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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

MELANIE JODOIN

Grievor

and

DEPUTY HEAD
(Department of Employment and Social Development)

Respondent

Indexed as
Jodoin v. Deputy Head (Department of Employment and Social Development)

In the matter of individual grievances referred to adjudication

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Isabelle Roy-Nunn, counsel

For the Respondent: David Perron, counsel

Heard at Ottawa, Ontario,
December 16 to 18, 2024.
Additional written submissions filed December 23, 2024.

REASONS FOR DECISION

I. Overview

[1] Melanie Jodoin was dismissed from her employment with Employment and Social Development Canada (ESDC) less than 12 months after commencing it, for having made certain comments to a co-worker. ESDC characterized her dismissal as a rejection on probation. She grieved her dismissal.

[2] When an employer rejects an employee on probation, it bears the initial burden to show that the employee was still in the probationary period and that it provided them with the required notice or pay in lieu of notice. If so, the burden shifts to the employee to prove that the employer's action was not a *bona fide* rejection on probation.

[3] Ms. Jodoin's grievance raises two issues, one at each stage of that test.

[4] The first issue is whether she was still a probationary employee when she was dismissed. She had disclosed a disability to management a few months after she was hired, and the accommodation process for her disability had not been completed by the time she was dismissed. Ms. Jodoin argues that s. 2(3) of the *Regulations Establishing Periods of Probation and Periods of Notice of Termination of Employment During Probation* (SOR/2005-375; "the *Probation Regulations*") paused her 12-month probationary period from the date she disclosed her disability until it had been fully accommodated.

[5] I have concluded that Ms. Jodoin was still in her probationary period when she was dismissed. A careful review of the text, context, and purpose of s. 2(3) of the *Probation Regulations* discloses that it does not apply to an employee, such as Ms. Jodoin, who discloses a disability after commencing their employment. Instead, it only operates at the beginning of a probationary period.

[6] The second issue is whether Ms. Jodoin's rejection on probation was in bad faith or discriminatory. I have concluded that it was not. Her rejection on probation was a good-faith response to comments that she made to a co-worker that reflected negatively on her suitability for employment in the federal public service. Neither those comments nor the decision to reject her on probation were linked to her disability.

[7] Therefore, I have denied Ms. Jodoin's grievance.

[8] My detailed reasons follow.

II. The grievor was still a probationary employee when she was dismissed

A. Overview of the *Probation Regulations*

[9] As I just laid out in the overview, the first issue is whether Ms. Jodoin was still a probationary employee when she was dismissed. ESDC acknowledged in closing argument that if Ms. Jodoin was not in her probationary period, her dismissal cannot stand.

[10] Subsection 61(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*") provides that a person appointed from outside the public service in the core public administration (which includes ESDC) is on probation for a period established by regulations enacted by the Treasury Board. Paragraph 26(1)(c) of the *PSEA* explicitly gives the Treasury Board the authority to enact regulations establishing probationary periods. It enacted the *Probation Regulations* using that power.

[11] The *Probation Regulations* spell out the probationary period for new employees in a schedule. There is no dispute that Ms. Jodoin's probationary period was 12 months. Subsections 2(2) and (3) of the *Probation Regulations* provide for some periods of time not included within the probationary period. The entire s. 2 of the *Probation Regulations* reads as follows:

…	[…]
Probationary period	***Période de stage***
2 (1) *The probationary period referred to in paragraph 61(1)(a) of the* Public Service Employment Act, *for the class of employees described in column 1 of an item of the schedule, is the period set out in column 2 of the item.*	***2 (1)*** *La période de stage visée à l'alinéa 61(1)a) de la* Loi sur l'emploi dans la fonction publique *est, pour la catégorie de fonctionnaires figurant dans la colonne 1 de l'annexe, la période figurant dans la colonne 2 en regard de cette catégorie.*
(2) *The probationary period does not include any period*	***(2)*** *La période de stage ne comprend pas :*
(a) *of leave without pay;*	***a)*** *les périodes de congé non payé;*

(b) *of full-time language training;*	***b)*** *les périodes de formation linguistique à plein temps;*
(c) *of leave with pay of more than 30 consecutive days; or*	***c)*** *les périodes de congé payé de plus de trente jours consécutifs;*
(d) *during which a seasonal employee is not required to perform the duties of the position because of the seasonal nature of the duties.*	***d)*** *dans le cas du fonctionnaire saisonnier, les périodes pendant lesquelles il n'est pas tenu d'exercer les fonctions de son poste en raison de leur nature saisonnière.*
(3) *The probationary period for an employee who is disabled and requires job accommodation begins on the day on which the necessary accommodation is made.*	***(3)*** *La période de stage du fonctionnaire handicapé à l'égard duquel doivent être prises des mesures d'adaptation commence à la date de prise des mesures.*
…	[…]

[12] Ms. Jodoin submits that she was not in her probationary period at the time of her dismissal because she was disabled and the accommodation measures had not yet been fully implemented. She submits that disclosing her disability paused the probationary period until she was fully accommodated. ESDC submits that s. 2(3) of the *Probation Regulations* did not pause her probationary period during the accommodation process.

[13] The question of whether Ms. Jodoin was in her probationary period must be resolved by interpreting the *Probation Regulations*. This requires assessing the text, context, and purpose of the *Probation Regulations*; see *Bernard v. Canada (Professional Institute of the Public Service)*, 2019 FCA 236 at para. 7 and *Piekut v. Canada (National Revenue)*, 2025 SCC 13 at paras. 42 to 45.

[14] I have concluded that an employee's probationary period is not suspended after they request accommodation for a disability. Rather, s. 2(3) of the *Probation Regulations* applies to employees who disclose a disability before or when they commence employment. In those cases, s. 2(3) means that the probationary period does not begin to run until the employee is accommodated.

[15] I will first set out the basic facts necessary to ground this issue in this case. Once I have done so, I will provide my reasons for concluding that the *Probation*

Regulations bears the meaning I have ascribed to it in light of its text, context, and purpose.

B. The facts relevant to this issue are not in dispute

[16] There is no dispute about the facts that are relevant to the effect of the *Probation Regulations*. ESDC hired Ms. Jodoin to the position of Payment Services Officer for a term from December 10, 2020, to December 7, 2021. As someone who was appointed from outside the public service, Ms. Jodoin was subject to a 12-month probationary period.

[17] In March of 2021, Ms. Jodoin explained to her team leader (Mireille Robert) that she had some medical conditions that explained why she had to take more frequent breaks to use the bathroom. She provided a medical note on May 21, 2021, explaining her medical conditions. The medical note asked for accommodations to work flow and tasks and a complete ergonomic assessment.

[18] On June 1, 2021, the manager responsible for Ms. Jodoin's unit (Katherine Raposo-Massé) sent a letter about the impact of her request for accommodation on her probationary period. That letter quoted from ss. 2(2) and (3) of the *Probation Regulations* and then stated as follows:

> …
>
> *As an employee who requires job accommodation, your probationary period has been interrupted, effective May 19th 2021 while we work together to implement appropriate accommodation measures for you in the workplace. Feedback for your work that is provided during this interruption period is not to be interpreted as performance management, or discipline. Rather, feedback meetings are intended as progress reports provided to support you in further developing the knowledge, skills, and abilities required to perform your work duties. We want you to be successful as a Payment Services Officer. Please use the feedback, as well as the other measures we have put in place (i.e. example coaching calling NAAL) to support your success, as opportunities to develop the knowledge, skills and abilities required for your position.*
>
> …

[19] The parties agree that ESDC took steps to accommodate Ms. Jodoin's disability but that it had not fully accommodated her by the time it dismissed her from her employment. As I stated in the overview, ESDC dismissed her because of comments

that she made to a co-worker. She made those comments on June 16 and 17, 2021, and ESDC dismissed her on July 20, 2021. In other words, both the events that led to her dismissal and the dismissal itself occurred after she had disclosed a disability but before that disability had been fully accommodated.

C. The June 1, 2021, letter has no legal effect

[20] Before examining the meaning of the *Probation Regulations*, I want to address the impact of the June 1, 2021, letter that I just quoted. That letter states clearly that Ms. Jodoin's probationary period has been interrupted.

[21] Ms. Raposo-Massé stated in her evidence that her understanding of that letter is that the probationary period had been interrupted for the purposes of assessing Ms. Jodoin's job performance but that it had not been interrupted for the purposes of assessing her suitability for the role. The comments that she made to a co-worker were relevant to assessing her suitability, not her job performance; therefore, she was still in the probationary period for that purpose.

[22] ESDC quite rightly did not advance that argument in its closing submissions. As the grievor pointed out, an employer cannot "slice and dice" probationary periods into different periods for different purposes, and in any event, there is too fine a line between suitability and job performance to make any such effort practical.

[23] Instead, ESDC submitted that the letter was wrong and that it had no legal effect. I agree.

[24] Probation in the core public administration is statutory, not contractual. By that I mean that the existence of a probationary period is a statutory requirement. Subsection 61(1) of the *PSEA* states that "[a] person appointed from outside the public service **is on probation** for a period …" [emphasis added] prescribed by the *Probation Regulations*. Paragraph 113(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *FPSLRA*") prohibits a collective agreement from establishing any term or condition of employment that has been established under the *PSEA* — including probationary periods. Neither bargaining agents nor individual employees in the core public administration have the ability to negotiate changes to probationary periods with their employer. Similarly, the employer has no ability to unilaterally

waive, extend, or otherwise determine a probationary period. As explained in *Gill v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 55 at para. 114:

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

[25] In *Canada v. Ouimet*, [1979] 1 F.C. 55 (C.A.), the Federal Court of Appeal held that a provision of the regulations in place at that time that purported to give the deputy head of a federal government department the power to extend an employee's probationary period was invalid because there was no express power in the *PSEA* permitting the deputy head to extend a probationary period. The Supreme Court of Canada affirmed that result in *Emms v. Canada (Deputy Minister of Indian Affairs and Northern Development)*, [1979] 2 S.C.R. 1148. This shows that the power to extend a probationary period must be set out expressly in the *PSEA*. There is no such express power; therefore, there can be no such implied power either.

[26] The letter of June 1, 2021, has no legal effect because the employer cannot adjust the probationary period (to extend it, shorten it, or suspend it). The length of the probationary period is set by operation of law through the *Probation Regulations*.

[27] Finally, the grievor argued that if the letter has no legal effect, it still shows bad faith on the part of the employer. I will address the grievor's claim of bad faith more broadly later in this decision.

D. The text of the *Probation Regulations* — the importance of the word "begins"

[28] As I set out earlier, the issue is about s. 2(3) of the *Probation Regulations*, which states that "[t]he probationary period for an employee who is disabled and requires job accommodation **begins** on the day on which the necessary accommodation is made" [emphasis added]. The key word in s. 2(3) is the word "begins", or, in French, the word "*commence*." The word is a synonym of "start". The word "begins" does not mean the same thing as "recommence" or "begins again".

[29] When an event starts and then is suspended for a time, we do not refer to it as beginning after that suspension. The event may continue, recommence, or even begin again — but it does not begin after having been suspended. A baseball game

suspended because of rain does not begin when the field dries off, a war suspended during a truce does not begin when the truce expires, and a journey suspended because of illness does not begin when the traveller recovers — they continue or recommence. To begin is to do the first part of an action, not the second part.

[30] On a plain reading of s. 2(3) of the *Probation Regulations*, it cannot apply to an employee who has already started their probationary period. It states that the probationary period for an employee who is disabled and requires accommodation **begins** when the accommodation is made. Therefore, s. 2(3) applies when a new employee discloses their disability before or when starting their employment. The probationary period for that employee does not begin until their disability is accommodated. The use of the word "begins" precludes s. 2(3) from applying to employees who are already in their probationary periods.

E. The context and purpose of the *Probation Regulations*

[31] A plain reading of the *Probationary Regulations* alone is not determinative, and its text must be considered in light of its context and purpose; see *Piekut* at para. 45. In this case, the context and purpose of s. 2(3) of the *Probation Regulations* support the interpretation that s. 2(3) applies only to employees who disclose their disability before their probationary periods begin. I say this for six reasons.

1. The textual context of s. 2(3) of the *Probation Regulations*

[32] First, s. 2(3) of the *Probation Regulations* must be read in context with s. 2(2). Subsection 2(2) states that "[t]he probationary period **does not include** any period …" [emphasis added] and then lists four periods excluded from the probationary period. This means that the Treasury Board, when preparing these regulations, turned its mind to situations when the probationary period should be suspended. It listed four of them. Had it intended a period before the accommodation of a disability to be treated the same way as those other four periods, it would simply have listed that period in s. 2(2) of the *Probation Regulations*, or it would have used the explicit language that the probationary period "does not include" that accommodation period.

[33] The presumption of consistent expression presumes that the drafter of legislation or a regulation uses language carefully and consistently within a statute or regulation. The same words have the same meaning, but where different terms are used, they have different meanings; see *Alberta (Information and Privacy*

Commissioner) v. University of Calgary, 2016 SCC 53 at para. 53. In this case, the Treasury Board used the phrase "does not include" in s. 2(2) but the word "begins" in s. 2(3). I must respect that choice; had the Treasury Board intended that s. 2(3) bear the meaning that Ms. Jodoin ascribes to it, it would have used the phrase "does not include" instead of "begins".

2. The statutory history of s. 2(3) of the *Probation Regulations*

[34] During closing arguments, I brought the history of s. 2(3) of the *Probation Regulations* to the parties' attention and asked for submissions about that history. Both parties provided written submissions about this point shortly after the hearing concluded.

[35] The current *PSEA* was enacted in 2005 by repealing and replacing a statute of the same name. Both versions of the *PSEA* provide that new employees are on probation when they start their employment. However, the pre-2005 version of the *PSEA* stated that the Public Service Commission was responsible for enacting regulations dealing with probationary periods; the current *PSEA* gives that authority to the Treasury Board instead. Therefore, the Treasury Board enacted the *Probation Regulations* in 2005. Before that, the regulations dealing with probationary periods were the *Public Service Employment Regulations* (SOR/2000-80; "the *PSER*").

[36] Both the *PSER* and *Probation Regulations* were accompanied by a regulatory impact statement. These regulatory impact statements do not form part of a regulation, but they may be used to assist in understanding a regulation; see *Merck Frosst Canada & Co. v. Apotex Inc.*, 2011 FCA 329 at para. 45; and *Monsanto v. Canada (Health)*, 2020 FC 1053 at para. 70.

[37] I will begin by setting out the relevant part of the *PSER*:

…	[…]
PROBATION	*STAGE*
Probationary period	*Période de stage*
30. *(1) The probationary period referred to in subsection 28(1) of the Act is the period described in Schedule 2 that corresponds to the*	***30.*** *(1) Le stage prévu au paragraphe 28(1) de la Loi est la période indiquée à l'annexe 2 pour*

class of employees of which the employee is a member.	*la catégorie de fonctionnaires applicable.*
Job accommodation	*Mesures d'adaptation*
(2) For the purpose of subsection 28(1) of the Act, the date of appointment of an employee who is disabled and requires job accommodation is considered to be the date on which the necessary accommodation is made.	*(2) Pour l'application du paragraphe 28(1) de la Loi, la date de nomination d'un fonctionnaire handicapé qui a besoin de mesures d'adaptation est réputée être celle à laquelle ces mesures sont prises.*
…	[…]

[38] There are two main differences between the *PSER* and the *Probation Regulations*. First, the *PSER* did not have the equivalent of s. 2(2) of the *Probation Regulations* setting out periods during which a probationary period did not run.

[39] Second, s. 30(2) of the *PSER* orients itself around the phrase "date of appointment". That is because s. 28(1) of the pre-2005 *PSEA* was also worded differently from s. 61 of the current version. The current version states that "[a] person appointed from outside the public service is on probation for a period …" spelled out in the *Probation Regulations*. Subsection 28(1) of the pre-2005 *PSEA* stated that an employee appointed from outside the public service "… shall be considered to be on probation from the date of the appointment until the end of such period as the Commission shall establish by regulation …".

[40] When read in that statutory context, s. 30(2) of the *PSER* was even clearer than the current *Probation Regulations* that it applied only at the very outset of the employment relationship. Instead of extending the probationary period, it deemed the date of appointment to be the date on which the necessary accommodation was made. It cannot have applied to an employee who disclosed a disability part way through their probationary period.

[41] Both parties in this case state that the difference between the two regulations is that under the *PSER*, the appointment of a disabled employee was delayed, while under the *Probation Regulations*, the probationary period of a disabled employee is delayed. I agree. However, in addition, the *PSER* also reflects the wording of the old *PSEA*. The old *PSEA* required probationary periods to begin upon appointment, so the *PSER* was

worded using that terminology. The new *PSEA* does not have that requirement, so the *Probation Regulations* can be, and are, worded differently.

[42] The two respective regulatory impact statements read as follows:

> ***PSER* regulatory impact statement:**
>
> …
>
> *Probation:*
>
> *The Regulations concerning probationary period give effect to section 28 of the Act by setting the length of the probationary period and stipulating the notice period that applies when a deputy head informs an employee that he or she is to be rejected on probation. The probationary and notice periods, which are not the same for all employees, are set out in a schedule to the Regulations. Employees are subject to a probationary period on entry to the Public Service only, which begins on the date of their appointment. It is important for all employees to have the tools and support needed to demonstrate fully that they meet the job requirements during that period. Therefore, the Regulations now ensure that disabled persons requiring accommodation at work benefit* ***do not begin their probationary period until the accommodation has been made.***
>
> …
>
> ***Probation Regulations* regulatory impact statement**
>
> …
>
> *The current regulations are the product of over a decade of consultations between the PSC, and departments and functional communities, with amendments responding to the operational needs of functional communities and organizations. Since April 2004, when the Public Service Human Resources Management Agency of Canada (PSHRMAC) began consultations on behalf of the TB, departmental and bargaining agents expressed overall satisfaction with existing flexibilities and did not bring forward any service-wide issues to suggest change.*
>
> ***The TB will maintain a status quo in its regulation regarding periods of probation*** *and periods of notice of termination of employment during probation for employees appointed from outside the public service.*
>
> …
>
> [Emphasis added]

[43] These two regulatory impact statements are a strong indication that the meaning of the old and new regulations was intended to remain the same. First, the *PSER*'s regulatory impact statement uses the language that is currently in the *Probation*

Regulations, in particular stating that employees "… do not **begin** their probationary period until the accommodation has been made" [emphasis added]. As I have said already, the *PSER* uses the word "appointment" to mirror the language of the *PSEA*; however, the intention behind the regulation was expressed using language that the Treasury Board could adopt in 2005 in light of the new wording of the *PSEA*.

[44] Second, the *Probation Regulations*' regulatory impact statement states that it is intended to maintain the status quo from the old *PSER*. This is another strong indication that s. 2(3) of the *Probation Regulations* applies only to employees at the outset of their probationary period — because that preserves the status quo in the old *PSER*.

[45] Ms. Jodoin pointed out that this intention to preserve the status quo cannot be entirely accurate because of s. 2(2) of the *Probation Regulations*, which did not exist in the *PSER*. I agree. However, regulatory impact statements are not line-by-line explanations of a regulation. Instead, they explain the broad intention behind the regulation. The broad intent behind the *Probation Regulations* was to preserve the status quo; however, when the language used clearly departs from the status quo (as in s. 2(2)), the clear language applies despite the broad statement of intent in the regulatory impact statement. On the other hand, s. 2(3) can be interpreted consistently with the status quo. I have already explained why that is its plain meaning. The regulatory impact statement is helpful context confirming that interpretation.

3. The case law does not assist in interpreting the *Probation Regulations*

[46] Both parties acknowledged that there are no cases dealing directly with this issue. However, both parties relied on *Gill* and submitted that it supports their positions.

[47] *Gill* was about the interpretation of s. 2(2) of the *Probation Regulations*. Specifically, it was about how to calculate paid and unpaid leaves of absences under ss. 2(2)(a) and (c) of the *Probation Regulations*. The Federal Public Sector Labour Relations and Employment Board ("the Board"), which in this decision also refers to any of its predecessors) concluded that the employer had miscalculated the paid and unpaid leaves of absences in that case and, as a result, terminated the grievor one day after the end of his probationary period.

[48] While the case was only about s. 2(2) of the *Probation Regulations*, the Board still commented about s. 2(3) by saying the following:

> …
>
> *[117] The purpose of ss. 2(2) and 3 of the probationary* Regulations *is to define the time frame of a probationary period. Those provisions simply state the time that does not count as part of that 12-month period.*
>
> …
>
> *[120] It is clear from a review of ss. 2(2) and 3 that not all leave is to be exempt from calculating the probationary period.…*
>
> …
>
> *[140] It is equally clear from the wording of s. 3 of the probationary* Regulations *that disabled employees who require accommodation shall not have the period counted in which they had to do their jobs without the accommodation. This not only makes perfect sense, it also aligns with the employer's argument that the probationary period is there to provide a reasonable period in which to assess new employees and to give them a reasonable period in which to demonstrate their competencies and suitability. It would not be fair or reasonable to assess new employees who require accommodation on their performance when they have not been provided the accommodation they require to do the work.*
>
> …

[49] Since s. 2(3) was not relevant to the facts in *Gill*, the Board did not go any further in parsing its meaning. The Board's comments, in particular at paragraph 140, could assist either side of this case. The Board's statement that "… disabled employees who require accommodation shall not have the period counted in which they had to do their jobs without the accommodation" assists Ms. Jodoin, but its statement that it "… would not be fair or reasonable to assess **new** employees who require accommodation on their performance …" [emphasis added] assists ESDC.

[50] I found *Gill* useful when considering the purpose behind a probationary period and the *Probation Regulations* more generally. However, I did not find it useful to determine the narrow issue in this case about the meaning of s. 2(3) of the *Probation Regulations*. The Board was not interpreting s. 2(3), and anything it said about that subsection was only context for its interpretation of s. 2(2) and the lengthy steps that it took to calculate the amount of paid and unpaid leave taken by the grievor in that case.

4. Maxims of statutory interpretation of benefits-conferring and human-rights legislation are not helpful in this case

[51] Ms. Jodoin relied on two principles of statutory interpretation in her argument: that benefits-conferring legislation should be interpreted in a broad and generous manner, and that human-rights-protecting legislation should also be interpreted in a broad and liberal fashion. According to Ms. Jodoin, both maxims mean that any ambiguity in s. 2(3) of the *Probation Regulations* should be resolved in her favour.

[52] These maxims of statutory interpretation are what the Supreme Court of Canada called "… secondary principles of interpretation, including residual presumptions …" at paragraph 48 of *Piekut*. The Court also stated that these maxims of statutory interpretation are only relevant if the statute remains ambiguous after considering its text, context, and purpose. I have concluded that the text, context, and purpose of the *Probationary Regulations* do not lead to any ambiguity; therefore, it is not necessary to resort to these secondary principles.

[53] However, in any event, I have concluded that neither maxim assists Ms. Jodoin in this case.

[54] The so-called "pro-benefit principle" originated with and has been applied to legislation that confers a discrete financial benefit on claimants, such as employment insurance (as in *Abrahams v. Attorney General of Canada*, [1983] 1 SCR 2 at p. 10), termination pay under employment standards legislation (as in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 36; and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986 at 1002 to 1003), pension benefits (as in *Girard v. Canada (Attorney General)*, 2022 FC 578), and payments to separating spouses (as in *Clarke v. Clarke*, [1990] 2 SCR 795 at 806 to 807). It has also been extended to other legislation that provides non-financial benefits, such as a mother's request for access to her children under Crown ward (as in *Kawartha-Haliburton Children's Aid Society v. M.W.*, 2019 ONCA 316).

[55] The *Probation Regulations* do not provide any benefit to employees. It impacts whether an employee who has been terminated has a claim against their former employer. That does not make it benefits-conferring legislation.

[56] At most, it is rights-limiting legislation because a good-faith termination during a probationary period cannot be referred to adjudication. However, the right to refer a grievance to adjudication is statutory. While there is a presumption against interfering

with common law rights, the presumption is much weaker when it comes to statutory rights. As explained in Sullivan, *The Construction of Statutes*, 7th ed., at paragraph 15.04(1), "[i]n the case of statute-based rights, the scope of the right is fixed by the legislature in the first place and the legislature is free to amend its legislation as it sees fit."

[57] Additionally, I agree with ESDC that Ms. Jodoin's interpretation of the *Probation Regulations* would benefit her in this case but that it would harm others by extending the 12-month probationary period. Employees terminated after that 12-month period would not benefit from an interpretation of the *Probation Regulations* that extended their probationary periods because of a disability that was accommodated. For these reasons, the maxim of a broad and liberal interpretation of benefits-conferring legislation cannot aid Ms. Jodoin in this case.

[58] The principle that human-rights-protecting legislation should also be interpreted in a broad and liberal fashion does not apply in this case either. That principle applies to legislation whose purpose is to enshrine or reflect constitutional or other fundamental rights. The principle obviously applies to human rights legislation (see *Insurance Company of British Columbia v. Heerspink*, [1982] 2 SCR 145 at 157 to 158), but it also applies to official languages and privacy legislation (see *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at paras. 23 to 25) in light of those statutes' "special purposes".

[59] The *Probation Regulations* as a whole do not serve a special purpose of preserving human rights. I am aware of no authority (and Ms. Jodoin has cited none) for the proposition that one subsection of a regulation should be interpreted as if it were quasi-constitutional legislation while the rest of the regulation should not be.

[60] Ms. Jodoin also submits that holding an employee who requires accommodation and is not receiving it to the same probationary standard as an employee with no limitations amounts to discrimination. She has overstated the state of the law in that submission. Holding a disabled employee to a particular job standard is discriminatory only if the disability is linked to that job standard. I will discuss this in greater detail later, when assessing Ms. Jodoin's claim that her termination was discriminatory.

[61] For these reasons, I did not find these two maxims of statutory interpretation helpful in interpreting s. 2(3) of the *Probation Regulations*.

5. Consequences of the interpretation in other cases

[62] If I adopted Ms. Jodoin's interpretation of s. 2(3), it would lead to results that are irrational or otherwise cannot have been intended by the drafters of that regulation.

[63] First, if Ms. Jodoin is right, what happens to the probationary period once the employee has been accommodated? Does it continue until exactly 12 months from the initial hire, does it continue for a longer period so that the total period of probation before the disability and after the accommodation adds up to 12 months, or does it restart for a new 12-month period? Ms. Jodoin submitted that this issue is not raised in this grievance, and therefore, I do not need to be concerned about it. Yet, I am. The first interpretation would shorten the probationary period, something that the *Probation Regulations* do not contemplate in any other situation. The third interpretation would also place an employee in the invidious position of being put back on probation for 12 months, potentially after having completed almost the entire probationary period, depending on when they disclosed their disability. The second interpretation is probably the least irrational, but it still extends an employee's probationary period and deprives them of the increased job security that comes with transitioning out of probation. None of these results is wholly satisfactory.

[64] Second, what is the impact of the period during which an employee is still waiting to be fully accommodated? For example, suppose an employee does something inappropriate before disclosing their disability and then the employer discovers it after the employee discloses their disability. Can the employee be rejected on probation while being accommodated? When I asked that during closing arguments, Ms. Jodoin said, "Yes." However, that is inconsistent with how the Board deals with all other rejections on probation. As shown in *Gill*, the employer cannot reject someone on probation outside the probationary period, even for events that occurred while they were on probation.

[65] The alternative, according to Ms. Jodoin's proposed interpretation, is that an employee does something wrong, leaves the probationary period while being accommodated, returns to probation after being accommodated, and is immediately rejected on probation for the event that occurred much earlier. I have real concerns about an interpretation of the *Probation Regulations* that would require an employer and employee to go through the effort (which may be considerable) of accommodating

a disability, all while knowing that the minute the accommodation is complete, the employee will be terminated anyway.

[66] Finally, Ms. Jodoin's interpretation could lead to a never-ending probationary period. Accommodating a disability is rarely a discrete event. The functional limits flowing from a disability can change or fluctuate over time. An employee could be fully accommodated one day, only to have their functional limitations change in a way that requires a different accommodation. On Ms. Jodoin's interpretation, this would stop and start the probationary period each time a revised accommodation is required.

6. Purpose of the *Probation Regulations*

[67] ESDC made a number of arguments about the purpose of probationary periods generally and why its interpretation of s. 2(3) of the *Probation Regulations* is consistent with that purpose. The purpose of a probationary period to provide an employer with time to assess the suitability of a new employee, both their performance of the tasks assigned to them and their more general suitability in terms of their character and ability to work in harmony with others; see *Jacmain v. Attorney General (Can.)*, [1978] 2 SCR 15 at 38 and 39, and *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134 at para. 109, among many other cases.

[68] I did not find the purpose of probationary periods generally to be useful or helpful in interpreting s. 2(3) of the *Probation Regulations*. The purpose of probationary periods is helpful when assessing the purpose behind s. 61 of the *PSEA*, which establishes a probationary period. However, the *Probation Regulations* fix the duration of the probationary period; they do not create such a period. Instead, I need to assess the purpose of the *Probation Regulations* generally and s. 2(3) specifically.

[69] Starting with the purpose of the *Probation Regulations* generally, it is clearly set out in s. 26(1)(c) of the *PSEA*, which grants the Treasury Board the power to make regulations "… establishing periods of probation for the purposes of subsection 61(1) …". Therefore, the purpose is to set the length of a probationary period.

[70] The way in which the *Probation Regulations* were drafted also helps illuminate two of its purposes. First, the *Probation Regulations* fix the period of probation in a schedule. The schedule has 6 categories of employees. Two of those categories are for employees recruited to undertake training or apprenticeships, and their probationary

periods are either 12 months or the length of their training or apprenticeship periods, whichever is longer. Two categories are for specific job classifications (research scientists and university professors), with 24- and 36-month probationary periods, respectively. There is a category for employees whose appointments are for a specified term of less than 1 year, and they are on probation for their entire term or 12 months (in the case of serial terms), whichever is shorter. The last category is for everyone else, who has a 12-month probationary period.

[71] In this way, the *Probation Regulations* provide a clear and fixed statement of the probationary period for each employee. The *Probation Regulations* ensure that there is no discretion in setting the length of a probationary period and that every employee in the same circumstances will have the same probationary period. In other words, their purposes are clarity and consistency.

[72] Second, s. 2(2) of the *Probation Regulations* provides an exception for periods of leave without pay, full-time language training, leave with pay of longer than 30 consecutive days, and seasons of inactivity for seasonal employees. These exceptions all share the common element that the employee is not at work, which means that the employer is unable to assess their job performance or more general suitability. This discloses another purpose of the *Probation Regulations*: to fix a time at work or while working that the Treasury Board feels is necessary to assess the performance and suitability of its new employees.

[73] Turning to s. 2(3) specifically, I have already quoted the regulatory impact statement for that provision. To summarize, it is to preserve the status quo of the original version of the regulations (the *PSER*), whose purpose was to delay the beginning of the probationary period until after a disabled employee had been accommodated.

[74] I have concluded that the specific purpose of s. 2(3) of the *Probation Regulations* is more helpful to interpreting it than the general purpose of the *Probation Regulations* or even the general purpose of probationary periods. However, my interpretation of s. 2(3) (that it applies only at the beginning of the probationary period) is not inconsistent with the purpose of the *Probation Regulations* to create clarity and consistency in the length of a probationary period. Nor is it inconsistent with the more general purpose of a probationary period. Being disabled and not fully accommodated

does not always make an employee incapable of working or incapable of being assessed for their suitability or job performance unrelated to their disability.

[75] Subsection 2(3) of the current regulations (unlike the *PSER*) allows employees who disclose their disability at the outset to still be appointed and attend the basic orientation and training that comes with any public service position while the employer arranges the necessary accommodation. It does not start the clock on the probationary period until that accommodation is set in place. However, once the clock has begun to run (either because the employee did not disclose their disability, as in this case, or because the accommodation was completed), the clock does not stop running as a result of a disability (either new or newly disclosed). Nothing in this is inconsistent with the broader purposes of the regulations or probationary periods more generally.

F. Conclusion on the meaning of s. 2(3) of *Probation Regulations*

[76] I have concluded that s. 2(3) of the *Probation Regulations* applies to employees who disclose their disability before or as they begin their employment. For these employees, the probationary period does not begin to run until they are accommodated. Employees who disclose a disability during their probationary periods remain on probation while they are accommodated. This interpretation of s. 2(3) is consistent with its plain wording that the probationary period "… **begins** on the day on which the necessary accommodation is made" [emphasis added]. It is also consistent with its context and purpose.

[77] This means that Ms. Jodoin was still in the probationary period when she was dismissed from her employment.

III. The rejection on probation was in good faith and not discriminatory

[78] Both parties agree that if Ms. Jodoin was still in the probationary period, she bears the burden of demonstrating that her rejection on probation was in bad faith or discriminatory. I also agree with that approach in this case.

[79] In *Tello*, at para. 111, the Board set out the two-step approach to grievances involving rejections on probation. In step one, the employer bears the burden of proving that the grievor was on probation at the time of their dismissal and that notice or pay in lieu of notice had been provided. I have already explained why I have

concluded that Ms. Jodoin was still in her probationary period when she was dismissed. She also conceded that she received the required pay in lieu of notice upon being dismissed.

[80] In step two, the grievor bears the burden of proving that their dismissal was a contrived reliance on the *PSEA*. Two ways a grievor may do so is to show that their dismissal was in bad faith or that it was discriminatory. Ms. Jodoin argues both in this case.

[81] I have concluded that Ms. Jodoin has not met her burden to prove that her rejection on probation was in bad faith or discriminatory.

[82] In this section of this decision, I will begin by outlining Ms. Jodoin's conduct that led to her dismissal. I will then explain my reasons for concluding that ESDC did not act in bad faith by dismissing her for that conduct. Finally, I will explain why its decision was also not discriminatory.

A. Conduct leading to Ms. Jodoin's dismissal

[83] Ms. Jodoin began working as a payment services officer on December 10, 2020. Payment services officers are essentially call-centre workers at ESDC. They take calls from Canadians who are applying for or receiving employment insurance.

[84] ESDC monitored six of Ms. Jodoin's calls between March 15 and May 19, 2021 and she received less than 75% (the passing grade) on four of them. Therefore, Ms. Robert met with Ms. Jodoin on May 11 and 19, 2021, to discuss her lack of progress. At that time, Ms. Jodoin disclosed that she had some medical conditions that were impeding her performance. She provided a doctor's note dated May 21, 2021, that provided a medical diagnosis, stated that Ms. Jodoin may need additional time or reminders to complete tasks, stated that she required "… accommodations for work flow and tasks", and recommended an ergonomic assessment.

[85] On June 1, 2021, Ms. Raposo-Massé sent the letter that I discussed earlier, incorrectly stating that Ms. Jodoin's probationary period would be interrupted. Also importantly, the letter stated that Ms. Jodoin would continue to be provided with feedback on her performance. This feedback was not to be used for performance management or disciplinary purposes but was meant as "… progress reports provided

to support [Ms. Jodoin] in further developing the knowledge, skills, and abilities required to perform [her] work duties."

[86] In addition to sending that letter, Ms. Raposo-Massé paired Ms. Jodoin with coaches to work with her one-on-one. Ms. Jodoin was assigned new coaches every few days. The coaching took place over the audio function in Microsoft Teams. The coach could use screen sharing but did not communicate over video.

[87] On June 16 and 17, 2021, Carley Stefik was assigned to be Ms. Jodoin's coach. Ms. Stefik was a relatively new Payment Services Officer, as she began working in October 2020, only a few months before Ms. Jodoin. Ms. Stefik listened in on Ms. Jodoin's calls over that two-day period, and then they discussed the calls after the fact. Ms. Stefik was very complimentary of Ms. Jodoin's call handling.

[88] Ms. Stefik explained that there was also what is called "green time". Green time is the time between calls. During green time, Ms. Jodoin chatted with Ms. Stefik. Ms. Stefik explained that there was more green time than usual on June 16 because it was a slow day for calls.

[89] During this green time, Ms. Jodoin made a number of comments that led to her dismissal. As I will explain shortly, Ms. Stefik was asked to send these comments in writing to her team lead, which she did on June 18, 2021. Therefore, I will reproduce Ms. Stefik's written recollection of those comments, as follows:

> …
>
> *Melanie had good call control, a calm/confident tone of voice, was able to identify the reason of each call and how to proceed. Melanie had an excellent day on the phones.*
>
> *During "green time" between calls, Melanie was very vocal about her personal beliefs and views regarding the current state of the world. For example, COVID-19, the Muslim family in London, indigenous children and the black lives matter movement. Melanie asked if I attended the National Public Service Week live event on Tuesday, I stated that I had. Melanie went on to say she could not believe that they used this as an opportunity to push the COVID-19 vaccine. She expressed that she does not believe that COVID-19 is as big a threat as the media states it is. She expressed that she herself does not believe masks are necessary or should be used as a method to help prevent the spread. I responded by saying "Everyone has their own opinions, if a mask makes you comfortable during the pandemic then wear a mask. If it doesn't,*

> *then it doesn't. Everyone is entitled to their own views." I left it at that.*
>
> *Melanie then brought up the Muslim family that was murdered in London. She mentioned that she could not believe that was brought up during the live event as well. "It happened and it's over. There are more important things going on besides that and the 215* [Indian residential school] *children they found. That's part of the history. It happened years ago. I don't see why it needs to be brought up today." She then went on to mention the Black lives Matter movement. "Same goes for the Black Lives whatever it was that happened in the states. Like really people? It's not like Hitler was walking around killing people. Then these people, rioters, bring up Aunt Jemima and whatever else they want cancelled because a cop apparently killed a black man in the US. It was like alright we're getting rid of Aunt Jemima and Uncle Ben, really all these things are history, they've been around for so long, it's the past, it's history, why are you pushing this now. All these people are demanding a day to remember these things people.. When will there be a day to remember white people?" She then mentioned how she is not racist or prejudice in any way.*
>
> *I was flabbergasted. I was not entirely sure how to respond.*
>
> …
>
> [*Sic* throughout]

[90] Ms. Stefik testified at the hearing. She confirmed that Ms. Jodoin made those comments. She said the comments started at around 10 a.m. on June 16, 2021. Ms. Stefik said that she kept trying to change the topic whenever Ms. Jodoin made one of those comments (or hoped that someone would call to stop the conversation) but that she was not sure how to deal with these comments. She was very uncomfortable with these comments, but did not tell Ms. Jodoin so.

[91] On June 17, 2021, Ms. Stefik reached out to her team lead for advice on what to do about these comments. Her team lead recommended that she inform Ms. Robert (Ms. Jodoin's team lead), so she did. Ms. Stefik met with Ms. Robert on June 18 and was asked to send an email outlining the comments, which she did; I have just quoted it. She also testified that she wrote that email based on notes that she wrote at the bottom of the report that all coaches prepare about their trainees.

[92] Ms. Jodoin also testified. Her evidence on this incident could charitably be characterized as unclear. She did not flatly deny saying those things. Instead, she said that her real concern was the volume of emails sent by ESDC to its employees. She went on to testify that she felt like issues to do with Black Lives Matters, Indigenous

Canadians, or the Muslim family that was killed did not have anything to do with her job and that she did not want to have to hear about these issues at work. In support of this claim, she provided an email that she sent to Ms. Robert on March 11, 2021, asking to receive fewer emails that confirm that transactions that she has submitted have been reviewed and that no further action is required. She was expected to spend 15 minutes each day reading ESDC's corporate emails. She was told in essence that reading the emails was a required part of the job and that they could not be skipped.

[93] Having heard Ms. Stefik and Ms. Jodoin, I prefer the evidence of Ms. Stefik. Her evidence was clear and unequivocal that Ms. Jodoin made those statements. Her evidence is also supported by the contemporaneous notes that she took, which are reflected in her email of June 18, 2021. She had never met Ms. Jodoin before or since those coaching sessions (and they had never seen each other until the hearing). In short, her evidence was clear, and she had no reason to make it up.

[94] By contrast, Ms. Jodoin did not clearly deny having said those things. Her explanation that she was simply complaining about the volume of emails that she received makes no sense, in two respects: why she would continue to complain about the volume of emails over a two-day period, and why she latched onto the particular emails about these events as the ones that she complained about.

[95] Ms. Jodoin argued that the fact that Ms. Stefik did not tell her that she was offended was relevant, as was the fact that Ms. Stefik did not make a formal complaint against her. Respectfully, neither of those facts are relevant.

[96] Ms. Stefik testified that she was taken aback by Ms. Jodoin's comments and that she was not sure what to do. Instead of confronting her directly, she tried to steer the conversation away from those topics (or hope that Ms. Jodoin would have a call to take). That strikes me as a perfectly understandable reaction to these comments. Many people are conflict-averse, and when faced with this sort of behaviour, they would choose to deflect it rather than confront it. As the Ontario Divisional Court recently pointed out in *Metrolinx v. Amalgamated Transit Union, Local 1587*, 2024 ONSC 1900 at paras. 56 to 61:

> *[56] … the Supreme Court of Canada has, for more than 30 years, been warning judges that it is an error to rely on what is presumed to be the expected conduct or reaction of a victim of sexual assault. In particular, a victim's reluctance to report or*

> *complain about a sexual assault cannot be used to draw an adverse inference about her credibility ….*
>
> *[57] The conduct in this case was not a sexual assault, although courts have recognized that. "harassment with a physical component constitutes a form of sexual assault and is among the most serious form of workplace misconduct" ….*
>
> *[58] In* Calgary (City)*, the Alberta Court of Appeal held, at para. 42, that while the Supreme Court's statements about reliance on these types of presumptions and stereotypes were made in the context of criminal proceedings, "the caution about these types of errors should apply equally to arbitrators adjudicating sexual assault grievances" In my view, there is no reason to limit this caution to "sexual assault grievances", the caution about these types of presumptions and stereotypes applies to all sexual harassment grievances.*
>
> *[59] A victim's reluctance to report or complain about sexual harassment may be caused by many factors: embarrassment, fear of reprisal, the prospect of further humiliation, or just the hope that, if ignored, the demeaning comments or behaviours will stop. This is true whether or not the conduct rises to the level of assault.*
>
> *[60] A victim's reluctance to report or complain cannot, however, relieve an employer of its statutory duty to conduct an investigation if an incident of sexual harassment comes to its attention.*
>
> *[61] The Arbitrator in this case concluded that Ms. A's reluctance to pursue a complaint meant that there was no harassment. He did not consider any of the other reasons why an employee in her situation might not complain. That line of reasoning relied on the myths, stereotypes and presumptions rejected by the Supreme Court of Canada and was unreasonable.*
>
> [*Sic* throughout]

[97] Ms. Jodoin's conduct was not sexual harassment. However, the same principles apply. As the Ontario Divisional Court pointed out, there are many reasons that someone may not complain about inappropriate actions right away, including a hope that if ignored, the inappropriate comments or behaviour will stop. Ms. Stefik did the right thing by reporting her concerns to her team lead. She was very fair to Ms. Jodoin by pointing out that she did not make these comments on a call and that her calls were all appropriate. That she did not challenge Ms. Jodoin directly during this two-day period does not make her recollection less credible nor her concerns less serious.

[98] Ms. Robert reported these comments to Ms. Raposo-Massé on June 25, 2021. Ms. Raposo-Massé decided to hear from Ms. Jodoin about it. She provided Ms. Jodoin with the third paragraph of Ms. Stefik's email that I quoted earlier on July 5 and met with

her about it the next day. Ms. Jodoin gave the same sort of half-denial that I described earlier. Ultimately, after discussing with labour relations advisors and her supervisor, Ms. Raposo-Massé decided to terminate Ms. Jodoin's employment and did so on July 20, 2021.

B. Accommodation process for Ms. Jodoin

[99] As I mentioned earlier, Ms. Jodoin provided a doctor's note to ESDC on May 21, 2021, outlining her disability and some accommodation measures that she required. ESDC began, but did not complete, those accommodation measures by the time it dismissed her from her employment.

[100] I have already mentioned the first thing that ESDC did, which was to stop assessing Ms. Jodoin's performance for the purposes of evaluating it.

[101] Second, ESDC ordered an ergonomic assessment for Ms. Jodoin. The ergonomic assessment was made on June 18, 2021. It was provided to Ms. Raposo-Massé a week later and to Ms. Jodoin in early July. They met to discuss it on July 8. The ergonomic assessment recommended some things that were implemented immediately or had already been provided, and it recommended other things that were not provided by the time of her dismissal, namely, a new chair, a sit-stand desk, and a footrest.

[102] Third, ESDC asked Ms. Jodoin's doctor to prepare a fitness-to-work and functional-abilities assessment form (called a "fit-faf"). Ms. Jodoin met with her doctor on July 9, and her doctor filled out the fit-faf and sent it to Ms. Jodoin on July 12, who forwarded it to Ms. Raposo-Massé that day.

[103] The fit-faf stated that Ms. Jodoin needed 15% extra reading time to complete her tasks and that she needed extra direct observation and teaching. The fit-faf also recommended that Ms. Jodoin work only four days each week, which was implemented immediately. She took Monday, July 19, 2021, off. During the hearing, Ms. Jodoin complained that she wanted to take Mondays or Fridays off because they were the busiest days, while Ms. Raposo-Massé wanted her to take Wednesdays off instead; however, since she was dismissed on Tuesday, July 20, she never ended up taking Wednesdays off.

[104] The fit-faf stated that Ms. Jodoin suffered from a disability that was "… causing mild impairment w. [*sic*] short term memory + executive function" and had "**mild**

cognitive changes" [emphasis in the original]. It concluded by stating that "… with more time to read, comprehend and integrate [Ms. Jodoin] should be able to perform without issue."

[105] Finally, Ms. Jodoin told the ergonomic assessor that her rheumatologist had not recommended that she return to work in December 2020 (she had been laid off in January 2020 from her previous employment and was unemployed when she started working for ESDC). Ms. Raposo-Massé was concerned about that, and Ms. Jodoin explained that she felt that her symptoms were in remission sufficiently to work. The fit-faf confirmed this, stating that she could work and complete her duties "with more support and time."

C. The rejection on probation was not in bad faith

[106] As I stated earlier, if an employer acts in bad faith, then that is not a *bona fide* exercise of the power to reject an employee on probation; see *Canada (Attorney General) v. Alexis*, 2021 FCA 216 at para. 8.

[107] ESDC's burden is not to establish just cause. As stated as follows by the Federal Court at paragraph 37 of *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529, "… the employer need not establish a *prima facie* case nor just cause but simply some evidence the rejection was related to employment issues and not for any other purpose." The concept of "employment-related issues" means "… a *bona fide* dissatisfaction with an employee's suitability or ability to perform the duties of the employee's position …"; see *Ebada v. Canada Revenue Agency*, 2021 FPSLREB 94 at para. 153, and the cases cited in that paragraph.

[108] In *Tello*, the Board addressed the concept of bad faith as follows:

> …
>
> *[127] … As noted by the Federal Court of Appeal in another context (*Dansereau v. Canada *(1990), [1991] 1 F.C. 444 (CA), at page 462) bad faith cannot be presumed and an employee seeking to provide evidence of bad faith "… has an especially difficult task to perform…." In* McMorrow v. Treasury Board (Veterans Affairs), *PSSRB File No. 166–02–23967 (19931119), an adjudicator noted, at page 14, that, in his view:*
>
> …
>
> … if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without

> regard to the facts, and therefore not in good faith, then that decision is a nullity….
>
> … It is trite to say that a determination of whether there is good faith or not must be gleaned from all the surrounding circumstances; there can be a multitude of sets of facts that may result in a conclusion of bad faith … keeping in mind … that good faith should always be presumed….
>
> …

[109] Ms. Jodoin argues that her rejection on probation was done in bad faith. She says this for two reasons, both of which I reject.

1. ESDC did not act in bad faith by continuing to monitor her performance

[110] First, she argues that ESDC acted in bad faith because it continued to monitor her performance after she disclosed her disability. In support of this argument, Ms. Jodoin points to two internal documents created by Ms. Raposo-Massé (one a chronology, the second an email) in which she listed some of the mistakes that Ms. Jodoin made. In closing argument, Ms. Jodoin refers to the email as a "grocery list" of performance concerns.

[111] I read that email carefully. It has a list of difficulties that Ms. Jodoin was experiencing between March 9 and 12, 2021 (i.e., while she was on training and before she was independently answering calls). There is then one entry for a call on May 12 (before she sent her doctor's note). Finally, there is one entry about whether Ms. Jodoin was disconnecting callers in early July and concluded with the phrase "Not a smoking gun." Ms. Raposo-Massé explained in cross-examination that deliberately hanging up on callers could be serious misconduct but that it was not clear that Ms. Jodoin having done that for two out of five calls one morning was serious.

[112] At the risk of coming across as flippant, one entry after she disclosed her disability is not a grocery list of complaints. The single reference to "Not a smoking gun" also does not show that ESDC was acting in bad faith when it terminated Ms. Jodoin; as Ms. Raposo-Massé described, it simply meant that she concluded that there was no evidence of misconduct.

[113] ESDC rejected Ms. Jodoin on probation because of her comments on June 16 and 17, 2021. ESDC had separate concerns about Ms. Jodoin's job performance. After Ms. Jodoin disclosed her disability, ESDC decided to give her additional coaching and

time to improve her performance. On one occasion, Ms. Raposo-Massé was concerned that Ms. Jodoin might have been hanging up on callers (which, as Ms. Raposo-Massé described, is not a performance issue but strays into deliberate misconduct) but decided that there was "no smoking gun" to show that she was hanging up on callers and so did nothing further about it.

[114] None of this meets Ms. Jodoin's burden to prove bad faith.

[115] In her opening statement, Ms. Jodoin argued that ESDC acted in bad faith because it was easier to fire her than accommodate her. She did not repeat that argument during closing submissions. Out of an abundance of caution, I will still address it quickly: I reject it. Ms. Raposo-Massé testified that the accommodations sought were not onerous, and I agree. They were also mostly implemented. She was given a four-day workweek, months of extra coaching, extra reading time (temporarily at least), and some of the physical office equipment recommended in the ergonomic assessment. ESDC had not yet provided her with a chair, sit-stand desk, and footrest. I do not accept as a matter of logic that ESDC terminated her employment because doing so immediately instead of waiting for her term to run out on December 6 was easier than providing her with a chair and desk and continuing to let her work four days a week and spend more time reading than other employees, for a few months. There is also no direct evidence to support the supposition that she was dismissed because doing so was easier than accommodating her.

[116] Finally, Ms. Jodoin also argued that the June 1, 2021, letter constituted bad faith because it wrongly stated that her probationary period had been suspended. That letter was in error, but that does not make it in bad faith. Ms. Jodoin never suggested that she relied on that letter in any way or that she thought that she could make the offending comments safely after she received that letter. She has not persuaded me that this letter is linked to the reasons for rejecting her on probation, and I cannot conclude that it was sent in bad faith or that rejecting her on probation after sending that letter was in bad faith either.

2. ESDC did not act in bad faith by rejecting her on probation for something unrelated to her employment

[117] Second, Ms. Jodoin argues that the comments that she made to her coach on June 16 and 17 were not sufficiently related to her duties to warrant her termination on probation. I disagree, for two reasons.

[118] First, her comments are related to her job duties for the reasons explained by Ms. Stefik about why she was concerned. Payment Services Officers often have to deal with irate callers, who are also from diverse backgrounds. If Ms. Jodoin felt comfortable making the comments she did to a coach whom she had never met before, there was a real risk that she might blurt out these same views to clients, particularly difficult callers who say things that may trigger a reaction from someone working at a call centre.

[119] Second, it would not matter if her comments were unrelated to her job duties. A probationary period is about more than assessing an employee's performance. As the Supreme Court of Canada put it in *Jacmain*:

> …
>
> *… The employee's poor conduct, irascible attitude and unsatisfactory adjustment to his surroundings are valid reasons for his superior's unwillingness to give him a permanent position in his Service. This seems obvious to me, but I will nevertheless cite the unanimous opinion of the arbitrators in* Re United Electrical Workers & Square D Co., *Ltd.* [(1956), 6 Lab. Arb. Cas. 289], *at p. 292:*
>
> > *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.*

> *That case involved a discharge in the private sector. The adjudicator in the case at bar attempted to establish a distinction between the private and public sectors. This proposition was not defended in this Court and I can see no basis for it, particularly since, as I have noted, the wording of s. 28 of the* Public Service Employment Act *is very loose. 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.*
>
> …
>
> [Emphasis added]

[120] As the Board put it more succinctly in *D'Aoust v. Deputy Head (Department of Public Works and Government Services)*, 2015 PSLREB 94 at para. 137, "… the concept of suitability for employment includes appropriate behaviour in the workplace."

[121] Ms. Jodoin's comments would be inappropriate not only when expressed to a caller but also when expressed to co-workers during a break. Ms. Jodoin felt comfortable making those comments to a coach whom she could not see and had never met (and could have been a member of one of the equity-seeking communities that she denigrated in her comments). That speaks clearly to her unsuitability to work in a diverse workplace committed to equity and respect.

[122] Ms. Jodoin filed copies of cases in which arbitrators concluded that an employer had not demonstrated just cause when an employee had made comments similar to or sometimes worse than the ones she made. However, as Ms. Jodoin admitted during closing argument, those cases are not relevant to her case. ESDC does not need to demonstrate just cause for her termination of employment; it needs only to identify its concerns about her suitability, and then the burden shifts to Ms. Jodoin to show that those concerns were held in bad faith or not employment-related. She has failed to meet that burden.

D. The rejection on probation was not discriminatory

[123] Ms. Jodoin also argues that her rejection on probation was discriminatory on the basis of her disability.

[124] Ms. Jodoin argues that ESDC discriminated against her by failing to turn its mind to whether her comments of June 16 and 17 were related to her medical condition, in two ways. First, Ms. Jodoin argues that she was concerned about email volume and that this concern was in part medical, as shown by her fit-faf, requiring

that she have extra reading time. Second, she also argues that her fit-faf disclosed a condition that contributed to her making those comments.

[125] I reject both arguments.

[126] First, I have already rejected Ms. Jodoin's testimony that she was only expressing concern about emails. She made the inappropriate remarks that Ms. Stefik attributed to her and was not just complaining about having to read too many emails about topics that she did not want to read about.

[127] Even if the comments were linked to Ms. Jodoin's distaste for ESDC's emails, she has not shown that her distaste is linked to her disability. At most, the fit-faf says that it takes her longer than usual to read documents, so she needs 15% more reading time — so, instead of the 15 minutes a day allocated to read ESDC's corporate emails, she should have 17 minutes and 15 seconds. The link between her fit-faf and her dislike of ESDC's emails is too tenuous for me to conclude that this dislike of corporate emails is linked to her disability. In any event, Ms. Jodoin's testimony was that she did not like their content, not just their length.

[128] Second, Ms. Jodoin has not demonstrated that she was the victim of a discriminatory practice. Both parties agree that I should apply the three-part test for discrimination set out in *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33: 1) whether she has a characteristic protected from discrimination under the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; "the *CHRA*"), 2) whether she experienced an adverse impact with respect to employment, and 3) whether the protected characteristic was a factor in the adverse impact.

[129] Both parties also agree that Ms. Jodoin has a disability protected from discrimination under the *CHRA* and that her rejection on probation was an adverse impact on her employment.

[130] However, Ms. Jodoin has not demonstrated that her disability was a factor in her rejection on probation. To meet that third element of the *Moore* test, Ms. Jodoin would need to demonstrate a link or nexus between her disability and her conduct that led to her rejection on probation; see *Canada Safeway Ltd. v. R.W.D.S.U.* (1999), 82 L.A.C. (4th) 1 at 15.

[131] Ms. Jodoin relies upon a single line from her fit-faf stating that she has a mild impairment to her short-term memory and "executive function." With respect, that single entry falls well short of the evidence necessary to demonstrate a link between her disability and the comments that she made on June 16 and 17, 2021.

[132] "Executive function" refers to a wide variety of cognitive processes. While executive functions can include inhibition control, they include much more than that. The fit-faf does not explain in what form Ms. Jodoin's executive functions are impaired. It also never suggests that she has a problem with impulse control. Under the section of the form dealing with "Social/emotional demands", including "Exposure to emotional or confrontational situations", the fit-faf says that she has no limitations or restrictions. When it explains her impairment to executive function, it says only "… takes slightly longer to integrate and retain new info". The form also says that her "… mental function can be slowed but not impaired to level of non function [*sic*]." None of this suggests that Ms. Jodoin suffers from an impairment to her impulse control.

[133] In short, the fit-faf does not demonstrate that the comments that Ms. Jodoin made on June 16 and 17, 2021, were linked to her disability.

[134] Ms. Jodoin did not call her doctor as a witness to explain the limits to her executive function.

[135] Ms. Jodoin testified about her disability. She explained the physical pain that she suffers and why her disability requires her to take more frequent breaks. She never testified about the limits to her executive functions. When asked directly in examination-in-chief whether her health was relevant to the discussion she had on July 6, 2021, with Ms. Raposo-Massé about these comments, she paused to re-read the summary of that discussion prepared by Ms. Raposo-Massé and then said this: "I don't feel my health is relevant to this particular discussion." She went on to explain that the discussion made her anxious, which can exacerbate her symptoms.

[136] Ms. Jodoin never testified that she had problems with her executive functions that were linked to the offending comments. Her doctor never testified, and the fit-faf does not mention inhibition control or anything similar that could point to a link between her disability and those comments. For these reasons, she has not demonstrated the necessary link or nexus between her disability and her rejection on probation.

IV. Conclusion

[137] In summary, s. 211 of the *FPSLRA* means that the Board does not have the jurisdiction to hear a grievance challenging a *bona fide* rejection on probation. I have concluded that Ms. Jodoin was still in the probationary period when she was rejected on probation on July 20, 2021, and that s. 2(3) of the *Probation Regulations* does not pause the probationary period for an employee who discloses a disability after starting their employment. ESDC also provided Ms. Jodoin with the required pay in lieu of notice after rejecting her on probation.

[138] At that point, the burden shifted to Ms. Jodoin to demonstrate that her rejection on probation was invalid. She argued that it was in bad faith and discriminatory. I dismissed both arguments. Her rejection on probation was a good-faith response to the comments that she made to her co-worker on June 16 and 17, 2021, and neither her comments nor the decision to reject her on probation were linked to her disability.

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

(The Order appears on the next page)

V. Order

[140] The grievance is denied.

April 28, 2025.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board