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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

CHRISTINE DARGIS

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Dargis v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Kim Patenaude, counsel

For the Employer: Andréanne Laurin, counsel

Heard via videoconference,
January 25 and 27 and August 23 and 24, 2021.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievances referred to adjudication

[1] Christine Dargis ("the grievor") was rejected on probation on July 24, 2015, while employed by the Canada Revenue Agency ("the Agency" or "the employer"). Her grievance ("the termination grievance") was denied at the final level of the grievance process.

[2] On September 28, 2016, the grievor referred this grievance to adjudication, as well as two other grievances relating to a discrimination allegation, with the Public Service Labour Relations and Employment Board ("the PSLREB").

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB to the Federal Public Sector Labour Relations and Employment Board ("the Board"). It also changed the name of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) to the *Federal Public Sector Labour Relations Act* ("*FPSLRA*").

[4] For the reasons set out in this decision, I conclude that the Board has jurisdiction to hear the termination grievance under ss. 209(1)(d) and (3) of the *FPSLRA*. The employer presented a legitimate reason to justify terminating the grievor's employment during her probationary period. I conclude that she did not succeed in rebutting that evidence. I also conclude that she failed to establish that a prohibited ground of discrimination or bad faith was a determining factor in the decisions made about her probation and termination.

II. Preliminary issue - Confidentiality and sealing order

[5] The employer asked that Exhibits F-15, F-16, and F-17 be sealed because they contain taxpayers' personal information. They are audit notes about taxpayers' files that the grievor prepared and refer to her interactions with them. I believe that these emails are important, to show the work that she did on the audits. Although some personal information was redacted from the exhibits, the parties agreed that the documents should be sealed because they contain taxpayers' information and demonstrate the work that was done to audit their income tax returns.

[6] In keeping with the open court principle, and following the *Dagenais/Mentuck* test (see *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835; and *R. v. Mentuck*, 2001 SCC 76), documents will be ordered sealed only if their disclosure would cause harm that would clearly outweigh the benefits of fully disclosing them (see *Pajic v. Statistical Survey Operations*, 2012 PSLRB 70). The Supreme Court of Canada (SCC) restated the *Dagenais/Mentuck* test as follows in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53:

> ***53*** *… A confidentiality order … should only be granted when:*
>
> *(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
>
> *(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*

[7] Generally, the Board respects the open court principle. Its hearings and files are public. However, in some cases, confidentiality must be considered. Privacy is one of the reasons justifying confidentiality. The audit notes and this information do not impact the transparency or understanding of the decision. However, their disclosure could harm third parties whose interests were not represented at the hearing. For this reason, I order the documents sealed. In this case, I find that the salutary effects of a confidentiality order outweigh the public interest in open court proceedings.

[8] Therefore, Exhibits F-15, F-16, and F-17 are ordered sealed.

III. Summary of the evidence

[9] The parties agreed that the employer would present first.

[10] At the hearing before me, the employer called the following witnesses: Marielle St-Louis, Manager, Appeals Division; Josée Therrien, Team Leader on an acting basis as of the issues in question; Jacinthe Bourgeois, Auditor; and Manon Dubé, Director, Central and Southern Quebec Tax Services Office.

[11] The grievor testified on her own behalf.

[12] The summary of facts that follows is based on the testimonies and evidence produced at the hearing. For consistency, I assembled the evidence and will present it in chronological order.

A. The probationary period

[13] The grievor described her education and work history over a number of years before she went back to school. She started her job with the Agency immediately after graduating from university in 2014.

[14] In June 2014, she received a call informing her that she had been accepted to the position of Trainee, Audit Learning Program (ALP), SP-04, at the Trois-Rivières Tax Services Office. Her job was to begin on September 2, 2014.

[15] A letter dated June 2, 2014, which reads in part as follows, confirmed that she was being appointed and that she had to successfully complete the Agency's probationary period that according to her offer letter, was for up to 12 months:

> [Translation]
>
> …
>
> *The* [Agency's] *Staffing Program requires that employees hired from outside the Agency (other than employees appointed under the Public Service Employment Act who have successfully completed the probationary period) serve a probationary period of up to 12 months at the* [Agency] *that will continue even if the employee is later appointed permanently or temporarily to other positions. Any significant period in which the employee does not perform the duties of the position will not be counted in the probationary period calculation, which will be extended accordingly. For employees appointed through an approved learning program, the probationary period may differ. Please refer to the relevant learning program for more information about the probationary period.*
>
> …
>
> *Employees with disabilities who require accommodation at work should let their managers know as soon as possible so that appropriate and timely accommodations can be made.…*
>
> …

[16] On September 2, 2014, the grievor began in her job as an audit trainee at the SP-04 group and level in the ALP. She was subject to the probationary period of up to 12 months.

[17] The grievor's employment relationship with the employer was governed by the collective agreement between the Agency and the Public Service Alliance of Canada for the Program Delivery and Administrative Services group that expired on October 31, 2016.

[18] The ALP recruited post-secondary students to work as auditors for the employer. It offered a combination of structured classroom training, practical experience, and on-the-job coaching. Ms. Therrien filed as evidence the calendar of courses offered from September to December 2014 in the local offices of Brossard, Sherbrooke, and Trois-Rivières. The grievor received her training at the Trois-Rivières office.

[19] The trainees' skills were to be evaluated after 4, 8, and 11 months. They also had to complete a self-evaluation after 2 and 7 months.

[20] One of the ALP's objectives (listed in the employee's performance report, which Ms. Therrien signed on November 19, 2014) is that trainees must complete three income tax audit files on their own during the probationary period.

[21] Ms. St-Louis also testified about how the ALP works. It is structured. Trainees spend 2.5 months in the classroom. Then, they are paired with a mentor to help with the mentor's files. They also accompany the mentor to taxpayer interviews. Later, they receive their own files. They are on probation for up to 12 months, during which they must complete 3 files on their own. The employer must decide whether to hire them before the probationary period ends.

[22] Ms. St-Louis presented the work description of an ALP trainee (SP-04). It describes the trainee's work as well as the necessary skills and responsibilities. The work involves conducting audits by applying the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.); "*ITA*"). Trainees must audit the reported income and the qualified expenses. To complete the work, they gather information about the taxpayer's activities. If a reassessment is warranted, the taxpayer has the right to dispute it, in accordance with the provisions of the Act.

[23] Trainees use the indirect verification of income approach to check for unreported income. This work requires considerable attention to detail and determines net worth. This approach constitutes the basic structure of the audited information.

[24] The grievor filed as evidence the course calendar that she received for September to December 2014. She said that she received her first two files in early November 2014, the "Jean" and "Guy" files. She did not understand why the employer assigned her the Jean file, which involved a garage, as she felt that nothing in particular justified auditing that file. However, she worked on the file with her mentor. She observed her mentor's first interview with the client and understood the procedure. The second file was about a bankruptcy involving an individual who lived with his mother and whose business had closed.

[25] Ms. Therrien was responsible for four trainees and two other employees. She said that she had a very good relationship with the grievor.

[26] She explained that under the ALP, audit trainees are asked to audit returns to ensure compliance with the laws that the employer enforces. Audit trainees identify, collect, and analyze taxpayers' data and prepare work documents based on the instructions given in the training at the start of the program. Audit trainees also communicate with taxpayers.

[27] Ms. Therrien guided her trainees throughout the program. Noted in a system were the number of hours each person spent on each file. She explained that the Agency expected a trainee to spend about 150 hours on a file, with no reassessment or with a minimal assessment. These files were described as small and as less complex than others. However, a large reassessment would mean spending more hours on a file. Her trainees could ask her or their mentors questions.

[28] She adduced as evidence the audit trainees' training history, including that of the grievor. For example, courses covered the following subjects: "[translation] Income and expenses basic rules", "[translation] Interview techniques", "[translation] Capital cost allowances", "[translation] SVP Win basic concepts", and "[translation] Net worth assessment". Before auditing files, the trainees had to establish a decision tree that the team leader approved. The employer expected the trainees to use the methods and tools made available to them, such as pivot tables, to ensure consistency.

[29] Ms. Therrien explained that an important module of the audit training was the "[translation] Net worth assessment". The pivot-table work method is used to establish net worth. This method constitutes the basic structure of the audited information. She explained that this method reduces the time required to audit files.

[30] According to her, the trainees could not choose whether or not to use the methods that they learned. Using those tools made audit work more effective by reducing the number of errors in the files.

[31] She confirmed that through the ALP, the trainees were paired with mentors who guided and assisted them. The trainees could consult their mentors if they had questions. In this case, the grievor was paired with Ms. Bourgeois from September to December 2014. Later, the grievor was asked to pose her questions directly to her team leader, Ms. Therrien.

[32] Ms. Bourgeois, the grievor's mentor, explained that between September and December 2014, the grievor went with her to meet with taxpayers in two of the files that she had previously begun. Then, she went with the grievor to initial interviews with taxpayers in two of her own files. They worked well together. The taxpayer visits went well.

[33] She said that the grievor worked well and very diligently. However, with respect to SVP Win, she explained that the grievor failed to apply its basic concepts and that she was reluctant to use it. Ms. Bourgeois reminded her that she had to use it because at that time, the steps that she had to take with the file, namely, the audit and draft assessment, were possible only through using it. Given the grievor's reluctance to use it, Ms. Bourgeois did not insist, and the mentorship ended in December. The grievor did not ask her many of questions.

[34] Ms. Therrien noted that around late December 2014, most trainees no longer had to consult their mentors. As for the grievor, her relationship with Ms. Bourgeois had already ended because, as Ms. Therrien recalled, Ms. Bourgeois had insisted that she use the SVP Win software. However, she was reluctant to use it. She did her work without using the software. Therefore, her mentorship with Ms. Bourgeois ended, by mutual agreement.

[35] Ms. Therrien explained that she told the grievor not to hesitate to contact her directly for guidance. Ms. Therrien explained that she encouraged all trainees to ask her questions when they were unsure of what to do and that her door was always open to them. She explained that she could answer their questions the same day or shortly after that. In addition, there was a spirit of mutual support among the team members. Everyone worked together and helped each other out.

[36] The grievor said that she used the SVP Win software but that she was told repeatedly that no matter the tool or software used, it was the result that mattered. Only in the spring did she understand that she had to use the new tool, for efficiency reasons.

[37] The grievor also explained that the other trainees had built closer relationships with their mentors than she had with hers. She felt that if her mentor had helped her more, at some point, her mentor would have advised her to send unordered documents back to the taxpayer rather than try to understand them. She did not receive that advice and lost time as a result.

B. The performance evaluation after four months of probation, and self-evaluations

[38] On October 23, 2014, the grievor completed her first self-evaluation. She identified the areas in which she felt comfortable and those in which she wished to improve.

[39] On November 19, 2014, Ms. Therrien gave the grievor a document with performance expectations and work requirements. The employer had the same expectations of all trainees.

[40] Ms. Therrien completed the grievor's first evaluation after four months of her employment at the Agency. The evaluation dated January 10, 2015 (which she signed on January 16), was based on her performance as of January 2, 2015. The evaluation was shared with her. Ms. Therrien's comments read in part as follows:

> [Translation]
>
> …
>
> *General strengths and weaknesses*
>
> *… Christine has some labour market experience in more than one area, which gives her a different view that allows her to think*

> *pragmatically. Christine should pay close attention to financial data. I am referring to the results of the final-net-worth exercise.*
>
> …
>
> *Recommendations for improvement*
>
> *… Pay close attention to financial data, and increase understanding of net worth.*
>
> …

[41] On March 27, 2015, Ms. Therrien corrected one of the grievor's audit files. She adduced as evidence her correction grid and comments. She said that the file contained errors.

[42] In April 2015, she corrected another of the grievor's audit files. She adduced as evidence her correction grid and comments. Once again, she said that the file contained errors.

[43] On April 16, 2015, after seven months of Agency employment, the grievor completed a second self-evaluation based on her observations as of April 8, 2015. She discussed it with her manager. In general, she noted that she was making progress. In the document, under the question "[translation] What questions or issues would I like to discuss with my team leader?", she wrote this: "[translation] I am a bit anxious about how things work (closing files, deadlines, the time I spend on files …)."

[44] On April 16, 2015, at Ms. Therrien's request, another trainee ("QA"), who clearly understood audit concepts, trained the grievor for two hours on how to conduct the necessary research. The following topics were covered: "[translation] Analyzing a taxpayer's bank account data", the "[translation] … worksheet template in SVP Win …", and "[translation] Categorizing transactions for the deposit analysis". Ms. Therrien explained that the review of basic concepts, which had already been taught, was necessary because of gaps identified in the grievor's work. The grievor was grateful for this session.

[45] Later, Ms. Therrien corrected a third audit file produced by the grievor. She adduced as evidence her correction grid and comments. She explained that the file contained errors as the grievor's audit rested on a flawed base.

[46] The employer introduced as evidence a document entitled "[translation] Additional information after verifying Christine's files" that contains a summary of the errors that Ms. Therrien noted when correcting the grievor's files.

[47] On May 2, 2015, Ms. Therrien verbally informed the grievor that she had to work faster on her audits. Ms. Therrien told the grievor that she could do it and to feel free to consult her if necessary.

[48] On May 22, 2015, the grievor asked Ms. Therrien for a new file in which she could start an audit because there was an unexpected delay in the file that she was working on, and her other files were progressing.

C. The eight-month evaluation

[49] The grievor's performance evaluation report after eight months of work, which was up to May 2, was finalized on June 2, 2015. In it, Ms. Therrien stated that the grievor met expectations for the following ability: "[translation] Effective interactive communication". However, she stated that the grievor met only part of the expectations for the following abilities: "[translation] Adaptability", "[translation] Planning, organization, and/or results monitoring", "[translation] Audit", and "[translation] Legislation, policies, and procedures".

[50] In the report, the employer stated as follows under "[translation] Analytical thinking":

> [Translation]
>
> *… Christine does significant work on her files. She poses many hypotheses before arriving at a conclusion. This suggests to me that she struggles to apply her analytical thinking. She must put herself in an auditor's shoes, which will help her let go of the bookkeeper role. She should be able to make great strides in her final three months.*
>
> …

[51] In the report, Ms. Therrien stated as follows under "[translation] Planning, organization, and/or results monitoring":

> [Translation]
>
> *Does Christine:*

> *• appear capable of identifying requirements and using available resources (human; namely, herself or other people and other resources) to achieve the objectives as best she can? I note that Christine struggles. It appears to me that she does not apply what she learned in training.*
>
> …
>
> *• appear capable of planning and organizing her and others' work? It is hard for her. Currently, only one file is closed. She works with a reduced inventory. But I think that in the next three months, she will be able to improve significantly.*
>
> …

[52] In the report, Ms. Therrien stated as follows under "[translation] Recommendations for improvement":

> [Translation]
>
> …
>
> *… For the remaining three months, we will work on understanding the deposit analysis, the withdrawal analysis, and net worth. Furthermore,* [VQ]*, a team member, helps Christine analyze deposits. Christine must come see me more often so that we can reduce her file time and focus on the work to be done, without doing too much. She can catch up by the end of August.*
>
> *Christine should take notes to avoid repeatedly having to ask for the same information.*
>
> …

[53] The grievor stated that during the June 2, 2015, meeting, Ms. Therrien reassured her by saying this: "[translation] Listen, I will help you and you will succeed; I want to sign you." Ms. Therrien confirmed that she wanted to help the grievor who, however, had to overcome a steep learning curve. After eight months, she still had not submitted a draft assessment and had not mastered net worth or the indirect verification of income approach, despite all the training. In addition, as per the performance expectations stated at the start of her probation, she had to finalize three files in three months.

[54] After that, Ms. Therrien continued to review and correct the grievor's work on her files.

[55] The grievor felt that she had made good progress on the six files on which she was working. She had completed one file and said that two others would be completed soon. However, the evaluation that she received on June 2, 2015, worried her greatly. She wanted to build a career at the Agency. Therefore, she felt it appropriate to consult a bargaining agent representative. She said that the fact that Ms. Therrien had to review or correct her files delayed her progress in her work.

[56] The grievor also wondered if her attention deficit hyperactivity disorder (ADHD) could be causing her to struggle at work. She also realized that conversations near her cubicle could distract her and that it would be beneficial for her to work in a quieter area. Therefore, she decided to disclose her medical condition.

D. Medical condition

[57] On June 3, 2015, she informed her team leader, Ms. Therrien, for the first time that she had a medical condition; ADHD. They discussed it and agreed that it would be beneficial for her to work in a quieter area. Ms. Therrien spoke to Ms. St-Louis about it.

[58] Ms. St-Louis wondered what accommodations were needed. Therefore, she sought advice from Labour Relations. Its representative informed her that she had to complete a form that would allow the employer to request details from the employee's physician, for accommodation purposes. The management team decided that it should ask the grievor for permission to contact her physician, to identify any limitations caused by her condition.

[59] The next day, June 4, 2015, the employer also provided the grievor with a new workspace. Ms. St-Louis explained that a Technology Services representative was to come by the office that day. The representative was in the Trois-Rivières office only once per month. Therefore, the management team used the occasion to ask him to transfer the grievor's computer equipment to a quieter area that it had identified.

[60] So, when the grievor arrived at the office on the morning of June 4, she was surprised that her computer had been moved to another cubicle. She explained that she felt humiliated and embarrassed because she had not been advised of the change. Ms. St-Louis explained that the management team had not had time to inform her but that it was done to help her.

[61] Then, when the grievor turned on her computer, she saw an email that Ms. Therrien sent to the team, reminding it to use an appropriate tone of voice given the shared work area and relating a comment that she had received that conversations could bother others. The grievor thought that her co-workers might connect her moving to another area to the comment that conversations could bother others. It heightened her humiliation. She thought that others would blame her for the comment.

[62] On her desk chair, she also found a document entitled "[translation] Medical assessments, Employee fact sheet" with the following handwritten note: "[translation] Come see me."

[63] The grievor thought that she should consult the bargaining agent representative, Sylvie Masse, who was also the president of the union local. Ms. Masse advised her to read the form and to make an appointment with her physician.

[64] On June 4, 2015, Ms. Therrien emailed the grievor to ask if she had read the medical assessment form and if she would consent to the employer contacting her treating physician.

[65] That day, the grievor replied to Ms. Therrien's email as follows, on Ms. Masse's advice:

> [Translation]
>
> …
>
> *Thank you for changing my workstation to help me get through this stage. I can already see the difference!*
>
> *I read the document about the approval to contact my physician. I do not believe that my condition prevents me from performing the duties of my position.*
>
> *However, I have to try harder to concentrate in some situations, like when co-workers chat about matters not involving work. In those cases, my attention is more easily drawn elsewhere.*
>
> *I don't think that my physician would restrict me from carrying out my auditing duties but would support that you moved me with the goal of finding a quiet workspace conducive to concentration.*
>
> *I would like to speak to my spouse first, before making any other changes.*
>
> …

[66] That day, Ms. Therrien shared her schedule for the next two weeks with her team, including the trainees. She said that she might take leave beginning the week of June 15, with an expected return on June 25.

[67] On June 5, 2015, Ms. Therrien wrote to the grievor again, stating that her reply was unclear and that she appeared to be refusing to allow the employer to contact her treating physician. Ms. Therrien felt that she had a duty to inform the grievor that given the circumstances, the probation conditions would apply, as stated at the start of the probation, and that she expected the grievor to meet the performance objectives before the end of her probationary period. The email also specified that a failure to meet the performance objectives could lead to a rejection on probation.

[68] The grievor read the email at the end of the day, after returning to the office from a client meeting. The email upset her, and she began to cry. Ms. Therrien heard her crying and came to see her, asking why she was still at the office. Ms. Therrien took her into a closed office to speak to her and told her that she did not expect her to still be at the office. Ms. Therrien thought that the grievor would see the email only on Monday morning. According to the grievor, Ms. Therrien told her this: "[translation] Don't worry; you will succeed. Come see me if you need to. Take Monday off; rest."

[69] Speaking about that situation, Ms. St-Louis added that the offer letter specified that anyone requiring accommodation had a duty to inform the employer. Therefore, the management team required the grievor to do her part so that appropriate accommodations could be made. Specifically, the letter stated as follows:

> [Translation]
>
> …
>
> *Employees with disabilities who require accommodation at work should let their managers know as soon as possible so that appropriate and timely accommodations can be made.…*
>
> …

[70] Ms. St-Louis added that after reading the grievor's June 4, 2015, email, the employer concluded that she did not want additional accommodations. For that reason, the probationary conditions remained unchanged. The management team wanted to inform her of it.

[71] On Monday, June 8, 2015, the grievor took a sick day.

[72] On June 9, 2015, the union representative, Ms. Masse, asked to meet with Ms. St-Louis, the acting manager, to discuss the grievor's situation.

[73] A meeting took place on June 10, 2015.

[74] On June 10, 2015, Ms. Therrien confirmed to her team that she would be on leave from June 14 to 24, 2015. Her co-worker, "DG", an auditor, would be available to answer the trainees' questions. However, Ms. Therrien said that DG would not review any files during that period.

[75] Therefore, Ms. Therrien was not in the office during that time.

[76] On June 12, 2015, the grievor asked for two more files.

[77] On June 15, 2015, the grievor visited Ms. St-Louis, to discuss her work struggles. Ms. St-Louis made notes after the meeting and sent them to Ms. Therrien, as she was the team leader. She noted the topics that were discussed and those that had to be discussed when Ms. Therrien returned from leave. One of the points was about net worth (relating to the indirect verification approach) and the grievor's ability to perform that analysis. Ms. St-Louis felt that the grievor blamed her supervisor for her work struggles.

[78] Ms. St-Louis explained that since the first evaluation completed after four months, the management team had found that the grievor was doing bookkeeping, while an auditor's role is to use indirect approaches to find errors and determine whether a taxpayer's expenses and entries are correct.

[79] On the meeting with Ms. St-Louis, the grievor said that she understood net worth. The only challenge was that Ms. Therrien had not had the time to check her file.

[80] On June 16, 2015, she emailed Ms. Therrien to ask about the status of her file corrections. She also said that she had requested a new file on May 22, 2015.

[81] At the hearing, Ms. Therrien explained that a procedure is followed before assigning an auditor a new file. She does not assign files. A specific Agency team takes

care of this task and has 10 business days to assign a file to an employee. The team evaluates the complexity of the files before assigning them to the right employees.

[82] It is unclear whether a new file was assigned to the grievor in early June. However, during her leave, Ms. Therrien corrected the file that the grievor was working on and gave it back to the grievor when she returned to the office. She explained that generally, it took three or four weeks to return a corrected file to a trainee, given the large number of files handled every week. She also explained that she makes a number of corrections to files as they progress, which is why many files are to be corrected. For example, she corrected a file at the planning stage, then again at the project statement stage, and finally, at the assessment finalization stage.

[83] When she returned from leave on June 25, 2015, Ms. Therrien informed the grievor that she had corrected the grievor's file while on leave because she was starting to fall behind in her corrections. By making that correction, she was able to verify whether the quality of the grievor's work had improved since she received additional training in April 2015. The trend continued; she struggled with integrating the concepts that she learned.

[84] Ms. Dubé explained that in early June, the management team learned that the grievor has ADHD. She expressed that in her job, she had noticed that a person could very easily perform audit work even with ADHD but that it is important to accommodate the person's needs. Therefore, the management team wanted to offer the grievor any necessary accommodations.

[85] However, the grievor provided no further information to the management team, other than her desire to work in a quiet area. Therefore, the management team offered her a quiet work area. Since it had no knowledge of other functional limitations, the management team took no further action. It considered that the different performance expectations that were communicated to the trainees, including the ability to work effectively and independently, also applied to the grievor.

E. The first grievance is filed

[86] On June 23, 2015, the grievor grieved her performance evaluation dated May 2, 2015, which she received on June 2, 2015. In her grievance, she stated as follows: "[translation] … incomplete because the employer did not provide me with the means

to achieve the objectives …". Among other things, she asked it to "[translation] … provide all the means [so that she could] achieve the objectives[,] make accommodations … [and] extend the evaluation period …".

F. Progress while on probation

[87] On June 25, 2015, after correcting an assessment that the grievor effected, Ms. Therrien emailed her to ask her to make some corrections as set out in the email.

[88] Ms. Therrien explained that at that time, in June 2015, two of the four trainees under her responsibility had already completed seven to eight files each, independently. However, the grievor had not made the same progress in her files. Her work fell short. She did not incorporate what she had learned or the instructions given to her. Therefore, she repeated the same errors applying the indirect verification of income approach. In short, the grievor's work was akin to bookkeeping, which was not required or useful in the circumstances.

[89] On June 26, 2015, Ms. Therrien went with the grievor to meet with a taxpayer, to observe her work on the second file that she had been assigned. Ms. Therrien confirmed that before travelling with the grievor to the taxpayer, she warned her not to talk to her about the grievance.

[90] According to the grievor, before leaving, Ms. Therrien told the grievor not to talk to her about the grievance, and she also considered taking two vehicles. The grievor said that Ms. Therrien's response made her uncomfortable. However, they chose to travel in the same vehicle. During the visit, the situation deteriorated. The taxpayers were uncooperative; they behaved threateningly toward the two Agency representatives. Therefore, Ms. Therrien was unable to observe the grievor's work during an initial appointment with a client. Ms. Therrien confirmed that she had never before witnessed such animosity from taxpayers.

[91] The grievor explained that she was completely shaken by the taxpayers' hostility. She and Ms. Therrien left the meeting site abruptly. Later, the grievor experienced a severe state of shock. She was shocked and paralyzed by the violence and animosity that the taxpayers exhibited that day. That state persisted.

[92] That day, June 26, 2015, was the grievor's last day at work. After that, she left her union representative, Ms. Masse, to deal with her case. Her physician diagnosed her with depression.

G. The first medical certificate

[93] On July 3, 2015, she provided the employer with a medical certificate dated June 17, 2015. It simply recommended four accommodations without specifying the nature of her limitations or restrictions, if any.

[94] Ms. St-Louis testified that the note surprised her because the accommodations were unusual. The recommended accommodations reflected the corrective measures that the grievor requested in her grievance of June 23, 2015, which she filed to contest her performance evaluation. The requested measures were as follows: 1) arrange for the employee to receive the support she needed to achieve her objectives, 2) provide clear and specific instructions, 3) give feedback as needed so that she could make corrections, and 4) provide a work environment with fewer distractions so that she would be better able to focus.

[95] Ms. St-Louis testified that the accommodations, except for the last one, were all part of the trainees' probation. Training, mentoring, file corrections, and guidance were all part of the regular support provided to the trainees during their probation. Then, the trainees had to achieve the program's objectives. Finally, with respect to the fourth accommodation, the employer had already offered the grievor a quiet work environment.

[96] Because of the unusual nature of the medical certificate, Ms. St-Louis thought that she should verify its authenticity. On July 6, 2015, the grievor's physician confirmed that it was authentic.

[97] Ms. Dubé insisted that the management team never received information about functional limitations from the grievor's physician. She read the medical certificate received on July 3, 2015. According to her, it did not describe any functional limitations. All the measures it requested were already in place in the program, except the last one (work in a quiet area).

H. The second medical certificate, and the request to extend the probation

[98] On July 7, 2015, the grievor obtained a medical certificate from her physician, which stated "[translation] medical leave; reassess on August 10, [20]15".

[99] On July 14, 2015, her union representative, Ms. Masse, asked on her behalf that the probationary period be extended, given the grievor's unplanned medical leave.

[100] Ms. Dubé, the director of the Central and Southern Quebec Tax Services Office, was consulted on this case when the time came to decide whether the employer wished to extend the grievor's probation. Ms. Dubé has about 500 employees under her responsibility. She is consulted as to whether to hire employees or reject them on probation.

[101] Ms. Dubé explained that in the end, she decided not to extend the probation. She explained that after discussing the matter with Ms. St-Louis, Ms. Therrien, and a Labour Relations representative, the management team decided that the employer had had enough time, in this case 10 months, to evaluate the grievor's performance during her probation.

[102] She added that the trainee program included training and a procedure for evaluating trainees' competencies. In the course of the procedure, the management team considered that the grievor's 10 months of work constituted a reasonable period of professional practice, during which her competencies were tested. The evaluations completed after 4 and 8 months of work had clearly shown that she did not possess the competencies expected of an auditor. Therefore, it felt that it was unnecessary to extend the probationary period to complete the evaluation initially planned after 11 months of work. It determined that extending the probationary period would change nothing. The gaps identified in each evaluation showed that the grievor did not possess the competencies expected of an auditor.

[103] Therefore, after a consideration, on July 17, 2015, Ms. Dubé informed Ms. Masse that the employer would not extend the grievor's probationary period. Although the grievor thought that a probationary period was automatically extended when an employee took sick leave, Ms. Dubé confirmed that that was not true. The employer has discretion in such situations.

[104] Ms. St-Louis explained that she recommended not extending the grievor's probation because in her opinion, multiple attempts had been made to help her complete her tasks. Her team leader, Ms. Therrien, regularly helped her. Furthermore, a program team member ("CP") again provided her with previous training content to help her. Another colleague, VQ, also again provided her with previous training content. However, all the personalized assistance did not produce the desired result in the grievor.

[105] According to Ms. St-Louis, the problem was that the grievor did not grasp the difference between a statutory audit and a tax audit. The purpose of her work was not to list all of a taxpayer's invoices during an audit but to use the indirect verification of income approach to identify any undeclared income. Despite the efforts to help her, the employer did not note any capacity or potential to do this work. Therefore, the management team believed that extending her probation would not make a difference. According to Ms. St-Louis, the employer had everything that it needed to decide on the probation.

I. The rejection on probation

[106] Ms. St-Louis explained that she had to recommend to Ms. Dubé whether to hire trainees or reject them on probation, based on their performance. In the case of the trainees for which Ms. Therrien was responsible, she and Ms. St-Louis regularly discussed their performance. Ms. St-Louis recommended to Ms. Dubé not to hire the grievor.

[107] Ms. Dubé explained that she agreed with that recommendation for the following reasons. She considered that having 10 months to observe the grievor's performance was enough to make an informed decision about her competencies as an auditor during her probation, and she familiarized herself with the summary prepared by Ms. St-Louis and the evaluation report marking 8 months of employment for the grievor (dated June 2).

[108] She said that the issue of the grievor's competencies was serious. She explained that the grievor's work required her to think analytically, to understand a situation by reducing it to its simplest parts and by following the steps to determine the

consequences, questions, or problems. However, the grievor did a lot of unnecessary work in her files. Therefore, she struggled to complete her audits.

[109] In particular, she failed to grasp the concept of net worth. Auditors must be able to assimilate the important concepts in their work. Furthermore, given the constant legislative changes, auditors must be able to assimilate new data quickly. Otherwise, their work will be replete with errors.

[110] In short, the grievor's audit planning was poor, as were her analytical thinking and her understanding of the rules. Despite the reminders, peer mentoring, and additional training she was offered, she failed to retain the important information and to demonstrate the competencies that an auditor must possess.

[111] Ms. Dubé explained that in all cases, a decision had to be made before the end of the 12-month probationary period. Given the grievor's unsatisfactory performance after 10 months of work, Ms. Dubé decided that rejecting her was the right decision. She did not consider the grievor's ADHD. She based the decision solely on the grievor's unsatisfactory performance.

[112] In a letter dated July 24, 2015, the grievor was informed that she had been rejected on probation because of her unsatisfactory performance. The rejection took effect on August 7, 2015, at the end of her work schedule. The letter was signed by the acting director of the Central and Southern Quebec Tax Services Office, who replaced Ms. Dubé then, as she was on leave. Ms. Dubé explained that she decided to reject the grievor. However, in her absence, her replacement signed the rejection letter.

J. The next two grievances

[113] On August 14, 2015, the grievor filed two more grievances, one against the decision not to extend her probation, and the other against the decision to reject her on probation. In them, she alleged a ground of discrimination.

[114] On July 27, 2016, the two grievances, as well as the one filed on June 23, 2015, were denied at the final level of the grievance process.

[115] On September 27, 2016, the grievor, represented by her union, referred the three grievances to adjudication.

K. The third medical certificate

[116] The grievor obtained a medical certificate dated August 5, 2015, which clarified the one of July 7, 2015. On July 7, the physician recommended medical leave beginning that day, to be reassessed on August 10. On August 5, the physician recommended indefinite medical leave.

IV. Summary of the arguments

[117] The parties asked the Board that issues of redress and mitigation measures not be addressed during this hearing. They requested that an extension be given for that purpose, if necessary. I granted the request.

A. For the employer

[118] The employer began by discussing the issue of the rejection on probation, which included a discrimination allegation. It went on to address the additional discrimination questions with respect to the grievor's June 2, 2015, evaluation and the decision not to extend her probation.

[119] The employer argued that a probationary period allows it to evaluate whether an employee has the abilities required to hold the position in question. In that respect, it brought to my attention three decisions: *Kagimbi v. Canada (Attorney General)*, 2014 FC 400 at para. 34 ("*Kagimbi* (FC)"; upheld in *Kagimbi v. Canada (Attorney General)*, 2015 FCA 74); *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134 at paras. 107 and 109; and *Wrobel v. Deputy Head (Canada Border Services Agency)*, 2021 FPSLREB 14 at para. 98. I reviewed those decisions and those that were later brought to my attention.

[120] The employer argued that the Board has limited jurisdiction in cases of rejection on probation. As long as the employer establishes a legitimate employment-related reason to reject an employee, an adjudicator cannot intervene. In that respect, it brought to my attention the following decisions: *Kagimbi* (FC) at para. 32; *Lavoie v. Canada Revenue Agency*, 2012 PSLRB 124 at para. 89; and *Souaker v. Canadian Nuclear Safety Commission*, 2009 PSLRB 145 at para. 129.

[121] The employer argued that it presented evidence, including clear testimony from Ms. St-Louis and Ms. Therrien, which satisfactorily demonstrated that it ended the

grievor's probation because of significant performance deficiencies. It was not satisfied with her work. She made errors in financial data accuracy and did not understand the analysis process that auditors must complete in their work.

[122] Furthermore, it argued that she failed to discharge her burden of demonstrating that her ADHD was a reason for her rejection on probation.

[123] It argued that she was hired through an auditor trainee program. She was subjected to a probationary period. Several people advised her and trained her, including Ms. Bourgeois and Ms. Therrien. They testified that she received several weeks of extensive classroom training at the start of the program. The training was given over several months, during which different instructors taught her the different aspects of her job. Ms. Bourgeois mentored the grievor. Ms. Therrien supervised her and assisted her.

[124] On November 19, 2014, Ms. Therrien explained the program's performance expectations to the grievor, which were adduced as evidence. On January 16, 2015, the grievor received her first evaluation, which identified the successes and weaknesses in her work. On April 8, 2015, in her self-evaluation, she expressed that she was satisfied with the support and coaching that she received from her peers. As she was struggling to complete her tasks, she received additional training on April 16 and 28, 2015. On June 2, 2015, Ms. Therrien gave her a performance evaluation noting the weaknesses in her work and the fact that she was behind in her files.

[125] The employer stated that on June 3, 2015, for the first time, the grievor informed Ms. Therrien that she had ADHD. She said that working in a quieter environment might help her. Therefore, Ms. Therrien suggested moving her workstation to a quieter area, and she agreed. On June 4, 2015, she was moved to a quieter area.

[126] The employer stated that at that time, it also asked the grievor if it could contact her treating physician to determine whether more accommodations were required. She replied that she did not think that her ADHD prevented her from performing her duties and that she did not think that her physician would restrict the audit tasks that she could perform.

[127] On June 23, 2015, she grieved her performance evaluation of June 2, 2015. Her last day of work was June 26, 2015.

[128] The employer specified that Ms. Therrien regularly advised the grievor on her audit work and corrected it. The reports adduced as evidence show that the grievor regularly received comments and advice on her work plans.

[129] On July 3, 2015, the employer received a medical certificate suggesting that the grievor was entitled to special treatment because of her ADHD and that four accommodations could be made.

[130] The employer considered that those four accommodations had already been offered to her.

[131] On July 24, 2015, it gave her the rejection letter.

[132] On August 14, 2015, she filed the two other grievances, against the refusal to extend her probationary period and the decision to terminate her employment.

[133] The employer argued that the Board does not have jurisdiction on the sole issues of the performance evaluation and the decision not to extend her probationary period. However, because she alleged discrimination during the probationary period, it can consider whether the employer acted in bad faith and whether a ground of discrimination contributed to the partially negative performance evaluation or to the decision not to extend her probation.

[134] Specifically, the employer argued that in a case of a rejection on probation, the Board's jurisdiction is limited to determining whether the rejection was a sham or camouflage or that it was made in bad faith or in a discriminatory manner. However, it may not examine the merits of the rejection.

[135] The employer added that the trainee program was comprehensive. Under it, the performance evaluation, the refusal to extend the probationary period, and the rejection on probation were connected. Furthermore, one event led to the next, and the result was a logical sequence. Therefore, one decision led to another decision, and so on. In short, according to the employer, this case has these three issues to decide:

1) Did a ground of discrimination contribute to the decision of June 2, 2015, which stated that the grievor only partially met the program's expectations?
2) Did a ground of discrimination contribute to the decision not to extend her probationary period?
3) Did the employer terminate her employment for employment-related reasons, or did she demonstrate that it was discrimination, bad faith, camouflage, or a sham?

[136] With respect to the third question, it argued that above all, the employer had to establish that the rejection was related to the employment, not to another reason. It argued that it satisfied the following four factors of the probationary condition:

1) that the grievor was on probation;
2) that the probationary period was still in effect as of the termination;
3) that she received notice or pay in lieu of notice; and
4) that she received a letter stating the reasons for which she was rejected on probation.

[137] Then, it argued that she had the burden of proof and that she had to demonstrate that the decision was a sham or camouflage or that it was made in bad faith or based on a ground of discrimination.

[138] In that respect, it brought to my attention the following decisions: *Currie v. Deputy Head (Department of Fisheries and Oceans)*, 2010 PSLRB 10 at paras. 47 to 49; *Kirlew v. Deputy Head (Correctional Service of Canada)*, 2017 FPSLREB 28 at para. 130; *Malik v. Deputy Head (Canada Border Services Agency)*, 2020 FPSLREB 64 at paras. 121 and 122; *Wrobel*, at para. 96; and *Kagimbi* (FC), at para. 29.

[139] It argued that evidence of a sham, camouflage, or bad faith must be real (see *Kirlew*, at para. 133). Good faith is always presumed first (see *Lavoie*, at para. 88; and *Tello*, at para. 127).

[140] According to the employer, to find that discrimination was a factor in its decision, the grievor had to establish a *prima facie* case of discrimination, namely, evidence that covered the allegations made and that if those allegations were believed, was complete and sufficient to justify a verdict in the grievor's favour in the absence of an answer from the employer. It stated that the Board ruled that three criteria must be met for this purpose, which are that 1) the person has a characteristic that is a prohibited ground of discrimination under the *Canadian Human Rights Act* (R.S.C.,

1985, c. H-6; "*CHRA*"), 2) the person suffered adverse treatment, and 3) those two criteria were linked (see *Kirlew*, at paras. 131 and 141; and *Wrobel*, at para. 107).

[141] The employer argued that it demonstrated that its decision to terminate the grievor was employment related. It specified that Ms. St-Louis explained that the grievor was behaving not as an auditor but rather as a bookkeeper. Ms. Therrien confirmed it and added that the grievor made the same mistakes repeatedly, rather than carrying out analyses. By mid-April, Ms. Therrien began to have concerns about the grievor's performance, so she offered the grievor additional training with VQ. It was demonstrated that the grievor also had tools or solutions available to her, including the training manual and the option to ask her colleagues questions. The training and performance objectives were clearly communicated to her in November, and one of the expectations was that each trainee would audit three files independently. She could not meet that objective. Furthermore, it was clear that she was not on track to meet it within two months (the time left in the probationary period before she went on sick leave).

[142] Ms. Dubé explained that she decided to terminate the grievor after reviewing her documented evaluations and discussing with her management team. She had sufficient information to conclude that the grievor was not performing well enough and that she would not be able to turn things around within 2 months. In her opinion, the evaluations showed that the grievor was unable to incorporate the concepts taught over the prior 10 months. She had seen the same weaknesses in the grievor's performance since January. The grievor's struggle to understand and complete the work at hand was problematic, given the constant changes to policies, regulations, and the *ITA*.

[143] According to the employer, Ms. Dubé explained that the grievor's ADHD did not affect her decision because the medical certificate that she received recommended certain accommodations but did not identify any work limitations. In addition, the first three requested accommodations had been in place since the beginning of her probationary period, and the fourth had been in place since June 4, 2015, when her workstation was relocated. Therefore, her evaluation was appropriate and fair. The employer argued that the evidence clearly showed that its four witnesses had legitimate concerns about the grievor's work and that her ADHD was not a factor.

[144] The employer argued that the grievor did not meet her burden of proof. She failed to show a sham, camouflage, bad faith, or discrimination. She did not establish a *prima facie* case of discrimination. In its opinion, the discrimination allegations were not credible, and they were made late in the process when she realized that she could lose her job.

[145] In fact, when she was hired, she was asked to inform the employer of any required accommodations. She mentioned nothing. Later, despite her struggle to understand a key audit method, she did not mention her ADHD. Only when she saw in her evaluation that she could lose her job did she bring up her disability. On June 2, 2015, the employer was unaware of the grievor's disability. Thus, no connection could be made between her medical condition and the evaluation.

[146] The employer clarified that ADHD is not visible. It must be informed to be aware of it. However, in this case, when the grievor disclosed her ADHD, she also told the employer that she did not believe that her condition affected her performance. At the hearing, she also stated that she did not believe that her ADHD affected her university studies.

[147] In the circumstances, since the medical certificate mentioned no limitations in the grievor's ability to do her job, and since she stated that her ADHD did not affect her ability to perform her job, the employer argued that it could fairly assess her abilities.

[148] It also noted contradictions in the testimonies at the hearing. It argued that the Board must assess the credibility of witnesses and that the applicable criterion is set out in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), which is noted at paragraph 137 of *Souaker*. Thus, the testimony accepted must be the most consistent with the balance of probabilities and "… which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

[149] In this case, according to the employer, the testimonies made before the Board have four contradictions.

[150] The first contradiction involves the conflicting testimonies about using the SVP Win software. According to the employer, both Ms. Therrien and Ms. Bourgeois

testified that the grievor did not use it, but she said that she did. According to the employer, the testimonies of its witnesses are more credible. Specifically, Ms. Bourgeois had no reason to lie; the outcome of the issue had no effect on her. According to the employer, the witnesses explained that using the software reduced the number of errors in files. That was why the employer felt that it was important for the auditors to use it and why it was counterproductive for the grievor not to use it.

[151] The second contradiction involves the checklists that Ms. Therrien prepared, which the grievor described as hers. According to the employer, the documents showed that they included Ms. Therrien's recommendations and questions about the grievor's work.

[152] The third contradiction involves the grievor's work methods. She stated that she was told that she could use her preferred work method. However, Ms. Therrien stated that the grievor did not understand the pivot-table work method and net worth and that her work required her to use that method. According to Ms. Therrien, it was preferred, for consistency purposes. It should be used since the employer has the right to establish the work methods required for a task.

[153] The fourth contradiction is about the interaction between the grievor and Ms. Therrien after the grievor filed her first grievance. According to the employer, the Board must consider whether, during that interaction, Ms. Therrien retaliated against the grievor in a way that made her feel uncomfortable. It stated that that was not so. Immediately after that, they agreed to drive together in the same car to a taxpayer's home, and they went together. Furthermore, it stated that filing a grievance is part of a normal public-service employment framework.

[154] With respect to its decision to refuse to extend the probationary period, the employer argued that the grievor failed to prove that her ADHD played a role in that decision. It argued that the Board has no jurisdiction over managing the probationary process (see *Malik*, at para. 123) and that it had no obligation to extend the probationary period if it felt that it had sufficient information to assess the grievor's skills (see *Souaker*, at para. 153).

[155] According to the employer, the management team explained why, after 10 months of employment, i.e., at the end of June 2015, it was able to determine that the grievor did not meet the objectives of her position in the program.

[156] In the alternative, the employer argued that it did not discriminate and that it fulfilled its duty to accommodate. The duty to accommodate is neither absolute nor unlimited. The employee has a role to play in the search for a reasonable compromise (see *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at paras. 22 and 38).

[157] The medical certificate dated June 17, 2015, recommended four accommodations. Three were offered to the grievor when she was hired and throughout her probationary period, which the documentary evidence showed. In addition, her physician did not identify any limitations on the tasks that she could carry out. And the fourth was put in place as soon as she mentioned it and before the medical certificate requested it. Her workstation was moved to a quieter location. However, she did not explain why her list of accommodations was not provided earlier (see *Currie*, at paras. 23 and 56).

[158] The employer argued that its witnesses explained that despite moving the grievor's workstation, the management team did not see any improvement in her performance in the month that followed.

[159] Therefore, the employer felt that it met its duty to accommodate the grievor. Even with the measures in place, she did not meet her performance objectives, and it was clear that she would not be able to meet them in the time remaining in the probationary period. Therefore, it chose to terminate her employment during that period.

[160] Thus, the employer argued that it established on a balance of probabilities that it terminated the grievor's employment for reasons related solely to the job. It argued that she did not meet her burden. She did not establish a connection between her condition and performance evaluation and the decision to reject her during her probation.

B. For the grievor

[161] The grievor stated that she agreed with the issues that the employer presented and the applicable burdens of proof already presented. She did not dispute that the Board has limited jurisdiction over rejections on probation.

[162] All three grievances have a discrimination allegation, and the last grievance challenges the rejection on probation. She chose to address all the issues together (the June 2 performance evaluation, the refusal to extend the probationary period, and the rejection on probation), since the June 2 evaluation prompted the decisions made later.

[163] The grievor also drew my attention to article 19 of her collective agreement, the no-discrimination clause.

[164] Similarly, she brought to my attention the decision in *Reeves v. Deputy Head (Department of National Defence)*, 2019 FPSLREB 61 at paras. 171 to 174 and 194. In it, the Board found that the employer did not provide a reasonable explanation for the adverse treatment that the grievor suffered. The grounds stated in the rejection-on-probation letter were insufficient to justify the decision in it, given that the apprenticeship period had not ended, that the grievor's performance had in fact been improving, and that a fellow apprentice had been allowed to take a relevant exam a second time. In that decision, the Board also found that discrimination had occurred, specifically that racial discrimination must have been at least a factor in building such a negative image of the grievor. The Board noted the absence of an explanation for the employer's actions and the evident animosity of some managers. It added that the employer should not have ended the grievor's probation before the original scheduled date; nor should it have denied him the opportunity to retake the relevant test.

[165] According to the grievor, the facts in this case are similar to those in *Reeves*. She said that no employment-related reason was behind her rejection on probation. She referred me to the criteria summarized at paragraph 174 of *Reeves* that reads as follows: "Therefore, the question at issue is whether the grievor's rejection on probation was employment related." In that case, the Board also stated the following at paragraph 172: "I find that I am properly seized of this grievance to the extent it is based on a violation of article 19 of the collective agreement, the anti-discrimination clause."

[166] To support her argument that the Board should be seized of this grievance because it is based on the violation of article 19 of the collective agreement, the no-discrimination clause, the grievor also brought *Souaker* to my attention. In that decision, the Board found that it had jurisdiction to decide Mr. Souaker's grievance and that his grievance had been validly referred to adjudication under s. 209(1)(a) of the *FPSLRA*.

[167] She argued that the employer decided to terminate her for the reasons specified in the July 24, 2015, letter. However, she argued that even if the Board finds that those reasons satisfy the test set out in *Tello* and as such satisfy the initial burden of proof of showing that the decision to terminate the grievor was based on employment-related reasons, this would not end the consideration of the issue. The question remains as to whether there was bad faith.

[168] She argued that the termination was not based on a legitimate employment-related reason but was made in bad faith. She argued that this conclusion stemmed from the following observations.

[169] First, she noted that the June 2, 2015, evaluation was late as it was for the period ending May 2, 2015. Thus, the original 12-month probationary period was reduced by 1 month, which is significant in a 12-month period. That delay meant that she had insufficient time to complete the program's requirements. Similarly, the January 2, 2015, evaluation issued on January 10 meant that she had 1 less week to improve.

[170] Second, she noted that the employer did not give her the means to meet the program's objectives. In an evaluation, it wrote that her work was akin to bookkeeping, which was not required or useful in an audit. However, the grievor argued that she lacked guidance and support. Her job description stated that trainees should consult their guides and that support would be provided. However, her mentor, Ms. Bourgeois, was not in the office much as she often carried out field audits.

[171] Ms. Therrien was also very busy and did not have time to guide the grievor. As a result, she did not receive support and guidance. The management team failed to ensure that she was on the right track. She was left on her own.

[172] To support her allegation that the employer did not provide her with the means to achieve her goals, she also argued that her file notes included in the T2020 forms completed for each file listed every action she took for each file. She argued that those documents did not prove that she received regular support from her supervisor. She noted that although the employer argued that those notes identified all the times that she consulted her supervisor, they did not prove that Ms. Therrien guided her over the course of her audits. Rather, the notes simply indicated that she submitted each correspondence to her supervisor before sending it to the different taxpayers.

[173] To further support her allegation that the employer did not provide her with the means to achieve her goals, she argued that she requested a mentor other than Ms. Bourgeois because she felt that she was not receiving as much help as were the other trainees. For example, she explained that another mentor would have advised her to return unordered documents to the taxpayer rather than try to understand them. But Ms. Bourgeois did not suggest that to her.

[174] Third, with respect to the employer's required work method, the grievor argued that the pivot table was a new work method that new auditors used and that the more experienced auditors did not yet use it. However, when she worked on Ms. Bourgeois's files, she had to use the old method that Ms. Bourgeois used because Ms. Bourgeois was trained on the new method only later. The grievor was told that she could use her preferred working method on her own files.

[175] Fourth, she argued that the employer was slow to provide her with adequate supervision, which she argued Ms. Therrien's testimony confirmed. Specifically, Ms. Therrien testified that only in April, the seventh month of the probationary period, did she begin to have concerns about the grievor's performance.

[176] According to the grievor, this showed that she did not receive adequate supervision. Had she been properly mentored, her issues (which she did not dispute) would have been identified earlier. She added that only on April 16 and 28 did she receive additional training on the pivot-table work method and on net worth. Only then did the employer realize that she had not grasped the material taught at the beginning of her probationary period.

[177] To further support her allegation that the employer delayed providing her adequate supervision, she argued that the way she performed some of her duties had not yet been evaluated in her June 2, 2015, evaluation. Specifically, in that evaluation, Ms. Therrien noted that because she was not far enough along in her file, some items were marked "[translation] unable to assess". According to the grievor, it was another indication that she was not sufficiently mentored while on probation.

[178] Similarly, she criticized the long delays correcting files. For example, the one referred to as the "Jean" file, which she submitted on February 20, 2015, was not discussed in a meeting until March 27, 2015.

[179] The grievor noted that in her eight-month evaluation report, Ms. Therrien specified that substantial improvement was required. Yet, the grievor argued that she was not given the opportunity to improve after May 2, 2015. From that date on, the employer provided her with no improvement plan, new tools, or additional mentoring.

[180] The grievor argued that in addition to providing tools, the employer should have given her time to improve her performance. Ms. Therrien was hopeful that the grievor could improve, but no additional mentoring was offered to her. However, she noted that according to the document entitled "[translation] Performance Management Procedures", dated April 1, 2015, under section 5.4, the employer had the following obligations:

> [Translation]
>
> ***5.4 Managing employee performance during a probationary period***
>
> *Managers must actively monitor and evaluate an employee's performance during a probationary period.*
>
> *At the beginning of the employee's probationary period, the manager must do the following:*
>
> - *explain the performance required to achieve a level 3 performance;*
> - *inform an employee on probation that ongoing monitoring and a formal performance evaluation at the end of the probationary period will be used to determine if the employee is qualified to continue in the position for which the employee was hired;*
> - *ensure that employees receive the necessary training, tools, and support to meet the requirements of their positions.*

> *If the employee's performance results are below level 3, the manager must do the following:*
>
> · *inform the employee immediately;*
>
> · *provide the employee with a reasonable opportunity to improve performance.*
>
> *If efforts to help an employee improve his or her performance do not successfully raise the performance to the required level 3, the manager must contact a performance management consultant for guidance.*
>
> …
>
> [Emphasis in the original]

[181] The grievor argued that she disclosed her ADHD and her requirement to work in a quieter area because she was shocked on receiving her evaluation on June 2, 2015, which was partially negative. In her opinion, her performance had improved. She argued that on June 4, 2015, she had very little time to consider the employer's request to consult her physician about whether accommodations were necessary, given her condition.

[182] She stated that Ms. Therrien's June 5, 2015, email, informing her that if she did not have specific limitations, she would have to meet the program's objectives and conditions, demonstrated that the employer did not provide her with a reasonable opportunity to improve.

[183] She argued that from the moment she disclosed her ADHD, the employer changed its attitude toward her. She said that both Ms. St-Louis and Ms. Therrien became closed off to her. In her June 15 email, Ms. St-Louis sent Ms. Therrien a summary of her meeting with the grievor. According to the grievor, Ms. St-Louis was on the defensive. She stated that this about the grievor: "[translation] … wants to blame us." Then, on June 25, 2015, Ms. Therrien questioned the grievor about some of her expenses, and copied Ms. St-Louis on that message.

[184] The grievor insisted that at that time, she asked the employer to assign her additional files, as her file was awaiting correction. Therefore, it was difficult for her to improve her performance.

[185] She also argued that although Ms. Therrien accompanied her on a visit to a taxpayer's home on June 26, 2015, the accompaniment should have happened earlier. For that reason, she was not evaluated beforehand on that task.

[186] With respect to her request to extend her probationary period, the grievor argued that the offer letter stated that an extension would be granted for the period in which she did not perform the position's duties. Since her last day on the job was June 26, 2015, she argued that the employer should have extended her probationary period. Her absence from that point on was for annual leave and sick leave.

[187] The grievor submitted that in *Gill v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 55 at paras. 112 to 118 and 139 to 144, the Board addressed a similar issue. It found that the employer terminated the grievor's employment without cause because his probationary period had been extended 41 days beyond its scheduled end, and he was terminated the following day.

[188] The grievor argued that in her case, after her workstation was moved, the employer should have re-evaluated her performance to determine if any improvements had been made. However, she had very little time to improve between June 4 and 26, 2015.

[189] She added that extending her probationary period would not have imposed undue hardship on the employer. Its only reason for not extending it was that the management team did not think that she could improve sufficiently before the 12 months ended. However, she said that the evaluation period was neither sufficient nor reasonable.

[190] She said that when she disclosed her ADHD and a union representative helped her, the employer decided not to extend her probationary period and to terminate her employment.

[191] She brought to my attention *Dyson v. Deputy Head (Department of Fisheries and Oceans)*, 2015 PSLREB 58 at para. 138, which reads as follows:

> *[138] While the case law is quite clear that the employer must state the reasons of its dissatisfaction as to the employee's suitability, there must be something to the employment-related reason relied on by the employer. While I agree that the employer need not*

> *establish a* prima facie *case of just cause for the rejection on probation, there must be some legitimate reason provided. It is insufficient merely to point to what could ordinarily be considered an employment-related reason as the reason for the rejection without some substance behind that reason. When there is no substance behind the alleged reason, that is evidence of a sham or camouflage and indeed bad faith and a contrived reliance on the rejection on probation provisions of the* PSEA.

[192] The grievor argued that the employer could not terminate her employment without just cause. For those reasons, she asked the Board to declare that it is appropriate for it to be seized of this grievance because its ground is the violation of article 19 of the collective agreement, the no-discrimination clause, and because the termination was arbitrary and discriminatory, and it violated article 19.

V. Reply

[193] The employer replied that the management team's decisions did not reflect a change in attitude toward the grievor and the disclosure of her ADHD. Rather, the management team had all the information it required to make an informed and reasonable decision about her probation. In her 10 months with the Agency, she did not make sufficient progress in her work to be able to meet the program's objective of completing 3 files independently by the end of the 12-month period. It was a reasonable conclusion in the circumstances.

[194] The employer also replied that *Gill* is distinguished from this case because the *Regulations Establishing Periods of Probation and Periods of Notice of Termination of Employment During Probation* (SOR/2005-375) do not apply to the employer.

VI. Reasons

[195] The Board derives its authority from the *FPSLRA*. Sections 209(1)(d) and (3) provide as follows:

> ***209 (1)*** *An employee … 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*
>
> …
>
> ***(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.*

…

> ***(3)*** *The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).*

[196] In their observations, the parties agreed as to the applicable burdens of proof, in particular the burden that the employer would have to satisfy only the following four factors of the probationary condition: (1) the grievor was on probation, (2) the probationary period was still in effect as of the termination, (3) she received notice, and (4) she received a letter stating why she had been rejected during probation. By that logic, the burden would then be on the grievor to show that the decision was a sham or camouflage or that it was made in bad faith or based on a discriminatory ground.

[197] However, I am not sure that that is the proper analytical framework for this issue. That method of analysis, set out at paragraph 111 of *Tello*, was developed for termination grievances filed by public servants in the core public administration. The *Tello* case analyzed the impact of s. 211 of the *FPSLRA* when analyzing burdens of proof. Section 211 provides that terminations under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "*PSEA*"), including terminations during the probationary period (ss. 61 and 62 of the *PSEA*), may not be referred to the Board for adjudication.

[198] However, the Agency is not subject to the *PSEA*. In addition, on May 28, 2015, it was designated (SOR/2015-118) under s. 209(3) of the *FPSLRA*. As a reminder, s. 209(3) provides that the Governor in Council may, by order, designate any separate agency for the purposes of s. (1)(d). Conversely, s. (1)(d) provides that an employee may refer to adjudication an individual grievance about his or her termination (for any reason that does not relate to a breach of discipline or misconduct) in the case of an employee of a separate agency designated under s. (3).

[199] The Agency was designated as a separate agency before the grievor was terminated on July 24, 2015, before she filed her grievances on June 23 and August 14, 2015, and before her grievances were referred to adjudication on September 28, 2016. That designation means that her grievances about her termination from the Agency could be referred to the Board, whether they are discipline related (s. 209(1)(b) of the *FPSLRA*) or for any other reason (s. 209(3)).

[200] Consequently, it is not clear that the analytical framework applicable to the core public administration, as set out in *Tello*, applies to the circumstances of this case. The Agency was indeed designated as a separate agency before the events in this case.

[201] To determine the appropriate analytical approach, it may be appropriate to recall that the one developed in *Tello* resulted from the fact that the new provision (s. 61 of the *PSEA*, which came into force in 2005) for those appointed on probation removed the requirement to provide a reason for a rejection on probation. Section 61, which applies to employees of the core public administration, reads as follows:

> ***61 (1)*** *A person appointed from outside the public service is on probation for a period*
>
> > ***(a)*** *established by regulations of the Treasury Board in respect of the class of employees of which that person is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act*; or*
> >
> > ***(b)*** *determined by a separate agency in respect of the class of employees of which that person is a member, in the case of an organization that is a separate agency to which the Commission has exclusive authority to make appointments.*

[202] In *Tello*, the Board inferred that that change to the law reduced the burden of proof on a deputy head, which no longer had the burden of showing just cause for a rejection on probation but had to satisfy only the four factors of the probationary condition (see paragraph 196).

[203] No provisions similar to s. 61 of the *PSEA* and s. 211 of the *FPSLRA* apply to the Agency. It is known that ss. 12(2) and (3) and s. 12.1 of the *Financial Administration Act* (R.S.C., 1985, c. F-11; "*FAA*") require that terminations by the Agency be with cause. Those provisions provide as follows:

> ***12 (2)*** *Subject to any terms and conditions that the Governor in Council may direct, every deputy head of a separate agency, and every deputy head designated under paragraph 11(2)(b), may, with respect to the portion of the federal public administration for which he or she is deputy head,*
>
> …
>
> > ***(c)*** *establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties; and*

> ***(d)*** *provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct.*
>
> ***(3)*** *Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(c), (d) or (e) or (2)(c) or (d) may only be for cause.*
>
> …
>
> ***12.1*** *Section 11.1 and subsection 12(2) apply subject to the provisions of any Act of Parliament, or any regulation, order or other instrument made under the authority of an Act of Parliament, respecting the powers or functions of a separate agency.*

[204] Therefore, I note that the standard for cause applies in matters subject to ss. 12(2) and (3) of the *FAA* and that that requirement is not altered by the Agency's enabling statute. Section 51(1)(g) of the *Canada Revenue Agency Act* (S.C. 1999, c. 17; "*CRAA*") provides that the Agency may terminate an employee and reads as follows:

> ***51 (1)*** *The Agency may, in the exercise of its responsibilities in relation to human resources management,*
>
> …
>
> ***(g)*** *provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part ….*

[205] Since the analytical framework developed in *Tello* does not apply to the Agency, it follows that the analytical framework applies that was in place before the changes were made to the *PSEA* (the changes made in the new version of s. 61). This means that in addition to meeting the four factors of the probationary condition (see paragraph 196), the employer had to show just cause for the termination in this case, in the context of the probation.

[206] The burden then shifted to the grievor to show that there was no reason for the rejection on probation. In other words, her burden was not necessarily to establish that her termination was a contrived reliance on s. 51(1)(g) of the *CRAA*, a sham, or a camouflage (that is, the decision was not based on a bona fide dissatisfaction as to her suitability; see *Tello*, at para. 111), but rather, it was to establish that no "[translation]

legitimate employment-related reason" justified terminating her during the probationary period.

[207] Although the distinction between the analytical framework that the parties proposed and what I propose may seem subtle, it is significant. A burden shifts.

[208] That said, for the reasons that follow, I conclude that the employer met its additional burden and that it presented a reason to justify terminating the grievor during her probationary period. In turn, I find that the grievor failed to rebut that evidence.

A. Issue 1: Did the employer demonstrate that the grievor was still on probation and that her termination was effected for cause?

[209] For the reasons that follow, I agree that the employer has not only satisfied the four basic factors related to the probationary condition (see paragraph 196) but also presented valid employment-related reasons for the termination.

[210] With respect to the first four factors, I note the following. First, between September 2, 2014, and August 7, 2015, the grievor was on probation as a trainee, and her position was classified SP-04 in the ALP.

[211] Second, the probationary period was still in effect when she was terminated on August 7, 2015. As stated in her offer letter, she was subject to a probationary period of up to 12 months at the Agency. In addition, the July 24, 2015, rejection letter advised her that her employment had ended during the probation.

[212] Third, on July 24, 2015, the grievor received official notice that her employment was being terminated effective August 7, 2015.

[213] Fourth, the July 24, 2015, letter stated why she was being rejected on probation. It included the following:

> [Translation]
>
> …
>
> *On June 2, 2014, you received an employment letter appointing you to the position of trainee, Audit Learning Program, at our Trois-Rivières office. That letter specified that you were on probation for a period of 12 months, starting September 2, 2014. That period gives the employer an opportunity to assess the*

> *suitabilities of new employees for the positions for which they were hired.*
>
> *In accordance with the powers vested in me by the Commissioner of the Canada Revenue Agency, pursuant to s. 51(1)(g) of the* Canada Revenue Agency Act*, I inform you by this letter of your rejection on probation. This decision was prompted by the fact that you have not been able to meet the performance objectives of your position, despite meetings and follow-ups to try to improve the situation.*
>
> …

[214] In this case, I must also consider the evidence that the employer presented to support its claim that the grievor was not meeting the performance objectives required by her position as an audit trainee.

[215] According to the employer's evidence, the grievor received training that spanned several weeks, assistance from a mentor, and help from her supervisor and co-workers to properly perform her audit-trainee duties. In several evaluation reports, beginning in April 2015, the management team documented its concerns that she was struggling to apply her analytical thinking. Ms. Therrien, Ms. St-Louis, and Ms. Dubé also testified that they found that the grievor's work contained errors, that its quality was inconsistent, and that ultimately, it did not prove valid and reliable. They explained that analytical thinking is a basic skill for auditors but that the grievor had not properly developed that skill. I accept those testimonies as credible.

[216] Specifically, the evidence shows that when she started, the grievor was taught the indirect verification of income approach and the pivot-table method, which are used to detect unreported income and determine net worth. Her job required using those work methods. The employer's witnesses testified and documented that she did not properly apply the work methods, which affected the quality of her analyses. As a result, on April 16 and 28, 2015, she received additional training on it.

[217] Despite the additional training, through the end of June 2015, while correcting the grievor's work, Ms. Therrien found that the grievor continued to struggle in this area. She had a hard time integrating the concepts and providing adequate analyses.

[218] The employer's expectations under the ALP were clearly communicated to the grievor. I have no reason to believe that those performance expectations were not justified. Before hiring a new employee, an organization may wish to know that

person's strengths and weaknesses and assess his or her skills. In this case, the employer felt that the grievor's analytical thinking skills were not up to the standard required to perform an auditor's work.

[219] It is true that the evidence is contradictory as to the level of help and assistance offered to the grievor. On one hand, she claims that she did not receive any assistance. On the other hand, the documentation and testimonies of the employer's representatives indicated that they met with her several times during her probationary period, to correct her work and review her performance.

[220] In addition, the employer introduced into evidence the ALP performance expectations that were given to the grievor on November 19, 2014, and the job description of a trainee in the ALP (SP-04), which outlines the activities and duties to carry out. From April 2015, it advised her that her analyses were inadequate and that she needed to incorporate the work methods that had been taught.

[221] Then, the employer brought to her attention the problems with her analytical thinking. It informed her that it was essential that she leave the bookkeeping role and that she adopt an auditing role.

[222] In addition, the employer demonstrated that the trainees had to integrate the work methods that were taught so that they could deploy optimally and perform the audit tasks and activities that are central to the Agency's mission. In particular, the employer's witnesses testified that the pivot-table method should be used, for consistency. I note that the employer has the right to establish the work methods required for a task.

[223] The employer also submitted the grievor's work evaluations, which described the deficiencies in her work. It decided to reject her on probation because she did not meet the ALP's requirements. It felt that it had sufficient information to make an informed decision that she was not able to successfully complete the program's requirements. Her hiring was conditional on her achieving that objective.

[224] In summary, I believe that the employer presented compelling evidence that the decision to terminate the grievor's employment was based on actual dissatisfaction

with her ability to meet the responsibilities of an Agency auditor. Therefore, it presented an employment-related reason for her termination during her probation.

B. Issue 2: Did the grievor establish that there were no grounds justifying her termination during her probationary period?

[225] The burden shifted to the grievor to show that the decision to terminate her employment during the probationary period was not based on a reason justifying her dismissal. Therefore, she attempted to show that the employer did not provide a good-faith reason for her termination because in its opinion, she does not have the necessary skills to perform the duties of her position.

[226] The grievor tried to convince me that her job performance was acceptable and that any shortcomings on her part were due to circumstances caused by the employer. In her opinion, she should not be held accountable for her struggles completing her auditing tasks, and I should assume that the employer caused her difficulties, that it acted in bad faith, or that her rejection on probation was a sham or camouflage.

[227] However, bad faith cannot be presumed in law; it must be proven.

[228] In this case, the evidence does not allow me to conclude that the errors identified in the grievor's work were unrealistic or that the employer did not act reasonably. Ample evidence in the file shows that the grievor struggled to apply her analytical thinking, which led to irregularities in her work.

[229] I have no doubt that the grievor is trustworthy. However, I believe that her perception that she did not receive sufficient training and supervision is based on an unreasonably high expectation. I believe that she received extensive basic training at the beginning of the program and reasonable assistance after that. However, the evidence indicates that her performance did not meet the ALP's expectations.

[230] The grievor disagreed with the findings in her evaluations. She stated that had she been properly supervised, her challenges would have been identified sooner. In her opinion, she experienced some difficulties, but she did not receive adequate and timely assistance.

[231] Therefore, I must assess the credibility of the witnesses and determine the version of the facts that appears to me the most probable for all the evidence. The parties referred me to the criteria set out in *Faryna*.

[232] Based on an analysis of all the evidence, I find that the version of events presented by the employer's witnesses is more likely and probable than the grievor's version. In my opinion, the case rests on verifiable evidence that the employer presented that the grievor struggled to apply her analytical thinking and that she did not meet the ALP's requirements.

[233] In summary, the employer established that it had significant concerns about her performance. It demonstrated that despite all the training it offered her, she had problems mastering the concepts that were taught and performing reliable analyses. That evidence presents a good-faith reason with respect to her ability to perform the duties of her position.

[234] In summary, having analyzed all the evidence, I find that the grievor's perspective that her job performance was acceptable despite the difficulties encountered and that the employer caused any shortcomings on her part is inconsistent with the preponderance of the evidence. On the contrary, her evaluations adduced as evidence and the testimonies of the employer's representatives concurred that she was not on track to meet the ALP's expectations.

[235] In that respect, I note that the trainees had to complete three income-tax audit files independently during the probationary period. However, the grievor had trouble completing her audits because she carried out a lot of unnecessary work on her files, and her analyses were inadequate. Although by June 2015, other trainees under Ms. Therrien had already completed seven or eight files each independently, the grievor was unable to complete three. Her analyses were not valid and reliable. Based on that finding, the management team concluded that she did not meet the ALP's requirements.

[236] Therefore, I find that verifiable and valid evidence was adduced to support the reason given for the grievor's termination. She failed to rebut that evidence. She failed to demonstrate that the employer's decision to terminate her during her probationary

period was not made in good faith and based on her unsatisfactory performance during the probationary period.

C. Issue 3: Did the grievor establish that her termination and the decision not to extend her probationary period were discriminatory?

[237] I have concluded that there was cause to terminate the grievor during the probationary period. However, the termination could not be justified if a prohibited ground of discrimination was a factor in that decision.

[238] The grievor argued that her rejection was discriminatory. In relation to any matter referred to adjudication, the Board may interpret and apply the *CHRA* (s. 226(2)(a) of the *FPSLRA*). Section 7 of the *CHRA* states that it is a discriminatory practice to refuse to continue to employ any individual or to differentiate adversely in relation to an employee on a prohibited ground of discrimination.

[239] To establish a *prima facie* case of discrimination, the grievor had to show that 1) she has a characteristic that is a prohibited ground of discrimination under the *CHRA* (a characteristic protected against discrimination), 2) she suffered adverse treatment, and 3) the protected characteristic was a factor in the adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61). I note the following.

[240] With respect to the first *Moore* criterion, the grievor claimed to have ADHD. I note that the first, second, and third medical certificates that she submitted to the employer did not state that she had ADHD. However, the employer did not question her allegation.

[241] Second, the grievor suffered adverse employment-related treatment when she was terminated and when it was decided shortly before her termination that her probationary period would not be extended. On that point, she began her probation on September 2, 2014. Approximately 10.5 months later, on July 14, 2015, on her behalf, her union representative requested an extension of the probationary period, in light of the grievor's unplanned absence for a medical reason.

[242] Thus, I find that the first two *Moore* criteria are met. A disability such as ADHD is a characteristic that is a prohibited ground of discrimination under the *CHRA* (s. 3). Then, the termination and the decision not to extend her probationary period were adverse treatment.

[243] However, the third criterion is not satisfied in this case. I find that even if the alleged facts are trustworthy, they do not establish that the protected characteristic (her ADHD) was a factor in the adverse effect.

[244] In *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, the employee in question alleged that his drug addiction, which is a disability, was a factor in his dismissal. At paragraph 39, the Supreme Court of Canada found that the connection between an addiction and adverse treatment cannot be assumed; it must be based on evidence.

[245] In this case, the grievor had to establish on one hand a connection between her disability and her termination and on the other hand one between her disability and the decision not to extend her probationary period. I believe that even if the grievor has ADHD, nothing links her disability to her termination or to the decision not to extend her probationary period. In fact, she wrote to the employer that she did not believe that her ADHD prevented her from performing her duties and that she did not believe that her physician would limit the auditing duties that she could perform.

[246] I am aware that on June 17, 2015, her physician recommended some general accommodations (namely, to give her the support provided in the program, clear and specific instructions, feedback, and a work environment with fewer distractions). These general recommendations alone do not allow me to establish a causal link between her disability and her termination or between her disability and the decision not to extend her probationary period. Ms. Dubé explained that under the ALP, the employer had to decide a trainee's success or failure in the program before the 12-month probationary period expired.

[247] If the grievor felt that her ADHD affected her job performance, as she claimed at the hearing, she had a duty to be proactive and to do everything she could to reduce the impact on her job. In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970, the Supreme Court held that an employee who requires accommodation for a disability must tell the employer and the union and explain the reasons for the request. The employee must be flexible and cooperative in finding solutions. The employee must act reasonably; that is, he or she cannot expect a perfect solution to his or her problem and must accept a reasonable outcome.

[248] In this case, the grievor could have provided the necessary information to her employer when her probationary period began or as early as possible, if indeed her disability affected her job performance.

[249] Further, I note that on June 3, 2015, when the grievor first disclosed her ADHD and her desire to work in a quieter location, the employer provided her with a quieter place to work. It also asked her if any other measures were needed and asked her for permission to contact her physician to find out what, if any, functional limitations her condition created. She responded that she did not believe that she was otherwise limited by her condition (she wished only to work in a quiet environment) and that she would speak to her treating physician.

[250] For all these reasons, I find that the grievor did not link her disability to her rejection on probation; nor did she link it to the decision not to extend her probation.

[251] In summary, I conclude that the grievor did not meet her burden of proving that her termination and the decision not to extend her probationary period were discriminatory.

D. Issue 4: Did the grievor establish that her June 2, 2015, evaluation was discriminatory?

[252] The Board has jurisdiction to hear the grievor's grievance against her termination under ss. 209(1)(d) and (3) of the *FPSLRA*. It is not clear that the Board has jurisdiction to hear her grievance about her performance review dated June 2, 2015, under s. 209(1)(b) of the *FPSLRA* (it would were her performance review found to be a disciplinary measure; see *Charest v. Deputy Head (Department of Public Works and Government Services)*, 2017 FPSLREB 18).

[253] In any event, even if I had jurisdiction to hear the grievor's grievance against her evaluation, I would conclude that she did not establish that her evaluation was discriminatory. Once again, the first two criteria in *Moore* have been met, not the third.

[254] With respect to the first criterion, the grievor affirmed having ADHD, and the employer did not question her allegation. Second, her partially negative evaluation could be associated with adverse treatment. However, as noted in the preceding paragraphs, she did not establish that her disability, her ADHD, affected her job

performance. Although she has ADHD, nothing allows linking her disability to her performance evaluation. Therefore, the third criterion in *Moore* is not met.

[255] In conclusion, if the Board had jurisdiction to hear this grievance, I would conclude that the grievor did not demonstrate that her performance evaluation was discriminatory.

VII. Conclusion

[256] I find that the employer presented just cause for the grievor's termination during her probationary period, which she failed to rebut. I find that she also failed to establish that a prohibited ground of discrimination or bad faith were determining factors in the decision making during her probationary period or in her termination.

[257] Finally, it is unfortunate that the grievor was unable to meet the ALP's requirements. Of course, ideally, she would have been able to easily transition to audit work, but that did not happen. Sometimes, a setback is a necessary hurdle that leads to a change of course and activities. I have no doubt that with all her abilities, the grievor has successfully shifted her focus to another rewarding activity.

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

(The Order appears on the next page)

VIII. Order

[259] The grievances in files 566-34-12985, 12986, and 12987 are dismissed.

[260] The following exhibits are ordered sealed: F-15, F-16, and F-17.

March 28, 2022.

FPSLREB Translation

Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board