Date: 20200212

File: 566-18-14479

Citation: 2020 FPSLREB 14

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

TERINA BELL

Grievor

and

STAFF OF THE NON-PUBLIC FUNDS, CANADIAN FORCES

Employer

Indexed as
Bell v. Staff of the Non-Public Funds, Canadian Forces

In the matter of an individual grievance referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Herself

For the Employer: Katia Calix, counsel

Heard at Ottawa, Ontario,
September 30 and October 1 to 4 and 28 to 31, 2019.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Terina Bell ("the grievor") was rejected on probation from her employment with the Staff of the Non-Public Funds, Canadian Forces (NPF or "the employer"), on April 18, 2017. Her grievance was dismissed at the final level of the internal grievance procedure, and she referred it to the Federal Public Sector Labour Relations and Employment Board ("the Board") on September 15, 2017.

[2] The hearing of her grievance before the Board began on March 11, 2019, and proceeded throughout the following week before Stephan Bertrand, a panel of the Board. Mr. Bertrand passed away in May 2019, and the matter was assigned to me. In March, counsel for the employer was Kevin Dulude. He was replaced at the hearing before me by Katia Calix, for reasons unrelated to this grievance.

[3] Mr. Bertrand had already heard two witnesses, Pierre Goulet and Carrie Stevens. The parties summarized the evidence from the initial hearing, but in the end, I decided to rehear Ms. Stevens' evidence, as the summaries were contradictory. I accepted the summaries submitted for Mr. Goulet, whose evidence was essentially contextual and not directly related to the events from which this grievance arose. This decision is based on the oral and documentary evidence and the arguments presented at the hearing days in September and October 2019.

II. Summary of the evidence

[4] At the hearing before me, the employer called the following witnesses: Carrie Stevens, Financial Services Manager; Kenneth Howard, SISIP Financial Branch Manager at the Petawawa army base in Petawawa, Ontario, and the grievor's supervisor; and Christianne Pleau, Regional Manager for SISIP Financial Services.

[5] The grievor testified on her behalf and called Krista Pelechaty-Earl, who was a human resources (HR) advisor with the employer in 2017.

[6] The grievor was hired through an external appointment process in August 2016 to work at the Petawawa army base as a financial planner with SISIP Financial Services (SISIP), one of the operations of the NPF, which is a separate agency that offers programs and services to members of the Canadian Armed Forces (CAF) and their families. SISIP delivers financial services, such as investment planning and advice. In

terms of purchasing mutual funds and trading in other financial instruments, it works with FundEX Investments Inc. ("FundEX"), a dealer registered with the Mutual Fund Dealers Association of Canada (MFDA).

[7] Ms. Pleau and Mr. Howard, who were on the selection board, both testified that the grievor was hired in large part because of her 17 years of experience in financial planning with several banks. Both stated that they wanted to hire someone who would need minimal training and who would know how to advise clients on investment and financial planning. The grievor had been registered as a mutual-fund agent with the MFDA. She would need to be registered with FundEX, which Ms. Pleau saw as a simple formality.

[8] The grievor was hired to work at the Petawawa SISIP office, which is small and had a staff of five (including her), consisting of the branch manager, Mr. Howard, who is also a financial planner; an administrative assistant; a financial counselor; and an insurance counsellor. The grievor's letter of offer provided for a nine-month probation period.

[9] The grievor's starting date was August 16, 2016. The employer had scheduled training sessions for her in Ottawa, Ontario, for the first three days. The first two days were mainly spent with Ms. Pleau. According to the schedule, and to Ms. Pleau, the grievor was provided with detailed information on SISIP, on the CAF pension and benefits, and on the CAF savings plan. Ms. Pleau also showed the grievor how to use Univeris, the software SISIP uses to record investment plans, including investments in mutual funds with FundEX. At the hearing, Ms. Pleau stated that the grievor listened attentively and took copious notes. The grievor testified that in fact she was left alone much of the time and that she was told to read the written materials that had been provided.

[10] On August 18, 2016, the grievor met with Ms. Stevens. Again, their respective recollection of the training provided differed markedly. Ms. Stevens stated that she explained Univeris and all the related compliance procedures; the grievor thought that they had more of a social conversation.

[11] Crucially, Ms. Stevens recalled telling the grievor that once she was registered with FundEX, she should contact Ms. Stevens so that all the transactions could be monitored for 90 days. The grievor did not recall being told that.

[12] On August 16, 2016, the grievor signed a lengthy document, which was an agreement between her, FundEx, and SISIP. It set out each party's rights and obligations, for FundEx as the mutual-fund dealer, the grievor as an agent "… for the sole purpose of trading in mutual funds and other lawfully permitted securities and financial products approved …" by FundEx, and SISIP as the agent company.

[13] In the agreement, the grievor, as the agent, agreed (item 5.2 vi) to "[u]ndertake to read the Principal's *Compliance Policies and Procedures Manual* ("CPPM") within … [30] days of execution of this Agreement." She also agreed to comply with all policies and procedures prescribed by the CPPM. This provision is repeated a little later, at item 10.2, in the following terms: "The Agent shall read the Principal's [CPPM] within … [30] days of execution of this Agreement, but, in any event, prior to the Agent's first transaction with the Principal."

[14] At the hearing, the grievor claimed that she had never received a copy of the CPPM from the employer, which its witnesses did not deny but instead stated that it was easily obtainable either from FundEX or online. None of those witnesses recalled her asking for a copy of the CPPM. It requires "repapering" clients transferred from one FundEx representative to another, as was the case for the grievor. She had replaced a financial planner in the Petawawa office and was expected to repaper approximately 400 clients. Repapering involved meeting with a client and filling out a "New Client Application Form" (NCAF) or a "Know Your Client" form (KYC), either of which would establish the client's investment profile and indicate that the grievor was now the client's financial planner.

[15] As confirmed by the schedule, the grievor went to the Petawawa office on August 19, 2016. Mr. Howard introduced her to the staff, showed her to her office, and discussed her set-up with her. On that day, Ms. Pelechaty-Earl provided the grievor with several HR documents, such as the dress code and the policy on alcohol consumption, and notably, the "NPF Harassment Prevention and Resolution Policy".

[16] Mr. Howard stated he had an open-door policy and that he was always willing to answer questions. He found that the grievor seemed very confident, and because she had been hired on the basis of her experience, he thought he would wait for her questions rather than try to impart knowledge. On September 2, 2016, according to the

document, the grievor and Mr. Howard reviewed and signed the financial planner job description.

[17] The job description provides that the financial planner must "Comply with securities regulations" and "Complete all required forms". Mr. Howard explained that those two points are very important, to protect clients. When he was asked how he would have ensured that they were observed, he answered that doing so was not his job. For the first 90 days after the grievor's registration with FundEX, the mutual-fund dealer, Ms. Stevens was responsible for ensuring compliance. After those 90 days, FundEX was to ensure compliance.

[18] Mutual funds and securities trading are highly regulated. The responsible organization is the MFDA, which establishes rules and guidelines for dealers, such as FundEX, and agents, such as the grievor. One of those rules is to ensure that documents are fully filled out before a client signs them. A client should never sign an incomplete form; it would be considered a form of signature falsification. Such a form (partially completed yet signed by a client) is termed a "pre-signed form" and is prohibited by the MFDA.

[19] On September 7, 2016, FundEX informed Ms. Stevens by email that effective September 6, 2016, the grievor was registered and would have to be closely monitored for 90 days. Ms. Stevens was to complete a "Close Monthly Supervision" report for 3 periods: September 6 to October 6, October 6 to November 6, and November 6 to December 6, 2016. The grievor was informed that she was registered, but the FundEX email was not forwarded to her.

[20] At the hearing, the grievor claimed that because she did not receive that email, she had not known that Ms. Stevens was supposed to monitor her. She knew about the 90 days of close supervision, as it is an industry standard, and it was not the first time she had been registered with a mutual-fund dealer. She assumed that FundEX would carry out the supervision. She did receive an email from Mr. Howard forwarding a chain of emails from FundEX. The first email showed that the SISIP branch manager for FundEx compliance purposes was Ms. Stevens.

[21] The expectation for the grievor was twofold: she needed to repaper the clients she had inherited from her predecessor, and she had to enter into Univeris all new transactions concluded with the clients. Repapering meant meeting with them to

introduce herself as their new financial planner and ensuring that all their information was up to date, including their investment choices and risk profiles.

[22] On September 21, 2016, the grievor emailed Ms. Pleau, inquiring when the transfer of her predecessor's clients would be done so that she could start meeting with them. Ms. Pleau answered that the process should be completed the following week.

[23] On October 6, 2016, Ms. Stevens sent FundEx a signed report for the first period. It contains standard statements, such as the following: "All orders, both buy and sell, and sales contracts have been reviewed by the supervising Branch Manager of FundEX Investments Inc." As she explained at the hearing, since to her knowledge the grievor had not yet started to deal with clients (since she had not contacted Ms. Stevens to that effect), the statement was truthful.

[24] Mr. Howard stated that at first, things seemed to go well. Then, according to him, the grievor developed a conflict with the financial counselor. Mr. Howard also spoke of the grievor's frequent absences, which he considered surprising and excessive. He found it difficult to communicate with her. For her part, she found him unhelpful. When she asked him questions, he would simply tell her to get the proper form, which the assistant would provide. She added that throughout her probation, he did not have much to teach her.

[25] On October 24, 2016, Brenda Thomson, Regional Branch Manager, FundEX, emailed the grievor to point out missing information on an NCAF that had been faxed to FundEX. After detailing the missing information, Ms. Thomson wrote as follows:

> …
>
> [The client] *should not be signing an incomplete NCAF, given the information that was omitted, this NCAF is considered a blank pre-signed form, which is strictly prohibited. How did the client come to sign this NCAF? …*
>
> *Please review the incomplete NCAF with the client and request that the client make selections for plan type(s), investment objective(s), risk tolerance(s), intended use of investment and time frame for investing.…*
>
> …

[26] The grievor answered the next day, as follows: "The NCAF was completed in my office with the client. I simply missed the KYC section by mistake. I've completed it and sent it to the server. Please let me know if there is anything else you need."

[27] It seems that this interaction was the first inkling the employer had that the grievor had been working with clients but without the close supervision that Ms. Stevens was supposed to provide. On October 30, 2016, Ms. Thomson wrote to Ms. Stevens as follows:

…

> *Another NCAF that was submitted to the fax server by Terina, that is technically a blank pre-signed form. This is the second NCAF completed in this manner (other client was …). It does not appear that she is getting any hands on training from Ken at the branch. She is going to need more training and guidance. Is she sending documentation to her [sic] for pre-approval?*

…

[28] At the hearing, Ms. Stevens confirmed that she had not been aware until then that the grievor had started dealing with clients, without her close supervision. Mr. Howard confirmed that he had not supervised the grievor either, as he had expected Ms. Stevens to do it. She was the person within SISIP who was considered the "Branch Manager" for the purpose of compliance with FundEX's rules.

[29] Ms. Stevens became involved when she discovered the situation. She wrote the following to Ms. Thomson on November 1, 2016:

…

> *Thanks for bringing this to my attention. I noticed that there's a KYC update for me to review of Terina's in my compliance review for today and Dina asked if she could release a trade of hers as well. None of which have been pre-approved. I sent her a quick e-mail [sic] asking for all the documentation to release the trade and also mentioned that I would be calling her to discuss further that everything needs to be pre-approved while she's on strict supervision.*

…

[30] The grievor testified that she was somewhat surprised to find out that Ms. Stevens was supposed to provide the close supervision and that it had not yet been done. She had simply assumed that FundEX was providing it.

[31] On November 7, 2016, FundEX emailed Ms. Stevens, requesting the second close-supervision report, from October 6 to November 6, 2016. Ms. Stevens sent the report. She simply checked off the standard statements, without making any comment, but at the bottom of the form, she added the following handwritten note: "Please see e-mail [*sic*] for additional comments and observations." The email read as follows:

> *Terina only started sending me items for pre-approval when she posted a trade November 1, 2016 that hadn't been pre-approved. The trade was flagged for me to release the trade and that's when I questioned if there was paperwork that wasn't coming my way. Also on November 1st, when I was reviewing compliance, there was a One-Time PAC for me to review in my module that I hadn't pre-approved.*
>
> *When I contacted Terina to discuss, she let me know she did not realize she was supposed to send me everything to pre-approve. I further explained that in addition to trades, she needed to send me all paperwork she does with a client to pre-approve. She indicated during that call she has been re-papering as many clients as possible to get the bulk transfer re-papered within 90 days. She estimated that there were likely about 40. I told her I needed to review all the NCAFs that she has done so far. She has only sent me the NCAFs she has done since November 1st. The NCAFs that I have reviewed and either approved or gone back to her to correct deficiencies that are dated by the client and Terina prior to November 1st are the one that appeared on my compliance module after November 1st.*
>
> *The Oldest NCAF that I have come across so far is dated October 5, 2016. That leads me to believe that she has been re-papering since October 5th, and most of what has appeared so far in my modules have been from October 25, 2016 onward.*
>
> [*Sic* throughout]

[32] From then on, Ms. Stevens certainly took a more active role in supervising the grievor's work. A number of emails were introduced in evidence showing that she pointed out mistakes, reminded the grievor of certain things, and generally carried out a monitoring role.

[33] At the hearing, Ms. Stevens testified that she repeatedly asked the grievor for the 40 NCAFs that she had not pre-approved. At the hearing, for her part, the grievor stated that it would have been a lot of additional work. In the end, according to Ms. Stevens, FundEX reviewed the NCAFs, and they did not seem to have any further problems. Ms. Stevens did say that this took some time; in the meantime, she kept asking the grievor for the NCAFs and did not receive a satisfactory response.

[34] Ms. Pleau was informed of the situation in early November. On November 8, 2016, Ms. Stevens sent her a detailed email titled, "Observations in reviewing Terina's work". In it, Ms. Stevens tells Ms. Pleau that she realized only on November 1 that the grievor had begun seeing clients and filling out NCAFs on October 5. Ms. Stevens then details a few problems she had to correct, including providing "Fund Facts" documents to clients, concerning their investments. Ms. Stevens wrote as follows about the issue, which seems to have continued throughout the grievor's employment:

…

> *I initially discussed the requirement of pre-delivery [sic] of Fund Facts during our training. She indicated that was normal, that's how it was all over. The first time I asked her to deliver Fund Facts, she said she didn't think she had to do it if the client already owned the fund. I explained the requirement to her again on November 1st or 2nd, and found myself continuously asking her to send it out before I approve everything the rest of the week and again today.*

…

[35] Ms. Stevens concluded as follows: "Long and the short, I am finding that I continuously have to go back and re-explain things to her. Most of the things I am re-explaining are industry regulations and not items that are specific to SISIP or Fundex."

[36] As the grievor pointed out at the hearing, Ms. Stevens wrote this email exactly one week after she had discovered that she had not been closely supervising the grievor.

[37] On November 9, 2016, Ms. Thomson and the grievor exchanged emails. The exchange shows that the grievor was still somewhat unclear as to how things should be done. She was having her paperwork approved by Ms. Stevens but was faxing NCAFs to FundEX that did not bear Ms. Stevens' signature. Ms. Thomson explained as follows: "Going forward do not send any documentation to the fax server until it has been reviewed and approved by [Ms. Stevens]."

[38] Mr. Howard was also made aware of the situation. According to his testimony, he decided to meet with the grievor more regularly. She said that that was per her own request. The first documented meeting was held on November 4, 2016. He sought advice on how he should communicate the results of this first meeting to the grievor.

[39] It seems that the events of early November had brought the employer to start considering a rejection on probation. Ms. Pelechaty-Earl, the HR advisor, gave the following advice to Ms. Pleau in an email dated November 14, 2016:

> …
>
> *Regarding your voice message and e-mail below and the next steps for Terina, I would recommend the following:*
>
> - *Ken provide a recap/summary of his discussion with Terina and send it to her via e-mail (or in a letter). It is also critical that in this e-mail, Ken also include his expectations of her performance. It is very important to provide this to the employee in writing.*
>
> …
>
> *Ultimately, at the end of the day, the employee needs to be provided with the opportunity to improve on the deficiencies that have been identified to her. When it comes to putting the case together to reject her while on probation, we need to ensure that we have formally provided her with feedback and discussion (which is why I strongly recommend putting it in writing) and also show that she has been provided with the chance to improve her performance/behavior and that she is well aware of what is expected of her.*
>
> …
>
> [*Sic* throughout]

[40] Mr. Howard emailed the grievor on November 18, 2016, about the November 4 meeting. It included a summary of the meeting and stated that progress had been noted since then.

[41] Mr. Howard testified that he had a number of concerns with the grievor's performance. His main concerns were what he considered excess absenteeism and a seeming lack of care for what he considered important. He was upset that she had missed a flight and taken another to a SISIP conference in Toronto, Ontario, although he admitted that she had not really missed anything at the conference and had not incurred additional costs.

[42] The "Performance, Conduct and Suitability Assessment Summary" ("the Summary") included with the email touched on those concerns and on others. The "[i]ssues … discussed" were the following: amount of absenteeism in a very short period, missing the flight to the FundEX conference, making personal calls during working hours, compatibility with colleagues, reluctance to pitch in at the front desk,

and finally, ability to meet work requirements and to adhere to established policies and procedures, specifically, placing "NCAF/Notes" in client files and following compliance procedures.

[43] An action plan was proposed in the Summary suggesting a Friday meeting with Mr. Howard to discuss progress and compliance and encouraging an open discussion. The grievor was asked to acknowledge her receipt and understanding of the Summary. She never did.

[44] The grievor testified she had been profoundly dismayed by the email and the Summary. She found all the criticism completely unfair, given that she had had no real supervision until November 1, she had felt ignored by Mr. Howard, and she had felt that she had been within her rights to take the leave granted any employee when necessary, whether for family obligations or as sick leave. At the hearing, Mr. Howard conceded that the grievor had taken leave that she had been entitled to. However, he still felt that better childcare arrangements could have been made.

[45] It seems that the relationship between the grievor and Mr. Howard soon became somewhat hostile, despite the fact that they both claimed that they had started with the best of intentions. She was hurt by the fact that he bought coffee for others, but not for her. He explained that he had been buying coffee for his assistant for years, out of concern because she had had difficult periods in her life. He also had a long-standing agreement with the insurance representative that he would buy her coffee, and she would buy shared lottery tickets. Mr. Howard testified that for the Friday morning meetings, he bought coffee for all the staff, including the grievor. She conceded that she could remember a few times when indeed he had bought coffee for all the staff.

[46] The grievor testified that she had felt excluded because of the coffee issue, so much so that she asked the administrative assistant whether there was a "… staff fund that everyone contributes to for say birthdays, the Christmas party, lunches or that sort of thing?" The assistant's one-word answer was, "Nope".

[47] However, all was not negative with Mr. Howard. In an email exchange dated November 17, 2016, with Ms. Stevens concerning a client's risk tolerance, the grievor wrote, "I had a good chat with Ken yesterday afternoon about the KYC, and I think I

finally get it!" Ms. Stevens responded, "It will come together", followed by a smiley face. She then approved the form that the grievor had repeatedly sent.

[48] Supervision by Ms. Stevens continued in November. Some email exchanges became somewhat tense, as in one dated November 18 to 22, 2016. Ms. Stevens asked for some corrections on a few forms. Twice, the grievor indicated, "done". The third time, Ms. Stevens betrayed some impatience, writing, "Let's try once more." She explained in detail the meaning of updating, as follows: "When a client signs a KYC Update, we need to update all relevant information. The date we include as the client update date is the date the clients signs." However, in her emails, Ms. Stevens did acknowledge that the grievor was not to blame for the lack of pre-approval before November 1, 2016. For example, in an email dated November 23, 2016, she wrote the following: "This is one of the ones you did before you knew you were supposed to get it pre-approved, so you didn't send it to me. [The FundEX compliance specialist] contacted me on it and asked me to get you to get the client to initial."

[49] When Ms. Stevens' supervision period ended, on December 12, 2016, Ms. Thomson, as the FundEX regional manager, simply took over the monitoring role. The grievor was a little surprised, as she had expected that Ms. Stevens' supervision would continue. When in early November, Ms. Stevens discovered that she had not been pre-approving the grievor's work, she emailed the grievor, stating that she had to pre-approve everything and that they would be working closely for the next three months. At the hearing, Ms. Stevens explained that it had been a mistake on her part; she knew that the close supervision was for three months, but she had not included the nearly two months of the period in which she did not provide supervision.

[50] In an email dated December 15, 2016, Ms. Thomson asked Ms. Stevens if the grievor's "paperwork and routines" had improved. Ms. Stevens answered, "For the most part yes". She still found two procedures wanting, which were updating Univeris at the same time as forms were faxed to the FundEX server and providing clients with the Fund Facts document.

[51] Mr. Howard's notes of his meetings with the grievor were introduced at the hearing. They record his concerns as of the meetings and can be summarized as follows:

- December 16, 2016: discussed the grievor's childcare arrangements and the fact that her sick leave use exceeded the average at the base.
- January 13, 2017: mentioned a concern about the rate of repapering; she had to pick up the pace. Notes on clients had to be entered in SamWeb (a SISIP database). "Despite being given clear direction to contact clients to repaper she continues to wait for clients to contact her."
- January 20, 2017: notes from client meetings were missing; discussed contacting for repapering again. She should not depend on the assistant to deal with all the bookings.
- January 27, 2017: The grievor was off work.
- February 3, 2017: Again, emphasized proper procedures for booking appointments. "Terina booked appointment on calendar no contact phone number or service number."
- February 10, 2017: "discussed slow progress in repapering clients. Also discussed importance of compliance issues. Terina got quite emotional. She does not comprehend the importance of compliance issues."
- February 17: "no meeting - both quite busy".
- March 3: a long meeting was held on a number of issues, including office procedures and her slow progress in repapering. "Brought up cell phone issue again. Terina got quite emotional". Also, "can't get her to understand the serious issue with the blank KYC". The staff had noted that she did not pitch in with handling the front-desk phones. Her notes were lacking on client files, and there had been a "number of complaints on [her] not getting back to clients in timely manner. She insists she does."
- March 8: Discussed as follows two cases, one a tax return, the other a redemption:

> *… clearly explained tax completion was not a priority could wait until her return, I will look after redemption request upon receipt.*
>
> *… Despite this clear direction Terina sent an e-mail [sic] to* [tax client] *and cc'd me that he could book an appointment with me to complete tax return.*

[52] At the hearing, the grievor questioned whether the notes were truly contemporaneous. Mr. Howard testified that they were. There is some question surrounding the December 16, 2016, notes, as the grievor introduced an email showing

that perhaps they had not met on that day. At the hearing, Mr. Howard testified that the date might be wrong, but he was certain that the meeting was held.

[53] Mr. Howard testified that the meetings became progressively more difficult. The grievor was defensive and became quite "emotional". He explained that she cried when she was criticized. He found it increasingly difficult to comment her work, as she would react quite negatively. One of his main concerns was that she did not seem to take the compliance criticisms seriously enough.

[54] On February 25, 2017, Ms. Thomson emailed the grievor, expressing concern that she had received another incomplete NCAF. Ms. Thomson wrote the following: "I am concerned with your current business practices, clients should never be presented with an incomplete/partially completed form for signature. I will be escalating this form to FundEX head office for further review/action." On February 27, 2017, the grievor responded that it was simply an oversight and that she would correct the situation by having the clients initial the missing information.

[55] On March 6, 9, 16, and 21, 2017, Ms. Thomson emailed about the absence of the Fund Facts sheet; it was a recurring problem. At the hearing, the grievor explained that she had indeed provided the sheet to the clients. She did not provide an explanation as to why she failed to have the information appear in Univeris.

[56] By then, Ms. Thomson was communicating regularly with Ms. Pleau to report the grievor's shortcomings. Ms. Pleau testified that it was the first time a financial planner had required so much attention. She decided to draw up a spreadsheet of the shortcomings Ms. Thomson had pointed out.

[57] The spreadsheet was introduced at the hearing. As became obvious in cross-examination, it contains some errors (such as including a mistake made by another financial planner) and repetitions; that is, the same form is reported on several times. That said, it summarizes the employer's concerns with the grievor's performance, and it shows errors of incomplete or defective form filling as well as delays in responding to FundEX queries.

[58] The grievor pointed out that for some non-responses, she had in fact been out of the office, on leave. However, being on leave does not explain all the delays. She also testified that by March 2017, she felt harassed and targeted, and she needed to take

time off because her health was suffering. She conceded that because of that, she did make mistakes, and her work had lagged. At the hearing, Mr. Howard was asked whether he had asked her about why she needed to take time off. He answered that he had not. Nor was he aware of two medical notes that she introduced at the hearing, one dated September 3, 2015, the other April 25, 2018, which speak of serious medical issues that might have required that she take time off work.

[59] The grievor felt that Mr. Howard wanted her to fail, as he saw her as a threat, since she had been hired to replace him when he retired, or so she believed. Ms. Pleau denied ever making any such promise.

[60] Mr. Howard completed a mid-year review for the grievor, but he never sent it to Ms. Pleau; nor did he discuss it with the grievor. In it, he stated that she was not keeping up with the repapering. It included a separate sheet that shows "New Money"; that is, investments made by clients and recorded that year. A good deal of the investments were attributed to the grievor's predecessor, despite the fact that she had left by August 2016. At the hearing, the grievor presented credible evidence that in fact, she had been responsible for the new investments.

[61] It was unclear who had prepared the report, and for what purpose. Ms. Pleau, who made the decision to reject the grievor on probation, said that she had never seen the report. Mr. Howard denied putting it together and added that it had played no role in his recommendation to reject the grievor on probation.

[62] Ms. Pleau explained that the sum of mistakes that the grievor had made, the numerous reports she received from Ms. Thomson, and the time the grievor was taking to repaper clients finally convinced her that the grievor was not suited to the job. The grievor never contacted her to speak of harassment or hardship from Mr. Howard. Ms. Pelechaty-Earl, who was the HR advisor, also stated that the grievor never communicated with her to complain about Mr. Howard, despite the fact that she had been provided with the anti-harassment policy. At the hearing, for her part, the grievor stated that she had just been hoping to get through her probation period. She did not want to complain before the probation ended because she was afraid that Mr. Howard's reaction would have been to terminate her employment. She blamed the employer, namely, Ms. Pleau, for not reaching out to investigate why she was taking so much time off.

[63] In December 2016, FundEX audited the Petawawa office. The audit showed that both Mr. Howard and the grievor had some corrections to make in their work. It pointed out that the grievor was not first reviewing clients' risk tolerance before making investment recommendations, that she had not provided signed copies of updated NCAF or KYC forms to clients, and that on a review of 12 files, 3 belonging to her had not been updated to the fax server in a timely fashion. All these points were covered in the FundEX CPPM. It was noted that Mr. Howard had a high percentage of stale-dated KYC forms and that twice, he had not confirmed providing Fund Facts to clients.

[64] At the hearing, the grievor testified that she had been doing well with clients, that she had received praise from Ms. Pleau, and that she had outperformed Mr. Howard in terms of new investments. There was documentary evidence to support her assertions that she had indeed generated new money and that she had provided service to clients that they had appreciated. At the hearing, Ms. Pleau conceded that the grievor could offer excellent service to clients. However, according to Ms. Pleau, the frequent and continuing compliance issues with FundEX could not be ignored.

[65] An illustration of FundEX's difficulties with the grievor is found in two series of emails sent a few days apart. On March 22, 2017, Ms. Thomson wrote the following, which was a continuation of an earlier email requesting corrections:

…

> *I forgot to add,* [client name] *dated her signature for March 6th and you dated your signature for March 20th. We need a note on the NCAF to indicate the different dates (for example 'KYC received by mail March 20th', etc). Can you record the reason for the different dates and resend a copy of the NCAF to the fax server? Please notify me when sent.*

…

[66] The grievor answered as follows, two days later: "I was on leave from the 8th to the 20th, [client name] emailed me the forms on the 9th. I faxed them to the server the same day I received them. I added a note to the NCAF as requested, it's been faxed to the server."

[67] On March 27, 2017, Ms. Thomson wrote the following email to the grievor:

…

> *I am reviewing* [client name]*'s NCAF and noted that the client has dated her signature for March 8/2017 and you dated your signature for March 20th. When you sign the KYC on a different date than the client signed we need a note to explain the different dates (i.e. NCAF received by mail March 20th, etc).*
>
> *Additionally, you dated your signature for March 20th however the NCAF was not sent to the fax server and Univeris was not updated Until March 24th. KYC information should be updated in Univeris and sent to the fax server the same day the KYC is received.*
>
> *Please provide an explanation for both dates, why your signature is dated the 20th and the client's is dated the 8th and please provide an explanation for why the KYC was not update [sic] and sent to the fax server on the 20th when you signed.*
>
> *Going forward please ensure that you write on KYCs and trade documentation to explain any difference in the date the client signed VS when you signed, when you are not signing the same day.*
>
> …

[68] Two days later, the grievor responded with only the following: "I was on leave from the 8th to the 20th, so I signed the NCAF when I received it. I was also out of the office March 22 and March 23rd."

[69] By March 2017, Mr. Howard was asking for reports on the grievor, which he admitted to in cross-examination at the hearing. The grievor introduced emails from the administrative assistant addressed to Mr. Howard reporting on the fact the grievor ate lunch at her desk and then took an hour after that to get away from her desk. In another email, the administrative assistant reported that the grievor booked only 20 minutes for repapering appointments and added this editorial comment: "Wouldn't it take more time to get to know your clients." Mr. Howard was not sure whether he had addressed that behaviour with the grievor. When he was asked whether he was concerned by the grievor's tears, since he had testified that she tended to become emotional when criticized, he simply said that everybody is different and reacts differently.

[70] In her testimony and cross-examination of the employer's witnesses, the grievor referred to an MFDA policy titled, "New Registrant Training and Supervision", which states the following: "MFDA Rule 1.2.4 requires all newly-registered salespersons to complete a training program within 90 days of being registered with the relevant provincial securities commission." According to her, the employer had failed by not providing that training to her after she was registered on September 6, 2016.

[71] Ms. Stevens, Mr. Howard, and Ms. Pleau testified that that requirement did not apply to the grievor as she had already been a registered mutual-fund agent with other private employers. MFDA Rule 1.2.4 provides as follows:

> *Upon commencement of trading or dealing in securities for the purposes of any applicable legislation on behalf of a Member* [such as Fundex]*, all Approved Persons* [such as the grievor] *who are salespersons shall complete a training program within 90 days of such commencement and a concurrent six month supervision period in accordance with such terms and conditions as may be prescribed form time to time by the Corporation,* ***unless he or she has completed a training program and supervision period in accordance with this Rule with another Member*** *or ….*
>
> [Emphasis added]

[72] In fact, Ms. Pleau stated that the grievor's experience as a mutual-fund dealer had been a major factor in hiring her for the financial planner position as she would have received the required training with the first mutual-fund dealer that had registered her as a salesperson.

III. Summary of the arguments

A. For the employer

[73] The employer states that the Board does not have jurisdiction to deal with a rejection on probation when it is established that the rejection was done for work-related reasons, as is so in this case. There was no sham or camouflage, and the measure was not disciplinary. Therefore, the grievance should be dismissed.

[74] The Board's jurisdiction to adjudicate grievances is defined at s. 209 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). Section 209 simply does not apply to the grievor's situation, as the rejection on probation was not disciplinary, and as a separate agency, the NPF is not covered by the provision on a termination for reasons other than a breach of discipline or misconduct. In her grievance, the grievor never raised any allegation that the termination was disciplinary; therefore, she could not raise it at the hearing.

[75] The employer further argues that the grievor cannot raise discrimination or harassment if the Board does not have jurisdiction to hear the grievance; those claims are not stand-alone.

[76] The employer acknowledges the case law that states that a rejection on probation may not be a sham or a camouflage or may not be done in bad faith (see *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529). The employer submits that the test is whether the employer has shown an employment-related reason for the discharge.

[77] Ms. Stevens testified to the fact that the grievor was trained at the start and that she was shown the different features of her job. The employer concedes that there was a glitch in her supervision, but it was corrected in late October and early November, first by Ms. Thomson providing guidance, then by Ms. Stevens assuming her monitoring role.

[78] Issues were identified to the grievor in the way she filled out forms and entered data in Univeris and with the FundEX server. Despite all the efforts made to show the grievor her shortcomings, she continued making the same errors. Mr. Howard also tried to provide her guidance, but she refused it.

[79] In a number of ways, the employer's witnesses and the grievor did not have the same view of the relevant events. Yet, she did not offer those witnesses the opportunity to explain their differing point of view in cross-examination.

[80] The employer presented a list of repeated unsatisfactory situations. Ms. Pleau testified that it was the first time a financial planner had encountered so many problems with FundEX's monitoring. The grievor's paperwork and data entry were deficient and did not improve even after a long period of systematic corrections. She argued that she felt harassed, yet the employer received no complaint or any indication that medical issues were the problem.

[81] The Board's case law is clear. Its jurisdiction over rejections on probation is very narrow. Once the employer shows an employment-related reason to justify the rejection, and the grievor cannot show that it was a sham or camouflage, the Board has no jurisdiction. The employer cites *Kagimbi v. Canada (Attorney General)*, 2014 FC 400, and *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134. I will return to these decisions in my analysis.

B. For the grievor

[82] The grievor submits that the rejection on probation was a sham and that it was done in bad faith. The employer's employment-related reasons were arbitrary and unsubstantiated. Mr. Howard, who was responsible for assessing her suitability, in fact had a strong bias against her. He created a toxic environment through bullying and harassment.

[83] The employer failed to provide the tools the grievor needed to succeed. The training was deficient, and the expectations were never clearly spelled out. She was never provided with a performance evaluation that would have allowed her to correct whatever mistakes the employer perceived.

[84] The termination was disciplinary. The grievor was blamed for errors and omissions beyond her control.

[85] The termination was unfair, as Ms. Pleau did not seek the grievor's response to the allegations made against her. Ms. Pleau relied on hearsay to terminate the grievor. This was a violation of the grievor's right to natural justice and procedural fairness. The employer did not follow its policies with respect to the probationary period or the termination. The grievor was not given fair warning that her performance needed to improve.

IV. Confidentiality order

[86] The employer requested that the following documents be sealed:

- its unredacted book of documents, Exhibit E-1 (a redacted version was provided);
- Exhibits E-5, E-6, and E-13; and
- Exhibit G-6, tabs 1 and 14.

[87] These documents will be sealed on the basis of the *Dagenais/Mentuck* test (see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and *R. v. Mentuck*, 2001 SCC 76), which was enunciated best in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. The test can be summarized as whether the salutary effects of keeping certain information confidential outweigh the deleterious effects of preventing public access to judicial proceedings, which is a right protected under the *Canadian*

Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.).

[88] As a general rule, the Board adheres to the open court principle. Its hearings and files are public. However, in some cases, confidentiality should be considered. One reason for favouring confidentiality is protecting personal information.

[89] All the documents that the employer asked to be sealed contain information on the investments of CAF members and their families. It is private information, and it has no bearing on the transparency or intelligibility of this decision. Yet, its disclosure could potentially harm third parties whose interests were not represented at the hearing. For this reason, I grant the sealing order.

[90] The employer also asked that Exhibits E-12, G-27, and G-29 be sealed. They either do not contain personal information or have already been redacted. They will not be sealed.

[91] The employer also requested the sealing of Exhibit G-1, tab 15, excepting a few emails. The bulk of the emails show the grievor's interactions with clients. I believe that those emails are important to show the work she did on the clients' behalf. All personal information has been redacted from that tab and from the emails and documents in tabs 16, 20, 24, 34, and 35.

[92] The employer requested the sealing of Exhibit G-1, tab 34. Again, this evidence is important as it shows that the grievor worked on investments and thus generated new money. The original has been sealed; the public file contains a redacted copy with numbers to indicate the correspondence between the list of new money and the clients.

V. Analysis

[93] A number of discrepancies arose in the evidence presented by the witnesses. I am very much guided in resolving them by the principle stated as follows in *Faryna v. Chorny*, 1951 CanLII 252:

…

> *… The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed*

> *person would readily recognize as reasonable in that place and in those conditions….*
>
> …

[94] The grievor asserted that Mr. Howard felt threatened with the possibility that she would take over his position, and thus, he worked to undermine her. She was convinced that she had been hired to replace him, that he knew it, and that he felt threatened by it.

[95] Ms. Pleau did not confirm that view. She testified that the grievor asked her about opportunities for advancement. She might have then vaguely referred to the fact that Mr. Howard was maybe nearing retirement, but she was adamant that she had made no promise. For his part, Mr. Howard testified that he had no intention of retiring at that point, which was at the hearing held over two years after the grievor had been rejected on probation. I find it more likely no promise was made, as it would be surprising for an employer representative to make that kind of promise to an employee on probation.

[96] The grievor reported that her initial training with Ms. Pleau and Ms. Stevens had little content. Ms. Pleau had placed in a room by herself to read materials. With Ms. Stevens, she had had more of a social conversation, and substantive issues were only briefly discussed, if at all.

[97] Ms. Pleau's and Ms. Stevens' reports on the same training were strikingly different from the grievor's description. Ms. Pleau said she spent time with the grievor and reviewed what appeared on the schedule. She stated that the grievor asked many questions and took copious notes. Ms. Stevens, who has trained a number of new financial planners, stated that she did the same as she always did, which was to provide the training indicated in the schedule.

[98] Neither Ms. Pleau nor Ms. Stevens were cross-examined to test their testimony in contrast to that of the grievor's. Neither of them was asked to comment on the grievor's view of the training. I find it a little strange that Ms. Pleau would remember questions and note-taking if she did not give the training but rather had the grievor sit in a room by herself. I also find it surprising that Ms. Stevens would not give the same training she was used to give to new financial planners. In any event, from the schedule itself, I find that various aspects of the financial planner's work were to be discussed. If the training was wanting, according to the grievor, of which I am not

convinced, she had sufficient background to ask further questions and request further training if she felt she needed it.

[99] The grievor also asserted that Mr. Howard created a toxic and unwelcoming environment at the branch.

[100] Mr. Howard was probably not a warm and caring supervisor. He was set in his ways, was disappointed in what he perceived as the grievor's attendance problems (she took family and sick leave that she was entitled to), and obviously found it hard to communicate with her, as meetings with her progressively became more confrontational, according to both testimonies.

[101] On the other hand, the grievor's perceived slights were not entirely Mr. Howard's fault. She felt excluded because he bought coffee for others and not for her. Yet, she never communicated that disappointment clearly. Her email to the administrative assistant, asking whether there was a common pot for a "staff fund", does not say anything about the underlying reason, which was the fact that Mr. Howard did not bring her coffee. She also testified that she did not feel that Mr. Howard could teach her anything. I strongly suspect that this message was conveyed at least implicitly to him, as he stated that she seemed very confident and that she did not take criticism well.

[102] I do not think that Mr. Howard engineered the grievor's rejection on probation. He had nothing to do with her errors completing forms and her inability to repaper clients at the expected speed, which were the main reasons for the rejection. I do not think that he created the toxic environment she felt she was in. I do think their interaction was less than satisfactory, on both sides. However, the grievor never tried to discuss her unhappiness in the workplace with Ms. Pleau, who was Mr. Howard's supervisor, or Ms. Pelechaty-Earl, the HR advisor.

[103] The grievor saw Ms. Thomson, Ms. Pleau, and Ms. Stevens as plotting to dismiss her because of the initial failing to supervise her correctly. I did not find the related evidence convincing.

[104] In November 2016, Ms. Stevens clearly admitted that she had not been monitoring the grievor as she should have been. Starting from that point, she did. I do not think that Ms. Thomson had anything to hide. She found mistakes made by the

grievor and pointed them out. Finally, I do not think that Ms. Pleau set out to get rid of the grievor. She had been pleased to hire the grievor and had expected good performance from her.

[105] According to section 209 of the *Act*, the Board does not have jurisdiction over a rejection on probation unless it was a sham or was in fact a disguised disciplinary measure. That section reads as follows:

> ***209 (1)*** *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> ***(a)*** *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> ***(b)*** *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> ***(c)*** *in the case of an employee in the core public administration,*
>
> > ***(i)*** *demotion or termination under paragraph 12(1)(d) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*
> >
> > ***(ii)*** *deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*
>
> ***(d)*** *in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*

[106] Termination cases are covered by s. 209(1)(b) but must be of a disciplinary nature. Sections 209(1)(c) and (d) do not apply, as the NPF is a separate agency that has not been designated under s. 209(3) for the purposes of s. 1(d).

[107] A long line of jurisprudence has established that if a rejection on probation is in effect disciplinary or a sham or that it was made in bad faith, then it is not valid (see *Canada (Attorney General) v. Penner*, [1989] 3 FC 429 (C.A.) (Q.L.), *Leonarduzzi*, and *Tello*). However, if the Board finds that the rejection on probation was genuinely based on work-related reasons, then the analysis ends, and the Board has no jurisdiction.

[108] Therefore, the test for a rejection on probation is not whether the employer had sufficient cause but rather whether there was a work-related reason for the rejection.

[109] In *Kagimbi*, the Federal Court ruled that the adjudicator's decision to uphold the rejection on probation was reasonable. The onus was on the employer to present evidence that the rejection was related to employment issues; the grievor then had to show that the termination was based on a cause other than a *bona fide* dissatisfaction as to suitability. The employer showed evidence of Ms. Kagimbi's shortcomings. She sought to show that the termination had been unfair, and thus made in bad faith, because she had not been informed of her shortcomings before it was done. The Federal Court quoted the following extract from the adjudicator's decision:

…

> *… in a rejection on probation, the employer must demonstrate good faith in its decision to terminate employment during probation. It cannot use a rejection on probation to camouflage another form of dismissal. However, it does not mean that the employer is required to be transparent with the employee during his or her probation and to inform the employee of shortcomings in his or her work, to give the employee a chance to correct them. Common sense and good management practices would dictate doing so, but the law does not require it.*

…

[110] As in *Tello*, I find that the grievor "… did not establish that the termination of employment was not a bona fide dissatisfaction as to [her] suitability for employment." In that decision, the adjudicator did not rely on all the grounds invoked by the employer for the rejection on probation. He found that two of them were sufficient to show *bona fide* dissatisfaction.

[111] The grievor cited a number of decisions, some of which I did not find relevant to her situation. For example, she included *O'Leary v. Treasury Board (Department of Indian Affairs and Northern Development*, 2007 PSLRB 10, in which the adjudicator ruled that the employer had not provided M. O'Leary with the proper tools to do his job and that it then demoted him when he did not live up to its expectations. However, the adjudicator did state at the start of his analysis that it was premised on the fact that Mr. O'Leary had not been under a probationary period, as he already had indeterminate status when he was promoted to the position he was demoted from. The adjudicator stated the following at paragraph 288 of the decision:

> *[288] … The employee was promoted from within the Public Service and was not under a probationary period. The employee not being under a probation period, the employer's obligations to assist the employee in attaining the desired level of productivity*

> *are greater than they would be had he been a probationary employee. This is not a situation where the employer can make a determination if the employee is suitable for the position as they would with a probationary employee.*

[112] Similarly, the conclusion in *Morissette v. Treasury Board (Department of Justice)*, 2006 PSLRB 10, does not apply to the grievor's situation. Ms. Morissette was an indeterminate employee; before dismissing her, the employer had the obligation to give her fair warning. No such obligation exists in a probationary situation, as stated in *Kagimbi*.

[113] In *Lapostolle v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 134, the adjudicator reduced a three-day suspension by one day because at the hearing, the employer presented no direct evidence of one of the elements of the grievor's misconduct. The grievor argued that similarly, Ms. Pleau's decision to reject her on probation was based on hearsay and therefore cannot stand.

[114] I disagree that the decision was based on hearsay, since Ms. Pleau received direct documentary evidence from Ms. Thomson and Ms. Stevens of the email exchanges with the grievor. She could see for herself the nature of the mistakes and the grievor's responses to corrections. Moreover, although it is true that Ms. Pleau also relied on Mr. Howard's reports, he testified directly before me. The underlying problem with hearsay is that it is evidence that cannot be tested by cross-examination. The opportunity to cross-examine was given to the grievor in this hearing, contrary to the situation in *Lapostolle*.

[115] In *Boutziouvis v. Financial Transactions and Reports Analysis Centre of Canada*, 2010 PSLRB 135, the employer, which was a separate agency such as the NPF, argued that the Board did not have jurisdiction, as the employee had been terminated other than for cause, according to the employer. Yet, the letter of termination, as well as the notes at the termination meeting, clearly showed that the employee was being terminated for misconduct.

[116] There is no such indication in this case. The letter of rejection on probation does not speak of misconduct; rather, it speaks of unsatisfactory performance that led to a conclusion of unsuitability. The grievor saw it as being punished for making errors and therefore as disciplinary. Pointing out errors and expecting them to be corrected

has nothing to do with misconduct, which concerns behaviour that is unacceptable, according to the employer's standards.

[117] At the hearing, the grievor argued that the rejection on probation was disciplinary, but that was not part of her initial grievance, which rather denounced the unfairness of the process and harassment on the part of Mr. Howard. It is a well-established principle (see *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.)) that the nature of a grievance cannot change at the adjudication hearing. Consequently, I do not deal with the discipline argument.

[118] From the letter of rejection and from the testimony of the employer's witnesses, the rejection on probation clearly related to dissatisfaction with the grievor's performance. The letter rejecting the grievor on probation outlined the following rationale for the rejection:

…

> *As you are aware, we have had various discussions with you regarding your performance throughout your probationary period. The Employer has outlined its expectations of you and provided you with guidance to assist you in achieving the performance level required to successfully complete your probationary period. Specifically, during meetings that occurred on: 4 & 25 November 2016; 16 December 2016; 13 & 20 January 2017; 3 & 10 February 2017; 3 & 8 March 2017, performance and competency concerns were discussed and documented by your immediate supervisor. During these meetings, the Branch Manager discussed with you your lack of compliance with FundEx policies and procedures and your apparent difficulty in repapering of clients in a timely fashion, and advised you that these particular deficiencies were areas that needed to be addressed in order to succeed in this role.*
>
> *Despite these discussions, you have unfortunately failed to take the necessary steps to correct the deficiencies noted above or to demonstrate that you have the competencies required to fulfill the duties of the position of Financial Planner. These difficulties demonstrate a pattern of substandard performance despite clear guidance and direction you have been given in an effort to assist you in improving your performance to the required level. Of equal concern is your failure to seek guidance or direction when you were unable to meet the duties and responsibilities of your position.*
>
> *Given your ongoing performance difficulties and your lack of improvement, I am no longer hopeful that the situation will improve, or that you will discharge your responsibilities now or in the future to the required level to successfully complete your*

> *probationary period and to be confirmed into the position of Financial Planner. Constant repetition of these difficulties despite various warnings, and your failure to improve the situation has now culminated in an untenable situation.*
>
> …

[119] In *Frezza v. Deputy Head (Department of National Defence)*, 2018 FPSLREB 18, a case about the rejection on probation of a civilian employee of the Department of National Defence, there was clear animosity against the employee, and there were no solid reasons for the rejection. In this case, I find it quite significant that Ms. Thomson was separate not only from the workplace but also from the NPF hierarchy. Ms. Pleau was very clear in stating that Ms. Thomson's detection of errors had weighed heavily in her decision. Even if the relationship between Mr. Howard and the grievor was not harmonious, Ms. Thomson's views on the grievor's errors were formed independently.

[120] The grievor cited *Dyson v. Deputy Head (Department of Fisheries and Oceans)*, 2015 PSLREB 58, a case in which the adjudicator found that the rejection on probation was in fact disciplinary, as the employer had been dissatisfied with the amount of sick leave the employee had taken. The alleged performance failings were shown to be unsubstantiated. In that case, the employer clearly knew that Mr. Dyson had health issues. The grievor argued that the employer should have known or should have asked her whether she had health issues. I can see no such obligation on an employer, absent clear indication from an employee of a health issue. Moreover, in this case, I do not see the employer's reliance on performance failures as a sham, contrary to *Dyson*.

[121] The evidence I received from the employer amply documented its concerns with the grievor's performance. There were persistent mistakes, such as incomplete forms, not entering Fund Facts in Univeris, and not ensuring that the proper procedure to enter data was followed. This can be seen in several emails as well as in the spreadsheet drawn up by Ms. Pleau. I also accept Ms. Pleau's testimony that given the grievor's previous work experience, she had been surprised that Ms. Thomson reported so many irregularities.

[122] The grievor claimed that she was badly trained, and she blamed others for her mistakes. She pointed to the fact that Ms. Stevens criticized her work on November 8, 2016, despite the fact that she started checking the grievor's work only on November 1.

[123] Obviously, it would have been preferable had the close supervision started as soon as the grievor became involved in clients' files. Ms. Stevens could have emailed the grievor on September 7, 2016, as soon as she learned that the grievor had been registered with FundEX, to remind her to have everything pre-approved before sending it to FundEX. That said, I do not think that it would have made a difference, as mistakes continued after Ms. Stevens' direct supervision in November and despite several reminders from Ms. Thomson, long after mistakes had been pointed out to the grievor. She rightly pointed out that Ms. Stevens' email detailing her mistakes just one week after she started supervising her was somewhat unfair. That said, I find it unsettling that the mistakes involved, as Ms. Stevens said, industry standards, as opposed to being FundEX or SISIP peculiarities.

[124] The grievor had no reasonable explanation for the mistake of not completely filling out NCAFs or of not recording providing Fund Facts to her clients on Univeris. She claims that Mr. Howard refused to review the forms she sent in. He was not cross-examined on this point. His understanding, according to his testimony, was that Ms. Stevens was reviewing the forms. It is difficult to imagine that he would not have told the grievor, had he been asked directly, to send the forms for pre-approval to Ms. Stevens.

[125] The grievor also pointed out that the employer had started considering the rejection on probation in early November, when she had not been properly supervised. However, the rejection did not occur then. It did give her the opportunity to correct her mistakes.

[126] It is a little difficult to follow the grievor not taking responsibility for the proper handling of the forms sent to FundEX. She signed a letter in early September acknowledging her obligation to read and apply the CPPM, yet she never asked for a copy of it; she expected to be given one. She knew the industry and the importance of compliance and rules; her knowledge of the industry was the reason she was hired. The email Mr. Howard addressed to her on September 6, 2016, showed that the branch manager for FundEX compliance was Ms. Stevens. I stated earlier that perhaps Ms. Stevens should have reached out on September 7, 2016. The grievor could also have followed up on the significance of "branch manager for FundEX compliance".

[127] Beyond the poor training, the grievor also referred to the fact she had felt harassed to the point that it caused serious medical issues for her. Yet, she gave the employer no indication of health problems during her period of employment.

[128] The grievor also stated she had been given no proper warning that she was risking termination before she was terminated. She knew that she was on probation, and she received many signs of dissatisfaction, both from FundEX and from Mr. Howard. I cannot believe that the rejection on probation came as a surprise, when she had taken considerable leave to avoid a situation she perceived as toxic. It would be difficult to believe she truly thought the employer was pleased with her performance. She did receive positive feedback; as stated, she did offer good service to clients. However, unfortunately, the negative elements became more important, and she could not deny them. She knew that she was having a hard time keeping up. In any event, as stated in *Kagimbi*, a fair warning is not part of the legal test to determine whether a rejection on probation was reasonable.

[129] Was it reasonable for the employer to think that the grievor was unsuitable? From its point of view, without further explanation from her, things were just not working out. Mr. Howard was dissatisfied with the repapering and the mistakes, which she seemed to brush off. Ms. Thomson had reported a number of mistakes that were basic regulatory requirements, such as completing forms, making timely updates, and providing investment-fund information. The grievor did not seem to be improving her performance. It was reasonable for the employer to think that she was not suited to the job and the workplace and therefore to proceed to the rejection on probation. I find that the employer's decision to reject her on probation was work-related. Consequently, the Board has no jurisdiction to intervene.

[130] That being so, the grievance must be dismissed.

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

(The Order appears on the next page)

VI. Order

[132] The following exhibits are sealed: E-1; E-5; E-6; E-13; G-6, tabs 1 and 14; and G-1, tab 34.

[133] The grievance is dismissed.

February 12, 2020.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board