Federal Court  Cour fédérale

Date: 20130412

Docket: T-1466-11

Citation: 2013 FC 365

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, April 12, 2013

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MARC-ANDRÉ BERGERON

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision by a Public Service Labour Relations Board (PSLRB) adjudicator dated August 12, 2011. In that decision, the adjudicator found that the termination of employment of the respondent, who was working for the Canadian Security Intelligence Service (CSIS) on probation, was abusive because the employer had failed to provide him, in accordance with its policies and procedures, with a written notice of shortcomings before terminating his

employment, and no employment-related reason was demonstrated. The adjudicator allowed the respondent's grievance and reversed his termination. The applicant is seeking a declaration that the adjudicator lacked jurisdiction to deal with the respondent's grievance. In the alternative, the applicant is asking this Court to refer this matter back to a different adjudicator for redetermination.

Background

[2] Marc-André Bergeron (the respondent) had been an intelligence officer with the Canadian Security Intelligence Service (CSIS or the Service) since January 6, 2003 (Applicant's Record, Vol 1, pp 115-21). In accordance with his offer of employment, the respondent was on probation for a five-year period, throughout the course of his Intelligence Officer Development Program (Applicant's Record, Vol 1, p 116).

[3] The respondent successfully completed the training for new intelligence officers, which ran from January 6 to April 11, 2003 (Applicant's Record, Vol 1, pp 123-28). Comments following the training indicate that the respondent needed to improve in the areas of reasoning and analysis, planning and organization (difficulty meeting deadlines; Applicant's Record, Vol 1, p 125). Between April 11, 2003, and December 6, 2005, the respondent received four performance evaluations. The passing score for performance evaluations is 2.5 out of 4.0. The respondent received the following scores:

a. from April 11, 2003, to January 6, 2004: 3 (Applicant's Record, Vol 1, pp 130-39);

b. from January 6, 2004, to January 6, 2005: 2.3 (Applicant's Record, Vol 1, pp 141-50);

c. from January 17, 2005, to April 5, 2005: 2.6 (Applicant's Record, Vol 1, pp 152-62); and

d. from April 6, 2005, to December 6, 2005: 2.5 (Applicant's Record, Vol 1, pp 165-75).

[4] No areas for improvement were indicated on the evaluation of April 11, 2003, to January 6, 2004. The evaluation for January 6, 2004, to January 6, 2005, made note of the respondent's serious difficulties in performing his duties adequately in several areas of responsibility and his great difficulty in meeting deadlines. It also mentioned improvements required in the areas of communications, confidence, professionalism, planning, analysis and, in particular, judgment (Applicant's Record, Vol 1, pp 144-45). The same evaluation also indicated that the respondent was not performing at a satisfactory level and that some areas were particularly serious, as the respondent did not seem to grasp the importance of what was at stake and the need to make adjustments (Applicant's Record, Vol 1, p 148). It stated that the respondent's performance had declined since June 2004 and that he seemed to have an attitude of complacency (Applicant's Record, Vol 1, p 149).

[5] In the two subsequent applications (covering the periods from January 17 to April 5, 2005, and April 6 to December 6, 2005), it was noted that the respondent's productivity should have been higher; that an improvement in his judgment had been detected through more thorough checks but that this needed to be more consistent; and that there [TRANSLATION] "is still room for improvement and there are certain shortcomings that need to be addressed to make him fully operational" (Applicant's Record, Vol 1, p 156). It was also noted that the respondent [TRANSLATION] "is still demonstrating certain shortcomings in his work" and [TRANSLATION] "is

somewhat inconsistent in his work" (Applicant's Record, Vol 1, p 169), and that he needed to improve in the areas of judgment, analysis, communication and professionalism.

[6] The respondent passed the Intelligence Officer Investigator Course that ran from January 9, 2006, to February 24, 2006 (Applicant's Record, Vol 1, pp 178-83). The evaluation stated that the respondent required improvement in the areas of interviewing techniques and the collection of relevant information and that he would have to demonstrate that he could use appropriate strategies during interviews to meet his objectives.

[7] In June 2006, the respondent was assigned to the Quebec Region as an investigator. He was initially supervised by an acting supervisor who did not evaluate him. The respondent's new supervisor took up his duties on September 5, 2006. The respondent was therefore evaluated for the period from September 5, 2006, to January 6, 2007, and he received a score of 2.4 (Applicant's Record, Vol 1, pp 188-98). Under necessary improvements, the evaluation mentions an inadequate operational report dated October 12, 2006, inadequate production and inadequate performance (Applicant's Record, Vol 1, p 192). It is also noted that the operational report prepared by the respondent contained incorrect facts, that he needed to increase the frequency of his interviews and that he had serious shortcomings but showed a desire to improve (Applicant's Record, Vol 1, p 193).

[8] The respondent later received two special performance evaluations. In his first special performance evaluation, covering the period from January 7, 2007, to May 7, 2007, he earned a score of 2.3 (Applicant's Record, Vol 1, pp 203-16), and in the second, covering the period from

May 8, 2007, to September 8, 2007, he earned a score of 2.2 (Applicant's Record, Vol 1, pp 218-31). The special evaluations indicated, among other things, that the respondent

a. had left an interview early to keep a social commitment (Applicant's Record, Vol 1, p 207);

b. had lacked initiative in attempting to obtain the contact information of an interviewee (shortcomings in interview techniques/ability to interview and judgment) (Applicant's Record, Vol 1, p 207);

c. had failed to inform his supervisor that he was leaving the office (Applicant's Record, Vol 1, p 207);

d. had failed to inform his supervisor of the interviews he was planning to conduct (Applicant's Record, Vol 1, p 207);

e. had asked poorly formulated questions during interviews, providing answers to the interviewee (Applicant's Record, Vol 1, p 208);

f. had conducted an unsatisfactory investigation, delivered an unsatisfactory report (Applicant's Record, Vol 1, p 208) and delivered an unsatisfactory interview report containing inaccurate information (sometimes incomplete, sometimes contradictory) (Applicant's Record, Vol 1, p 222);

g. had provided an incorrect e-mail address to an interview subject using an operational pseudonym (Applicant's Record, Vol 1, pp 212 and 214);

h. lacked judgment and professionalism (Applicant's Record, Vol 1, p 223); and

i. was incapable of distinguishing fact from fiction (Applicant's Record, Vol 1, p 226).

[9] During a meeting with the evaluating supervisor, Ms. Stewart, in May 2007, the respondent had indicated that he understood the gravity of the situation, which led Ms. Stewart to expect increased effort and significant improvement from the respondent. She nevertheless noted that the shortcomings remained (Applicant's Record, Vol 1, p 226). During a meeting in June 2007, a manager, Mr. Boyer, stated that the respondent seemed to understand the gravity of

the situation (Applicant's Record, Vol 1, p 231). He was told during a meeting on June 8, 2007, that if he did not improve, he would be given a written notice of shortcomings, and that if his performance did not improve after he received the notice, steps would be taken that could result in his termination (Applicant's Record, Vol 1, p 215). The respondent stated in June 2007 that he wished to improve his performance significantly (Applicant's Record, Vol 1, p 213).

[10] The respondent's employment was terminated on October 2, 2007, three months before the end of his probationary period (Applicant's Record, Vol 1, p 233). The respondent's letter of termination refers to the evaluations of September 5, 2006, to January 6, 2007; January 7, 2007, to May 7, 2007; and May 8, 2007, to September 8, 2007.

[11] The respondent filed a grievance on October 17, 2007, which was dismissed at both levels of the Service's grievance process, on November 7, 2007, and December 20, 2007 (Applicant's Record, Vol 1, pp 235-37). The respondent's grievance was referred to a PSRLB adjudicator for adjudication on January 17, 2008. The hearing before the adjudicator was held on May 9, 2008; from January 5 to 7, 2011; and from March 15 to 18, 2011. The adjudicator's decision was rendered on August 12, 2011.

The impugned decision

[12] The applicant objected to the adjudicator's jurisdiction to hear the respondent's grievance because his employment had been terminated during probation for employment-related reasons. The adjudicator decided to reserve her decision on the objection and hear the evidence on the merits of the grievance (Applicant's Record, Vol 1, pp 7-8, para 5 of the decision). The

applicant's evidence consisted of the testimony of Michel Coulombe, Director General of the Quebec Region. The latter stated that he had terminated the respondent's employment after examining all of his performance evaluations and noting the same shortcomings arising in each one, namely, a lack of judgment and rigour, over the course of more than four years. The respondent's evidence consisted of his own testimony, the testimony of two other CSIS employees, the testimony of the regional employee representative, and several e-mail exchanges between the respondent and his supervisor. The respondent argued that he had discharged his burden of demonstrating that the employer had violated its own policies and that there was a personality conflict between himself and his new supervisor.

[13] The adjudicator identified two issues that she had to resolve in light of the parties' claims, namely: (i) Did the employer respect its own policies and procedures regarding termination of employment during probation, and (ii) did the employer establish an employment-related reason?

[14] As for the first issue, the adjudicator began by pointing out a contradiction between the fact that the respondent was subject to a five-year probationary period, while the letter of termination refers to an evaluation period of only 13 months, from September 5, 2006, to September 8, 2007 (paragraphs 89-91 of the decision). The adjudicator stated that during the first 44 months after he was hired, the respondent's performance was acceptable, since the Service did not terminate his employment. The adjudicator rejected evidence of the respondent's shortcomings prior to September 5, 2006, considering them irrelevant for two reasons: first, because the letter of termination referred only to the period from September 5, 2006, to September 8, 2007, and second, because although the respondent received a score of 2.3 for the

period from January 6, 2004, to January 6, 2005, he later received scores of 2.6 (from January 17 to April 5, 2005), and 2.5 (from April 6 to December 6, 2005), and a score of 3 for his investigator training. The adjudicator stated that the employer had to accept the positive scores that it had itself attributed to the respondent.

[15] The adjudicator then turned to the issue of the notice of shortcomings, which the respondent did not receive before his employment was terminated. The adjudicator noted that according to a CSIS procedure entitled *Performance Evaluation Program* (HUM-306), this notice is discretionary, stating that a [TRANSLATION] "written notice of shortcomings may be issued to an employee" (at section 3.6 of the earlier version and section 4.1.4 of the version dated July 18, 2007). However, the adjudicator also noted that the *Performance Evaluation Program* refers to a provision of *Procedures – Performance Evaluation* (HUM-306-01) that is not discretionary, stating at paragraph 5.2 that if after at least two special evaluations, the employee's performance does not improve, "[t]he supervisor must meet with the employee to provide him or her with a written notice of shortcomings" (emphasis in the original). The adjudicator also noted that, in this case, the respondent's evaluation covering the period from January 7 to May 7, 2007, stated that the respondent would be provided with a written notice of shortcomings and that if the situation persisted after this notice, steps could be taken to terminate his employment (Applicant's Record, Vol 1, pp 41-2, para 96 of the decision).

[16] The adjudicator noted that the purpose of the *Performance Evaluation Program* (HUM-306) is to promote ongoing communication between managers and employees regarding performance, and that the respondent did not benefit from such communication in this case. The

adjudicator found that the respondent's supervisor had not met with him to establish a work plan together, had not given him the necessary advice, had failed to provide guidance and ensure that he had the proper training, and had failed to inform him of the steps he had to take to improve his performance. The adjudicator noted that these steps are listed in sections 2 and 5 of the *Performance Evaluation Program* (HUM-306).

[17] The adjudicator also took into account the testimony of the regional representative, who said that it was unusual for an employee to be surprised by a termination, and that an employee generally receives a written notice of shortcomings before his employment is terminated. The adjudicator ultimately held that if the Service terminates employment on the basis of its own policy, it must consider not only the provisions that operate in its favour, but also those that favour the employee. According to the adjudicator, the employer skipped an essential step by terminating the respondent's employment without first issuing him a notice.

[18] The adjudicator then considered the second issue that she had identified, that is, whether the employer had established an employment-related reason for termination. The adjudicator noted the respondent's argument that his performance had met the Service's standards until he ended up under the supervision of his new supervisor. She also took into account the respondent's argument that the performance evaluations did not reflect his overall performance, that his supervisor had already made up his mind and that the Service had failed to follow its own guidelines before terminating his employment.

[19] The adjudicator also stated that in the case of a termination, the burden of proof lies initially with the employer, who must provide the reasons for the termination. The adjudicator cited a few cases that stated that the employer's burden of proof is less stringent for terminations during probation (*Jacmain v Canada (Attorney General)*, [1977] SCJ no 111 (QL), [1978] 2 SCR 15 [*Jacmain*]; *Canada (Attorney General) v Penner*, [1989] 3 FC 429, 99 NR 213 (FCA) [*Penner*]; *Canada (Attorney General) v Leonarduzzi*, 2001 FCT 529, 205 FTR 238 [*Leonarduzzi*]). The adjudicator held that the employer had to prove that the reason for the termination was employment-related, at which point it would fall to the employee to demonstrate that the employer's decision was abusive.

[20] In this case, the Service stated that it had employment-related reasons for terminating the respondent's employment, namely, the performance evaluations, and that these evaluations constituted a sufficient warning to the respondent, given that he was still on probation. The adjudicator noted that the evidence of this was limited to Mr. Coulombe's testimony. The respondent, on the other hand, presented several e-mails demonstrating his exchanges with this supervisor and the weekly objectives he would set, as well as the supervisor's response to these objectives. The adjudicator noted that the respondent's supervisor had stated that his workplace achievements were insufficient in an e-mail dated November 21, 2006, but that the respondent had then begun exceeding his weekly objectives. There was no further mention of insufficiency after November 21, 2006. The adjudicator reviewed 58 e-mail exchanges initiated by the respondent between September 5, 2006, and October 2, 2007, of which only 3 involved negative feedback. The adjudicator held that the respondent had demonstrated to her satisfaction that his supervisor had not clearly expressed his dissatisfaction and the ways in which he could improve.

[21] On the basis of this finding, the adjudicator said that she was of the view that the respondent had demonstrated that his dismissal was arbitrary and therefore unjustified. She stated that this caused the burden of proof to shift, and that the Service had to respond to the respondent's evidence to support its position that it had an employment-related motive. In the adjudicator's view, the Service failed to do so.

[22] The applicant offered as an employment-related reason the respondent's failure to meet the basic requirements of the position of intelligence officer as a result of his lack of rigour, planning, organization and judgment and his poor-quality interviews. The respondent also allegedly damaged the Service's credibility and effectiveness and compromised its security on more than one occasion. The adjudicator stated that the respondent had countered most of the incidents for which he had been criticized with examples of instances in which his supervisor had approved his work. After identifying several examples drawn from the e-mail exchanges, the adjudicator found that the Service had failed to persuade her that the termination of the respondent's employment had been justified or that there had been a legitimate, employment-related reason.

[23] The adjudicator held that the termination of the respondent's employment had been abusive because the Service had failed to give him a written notice of shortcomings before the termination and did not meet its burden of demonstrating an employment-related reason. Accordingly, the adjudicator held that she had the jurisdiction to allow the grievance and reverse the termination, which she did.

Issues

[24] The following issues arise from this case:

a. What is the applicable standard of review?

b. Did the adjudicator err in determining the issues and the parties' burdens of proof?

Analysis

Standard of review

[25] In this case, there are two aspects to the standard of review issue: the identification of the applicable burden of proof and the adjudicator's findings of fact. Although the context was different, the Federal Court of Appeal made this distinction in *Cyprus (Commerce and Industry) v International Cheese Council of Canada*, 2011 FCA 201 at para 19, 420 NR 124 [*Cyprus*]: "The Judge therefore did indeed apply the standard of correctness to the identification of the applicable burden of proof and the standard of reasonableness to the Registrar's findings of fact."

[26] The standard of correctness applies to the identification of the burden of proof applicable in the case of termination of employment during probation. This is a question of law arising from the interpretation of the case law and the decisions rendered by the courts and tribunals in this area. There are not two ways to identify the burden of proof imposed on each party—there is only one. Any error by the adjudicator with respect to identifying the burden of proof to impose on each party therefore calls for no deference on the part of this Court and is subject to the standard of correctness (*Cyprus*, above, at para 19; *Mugesera v Canada (Minister of Citizenship*

and Immigration), 2005 SCC 40, [2005] 2 SCR 100). Accordingly, it is open to this Court to substitute its own conclusions for those of the adjudicator in the case of an error (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, [2008] 1 SCR 190 [*Dunsmuir*]).

[27] With respect to the second issue, i.e., in the event that the adjudicator has correctly identified the burden of proof but has applied it erroneously, it is the standard of reasonableness that applies. The issue of whether the evidence before the adjudicator discharges the burden imposed on each party is a determination made by examining questions of fact, as well as questions of mixed fact and law, which calls for a standard of reasonableness, given the adjudicator's expertise in the field of public service labour relations and the privative clause at section 233 of the *Public Service Labour Relations Act* (*Dunsmuir*, above, at paras 52-55). In such cases, it must be acknowledged that more than one finding is possible and that the adjudicator's expertise plays an important role in that determination (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 25 and 59, [2009] 1 SCR 339; *Canada (Attorney General) v King*, 2009 FC 922 at para 10, [2009] FCJ no 1137 (QL)). Deference is therefore owed to the adjudicator's findings regarding questions of fact and questions of mixed fact and law; what is to be examined is the reasonableness of her findings about whether the burden of proof was met. The Court must therefore limit its review to "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

[28] In this case, regardless of the applicable standard of review, the adjudicator's decision cannot be upheld even on a standard of reasonableness.

Introductory remarks

[29] The wording of the legislative provisions relevant to judicial review is provided in the annex to these reasons for judgment and judgment. It is worth noting that under Schedule V of the *Financial Administration Act*, RSC 1985, c F-11 [*Financial Administration Act*], CSIS is a separate agency. CSIS has been delegated the authority to manage its human resources. In fact, under section 8 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*], the Director of the Service has the exclusive power to appoint Service employees, determine their conditions of employment and perform the functions of the Treasury Board under the *Financial Administration Act* and of the Public Service Commission under the *Public Service Employment Act*, SC 2003, c 22, sections 12 and 13. This delegation of functions to the Director of the Service is made notwithstanding, among other statutes, the *Public Service Employment Act*, above, which is therefore not applicable to this case. The CSIS has adopted its own human resources policies, including HUM-407, entitled "External Recruitment", which deals specifically with termination during probation at section 7.3 (Applicant's Record, Vol 1, p 311). Moreover, labour relations at CSIS are not governed by the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [PSLRA], except for the provisions on grievances from Part 2 of the PSLRA (subsection 2(1) of the PSLRA, definition of "employee"). Section 209 of the PSLRA sets out the circumstances in which such a grievance may be referred to adjudication; paragraph 209(1)(*b*) in particular applies to this case.

Burden of proof

[30] Essentially, the applicant alleges that the adjudicator erred in her identification and application of the burden of proof, and the respondent disagrees. The respondent submits that the adjudicator applied the appropriate legal principles and that it was therefore reasonable for her to find that she had the jurisdiction to consider the grievance and that the dismissal should be set aside.

[31] At this stage it is appropriate to review the legal principles applicable when dealing with termination during probation. In the context of termination during probation, the adjudicator's jurisdiction is not removed solely because the employer is calling the situation a termination (*Canada (Treasury Board) v Rinaldi*, [1997] FCJ no 225 (QL), 127 FTR 60). On the basis of the principle that form should not take precedence over substance, the adjudicator is entitled to look into the matter to ascertain whether the case is really what it appears to be (*Penner*, above, pp 440-41).

[32] A long line of case law has established that the adjudicator may hear the evidence, but with some caveats (*Penner*; *Leonarduzzi*; *Rinaldi*). To this effect, the case law has developed the following procedure: the employer has the initial burden of demonstrating that the reason for the termination during probation was genuinely employment-related. If so, the burden shifts to the grievor to demonstrate that the termination was in fact a sham, a camouflage or in bad faith (*Archambault v Canada (Customs and Revenue Agency)*, 2005 FC 183 at paras 8-12, [2005] FCJ

no 229 (QL) and *Archambault v Canada Customs and Revenue Agency*, 2003 PSSRB 28 at paras 51 to 61, [2003] CPSSRB no 25). There has been no legislative amendment altering the application of this principle, and the parties have not raised any before this Court.

[33] Therefore, in order to demonstrate that the reason for the termination was employment-related, "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" (*Leonarduzzi*, above, at para 37; emphasis added). This can be described as a "low threshold", as the adjudicator noted in her decision (Applicant's Record, Vol 1, p 50, para 124).

[34] At paragraph 42 of *Leonarduzzi*, above, the Court nuanced the respondent's argument as follows: "The respondent submits the employer must make a *prima facie* case that the grievor was terminated for just cause. This is not so. A distinction must be made between an employment related reason and 'just cause'". Furthermore, the following passage from *Penner*, above, at p 438, cited at paragraph 42 of *Leonarduzzi*, above, presents what the Federal Court of Appeal has designated as the correct approach in the circumstances:

> Other adjudicators have adopted quite a different attitude and accepted that they had no jurisdiction to inquire into the adequacy and the merit of the decision to reject, as soon as they could satisfy themselves that indeed the decision was founded on a real cause for rejection, that is to say a *bona fide* dissatisfaction as to suitability. In *Smith* (Board file 166-2-3017), adjudicator Norman is straightforward:
>
> > In effect, once credible evidence is tendered by the Employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes shuddering to a halt. The adjudicator, at that moment, loses any authority to order the grievor reinstated on the footing that just cause for discharge has not been established by the Employer.

[Emphasis added.]

[35] The onus was on the respondent to demonstrate that the termination was in fact based on a cause other than a *bona fide* dissatisfaction as to suitability, in other words, that the employer had acted in bad faith or that the termination was a camouflage or sham. This is admittedly a heavy burden.

[36] In short, if an adjudicator is of the view that the employer had an employment-related reason for terminating the employment during probation and that the termination was not "camouflaged", he or she has no jurisdiction.

[37] In this case, the Court notes that the adjudicator correctly describes the burden on each of the parties at paragraph 113 of her reasons, stating that

> . . . for a termination during probation, the employer must present evidence that the termination was justified by an employment-related reason. The grievor then must demonstrate that the employer's decision was abusive or that, to use the usual terms, the employer's actions were a sham or camouflage or that the employer acted in bad faith. This is a very high standard for grievors to meet.
>
> (Applicant's Record, Vol 1, p 47)

[38] The difficulty lies in the fact that the adjudicator's statement—which is consistent with the principles set out in the case law respecting the termination of an employee during probation—is not further reflected in the decision and remains a theoretical statement. It is difficult to draw any correlation between paragraph 113 of the adjudicator's decision and the rest of her reasons.

[39] For example, some excerpts from the adjudicator's reasons indicate that she erred in her application of the burden of proof:

> a. "Therefore, the grievor submitted evidence that his termination was arbitrary and, consequently, unjustified. Thus, the burden of proof shifted. To support its position that it had an employment-related reason, the employer had to provide a response to the grievor's evidence. The employer did not produce that rebuttal evidence." (Applicant's Record, Vol 1, p 49, para 120 of the decision)
>
> b. "I believe that the grievor's cross-examination did not draw out the admissions needed to warrant the employer's decision to terminate him while on probation." (Applicant's Record, Vol 1, p 49, para 122 of the decision)
>
> c. "Although an 'employment-related reason' might seem like a relatively low threshold, the employer had to persuade me nonetheless that its decision was neither frivolous nor arbitrary and that it had a genuine employment-related reason to warrant termination." (Applicant's Record, Vol 1, p 50, para 124 of the decision)
>
> d. "In this case, I believe that the grievor discharged his burden of proof to demonstrate that the termination of his employment was unjustified. The employer did not convince me to the contrary, on a balance of probabilities." (Applicant's Record, Vol 1, p 52, para 134 of the decision)

[40] These excerpts show that the adjudicator's application of the burden of proof was confused. If the adjudicator believed there was bad faith or a sham on the employer's part, she had to analyse the evidence in the second stage of the burden of proof, and the onus was on the respondent to persuade her, not the applicant. However, the adjudicator seems to have imported elements of the respondent's burden of proof into her analysis of the first stage of the burden, simultaneously increasing the applicant's burden of proof and reducing the respondent's. In fact, the adjudicator's analysis (and the issue) stops at the first stage of the burden (employment-related reason) as though there were nothing more to consider. There is no analysis of the second

stage of the burden (sham, camouflage, bad faith). This error in the application of the burden has repercussions for the interpretation of the facts.

[41] If CSIS has indeed established an employment-related reason through the testimony of Mr. Coulombe, who decided to dismiss the respondent on the basis of repeated unsatisfactory performance evaluations, the onus shifts back to the respondent to prove that CSIS acted in bad faith or used a camouflage or sham in terminating his employment during the probationary period. However, the respondent's evidence was presented in support of the argument that his termination was unjust. That was not the respondent's burden; what he needed to demonstrate was that his termination was a camouflage or a sham, or had been carried out in bad faith (*Owens*, above).

[42] The respondent submits that he did establish camouflage and bad faith in his termination by demonstrating a conflict of personality between himself and his supervisor. The Court notes, however, that the respondent's shortcomings were identified in his initial performance evaluations, even before he was evaluated by his last supervisor, who took up his duties in September 2006. Even those evaluations in which the respondent received a score higher than the average of 2.5 indicate shortcomings and necessary improvements that remained consistent throughout the years (the need to display more rigour, professionalism, judgment and better time management skills).

[43] It is unreasonable to have found that the evidence contradicting the performance evaluations is sufficient for the respondent to discharge his burden. The adjudicator herself acknowledges that this "is a very high standard" (Applicant's Record, Vol 1, p 47).

[44] With respect, this finding is not within the range of possible, acceptable outcomes regarding the evidence and the heavy burden on the respondent, particularly in light of the consistent record of his performance shortcomings since June 2004. Shortcomings in an employee's performance certainly constitute an employment-related reason and are especially relevant to cases of termination during probation. Mere disagreement with the conclusions in the evaluations is not enough to establish bad faith on the part of the employer.

[45] The adjudicator states that the e-mails adduced in evidence do not convince her that the respondent's supervisor had given him the full story during the evaluation period. Instead, the adjudicator should have asked whether the e-mails convinced her that the employer had acted in bad faith or engaged in camouflage or a sham. The same can be said for the respondent's argument regarding the HUM-306 and HUM-306-1 documents and the notice of shortcomings.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed and that the decision be referred back to a different adjudicator to be decided in accordance with the reasons of this Court.

"Richard Boivin"

Judge

Certified true translation
Francie Gow, BCL, LLB

ANNEX

The *Canadian Security Intelligence Service Act*, RSC 1985, c C-23:

PART I	PARTIE I
CANADIAN SECURITY INTELLIGENCE SERVICE	SERVICE CANADIEN DU RENSEIGNEMENT DE SÉCURITÉ
…	[…]
MANAGEMENT OF SERVICE	GESTION
…	[…]
Powers and functions of Director	Attributions du directeur
8. (1) Notwithstanding the *Financial Administration Act* and the *Public Service Employment Act*, the Director has exclusive authority to appoint employees and, in relation to the human resources management of employees, other than persons attached or seconded to the Service as employees,	**8.** (1) Par dérogation à la *Loi sur la gestion des finances publiques* et à la *Loi sur l'emploi dans la fonction publique*, le directeur a le pouvoir exclusif de nommer les employés et, en matière de gestion des ressources humaines du Service, à l'exception des personnes affectées au Service ou détachées auprès de lui à titre d'employé:
(*a*) to provide for the terms and conditions of their employment; and	*a*) de déterminer leurs conditions d'emploi;
(*b*) subject to the regulations,	*b*) sous réserve des règlements:
(i) to exercise the powers and perform the functions of the Treasury Board relating to human resources management under the *Financial Administration Act*, and	(i) d'exercer les attributions conférées au Conseil du Trésor en vertu de la *Loi sur la gestion des finances publiques* en cette matière,
(ii) to exercise the powers and perform the functions assigned to the Public Service Commission by or pursuant to the *Public Service Employment Act*.	(ii) d'exercer les attributions conférées à la Commission de la fonction publique sous le régime de la *Loi sur l'emploi dans la fonction publique*.

Discipline and grievances of employees

(2) Notwithstanding the *Public Service Labour Relations Act* but subject to subsection (3) and the regulations, the Director may establish procedures respecting the conduct and discipline of, and the presentation, consideration and adjudication of grievances in relation to, employees, other than persons attached or seconded to the Service as employees.

Conduite des employés et griefs

(2) Par dérogation à la *Loi sur les relations de travail dans la fonction publique* mais sous réserve du paragraphe (3) et des règlements, le directeur peut établir des règles de procédure concernant la conduite et la discipline des employés, à l'exception des personnes affectées au Service ou détachées auprès de lui à titre d'employé, la présentation par les employés de leurs griefs, l'étude de ces griefs et leur renvoi à l'arbitrage.

Adjudication of employee grievances

(3) When a grievance is referred to adjudication, the adjudication shall not be heard or determined by any person, other than a full-time member of the Public Service Labour Relations Board established under section 12 of the *Public Service Labour Relations Act*.

Arbitrage

(3) Les griefs renvoyés à l'arbitrage ne peuvent être entendus et tranchés que par un membre à temps plein de la Commission des relations de travail dans la fonction publique constituée par l'article 12 de la *Loi sur les relations de travail dans la fonction publique*.

Regulations

(4) The Governor in Council may make regulations

(*a*) governing the exercise of the powers and the performance of the duties and functions of the Director referred to in subsection (1); and

(*b*) in relation to employees to whom subsection (2) applies, governing their conduct and discipline and the presentation, consideration and adjudication of grievances.

Règlements

(4) Le gouverneur en conseil peut prendre des règlements:

a) pour régir l'exercice par le directeur des pouvoirs et fonctions que lui confère le paragraphe (1);

b) sur la conduite et la discipline des employés visés au paragraphe (2), la présentation de griefs par ceux-ci, l'étude de ces griefs et leur renvoi à l'arbitrage.

The *Financial Administration Act*, RSC 1985, c F-11:

ALTERATION OF SCHEDULES	ANNEXES
…	[…]
Addition to Schedule IV or V	Inscriptions aux annexes IV et V
3. (7) The Governor in Council may, by order, add to Schedule IV or V the name of any portion of the federal public administration	**3.** (7) Le gouverneur en conseil peut, par décret, inscrire aux annexes IV ou V le nom de tout secteur de l'administration publique fédérale pour lequel :
(*a*) to which Part I of the *Canada Labour Code* does not apply; and	*a*) la partie I du *Code canadien du travail* ne s'applique pas;
(*b*) in respect of which a minister of the Crown, the Treasury Board or the Governor in Council is authorized to establish or approve terms and conditions of employment.	*b*) les conditions d'emploi peuvent être déterminées ou approuvées par un ministre fédéral, le Conseil du Trésor ou le gouverneur en conseil.
Transfers between Schedules IV and V	Transferts entre les annexes IV et V
(8) The Governor in Council may, by order, delete the name of any portion of the federal public administration named in Schedule IV or V, in which case the Governor in Council must add the name of that portion to the other one of those two schedules, but the Governor in Council need not do so if that portion	(8) Le gouverneur en conseil peut, par décret, radier de l'une des annexes IV ou V le nom de tout secteur de l'administration publique fédérale; il l'inscrit alors à l'autre de ces annexes. Cette obligation ne vaut toutefois plus lorsque le secteur en cause :
(*a*) no longer has any employees; or	*a*) soit ne compte plus de fonctionnaires;
(*b*) is a corporation that has been excluded from the operation of Part I of the *Canada Labour C*ode.	*b*) soit est une personne morale qui a été exemptée de l'application de la partie I du *Code canadien du travail*.
…	[…]
PART I	PARTIE I

ORGANIZATION	ORGANISATION
TREASURY BOARD	CONSEIL DU TRÉSOR
…	[…]
Human Resources Management	*Gestion des ressources humaines*
Definitions	Définitions
11. (1) The following definitions apply in this section and sections 11.1 to 13.	**11.** (1) Les définitions qui suivent s'appliquent au présent article et aux articles 11.1 à 13.
…	
"deputy head" « administrateur général »	« administrateur général » "deputy head"
"deputy head" means	« administrateur général » S'entend :
…	[…]
(*c*) in relation to a separate agency, its chief executive officer or, if there is no chief executive officer, its statutory deputy head or, if there is neither, the person who occupies the position designated under subsection (2) in respect of that separate agency; and	*c*) à l'égard de tout organisme distinct, de son premier dirigeant ou, à défaut, de son administrateur général au titre de la loi ou, à défaut de l'un et l'autre, du titulaire du poste désigné en vertu du paragraphe (2) à l'égard de cet organisme;
…	[…]
"public service" « fonction publique »	« fonction publique » "public service"
"public service" means the several positions in or under	« fonction publique » L'ensemble des postes qui sont compris dans les entités ci-après ou qui en relèvent :
(*a*) the departments named in Schedule I;	*a*) les ministères figurant à l'annexe I;
(*b*) the other portions of the federal public administration named in Schedule IV;	*b*) les autres secteurs de l'administration publique fédérale figurant à l'annexe IV;
(*c*) the separate agencies named in Schedule V; and	*c*) les organismes distincts figurant à l'annexe V;

(*d*) any other portion of the federal public administration that may be designated by the Governor in Council for the purpose of this paragraph.

d) les autres secteurs de l'administration publique fédérale que peut désigner le gouverneur en conseil pour l'application du présent alinéa.

"separate agency"
« organisme distinct »

« organisme distinct »
"separate agency"

"separate agency" means a portion of the federal public administration named in Schedule V.

« organisme distinct » Secteur de l'administration publique fédérale figurant à l'annexe V.

…

[…]

SCHEDULE V
(Sections 3 and 11)

ANNEXE V
(articles 3 et 11)

SEPARATE AGENCIES

ORGANISMES DISTINCTS

…

[…]

Canadian Security Intelligence Service
Service canadien du renseignement de sécurité

Service canadien du renseignement de sécurité
Canadian Security Intelligence Service

…

[…]

The *Public Service Labour Relations Act*, SC 2003, c 22:

INTERPRETATION

DÉFINITIONS ET INTERPRÉTATION

Definitions

Définitions

2. (1) The following definitions apply in this Act.

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

…

[…]

"*employee*"
« fonctionnaire »

« fonctionnaire »
"*employee*"

"*employee*", except in Part 2, means a person employed in the public service,

«fonctionnaire» Sauf à la partie 2, personne employée dans la fonction

other than

…

(*e*) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;

…

publique, à l'exclusion de toute personne:

[…]

e) employée par le Service canadien du renseignement de sécurité et n'exerçant pas des fonctions de commis ou de secrétaire;

[…]

PART 2

GRIEVANCES

PARTIE 2

GRIEFS

…

[…]

INDIVIDUAL GRIEVANCES

GRIEFS INDIVIDUELS

…

[…]

Reference to adjudication

Reference to adjudication

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(*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,

Renvoi à l'arbitrage

Renvoi d'un grief à l'arbitrage

209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire 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) 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

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

(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*) 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.

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 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.

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.

Designation

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

Désignation

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

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1466-11
STYLE OF CAUSE:	Attorney General of Canada v Marc-André Bergeron
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 25, 2013
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APPEARANCES:

Karl Chemsi	FOR THE APPLICANT
Marie-Lise Desrosiers	FOR THE RESPONDENT

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Firm of Maître Desrosiers Brossard, Quebec	FOR THE RESPONDENT