she was assigned only L1P1 work, and again, according to her, she was not advised that her work was unacceptable.

[8] In November 2011, the grievor was relocated from the employer's Burnaby office to its Vancouver, B.C., office, where again, she was assigned and performed only L1P1 work. Between February and June 2012, she went on assignment as a citizen services officer (CSO) in which she worked directly with the public, which was not particularly to her liking. In July 2012, she returned to her substantive PM-01 position and expected that she would be allowed to perform her L1P1 work as she had done all along. She did so until September 2013. According to the grievor, at that point, she was advised that the employer now expected her to carry out all PM-01 tasks, and she was again required to complete the L1P2 training.

[9] Again, the grievor successfully completed the course part but not the monitoring part. She was allowed to linger carrying out only L1P1 work until late 2013, when she was advised that she was to be put on a PAP. She went through a series of three team leads who assessed her performance and was put on a series of four PAPs commencing in October 2013 to address her performance deficiencies, during which her performance quotas increased. The only thing that changed after each PAP review was that the employer increased her performance quotas.

[10] According to the grievor, despite doing everything to be successful, she could not meet the employer's demands. She received no feedback on what she was doing wrong, and her deficiencies were not brought to her attention. According to her, no one ever explained the problems to her or showed her how to correct her errors in a way she understood. Also according to her, she asked for more training and monitoring and for the opportunity to job shadow a colleague. Each request was denied. Her requests to her business expertise advisor (BEA), to speak to a team lead about her concerns with the monitoring process, were ignored.

[11] After being allowed to carry out only L1P1 work for approximately five years (according to the grievor, this occurred without any indication that her work was substandard), successfully completing her probationary period, and failing to meet the goals and quotas set out in the four PAPs from October 2013 to September 2014 (during which her pleas for assistance and further training were ignored), the grievor's employment was terminated on September 19, 2014, by Michael Gardiner, Assistant Deputy Minister, Western Canada and Territories Region, Service Canada. She had never met him, and he had never been involved in the assessment process.

[12] Mr. Gardiner testified that his decision to terminate the grievor's employment was based on a review of her file and her performance evaluations. He relied entirely on the evaluations of the people in his chain of command who were directly responsible for evaluating her work to conclude that she was unable to meet the performance standards required of her position. Through the review, he satisfied himself that it was not a disciplinary matter and that no other allegations caused him concern.

[13] From the briefings he received from his subordinates when they sought his approval to terminate the grievor's employment, it was clear to Mr. Gardiner that she was aware of the performance standards she had to meet and that she had received all the training required to help her meet them. He assured himself that the problem with her performance was qualitative, not quantitative. The accuracy of her work was of particular concern as the employer's mandate was to provide accurate information to Canadians who called in, so that they would receive the correct benefits.

[14] Before taking any action, Mr. Gardiner verified that all the assessments of the grievor's performance had been done properly and that she had been assessed against the national performance standards. After reviewing the warning letters, he concluded that she had no realistic chance to meet the standards. The employer needed to move on, so he decided that the termination of her employment was warranted. He was satisfied that all the necessary steps had been taken to allow her to retain her job.

[15] As the assistant deputy minister, Mr. Gardiner did not supervise line employees, like the grievor and her immediate supervisors. He expected that she would have been provided with the resources and time to help her improve. Only if she reached plateaus

or if no progress were made would a termination decision have been necessary. He expected an arduous effort on the part of everyone involved in the evaluation process.

[16] The director general responsible for the area in which the grievor was employed was responsible for the integrity of the process. Mr. Gardiner admitted that he was not an expert in the performance assessment regime as it was not within his scope of responsibility. He relied on the expertise of the director general and his or her subordinates to protect and ensure the integrity of the assessment process which the evidence showed consisted of 4 PAPs lasting a total of 14 weeks. His decisions were based on the director general's assurance that this had been done. He relied on the assurances he received from Carolyn Young, the grievor's service manager, and Wendy McMurray, the director of employment insurance in Vancouver.

[17] Alison Davies testified that she was the first BEA who attempted to help the grievor meet the employer's expectations after her return from her CSO assignment and during her first PAP. Once the grievor had again completed the L1P2 training, Ms. Davies was assigned as her BEA during the monitoring phase. Her BEA role was to monitor the grievor and provide her advice and guidance related to the subject matter covered in L1P2 of the training. She was to assess how much the grievor had learned and whether she could apply it in a practical situation. The grievor was to complete files and submit them to her BEA for review.

[18] For each area of work the grievor was taught, she was expected to maintain an 80% accuracy rate before she was released from the monitoring phase, which she never accomplished. The normal L1P2 monitoring period was six weeks, with accuracy increasing over that period. During the period, Ms. Davies met biweekly with the grievor and her team lead to review her progress.

[19] According to Ms. Davies, the grievor required considerable help completing claims. Ms. Davies said that it reached the point that with all the grievor's questions, Ms. Davies ended up processing the claims. Instead of monitoring a sample of the grievor's claims, Ms. Davies found herself monitoring 100% of her completed claims. Based on all that, Ms. Davies concluded that the grievor did not have a good understanding of L1P1 work, so errors in her basic calculations complicated later calculations. In the end, the grievor did not successfully complete the monitoring stage evaluated by Ms. Davies.

[20] When Ms. Davies advised her of the risk associated with failing to complete the monitoring stage, the grievor asked if she could be allowed to work only on simple files, which she could complete without error. That would have allowed her to meet her 80% error-free target. Ms. Davies explained that it was not possible, as technology allowed calculating the so-called “easy” claims automatically, meaning no PSO was required.

[21] The outcome of the grievor’s monitoring period was not Ms. Davies’ decision. She recommended to management that the grievor undergo further monitoring via another PAP, along with more mentoring. It was clear to Ms. Davies that the grievor could not be released from the mentoring stage of her L1P2 training.

[22] If the grievor did not understand the fact-finding that needed to be done to complete a claim, then she would not understand any issues that arose with a claim. It was clear to Ms. Davies that the grievor did not understand the information she needed to obtain from claimants to complete the claims she worked on. Her errors resulted in incorrect employment insurance benefits to claimants or in no benefits being paid. PSOs like the grievor must be fully trained, must be able to carry out every phase of a claim, and must recognize issues with claims when they arise.

[23] When Ms. Davies became the grievor’s BEA during her first PAP, she knew that the grievor had been unsuccessful in completing the monitoring portion of L1P2 training at least twice. She was also aware that the grievor had successfully completed L1P1 training, although she believed there were serious weaknesses at that level that prevented the grievor from successfully completing the L1P2 work. Ms. Davies testified that she told Ms. Young, the grievor’s service manager, and the grievor’s team leads that there were indications that the grievor did not understand the L1P1 work, which prevented her from completing L1P2 work. Ms. Davies recommended retraining at L1P1.

[24] Employees on PAPs are expected to work independently and without assistance. They are to seek guidance when necessary. Instead, Ms. Davies spent significant time sitting with the grievor each morning discussing the claims she was to process that day and referring to reference manuals. The two met regularly during the monitoring period to review the grievor’s progress. Once this PAP was completed, Ms. Davies had

no further role in monitoring the grievor's work. Harmesh Toor, another BEA, took over.

[25] Ms. Toor testified that when reviewing claims during an employee's monitoring phase, including the grievor's, her practice was to provide feedback via email the next day in which she identified the corrections required. She might or might not refer to the policy or regulation applicable, depending on the number of times a same mistake had been made. If the deficiencies or observations were complicated, she would ask the employee to come to her desk for an in-person explanation of why the claim needed correcting. Feedback was provided on every claim during the monitoring period. The employees were to submit their questions in writing to her only after completing their research.

[26] According to Ms. Toor, the grievor had to meet 2 goals during her PAP monitoring period: productivity (the number of claims completed per week to be submitted for review) and quality (the percentage of claims completed without deficiencies). The 80% efficiency standard was to be achieved across all types of files, not just with respect to a specific type.

[27] If the grievor had any questions about her work, she was required to submit them to Ms. Toor, but only in writing. According to Ms. Toor, this requirement allowed her to analyze the number and types of questions so that she could determine if there was a knowledge gap or if the grievor was simply unable to locate the reference material she needed. The grievor was told that she had a minimum of 20 files to complete per week and that if she had a question for Ms. Toor, she was to email it and move on to another file, pending the receipt of an answer. Open-ended questions were not allowed.

[28] Ms. Toor started monitoring the grievor in March 2014; it continued for approximately three four-week periods (it might have been two; she could not remember). The accuracy requirement started at 80% because that was the national standard for someone who had been trained and monitored. All PAPs start with the national standard. She used the same monitoring method for each PAP. The only things that changed were the targets to be met, which were set by management. They increased weekly, despite the results of the previous week.

[29] The first issue that Ms. Toor noted with the grievor's performance was that she had difficulties communicating with the clients and the employers who called the centre. Another issue Ms. Toor identified was that the grievor could not determine if a file had information gaps. Her job was to determine if the information from one source contradicted that from another and if so, which was correct. She would accept information without conducting any critical analysis of whether it made sense vis-à-vis the rest of the information in the file. She made such mistakes repeatedly.

[30] Ms. Toor raised these concerns with the grievor when she made the corrections and returned the file to her via email. She was then to correct the file and return it to Ms. Toor. Often, files were incomplete on the second review. The grievor made the wrong changes, made errors when making the changes, did not complete the required changes, or had not completed the required fact-finding. According to Ms. Toor, the fact that the grievor was still unable to correct files after she had been given directions indicated that she did not understand the concepts behind calculating claims.

[31] On occasion, Ms. Toor sat with the grievor and answered her questions in person, according to her testimony. When she did, she explained to the grievor the concepts behind how a claim was calculated. Despite all her efforts, the grievor repeatedly made the same types of errors.

[32] Ms. Toor had several concerns with the grievor's work. She made errors in both her L1P1 and L1P2 work. Often, her work required correcting her corrections. The questions that she asked Ms. Toor during the monitoring periods were difficult to understand. In Ms. Toor's opinion, they were too general and inappropriate. They often required Ms. Toor to complete a claim to answer them. She gave Ms. Toor no indication that she had researched a question before asking it.

[33] Ms. Toor was asked to sit with the grievor, watch her process a claim, and provide her with feedback and coaching while she worked, which she did. Ms. Toor selected a file that required some fact-finding. She sat with the grievor and took notes while the grievor worked. One of the key things she noticed about the grievor's work was that if she was confused, she moved on, but she made no note to clarify what had confused her before she moved on to the next thing. According to her testimony, Ms. Toor did not intervene when she saw the grievor do this as she wanted to observe the grievor's process from beginning to end.

[34] Typically, PSOs document questions as they proceed through the review of a claim. The grievor did not do this, which, according to Ms. Toor, made it difficult to assess claims. This was very concerning to Ms. Toor. The grievor's lack of methodology carried over into her approach to fact-finding, which also was very disconcerting to Ms. Toor.

[35] Once the grievor completed the review of the file selected by Ms. Toor, and Ms. Toor had noted the deficiencies, she brought the grievor to her desk and showed the grievor how the claim should have been done. Ms. Toor explained to the grievor that she needed to develop her own consistent methodology for reviewing files as she had just demonstrated to the grievor her methodology.

[36] Despite all Ms. Toor's efforts, the grievor still took more than the normal amount of time to complete claims and was still unable to meet the 80% accuracy requirement. Normally, when productivity dropped, accuracy would rise, but not for the grievor. She simply did not know what she was doing and did not understand what to do with the information she received. She did not understand how to calculate benefits. She memorized questions to be asked but could not determine which ones were required for which types of claims. She would ask questions that were not necessary for certain types of claims because she did not understand the calculation process.

[37] The rules with respect to the questions that the grievor was allowed to send to Ms. Toor were strict. They could not be phrased in an open-ended way but in such a way that they could be answered with either "Yes" or "No". Some of the grievor's questions for Ms. Toor were very basic. She should have known the answers, given that she had been trained and monitored at L1P1. She also asked what questions Ms. Toor considered were inappropriate. For example, she asked Ms. Toor to review a claim before it was submitted for monitoring, so that Ms. Toor could tell her if she had missed anything.

[38] Ms. Toor did not recall whether she responded to the grievor's questions as quickly as possible or within one day. Based on how the grievor completed her work, it was clear to Ms. Toor that the grievor was struggling with identifying which questions to ask. According to Ms. Toor, redoing L1P1 training would have been unlikely to help the grievor identify what questions to ask, given the types of questions and problems

she encountered. She had received very extensive training, monitoring, and coaching, and it had produced no improvement. Redoing L1P1 training was unlikely to change the results, according to Ms. Toor.

[39] Ms. Toor testified that she also had concerns with the grievor's interactions with clients. As an example, she described a situation in which a client had disagreed with the waiting period. The grievor did not understand the client's options and did not know that the client could request a reconsideration, which was taught in the first week of L1P1 training. Instead, she forwarded the claim to a level 2 adjudicator even though the waiting-period question was black and white.

[40] Ms. Toor testified that she never received a request from the grievor to speak to her team lead. She would have documented it if so. If the grievor had issues with the monitoring she received, Ms. Toor was unaware of it.

[41] According to Ms. Toor, during the final PAP monitoring, the grievor did not meet any of the productivity or accuracy targets set for her in any of the weeks during the PAP. She made errors in basic calculations that repeated those seen during the second and third PAPs. She continued to make correction errors. She continued to have communication difficulties and did not recognize the consequences of her errors. Even if she worked on a claim that was strictly at L1P1, she did not fully understand it. It was difficult to find claims that were strictly at L1P1, as L1P2 benefits may appear on any claim, according to Ms. Toor.

[42] According to Ms. Toor, L1P2 work required a sound understanding of L1P1 work, which the grievor did not have. If she did not understand how to calculate an L1P1 claim, she could not be expected to calculate an L1P2 claim. It was clear that she was missing this key part of her training, but Ms. Toor did not recall Ms. Davies informing her that the grievor lacked this understanding.

[43] In Ms. Toor's experience, retraining is not effective because the reason that the material was not understood the first time remains. The grievor's problems were difficult to fix through retraining. She required the abilities to remember what she had learned in training and to apply it.

[44] Eugene Wong was the grievor's team lead during her PAPs. His role was to ensure that the PSOs who reported to him met national standards and that they did a

good job and were happy to come to work. He started working with the grievor on her return from her CSO assignment. He felt that she needed retraining in L1P2 work, which occurred in September 2013. She was unsuccessful in the subsequent monitoring period. At no time did she mention any accommodation needs.

[45] As the grievor's team lead, he did not monitor her work, but he set up weekly meetings to discuss the previous week's monitoring report prepared by the BEA assigned to her. He asked for her comments on the reports and asked her what could be done to help her improve. Despite this, the PAPs were not successful. After the first PAP was unsuccessful, the grievor reported that her workstation was in a high-traffic area in an open-floor-plan workplace. She reported to Mr. Wong that it distracted her. He asked his manager if he could address this concern. She was moved to a different workstation as she requested, but nothing improved.

[46] The grievor advised Mr. Wong that she did not like being monitored and that she found the PAPs very stressful. After the first PAP, she asked about her options and whether demotion was a possibility. Mr. Wong and Ms. Young (the service manager) told her that resigning was her only real option. If she chose to stay, she had to participate in the PAP. She did, and the second PAP was put in place, with Ms. Toor as the BEA. Mr. Wong created the PAP in consultation with the BEA and Ms. Young.

[47] During the review of the second PAP, the grievor asked to shadow an experienced PSO. Mr. Wong testified that he arranged for it but that in the end, it did not take place because Ms. Young felt that the grievor would learn more from sitting with Ms. Toor, which did occur. The grievor also was given the opportunity to see how Ms. Toor reviewed the grievor's claims. Normally, job shadowing of this sort lasted a half-day, but Mr. Wong approved a full day for the grievor.

[48] In the end, the final monitoring report for the second PAP was not glowing with respect to the grievor, according to Mr. Wong. He testified that during the review, he explained to her how he would work on a claim. To him, she seemed receptive. He asked her if she could think of a workable solution that they could propose. Her only suggestion was that she be left to carry out only L1P1 work, which was not an option. The workplace had space only for fully functioning PSOs. To keep her on only L1P1 work would have made it very difficult to assign her work. When the L1P1 work inventory ran low, she could not be assigned other work, because of her profile. It

would have meant taking work from trainees, which would have stopped the training process. It would also have caused the employer to lose its ability to assign work at that level for retraining or refresher purposes.

[49] In the end, after the four PAPs, despite all the employer's efforts, the grievor did not meet the national standard. Mr. Wong had no role in making the decision to terminate her employment other than to update his manager on her progress. He was aware that she did not have a good understanding of L1P1 work, which caused her issues with successfully completing her PAPs. He testified that he would have discussed this with Ms. Young as he discussed each of her monitoring reports with her.

[50] Mr. Wong did not recall what if anything the employer did to help improve the grievor's understanding of L1P1 work. She indicated to him and to Ms. Young repeatedly that she had the knowledge required to complete L1P1 work. If she needed retraining in that area, it was up to her to ask for it. Up to the point of her CSO assignment, the grievor had carried out only L1P1 work. She never indicated to Mr. Wong that she had any problems understanding it.

[51] When he was asked how much input the grievor had in drafting the PAPs, Mr. Wong testified that she had none. The team lead drafts PAPs. The grievor could voice concerns when one was handed to her, but that would have been the extent of her input. Ms. Young presented the PAPs to her. Each was a continuation of the last; each picked up after the last, and so the productivity and accuracy quotas rose with each week of each PAP. Mr. Wong described his role in the process as helping the grievor succeed. He did not recall Ms. Toor ever telling him that no amount of training would solve the grievor's problems.

[52] The grievor repeatedly asked Mr. Wong what would happen if she did not meet the national standards. From the beginning of the PAP process, he advised her that she might be terminated. He recalled her asking him a number of times, in his word "often", why he did not just fire her, because that was what they, the employer, wanted. However, he did not recall exactly how many times she asked him or whether he answered her.

[53] Ms. Young was the service manager at the employer's Vancouver Harbour Centre location. She was responsible for Mr. Wong, the BEAs, and the grievor, among others. When the grievor returned from her CSO assignment, Ms. Young received feedback

from Service Canada that made her question why the grievor was returning to her PSO position. Ms. Young was not sure why the assignment had ended, only that it had ended abruptly. The grievor was now in the position of returning to a job for which Ms. Young did not think she was a good fit. And as a result of the DRAP and automation, the job no longer existed as it had when the grievor had left. On the other hand, Ms. Young considered the grievor better suited to the CSO job.

[54] At the time, Ms. Young's opinion was that rather than return to her PSO job, the grievor should actively search for employment elsewhere. When she received feedback from Mr. Wong that the grievor had made an error that resulted in a client being without benefits for 56 days when the service standard was 28 days, she asked him to review how the grievor was doing her work. As a result, she was assigned only L1P1 work with production quotas below the national standard. The result was that rather than increasing, her productivity dropped.

[55] Despite this, the grievor was sent on L1P2 training and was put through the mentoring process in which the team lead identified the gap in her understanding of L1P1 work. Ms. Young developed a plan as to how this needed to be addressed and met with the grievor and Mr. Wong to deliver the first of the many formal PAPs. The team lead, the BEA, and Ms. Young developed the PAP jointly. It contained specific targets developed by the BEA, based on national standards.

[56] Ms. Young advised the grievor that as the monitoring period proceeded and she did not meet the goals set for her, a PAP was required. She was to have direct access to the BEA during the PAP but was not to consult her co-workers or seek advice from them. Mr. Wong was to meet with the grievor weekly, which he often did, following which he briefed Ms. Young.

[57] The PAPs were not considered retraining periods, as the grievor had already completed the classroom portion of the L1P2 training three times. The PAPs were a controlled environment in which she was to prove that she could do her job. She was given claims to complete, which were to show that she had learned how to do her job and that she could do it within the national standards. The feedback meetings with the BEA and Mr. Wong were to advise her of her progress.

[58] When she did not meet the first PAP's requirements and was faced with another PAP, the grievor sought a voluntary demotion or alternatively to be allowed to return

to her previous profile of carrying out only L1P1 work. At the meeting with Ms. Young, she even went so far as to say to those attending, “Just fire me now.” Instead, Ms. Young insisted on a second PAP and stressed the consequences of not meeting its requirements.

[59] The grievor was offered access to the Employee Assistance Program and was asked if she needed any type of workplace accommodation. She did not identify any accommodation need or any reason she could not meet the national standard. In the PAP that followed the second warning meeting, she was required to work toward meeting the national quality standard of 80% over the life of that PAP.

[60] Due to the grievor’s absences, the second PAP started only in March of 2014. When she asked to be moved to a quieter desk with fewer distractions, Mr. Wong accommodated her. Despite this, at the end of the second review period, she again failed to meet the PAP’s standards. A third warning and yet another PAP were required.

[61] During that PAP, the grievor did show some improvement, but it was not sustained. She complained that others were treated differently and that the expectations of her were more than the expectations of the others, although the expectations for both were based on the national standard. She formally requested a deployment. It was refused because, according to Ms. Young, no manager would consider taking on the grievor while she was on a PAP.

[62] Ms. Young was not surprised that the grievor failed the third PAP. A fourth and final one was prepared and delivered to her with the warning that if she failed this time, her employment would be terminated (Exhibit 2, tab 49). This PAP was for a three-week period rather than the usual four-week period. Ms. Toor’s report (Exhibit 2, tab 54) at the end of this PAP expressed concerns with claims comprehension, processing accuracy, communication skills, and misinformation that the grievor provided to clients. Once Ms. Young read it and it became apparent to her that the grievor had no chance of success, she recommended the grievor’s termination to her manager, Ms. McMurray.

[63] According to Ms. Young, it did not matter that the grievor thought that she was doing a good job; she was not. Ms. Young determined that the grievor met neither the quality nor the quantity targets for the work assigned to her. Based on Ms. Young’s

comparison of the grievor's skills to the competencies for the position, the grievor did not meet the job qualifications.

[64] Ms. Young did not know how the grievor had managed to pass the probationary period without completing the L1P2 part of the training and monitoring. She commented that other people in similar situations would have been terminated. The grievor was the only person she had ever heard of who had made it through that way.

[65] Ms. McMurray was the director of employment insurance in Vancouver when Ms. Young contacted her about the grievor. She had been briefed about the progress of the PAPs. By the time the fourth PAP was being considered, Ms. McMurray briefed the Director General so that Mr. Gardiner could be made aware of the likelihood that this situation would soon be on his desk. In late summer 2014, Ms. McMurray supported Ms. Young's recommendation that the grievor's employment be terminated and passed it up the chain of command for approval.

[66] Ms. McMurray testified that termination is the only alternative for someone who cannot carry out the whole gamut of PSO duties. Before considering termination, she asked Ms. Young to explore other options. The Citizen Services Centre said that the grievor was not suited for the work. The Temporary Foreign Workers section had no openings. Options at the call centre in Edmonton, Alberta, were considered and discarded. The DRAP's effects meant that no vacancies were available; a significant downsizing had occurred across the federal government, including where the grievor worked. Automation had taken over tasks, including many of those performed at L1P1. The staff had to move on to L1P2 work, which the grievor could not do.

[67] It was bad for workplace morale to allow the grievor to carry out only L1P1 work while others being paid at the same rate were expected to carry out the full range of duties. Furthermore, according to Ms. McMurray, it was not good stewardship of public funds. Ms. McMurray denied any knowledge of the fact that the grievor had been allowed to do just that for 14 months, from the time of her return in 2012 until she was sent to L1P2 training in 2013. She also was unaware that at no point since her return was the grievor provided with a refresher of the L1P1 training.

[68] The grievor's testimony was very emotional. According to her, despite every effort she made to meet the employer's expectations, she was unable to, and as a result, her employment was terminated. Also according to her, she tried everything to

succeed and to please her employer. She asked for more training, mentoring, and job shadowing with a colleague, but the employer refused everything she asked for. She was denied both a demotion and a deployment.

[69] She failed at PAP after PAP, and nothing changed. Nothing was being done differently to help her succeed. The only changes were to her quotas, which increased for quality and quantity of work, week over week. When she asked at each PAP meeting that something be done differently, she was told that she knew what she had to do, so she just had to do it. When she asked for a BEA other than Ms. Toor, her requests were ignored. The only thing done consistently was increasing her quotas weekly with each PAP. All her suggestions fell on deaf ears.

[70] When the grievor asked to job shadow a colleague, she was told to sit with Ms. Toor for two shifts (initially, it was meant to be for only one shift). The grievor testified that she could not communicate with Ms. Toor, but the employer was not willing to take note of it. Ms. Young told the grievor that it would be of no help to her to sit with a colleague and bring her performance issues to others' attention.

[71] Ms. Toor would not allow the grievor to ask open-ended questions, which is a format that the grievor understood. According to the grievor, since she did not understand the work, she could not ask the questions in the format required, which meant that Ms. Toor refused to communicate with her, despite her requests for assistance. She testified that she needed help determining what questions to ask the clients but that Ms. Toor was not interested or willing to hear that or to help her. Ms. Toor responded to questions that she submitted in the proper format within 24 hours, usually the next morning, which meant that the claims she was working on could be completed only on the next day, which impacted her productivity.

[72] The only feedback that the grievor received throughout any of the PAPs was the normal feedback expected in a normal monitoring period, according to her evidence. The weekly monitoring report was in a format different from what she would have considered as feedback intended to correct and improve her performance under a PAP. The monitoring report was merely a list of what needed to be corrected on the files she had reviewed. PAP feedback would have been in the nature of assistance to help her finish a claim, something more in-depth than what all the PSOs received with respect to files that the BEAs monitored.

[73] The training that the employer provided was not aimed at helping the grievor overcome her deficiencies. It served only to reinforce them, as did Ms. Toor's mentoring. The grievor admitted that she might not have been a good fit for her position, but in the circumstances, she did not receive a proper chance to learn. According to her, the employer never intended for her to succeed. Ms. Young, Mr. Wong, and Ms. Toor merely went through the steps required to terminate her employment. Ms. Young wanted the grievor gone; she never wanted the grievor to return from her CSO assignment, which was how she would get rid of the grievor.

[74] At the PAP review meetings, the grievor was provided with a litany of everything she had done wrong during the life of that particular PAP. At no time was any improvement noted when it occurred. No help was offered. She received no suggestions on how she might be able to improve. At each meeting, Ms. Young told the grievor that if she failed, she would be demoted or terminated, but when the grievor asked to be demoted, Ms. Young denied the request. This clearly meant that the only option was termination.

[75] Ms. Young was not interested in helping the grievor and did nothing to help her, according to the grievor. All the grievor's pleas for assistance were ignored, which is proven in the minutes of the meetings during which the PAP results were reviewed (Exhibit 1, tabs 30 and 35). In fact, at one meeting, Ms. Young admitted to the grievor that she was just following the steps necessary to terminate her employment (Exhibit 1, tab 35, page 3).

[76] The result is that the PAP process, which was intended to set the grievor up for success, did quite the opposite. It made her feel small, stupid, and bullied by Ms. Toor, Mr. Wong, and Ms. Young. No one asked her about it when her employment was terminated.

[77] The grievor contacted Susan Lang, a shop steward with the Public Service Alliance of Canada, about issues she had with the levels of production that the employer had set for her as part of the PAPs. Ms. Lang attended three meetings with the grievor at which the results of the PAPs were discussed. The first was on May 7, 2014. The grievor explained to Ms. Young at that meeting that she was very stressed because comprehension and the retention of the information required to complete the

work was an issue, and she needed more help. Ms. Young agreed to have Ms. Toor review the material with the grievor.

[78] This was the meeting at which the grievor requested an opportunity to job shadow a colleague. Ms. Young refused, as the grievor might have learned something incorrect while watching an experienced PSO. The only option offered to her was to sit with Ms. Toor, who was to run through processing a claim with her. In Ms. Young's opinion, this was enough. The grievor responded that sitting with the operations manual while job shadowing an experienced PSO would have been much preferable and easier for her. Still, her request was denied.

[79] According to Ms. Lang, every time the grievor made a suggestion or request during the meeting, Ms. Young's immediate response was to deny it. At no point was the grievor asked her opinion of the process or of how it was working for her. The employer did not seek her input into the PAP process while Ms. Lang was present.

[80] The grievor's performance results were taken as an average of the four weeks of the PAP. If she had a particularly bad week, it did not matter to the employer that the other three weeks' production met the standard, as the overall average of the four weeks did not meet it. The grievor passed or failed her PAPs based on that assessment method rather than via an honest review of the weekly results, according to Ms. Lang.

[81] Ms. Lang attended the termination meeting with the grievor at which she was terminated after six years of doing what she was told to keep her job. She was a good employee who tried everything possible to make her employer happy, but the employer threw her out. It knew that the root of her performance issues was her poor comprehension of L1P1 work, which is the basis for all claims processing. She could not succeed if she did not understand how benefits were calculated at the base level before making decisions about other specialized benefits. She needed retraining from the beginning, which she and Ms. Davies had told the employer. It did nothing to help her.

[82] David Saba attended the grievance presentation meetings with the grievor as her National Union Representative for the CEIU (Canada Employment and Immigration Union). He made presentations on her behalf and argued that the employer's assessment had been unfair and that it was done in bad faith. The PAPs were of an extremely short total duration (14 weeks). That was counter to the employer's

“Directive on Performance Management”, which states that PAPs may take up to 18 months. The employer’s labour relations advisors, who had to be consulted before its representatives could proceed with the termination, recommended against the termination, as it was premature (Exhibit 1, tab 39). The swiftness with which the warning letters were provided to the grievor was punitive and disheartening. How could she possibly recover and show improvement when two weeks later, she was given another warning letter? It was clear that from the beginning, the employer intended to terminate her, as is evident from an email sent by Ms. Young on October 22, 2013, stating that weakness was found in her L1P1 work, “which is a concern” and questioning “for how long would we consider monitoring if she is not making benchmarks for quality and quantity at this point (Exhibit 1, tab 11) and also the email sent by Ms. Young on December 11, 2013 in which she wrote to Ms. McMurray: “... a 2 week action plan ...won’t be looked upon as enough time provided to the employee to show improvement. Our case will be stronger with a 4 week action, though if you wanted to move more quickly, Barb indicated we could do a 3 week action plan and deliver a letter after that ... (exhibit 1 tab 16).

III. Summary of the arguments

A. For the employer

[83] Over a five-year period, the grievor was provided with standardized training, standardized objectives, mentoring, and coaching. She received clearly communicated warnings. In the end, she could not meet the requirements of her position. The employer concluded reasonably that it should terminate her employment. There is no evidence of bad faith.

[84] The test the Board is to apply is whether it was reasonable for the employer to deem the grievor’s performance unsatisfactory (see *Raymond v. Treasury Board*, 2010 PSLRB 23). Under s. 230 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”), an adjudicator is to focus on the performance assessment. The PAPs were the culmination of five years of assessing the grievor’s performance.

[85] According to paragraph 123 of *Raymond*, an employer is in a better position to assess an employee’s performance than is an adjudicator. It is not for the adjudicator to substitute his or her opinion for that of the employer with respect to the performance assessment. Mr. Gardiner was aware that the grievor had taken L1P2

training three times and that the outcome of the PAPs was the same each time. He concluded that termination was appropriate, despite advice to the contrary from the employer's Labour Relations section. He determined that that was the appropriate penalty. According to paragraph 124 of *Raymond*, the adjudicator does not have the authority to review the appropriateness of that penalty.

[86] The test to be applied by the adjudicator is found as follows at paragraph 130 of *Raymond*:

... In cases of termination for cause due to incompetence, the employer must show:

- that it has acted in good faith;*
- that it has set appropriate standards of performance which were clearly communicated to the employee;*
- that it gave the employee the necessary tools, training and mentoring to achieve the set standards in a reasonable period of time;*
- that it warned the employee in writing that failure to meet the set standards by a reasonably set date would lead to termination of his employment, and finally,*
- that the employee has failed to meet these standards.*

[87] The rationale in *Raymond* is reiterated in *Plamondon v. Deputy Head (Department of Foreign Affairs and International Trade)*, 2011 PSLRB 90. In *Forner v. Canada (Attorney General)*, 2016 FCA 136, the Federal Court of Appeal ruled that an adjudicator was not to conduct an independent analysis of an assessment. Performance is the issue, not the reasonableness of a termination (see *Mazerolle v. Deputy Head (Department of Citizenship and Immigration)*, 2012 PSLRB 6).

[88] The grievor acknowledged that she was unsuccessful. She contested only her termination. As an adjudicator, to determine that bad faith was present in an assessment, the following three questions must be answered: Were the standards communicated? Was training provided? Was she fairly assessed? (See *Mazerolle*, at paras. 141 to 144; *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; and *Williams v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 39.)

[89] Bad faith must be established on the facts of the case (see *Hamilton Public Library v. CUPE, Local 392* (2013), 238 L.A.C. (4th) 116). The onus is on the grievor to

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show that the employer was motivated by hostility, malice, ill will, or dishonesty or that it had an improper motivation. The essence of bad faith is dishonesty of purpose.

[90] All the employer's witnesses stated a consistent message. Three were involved in the front-line supervision and mentoring of the grievor. She was given chances before the PAPs were introduced. When she returned from her CSO assignment, the situation was no longer sustainable. The evidence shows that the employer's representatives interacted during the monitoring period. While it is true that the grievor could not communicate with Ms. Toor, it is also true that she had communication problems in general.

[91] The grievor worked from memory, and claims processing cannot be done that way. If she did not have a fundamental understanding of the basic concepts, she could not do her job. L1P1 work was addressed each time an L1P2 problem was addressed. Ms. Toor's personality is irrelevant. She may be process-driven, but what she highlighted to the employer was the grievor's lack of a systematic approach to her work.

[92] The entire five years during which the grievor did not function at-level should be the focus of this grievance and not the four PAPs. No matter the consequence, the reality was that she could not do her job. In the last three weeks of a PAP, even had she met her targets, she would have been a low-performing employee unsuited to her position. The fundamental problem was that she could not demonstrate the quality required or perform the full range of her duties.

[93] The nature of the work environment changed in 2012 with the DRAP. It was no longer sustainable for the employer to maintain her in the workplace performing only part of her job. L1P1 work had been eliminated with automation. Demotion is not part of the legal test. Treasury Board guidelines are a best practice, not the law as expressed by the Board.

[94] Three levels of management assessed the grievor's performance — Ms. Young, Ms. McMurray, and Mr. Gardiner. They looked at more than the PAP results. Their overall assessment considered the grievor's suitability for the PSO position. Mr. Gardiner determined that further training was unlikely to result in a different conclusion. Despite all her efforts, after five years, the grievor was not performing the full range of PSO duties.

[95] The work environment had easily measurable work with clear performance targets. The processes were automated, so the employees solved problems that the automated processes could not solve. All the BEAs involved in monitoring the grievor identified her lack of a methodological approach, which resulted in corrections and corrections to corrections, as the source of the problem. Clearly established performance targets have to be met in a fulsome way, not just in the aggregate.

[96] Mr. Gardiner queried whether further training would make a difference. When he was unable to conclude that another attempt at training would lead to a different result, he decided that termination was appropriate. He asked the right questions and concluded that a different outcome was not possible. It is not a question of whether termination was the right choice or if demotion was possible but of whether the assessment was reasonable.

B. For the grievor

[97] This case is not similar to *Kalonji*. In this case, the grievor was allowed to do part of her job for 5 years without being criticized by her employer. Then out of the blue, she was put on a series of PAPs totalling 14 weeks and then was terminated. According to *Williams*, 18 months is a reasonable period in which to meet the required standards. How then could 14 weeks be reasonable?

[98] At paragraph 128, *Raymond* defines “reasonableness” using the definition in *Dunsmuir v. New Brunswick*, 2008 SCC 9. According to *Dunsmuir*, the conclusion must fall within the realm of those possible. However, in *Grant v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 59 at para. 109, the adjudicator found that bad faith, if proven to have tainted a performance assessment, can lead to a finding of unreasonableness under s. 230 of the *Act*.

[99] The Board and its predecessors have found that the employer acted in bad faith when it did not find a grievor alternate employment even though its manual requires it to explore such options (see *Nnagbo v. Treasury Board (Public Works and Government Services Canada)*, 2001 PSSRB 1 at para. 58). That was so in this case, as was the fact that the employer did not consider the grievor’s demotion requests.

[100] The close supervision she was subjected to was intended to document her failings rather than help her overcome them. The warning she was repeatedly given

was that the Sword of Damocles was hanging over her head. The PAPs set her up to fail; how could she possibly have achieved more if she could not accomplish the basic workload?

[101] The employer may be entitled to terminate an employee, but it must be done reasonably and fairly. However, in this case, the grievor was never given the opportunity to succeed. At the outset, Ms. Davies identified that the grievor lacked L1P1 understanding, which the employer did nothing to correct. She was released from her L1P1 monitoring and was allowed to complete her probationary period without successfully completing L1P2 monitoring. How did that happen if she was unable to do the work? She was allowed to do nothing other than L1P1 work for five years, and no problems arose. How did that happen? Then, when she returned to the worksite after an assignment as a CSO, post-DRAP, it was a crisis, and she had to go.

[102] The grievor asked to be demoted because she saw the writing on the wall. She felt unsupported. She came back from the deployment and was allowed to carry out L1P1 work for another year before everything came up. The managers knew when she returned that it was not in her best interests, yet they said nothing and allowed her to resume her original work profile.

[103] PAPs are mandatory when employees do not meet the objectives of their positions. The grievor had not been meeting her objectives since 2008, but the employer did nothing until 2013. Proper performance management and the success of a PAP require ongoing feedback on how to be successful. The grievor met her obligations under the PAP. She participated and proposed solutions, but the employer did nothing to help her overcome her deficiencies. It did not consider any reasonable alternatives, even when she proposed them. It did not support her in any reasonable way that was geared toward success.

[104] The employer was content to allow her to carry out L1P1 work for five years. It allowed her to complete her probationary period while doing nothing else. It transferred her between offices and still allowed her to do nothing else. It brought her back from an assignment and returned her to L1P1 work. Then a year later, it demanded that she start carrying out L1P2 work, because of automation. She again passed the classroom portion of the training but failed the monitoring portion; this time, she was put on a PAP.

[105] Ms. Davies' suggestions from her review of the first PAP were ignored. The other three PAPS were duplicates except for the targets to be met. At no time was the grievor asked for her input into the PAPs. The employer clearly demonstrated bad faith when it assigned her L1P2 work when it knew that she did not have a sound understanding of L1P1 work, which was required for the L1P2 work.

[106] Mr. Gardiner admitted that he knew it. Ms. Davies raised the issue. Ms. Toor knew that the grievor's errors were caused by her lack of comprehension of L1P1 work, which she included in her final review. The grievor made errors on her corrections because she did not understand why she was making the corrections. Despite this, the employer denied her training, job shadowing, and appropriate treatment. The employer's actions reinforced her sense that she was stupid.

[107] Mr. Gardiner testified that this was the only time he has terminated someone for poor performance. He said that he reviewed the letters and concluded that the grievor would never be successful. He relied on the rationale that others had done their jobs properly, which was not the case. Those involved knew that the grievor had problems, but they would not help her overcome them.

[108] The grievor's workload during the PAPs was not appropriate; she would never have been able to achieve it, yet she was measured against it. The workload increased from PAP to PAP, yet the knowledge gap remained the same. The administration of the PAPs was flawed. She was told about errors but received no help correcting them or understanding why they were errors.

[109] The employer communicated performance standards that were impossible for the grievor to meet. It set her up to fail to accomplish its goal of removing her from the workplace, which is the epitome of bad faith. This grievance should be upheld, and the grievor should be reinstated.

IV. Reasons

[110] Contrary to counsel for the employer's arguments, in my opinion, the PAPs were not the result of five years of assessing the grievor's performance. Rather, they were the result of her return from the CSO assignment. Faced with an employee who had not been performance-managed properly throughout her career, an underachiever who

had been allowed to languish, and in the throes of the DRAP and its fallout, the employer was not sure how to handle her.

[111] It was clear from the evidence that Ms. Young hoped that the problem would have been resolved by the grievor taking the CSO assignment.

[112] Ms. Young was not sure why the CSO assignment had ended, only that it had ended abruptly. The grievor was then in the position of returning to a job for which Ms. Young did not think she was a good fit. On the other hand, Ms. Young considered the grievor better suited to the CSO job. At the time, Ms. Young's opinion was that rather than returning to her PSO job, the grievor should actively search for employment elsewhere. Instead, Ms. Young had to deal with an employee in her organization who did not fit.

[113] The grievor repeatedly asked Mr. Wong what would happen if she did not meet the national standards. He advised her that she might be terminated. He recalled her asking him a number of times, in his word "often", why he did not just fire her, because that was what the employer wanted, but he did not recall exactly how many times she asked. My assessment of the facts, as I heard them over nearly two weeks of evidence, is that the grievor was correct; that was exactly the employer's purpose.

[114] Ms. Toor testified that the grievor did not request to speak to her team lead and did not document any such request. If she had issues with the monitoring she received, Ms. Toor was unaware of it. Ms. Toor's version of her mentoring is not credible. Obviously, she was completely oblivious to the stress that the grievor was under during the PAPs she supervised, and she took no reasonable steps to help the grievor succeed. Her actions amounted to those of an invigilator at an exam, nothing more. This did not meet the threshold of offering proper assistance to the grievor in an honest attempt to help her succeed.

[115] The rules with respect to the questions that the grievor was allowed to send to Ms. Toor were unreasonably strict and did not take into account her inability to communicate with Ms. Toor. They could not be phrased in an open-ended way but in such a way that they could be answered with either "Yes" or "No". Otherwise, according to Ms. Toor, she would have been unable to assess if the grievor had done the work or if she was looking to Ms. Toor for the answer.

[116] I find that reasoning unfathomable, given that by all descriptions, the grievor was incapable of performing even the most basic of tasks. I believe that it is more likely that Ms. Toor would have just assumed that the grievor had not understood the task or had done the work before asking a question and that she did not seek confirmation that she was on the correct path. In my opinion, this precluded the grievor from seeking guidance, which was contrary to the purpose of the mentoring, job shadowing, and the PAP process.

[117] It was commonly acknowledged that the root of the grievor's problem comprehending L1P2 work was her weak understanding of L1P1 work. Ms. Toor also identified as much in her invigilation of the PAPs. However, while the grievor was retrained in L1P2 work in 2013, at no time did she receive a refresher in it, despite the widely accepted fact that it was the root of her failure to comprehend that work.

[118] When he was asked how much input the grievor had in drafting the PAPs, Mr. Wong testified that she had none. The team lead drafts PAPs. The grievor could voice concerns when one was handed to her, but that would have been the extent of her input. Ms. Young presented the PAPs to her. Each was a continuation of the last; each picked up after the last, and so the productivity and accuracy targets rose with each PAP. Mr. Wong described his role in the process as helping the grievor succeed. He did not recall Ms. Toor ever telling him that no amount of training would solve the grievor's problems.

[119] No serious or other consideration was given to the grievor's demotion request. While reassignment to L1P1 work was not a reasonable request or within the contemplation of the employer's policy, demotion was and should have been given proper consideration, particularly in light of her request. It was not, simply because it did not fit with the employer's overall plan, which was to discharge her.

[120] I accept the grievor's evidence that at the PAP review meetings, she was told only what she had done wrong during the life of that particular PAP. I also accept that no honest offer of help was ever made to her and that no useful suggestions were given to her on how she might improve her performance. I believe that at each meeting, Ms. Young told the grievor that if she failed, she would be demoted or terminated, because this is consistent with the exhibits, and that when the grievor

asked to be demoted, Ms. Young denied it. This clearly meant that the only option being considered was termination, which was clearly an act of bad faith.

[121] I also accept Mr. Saba's comments that the PAPs were of extremely short duration (a total of 14 weeks). That was counter to the Treasury Board's Directive on Performance Management, which states that PAPs may take up to 18 months. The employer's labour relations advisors, who had to be consulted before its representatives could proceed with the termination, recommended against the termination, as it was premature (Exhibit 1, tab 39). The swiftness with which the warning letters were provided to the grievor was clearly punitive and disheartening, based on her testimony that she felt "small, stupid, and bullied". How could she possibly recover and show improvement when two weeks later, she was given another warning letter? It was clear that from the beginning, the employer intended to terminate her (Exhibit 1, tab 11).

[122] Also clear from the notes of the meetings is that in response to the grievor's comments that being on a PAP was very stressful, as was attending the review meetings, Ms. Young told her that it might be stressful but that it was the protocol that had to be followed to dismiss someone (Exhibit 1, tab 35, page 3). Ms. Young did not deny making that comment on the stand, which in the Board's opinion was indicative of her intention and of the bad faith with which, as the manager in charge of this process, she undertook the performance management process, which ultimately resulted in the grievor's termination.

[123] I note that the Directive on Performance Management states as follows:

5.1 Objective

The objective of this directive is to promote a commitment, shared by managers, employees and their organizations, to sustaining a culture of high performance in the public service.

5.2 Expected results

*5.2.1 A healthy workplace environment based on **public sector values**, where leadership, commitment and results are promoted;*

5.2.2 Employees are productive, provide excellent service to Canadians and demonstrate the required knowledge, skills, behaviours, competences and engagement to perform their duties;

5.2.3 Cases of unsatisfactory performance are addressed expeditiously within organizations

...

[Emphasis added]

[124] The actions of those involved in the grievor's termination for performance issues failed to meet the most basic of principles key to the employer's directive. The employer did not promote a commitment to high performance, did not address the issue of unsatisfactory performance expeditiously (in fact, the employer allowed it to continue for at least five years), did not promote a healthy workplace, and did not act in a manner consistent with the *Values and Ethics Code for the Public Sector*. The employer's argument that the Board should consider its directive a best practice is disingenuous when it has strenuously argued in the past before me that the employer's directives are to be followed to the letter within the workplace.

[125] To proceed with a PAP and in a manner specifically aimed at removing from an employer's employ in the shortest possible time frame someone who does not meet the employer's performance expectations, without proper training, listening, or feedback or providing that person the opportunity to succeed in a supportive environment, leaving them feeling belittled, worthless, and bullied is an abuse of authority prohibited by the *Values and Ethics Code for the Public Sector*. Any such process must have been carried out in bad faith and cannot withstand this Board's review.

[126] According to *Hamilton Public Library*, bad faith must be established on the facts of the case. The onus is on the grievor to show that the employer was motivated by hostility, malice, ill will, or dishonesty or that it had an improper motivation. In this case, while I cannot conclude that the employer's representatives were motivated by hostility, malice, ill will, or dishonesty, they were most certainly had an improper motivation. The grievor demonstrated to my satisfaction that the employer's sole purpose in pursuing the assessment process was that it was required to terminate her employment. At no time did the employer intend that it be part of a retention strategy.

[127] According to *Mazerolle*, I must answer the following three questions to determine whether the employer's actions were in bad faith: Were the standards communicated? In this case they were. Was training provided? I do not believe so. Many people in the assessment process identified the need for L1P1 training, and it was not provided. A house built without a proper foundation is doomed to crumble, which happened in this case. Furthermore, providing an invigilator is not the same as providing a mentor or someone to guide and assist with learning, when required.

Additionally, any and all requests for mentoring and job shadowing with someone that the grievor could communicate with were denied. Counsel for the employer conceded in argument that the grievor could not communicate with Ms. Toor, which it recognized, but it made no changes to assist her. As a result of the employer's failure to provide the grievor with adequate and proper training, which it had identified as key to her success, it made it impossible for her to succeed. Clearly, it was an act of bad faith.

[128] The third question is whether she was assessed fairly. No assessment carried out in bad faith is fair. The way she was assessed, the time frame in which it was done, the lack of ability to ask questions consistent with her ability to learn, the delay in responding to any questions she asked, the lack of training and proper mentoring, all the other deficiencies in the process, and the clear goal of termination assured that she was not properly assessed. That clear goal firmly rooted the process in bad faith.

[129] The evidence is contrary to counsel for the employer's argument that Mr. Gardiner assessed the grievor's performance and independently concluded that she should be terminated. In his evidence, he was very clear that he relied on the process that Ms. Young and her subordinates had conducted. That process was carried out in bad faith, was found to have violated the *Values and Ethics Code for the Public Sector*, and was flawed from the beginning. Consequently, any decision he made that relied on that process was also flawed and perpetuated the bad faith under which it was conducted. There was only one purpose to the many assessment periods through which the grievor was put: terminating her employment.

[130] As argued by counsel for the employer, the test to be applied by an adjudicator in cases such as this is found at paragraph 131 of *Raymond*. I have determined that the deputy head's delegate acted in bad faith by relying entirely on a process carried out in bad faith, contrary to the employer's policy and to the *Values and Ethics Code for the Public Sector*. Appropriate standards were not set; the ever-increasing incremental standards, which the employer knew were impossible to meet without an understanding of L1P1 fundamentals, were not reasonable. That the grievor was not given the necessary training and mentoring and that she was watched over by someone with whom she could not communicate, Ms. Toor, cannot be considered appropriate. The employer knew that in those circumstances, the grievor could not meet the

standards, no matter how much time she was given. Its sole purpose was to jump through the hoops necessary to proceed with her termination.

[131] As was the case in *Grant*, bad faith has been proven to have tainted the performance assessment and leads me to a finding of unreasonableness under s. 230 of the *Act*.

[132] For these reasons, the grievance is allowed. However, I must also consider the reasonable remedy. The grievor asked that I reinstate her to any other position at her level, which I do not have the authority to do. The employer asked that I leave the remedy to the parties. I order that the grievor be reinstated to a PM-01 position to which the parties mutually agree (see *Attorney General of Canada v O'Leary*, 2008 FC 212 at paras. 13-15).

[133] Alternatively, if no such position exists, I will leave it to the parties to determine an appropriate settlement in lieu of reinstatement for the period from the date of the grievor's termination to the date on which she began permanent full-time employment elsewhere, less any statutory or other deductions, including wages earned during the period of other employment. The settlement must include an appropriate rate of interest to cover the prejudgement and post-judgement periods.

[134] I will retain jurisdiction to determine the appropriate settlement in lieu of reinstatement in the event that the parties are unable to resolve the matter on their own.

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

(The Order appears on the next page)

V. Order

[136] The grievance is allowed.

[137] The grievor is to be reinstated to a PM-01 position upon which the parties mutually agree within 90 days of this decision, unless they agree otherwise on payment in lieu.

[138] The grievor shall be paid all wages and benefits retroactive to the date of her termination, less all statutory or other deductions required by legislation or a collective agreement and the deduction of any amounts claimed as income from employment on her income tax for the same period.

[139] The grievor shall be entitled to interest on the net amount owed her under paragraph 139 at the appropriate rate of interest in accordance with the laws of British Columbia, as provided for in s. 36(1) of the *Federal Courts Act*, (R.S.C., 1985, c. F-7), prejudgement interest to be calculated from the date of the termination to the date of this judgement and after that, from the date of this judgement until the date of payment at the post-judgement rate.

[140] I will retain jurisdiction to determine the amount owed the grievor as payment in lieu of reinstatement in the event that the parties are unable to come to a mutual agreement.

[141] I will retain jurisdiction over the implementation of any order under this decision for six months from the date of that order.

December 6, 2019.

**Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board**