Date: 20230113

File: 566-02-38219

Citation: 2023 FPSLREB 4

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

KATHLEEN RUKAVINA

Grievor

and

TREASURY BOARD
(Department of Western Economic Diversification)

Respondent

Indexed as
Rukavina v. Treasury Board (Department of Western Economic Diversification)

In the matter of an individual grievance referred to adjudication

Before: Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Abudi Awaysheh, grievance and adjudication officer, Public Service Alliance of Canada

For the Respondent: Adam C. Feldman, counsel

Decided on the basis of written submissions, filed February 26, April 19, and May 24, 2022.

REASONS FOR DECISION

I. Introduction

[1] The grievor, Kathleen Rukavina, was a probationary communications officer (IS-04). Her employment was terminated during probation by a letter dated September 15, 2017. In issuing the letter pursuant to s. 62 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "*PSEA*") her manager stated that she had concluded "… that despite efforts to bring your performance to an acceptable level, you have not demonstrated that you can satisfactorily perform the duties of a Communications Advisor."

[2] The grievor filed a grievance on October 20, 2017, pursuant to s. 208 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which stated that the termination "… was not warranted and [was] without just cause."

[3] This grievance then engaged the ongoing jurisdictional tension between s. 62 of the *PSEA*, which permits the deputy head of an organization to terminate a probationary employee's employment, and s. 209(1)(b) of the *Act*, which permits an employee to file a grievance if that grievance "… is related to … a disciplinary action resulting in termination, demotion, suspension or financial penalty …". The tension arises because the jurisdiction granted to an adjudicator to consider disciplinary action pursuant to s. 209(1)(b) is removed by s. 211, which states that nothing in s. 209 "… is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to … any termination of employment under the *Public Service Employment Act* …".

[4] In due course, the Treasury Board (Department of Western Economic Diversification), hereafter ("the employer") made an objection dated June 21, 2018, to the Federal Public Sector Labour Relations and Employment Board's ("the Board") jurisdiction on the ground that the termination was not a disciplinary action but was rather what used to be called (and sometimes still is) a rejection on probation and so was beyond an adjudicator's jurisdiction.

[5] On December 10, 2021, and following a review of the file, the Board invited the parties to do the following:

…

> *This matter pertains to a rejection on probation. The employer has filed an objection to the Board's jurisdiction and a reply has been received from the bargaining agent.*
>
> *The Board has decided that the preliminary objection raised by the employer will be decided on the basis of written submissions. The parties will have the opportunity to file additional written submissions with respect to the Board's jurisdiction to hear this matter. The parties are invited to provide submissions as to whether, if the facts alleged by the grievor and its [sic] submissions are accepted as true, there is an arguable case that the grievor's rejection on probation was done in bad faith or was a contrived reliance on the* Public Service Employment Act*: see the discussion pertaining to the Board's jurisdiction in* Kirlew v. Deputy Head (Correctional Service of Canada)*, 2017 FPSLREB 28 that both parties have referred to in their correspondence with the Board.*
>
> *If the Board concludes that the allegations raised by the grievor do not demonstrate an arguable case bringing this matter within the Board's jurisdiction, the grievance may be dismissed.*
>
> …

[6] Based on the facts before the Board, and for the following reasons, the Board has concluded that the grievor's allegations do not demonstrate an arguable case bringing this matter within its jurisdiction, and an order declaring that there is no jurisdiction to hear this grievance will be issued.

II. The parties' submissions

[7] This decision was based on the parties' written submissions over an extended period. They submitted bundles of documents (mostly email correspondence) and exhibits, together with will-say statements of the grievor, her manager, and a number of co-workers, which were supplemented with written submissions. Because of this intermixture of disparate types of evidence and submissions, I have decided to provide a more-or-less chronological outline of the material. After that, I will then consider the employer's reasons and the grievor's alleged facts within that framework.

III. The evidence and facts based on the material submitted

[8] On October 19, 2016, the grievor was offered a full-time indeterminate appointment to a communications advisor (IS-04) position. The offer was made by Donna Kinley, Manager, Consultations, Marketing, and Communications (Alberta Region). The offer letter included the advice that in accordance with s. 61 of the *PSEA*, the grievor would be subject to a 12-month probationary period.

[9] In or about May 2017, Ms. Kinley prepared a performance appraisal of the grievor's work to date. Her comments on the grievor's overall abilities were positive. No negative comments or areas for improvement were noted. The grievor's assessment of that written appraisal, as follows, is an accurate summary:

> …
>
> *My Performance Evaluation meeting with Donna was held at either the deadline or after the deadline to submit. I was expecting some areas that Donna would identify for me to work on and some areas for improvement. There were none communicated to me and none indicated in my final Performance Evaluation. In fact, it was glowing. The evaluation did include areas or additional responsibilities that Donna wanted to see me take on in the coming year. But nothing negative and no area that needed improvement.*
>
> …

[10] Ms. Kinley, in a will-say statement dated April 4, 2022, explained that when issuing performance evaluations, she always did this:

> …
>
> *… was always sensitive to how each individual employee received feedback and approached each conversation with the goal of ensuring the employee felt valued and appreciated, while understanding work that we would undertake in areas of growth/improvement.*
>
> …

[11] On September 15, 2017, Ms. Kinley provided the grievor with a letter advising her that she was terminated while on probation. The first two paragraphs of that letter are material, as follows:

> …
>
> *As indicated in your letter of offer, your initial appointment to the Public Service on October 24, 2016 was subject to a 12-month probationary period in accordance with the governing Treasury Board Regulations. I have concluded that despite efforts to bring your performance to an acceptable level, you have not demonstrated that you can satisfactorily perform the duties of a Communications Advisor.*
>
> *Therefore, in accordance with the authority delegated to me by the Deputy Minister, and pursuant to section 62 of the* Public Service Employment Act, *you are hereby terminated during the probationary period from your position of Communications Advisor, due to your unsatisfactory performance. More specifically,*

> *your ability to demonstrate excellent writing and editing skills with consistency and accuracy is not being produced at the required (IS 04) level.*
>
> …

[12] In her will-say statement, Ms. Kinley noted the following with respect to the grievor's performance:

> …
>
> *… There are several examples where Kathleen's work, not the work of others, required revisions. This includes products developed for Ministerial Tripbook [sic] that had departmental name wrong, incorrect project funding amounts, wrong dates for tour. There are news release examples where instruction was provided on key messaging and Kathleen still produced a work product that was not acceptable. Trip books and news releases are examples of documents where a high degree of accuracy, completeness and key messaging is critical when providing documents to elected officials.*
>
> …

[13] The grievor was relieved of her duties effective September 15, 2017, but was paid until October 23, 2017, in accordance with s. 62(2) of the *PSEA*.

[14] The grievor filed a grievance on October 20, 2017, which stated as follows:

> …
>
> *I grieve the letter of termination of employment dated September 15, 2017 signed by Donna Kinley (Manager, Consultation Marketing & Communications) as I believe that said letter was not warranted and* [was] *without just cause. As such, consultation is requested with my Labour Relations Officer on this grievance at the final level of the grievance procedure.*
>
> …

[15] By way of corrective action, she requested the following: "I request that the above-noted letter be immediately withdrawn. I further request that all copies related to this matter be destroyed in my presence. Furthermore, I request that I be reinstated without loss of pay and benefits, and, that I be made whole."

[16] The final-level grievance hearing took place on January 25, 2018. Present were Assistant Deputy Minister ("ADM") Jim Saunderson, Andre Gareau from Human

Resources, the grievor, and Raymond Brossard, Labour Relations Officer, Union of National Employees.

[17] After introductions, Mr. Brossard presented a package of documents, which included the grievor's offer of employment, the IS-04 work description, the grievor's May 2017 performance management review, and written submissions entitled, "Final Level - Grievance Presentation: January 25, 2018".

[18] The essence of the written grievance submission was that the grievor's performance had been good, even exemplary; that she had received limited coaching or feedback; and that she had never been advised of any performance shortcomings. It referred to *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, which it said stood for the proposition that adjudicators have jurisdiction over terminations during probation if the decision to terminate was made arbitrarily, discriminatorily, or in bad faith. It referred to *Bergeron v. Canadian Security Intelligence Service*, 2011 PSLRB 103, in which the adjudicator set aside a termination during probation given that the employee had not been given any advance notice of any shortcomings in his performance. It also referred to the decision in *Dyson v. Deputy Head (Department of Fisheries and Oceans)*, 2015 PSLREB 58, in which the adjudicator found that a decision made without any legitimate evidence to support a *bona fide* dissatisfaction with the grievor's suitability was made in bad faith.

[19] The Public Service Alliance of Canada ("the bargaining agent" or "PSAC") concluding statements captured the essence of the grievor's position, as follows:

> …
>
> *… In closing, the Union of National Employees (PSAC) and the grievor believe that the manager (Mrs. Kinley) clearly failed to demonstrate why Mrs. Rukavina did not meet the department's satisfaction in respect to her functions as a Communications Advisor. One could question how an experienced and seasoned communications advisor (and former Press secretary) having worked in and for the office of the Premier (where she would review all government communications prior to being released to the public), would not be able to satisfy the needs of this department.*
> *Kathleen will admit there were errors at times, as this is not uncommon in this field and for the most part, said errors raised by the manager were very minor. One could question how this rejection was factually based on objective and demonstrable*

> *grounds… and the answer is quite simple; it was not. One could also question if the rejection on probation was a form of reprisal.*
>
> *… We believe that any manager cannot reasonably be expected to be able to assess the full capabilities and potential of a job applicant from a brief interview, application form or resumé, references and the like. Accordingly, the intent and spirit is that probationary periods are to be used to assess an employee's performance and conduct after an appointment to a position from outside the public service… not claims of minor administrative errors.*
> *As outlined in the redress portion on the grievance form, we believe that this rejection was issued without just cause.*
>
> …

[20] ADM Saunderson and Mr. Gareau discussed their understanding of the reason for the grievor's termination on probation, which essentially came down to a perceived inattention to detail, as follows:

1) ADM Saunderson had seen a letter prepared by the grievor that had needed significant improvements;
2) information that she had been asked to prepare for a tour by Parliamentary Secretary Kate Young had multiple errors;
3) a letter of greeting that the grievor had prepared for a TEC Edmonton/UHF Merck Health Innovation Incubator grand opening had to be revised at the ADM's request;
4) products developed for the Drywall Support Program had not met departmental standards for messaging, even though key issues had been discussed in advance; and
5) a success story for Trade Winds for Successes was not prepared, despite reminders.

[21] The grievor agreed that she had made, in her words, "minor errors" from time to time but blamed the press of the work, the involvement of others, or the lack of coaching or feedback. She alleged that Ms. Kinley had a "passive-aggressive" style and suggested that the termination on probation was a reprisal for her having spoken to the ADM about Ms. Kinley's questioning whether she had provided confidential information outside the employer.

[22] The final-level response to the grievance, dated February 7, 2017, was from ADM Saunderson. He reviewed the submissions of the grievor and her union representative at the grievance hearing on January 25, 2018, and the materials submitted at that time, as well as the material that Ms. Kinley provided.

[23] He advised that he had investigated the grievor's claim that her manager had bullied her. He advised that he had not found evidence supporting that claim or any other evidence that would lead him to believe that her termination while on probation was done in bad faith. He was also satisfied that the grievor's supervisor had provided sufficient feedback over the course of her probationary period and that there was sufficient reason to warrant the termination. He denied the grievance.

[24] On April 12, 2018, PSAC filed a form 21, which is entitled, "Notice of Reference to Adjudication of an Individual Grievance". The notice was filed under ss. 209(1)(b) and (c)(i) of the *Act*. The first provision pertains to disciplinary action that results in termination, demotion, suspension, or financial penalty. The second pertains to the termination of an employee pursuant to s. 12(1)(d) of the *Financial Administration Act* (R.S.C., 1985, c. F-11) for unsatisfactory performance or under s. 12(1)(e) for any other reason that does not relate to a breach of discipline or misconduct.

[25] On June 21, 2018, Asira Shukuru, Analyst, Employer Representation in Recourse at the Treasury Board wrote to the Board to object to the reference to adjudication. She submitted that the Board lacked jurisdiction on a number of grounds. The one before me concerned the issue of the Board's jurisdiction in a case of a termination during probation. She submitted that "[t]his is a case of a valid termination during probation and in line with the Federal Court's decision in *Canada (Attorney General) v. Leonarduzzi* [2001 FCT 529]." She referred as well to *Canada (Attorney General) v. Penner*, [1989] 3 FC 429 (C.A.); *Tello*; and *Kirlew v. Deputy Head (Correctional Service of Canada)*, 2017 FPSLREB 28.

[26] On June 29, 2018, Lindsay Cheong, a PSAC grievance and adjudication officer, wrote to the Board in reply to Ms. Shukuru's objection. She submitted that the decision in *Kirlew* fully supported the bargaining agent's request "… to be heard before the Board in order to make our case on this rejection on probation… Grievors may present their arguments before an adjudicator in order to establish the Board's jurisdiction …".

IV. Summary of the submissions

A. For the grievor (February 26, 2022)

[27] The submissions filed on the bargaining agent's behalf on February 26, 2022, were based primarily on a "Timeline of Events at WD" ("Timeline") that the grievor prepared on December 20, 2021. It has 9.5 single-spaced pages comprising 76

paragraphs. The grievor provided a detailed description of her experience and background before her employment with the employer. She described her interviews with Ms. Kinley about the position, noting as follows: "While the role was more junior that what I had previously done, I was excited by the opportunity to help [Ms. Kinley] achieve her goal." She acknowledged that her performance on one project — what she called the "Trip Book" — in September 2017 might have been wanting to some degree but blamed any shortcomings on others, suggesting that "… either the information [that she should have included in the book] was held back from [her] to make [her] task more difficult, or there was a serious issue with record-keeping [*sic*]."

[28] On a more general level, the grievor objected as follows:

> …
>
> *… if a manager was concerned about my lack of experience on a project like this* [the Trip Book] *and was looking to set me up for success, there would have been clear directions, a format to follow, an approval protocol to follow, and a person to mentor me.…*
>
> …

[29] The grievor recalled her manager being unhappy with what she had done. However, the grievor said that she could recall only one error and explained it on the basis that she had been typing a different name many times during a briefing, "… so it was an honest mistake that of course [*sic*] spell-checker didn't pick up."

[30] Abudi Awaysheh, Grievance and Adjudication Officer, commenced by outlining the employer's initial objections and the bargaining agent's response to the issue of an adjudicator's jurisdiction, if any, over a "rejection on probation". He then quoted substantial portions of the facts that the grievor laid down in her Timeline. He also referenced the employer's policies with respect to termination during probation, the job description, and the email correspondence that had been disclosed to the grievor in April 2018.

[31] Mr. Awaysheh relied upon summaries of *Kirlew*; *Yeo v. Deputy Head (Department of Employment and Social Development)*, 2019 FPSLREB 119; *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109; and *Alexis v. Deputy Head (Royal Canadian Mounted Police)*, 2020 FPSLREB 9 ("*Alexis*") (upheld in *Canada (Attorney General) v. Alexis*, 2021 FCA 216 ("*Alexis* FCA")).

[32] He then made several submissions.

[33] First, he emphasized that there was no documentary evidence or proof that Ms. Kinley had ever spoken to the ADM about the grievor's performance or that the alleged shortcomings had ever been brought to her attention. Nor did she receive proper training, noted as follows:

> …
>
> *44. There is not one single piece of evidence that:*
>
> 1. *the Union was aware at any point in time (including termination) that there were problems with the Grievor's performance*
> 2. *the Employer informed the Grievor in writing that there were problems in her work*
> 3. *Any written documentation made at the time, that validates Ms. Kinsley's allegations that she spoke to the Grievor about her work performance in June 27, July 25, or August 25, 2018, or*
> 4. *Any written documentation there is documentary evidence that shows that there was "consideration … to terminate during probation based on performance …. As early as May 2017," as alleged by the employer.*
>
> …
>
> [*Sic* throughout]

[34] He added that the employer had done the following:

> …
>
> *… failed to comply with Exhibit 8 the Treasury Board Guidelines for terminating an employee during probation require that the employee on probation:*
>
> 1. *knows the specific job duties and requirements of the position;*
> 2. *is aware of the required standard(s) of performance and appropriate conduct;*
> 3. *receives feedback when performance or conduct requires improvement; and*
> 4. *receives the appropriate training for the position.*
>
> …

[35] He argued that the absence of any written documentation to support the employer's professed concern about the grievor's performance was fatal to the

employer's position. The grievor was never advised of any shortcomings, was never given a statement of duties, and was never mentored. Her written performance evaluation raised no concerns.

[36] He submitted that Ms. Kinley "for whatever reasons disliked" the grievor, suggesting that the reason for this dislike rested in the grievor's failure to nominate Ms. Kinley for an internal employee award in April 2017.

[37] He sought as a remedy that the Board reinstate the grievor or allow the grievance to continue to a full hearing "… so that the Grievor can have an opportunity to demonstrate why the employer has terminated her employment for reasons that were not made in good faith."

B. For the employer (April 19, 2022)

[38] Counsel for the employer provided a 188-page submission in 2 volumes. 31 pages of it comprised the submissions on the facts. The balance consisted of a large number of emails, will-say statements of other employees, and a detailed comparison of the statements in the grievor's Timeline with that evidence.

[39] Counsel for the employer submitted that Ms. Kinley's will-say statement made it clear that she had discussed concerns about the grievor's performance with her. The grievor's allegations to the contrary were groundless and were meant to deflect from her shortcomings. He noted that the grievor did acknowledge some errors but alleged that they must have originated elsewhere — that her work had been sabotaged by poor data management or by someone else. He submitted that her failure to take ownership of such errors was itself evidence of poor performance.

[40] Counsel for the employer also submitted a detailed breakdown that compared the grievor's comments in her Timeline with the will-say statements of Ms. Kinley and of some co-workers. He then referred to *Tello*; *Kirlew*; *Leonarduzzi*; *Kagimbi v. Canada (Attorney General)*, 2014 FC 400; and *Alexis*. In summary, the employer requires only an employment-related reason to terminate a probationary employee to deny an adjudicator jurisdiction. The fact that the grievor might not have been given much notice of those issues was not a basis to find otherwise. Accordingly, counsel submitted that the Board should dismiss the grievance for want of jurisdiction.

C. The grievor's reply submissions (May 24, 2022)

[41] The bargaining agent's representative provided a 40-page reply.

[42] He submitted that the employer's questioning of the grievor's credibility exacerbated the defects in the employer's position and made a hearing all the more necessary. He noted as follows at paragraphs 5 and 7 of his submissions:

> *5. The Bargaining Agent takes offence at what the Employer writes at page 19 in response to a statement the Grievor says at para 74 of her submissions. The Employer writes, "This frivolous allegation is false, and potential grounds for defamation." The Grievor is a journalist and the Employer, the Government of Canada is attacking her credibility, the most important matter for a journalist. The Bargaining Agent submits that a formal hearing is required now, to dispel with the Employer's accusation about the Grievor's credibility which affects her employment as a media relations and communications professional.*
>
> …
>
> *7. Furthermore, we submit, that this case demonstrates* [that] *systemic racism, prejudice, and other forms of discrimination will occur against people pursuant to their protected characteristics under the* Canadian Human Rights Act *(including their political belief) should an employer be allowed to reject a probationary employee due to performance reasons in any of the following situations (each of which occurred in this situation):*
>
> 1. *Failing to have meetings at the workplace to inform them of their performance concerns*
> 2. *Refusing to provide an action plan to ensure their success and increase performance.*
> 3. *Refusing to provide training to resolve the alleged performance decencies.*
>
> [*Sic* throughout]

[43] I pause to note that this was the first suggestion that the termination on probation was the product of "… systemic racism, prejudice, and other forms of discrimination [that] will occur against people pursuant to their protected characteristics …." I also note that there was nothing in the material to suggest there was any support for such allegations, or that they represented anything more than a last minute attempt to cloud the issues.

[44] There followed the grievor's detailed response — and objections — to the contents of the will-say statements of three co-workers, and Ms. Kinley. The bargaining

agent's representative then went over the decisions that counsel for the employer had referenced. He then heavily criticized what he submitted were failings in Ms. Kinley's management, as follows:

> …
>
> *29. The employer says they have dealt in good faith with the Grievor. All the information below is what a "Succeed Plus" excellent manager like Ms. Kinsley should do, according to the employer when dealing with an employee on probation.*
>
> 1. *Telling the Grievor in a Public Service Performance Agreement in which the Grievor is told that they meet the requirements of the position after more than 6 months in the position, but then somehow not having another Performance Agreement, that outlines the Employer's concerns about the Grievor's lack of performance after that agreement..*
> 2. *Not having a one on one meeting with the employee at the workplace to inform them of their performance concerns.*
> 3. *"Having Coffee" wherein important discussions that can result in the end of continjing income for a newly divorced mother who was the sole bread winner in her new famil unit is appropriate*
> 4. *Having an acting manager like Ms. Calderon note the Grievor's deficicnes, not share them with the Grievor, but share them with their substantive manager.*
> 5. *Having the substantive manager, talk to the acting manager about the Grievor's performance, but not have the substantive manager relay those performance concerns to the Grievor.*
> 6. *Not providing an action plan to identify the employee's weakness so that they can be aware of their shortcoming.*
> 7. *Determining that any additional training would not be of any assistance in ensuring that the employee can resolve their performance failures.*
> 8. *Refusing to extend the probationary period so that the Grievor can become successful.*
> 9. *Not taking any notes of any meetings to document important matters that were said.*
> 10. *Not following up in writing to inform the Grievor of important issues that will affect their employment.*
> 11. *Having a Deputy Minister delegate the rejection on probation matters to a subordinate, i.e. rely on the hearsay of what that subordinate said to reach that decision.*
> 12. *Not telling the Grievor of performance because they feared the Grievor's feelings as the Grievor was going to get married.*

> *13. Not assisting a person who they have identified to be "sensitive to criticism."*
>
> *14. Expecting that the Grievor's performance would somehow miraculously change and would "reset" after they returned to the workplace following their wedding.*
>
> *15. Reminding someone that because of their political belief, they could be presumed to be acting against the employer.*
>
> …
>
> [*Sic* throughout]

[45] He concluded by submitting that none of this amounted to good faith on the part of the employer.

V. Analysis and decision

[46] Before proceeding, I think it appropriate to make the following general observation about these types of grievances.

[47] First, the debate over the jurisdiction of an adjudicator in cases involving probationary employees' terminations has been going on since at least the Supreme Court of Canada's decision over 40 years ago in *Jacmain v. Attorney General (Canada)*, [1978] 2 S.C.R. 15. But grievance adjudication and litigation then — compared to now — was rocket-propelled. In *Jacmain*, the time between the notice of rejection for cause to its effective affirmation in the Supreme Court of Canada was only roughly three-and-a-half years. By way of contrast, it often now takes that amount of time just to get to the hearing on jurisdiction.

[48] Second, it is quite clear from the decision of the majority in *Jacmain* that the fact that the employer's reason for the termination could also have supported discipline instead was immaterial; see *Penner*, to the same effect. Nor is this an unreasonable conclusion from a labour relations standpoint. An employee who does not perform according to expectations, is continually late, is insubordinate, or is rude and disrespectful may be disciplined. All such conduct is grounds for discipline. But such conduct in the case of a probationary employee is **also** cause for the employer to conclude that he or she is not a suitable fit and that his or her probationary employment should be terminated on notice.

[49] Third, the need to distinguish the two has on occasion led to hearings that were difficult to distinguish from full-blown disciplinary hearings in terms of time, number

of witnesses, documents, and submissions; see, for example, *Alexis*, involving a termination letter dated June 5, 2015, and a hearing on jurisdiction that occupied five days in August and September 2019. The application to set aside the resulting award was dismissed on November 9, 2021; see *Alexis* FCA. In *Tello*, the grievor was rejected on probation on July 29, 2009, and a four-day hearing on jurisdiction was held in August 2010. That may be an unavoidable consequence of a grievor's burden to show that the decision was made in bad faith or that it was arbitrary or discriminatory. Since such allegations are rarely based on clear-cut evidence, a great deal of time can be spent searching for — or trying to establish — the real reason for the employer's decision.

[50] The employer does not have to establish **just cause**. It need only show a cause related to employment; see *Leonarduzzi*, at paras. 39 and 40; and *Penner*, at 438. The adjudicator is not entitled to second-guess the employer as to the sufficiency of that cause. The employer — not the adjudicator — is in the best and indeed the only position to determine whether a probationary employee's "attitude" would be a good fit for the position; see, for example, *Jacmain*; *Alford v. Government of Yukon*, 2006 YKSC 31 at para. 42; and *Bell v. Staff of the Non-Public Funds, Canadian Forces*, 2020 FPSLREB 14 at para. 108. And while common sense and good management practice might suggest that a manager inform the probationary employee of any shortcomings, to give him or her a chance to improve, it is not a legal requirement; see *Bell*, at para. 109, citing *Kagimbi*, at para. 33.

[51] That this should be so should not be surprising. As Mr. Justice Tremblay-Lamer observed in *Kagimbi*, at para. 34, "The jurisprudence shows that the statute is drafted such that the employer has a great deal of flexibility during the probation period, precisely so that it can evaluate the skills of a potential employee." As long ago as the Supreme Court of Canada's decision in *Jacmain*, it was recognized that the status of a probationary employee is on an entirely different footing from that of an employee who, whether under a collective agreement or under statute, could be disciplined only for just cause. Toward the end of his decision for the majority in *Jacmain*, Mr. Justice de Grandpré turned to the distinction between permanent employees and those on probation. He cited at page 38 with approval the following passage from *United Electrical Workers v. Square D Co., Ltd.* (1955), 6 L.A.C. 289:

…

> *An employee who has the status of being "on probation" clearly has less job security than an employee who enjoys the status of a permanent employee. One is undergoing a period of testing, demonstration or investigation of his qualifications and suitability for regular employment as a permanent employee, and the other has satisfactorily met the test. The standards set by the company are not necessarily confined to standards relating to quality and quantity of production, they may embrace consideration of the employee's character, ability to work in harmony with others, potentiality for advancement and general suitability for retention in the company. Although it is apparent that any employee covered by the agreement can be discharged for cause at anytime [sic], the employment of a probationer may be terminated if, in the judgment of the company prior to the completion of the probationary period, the probationer has failed to meet the standards set by the company and is considered to be not satisfactory.*
>
> …

[52] Mr. Justice de Grandpré went on to state that he saw "no basis" for a distinction on this point between the public and private sectors, as follows: "I would think that in the public sector, as in the private sector, the employee who wants to improve his lot must still take certain risks."

[53] This also means that a probationary employee whose performance is fine, even exemplary, may yet find themselves rejected on probation because of what Adjudicator Weatherill in *Jacmain* called "attitude". Managers run departments full of employees who must get along with each other to ensure that operations run smoothly and productively. An otherwise fully qualified and high-performing employee may nevertheless be found wanting on probation because of an inability to get along with co-workers.

[54] This also means that at issue is not whether the manager is a good manager. Nor is it whether the cause could withstand scrutiny in a discipline-for-cause grievance. It is enough that the manager's decision is made in good faith, is not arbitrary, and is not discriminatory. It other words, it cannot be because the probationary employee has blue eyes, belongs to a particular religion, or rejected a sexual advance. But it can be because the employee does not get along with the manager or co-workers or fails to live up to the performance standards of the position.

[55] Having said all that, I note as well that the law and statutory changes with respect to the jurisdiction issue have evolved to the point that in these cases, the onus first lies on the employer to establish these four things:

1) that the employee was on probation;
2) that the probationary period was still in effect as of the termination;
3) that notice, or pay in lieu of it, was provided; and
4) that there was an employment-related reason for the decision to terminate the probationary employee (see *Tello*, at para. 111).

[56] The last point will usually involve the employer putting the termination letter, which would normally state the reason for the termination, into evidence. It may go into evidence by agreement or through a witness that the employer calls. But the onus on the employer is not high.

[57] Once those four points are established, the burden shifts to the grievor, who bears the burden of showing that there is some evidence of facts that if accepted as true, establish an arguable case that the reason for the termination was a sham or camouflage or that it was made in bad faith (which in essence is to say that it was made for a reason unrelated to employment). It is not an easy burden to meet. Bad faith is not presumed; it must be proved (see *Dargis v. Canada Revenue Agency*, 2022 FPSLREB 20 at para. 227). Nor is it enough to show that the employer made mistakes in its evaluation of the grievor's performance or that it did not give the grievor a chance to improve their performance or to respond to allegations of shortcomings in that performance. Nor is it material that the grievor disagrees with the employer's evaluation of that performance; see *Boiko v. National Research Council of Canada*, 2018 FPSLREB 11 at paras. 541 to 543. However, if the grievor does the following (from *Tello*, at para. 111):

> *… establishes that there were no legitimate "employment-related reasons" for the termination (in other words, if the decision was not based on a bona fide dissatisfaction as to his suitability for employment:* Penner *at page 438) then the grievor will have met his burden.…*

[58] What then is the grievor to establish — and how — to fend off an employer's objection to jurisdiction? In such cases, the Board has sometimes formulated its approach as being a question of considering whether the allegations, if taken as proven, set out an arguable case. If so, the matter proceeds to a full hearing. If not, the objection is granted, and the grievance is denied or the complaint is dismissed; see, for

example, *Beniey v. Public Service Alliance of Canada*, 2020 FPSLREB 32 at para. 57; *Fry v. Parks Canada Agency*, 2021 FPSLREB 88 at para. 33; *Burns v. Unifor, Local 2182*, 2020 FPSLREB 119 at para. 9; *Gabon v. Department of the Environment*, 2022 FPSLREB 6 at para. 4; and *Osman v. Public Service Alliance of Canada*, 2021 FCA 227 at para. 9.

[59] I have difficulty with the wording of the test and its application for several reasons.

[60] The test had its origins in a different forum—the common law courts—which are governed by different rules and a different practice. There the arguable case test is based on pleadings, whether statements of claim or of defence. The pleadings seek remedies that are based on detailed allegations of act that the party says they will prove—and that once proved, will justify the relief sought. By times an opponent will say that the facts a party relies upon to establish its claim or defence, even if proved, will not ground that claim or defence. If that submission is true there would be no point in the claim or defence proceeding through the complex, time consuming and expensive process of disclosure, discovery and trial. Hence the opponent will make a motion to court for an order dismissing the claim or the defence on the ground that the facts as pleaded, assuming them to be true, will not establish the claim or defence. No evidence of the facts that the party says it will prove is put before the court on such motions. The pleadings and the facts alleged therein govern.

[61] That approach—and that test—works well in the courts because it is premised on the detailed allegations of facts in a pleading that a party says will add up to—or justify or establish—its claim or defence. But labour grievances are not pleadings. They rarely if ever contain more than a few sentences. They generally allege conclusions—for example, that the employer acted in bad faith or arbitrarily—rather than the specific facts that, if proved, could establish that allegation. Such generality and lack of specifics means that if the arguable case test required such allegations to be assumed to be true, then every grievance stemming from a termination on probation would go to a hearing.

[62] But that is not what appears to happen when the employer objects to a probationary termination grievance on the grounds of jurisdiction. Rather, the Board looks for some facts that, if accepted, might establish one of the prohibited exceptions to the employer's right to terminate a probationary employee. As noted in *Holowaty v.*

Deputy Head (Correctional Service of Canada), 2022 FPSLREB 44 at para. 13, the Board requires the grievor to present factually supported allegations that if proved could establish the grievance. Assertions in a matter involving jurisdiction are not sufficient; some evidence is required: see, for e.g., *Alexander v. Attorney General of Canada (Deputy Head, Public Health Agency of Canada)*, 2016 FCA 132.

[63] It should be noted here that in looking for facts to support the allegations what the Board is really doing is considering and weighing evidence in order to decide whether the allegations made by a grievor or complainant could add up to an arguable case—that is, the right to a hearing: see, for example, *Beniey*. That is to say, the Board has moved away from a strict application of the arguable case test to one that is closer to another practice in the common law courts—that of summary judgment on evidence. Summary judgment motions in the courts are often employed where the rights involved depend on relatively straightforward facts that if accepted would produce the remedy sought. So, for example, in a claim based on a loan, the plaintiff will submit affidavit evidence to show that the money was loaned, that it was due on a certain date, and that it is now owing. The onus then shifts to the respondent to provide evidence of facts that might provide defence to the claim. The court then considers and weighs the evidence. If the respondent's evidence could add up to a defence then the motion is dismissed; if not, then the claim is granted. In short, the courts have recognized that in some cases a judge can obtain a full appreciation of the evidence and issues—and hence the ability to make a final decision—without a full trial: see the discussion in *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 1 to 7 and 23 to 33.

[64] The Board's jurisdiction to hear and weight evidence, and to make decisions based on such evidence without a full hearing, is clear. Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) provides that the Board "… may decide any matter before it without holding an oral hearing." For that matter, there is no inherent right to a full hearing. The Board also has the jurisdiction to "accept any evidence, whether admissible in a court of law or not…" s. 20(e). Indeed, in my view the Board's jurisdiction under s. 22 is not limited to deciding whether a party has an arguable case. It also includes the ability to decide such a motion on the merits, at least where there is sufficient uncontested material to permit it to reach an appropriate decision. Procedural fairness and natural justice do not require that every dispute be decided by way of a full hearing with *viva voce* evidence

and cross-examination. Procedural fairness may be satisfied so long as the parties are provided with an opportunity to know the case they have to meet, and a chance to make their own case: see generally *McRaeJackson v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, 2004 CIRB 290, at paras. 1, 2, 13 and 50; *Sganos v. Association of Canadian Financial Officers*, 2022 FPSLREB 30, at paras. 71 to 73; and *International Brotherhood of Electrical Workers Local 1739 v. International Brotherhood of Electrical Workers*, 2007 CanLII 65617 (ON SCDC).That jurisdiction enables the Board to accept, weigh and act upon such evidence as emails, texts, written statements of parties and witnesses (whether given under oath or not)—in other words, the type of evidence that was used by the parties in the case before me.

[65] To return to my initial concern, the point is that at issue in a request to dismiss a grievance for want of jurisdiction are not the allegations made by the grievor or, for that matter, the employer. It is the evidence that is said to establish the facts that are said to establish the merits of a grievance or complaint—or at least, that the matter should proceed to a full hearing.

[66] Reformulating the analysis in this way recognizes that many of the grievances and complaints that end up before the Board do not involve disputes over material facts. Rather, most turn on the inferences to be drawn from such facts, or the legal consequences of such facts. They depend too upon a contemporaneous record, created by the parties and composed of correspondence, emails, texts, and social media postings. It is a record of what the parties said or did before the dispute or as it arose. Such evidence might not have been made under oath, but there is little reason in most cases to doubt its authenticity. Credibility is rarely a central issue in the face of such a record. Indeed, that record often forms the body of the documentary evidence that is put before the Board in a full hearing. And in such a case the Board clearly has the jurisdiction to decide those inferences and those consequences without the need for a full hearing.

[67] Returning now to the facts and the parties' submissions, first, I was satisfied that the employer established that when the termination letter was sent, the grievor was a probationary employee, that the letter was sent during her probationary period, and that suitable notice or payment in lieu was made.

[68] I was also satisfied that the grievor's manager established that at least on a *prima facie* basis, she had an employment-related reason for her decision. The grievor's duties and responsibilities included creating the public face of and representations for government ministers and their departments. Clearly, accuracy and expedition in the creation of that representation were crucial to the position. The grievor dismissed or downplayed her manager's concerns about typographical errors or missing content in the reports and statements she prepared as minor or as something that she should have been warned against. But her manager's concerns were about things that anyone in the grievor's position would or should have known were central to her duties and responsibilities as a communications advisor. She did not need to be told that they were important — or, to put it another way, the fact that an employee does not appreciate the importance of core responsibilities is itself an employment-related cause for concern in the case of a probationary employee.

[69] I should note in this respect that the grievor lent some weight to the manager's concerns, inasmuch as she acknowledged in her Timeline that given her past work and career as a public affairs officer for the Alberta government, "… the role [she was offered by Ms. Kinley] was more junior than what [she] had previously done …". She might, as she said, have nevertheless been "… excited by the opportunity to help [her manager] achieve her goal", but it is also true that working in roles less suited to one's experience and expectations does not always lead to acceptable performance.

[70] In any event, I was satisfied that Ms. Kinley had a reasonable employment-related reason for her decision to terminate the grievor during her probationary period. It might not have withstood a just cause assault, but that is not the burden that the employer had to meet.

[71] Given that conclusion, the burden then shifted to the grievor to show the following (from *Tello*, at para. 111):

> *… that the termination of employment was a contrived reliance on the new* PSEA*, a sham or a camouflage. If the grievor establishes that there were no legitimate "employment-related reasons" for the termination (in other words, if the decision was not based on a bona fide dissatisfaction as to his suitability for employment:* Penner *at page 438) then the grievor will have met his burden.…*

[72] I was not persuaded that the grievor met that burden, despite the volume of material she and her represented placed before the Board. The thrust of her case, as laid out in her Timeline, was essentially that she did not always agree with her manager, that her manager had been unreasonable and therefore by implication could not have acted in good faith, or that the manager had been upset that the grievor had done things without first consulting with her. But disagreeing with a manager's decisions is not a fact that establishes an arguable case of arbitrary, discriminatory, or bad-faith conduct on his or her part.

[73] The grievor particularly emphasized the good performance review that she received from the manager in May 2017 and on the fact that in only a few minor (in her view) instances, her performance fell short, and in only a few instances did her manager express any concern to her. However, as I have already noted, the fact that a manager might not have been as forthright about shortcomings in a probationary employee's performance, as good labour relations might dictate, is not enough to establish bad faith or that the manager lacked an employment-related reason for the termination.

[74] Accordingly, on the evidence, facts, and materials that the parties relied upon, I was satisfied that the employer established that it had a legitimate employment-related reason for its decision to terminate the grievor on probation. Nor did the grievor provide evidence of facts that, would establish that the employer acted in a discriminatory or an arbitrary manner or out of bad faith. Accordingly, I declare that I have no jurisdiction to hear this grievance.

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

(The Order appears on the next page)

VI. Order

[76] For the above reasons and on these facts, I declare that the Board has no jurisdiction to hear this grievance, and I order the file closed.

January 13, 2023.

Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board