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FROM JACMAIN TO LEEMING: THE PROBLEM OF PROBATIONARY EMPLOYEES IN THE PUBLIC SECTOR*

By ALAN BRUDNER**

I. INTRODUCTION

The probationary employee has always posed special problems for arbitral jurisprudence. On the one hand, arbitrators have recognized that probationary status implies by its very nature a right to job security of a lower order and strength than that enjoyed by permanent employees. The employer, it is conceded, has a legitimate interest in selecting workers who are suitable both in terms of technical competence and qualities of character, and in the public sector this interest gains additional importance from its association with the public interest in a meritocratic civil service.1 Furthermore, the decision as to the suitability of the probationer for the job is understood to be properly one for the employer rather than the arbitrator, so that a great deal more deference is paid to the employer's judgment in releasing a probationer than in dismissing someone who has already proved himself. On the other hand, it is also recognized that, given the importance of the interest in gainful employment, the often prolonged period of probation, and the investment he has made in the job, the probationer has a right to protection against arbitrary and unfair treatment. The conflict between these equally legitimate interests underlies the two main issues in the jurisprudence concerning probationary employees: whether and under what circumstances an arbitration board may review a deci-
sion to terminate a probationary employee; and, assuming jurisdiction in the Board, what is the appropriate standard of arbitral review?

In private sector arbitration, these issues, while giving rise to much difference of opinion, are nonetheless capable of determination in a relatively straightforward manner. This is so because arbitrators in the private sector derive their jurisdiction solely from collective agreements, which either grant (tacitly or expressly) or deny probationers the right to grieve discharges. Accordingly, it has been generally held that, except where the collective agreement expressly says otherwise, probationary employees have the same right of access to grievance procedures as permanent ones. In reviewing the termination of a probationer, however, private sector arbitrators normally apply a less searching standard of scrutiny than they do to discharges of seniority-rated workers, although the precise nature of the appropriate standard is still a matter of debate. The fact that arbitrators in the private sector derive their jurisdiction exclusively from collective agreements has meant that, however contentious and difficult the issues, their resolution can proceed straightforwardly on the basis of principle, unencumbered for the most part by legal casuistry.

It is otherwise in the public sector. There matters are enormously complicated by the interaction between two often conflicting sources of arbitral jurisdiction as well as by the interplay between two apparently conflicting statutes. Arbitrators in the federal and Ontario public sectors derive their jurisdiction to hear grievances not only from collective agreements but also from statute. In Ontario the relevant statute is the Crown Employees Collective Bargaining Act, section 18(2) of which grants an employee the right to final determination of certain types of grievances by a Grievance Settlement Board. Specifically, an employee claiming "that he has been appraised contrary to the governing principles and standards" or that he has been "disciplined or dismissed or suspended from his employment without just cause" may process his grievance in accordance with the procedures set out in the collective agreement and, failing final settlement, refer the matter to the Grievance Settlement Board. It has been consistently held that the term "employee" in section 18(2) includes probationary as well as permanent staff. These provisions must, however, be read together with section 22(5) of the Public Service Act, which provides that "a deputy minister may release from employment any public servant during the first year of his employment..."

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2 In Ontario the matter has become more complicated of late, as arbitrators must now determine whether a denial by the collective agreement of a right to grieve dismissals is a lawful denial of a substantive right or an unlawful denial of a procedural right. See Re Toronto Hydro-Electric System and C.U.P.E., Local 1 (1980), 111 D.L.R. (3d) 693, 29 O.R. (2d) 18, 80 C.L.L.C. para. 14,035 (Ont. H.C.).


4 R.S.O. 1980, c. 108.


6 R.S.O. 1980, c. 418.
for failure to meet the requirements of his position". In the public sector, therefore, whether or not a Board has jurisdiction to review the termination of a probationary employee depends on the answer to two prior questions: where the collective agreement expressly denies probationers access to the grievance machinery, can the Grievance Settlement Board nevertheless claim jurisdiction under the *Crown Employees Collective Bargaining Act*? And, assuming such jurisdiction, to what extent is it qualified by section 22(5) of the *Public Service Act*?

The first of these questions has been answered, at least for the New Brunswick context, by the recent Supreme Court of Canada decision in *Re the Queen in Right of New Brunswick and Leeming.* In that case the Court ruled that the New Brunswick counterpart of the *Crown Employees Collective Bargaining Act* added no substantive rights to those conferred by a collective agreement, so that the denial by the contract of a probationer's right not to be discharged except for just cause was conclusive. The correctness of this decision and its application to the Ontario and federal contexts will be examined in Part V.

The second question (to what extent is the Grievance Settlement Board's jurisdiction under section 18(2) of the *Crown Employees Collective Bargaining Act* modified by section 22(5) of the *Public Service Act*) has been answered by the positing of a distinction between a probationer's "release" for failure to meet the requirements of his job and his "dismissal" for disciplinary reasons. Following the Supreme Court decision in *Jacmain v. Attorney General of Canada,* the Grievance Settlement Board held that a *bona fide* release for cause was immune from arbitral review, whereas a disciplinary dismissal was subject to full appellate review for just cause, that is, for the sufficiency of the grounds for discharge. Furthermore, since the Grievance Settlement Board claimed (on the authority of *Jacmain*) preliminary jurisdiction to determine whether a release was a camouflaged dismissal, and since absence of cause is taken to be an indication of "dismissal", it could in effect review a release according to a lower standard of good faith to ensure that it was properly motivated by concerns of occupational competence rather than by ill-will or prejudice. The result of this approach is that the Board applies a higher or lower standard of review depending on whether the conduct that gave rise to termination was culpable or blameless even though the reason for termination in either case is unsuitability for the job. Thus the probationer whom the employer deems unsuitable because of wilful misconduct stands a better chance of being reinstated than one deemed unsuitable for reasons of personality or compatibility.

It is submitted that this result is both illogical and contrary to sound principle. It seems to have been arrived at because the terms "release" and "dismissal" have been taken to designate mutually distinct and self-subsistent concepts referring to the nature of the conduct, innocent or blameworthy, that

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8 *Supra* note 5.
caused the termination. It shall be the argument of this essay that this approach is incorrect, because it leads to a standard of review of terminations for misconduct that stretches the proper limits of arbitral authority. The standard of review most consistent with the role of the arbitrator, it will be argued, is one which scrutinizes the criteria of evaluation as well as the opportunity afforded the probationer to meet these criteria, but which leaves to the employer’s judgment the decision as to whether the criteria have in fact been satisfied. Further, this standard ought to be applied whether the probationer’s unsuitability for the job manifests itself in innocent incompetence or in blameworthy conduct. The distinction between “release” and “dismissal” should, accordingly, not be taken to refer to employer responses to different types of conduct, but should be used merely as a device to gain review of releases to ensure that they are properly motivated. Only if the release fails to meet the standard of good faith should it be characterized as a dismissal so as to permit the Board to reinstate the probationer under section 18(2)(c). In other words, the definition of “dismissal” should not be termination for misconduct but rather bad faith “release”.

II. THE STANDARD OF ARBITRAL REVIEW

At least three different standards of review have been applied to the termination of probationary employees. The earlier cases seem to have decided that the employer has an absolute discretion to release a probationer, and that, therefore, a board of arbitration has no jurisdiction to inquire into the reasons for such a release. At the other extreme is the view propounded in Re Porcupine Area Ambulance Service and C.U.P.E., Local 1484, and followed in a number of cases during the last decade. According to this view, the employer’s decision to terminate a probationer is reviewable not only for the rationality (that is, relevance to suitability) of the criteria applied in the evaluation of the employee but also for the reasonableness of the evaluation itself. To be sure, it is only a “palpably unreasonable” assessment with which the arbitration board will interfere. Nevertheless, the employer must, according to Re Porcupine, “not only prove the facts upon which he based his action, but in addition that the employee’s conduct demonstrates that it is reasonable to conclude such an employee will likely prove unsuitable as a seniority-rated employee”.

Between these extremes is the position well summarized by Palmer. “Although”, writes Palmer, “there is some reluctance to examine the validity of the employer’s determination of the suitability of a probationary employee . . . all arbitrators appear to accept that such a determination must be reached in a fair way.” The requirement of fairness may be subdivided into  

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10 Square D Co., supra note 1; Re Fittings Ltd. (1956), 6 L.A.C. 300 (Curtis), Re Dryden Paper Co. (1964), 14 L.A.C. 405 (Lane).


12 Supra note 1, at 186.

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three elements. First, the facts upon which the assessment is based must be proved by the employer.\textsuperscript{14} It would be obviously unjust to the probationer to permit his employer to release him on the basis of occurrences which the employer has either fabricated or mistakenly apprehended. Second, the employee must be evaluated in terms of objective criteria that are rationally related to suitability for the job.\textsuperscript{15} Thus, terminations for reasons of race, religion, union activity, malice, or failure to meet standards disproportionate to the true requirements of the position will be struck down. Third, though this element is less well established, the employee must be given a fair opportunity to meet the employer’s standards; that is, he must have notice of the employer’s expectations unless these are obvious from the circumstances, reasonable instruction in his responsibilities, and sufficient time to reveal his capacities.\textsuperscript{16}

In public sector arbitration, the employer will often urge the first standard upon the Board, relying either on a clause in the collective agreement denying probationers the right to grieve a termination or on section 22(5) of the \textit{Public Service Act}, or on both. In the period immediately preceding the Supreme Court decision in \textit{Jacmain}, the Grievance Settlement Board rejected these arguments in favour of a standard of review that, it is submitted, failed properly to respect the difference between probationary and permanent employees. In \textit{Re Eriksen and Ministry of Correctional Services},\textsuperscript{17} for example, the Board seized jurisdiction to review the termination of a probationer on the basis of section 18(2) (then section 17(2) ) of the \textit{Crown Employees Collective Bargaining Act} despite a clause in the collective agreement denying probationers the right to grieve. It went on to hold that the distinction between a release for failure to meet the requirements of the job and a dismissal for cause did not necessarily correspond to a difference between the terminations of two types of employee, probationary and permanent; rather, it corresponded to a difference between two types of conduct, one blameless the other culpable, both of which might be grounds for the termination of a probationer. If the latter were guilty of misconduct, the Board had jurisdiction under section 18(2)(c) to review disciplinary discharges; if he were released for unfitness, the Board had jurisdiction under section 18(2)(b) to determine whether he had been “appraised contrary to the governing standards and principles”. In either case the Board would apply the standard of review established in \textit{Re Porcupine}. In the result, the Grievance Settlement Board decided that conduct meriting a five-week suspension without pay (imposed by the Board) did not warrant release of the probationer for failure to meet the requirements of the job.\textsuperscript{18}


\textsuperscript{16} \textit{Re Toronto Hydro-Electric System} (1981), 30 L.A.C. (2d) 58 (Barton); \textit{Re Pacific Western Airlines Ltd.}, \textit{supra note 15}.

\textsuperscript{17} \textit{Supra note 5}.

\textsuperscript{18} \textit{Re Joyce and Min. of Attorney-General, supra note 5}.
This approach was certainly misguided. A standard of review that scrutinizes not only the criteria of evaluation but also the reasonableness of the employer's assessment involves an exercise of authority that strains both the legitimacy and the competence of the arbitrator. In the case of a disciplinary discharge of a permanent employee, the Board may properly review for adequacy of grounds because it is reviewing the fairness or justice of a penalty. The worker has already demonstrated his capacity for the job, so that the purpose of the discharge is not primarily to rid the employer of an incompetent employee but to deter others from similar conduct. However, in the case of a probationer, any misconduct is simply part of the totality of the employee's work performance that must be considered in assessing his suitability for the job. To review for adequacy of grounds here, therefore, is to review not the fairness of a penalty but rather the soundness of a managerial prediction as to the probable success of an employee at his work. No doubt it is possible to imagine cases where the termination of a probationer is for misconduct so trivial and isolated that it cannot have been imposed for any other than punitive reasons. In such cases a review for unreasonableness is unavoidable, because the judgment that the termination is penal presupposes the conclusion that it is unjustified. But such a review is here also permissible because it is ex hypothesi the review of a penalty and not of a managerial assessment. In all but these extreme cases, however, the misconduct of the probationer will be relevant to the question of his suitability, so that any review for the sufficiency of the grounds for termination will be one not for the fairness of the discharge but for its wisdom. The arbitrator, it is submitted, has neither the competence nor the authority to make such a judgment; it is no part of his function to render employer-like decisions or to impose upon employers workers whom they have in good faith deemed unsuitable for the job.

The Re Porcupine standard fails, therefore, not because it leans too far in favour of the employee (which is a matter of opinion) but because it is inconsistent with the specific function of the rights arbitrator, which is to ensure fairness rather than empirical reasonableness. By this criterion the first standard (no review) also fails, for the obvious reason that it leaves fairness without a sword. The intermediate standard, on the other hand, is the one best suited to the arbitrator's function, for it focuses exclusively on the fairness (that is relevance) of the criteria of assessment as well as of the opportunity afforded the individual to meet them, while leaving to the employer the task of empirical judgment. It therefore also achieves an equitable balance between the employee's interest in objective treatment and the employer's interest in selecting qualified staff.

III. "RELEASE" AND "DISMISSAL"

The Grievance Settlement Board was compelled to revise its approach to public sector probationers by the Supreme Court decision in Jacmain. The facts of the case illustrate the pitfalls of a too literal interpretation of the

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19 This is not to suggest that a court may not require a public employer to meet standards of procedural fairness in releasing an employee for unfitness; see Re Nicholson and Haldimand-Norfolk Regional Bd. of Commissioners of Police, [1979] 1 S.C.R. 311; Re Haladay and the Crown in Right of Ont., supra note 9, at 149.

20 Supra note 5.
distinction between "releases" and "dismissals". Jacmain was a probationary employee in the Office of Official Languages. During his period of probation he was given a five-day suspension for irascible behaviour, but the penalty was revoked when Jacmain's grievance succeeded. A few months later Jacmain's supervisor gave him notice of rejection for cause pursuant to section 28(3) of the Public Service Employment Act, which is the federal counterpart of section 22(5) of the Public Service Act. When his grievance failed, Jacmain referred the matter to adjudication under section 91(1)(b) of the Public Service Staff Relations Act, which permits an employee access to adjudication if the treatment complained of is "disciplinary action resulting in discharge, suspension, or a financial penalty". As it had done at all previous levels of the grievance process, the employer disputed the jurisdiction of the adjudicator on the ground that Jacmain's termination was a "rejection for cause" rather than a disciplinary discharge. The adjudicator held that, while he had no jurisdiction to review a rejection for cause, he did have authority to review the employer's characterization of the termination to ensure that what purported to be a rejection for cause was not in fact a disguised attempt at disciplinary discharge. Finding that the only conduct supporting the termination was that for which Jacmain had earlier been suspended, the adjudicator labelled the termination a discharge, seized jurisdiction under section 91(1)(b), and ruled that the conduct of the grievor did not warrant termination.

On appeal by the employer to the Federal Court of Appeal, the adjudicator's decision was reversed. The Court agreed that the adjudicator had authority to review the characterization of the termination for colourability. But, said the Court, once he had found that the termination was for bona fide reasons, he had no further jurisdiction to weigh the sufficiency of those reasons. "There could only be disciplinary action camouflaged as rejection," said Heald J., "in a case where no valid or bona fide grounds existed for rejection." In other words, the distinction between rejection for cause and disciplinary discharge does not correspond to a difference between two types of conduct, one blameworthy the other innocent, because blameworthy conduct can be a cause for rejection. Rather the distinction is purely reflexive in that sense that, insofar as it applies to probationary employees, disciplinary action means frivolous or bad faith rejection. There are, no doubt, passages in Heald J.'s judgment in which His Lordship holds to the more traditional distinction based on types of behaviour. However, in these passages Heald J. is trying to conform his reasoning to an earlier judgment of the Court in Re Fardella and the Queen, where Jackett, C.J. had insisted on the illusory distinction between insubordination that is cause for rejection and insubordination that is grounds for disciplinary discharge. The clear meaning of the words quoted above is that Heald J., speaking for the Court, has rejected this distinction.

On appeal to the Supreme Court, the decision of the Court of Appeal was upheld. It is a measure of the complexity of the issues involved that, despite a

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six-three majority decision, the members of the Court aligned themselves differ-
ently on most of the major points. All nine judges agreed that an ad-
judicator could review the employer’s characterization of the termination for
colourability, but that once he found a good faith rejection, no further inquiry
was permitted. Five judges (Pigeon, Beetz, Dickson, Laskin and Spence JJ.)
held that the adjudicator could review on the merits in the case of a
disciplinary discharge, while the other four (de Grandpré, Martland, Judson
and Ritchie JJ.) left this question open. Moreover, these four judges referred
approvingly to Heald J.’s interpretation of the distinction between rejection
for cause and disciplinary discharge, and since the lower court’s decision turn-
ed on that distinction, they upheld it. Two judges (Pigeon and Beetz JJ.)
disagreed with Heald J.’s approach, arguing that the adjudicator was not en-
titled to find a disciplinary action solely on the basis of an inability to find a
sufficient cause for rejection. Since, however, they thought that this is what
the adjudicator had done, they sided with de Grandpré, Martland, Judson
and Ritchie JJ. in upholding the decision of the Court of Appeal. Three judges
(Dickson, Laskin and Spence JJ.) dissented. Speaking for the minority,
Dickson J. argued that “rejection for cause and disciplinary discharge are
separate and distinct concepts”,25 referring to different types of reasons for
terminating a probationer, and that the adjudicator had not erred in finding
that Jacmain had been terminated for disciplinary reasons. Thus a five-four
majority (Dickson, Laskin, Spence, Pigeon and Beetz JJ.) disagreed with the
Court of Appeal’s interpretation of the difference between rejection for cause
and disciplinary discharge. That interpretation is no doubt odd from a lexical
standpoint; nevertheless it is, I submit, the correct one.

Let us consider Dickson J.’s objection to the approach taken by the Court
of Appeal. The crucial passage reads as follows:

As I read the judgment of Mr. Justice Heald, his reasoning appears to proceed on
this basis:

1. The appellant’s attitude was wrong.
2. This would justify rejection for cause.
3. There could only be discharge for disciplinary reasons when there was no
   valid cause for rejection.
4. Therefore, the termination of employment was a rejection for cause, and the
   adjudicator was without jurisdiction.

The reasoning, with respect, contains fundamental fallacies. First, it approaches
the matter from the wrong end. Two questions must be distinguished: (i) was the
termination of employment disciplinary discharge or rejection for cause? (ii) was
termination justified? The first is a jurisdictional question; the second goes to the
merits. Mr. Justice Heald answered the second question and used the answer to
resolve the first question. The proper approach is to answer the first question and
then, depending upon the answer, to proceed to the second question. Second, it
does not inexorably follow that, simply because there lurked in the background
some cause which might justify rejection, the termination must, of necessity, be re-
jection and not disciplinary discharge.26

On the surface, Mr. Justice Dickson’s reasoning seems impeccable. Let
us, however, consider the matter more closely. The first question the learned

25 Jacmain, supra note 5, at 20.
26 Id. at 32-33.
Judge would ask (was the termination a discharge or a rejection?) assumes that there is an essential, analytic distinction between these concepts as applied to probationary employees. What could be the ground of this distinction? It must lie either in the nature of the conduct provoking the employer response or in the motives of the employer. Yet it seems clear that any conduct which would justify a disciplinary discharge could also justify (in the case of a probationer) a rejection for cause. So there is nothing in the nature of the employee's conduct that could tell us whether the employer's action was a "rejection" or a "discharge". Must we then inquire into the employer's motives? But (evidentiary problems aside) in any termination of a probationer for misconduct, the employer's motives are bound to be mixed. The termination serves both as an example to others and as a rejection of an employee deemed unqualified for the job. If an employer honestly intends the latter objective, it is difficult to see why the mere fact that he also intends the former should expose his assessment of a probationer to the same standard of review that is applied to the terminations of permanent employees. But what, it may be inquired, of an employee whose work and overall attitude are beyond reproach and who is terminated for some trivial misdemeanor? Is it not clear at least in these extreme cases that the termination was purely disciplinary? Indeed it is. However, it will be observed that we arrive at this conclusion by the very method of reasoning urged by Heald J. and forbidden us by Dickson and Pigeon JJ. That is to say, we conclude that the action is disciplinary from the fact that there is no valid cause for rejection.

At bottom, Dickson J. wants to insist on an independent notion of disciplinary discharge because he fears that, without such a concept, any instance of disciplinary discharge would be construable as a rejection for cause, and the protection afforded probationers by section 91(1) of the Public Service Staff Relations Act would prove illusory. However, this is not the case. As long as the adjudicator has jurisdiction to go behind the employer's characterization of the termination, he has leverage with which to review a release to ensure that it was a good faith rejection for unfitness. If (and only if) he finds that it was not, he may characterize the termination as a disciplinary discharge, take jurisdiction under section 91(1)(b), and review for just cause.

IV. THE REVISION OF ERIKSEN

It will be recalled that, prior to Jacmain, the Grievance Settlement Board claimed jurisdiction to review for just cause whether the termination was a "release" or a "dismissal". In Re Leslie and the Crown in Right of Ontario, the Grievance Settlement Board had to reconsider its approach to probationary employees in light of the unanimous opinion of the Court in Jacmain that an arbitrator had no jurisdiction to review a good faith rejection for cause. The Board held that section 18(2)(c) gave it jurisdiction to review disciplinary dismissals, but that it had no authority to review releases for unsuitability unless the parties conferred such jurisdiction upon it in the collective agreement. In the words of the Chairman, "the bona fide release of a pro-

27 Id. at 20.
28 Supra note 9.
bationary employee in the first year of his employment made in good faith and for failure to meet the requirements of his position cannot be contested before this Board under section 17(2)(c)'s. However, the next question is: how can the Board obtain jurisdiction to review a release for bad faith? The Chairman answered this question as follows:

Until the Supreme Court of Canada has said otherwise, this Board is of the opinion that the employer cannot camouflage either discipline or the termination of an employee for a reason other than the employee's failure to meet the requirements of his position . . . by the guise of a 'release' under s.22(5) of the Public Service Act. This Board, therefore, has jurisdiction to review a contested release to ensure that it is what it purports to be.

In other words, the Board has authority to review a release for colourability; and if it finds that such a release was made in bad faith, that is, for reasons other than the failure of the employee to meet the requirements of his position, it may seize jurisdiction to review it under section 18(2)(c). The Board thus seems to have adopted Heald J.'s approach in holding that a bad faith release will give rise to an inference of a disciplinary discharge. On the other hand, it is clear that the Board has not restricted the notion of disciplinary discharge to mean a bad faith release. That is to say, it continues to view "dismissal" as an independent and self-subsistent concept defined by reference to the type of conduct that provoked the termination. This is made explicit in Re Haladay and the Crown in Right of Ontario, where the Board declared that "the hallmark of dismissal is punishment for voluntary malfeasance". Accordingly, the distinction between "release" and "dismissal" is principally a distinction between morally blameless and morally blameworthy conduct.

What are the consequences of this approach? First, if the conduct allegedly provoking the termination is innocent, an arbitrator can review for bad faith or improper motives only; there is no jurisdiction to review the reasonableness of the decision. If, on the other hand, the conduct is blameworthy, the termination is subject to review for just cause or for the sufficiency of the grounds for discharge. The arbitrator thus applies two different standards of review depending on the nature of the conduct that led to termination. But since conduct that warrants a disciplinary dismissal is also conduct that could warrant a rejection for unfitness, there is no rational basis for this double standard of review. In either case the reason for termination is the same: unfitness for the job. The only situation (as we have seen) in which the double standard is justified is where the termination could not possibly have been for unfitness and is therefore properly construable as punishment pure and simple. But this is to define "dismissal" not by reference to conduct but by reference to the validity of the reasons for "release".

Second, the Board's definition of "dismissal" leads not only to an irrational double standard of review but also to a standard of review in cases of

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29 Id. at 134.
30 Id.
31 Supra note 9.
32 Id. at 156. Cf. Re Robertson and Treasury Bd., unreported, PSSRB file 166-2-454; and Re Bd. of Ed. for the Borough of Scarborough, supra note 14, at 171.
misconduct that usurps the legitimate role of the employer. The Board has now deemed it proper to defer to managerial discretion in cases of good faith rejection for cause. Since misconduct is, except in extreme circumstances, reasonably construed as cause, it should no more interfere with the employer's decision where the conduct of the employee is blameworthy than when it is innocent.

Third, the concept of dismissal adopted by the Board leads to procedural difficulties which it acknowledged in Re Haladay. Given the jurisdictional consequences of a finding of "dismissal", the employer must adduce evidence of unfitness without introducing anything that might give rise to an inference of blameworthiness. For its part the union must show that the employee was terminated for misconduct without allowing the inference that the allegations of blameworthiness are well-founded. The result, as the Board noted, is that arbitrators are left to decide the all-important jurisdictional issue largely within an "evidentiary vacuum".

Instead of looking at the nature of the probationer's conduct, the Board should look first at whether there were bona fide reasons for termination. Only in the absence of such reasons should the Board characterize a termination as a dismissal and take jurisdiction under section 18(2)(c). It may be argued, however, that this is a highly artificial and unduly complicated means of protecting probationers against arbitrary treatment, and there is considerable merit in this reproof. Far more elegant would be a line of attack that relied on section 18(2)(b), which gives the Grievance Settlement Board jurisdiction to review an employee's grievance based on a claim "that he has been appraised contrary to the governing principles and standards". Since this provision speaks only of standards, it is peculiarly well adapted to the situation of probationers, for whom the appropriate standard of review is one which scrutinizes the criteria of assessment rather than the assessment itself. Accordingly, any termination of a probationary employee, whether or not for misconduct, could be reviewed by the Board under section 18(2)(b) to ensure that proper criteria had been applied. "Governing" could then be interpreted to mean standards that are ascertainable, relevant, and uniformly applied. Into the requirement of ascertainability, moreover, could be read the elements of fair opportunity mentioned above. Here there would be no need to distinguish between "release" and "dismissal", no need to base jurisdiction on a prior finding of fact, and no need to have one standard of review for innocent conduct and another for blameworthy conduct. Unfortunately, however, the Grievance Settlement Board has lately placed an exceedingly narrow construction on section 18(2)(b). In Tucker v. The Crown in Right of Ontario, the Board held that "governing principles and standards" meant "formal procedures", and this view has been followed in subsequent cases. The implication is that if there are no formal procedures of evaluation, the employee cannot claim that he was appraised contrary to them. It seems obvious, however,

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33 Supra note 9, at 156.
34 R.S.O. 1980, c. 108.
35 Unreported, GSB file 206/78.
36 See Winnie Leung and Min. of Industry and Tourism, unreported, GSB file 80/78; Pecoskie and the Crown in Right of Ont., unreported, GSB file 95/80; Atkin and the Crown in Right of Ont., unreported, GSB file 322/80.
that the absence of formal procedures makes it all the more imperative that the Board supply standards of fair appraisal by which to control the capriciousness of employers.

V. COLLECTIVE AGREEMENTS AND THE STATUTORY RIGHT TO GRIEV

Thus far it has been argued that the appropriate standard for reviewing releases of probationary employees is one that scrutinizes the relevance and publicity of, as well as the opportunity for satisfying, the criteria of assessment, and that in Ontario public sector arbitration this standard of review can be applied in either of two ways: under section 18(2)(c), through review of releases for colourability, where a finding of unfair assessment can give jurisdiction to reinstate for dismissal without just cause, or (and preferably) under section 18(2)(b) through a direct review of the criteria of assessment. Still to be considered is the effect of a clause in a collective agreement denying probationers the right to grieve a termination.

In the private sector, this issue has lately been the subject of considerable arbitral controversy. The leading case is Re Toronto Hydro-Electric System and C.U.P.E., Local 1,37 in which the Ontario Divisional Court upheld a probationer's right of access to grievance machinery in the face of a collective agreement purporting to deny him that right. The Court held that the collective agreement violated section 37 (now section 44) of the Ontario Labour Relations Act,38 which enjoins the parties to submit all differences during the life of their agreement to arbitration. The parties could, the Court said, agree to deny probationers the substantive right not to be terminated except for just cause; they could not, however, derogate from the procedural right conferred on all employees by statute to vindicate whatever substantive rights the collective agreement gave them. On appeal to the Ontario Court of Appeal, the decision was upheld on the sole ground that it was not patently unreasonable,39 and the Supreme Court refused leave to appeal. This lukewarm ratification of a two-one decision has emboldened some arbitrators to take the view that the issue is still unsettled. Thus, in Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union, Local 414,40 the Board held that a collective agreement denying probationers access to grievance machinery did not violate section 37 of the Ontario Labour Relations Act because the latter conferred no rights on the individual. Rather, said the Board, section 37 merely enjoins the establishment of machinery for the resolution of differences under the agreement, leaving the parties free to bargain over the nature and terms of such procedures.41

In Leeming42 the issue of the relationship between contractual and

37 Supra note 2.
38 R.S.O. 1980, c. 228.
40 (1982), 1 L.A.C. (3d) 78 (Hinnegan).
41 See also Re Children's Aid Society of Metropolitan Toronto (1980), 27 L.A.C. (2d) 324 (McLaren).
42 Supra note 7.
statutory rights of grievance for probationers came before the Supreme Court. The case concerned the interaction between a collective agreement and a provision of the New Brunswick Public Service Labour Relations Act43 modelled on section 91 of the Public Service Staff Relations Act. The agreement provided that “no employee who has completed his probationary period shall be suspended or discharged except for just cause”. It further provided that probationary employees “shall be entitled to all rights and privileges of the Agreement, except with respect to discharge”, and that the employment of such probationers “may be terminated at any time during the probationary period without recourse to the grievance procedure”. Accordingly, the agreement denied probationers the substantive right not to be discharged for disciplinary reasons except for just cause as well as the procedural right to grieve terminations in general. Both the adjudicator and the Court of Appeal held that these provisions were ineffective in depriving the grievor of her rights because section 92(1)(b) of the Public Service Labour Relations Act conferred independent jurisdiction on the adjudicator to hear grievances concerning disciplinary discharges. Finding that the grievor was terminated for disciplinary reasons, the adjudicator took jurisdiction under the Act, applied a just cause standard and reinstated the employee. The Court of Appeal upheld the adjudicator (with variation of the award for compensation), arguing that the collective agreement denied probationers only a procedural right of grievance while remaining silent on their substantive rights to a just cause standard of discharge. The denial of the procedural right could not stand, however, in the face of the statute’s conferral of such a right, while the agreement’s silence on the question of the acceptable grounds for discharge left the Court free to apply the common law standard of just cause.

The Supreme Court reversed. Speaking for a unanimous Court, Martland J. said:

In my opinion, sections 91 and 92 of the Act do not purport to confer substantive rights upon employees in addition to their rights as defined in the collective agreement. . . . In putting the respondent into the same position as that of a permanent employee, the adjudicator ignored the express provisions of . . . the collective agreement, [which] . . . enables the employer to terminate the employment of a probationary employee without recourse to the grievance procedure.44

The decision can be interpreted in two ways. The Court may be saying that the collective agreement exhausts the terms and conditions of the grievor’s employment and that therefore the Act adds no new statutory rights to those agreed to by the parties. This reading is suggested by passages in which Martland J. disapprovingly interprets the lower Court’s position as stating the opposite conclusion, as well as by his apparent acceptance in the passage quoted above of the collective agreement’s denial to probationers of both substantive and procedural rights of grievance. It is unlikely, however, that the Court meant to go this far. To say that the statute adds no rights to the collective agreement is to say either that the statute creates no rights at all or that it creates rights from which the parties may opt out. The first alternative is inconsistent with Jacmain, and since Martland J. makes no reference to that

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44 Supra note 7, at 206-207.
decision (in which he concurred), we may assume he did not mean to overrule it. Furthermore, while the suggestion that statutory grievance procedures confer no individual rights has some plausibility in the context of private sector labour relations, it cannot be seriously maintained with respect to statutes in the public sector. Unlike their private sector counterparts, public service labour relations statutes typically give access to adjudication, in certain circumstances, to the individual employee rather than to the parties to the collective agreement. Thus the New Brunswick statute (like the Public Service Staff Relations Act and the Crown Employees Collective Bargaining Act) explicitly confers on the individual a right to refer disciplinary discharges to adjudication should he be dissatisfied with the results of his grievance at lower levels; and it allows him in these circumstances to carry the action himself. Thus the individual has a right to grieve disciplinary action quite apart from, and in addition to, any rights he may have under the collective agreement as a member of the union.

Did the Court in Leeming mean to say that the statute confers rights from which the parties may opt out? This too is unlikely. In the first place, if the statutory right to grieve a disciplinary action belongs to the individual employee, it is difficult to see how the union could be permitted to bargain it away. Since the statute embodies a public policy of protecting individual rights of grievance against union majorities, it would seem to come under the exception to the rule that allows the parties to contract out of statutory provisions. In any case, such a contracting out appears to be explicitly ruled out by section 63(2)(a), which stipulates that "no collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment... the alteration or elimination of which... would require or have the effect of requiring the enactment or amendment of any legislation by the Legislature..." Secondly, Martland J. himself recognized the primacy of the statute over the collective agreement in saying that the respondent was "bound by the provisions of [the agreement] unless there can be found in the Act some provision which diminished their impact on her". His Lordship was here faithfully following section 65 of the New Brunswick statute (section 58 of the Public Service Staff Relations Act) which provides that a collective agreement is binding upon the employees in the bargaining unit, "subject to... this Act".

A more likely interpretation of the decision in Leeming is that the statute confers on employees only a procedural right to grieve disciplinary action; it confers no substantive rights. The latter arise solely from the collective agreement, so that if the parties deny a probationer the right not to be discharged except for just cause, he has nothing upon which to exercise his undoubted statutory right of access to adjudication. Such a reading is supported (arguably) by the letter of sections 91 and 92; it is formally consistent with

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45 See Re Dominion Stores Ltd., supra note 40.
47 See Dooling and the Treasury Bd., unreported, PSSRB file 166-2-308.
49 See also Public Service Staff Relations Act, R.S.C. 1970, c. P-35, s. 56(2).
50 Supra note 7, at 206.
main, in which the collective agreement did not exclude probationers from the substantive rights of employees; and it is consistent with evolving jurisprudence in the private sector.

If this is indeed the correct reading of Leeming, then it is equally applicable to disputes arising under the Public Service Staff Relations Act, section 91 of which replicates section 92 of the New Brunswick statute. The result is that, Jacmain notwithstanding, a probationer in the federal public service may be denied any review of a disciplinary discharge (including a bad faith release) by an agreement between the union and the employer excluding him from the right not to be discharged except for just cause.

The case, it is submitted, is wrongly decided. First, there is evidence within the four corners of the statute suggesting that section 91 confers substantive rights on employees. Section 1 of the New Brunswick Act (section 2 of the Public Service Staff Relations Act) extends the right to grieve disciplinary action to managerial employees — that is, to persons otherwise excluded from the definition of employee and hence also from collective bargaining rights under the Act. If collective agreements can alone give content to the right to grieve, then these employees are forever doomed to come to arbitration empty-handed, a rather odd result given that the Legislature went out of its way to protect them. Second, the decision is wrong from the standpoint of a purposive analysis of the statute. A procedural right without a substantive one upon which to exercise it is really no more a right than is a substantive right without a remedy. Accordingly, by interpreting section 91 as conferring on the individual a mere procedural right, one which the parties may empty of significance by denying him substantive rights, the Court has in effect permitted the parties to trade away rights reserved by statute to the individual. The best reading of the decision thus leads to the same result as does the worst reading. By allowing the parties to render nugatory the rights guaranteed by section 91, the Court has for all practical purposes made the statute subject to the collective agreement. If, as seems clear, the purpose of section 91 was to safeguard individual rights of grievance against the vicissitudes of bargaining power and majority rule, then the decision in Leeming has subverted that intention. It is thus contrary to the Interpretation Act, which directs courts to give statutes the large and liberal construction needed to fulfill their objectives.

Fortunately, however, the decision in Leeming is probably inapplicable to disputes arising under the Crown Employees Collective Bargaining Act. This is because the language of the latter statute is different in a number of crucial respects from that of the New Brunswick legislation and the Public Service Staff Relations Act. If Leeming is taken to mean that the New Brunswick statute added no rights to those available under the collective agreement, then this can have no relevance to the Crown Employees Collective Bargaining Act, for the latter explicitly gives the employee "in addition to" his rights under a collective agreement a right to grieve disciplinary action or an unfair appraisal. Accordingly, there is here no doubt that the statute confers rights

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52 See Perrin's dissent in Abbott and the Crown in the Right of Ont., unreported, GSB file 481/80.
personalized in the individual, rights which the parties cannot trade away. Moreover, even if *Leeming* is taken to mean that the New Brunswick statute conferred only procedural rights, leaving substantive ones to be determined by the collective agreement, it is still inapplicable to the *Crown Employees Collective Bargaining Act*. For in contrast to both the New Brunswick statute and the *Public Service Staff Relations Act*, section 18(2)(c) of the *Crown Employees Collective Bargaining Act* clearly gives a right of grievance to an individual claiming that "he has been disciplined or dismissed or suspended from his employment without just cause". In other words, the section confers on all employees in the bargaining unit a substantive right not to be disciplined without just cause as well as a procedural right of access to adjudication.

VI. CONCLUSION

Within a span of three years, the Supreme Court has rendered two major decisions regarding the rights of probationers in the public sector. Although these decisions can stand together in a strictly doctrinal sense, they are nonetheless difficult to reconcile from the standpoint of principle. In *Jacmain* a majority of the Court recognized that probationers ought to have the same rights as other employees with regard to disciplinary action, and that, even with regard to releases for unfitness, they were entitled to a review for colourability to ensure that what purported to be a release was not a disguised attempt at discipline. The rationale for this approach is clear: while deference must be paid (particularly in the public sector, where the merit principle requires it) to managerial discretion in matters pertaining to the selection of staff, disciplinary action is properly subject to review for fairness irrespective of whether the employee is probationary or permanent. Although it is true that the Court in *Jacmain* failed to arrive at a definition of disciplinary discharge that adequately distinguishes it from rejection for cause, it nonetheless recognized that the Legislature had, in section 91 of the *Public Service Staff Relations Act*, ensured individual employees protection against arbitrary punishment. In *Leeming*, on the other hand, the Court ruled that the protection against arbitrary treatment afforded probationers by statute could be bargained away by the parties to the collective agreement. It thus not only frustrated the statutory intention of securing rights to employees *qua* individuals; it also declared that what the government could not do as a government through the *Public Service Employment Act*, it could do as an employer through the collective agreement.

On the other hand, the decision in *Leeming* is bound to have a salutary effect in the private sector, where it supports, or can be read as supporting, a progressive trend toward reading into private sector statutes a guarantee to probationers of at least a procedural right of access to grievance machinery. No doubt the parties may undermine this right by denying probationers substantive rights to a just cause dismissal. Still, it is a right they did not previously enjoy, and it is now open to arbitrators to interpret contract language to determine whether substantive or procedural rights have been denied. Conceivably the Court in *Leeming* took its cue from the trend in private sector adjudication culminating in *Toronto Hydro*. If so, it failed to recognize that what was a progressive step in the private sector is a retrograde one in the public.