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File: 566-02-7297

Citation: 2015 PSLREB 58



Public Service Labour Relations Act

Before an adjudicator

BETWEEN

CRAIG DYSON

Grievor

and

**DEPUTY HEAD
(Department of Fisheries and Oceans)**

Respondent

Indexed as

Dyson v. Deputy Head (Department of Fisheries and Oceans)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, adjudicator

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Respondent: Kétia Calix, counsel

Heard at St. John's, Newfoundland,
August 6 and 7, 2014.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Craig Dyson (“the grievor”) was hired by the Department of Fisheries and Oceans Canada (DFO) as a Fishery Officer Trainee (FOT), at the General Technical-02 (GT) group and level, effective May 26, 2008. The grievor was part of the Conservation and Protection Branch and was stationed at Bay Roberts, Newfoundland. On July 5, 2010, the grievor was rejected on probation.

[2] On July 9, 2010, the grievor filed a grievance against his rejection on probation and requested to have the termination of his employment rescinded, that he be granted all remedies deemed just and that he be made whole.

[3] On July 6, 2012, the grievor referred his grievance to the Public Service Labour Relations Board (“the PSLRB”) for adjudication under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the *PSLRA*”).

[4] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (“the Board”) to replace the PSLRB as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *PSLRA* as that *Act* read immediately before that day.

[5] The respondent has objected to the jurisdiction of an adjudicator to hear the grievance on the ground that section 211 of the *PSLRA* does not allow referring a grievance to adjudication about any termination made under the *Public Service Employment Act* (“the *PSEA*”).

[6] At the outset of the hearing the grievor requested, and I granted, an order excluding witnesses.

[7] At the outset of the hearing the grievor challenged the employer’s position that the grievor was on probation at the time his employment was terminated. During the course of the hearing, the grievor conceded his position on this point and agreed that he was still on probation at the time of his termination.

II. Summary of the evidence

[8] The employer called five witnesses, and the grievor testified on his own behalf.

[9] On May 7, 2008, the grievor received an offer of indeterminate employment from the DFO as an FOT in the Fishery Officer Career Progression Program (FOCPP) in the Fisheries and Aquaculture Management Branch, Conservation and Protection, at the Bay Roberts, Newfoundland, detachment, effective May 26, 2008. The offer was subject to a probationary period for the duration of the program or for twelve months, whichever period was longer. The position was at the GT-02 group and level.

[10] Prior to being offered the position, the grievor had been required to successfully complete a 17-week cadet training program, which was a prerequisite of being admitted to the FOCPP and that was held at the Royal Canadian Mounted Police (RCMP) Training Depot in Regina, Saskatchewan.

[11] Kenneth Scott was, at all material times, Chief of Enforcement and Training Standards for the DFO in Newfoundland and Labrador. He testified that he is responsible for the recruitment and training of all new Fishery Officers (“FOs”) in Newfoundland and Labrador.

[12] The grievor’s immediate supervisor was Leo Doyle. Mr. Doyle did not testify before me due to a medical condition that was outlined in a note from his treating physician, which was provided to me during the course of the hearing by counsel for the employer.

[13] Mr. Doyle reported to James Francis who was, during the relevant time, the detachment supervisor for the DFO at Bay Roberts, Newfoundland. Mr. Francis in turn reported to Bennett Rogers who, at all material times, was Area Chief for Conservation and Protection for Eastern and Southern Newfoundland.

[14] Robert Lambert is Director of Conservation and Protection for the Newfoundland and Labrador Region of the DFO. The grievor, as well as Messrs. Scott, Rogers, Francis and Doyle, all reported “indirectly” to him through a chain of command. Mr. Lambert was responsible for the decision to reject the grievor while on probation.

[15] Mr. Scott testified that the FOCPP is a two-stage program, which is roughly 30 months long, of which the entire period is probationary. The entry level of an FO, who is not on probation, is the GT-04 group and level. The FOTs in the FOCPP are hired at the GT-02 group and level and are expected to progress, after about 18 months, to the GT-03 group and level and, after a further 12 months, move up to an FO level (GT-04 group and level), at which point the probationary period ends.

[16] Mr. Francis testified that Mr. Doyle came to him on numerous occasions to discuss the grievor's performance, and on a couple of occasions, he spoke to the grievor directly, once in July 2009, and once in September 2009.

[17] According to Mr. Francis, the grievor's overall performance from the time he reported to Bay Roberts in May 2008 until his termination in July 2010 was poor.

[18] On July 5, 2010, Mr. Lambert issued a letter terminating the grievor's employment (Exhibit E-1, Tab 1), which stated as follows:

...

The letter of offer that you received dated May 7th, 2008, appointing you to the position of Fishery Officer Trainee, specified that, in accordance with section 61 of the Public Service Employment Act, you were subject to a probationary period for the duration of the Program or 12 months, whichever is longer, excluding any periods of leave without pay, full-time language training or leave with pay in excess of thirty consecutive days and any off-duty periods in the case of seasonal employees.

...

The purpose of this letter is to advise you that, in accordance with the authority delegated to me under section 62 (1) of the Public Service Employment Act, I have concluded with regret that your employment with the Department of Fisheries and Oceans will be terminated, effective today, July 5, 2010, at the close of business. . . .

The reason for terminating your employment is due to your unsuitability for the position of Fishery Officer Trainee, more specifically...

- *Concerns related to reliability and attendance;*
- *Failure to meet work requirements*
- *Failure to adhere to established policies, procedures, practices, and codes of conduct.*

...

[19] Mr. Lambert testified that his decision to reject the grievor while on probation was based on recommendations that were made to him; however, he did not elaborate as to the source of the recommendations. He also testified as to the specifics of the unsuitability, which were set out in his letter of July 5, 2010, as he understood them.

A. Concerns related to reliability and attendance

[20] Mr. Lambert stated that the documents that were provided to him clearly described to him situations as they evolved. According to Mr. Lambert, there were clear instructions, given by supervisors, which were not followed by the grievor.

[21] Mr. Lambert testified that FOs and FOTs work in the field (sometimes out on the ocean), and there needs to be a minimum of two officers; when one is missing, it throws the operation off. When an FO or FOT is going to be away from work, their supervisors need to know as this will affect the scheduled stakeouts, patrols and investigations. He stated that there was a concern that the grievor was not contacting and advising his supervisor when he was going to be away from work; nor did he advise as to the reason for his absence. He also stated that the grievor missed shifts without notifying anyone.

[22] Mr. Lambert testified that it was brought to his attention that after one year of employment, the grievor was significantly over his allotted sick leave credits and had been advanced further sick leave credits.

[23] Exhibit E-1, Tab 9, is an email dated May 17, 2010, from Mr. Francis to Mr. Rogers, copied to Mr. Doyle, and was entitled: "Ongoing issues surrounding sick leave and failure to contact supervisor when leave is taken." This email sets out a series of events with respect to the taking of sick leave during the week of May 10 through 17, 2010. According to this email, the grievor was sick and unable to work the week of May 10, 2010 and the weekend of May 15-16, 2010 and called in sick again on Monday, May 17, 2010. The email discloses that the grievor contacted the detachment office many times throughout that time frame to advise that he was not feeling well and would not be in to work. In all but one case, the grievor did not call his supervisor or the detachment supervisor, instead speaking with an FO, the detachment clerk or leaving messages with the detachment clerk's message manager.

B. Failure to meet work requirements

[24] Mr. Scott stated that all FOTs must pass medical and physical tests, psychological testing to carry a firearm, possess a valid driver's licence and receive the appropriate security clearance.

[25] Mr. Scott testified that as part of the FOCPP, the FOTs' work is assessed by a three-person review committee chaired by him. The review process involves both a written test and an assessment of the FOTs' work as against the FO competencies. Mr. Scott stated that to review the competencies, FOTs are provided with examples of the FO competencies and are asked to provide to the review committee a written submission containing examples of their actual work in the field that demonstrates how they have achieved the competencies against which they are being assessed.

[26] Mr. Scott testified that the review takes place 18 months into the FOCPP. To be successful and move forward and become a GT-03, FOTs must meet the competencies as assessed by the review committee. According to Mr. Scott, he does a preliminary review of each FOT's submission on the competencies to see if there are any areas of the submission that can be improved; if so, he provides suggestions to the FOTs such that they can provide their best examples via their submission to the review committee.

[27] Mr. Lambert stated that Mr. Scott had been doing training for 20 years and has overseen the training process. He is very conscious of the process, and if there is something a recruit is not getting, it is important to ensure that the FOTs get all the training they need. According to Mr. Lambert, the grievor's supervisors sat down with the grievor. He was further aware that in the spring of 2009 a meeting took place where issues were discussed. Mr. Lambert also stated that he was aware that the grievor's progress was revisited two-three months after the spring 2009 meeting.

[28] The grievor provided the review committee his initial submission by forwarding it to Mr. Scott on January 22, 2010. A copy of this submission was marked as Exhibit E-2. Mr. Scott stated that he sent the grievor's submission back to the grievor on February 15, 2010, with the following suggestions for him to modify prior to the formal assessment:

...

You must re-submit responses for the following competencies:

- Analytical Thinking
- Information Seeking
- Adaptability
- Self Confidence
- Initiative
- Results Orientation
- Teamwork and Cooperation

Your responses must meet the definitions as provided and you must fully elaborate in your responses and provide the necessary details. The responses you provided are very brief, lack the necessary detail and do not meet the assessment criteria. Also, you were instructed that these examples were validate by your field supervisor and detachment supervisor.

“Please remember that your written submission must also be validated by your Field Trainer/Field Supervisor and corroborated by your Detachment Supervisor prior to submission”.

Please provide your amended competencies to me no later than 0800 hrs. Monday Feb 22, 2008.

...

[Sic throughout]

[Emphasis in the original]

[29] The grievor amended and resubmitted his submission as against competencies. The submission and the committee’s assessment are marked as Exhibit E-3. Mr. Scott forwarded the committee’s assessment to the grievor by way of an email dated March 5, 2010, which stated in part as follows:

...

...The amended competencies were reviewed again on Feb 22, 2010 and during this second review the committee concluded that 6 of these competencies still did not meet the assessment criteria. These competencies are follows:

- Adaptability
- Self Confidence
- Dependability
- Initiative
- Results orientation
- Teamwork & Cooperation

A review of your GT-03 logbook was also completed and many of the elements do not have any entries for the field training period. Given the results of the assessment process your field training program has been extended for three months effective March 1, 2010 up to May 31 2010. During this extension it is imperative that you focus on the areas that have been identified and work closely with your field supervisor to ensure you receive training in these areas. . . .

. . .

[Sic throughout]

[30] There are three general sections that FOTs are assessed on: “Knowledge,” “Abilities and Skills,” and “Personal Suitability.” The grievor passed both the Knowledge and Abilities and Skills parts of the competencies; however, he did not pass the Personal Suitability part. Mr. Scott extended the grievor’s time for this portion of the training for a further three months, to May 31, 2010, after which he would again be evaluated.

[31] There are seven competencies under Personal Suitability: “Adaptability,” “Self Confidence,” “Self-control,” “Dependability,” “Initiative,” “Result Orientation” and “Team-work and cooperation.”

[32] On May 30, 2010, at the end of the three-month extension, the grievor provided Mr. Scott with his submission as against competencies. Exhibit E-4 is a copy of the grievor’s submission against the competencies dated May 30, 2010, as well as the assessment of the review committee dated June 3, 2010. Again, the grievor passed both the Knowledge and Abilities and Skills part; however, he again failed on Personal Suitability.

[33] Of the seven competencies under Personal Suitability, the grievor failed both the Dependability and Result Orientation competencies.

[34] Under Dependability, the assessment form states as follows:

Is punctual. Conducts oneself in accordance with the Code of conduct for Fishery Officers. Can be relied upon to perform assigned duties with a minimum supervision. Consistently completes tasks in an appropriate and timely manner, according to what has been asked.

[35] Under Result Orientation, the assessment form states as follows:

Improves Performance: Sets own objectives or makes specific changes in own/team work methods to improve performance (e.g., does something better, more efficiently; improves quality).

[36] There is nothing set out in the assessment of the competencies, at Exhibit E-4, that states how the grievor failed the two competencies. Both Mr. Scott and Mr. Rogers gave evidence before me. Mr. Scott was asked in chief specifically about how the grievor did not meet the competencies. Mr. Scott testified that the competency-based submission is to create a level playing field; the FOTs are to draw from their experience. He stated that he was a member of a three-panel board, which involved at least one active FO and someone from human resources, and they try to have at least one female member of the board. He then stated that they review the examples provided by the FOTs to determine if the FOT meets or doesn't meet the definition as set out in the competency.

[37] Mr. Rogers was also asked in chief about the review committee process. He was also asked about the grievor's competencies in regard to the process. His answer was that there are three board members who individually review the submission and then they meet and discuss the submission and then evaluate and reach a consensus.

[38] Jennifer Kendall works in human resources (HR) and at the time was an acting HR advisor. She was the third member on both review committees that assessed the grievor. There was no evidence put forward to suggest that Ms. Kendall is a trained FO.

[39] Ms. Kendall was also asked in chief about the review committee process. She was also asked about the grievor's competencies in regard to the process. Her answer was that there are three board members who individually review the submission and then they meet and discuss the submission and then evaluate and reach a consensus.

[40] None of Messrs. Scott or Rogers or Ms. Kendall in their evidence before me explained how it was that the grievor did not meet the two competencies as set out in Exhibit E-4.

C. Failure to adhere to established policies, procedures, practices and codes of conduct

[41] When testifying as to what he relied upon with regard to this reason to support his finding that the grievor failed to adhere to established policies, procedures, practices and codes of conduct, Mr. Lambert relied on two occurrences, which he stated caused him to reach this conclusion:

1. He breached the RCMP policy against consuming alcohol on-base while he was at the RCMP Training Depot in Regina.
2. He failed to follow the firearms policy when a magazine for a weapon went missing.

[42] With respect to the matter at the RCMP Training Depot in Regina, Mr. Lambert stated that there was a policy against consuming alcohol while at the training facility. The grievor was aware of this rule and broke it. The grievor was issued a letter of reprimand for this action dated March 10, 2008 (Exhibit E-1, Tab 11). The grievor was advised in the letter of reprimand that further misconduct during that training program would result in termination from that program.

[43] The program at the RCMP Training Depot predated the grievor's offer of employment as an FOT, which was made to him on May 7, 2008; therefore, it predated his probationary period.

[44] When Mr. Lambert was cross-examined, he was not sure when the grievor's period of probation started. He appeared to believe it started when he was at the RCMP Training Depot. It was only upon re-examination, after being shown the grievor's letter of offer of employment dated May 7, 2008, did Mr. Lambert state that the grievor's probationary period started on May 26, 2008, which was the start date of his employment with DFO.

[45] During the cross-examination of Mr. Scott, the March 10, 2008 letter of reprimand (Exhibit E-1, Tab 11) was put to him, and he was asked if this letter formed part of the assessment of the grievor. At this juncture, Mr. Scott was excused from the witness box and a discussion was held with respect to the relevance of this document and the material contained therein with respect to the issues involved in this hearing.

At the end of the discussion, the employer advised me that they were not relying on Exhibit E-1, Tab 11 (the March 10, 2008 letter of reprimand).

[46] The second incident involved the loss of a magazine for the grievor's duty weapon. A magazine holds the bullets for the weapon. Mr. Lambert testified that the firearms policy sets out a clear procedure, which procedure was not followed by the grievor. The policy requires that in the event of loss, the firearms officer, the local police and the supervisor are to be notified.

[47] The firearms policy was not produced at the hearing, although an excerpt from it was cut and pasted into an email sent by Mr. Scott to the grievor amidst a series of emails sent with respect to the lost magazine issue (Exhibit E-1, Tab 4). Mr. Scott stated that the policy is available on the employer's website and is roughly 80-90 pages long.

[48] The excerpt, as found at Exhibit E-1, Tab 4, states as follows:

58.1 Where a magazine for an approved, DFO issue, Smith and Wesson, model 5946, semi-automatic pistol, is lost or stolen, the Fishery Officer to whom the magazine was issued shall immediately report, both verbally and in writing the circumstances regarding the loss or theft to

- (a) the police of local jurisdiction;*
- (b) that Fishery Officer's supervisor; and*
- (c) the Regional Firearms Officer.⁵¹*

[49] Mr. Scott testified that while he oversees the firearms training for FOTs in the region, he is not on the range at all times that training is taking place, as there are firearms officers who are there and are responsible for the training. The firearms range is in the vicinity of St. John's.

[50] Mr. Francis testified that it is a danger to the public if a firearm or ammunition is lost.

[51] When asked about the impact of losing a magazine, Mr. Lambert testified that the magazine holds the ammunition, and that last year (2013), one was lost, and there was a major search.

[52] The grievor testified that during the course of one of the days of his firearms requalification training, he lost an empty magazine. Much of the evidence on this incident is straightforward and is set out in the emails found at Exhibit E-1, Tab 4, and from the grievor himself.

[53] Exhibit E-1, Tab 4, is a series of email exchanges related to the loss of the magazine. The exhibit does not appear to be the complete email exchanges. They appear to be portions of exchanges obtained under the *Access to Information Act* (“the *AIA*”). It was not explained to me why these documents, which were produced and introduced into evidence by the employer, would have had to be obtained through the *AIA*, as the documents are the property of the employer.

[54] The grievor had been issued three magazines for his duty weapon. On January 27-28, 2010, the grievor and others were involved in firearm requalification training at a range located in or about the vicinity of St. John’s. On Wednesday January 27, 2010 at the end of the training day, he left the range and travelled back to Bay Roberts. He testified that he believed he had left the range with all of his magazines: two in his duty pouch, and one in his weapon. He stated that he did not realize that the one that was supposed to be in his weapon was not there until about 7:00 p.m., when he had returned to Bay Roberts.

[55] According to the grievor, none of his magazines were loaded. The evidence before me was that no ammunition was missing.

[56] The grievor stated that he knew he had to report the loss but was not sure as to whom to inform. On the following day, Thursday, January 28, 2010, he notified the firearms officer who had been responsible for training the previous day, Wilfred Porter, of the missing magazine. He states that he asked of Mr. Porter if any spare magazines were found and was told, “No.” He testified that he also asked Mr. Porter if he had to notify anyone else about the missing magazine and that Mr. Porter told him, “No.” Mr. Porter gave him a spare magazine and instructed him to advise Mr. Scott if the missing magazine turned up.

[57] On Tuesday February 2, 2010, Mr. Porter emailed Trent Barrett. Mr. Barrett’s position in the organization was not identified to me. Mr. Porter’s email to Mr. Barrett was sent at 10:36 a.m. on February 2, 2010 and is as follows:

...

I have been thinking about Craig’s lost Mag.. I don’t think We handled this correctly. According to the Firearms policy, any lost or stolen mag is to be reported to : Local police, Fishery Officer’s supervisor and to RFO(Ken). What concerns me most is; I think the mag was filled with amo. I asked Craig about

this and he said that it wasn't.. He dosen't know where he lost the Mag. It wasn't sited at the range.

...

I gave Craig another Mag that was turned in to me by an Officer who said that he had gone home last year from the range with an additionl Mag..... Mag was turned in with practice amo still in the Mag.

I advise Craig to keep looking for the Mag and to report if he found it or not. Waiting to hear from him. I think Ken should be made aware of this.

[Sic throughout]

[58] Between 10:36 a.m. and 1:05 p.m. on February 2, 2010, Mr. Porter and Mr. Barrett exchanged a couple of very short emails with respect to the number of magazines the grievor attended with at the range. At 1:28 p.m. that same day, they started to copy Mr. Scott on their email chain.

[59] The grievor testified that after the weekend ended, he received an email from Mr. Porter, stating that he had to report the loss of the magazine to his supervisor. The grievor reported the loss of the magazine to Mr. Doyle via email on February 2, 2010 as well as to the local police.

[60] Neither Mr. Porter nor Mr. Barrett testified before me.

[61] Mr. Scott did not testify about his involvement in the email exchange with respect to the missing magazine.

[62] The grievor was asked in cross-examination if he was aware of the firearms policy. His answer was, "I am now." When it was suggested to him again in cross-examination that he should have known that the policy required him to report the missing magazine, the grievor responded by stating that "[he] knew [he] had to report it and [he] used [his] best judgement and reported it to the range officer." It was then put to the grievor that the range officer told him to report the lost magazine, to which the grievor replied, "No, not at the time." When he was re-examined on the discussion he had with the range officer (Mr. Porter) when he reported the loss of the magazine, the grievor was asked if Mr. Porter instructed him to report the missing magazine to anyone on that day. The grievor's answer was, "No."

[63] The firearms policy was not introduced into evidence.

[64] I heard no evidence of:

1. what, if any, training the grievor received with respect to the firearms policy;
2. whether the grievor was provided a copy of the firearms policy;
3. what, if any, information or training the grievor was given with respect to accessing the firearms policy on the DFO intranet site; and
4. whether the firearms policy was actually available on the DFO intranet site at the time the loss of the magazine incident occurred.

[65] When Mr. Lambert testified about his reasoning behind his decision to reject the grievor on probation, he was brought to the third bullet in his letter, referencing the failure to adhere to established policies. In his explanation of that reason, he referred to the fact that the grievor did not follow the firearms policy; nor did he follow the RCMP policy with respect to the ban on consumption of alcohol while at the RCMP training facility in Regina. Mr. Lambert then added that the grievor did not follow the clear rules that if he was sick, he was to contact his supervisor and provide a doctor's note. According to Mr. Lambert, there were numerous examples of assistance being given to the grievor, which he either could not understand or would not understand.

[66] Mr. Lambert was cross-examined on the probationary period as to how long it was, when it commenced and when it ended. Mr. Lambert stated that the probationary period was 30 months and that he was not sure when the grievor's probationary period started. He understood that the grievor's probationary period was extended and that he believed it was for 33 months.

D. Attendance due to medical issues

[67] The grievor testified that during the course of his probation, he sought counselling due to some personal issues. He stated that his immediate supervisor, Mr. Doyle, was aware of the counselling sessions, and on one occasion, Mr. Doyle asked him how the counselling was going. The grievor stated that he told Mr. Doyle that the counsellor said to him that: "[he] seemed a little depressed." He stated that shortly after saying this to Mr. Doyle, he was called into Mr. Francis's office, he was taken off field work, his sidearm was taken from him and he was required to undergo a fitness-to-work evaluation (FTWE).

[68] Mr. Francis testified he heard that the grievor mentioned to Mr. Doyle that “he may be experiencing depression.” He stated that he called the grievor and Mr. Doyle into his office and advised them that due to the use of the word “depression,” the grievor had to surrender his firearm. He stated that he would have been remiss if someone under his supervision was suffering from depression and he let them keep a firearm. He stated that he was never aware that the grievor was actually suffering from depression and that he removed the firearm because of the use of the word “depression” by Mr. Doyle.

[69] The grievor stated that he was out of the field for three months. He testified that he felt that this loss of three months in the field would affect his performance.

[70] There was no evidence that the grievor was actually suffering from or diagnosed as being depressed.

[71] An FTWE was carried out on the grievor, and an FTWE report was signed by the Health Canada physician dated November 25, 2008 that stated the grievor was fit to return to full duties with no work limitations (Exhibit E-1, Tab 8).

[72] The grievor testified about the medical conditions that affected his attendance at work. He stated that he was sick a lot and at the time he didn’t know what was causing it.

[73] The grievor testified that due to the amount of time he was sick, Mr. Francis asked him to provide medical certificates. The grievor stated in his evidence that when requested to provide a medical certificate, he did (Exhibit E-1, Tab 3).

[74] Exhibit E-1, Tab 3 is a series of emails between a number of people including the grievor, Mr. Doyle, Mr. Francis and Mr. Rogers, with respect to the sick leave issue. As part of the email chain, there is an email dated May 4, 2009 from Mr. Rogers attaching a cut and paste of article 39 of the collective agreement, which addresses sick leave. As part of this email Mr. Rogers states that medical certificates are no longer required from the grievor, however the grievor has to have sick leave credits and has to satisfy Mr. Francis that he was sick. The final email in the chain at 12:19 p.m. on May 4, 2009, from Mr. Francis to Mr. Rogers states as follows:

...

There is a problem with Craig's sick leave. I talked to him a few ago [sic] and had agreed to carry a deficit for him hoping he would make it up. At that time the deficit was 6-7 days. I was asking for a doctor's note as a control mechanism hoping to keep the deficit under control. He currently has a deficit of 10.75 hours. I assume that is for the entire 2009-2010 fiscal year. What do you do!!!!!!

[75] Clauses 39.02, 39.03 and 39.04 of the collective agreement state as follows:

39.02 *An employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:*

(a) *he or she satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer,*

and

(b) *he or she has the necessary sick leave credits.*

39.03 *Unless otherwise informed by the Employer, a statement signed by the employee stating that because of illness or injury he or she was unable to perform his or her duties, shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 39.02(a).*

39.04 *When an employee has insufficient or no credits to cover the granting of sick leave with pay under the provisions of clause 39.02, sick leave with pay may, at the discretion of the Employer, be granted to an employee for a period of up to one hundred and eighty-seven decimal five (187.5) hours, subject to the deduction of such advanced leave from any sick leave credits subsequently earned.*

[76] Mr. Francis stated that during the first 15 months of training, the grievor had used 25-26 days of sick leave and was in a deficit position of negative 11 days. He confirmed that he required the grievor to provide medical certificates from a doctor (Exhibit E-1, Tab 3).

[77] The grievor testified that his family doctor eventually diagnosed him with irritable bowel syndrome, and this was outlined in a medical certificate that was provided to the employer. He further testified that he was referred by his family doctor to a specialist; however, that appointment with the specialist was not until after he was rejected on probation. The grievor testified that upon seeing the specialist, albeit after

his rejection on probation, he was diagnosed with a hiatal hernia, which was the cause of his recurring stomach ailments that was causing him to miss work.

[78] In cross-examination, the grievor was asked if he always complied with his supervisor's request for a medical certificate, to which he answered, "Yes." The grievor was shown a medical note (Exhibit E-5) dated January 6, 2009, and asked if he recognized the note, to which he answered, "Yes." He was then asked if he had copies of the notes he had provided to the employer, to which he replied "Yes." He was asked if he brought them with him to the hearing, to which he responded "No."

[79] No employer witness was asked about dates that the grievor was away and was required to, but did not, provide a note.

[80] No witness testified that the grievor did not comply with any request to provide a medical certificate or doctor's note when requested.

[81] No policy, rule or guideline was presented into evidence that required FOTs to call a specific person if they were unable to attend work due to illness.

[82] Mr. Francis testified that the grievor was supposed to contact Mr. Doyle or in his absence him and advise if he was not going to be in at work. He stated that the grievor on some occasions did not call Mr. Doyle or him when he was going to be off sick.

[83] Exhibit E-1, Tab 9, is an email dated May 17, 2010, from Mr. Francis to Mr. Rogers, copied to Mr. Doyle, which is entitled, "Ongoing issues surrounding sick leave and failure to contact supervisor when leave is taken." The email is a series of 11 bullet points by Mr. Francis on this issue addressing the grievor's absence from work, due to illness, from Monday, May 10, 2010, to Monday, May 17, 2010. While Mr. Francis is the author of the email, he does not appear to have been involved in any of the discussions that took place. The persons identified in the email who were involved in the discussions are the grievor, Mr. Doyle, FO Harrison Sharpe, and the detachment clerk, Samantha Newhook.

[84] As stated earlier, Mr. Doyle did not testify before me. FO Sharpe did not testify before me; nor did Ms. Newhook testify before me.

[85] There were a number of documents referred to in Exhibit E-1, Tab 6, about a harassment complaint. Mr. Lambert did not refer to any of these documents in his

evidence with respect to the reasoning behind the termination of employment; nor did the grievor talk about these documents or this issue.

III. Summary of the arguments

A. For the respondent

[86] The employer argued that the grievor was rejected on probation in good faith and for legitimate employment-related reasons. The grievor was not a suitable employee.

[87] The employer states that the evidence does not support that the termination of the grievor's employment was a sham, a camouflage, contrived, in bad faith or disguised discipline, and as such, an adjudicator under the *PSLRA* does not have jurisdiction.

[88] Mr. Lambert testified that he decided to reject the grievor while he was on probation for the following reasons:

1. Concerns over reliability and attendance;
2. Failure to meet work requirements;
3. Failure to adhere to established policies, procedure, practices and codes of conduct.

[89] The employer stated that it wasn't that the grievor was using sick leave that was problematic but that he was not following the established protocol to call in when he was not able to attend at work. He failed to contact his immediate supervisor or the detachment supervisor as he had been instructed. This is reflected in the email from Mr. Francis to Mr. Rogers dated May 17, 2010 and found at Exhibit E-1, Tab 9.

[90] The employer stated that both Messrs. Rogers and Francis spoke to the issue of the grievor's failure to meet work requirements. The grievor had problems with his work on violations files. He did not meet the written competencies at his 18-month review and was given a three-month extension in which to improve. After 21 months, despite being given the extension and coaching and instructions, the grievor had failed to improve. It was the evidence of all three members of the review committee, Messrs. Scott and Rogers and Ms. Kendall, that the grievor did not meet the competencies of a GT-03 such that he could advance in the FOCPP.

[91] The employer argued that the grievor's failure to follow the firearms policy when he lost a magazine for his sidearm, which formed part of his defensive gear, showed that the grievor failed to adhere to established policies.

[92] An adjudicator addressed the issue of objections to jurisdiction in matters ostensibly under the PSEA in *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134. Paragraph 112 stated as follows:

[112] As I have concluded earlier in this decision, the provisions of the new PSEA have changed the burden of proof for cases involving the termination of employment of probationary employees. The deputy head no longer has the burden of proving a legitimate employment-related reason for the termination of employment, apart from providing the letter of termination which sets out the reason for its decision. The burden is on the grievor to show the deputy head's contrived reliance on the new PSEA or that the rejection on probation was a sham or a camouflage. A termination of employment not based on a bona fide dissatisfaction as to suitability (or for no legitimate "employment-related reason") would be a contrived reliance on the PSEA, a sham or a camouflage.

[93] Paragraph 127 of *Tello* states as follows:

*[127] As the grievor was unable to establish that the decision to reject him on probation was arbitrary, he bears the burden of demonstrating that the termination of employment is a "sham" or a "camouflage." As noted by the Federal Court of Appeal in another context (Dansereau v. Canada (1990), [1991] 1 F.C. 444 (CA), at page 462) bad faith cannot be presumed and an employee seeking to provide evidence of bad faith "... has an especially difficult task to perform. . . ." In *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119), an adjudicator noted, at page 14, that, in his view:*

...

...if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without regard to the facts, and therefore not in good faith, then that decision is a nullity. . . .

...It is trite to say that a determination of whether there is good faith or not must be gleaned from all the surrounding circumstances; there can be a multitude of sets of facts that may

result in a conclusion of bad faith . . . keeping in mind of course that good faith should always be presumed. . . .

. . .

[94] *Rahman v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2013 PSLRB 6, upheld by *Rahman v. Canada (Attorney General)*, 2013 FC 1007, provides that a termination of an employee who is on probation may only be reviewed by an adjudicator where the termination was contrived or a sham or camouflage to terminate for some reason other than performance. This same concept is set out at paragraph 135 of *Michaux v. Deputy Head (Department of Human Resources and Skills Development)*, 2012 PSLRB 38.

[95] The employer also referred me to *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.); *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529; *Archambault v. Canada (Canada Customs and Revenue Agency)*, 2005 FC 183; *Chaudhry v. Canada (Attorney General)*, 2007 FC 389; *Maqsood v. Treasury Board (Department of Industry)*, 2009 PSLRB 175; *Maqsood v. Canada (Attorney General)*, 2011 FCA 309; *Ducharme v. Deputy Head (Department of Human Resources and Skills Development)*, 2010 PSLRB 136; *Kagimbi v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 19; *Kagimbi v. Canada (Attorney General)*, 2014 FCA 400; *Hamza v. Deputy Head (Department of National Defence)*, 2010 PSLRB 119; and *Currie v. Deputy Head (Department of Fisheries and Oceans)*, 2010 PSLRB 10.

[96] In case there are issues of credibility, I must look to the reasoning set out at paragraphs 10 through 12 in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA), which is recognized by the PSLRB in *Souaker v. Canadian Nuclear Safety Commission*, 2009 PSLRB 145, at para 137.

[97] The employer states that there are no facts that would establish that this is anything but a legitimate rejection on probation, and there is no sham, camouflage, disguised discipline or bad faith.

B. For the grievor

[98] It is the position of the grievor that the employer was acting in bad faith. The employer's true motive in terminating the grievor was the grievor's medical condition.

[99] The employer sent the grievor for an FTWE when it heard the word “depression.”

[100] The employer produced one medical certificate, dated January 6, 2009 (Exhibit E-5). The employer submitted that it had only one on file, yet the grievor testified that he provided other medical certificates. Exhibit E-1, Tab 3, is a series of emails between a number of people, including the grievor, Mr. Doyle, Mr. Francis and Mr. Rogers, with respect to the sick leave issue. As part of the email chain, there is an email dated May 4, 2009 from Mr. Rogers attaching a cut and paste of article 39 of the collective agreement, which addresses sick leave. As part of this email, Mr. Rogers states that medical certificates are no longer required from the grievor; however, the grievor has to have sick leave credits and has to satisfy Mr. Francis that he was sick.

[101] The grievor complied with the employer’s instructions when he was required to provide medical certificates. The real issue is the fact that the grievor was sick. A legitimate use of sick leave credits is not a legitimate reason to reject someone on probation.

[102] The respondent stated that the grievor failed to report to his supervisor when he was sick. The grievor did report to his employer when he was sick and followed the procedures as set out in the collective agreement. The employer did not tender any other policies, procedures or rules that would suggest that he was to do more than what was in the collective agreement. The real issue here is reliability due to the use of sick leave.

[103] Article 39 of the collective agreement provides that when an employee no longer has any sick leave credits, the employer may, at its discretion, advance an employee credits. This is what happened with the grievor, and this is the real issue. Exhibit E-1, Tab 3, includes an email dated September 14, 2009 from Mr. Francis to Mr. Doyle, in which he outlines a discussion about the grievor’s performance and his sick leave balances. With respect to the sick leave balances, Mr. Francis stated as follows:

...

I advised Craig that his sick leave balance was now -11 days and that I was not prepared to carry a negative balance any longer. I reminded him that contractually there was a discretionary provision for the employer to approved sick leave balances up to a maximum of -25 days but felt that

Craig, as a relatively new employee, had used an excessive amount of sick leave already and that any further sick leave would be considered leave without pay. Furthermore, Craig was advised that all future sick leave would require a doctor's note.

Craig had visited a doctor earlier this afternoon and returned with a form, signed by his doctor, requesting certain lab test to be conducted on him in hopes of determining what may be causing Craig to require so much sick leave.

...

[104] With regard to the alleged failure to report to his supervisors, the grievor followed the procedures as per the collective agreement. The employer did not tender any evidence that the grievor was required to go beyond what was in the collective agreement.

[105] With respect to the loss of one of the magazines for the grievor's firearm, the grievor reported the loss of his magazine. At Exhibit E-1, Tab 4, there is an email from Mr. Porter, who was the grievor's firearms instructor. He admits that he and a fellow officer provided the grievor the wrong instructions.

[106] The employer has used both the alleged breach of the firearms policy and the incident at the RCMP Training Depot; however, if there is no question as to the start date of the probationary period, then the employer's reliance on the incident at the RCMP Training Depot and the letter of reprimand (Exhibit E-1, Tab 11) is evidence of bad faith on behalf of the employer. The incident at the RCMP Training Depot predated the offer of employment to the grievor and as such predated the probationary period.

[107] *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109, at paragraph 79, states as follows:

[79] To determine whether the employer's actions were made in good faith, I must examine the meaning of good faith. In the Treasury Board's "Guidelines for Non-Disciplinary Demotions or Termination of Employment for Cause", good faith is defined as: "Means a manner of conduct based upon honesty of intentions and fairness of treatment." The test or procedure/principles adopted by the Treasury Board with respect to the principles of fairness are:

- the duty to act in good faith;
- the duty to fully inform the employee of what is

required from him or her;

- the duty to inform the employee that he or she is not meeting the requirements of the position, and to inform him or her of the nature of the deficiency and what the consequences will be if he or she continues to fail to meet the requirements of the position;
- the duty to provide the employee with the opportunity to make the necessary adjustments to meet requirements;
- the duty to assist the employee in making these adjustments; and
- the duty to explore reasonable alternative solutions before demoting the employee or terminating his or her employment.

[108] The grievor also relied on *McMath v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 42.

[109] The employer did not fully inform the grievor of what was required of him; nor did it inform him of what the consequences would be. The email dated September 14, 2009 from Mr. Francis to Mr. Doyle (Exhibit E-1, Tab 3) comes close to meeting these requirements but stops short. There is also no evidence that the employer satisfied the duty to assist in making the necessary adjustments.

[110] If it is not in good faith, it must therefore be bad faith.

[111] The letter of July 5, 2010 (Exhibit E-1, Tab 1) set out three basic reasons for the termination of employment:

- Reliability and attendance
- Failure to meet work requirements
- Failure to follow established policies, procedures or practices

[112] With respect to sick leave, the grievor followed the procedures as set out in the collective agreement. He used all of his sick leave, and the employer advanced him time as per the collective agreement; to now use that against him as a basis for his termination is bad faith.

[113] With respect to performance, although there may have been shortcomings, the employer never communicated to the grievor the consequences; nor did it try and assist him. This is therefore bad faith.

[114] With respect to the failure to follow policies and procedures, there is evidence lacking as to what the policies and procedures were. The grievor did report the missing magazine; he acted in good faith.

[115] *Bergeron v. Canadian Security Intelligence Service*, 2011 PSLRB 103, stated at paragraph 136 as follows:

[136] In summary, I conclude that terminating the grievor during probation was abusive for the following two reasons:

- (i) by failing to provide him a written notice of shortcomings before terminating him, as promised, the employer failed to respect the policies and procedures that it had instituted under section 8 of its constituent Act, resulting in a defect sufficient to invalidate the termination; and*
- (ii) in the absence of proof on a balance of probabilities contradicting the grievor's testimony, the employer failed to discharge its burden to present the necessary evidence of an employment-related reason.*

[116] The real reason for the termination was the excessive sick leave taken. This is the sham and camouflage. The grievor had legitimate medical reasons to miss work, and the action of the employer is discrimination on a prohibited ground.

[117] The grievor requests that jurisdiction be taken, his grievance be allowed, he be permitted to complete his training and be reinstated as a GT-04.

C. Respondent's reply

[118] The use of the sick leave and the deficit of sick leave credits was not the reason for terminating the grievor — it was his failure to follow the protocol established that employees were to contact supervisors to report any absences.

[119] With respect to the loss of the magazine, there was no evidence that the loss should not have been reported immediately to the local police, Mr. Scott and Mr. Doyle. The grievor should have known the firearms policy; while no one seemed to know the

policy, when they knew, they advised the grievor. However, the range officers are not the grievor's supervisors. A reasonable person should have reported it.

[120] The grievor did not have a copy of the firearms policy, and five days elapsed before he reported the loss.

[121] With respect to work performance issues, his supervisors met with him and explained to him the issues. When the grievor did not meet the competencies, his supervisors gave him an extension of time. The fact that the competencies were not met was not contradicted by the grievor. Nothing was mentioned by him about his workload. The grievor was given an opportunity to succeed, and he failed to meet the definitions. Assistance was given to the grievor, which was not challenged by the grievor when he testified.

IV. Reasons

[122] The initial question before me is one of jurisdiction. Section 211 of the *PSLRA* states as follows:

211. Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to

(a) any termination of employment under the Public Service Employment Act; or

(b) any deployment under the Public Service Employment Act, other than the deployment of the employee who presented the grievance.

[123] The jurisprudence in this area is quite settled. The Federal Court has succinctly set out the generally accepted test at paragraphs 51 and 53 of *Chaudhry* as follows:

...

[51] In these circumstances, the employer satisfied the adjudicator that it had met the burden of proof which required it to show some evidence of an employment-related reason for a rejection on probation. In this regard see Canada (Attorney General) v. Leonarduzzi (2001), 205 F.T.R 238, at para. 37, where Lemieux J. wrote:

Specifically, 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.

...

[53] Once the employer's onus was met, the burden shifted to the employee to show bad faith. In this regard, the adjudicator concluded that the Applicant had not shown that the Rejection on Probation was a sham or made in bad faith.

...

[124] In *Kagimbi v. Canada (Attorney General)*, 2014 FC 400, in upholding the adjudicator's decision, the Federal Court stated the PSEA has been drafted in such a manner as to provide the employer with a great deal of flexibility during the probation period "... precisely so that it can evaluate the skills of a potential employee." The Court went on to state that the employer's decision to dismiss the employee was a decision that was made in good faith, "... i.e. that it was based on dissatisfaction as to the employee's abilities to do the work in question."

[125] Mr. Lambert made the decision to terminate the grievor for the reasons as set out in his letter to the grievor of July 5, 2010, which reasons were based on information provided to him from other individuals. The reasons set out in that letter satisfy the test enunciated in *Tello*.

[126] This, though, does not end the inquiry. As set out in the jurisprudence, the grievor may be able to satisfy an adjudicator that he or she has jurisdiction if he can establish, on a balance of probabilities, that the reason for the termination was not for a legitimate employment-related reason but for some other contrived reason, disguised discipline, a sham, camouflage or bad faith. At paragraph 127 of *Tello*, the adjudicator states as follows:

*[127] As the grievor was unable to establish that the decision to reject him on probation was arbitrary, he bears the burden of demonstrating that the termination of employment is a "sham" or a "camouflage." As noted by the Federal Court of Appeal in another context (Dansereau v. Canada (1990), [1991] 1 F.C. 444 (CA), at page 462) bad faith cannot be presumed and an employee seeking to provide evidence of bad faith "... has an especially difficult task to perform. . . ." In *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119), an adjudicator noted, at page 14, that, in his view:*

...

... if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without regard to the facts, and therefore not in good faith, then that decision is a nullity. . . .

... It is trite to say that a determination of whether there is good faith or not must be gleaned from all the surrounding circumstances; there can be a multitude of sets of facts that may result in a conclusion of bad faith . . . keeping in mind of course that good faith should always be presumed. . . .

...

[127] For the reasons that follow, I find that the grievor has established that the employer acted in bad faith and did not base its decision on a bona fide dissatisfaction as to his suitability. The finding of bad faith has been gleaned from all of the facts which have been set forth in support of the three reasons articulated by Mr. Lambert in his letter of July 5, 2010.

[128] I agree with the reasoning set out at paragraph 92 of *Dhaliwal*, which states as follows:

[92] Prior to making and rendering a decision, it is incumbent on the decision-maker [sic] to seek out and know the facts. It is my belief that the Warden based his decision on honesty of intention; however, it was not based on all of the relevant facts.

[129] I believe Mr. Lambert based his decision on honesty of intention; however, it was not based on all of the relevant facts.

A. Alleged performance issues

[130] During the course of the probationary period (training program), all FOTs have their performance assessed against certain competencies by a three-person review committee chaired by Mr. Scott. It is at this juncture that, if they are successful, they move from the GT-02 to the GT-03 group and level. The grievor's assessment took place in February 2010, at roughly 20 months into the program. The grievor did not pass this assessment review, and as such, he was given a three-month extension until

June 2010 to get over this hurdle. The June 2010 assessment of competencies was Exhibit E-4.

[131] Exhibit E-4 states that the grievor passed the Knowledge and the Abilities and Skills portions of the competencies; however, it also states that he has failed in the Personal Suitability portion. Appendix E of Exhibit E-4 sets out the 7 competencies against which personal suitability is being assessed, which are as follows:

- adaptability
- self-confidence
- self-control
- dependability
- initiative
- result orientation
- team-work and cooperation

[132] The assessment review form itself sets out for each of the competencies a brief definition of what meeting the competency would entail. Immediately to the right of this paragraph is a box in which a letter mark of a “P” for pass and an “F” for fail is registered. Below the definition of each individual competency is a box with the wording: “Rationale supporting the Result” (“rationale box”), within which comments are to be written.

[133] The assessment review indicates that the grievor passed the competencies of Adaptability, Self-confidence, Initiative, and Team-work and cooperation. It also indicates that he failed the competencies of Dependability and Result Orientation. Finally, it indicates that the competency of Self-control was not marked. For the four competencies that the grievor passed, there is nothing written in the rationale box; nor is there anything written in the rationale box for the competency of Self-control. For the two competencies that the grievor has failed, the comment found in the rationale box is: “Does not meet definition.”

[134] All three of the members of the review committee gave evidence before me. None of them testified that an FOT had to pass all seven of the competencies to pass the competency review. No evidence was adduced to explain the pass/fail criteria. No evidence was adduced to explain the non-mark for the competency of Self-control. No evidence was adduced to explain if an FOT had to pass all seven of the competencies under Personal Suitability to achieve a pass.

[135] In fact, none of the three review committee members explained how the grievor failed the two competencies, despite being asked specifically, in examination in chief, by counsel for the employer how he failed to meet these two competencies. While I place little weight on the evidence in this area given by Ms. Kendall, as she was not an FO, I do place significant weight on the non-responses by both Messrs. Scott and Rogers, who were not only seasoned FOs but were managers. There could not have been any confusion as to the question posed, as counsel for the employer had brought both Mr. Scott and Mr. Rogers to Exhibit E-4 and specifically asked how they concluded the grievor did not meet the requirements. Both Mr. Scott and Mr. Rogers answered in strikingly similar fashion. Mr. Scott stated that the process was to ensure a level playing field and to draw from the assessed employee's experience. Mr. Rogers stated that the board members individually review, then assess and then discuss the assessment and reach a consensus. What both of them neglected to state was why the grievor did not meet the requirements.

[136] Mr. Lambert specifically stated in his letter of July 5, 2010 that one of the reasons the grievor was terminated was due to his performance. Yet, the latest and most timely performance assessment put forward into evidence by the employer, Exhibit E-4, shows the grievor passing all of the Knowledge and Abilities and Skills portions of the competencies assessment and only failing two of the Personal Suitability competencies. Mr. Lambert testified that he did not have any direct knowledge of the grievor's performance issues as he did not supervise the grievor. The grievor's supervisor, Mr. Doyle, did not testify. The only areas lacking were in two of the seven Personal Suitability competencies; however, none of the three review committee members said how the grievor failed them. It is clear that Mr. Lambert relied on the information provided to him in support of this assessment; however, for this reliance to be in good faith and to meet the test of a bona fide dissatisfaction as to the grievor's suitability, the facts must exist to support that finding. Here, if those facts exist, they were never provided to me, despite the clear question being asked of

the three people who made the determination. If they can't provide those facts, Mr. Lambert's finding is no longer made in good faith, but bad faith and is arbitrary.

[137] Mr. Francis suggested the grievor's performance was poor throughout his probationary period. While there was some evidence that the grievor had had some issues with his performance, and while I have no doubt that the grievor had some difficulties in his performance during the probationary period, I expect that this would not be unusual, since the probationary period is coincidental with the training program. I expect no FOT arrived in the FOCPP knowing everything and doing everything perfectly and that there were likely some bumps along the way. However, Exhibit E-4 indicates that the grievor is passing but for two competencies, in one particular area, of which no one could explain why he did not meet them.

[138] While the case law is quite clear that the employer must state the reasons of its dissatisfaction as to the employee's suitability, there must be something to the employment-related reason relied on by the employer. While I agree that the employer need not establish a *prima facie* case of just cause for the rejection on probation, there must be some legitimate reason provided. It is insufficient merely to point to what could ordinarily be considered an employment-related reason as the reason for the rejection without some substance behind that reason. When there is no substance behind the alleged reason, that is evidence of a sham or camouflage and indeed bad faith and a contrived reliance on the rejection on probation provisions of the *PSEA*.

B. Alleged failure to adhere to policies, procedures, rules, guidelines and codes of conduct, and alleged reliability and attendance issues

[139] Also disconcerting is the evidence tendered with respect to the third reason put forward by Mr. Lambert to terminate the grievor, that being the failure to follow policies, procedures, rules, guidelines and codes of conduct.

[140] When Mr. Lambert testified, he appeared to be confused as to the actual details regarding the probationary period and the actual specifics of the grievor's probation. Indeed, he did not know when it started, and appeared to think that the time the grievor spent at the RCMP Training Depot was a part of it.

[141] During the course of Mr. Lambert's evidence with respect to his reasoning as to what actions of the grievor he relied upon in support of his statement that the grievor

failed to adhere to established policies, procedures, practices and codes of conduct, Mr. Lambert testified that the grievor exhibited a pattern of behaviour, which pattern started with the incident at the RCMP Training Depot. This incident, however, took place sometime prior to March 10, 2008 (Exhibit E-1, Tab 11) and predated the offer of employment with the DFO, which was May 7, 2008, and therefore logically predated the start of his probationary period, which was May 26, 2008. While the employer did state during the course of the hearing that it was no longer relying on the incident at the RCMP Training Depot, this does not alter the fact that Mr. Lambert certainly relied upon it to make his decision. Not only did he rely on it, it was clear to me that he believed that it took place during the course of the probationary period, that he was entitled to rely upon it and that it was part of the pattern exhibited by the grievor.

[142] The incident which took place at the RCMP Training Depot was something the DFO was aware of when it made its offer of employment to the grievor; they chose to make an offer to the grievor notwithstanding that this event had occurred. As this incident could not, taken on its own, be relied upon by the employer to reject the grievor on probation, it surely taints the decision of Mr. Lambert, as he testified that it was this action, as well as the failure to follow the firearms policy and policies relating to calling in sick, that triggered his reasoning relating to the finding that the grievor did not adhere to established policies, procedures, practices and codes of conduct.

[143] In regard to the allegation of the failure to follow the firearms policy, the uncontroverted evidence was that the grievor misplaced an empty magazine for his duty weapon. The grievor reported the loss of his empty magazine to his training officer. That officer gave the grievor, the person whom he was training, the wrong information. This is set out in that officer's own words, found at Exhibit E-1, Tab 4, in his email of February 2, 2010 at 10:36 a.m., when he emailed Mr. Barrett as follows:

...

I have been thinking about Craig's lost Mag.. I don't think We handled this correctly. According to the Firearms policy, any lost or stolen mag is to be reported to : Local police, Fishery Officer's supervisor and to RFO(Ken). What concerns me most is; I think the mag was filled with amo. I asked Craig about this and he said that it wasn't.. He dosen't know where he lost the Mag. It wasn't sited at the range.

...

I gave Craig another Mag that was turned in to me by an Officer who said that he had gone home last year from the range with an additional Mag..... Mag was turned in with practice amo still in the Mag.

I advise Craig to keep looking for the Mag and to report if he found it or not. Waiting to hear from him. I think Ken should be made aware of this.

[Sic throughout]

[144] When it appears the grievor is made aware that he must advise the police, his supervisor and Mr. Scott, he appears to take that step within what appears to be a matter of about an hour.

[145] I was not provided a copy of the firearms policy. The evidence before me was that the policy was some 80-90 pages long and was generally available on the employer's web page. I was provided no specifics as to if the policy was available at the time the incident occurred. With respect to the grievor being aware of the specifics of the policy at the time of the incident occurring, it was submitted that the grievor should have received training with respect to firearms and the firearms policy when he was at the RCMP Training Depot. In fact, I was provided with no evidence as to whether or not the grievor was ever actually made aware of any of the provisions of the firearms policy at any time, except when he was told on or about February 2, 2010 that he had to report the loss to the police, his supervisor and Mr. Scott, and when provided with this information, he appears to immediately comply.

[146] Not following the firearms policy, on the face of it, would factually be considered a valid employment-related reason to reject an employee on probation; however, again, there must be some substance behind that reason. It is not sufficient to state that there is a policy out there that the employee did not follow. If the employer has not made it clear or does not enforce the policy, it is inappropriate to use it as a reason for rejection of the employee on probation. It is clear from the evidence that the loss-reporting requirements of the firearms policy were not known to those persons who were charged with firearms instruction and qualification. If the individuals who are tasked with training probationary employees are not only not aware of the requirements, but also instruct their trainees in a manner that is opposite to the policy, the employer surely cannot be acting in good faith when it uses this against the trainee.

[147] Finally, Mr. Lambert also suggested that the grievor did not follow the policy with respect to sick leave. This appears to also be the basis for his determination regarding attendance and reliability.

[148] Clauses 39.02, 39.03 and 39.04 of the collective agreement state as follows:

39.02 *An employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:*

(a) *he or she satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer,*

and

(b) *he or she has the necessary sick leave credits.*

39.03 *Unless otherwise informed by the Employer, a statement signed by the employee stating that because of illness or injury he or she was unable to perform his or her duties, shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 39.02(a).*

39.04 *When an employee has insufficient or no credits to cover the granting of sick leave with pay under the provisions of clause 39.02, sick leave with pay may, at the discretion of the Employer, be granted to an employee for a period of up to one hundred and eighty-seven decimal five (187.5) hours, subject to the deduction of such advanced leave from any sick leave credits subsequently earned.*

[149] Messrs. Francis and Rogers gave evidence about the grievor's attendance and use of sick leave. There is no doubt that the grievor was using a lot of sick leave. The employer advanced him sick leave credits under the collective agreement. This was discretionary. At some point the employer also required the grievor to submit medical certificates to justify the granting of sick leave with pay. Although there was an allusion by the employer that the grievor did not submit medical certificates when required, there was no actual evidence that this was the case; in fact, the grievor testified that whenever he was required to provide medical certificates, he did so.

[150] At Exhibit E-1, Tab 3, is a series of email exchanges between Mr. Francis and Mr. Rogers wherein Mr. Rogers confirmed to Mr. Francis that the grievor need only to satisfy the employer that he is sick for his supervisor to approve sick leave with pay. It is clear from the final email in the chain at 12:19 p.m. on May 4, 2009, from Mr. Francis

to Mr. Rogers, that Mr. Francis is frustrated with the amount of sick leave the grievor is taking. The email states as follows:

...

There is a problem with Craig's sick leave. I talked to him a few ago and had agreed to carry a deficit for him hoping he would make it up. At that time the deficit was 6-7 days. I was asking for a doctor's note as a control mechanism hoping to keep the deficit under control. He currently has a deficit of 10.75 hours. I assume that is for the entire 2009-2010 fiscal year. What do you do!!!!!!

...

[151] It is clear to me from the wording of the email of May 4, 2009, that Mr. Francis seems to think that requiring the doctor's note will keep the grievor from being off sick. The way it is written suggests that the grievor is misusing the sick leave credits and that the way he was going to be controlled was by the use of doctor's notes.

[152] There was no evidence whatsoever that the grievor wasn't sick when he said he was sick. To the contrary, the evidence established that the grievor suffered from irritable bowel syndrome and from a hiatal hernia, which caused the recurring stomach ailments that made him miss work.

[153] The employer has suggested that the grievor failed to inform the employer when he was sick by failing to call Mr. Doyle or Mr. Francis directly. I was provided no evidence that this was a policy or procedure or guideline of the employer. The evidence in support of this was contained in an email sent by Mr. Francis to Mr. Rogers dated May 17, 2010 (Exhibit E-1, Tab 9). The essence of this email is that the grievor, during the time frame of May 10-17, 2010, did not speak with his supervisor directly every time he called in sick.

[154] I have doubts as to the accuracy of the information contained within this email. First, it is a summary of a series of events that took place, and the actual source of all of the information was never provided; nor is it clear if it is accurate. Mr. Doyle, the grievor's direct supervisor, never testified; nor did either FO Sharpe or Ms. Newhook. While the grievor did testify before me, he did not provide any insight into this event. While it is not uncommon in these circumstances to look at what may be considered as "the best evidence," in these circumstances, it would be neither fair nor in accord with the rules of natural justice to accept this. The calling-in-sick is not an event of such

magnitude that a person would remember the details or specifics of what transpired, unless there was a reason for them to do so. Memories fade over time; it would be both unfair and illogical to expect the grievor, more than four years later, to recall the exact innocuous events that transpired when he called in sick back in May of 2010. I have therefore given no weight whatsoever to this evidence.

[155] While an employer is entitled to set rules, policies, procedures and codes of conduct, they may not be used in bad faith or as a sham or camouflage. If the employer sets a rule as to the start time for work, yet does not enforce it for any of its employees, it would be bad faith if it only enforced it to justify the rejection on probation of an employee, citing it as a legitimate employment-related reason.

[156] As I have found that the decision to reject the grievor was done in bad faith and not based on a bona fide dissatisfaction as to the grievor's suitability, I have jurisdiction.

[157] Due to the passage of time, and the fact that the grievor was still a probationary employee and in the FOCPP and that I do not have the authority to appoint, I am ordering the grievor to be reinstated into his position as an FOT at the GT-02 group and level.

[158] Due to the passage of time, it is also likely that while some of what the grievor learned during his initial training program, he retained, it would not be unreasonable to expect that he has also forgotten material. The employer shall assess the grievor and determine how much training the grievor requires to complete the FOCPP, and the grievor shall be placed back into the program.

[159] As I have not heard evidence with respect to what monetary remedy would be appropriate in the circumstances, I shall retain jurisdiction to deal with the matter. While I urge the parties to resolve this on their own, they shall, within 10 business days of the date of this decision, provide their availability to the Board for a hearing on the issue of monetary remedy.

[160] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[161] I declare that I have jurisdiction to hear the matter.

[162] The grievance is allowed.

[163] The grievor is to be reinstated at the GT-02 group and level, retroactive to July 5, 2010.

[164] I shall remain seized of this matter to deal with the matter of monetary remedy.

[165] The parties shall meet forthwith and try and agree on the appropriate amount of monetary remedy, failing which a hearing shall be scheduled.

[166] The parties shall, within 10 business days of the date of this decision, provide to the Board their availability with respect to a hearing on monetary remedy.

June 26, 2015.

**John G. Jaworski,
adjudicator**