Date: 20251003

File: 566-02-44606

Citation: 2025 FPSLREB 129

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

CHRISTINA WALL

Grievor

and

TREASURY BOARD
(Department of Employment and Social Development)

Employer

Indexed as
Wall v. Treasury Board (Department of Employment and Social Development)

In the matter of an individual grievance referred to adjudication

Before: Guy Grégoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Herself

For the Employer: Chris Ludwinski, counsel

Heard by videoconference,
May 6 to 9, 2025.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] On July 22, 2020, Christina Wall ("the grievor") received a one-year appointment as a payment services officer (PSO) classified PM-01 with Employment and Social Development Canada ("the employer") in its Benefits Delivery Service Branch - Call Centre in Regina, Saskatchewan. It began on September 8, 2020, and was to end on September 7, 2021.

[2] Her employment was terminated on January 12, 2021, during her probation period. The employer concluded that she did not demonstrate that she could satisfactorily perform a PSO's duties.

[3] On April 26, 2022, after it went through the grievance process with the employer, the Public Service Alliance of Canada ("the bargaining agent") referred the grievance to the Federal Public Sector Labour Relations and Employment Board ("the Board") under s. 209(1)(c)(i) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[4] At the start of the hearing, the employer raised three objections, challenging the Board's jurisdiction to hear the grievance and the grievor's right to raise new arguments.

[5] In its first objection, the employer claimed that the grievance was referred to adjudication erroneously under s. 209(1)(c)(i); it should have been referred under s. 209(1)(a), by which the grievor required her bargaining agent's support to file the grievance. That support was withdrawn on March 22, 2024. The employer argued that the Board is without jurisdiction to hear this grievance.

[6] The employer's second objection was based on the *Burchill* principle (see *Burchill v. Attorney General*, [1981] 1 F.C. 109 (C.A.)), given that the grievor made a discrimination allegation at the hearing that was not made during the grievance process.

[7] In its third objection the employer expressed its concern that the grievor did not respect the *Browne and Dunn* principle (from the United Kingdom decision *Browne v. Dunn*, (1893) 6 R. 67, H.L.), meaning that she might introduce facts in her testimony

that were not put to the employer's witnesses in examination-in-chief or cross-examination.

[8] I will address all the objections later in this decision.

[9] For the reasons that follow, I find that the grievor's termination occurred while she was still in the probation period and for employment-related reasons. Therefore, this grievance is denied.

II. Summary of the evidence

A. For the employer

[10] On July 22, 2020, the grievor received and accepted an offer letter for the term employment at the employer's Regina Employment Insurance call centre. She was appointed from an external selection process for a period of 12 months. The term began on September 8, 2020, and was to end on September 7, 2021. The offer letter stated, "All appointments … from outside the Public Service are subject to a probationary period of 12 months …".

[11] A manager then emailed her on August 17, 2020. The email reiterated that there was a 12-month probation period. It stated that the 3 training phases, which comprised classroom training, mentoring, and transitional support monitoring, would last about 15 weeks. It also stated that the classroom training included taking 5 tests and that the pass mark on each one was 75%. It warned that if she failed to reach that pass mark, her continued employment could be affected.

[12] The classroom training was the first phase and lasted approximately nine weeks. The candidates had to pass three out of the five tests. Failing meant termination on probation.

[13] The second phase involved mentoring the candidates and was divided into two periods. Each candidate was paired with an experienced PSO to observe them. The candidate then took calls from claimants. During this phase, the mentor prepared a daily report (called a "side-by-side" report) of the candidate's progress at answering claimants' questions. Two side-by-side reports were prepared.

[14] At the end of each mentoring period, a business excellence advisor (BEA) assessed the candidate's performance through a "Transitional Support Strategy

Assessment" ("the TSS assessment") in which the BEA listened in on calls for two half-days. Two mentoring training periods were held, and two TSS assessments were made.

[15] In both TSS assessments, the grievor's performance was found unsatisfactory, which led to her termination on probation.

[16] The grievor was not subjected to the third and final phase, which was the transitional support monitoring period.

[17] The grievor failed three of the five first-phase tests. She failed the first one (receiving a mark of 71%) because of a technical issue, as she returned it without completing it. She then failed two other tests, achieving marks of 68% and 69%, respectively. Although she failed three of them, she was allowed to continue with the second phase, as she was given the benefit of the doubt due to the technical issue.

[18] The two BEAs who conducted the TSS assessments, Reid Weighill and Alexis Carlston, were called to testify on the employer's behalf. Both testified that they did not know the grievor personally; they knew her only in the course of her employment at the call centre.

[19] The employer submitted the grievor's two side-by-side reports and two TSS assessments. They contain copious details and an example of her performance while taking calls and answering claimants' questions. They form part of the record and illustrate many of her deficiencies, demonstrated in situations in which she required her mentor or the BEA to intervene often, to correctly offer her the right information.

1. Mr. Weighill

[20] The grievor cross-examined Mr. Weighill. He testified that he had not been her assigned BEA; it was Ms. Carlston. But since Ms. Carlston had been away, he prepared the grievor's first TSS assessment. The employer's policy is to send that report to the candidate's team leader (TL). He answered questions about his BEA training and noted that it had been relatively short. He confirmed that as a BEA, he does not have the authority to terminate a PSO's employment.

2. Ms. Carlston

[21] On cross-examination, Ms. Carlston stated that she did not recall being late for the grievor's second TSS assessment or any related technical issues. She testified that

the grievor had been able to access three systems but had been unable to extract the required information without Ms. Carlston's help. She provided examples from the second TSS assessment. She explained technical notions such as "trip down" and "manual actions". Referring to the summary section, she provided examples of procedures that the grievor missed.

3. James Hendrickson

[22] James Hendrickson, the grievor's TL, testified that his responsibilities included supporting the PSOs, helping with technical issues, and monitoring the progress reports (the side-by-side reports and the TSS assessments). He too testified that he did not know the grievor other than in the work environment and that he knew nothing of her personal life.

[23] In his testimony, he detailed the training structure. He stated that the classroom and mentoring training takes about three months. He explained that mentoring takes five to six days, after which a BEA assesses the candidate. If required, an additional mentoring period can be provided. He testified that the grievor's classroom training was done online because of the COVID-19 pandemic.

[24] He testified that the grievor did not invoke any medical condition that would have affected her performance on the first-phase tests. He stated that normally, candidates who fail the two tests have their employment terminated. He kept his service manager ("the manager"), Jamie Howie, who was his superior, abreast of the candidates' training progress. On September 30, 2020, he emailed her a summary of a meeting he held with the grievor after she failed one test. He testified that other such meetings were held (on October 22 and November 9, 2020). He testified that she was allowed to continue the training because significant time had been invested in her, and some recruiting difficulties had been encountered.

[25] Mr. Hendrickson recognized that at the relevant time, he and Ms. Carlston, who made the second TSS assessment, were in a relationship and living together. He testified that that did not cloud his judgment when he assessed the grievor. He also testified that he did not, at no time, flirt with the grievor and that no one raised an issue of jealousy during that time.

[26] The TL always receives all the side-by-side reports. They allow the TL to monitor the candidates. The grievor never raised any medical or personal issues that would have explained her performance during the mentoring phase.

[27] He stated that the TSS assessments are similar to the side-by-side reports. The grievor's assessor indicated where she struggled with her duties. Her first TSS, dated December 7, 2020, was discussed with her, and a summary of the discussion was sent to the manager the following day. The discussion described where improvements were required and warned the grievor that if she failed the second TSS assessment, her employment would be terminated. He stated that the discussion's goal was to help her succeed as a PSO.

[28] After that, it was agreed that the grievor would be offered 10 more days of mentoring and that another BEA, Ms. Carlston, would carry out a second TSS assessment. Unfortunately, the second one identified no significant differences from the first one, and any improvement identified was insufficient with respect to where the grievor was in her training. A report was sent to the manager, who then decided to terminate her.

[29] The TL testified that he never discussed terminating the grievor's employment with Ms. Carlston, that he was not aware of any administration investigation involving the grievor, that he had never been suspended from his duties, and that he had never been laid off.

[30] Under cross-examination from the grievor, Mr. Hendrickson testified that although he considered himself part of management, he has never been a service manager. He confirmed that technical issues occurred when the grievor wrote her first test. He stated that he documented everything because he had to maintain a paper trail. He confirmed that she never received copies of her side-by-side reports.

[31] He stated that it is important that a PSO avoid inaccuracies. He stated that the manager made the decision to terminate the grievor's employment during her probation. He testified that he had no recollection of approving vacation time for the grievor or of meeting with the manager about a conflict of interest outside her office after the grievor's termination meeting or of having such a meeting at all. And he did not retain any instant messages exchanged with the grievor or anyone else. He testified

that he did not ask the grievor for a copy of her passport or driver's licence. Finally, he testified that at all relevant times, she was part of his team.

4. Ms. Howie

[32] Ms. Howie was the manager at the relevant time. She too testified that she did not know the grievor outside the work environment or anything about her personal life. She met the grievor only during her probation period.

[33] She stated that she receives copies of the progress reports, to be kept apprised of all the new hires. It is her decision to terminate or continue a new hire's employment. She testified that the grievor was allowed to continue her training.

[34] Ms. Howie confirmed that she consulted one of the employer's Labour Relations (LR) Consultant, who advises and guides on rejections on probation.

[35] Ms. Howie testified that her assessment of the grievor's side-by-side reports set out that the grievor's performance was not good, that she required BEA assistance, and that she lacked the knowledge to complete the work on her own. Her performance was unsatisfactory.

[36] Ms. Howie also testified that the TSS assessments detail how crucial it is for a PSO to be able to follow procedures, as the service that they provide affects claimants financially and may negatively impact their lives. The grievor's first TSS assessment made it clear that she could not work on her own, independently. And the second one demonstrated and confirmed that she did not have the knowledge to work on her own.

[37] Ms. Howie testified that it is uncommon that a candidate fails three tests and continues with the training. She recounted the circumstances of the technical issue during the grievor's first test. She relied on the grievor's tests results in her classroom training and her unsatisfactory performance during her mentoring phase, nothing else. She stated that she made the decision to terminate the grievor.

[38] Ms. Howie further testified that before she made her final decision to terminate the grievor, she called on another manager, Jayci Kirsch, to reassess the grievor's performance reports, for a second opinion. Ms. Kirsch acted as a neutral third party, to assess the BEA's report and conclusion. Ms. Kirsch agreed with that conclusion.

[39] Ms. Howie stated that the grievor was provided with two weeks of pay in lieu of a termination notice.

[40] She stated that she was not aware that Mr. Hendrickson and Ms. Carlston wanted the grievor terminated from her employment; no post-employment investigation was carried out, and no one was fired from their position.

[41] Ms. Howie testified that the grievor made a conflict-of-interest allegation after she was terminated and only during the grievance process. She did not recall conversing with Mr. Hendrickson outside her office after she held the termination meeting with the grievor.

[42] The grievor questioned Ms. Howie about some items in her second TSS assessment, which involved completed transactions and one call that disconnected, and stated that she did not know who had disconnected the call, the caller or the grievor. She was also questioned about the section related to "educating the client" and confirmed that even though BEA's do not provide provincial services, a PSO should be able to refer claimants to alternative options, such as provincial welfare services or the CPP.

[43] Ms. Howie stated that she did not know when she became aware that the TL and one of the BEAs were in a relationship. She stated that the TL approved leave for the grievor. She stated that reviewing a TSS assessment takes her about 45 minutes. She testified that she entered the data for the grievor's termination on January 12, 2021, and that the employer's pay office processed the grievor's pay in lieu of notice.

5. Ms. Kirsch

[44] In her testimony, Ms. Kirsch confirmed that her involvement in the grievor's termination was providing the second opinion on the grievor's TSS assessment. She stated that neither Ms. Carlston nor the grievor reported to her. She stated that the grievor's mistakes could have directly impacted claimants and led to a lack of a payout, an overpayment, or a payment being stopped. She testified that the grievor's gender or marital status had no impact on her opinion. She has no personal knowledge of the grievor. She confirmed that it was Ms. Howie's decision to terminate the grievor's employment.

[45] The grievor did not questioned Ms. Kirsch.

B. For the grievor

[46] The grievor testified that the conflict of interest was due to Ms. Carlston's and Mr. Hendrickson's relationship. At that point, the employer made a *Browne and Dunn* objection principle, which I rejected. I allowed the grievor to continue her testimony. My reasons follow.

[47] The grievor testified that she met the TL when she joined the call centre. He was her supervisor. She testified that she saw him in the office often and that at times, he pulled her out of the classroom training to talk about it but also to talk about "personal stuff". She stated that it continued while she worked online, and they would talk about personal subjects. She stated that at the time, he did not have a "girlfriend." She stated that once, he tried to have her transferred to another team. In December 2020, he announced that he had recently moved in with Ms. Carlston.

[48] The grievor testified that the TL emailed her to let her know that Ms. Carlston, her BEA, would be late for her TSS assessment on the morning of January 7, 2021. She stated that the BEA was very agitated that morning and that the BEA took a long break from her assessment. She complained about the support that she received from the BEA.

[49] She testified that on December 11, 2020, she emailed her TL. She raised the conflict-of-interest issue involving him and stated that she had only the manager to turn to. On that same day, at 16:30, he called her and asked to meet with her, to inform her that she had been unsuccessful in her second TSS assessment and that her employment would be terminated. She testified that her TL told her that she had to go on vacation and approved it for that day, even though she did not ask for it.

[50] She met with her manager and TL. She was advised of her employment termination. She stated that the manager pulled her aside to discuss the conflict of interest but that the employment termination had already been processed.

[51] The grievor stated that she wanted a fair and unbiased assessment and that she had moved to Regina just for that job. She claimed that she knew the job inside out, that she could navigate all the systems and procedures, that she participated in the training, and that she asked the trainers and mentors many questions. She claimed

that she was not informed that she could have had a bargaining agent representative present at the termination meeting.

[52] The termination meeting began with reviewing the second TSS assessment. But it stopped three quarters of the way through when the manager asked the BEA to explain the assessment. The grievor saw no useful purpose to it since she had already signed her termination papers.

[53] The grievor claimed that she heard the manager scold the TL outside her office about his relationship with Ms. Carlston.

[54] The grievor testified that she felt very badly about how a woman could be treated so poorly and that she could do nothing about it but cry. She claimed that she also made a human rights complaint about the conflict of interest, mainly against the TL and Ms. Carlston. She recognized that she was not the only female at the call centre.

[55] She stated she received her pay lieu of notice two-and-a-half years later.

[56] In cross-examination, the grievor testified that in the mentoring phase, she had three different mentors. She claimed that she never saw the side-by-side reports but was only told about them. She knew that she was not yet a good performer and that she required more training.

[57] The employer questioned the grievor about many of the comments in the side-by-side reports and the TSS assessments. Generally, she answered that they were not sufficiently detailed for her to comment on them.

III. Summary of the arguments

[58] When I reached my conclusion, I considered all the parties' evidence and lengthy arguments, which I will now summarize.

A. For the employer

[59] The employer began its arguments by reviewing its objections.

[60] The first objection pertained to the grievance's referral to adjudication under s. 209(1)(c)(i) of the *Act*. The employer argued that when a bargaining agent withdraws its support, it is considered a withdrawal of a grievance filed under s. 209(1)(a) and all matters pertaining to that section. It argued further that the grievance should have

been referred under s. 209(1)(b). It claimed that not referring the grievance under the proper section of the *Act* was prejudicial to its position, as it was left in the dark and could not know the case that it had to meet.

[61] The second objection was based on the *Burchill* principles. The employer argued that the grievor attempted to expand the grievance's scope by claiming discrimination with respect to her rejection on probation. It quoted the grievance referral form, which had only this one sentence: "I grieve management [*sic*] decision to terminate my employment and release me while on probation which I was notified on 12-Jan-2021". He argued that *Burchill* provides that a grievor may not refer a new or a different grievance to adjudication, only the one that was presented up to and including the final level.

[62] The employer argued that the discrimination allegation was not made in the grievance presentation form or during the grievance process. It claimed that the case law is clear in that the employer is entitled to know the specifics of a grievor's grievance, so that the issues may be properly addressed. It stated that when a grievance is amended or when new items are added to it once the internal grievance has ended, the very purpose of that procedure can be undermined.

[63] The employer added that the grievor's failure to complete a Form 24 from the Board demonstrates that she had no intention to make a discrimination allegation when the grievance was referred to adjudication. That failure bars her from receiving damages for discrimination under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[64] The employer argued that the discrimination allegation was an attempt to recharacterize the grievance and that it violated the *Burchill* principles. It claimed that nowhere in the grievance did the grievor allege discrimination or a breach of the *CHRA* or the no-discrimination article of the relevant collective agreement. It relied on *Mutart v. Canada (Attorney General)*, 2014 FC 540 at para. 33, quoting *Burchill* and following the principle that grievors are not permitted to alter their grievances' nature when the referral to adjudication is made.

[65] The employer added that the grievor's reply made no reference to a discrimination allegation because, it claimed, none was made during the grievance process.

[66] The employer's third objection was on jurisdiction and was based on the Board's inability to hear a grievance related to an employee's rejection while on probation. It restated that the grievance was referred to adjudication under s. 209(1)(c)(i) of the *Act*, which it claimed allows referring the grievances that it sets out but does not allow referring a grievance about a rejection while on probation effected under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). It quoted s. 211(a) of the *Act*, as follows: "Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to (a) any termination of employment under the *Public Service Employment Act* …".

[67] It referred to s. 61(1) of the *PSEA*, which provides that a person appointed from outside the public service is on probation for a period set out in the related regulations, which was 12 months in this case. It continued by noting that s. 62(1) states that the deputy head may notify an employee that his or her employment will terminate at the end of the notice period, with payment in lieu of notice. It relied on *Boyce v. Treasury Board (Department of National Defence)*, 2004 PSSRB 39 at para. 50, in which the former Board stated that its jurisdiction on cases of rejection while "… on probation is significantly circumscribed by legislation and the decisions of the Federal Court." It further states that the threshold that the grievor must meet is very high and conversely that the employer's is very low to justify a rejection while on probation.

[68] The employer referred to *Holowaty v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 44 at para. 11, which states the following:

> *[11] A rejection on probation is characterized by the following four elements:*
>
> *• the employee was placed on probation;*
>
> *• the employee's probationary period was still in effect as of the termination;*
>
> *• notice or pay in lieu was provided; and*
>
> *• employment-related concerns about the employee's suitability were the reason for the termination.*

[69] It argued that the *PSEA* is written in such a way that the employer has a great deal of flexibility during the probationary period, so it can evaluate an employee's skills while they are on probation. It argued that if an employer demonstrates legitimate concerns about an employee, unless they are trivial, its decision to terminate

the employee cannot be said to be a sham or camouflage (see *Boyce*). Citing *Fell v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 2 at para. 122, it claimed that a grievor must demonstrate that the grounds for the rejection on probation were essentially a fabrication.

[70] The employer argued that the four elements in *Holowaty* have been satisfied.

[71] As stated, the employer employed the grievor as a PSO for the term position from September 8, 2020, to September 7, 2021. She was subjected to the 12-month probation period stated in the July 22, 2020, offer letter and the email that her manager sent on August 17, 2020. Her employment was terminated on January 12, 2021, per the termination letter of the same date.

[72] The employer submitted that the grievor failed three out of the five mandatory tests and that it was out of good faith that it allowed her to continue with the mentoring phase. Three people assessed her and identified continuing deficiencies in her performance. Its witnesses elaborated on those deficiencies.

[73] The termination letter stated that despite management's effort to bring the grievor's performance up to an acceptable level, she was not able to demonstrate that she could satisfactorily perform her PSO duties. It further stated that the decision to terminate her while she was on probation was based on a careful consideration of her performance, specifically not being able to graduate to taking calls on her own.

[74] The letter also advised that the grievor would receive two weeks' salary in lieu of notice.

[75] The employer contended that the evidence before the Board satisfies the four requirements for a valid rejection on probation, namely, the grievor was on probation, the probationary period was still in effect as of the termination, she was paid in lieu of notice, and there was an employment-related reason for the decision to terminate her. It concluded by stating that the Board is absent the jurisdiction to inquire any further into this matter, under s. 211 of the *Act*.

[76] The employer then presented its argument on the merits of the case. It claimed that it had established that the grievor's rejection on probation was valid and that the onus shifted to her. It argued that the Board must decline jurisdiction unless the grievor could demonstrate that on a balance of probabilities, the rejection on

probation was conducted in bad faith, a sham, a fabrication, a camouflage, or done for discriminatory reasons.

[77] The employer argued that in a discrimination claim, the grievor has the onus to establish a *prima facie* case of discrimination. If the grievor does so, then the onus shifts to the employer, to justify its conduct. It cited the following three-part test set out in *Moore v. British Columbia (Education)*, 2012 SCC 61:

> 1) Does the grievor have a characteristic protected from discrimination?
> 2) Did she suffer an adverse impact?
> 3) Was the protected characteristic a factor in the adverse impact?

[78] The employer recognized that as a woman, the grievor's discrimination allegation fell under the ground of sex, which is a characteristic protected under s. 3(1) of the *CHRA*. It also recognized that she suffered an adverse impact when she was rejected on probation.

[79] As for the third part of the test, the employer affirmed that the rejection on probation was done for employment-related reasons, not discrimination. It argued that when there is insufficient evidence of a nexus between a protected characteristic and the decision to reject an employee while they are on probation, this part of the test is not met, and the Board must decline jurisdiction. It argued that there is no link between any alleged discrimination and the decision to reject the grievor while she was on probation.

[80] It claimed that the grievor's perception that her rejection on probation was based on the fact that she is a woman or on account of her marital status is not sufficient to establish discrimination. It relied on *Brown v. Commissioner of Correctional Service of Canada*, 2012 PSST 17, to affirm that "… 'an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough'". It also quoted from Canadian Human Rights Tribunal's decision in *Dawson v. Canada Post Corporation*, 2008 CHRT 41 at para. 69, as follows:

> *[69] A belief, however strong, that someone is being discriminated against is not sufficient in law to give rise to an inference of discrimination or to establish a* prima facie *case of discrimination … there must be some evidence, i.e. material facts, that if believed, will make the existence of … the case.*

[81] The employer submitted that in this case, the grievor did not establish a fact that confirmed her belief that discrimination was a factor in its decision to reject her on probation. There was not even sufficient circumstantial evidence to substantiate her discrimination allegation. It submitted that instead, the documentary evidence and its witnesses' testimonies clearly demonstrated that the grievor did not meet the objective performance expectations. The grievor testified that she overheard the TL and the manager stating that they wanted to "get rid of her." It argued that during the witnesses' examinations-in-chief, they both denied having that conversation.

[82] The grievor also alleged discrimination based on gender and marital status, but all the witnesses denied it or knowledge of her personal information and stated that those factors played no role in assessing her and in making the decision to terminate her while on probation.

[83] In conclusion, the employer asked that this grievance be denied.

B. For the grievor

[84] The grievor confirmed that a discussion with her TL occurred on or around December 1, 2020, about her first side-by-side report. She then referred to an email dated December 8, 2020, which was a meeting summary of the BEA's TSS assessment that reviewed her progress. She confirmed that she was warned that if she failed to pass a second TSS assessment, she would be rejected on probation.

[85] She argued that she raised a conflict of interest at the third-level presentation of her grievance through her bargaining agent representative. It is evidenced by a stack of documents dated December 9, 2021. The representative raised questions about the Values and Ethics Team's conclusion that there was no conflict of interest. The grievor and her representative posed this question: "How can an assessment be done when the person making the allegation is never interviewed?"

[86] The grievor raised questions about the process and about obtaining her information. She stated that she proceeded through an access-to-information and privacy process (ATIP) but that it took a long time to receive the information. She stated that she did not blame anyone for it.

[87] She stated that a meeting was held about her termination, but she felt that the manager did not want to be there.

[88] She referred to s. 127.1(1) of the *Canada Labour Code* (R.S.C., 1985, c. L-2). She stated that the employer must try to resolve a complaint and that if there is no resolution, an investigation must be launched. She argued that there was no response to the harassment allegation.

[89] The grievor argued that she was not given a reasonable chance of success, as the assessors did not act fairly and with diligence. The decision to reject her while on probation was not based on a fair and objective assessment. She claimed that her termination was disguised discipline and that it was done in bad faith. She claimed that she was not provided a fair opportunity to demonstrate her skills and abilities. She submitted that she should have been given the opportunity to receive another TSS assessment, this time by an unbiased BEA.

[90] She argued that her first TSS assessment should have been sent to her. She submitted that possibly, it was written after the fact, and that there is no evidence that it was written when it was supposed to have been written. She claimed that the decision was based on false reports. She stated that she felt like she was being blocked and that she was prevented from having the appropriate tools.

[91] She argued that the TL's and Ms. Carlston's relationship was inappropriate and that it caused a conflict of interest in their official duties. She argued that the TL and Ms. Carlston, who was her BEA, should have maintained a distance. She claimed that her bargaining agent representative raised the conflict of interest through the three levels of the grievance process. She stated that their relationship disclosure did not comply with the employer's policies and conflict-of-interest forms, which is why the manager testified that she was not aware of their relationship.

[92] She argued that she was disappointed when she found out that her first mentor prepared her first TSS assessment. And she stated that the TL affirmed that it was attached to an email when in fact it was not.

[93] She claimed that over time, her TL steadily increased his discrimination against her. He was unable to speak to her, and he emailed other TLs, to see if he could place her on their teams.

[94] She claimed that during her second TSS assessment review with Ms. Carlston, her TL also listened in. He assessed the grievor's soft skills. She argued that that completely removed her dignity and constituted bullying and harassment of her.

[95] She stated that her conflict-of-interest allegation was not investigated and that the report was completed only after she received her ATIP reply. She claimed that she was not advised of her right to have a bargaining agent representative accompany her to the termination meeting.

[96] She argued that when she cross-examined Ms. Carlston about her second TSS assessment, Ms. Carlston's answers were vague and contained misrepresentations and false statements. She provided examples, such as when Ms. Carlston stated that the grievor had access to a specific computer system (the SPS system,) when in fact she did not, and when Ms. Carlston stated that the grievor should have referred a claimant to the Canada Pension Plan (CPP) but that there was no reason to. She analyzed the TSS assessment reports in more depth and contradicted the comments in them.

[97] The grievor stated that a clear breach of the relevant collective agreement took place. It was the agreement for 2018 to 2023. She argued that clauses and articles 59.03, 59.04, 10, 10.02, 20, 20.1, 58, 58.01, and 6 were clearly contravened.

[98] The grievor submitted that she made a human rights complaint on November 14, 2021. During her arguments, she submitted a Canadian Human Rights Commission form that could be called a "complaint kit". The employer objected to its admission into evidence, relying on *Burchill*. I decided to accept it and to determine in my conclusion the weight that it should carry.

[99] In that form, the "Summary of Allegations" section reads as follows:

> *I had a fake assessment completed on behalf of my employer that was done by my supervisors common-law partner. The assessment that was recorded was a filled with false statements, sections of the assessment that had never happened at all, reporting on systems that I had never accessed or even had access to them. It was not a fair nor impartial assessment that was completed by this assessor. It was a conflict of interest for my assessor to purposely chose to take on my assessment because she was jealous and wanted to "get rid of me" and did not want me talking to her boyfriend at all in any way.*
>
> [*Sic* throughout]

[100] The grievor argued that she is a protected person as a woman in the workplace and that in particular, her assessments were sexualized. She referred to part 1 of the *CHRA* and stated that the employer had to protect her from the prohibited grounds of discrimination. She claimed that she was not treated fairly, and that the workplace was not an environment free from discrimination on the basis of sex and marital status. She submitted that she was treated differently based on her sex and perceived marital status. She claimed that she was deprived of an employment opportunity.

[101] She claimed that neither one of her assessments complied with the *Conflict of Interest Act* (S.C. 2006, c. 9, s. 2), specifically Part 1, *Conflict of Interest Rules*, and ss. 4, 5, 6, 6(1), 7, and 8.

[102] The grievor claimed that both her TL and her BEA, Ms. Carlston, were required to sign an attestation form disclosing their potential conflict of interest. She claimed that both signed a statement that they had read and understood the *Values and Ethics Code for the Public Service* and that they should have acknowledged their conflict of interest.

[103] The grievor cited the *Employment Equity Act* (S.C. 1995, c. 44). She claimed that the employer has the duty to identify and eliminate employment barriers against persons in designated groups such as hers, which is women. She argued that the conflict of interest went against the employer's established policies and practices and adversely impacted her employment.

[104] She referred to the employer's *Code of Conduct* and the *Values and Ethics Code for the Public Service*, specifically paragraph E, "Supervisors As Role Models and Integrity", where it states in the "Expected Behaviours" section that one should never use her or his official role to obtain an advantage for oneself or a disadvantage for someone else.

C. The employer's rebuttal

[105] The employer argued that no evidence was adduced that the grievor's second TSS assessment was sexualized.

[106] It argued that the conflict-of-interest allegation was not made during the grievor's employment but only after she was terminated. It argued that no evidence was adduced that the TL and Ms. Carlston made the second TSS assessment together.

IV. Reasons

A. Does the Board have jurisdiction over the grievance given the bargaining agent withdrew its support?

[107] The employer claimed that the grievance was referred erroneously under s. 209(1)(c)(i) of the *Act* instead of under s. 209(1)(a), which required the grievor to have her bargaining agent's support to file the grievance. It is a fact that it withdrew its support on March 22, 2024. Had the grievor filed the grievance under s. 209(1)(a), she would indeed have required that support. However, nothing in the *Act* precluded her from filing it under s. 209(1)(c)(i) without that support.

[108] This objection is dismissed. I find that this grievance is properly before me.

[109] Having said that, the grievor alleged that the employer contravened several provisions of the relevant collective agreement. I agree with the employer's argument that s. 209(2) of the *Act* states that the Board is without jurisdiction to hear evidence related to collective agreement interpretation without the bargaining agent's approval. Since it withdrew its support, I cannot consider those allegations, and they are dismissed.

B. The rejection on probation was not in bad faith, a sham or discriminatory

1. Legal principles that apply to rejections on probation

[110] The legal framework applicable to matters of rejection on probation in the core federal public administration is found at ss. 209 and 211 of the *Act* and s. 62 of the *PSEA*. Section 209 of the *Act* reads as follows:

Reference to adjudication	***Renvoi d'un grief à l'arbitrage***
209 (1) *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt*	***209 (1)*** *Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un membre, au sens du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada,

with to the employee's satisfaction if the grievance is related to

(a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*

(b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*

(c) *in the case of an employee in the core public administration,*

(i) *demotion or termination under paragraph 12(1)(d) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*

(ii) *deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*

(d) *in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*

Application of paragraph (1)(a)

(2) *Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*

Designation

peut renvoyer à l'arbitrage tout grief individuel portant sur :

a) *soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;*

b) *soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;*

c) *soit, s'il est un fonctionnaire de l'administration publique centrale :*

(i) *la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la* Loi sur la gestion des finances publiques *pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,*

(ii) *la mutation sous le régime de la* Loi sur l'emploi dans la fonction publique *sans son consentement alors que celui-ci était nécessaire;*

d) *soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).*

Application de l'alinéa (1)a)

(2) *Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)a), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.*

Désignation

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

(3) *Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)d), tout organisme distinct.*

Reference to adjudication

209.1 *In addition to his or her rights under section 209, an employee, other than an employee who occupies a managerial or confidential position or who is not otherwise represented by a bargaining agent, may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the employee has suffered physical or psychological harm, property damage or economic loss as the result of — or has otherwise been adversely affected by — the contravention of a provision of regulations made under subsection 117(1) of the* Accessible Canada Act, *and the grievance is related to that contravention.*

Renvoi d'un grief à l'arbitrage

209.1 *Outre les droits qui lui sont accordés au titre de l'article 209, le fonctionnaire qui n'occupe pas un poste de direction ou de confiance ou qui n'est pas autrement représenté par un agent négociateur peut, après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, renvoyer à l'arbitrage tout grief individuel s'il a subi des préjudices physiques ou psychologiques, des dommages matériels ou des pertes économiques — ou a été autrement lésé — par suite d'une contravention à une disposition des règlements pris en vertu du paragraphe 117(1) de la* Loi canadienne sur l'accessibilité *et que le grief est relatif à cette contravention.*

[111] Section 62 of the *PSEA* reads as follow:

62 (1) *While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*

(a) *the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act, *or*

(b) *the notice period determined by the separate agency in respect of the*

62 (1) *À tout moment au cours de la période de stage, l'administrateur général peut aviser le fonctionnaire de son intention de mettre fin à son emploi au terme du délai de préavis :*

a) *fixé, pour la catégorie de fonctionnaires dont il fait partie, par règlement du Conseil du Trésor dans le cas d'une administration figurant aux annexes I ou IV de la* Loi sur la gestion des finances publiques*;*

b) *fixé, pour la catégorie de fonctionnaires dont il fait partie, par*

class of employees of which that employee is a member, in the case of a separate agency to which the Commission has exclusive authority to make appointments,	*l'organisme distinct en cause dans le cas d'un organisme distinct dans lequel les nominations relèvent exclusivement de la Commission.*
and the employee ceases to be an employee at the end of that notice period.	*Le fonctionnaire perd sa qualité de fonctionnaire au terme de ce délai.*
Compensation in lieu of notice	***Indemnité tenant lieu de préavis***
(2) *Instead of notifying an employee under subsection (1), the deputy head may notify the employee that his or her employment will be terminated on the date specified by the deputy head and that they will be paid an amount equal to the salary they would have been paid during the notice period under that subsection.*	***(2)*** *Au lieu de donner l'avis prévu au paragraphe (1), l'administrateur général peut aviser le fonctionnaire de la cessation de son emploi et du fait qu'une indemnité équivalant au salaire auquel il aurait eu droit au cours de la période de préavis lui sera versée. Le fonctionnaire perd sa qualité de fonctionnaire à la date fixée par l'administrateur général.*

[112] *Holowaty* refers to the Federal Court of Appeal's decision in *Canada (Attorney General) v. Alexis*, 2021 FCA 216, which stated that the Board has no jurisdiction over a termination of employment under the *PSEA*, according to the s. 211 of the *Act*.

[113] *Holowaty* reminds that a rejection on probation is characterized by these four points: the employee was on probation, the employee was still on probation when the termination was affected, a notice was given or pay in lieu of one was made, and the employee was terminated for employment-related reasons.

[114] Although the Board has an apparently limited jurisdiction on the matter, the case law has determined that it has jurisdiction to hear the following (from *Holowaty*, at para. 9):

> *[9] … allegations that if proven, would demonstrate that the rejection on probation was made in a manner that was arbitrary, discriminatory, or in bad faith (see, for example,* Wrobel v. Deputy Head (Canada Border Services Agency), *2021 FPSLREB 14;* Rouet v. Deputy Head (Department of Justice), *2021 FPSLREB 59 at para. 305;* Reeves v. Deputy Head (Department of National Defence), *2019 FPSLREB 61;* Ontario Northland Transportation Commission v. Teamsters Canada Rail Conference Maintenance of Way Employees Division, *2020 CanLII 107424 at para. 62; and* Tello v. Deputy Head (Correctional Service of Canada), *2010 PSLRB 134 at para. 109). As noted in* Tello*:*

…

> [109] … In *Penner*, at page 438, the Federal Court of Canada referred to "… a *bona fide* dissatisfaction as to suitability." Arbitrators have generally held that a private sector employer is to be given a great deal of discretion in making this assessment and an arbitrator must not overrule an employer's decision unless the decision is arbitrary, discriminatory or in bad faith ….
>
> [110] If a deputy head terminates the employment of a probationary employee without any regard to the purpose of a probationary period — in other words, if the decision is not based on suitability for continued employment — that decision is one that is arbitrary and may also be made in bad faith. In such a case, the termination of employment is not in accordance with the new *PSEA*.

…

[115] *Fell*, at para. 122, stated that the grievor's burden is quite difficult. It is not sufficient that he or she demonstrates that the employer's process was imperfect or unfair. They must demonstrate that it acted in bad faith and that any ground for the termination that it alleged was a fabrication.

2. The employee was on probation at the time of the rejection and a notice was given

[116] I will now turn to the evidence in this case. It established that the grievor accepted the term-employment offer, which was from September 8, 2020, to September 7, 2021. The offer clearly stipulated, "All appointments and deployments from outside the Public Service are subject to a probationary period of 12 months …". The probationary period was also referred to in a follow-up email on August 17, 2020, from the manager to the grievor. Her employment was terminated on January 12, 2021, which was well within the probationary period. And from her testimony, she received her pay in lieu of notice, albeit it was somewhat delayed.

[117] There is no issue that those circumstances meet the first three parts of the *Holowaty* test. The grievor was on probation, the probation was still in effect as of her termination, and she received pay in lieu of notice. The remaining point is whether an employment-related reason was behind the decision to terminate her.

[118] To support its decision to terminate the grievor, the employer demonstrated that she failed three of the five tests, which should also have led to her termination.

For its own reasons, the employer decided to continue her training. It then submitted written assessments of her progress and performance in her training, all of which demonstrated that she required improvement.

[119] I also heard the assessors' testimonies, which established on a balance of probabilities their objectivity when they assessed the grievor. The evidence demonstrated that each written assessment, which included the side-by-side reports and the TSS assessments, contained many concrete examples of her deficiencies meeting the employer's expectations.

[120] Based on the preponderance of the evidence, I conclude that the grievor was on probation when her employment was terminated, that the employer provided reasons for the termination, and she was given notice.

3. The grievor failed to demonstrate that the reason for termination was merely a sham or a camouflage, or that it was invoked in bad faith.

[121] The grievor argued that the reason her employment was terminated was because she raised a conflict-of-interest issue in the workplace given that her BEA and TL were in a relationship. She also alleged discrimination based on sex and family status to which the employer objected, stating that these allegations were not raised in the grievance process.

[122] The grievor had the heavy burden of demonstrating on a balance of probabilities that her termination was the result of a sham or that it was in bad faith. I find that she offered no evidence to support her allegations.

a. The conflict-of-interest allegation

[123] In her argument, the grievor raised the conflict of interest of her BEA and TL's relationship. She alleged jealousy between the BEA and her. She cross-examined both the BEA and the TL, but no testimony lent any credence to the claim.

[124] On this issue, the employer made a *Browne and Dunn* objection.

[125] The Board explained well the requirements of *Browne and Dunn* at paragraph 192 of its decision in *Stene v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 36:

> ***192*** *The rule in* Browne and Dunn *requires that a party that is going to challenge the credibility of a witness by putting forward contradictory evidence must put that contradictory evidence to that witness. This is to allow the witness whose evidence they are trying to contradict an opportunity to explain. If the rule in* Browne and Dunn *is not followed, the court or tribunal will not allow that party to rely on the contradictory evidence.*

[126] I rejected the objection while offering the employer the chance to recall its witnesses, if necessary, to contradict the grievor's testimony. It did not. It wanted to limit the grievor's ability to introduce contradictory testimony without allowing its witnesses to reply. It claimed that that was prejudicial to its case.

[127] I am guided by the fact that an administrative tribunal, such as the Board, is not governed by the strict rules of evidence and that is the master of its proceedings. However, it is limited by the rules of natural justice. As is often the case for grievors who are not represented before the Board, they are not always informed of the many legal principles and intricacies. Allowing a grievor to testify in contradiction of *Browne and Dunn* does not always lead to prejudice, especially if the employer is aware that the testimony will be heard.

[128] In its examinations-in-chief of its witnesses, the employer asked the BEA and the TL questions about their relationship, and both confirmed its existence and its lack of role in their assessments of the grievor's performance. The manager was also questioned about it and confirmed that it was not a factor in reaching her decision and that it did not influence her decision.

[129] I find that the employer was aware of the conflict-of-interest allegation and that it suffered no irreparable prejudice when the Board allowed the testimony.

[130] The relationship could have given rise to a conflict-of-interest argument. The well-established test to determine of the presence of a conflict of interest or bias is to ask what a well-informed person would conclude if faced with the circumstances. I am not convinced that someone well informed would conclude that the perceived conflict of interest intervened in any way with the decision to terminate the grievor's employment while she was on probation. Other than her testimony, no evidence supported that claim.

[131] The grievor also argued that s. 127.1(1) of the *Canada Labour Code* was contravened. She stated that the employer has the onus to try to resolve a complaint. Section 127.1 (1) reads as follows:

> ***127.1(1)*** *An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident, injury or illness arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by … sections 128, 129 and 132, make a complaint to the employee's supervisor.*
>
> ***127.1 (1)*** *Avant de pouvoir exercer les recours prévus par la présente partie — à l'exclusion des droits prévus* […] *aux articles 128, 129 et 132 —, l'employé qui croit, pour des motifs raisonnables, à l'existence d'une situation constituant une contravention à la présente partie ou dont sont susceptibles de résulter un accident, une blessure ou une maladie liés à l'occupation d'un emploi doit adresser une plainte à cet égard à son supérieur hiérarchique.*

[132] The employer addressed that issue in its first-level reply to the grievance, in which it stated that its Values and Ethics Team conducted an assessment that confirmed that such a conflict did not exist.

[133] In this case, no evidence was adduced that the relationship between the grievor's BEA and the TL's had any impact on the employer's decision to terminate the grievor while she was on probation.

b. The discrimination allegation based on sex and family status

i. The grievor's discrimination allegation is not new

[134] The employer made an objection based on *Burchill*, stating that the allegations that were made before the Board were not raised in the grievance process. As mentioned, self-represented grievors are not always aware of such rules, and it is important that one party not be taken by surprise by new allegations. However, in this case, the employer knew of the discrimination allegation but acted as if it did not know of it.

[135] As stated above, on November 14, 2021, the grievor made a human rights complaint before the Canadian Human Rights Commission. This was during the grievance process and before the second level decision was rendered by the employer. The summary of her allegations explained the basis of her complaint:

> *I had a fake assessment completed on behalf of my employer that was done by my supervisors common-law partner. The assessment that was recorded was a filled with false statements, sections of the assessment that had never happened at all, reporting on systems that I had never accessed or even had access to them. It was not a fair nor impartial assessment that was completed by this assessor. It was a conflict of interest for my assessor to purposely chose to take on my assessment because she was jealous and wanted to "get rid of me" and did not want me talking to her boyfriend at all in any way.*
>
> [*Sic* throughout]

[136] Although I agree with the *Burchill* argument that a grievor must not raise new allegations before the Board, I conclude her discrimination allegation did not change the nature of the grievance. She is still alleging that the reason for her termination was merely a sham or a camouflage, or that it was invoked in bad faith.

[137] Based on the evidence, the employer cannot argue that it was surprised by this discrimination allegation. The employer offered a very well-articulated argument on the specific topic of discrimination — it did not suffer any prejudice.

[138] This objection is dismissed.

ii. The grievor did not make out a *prima facie* case of discrimination

[139] The grievor made her discrimination allegation based on sex and family status. She adduced no evidence, cogent or otherwise, to set out that she was discriminated against because she is a woman. She simply made the conclusion that she is a woman and her employment was terminated; therefore, discrimination occurred. Also, no evidence was submitted about her family status to sustain the allegation. The employers' witnesses testified that none of them knew the grievor before her employment or had any knowledge of her family situation.

[140] The grievor also cited the *Employment Equity Act* and claimed that the employer has a duty to identify and eliminate employment barriers against persons in designated groups which includes women.

[141] To determine if discrimination occurred, the grievor had to first make a *prima facie* case. She had to present facts that if believed would have established that discrimination occurred. The onus of proof would then have reverted to the employer, to justify its conduct.

[142] In *Moore*, the Supreme Court of Canada established the *prima facie* discrimination test in the following terms, at paragraph 33:

> *[33] … to demonstrate* prima facie *discrimination, complainants are required to show that they have a characteristic protected from discrimination under the* Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.…*

[143] The grievor is a woman and therefore is protected from discrimination. But she adduced no evidence whatsoever as to her family status as of the hearing or at the time relevant to the grievance. So it is that I find that her family status argument fails.

[144] Did the grievor suffer an adverse impact? She was terminated while on probation. So, yes, she did suffer an adverse impact.

[145] The third question asks if the protected characteristic was a factor in the adverse impact. In this case, the evidence clearly established that the grievor's employment was terminated for employment-related reasons, as stated earlier in this decision. She also recognized that the call centre had other female employees.

[146] Based on that test, I conclude that the grievor failed to establish a *prima facie* case of discrimination. The discrimination allegation is dismissed.

[147] At the start of the hearing, the employer made its objection that the Board lacks jurisdiction to hear this grievance, based on s. 211 of the *Act*.

[148] I conclude that the objection is founded. Based on s. 211 of the *Act* and s. 62 of the *PSEA*, I have no jurisdiction over the grievor's termination while she was on probation.

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

(The Order appears on the next page)

V. Order

[150] The employer's objection to the Board's jurisdiction is allowed.

[151] The grievance is denied.

October 3, 2025.

Guy Grégoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board