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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

LLOYD KIRLEW

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Kirlew v. Deputy Head (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Jacob Axelrod, counsel

For the Respondent: Joel Stelpstra, counsel

Heard at Edmonton, Alberta,
June 27 to 30, 2017.
(Written submissions received
July 6 and 20, 2017.)

I. Individual grievances referred to adjudication

[1] Lloyd Kirlew ("the grievor") was hired on October 20, 2014, as a correctional officer (CX) at the CX-1 group and level at the Edmonton Institution (EI) of the Correctional Service of Canada ("CSC"). The grievor filed a grievance on January 13, 2015, alleging that the Deputy Head of the CSC ("the respondent") had discriminated against him. One month later, on February 12, 2015, he was dismissed while still on probation. On March 13, 2015, he filed a grievance against his dismissal, which he alleged was discriminatory and constituted disguised discipline. Both grievances were referred to adjudication on June 11, 2015. The grievor specified at the hearing into the grievances that the grounds of discrimination were his race (black), his ethnic origin (Jamaican) and his age (49).

[2] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act*, and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*"). For ease of reading, the Board includes both the Public Service Labour Relations and Employment Board and the Federal Public Sector Labour Relations and Employment Board, and the Act includes both the *Public Service Labour Relations Act* and the *Federal Public Sector Labour Relations Act*.

[3] For the reasons set out below, I find that the Board lacks the jurisdiction to deal with the dismissal grievance. The grievor was still on probation during his employment and there is no evidence that the performance issues upon which his termination was based were a camouflage for bad faith or discrimination. He also failed to establish that his treatment during the course of his employment was discriminatory.

II. Summary of the evidence

[4] The grievor is of Jamaican origin. He came to Canada at the age of 13 and grew up near Toronto, Ontario. He has been active for a long time in the Afro-Caribbean Race Relations Association, which seeks to solve race-related issues in the community

by working with schools, police, communities, and employers. He has a college diploma in electronics engineering. He worked at a penitentiary in Kingston, Ontario, in information technology starting in 2011.

[5] In 2014, he applied for a CX position and was selected for training. The training for new CXs has various components. The initial core training is composed of three modules. Two are online and are usually completed within four to six weeks. The third module is 12 weeks of training at the RCMP depot in Regina, where the trainees acquire skills and learning in the following areas: law and policy, dealing with difficult inmates, self-defence, handling and using firearms, and use of force; in sum, they receive training in every aspect of a CX's job. Once they successfully complete the core training, the trainees receive offer letters for CX-1 positions and are deployed to different institutions.

[6] After successfully completing his training, the grievor was offered the CX position at EI. The letter of offer included a 12-month probationary period. He arrived at EI with two other graduates of the Regina training.

[7] EI is a maximum-security penitentiary. It has a master control room along with several armed posts, named "One-control", "Two-control", and "Three-control" and others named "subcontrol". One-control manages the entry and exit of staff and inmates into and from EI. Two-control manages the movement of staff into the different units and the movement of inmates to medical services. Three-control manages the movement of inmates to programs and activities. Subcontrols are at the range level. They control the movement of inmates in and out of cells. A subcontrol is designated by two letters, such as "A/B" or "G/H", and views 48 cells, arranged in two rows in two hallways. "A" would designate two levels of 12 cells to the left of the subcontrol post, and "B" would designate the same arrangement of cells in the opposite direction.

[8] Upon deployment, a new CX-1 receives on-the-job training (OJT), to learn how to operate in the specific institution where he or she has been deployed. The average OJT throughout Canada is two weeks. In the EI, it is usually three weeks, since it is a maximum-security institution housing difficult inmates.

[9] When the grievor first arrived at EI, he was greeted by Connie Squires, who was in charge of new recruits. He testified that as they toured EI, she commented about his facial hair. He explained that he had shaved the night before, as he was in the habit of doing since his training at the RCMP depot, as they had to be ready very early in the morning. Ms. Squires asked another person who was there to confirm the policy that no facial hair is permitted. That person said that the only person who had not agreed with the policy also wore a turban and was long gone. Mr. Kirlew said that this incident left a bad taste in his mouth.

[10] In her testimony, Ms. Squires denied that event as it would have been contrary to her policy of dealing with such matters privately. She did not deny she might have made a comment about facial hair, as it was important with respect to using equipment.

[11] The grievor testified that the other two recruits did their OJT elsewhere. He was sent to several control posts, but no one told him what to do. He was told to observe. At the end of the day, he would attend a debriefing with Ms. Squires. She would ask how he did; he would answer that he was receiving positive feedback. She would say that that was not what she had heard and would criticize whatever he had been doing. She would praise the other two recruits. She told the grievor a number of times that he was not "switched on". She would also test him with questions and then make buzzer sounds after every answer he would give, as if to show he could only be wrong.

[12] Ms. Squires testified that she has been a CX-1 for 23 years. For the last seven years, she has been the coordinator of new recruits. She has been responsible for training approximately 150 recruits.

[13] She explained that the expectation is that new recruits will be competent for all duties in all posts after three weeks of OJT. There are several benchmarks in the training, and a debriefing is held every day with the new recruits, to go over what they learned and to identify those areas where improvement is necessary.

[14] On October 31, 2014, after two weeks of training, Ms. Squires identified a number of deficiencies with the grievor's performance. The concerns were listed in the following manner:

1 Control [controls movement in and out of EI]

- *Provided with a copy of Post Orders - 532 however did not review*
- *Unable to effectively taking over the post (count board/tally sheet)*
- *Unable to comprehend the functions of the Key controls*
- *Unable to effectively manipulate Touch screen and mouse activation*
- *Unable to properly document on Movement sheet/log book*
- *Unable to manipulate the Count board*
- *Unable to comprehend and conduct Count procedure properly*
- *Unable to utilize the One Control barrier should*
- *Unable to manipulate and comprehend the Camera's*
- *Did not identify staff entering post (turning around and get a visual prior to allowing entry)*

2 Control [controls the movement within EI of professional help to the inmates]

- *Provided with a copy of Post Orders - 524 - however did not review*
- *Unable to listen, comprehend and communicate effectively on the radio*
- *Unable to comprehend the functions of the keys*
- *Unable to communicate effectively with handing over the post*
- *Unable to manage and prioritizing - Doctors passes, Methadone, Nurse call ups*
- *Unable to manipulate the touch screen and mouse activation*
- *Unable to monitor the Camera's*
- *Unable to coordinate Movement effectively (health care, programs, A&D)*
- *Unable to document Log book entries effectively and timely*

3 Control [controls the movement of inmates from cells to programs and activities]

- *Provided with a copy of Post Orders - 525 - however did not review*
- *Unable to complete Radio procedures effectively*
- *Unable to demonstrate knowledge with Keys*
- *Unable to show initiative in Setting up/handing over/shutting down post*
- *Unable to effectively manipulation the touch screen and mouse activation*
- *Unable to change Camera's (PTZ)*
- *Unable to prepare for Movements (kitchen, Corcan, SIS, W&E, programs, sweatlodge)*
- *Unable to demonstrate confidently how to respond Emergencies*
- *Unable to manage Log book entries*

Industries Catwalk [inmate movement supervision]

- *Provided with a copy of Post Orders - 522 - however did not review*
- *Unable to prepare major Movements (kitchen, Corcan, SIS, W&E, programs, school, sweatlodge)*
- *Unable to document Log book entries effectively*
- *Unable to communicate effectively*

Subcontrol *(22 hours)* [supervision of ranges where inmates are housed]

- *Has been provided with a copy of Post Orders - 527 but has not reviewed*
- *Unable to provide an accurate Handover briefing*
- *Unable to document accurate times and events in the subcontrol log book*
- *Unable to comprehend memo's*
- *Unable to prepare accordingly for movements*
- *Unable to comprehend door functions/touch screen*
- *Unable to identify Keys and usage - issuing, familiarity of all keys*
- *Unable to ackowledge and clear Cell calls*
- *Unable to understand, listen and respond to the radio*

- *Unable to complete steps when an inmate is leaving the unit (OSC, MTA, Release) Count board, touch screen, log book, relay information to office, relaying information to 1 control*
- *Unable to use the Intercom system effectively*
- *Unable to demonstrate the ability to respond to an emergency*
- *Unable to the Use of doors and barriers - function, interlocks, etc*
- *Unable to walk staff on the Range walk consistently - unaware of high risk areas*
- *Unable to Task management - prioritizing-preplanning*
- *Unable to manage movement's effectively*
- *Within unit areas – office, multi-purpose room*
- *Off unit scheduled moves – gym, programs*
- *Unscheduled moves*
- *Unable to manage Lock-up/count*
- *Unable to have effective time management (lock up, movements)*
- *Unable to release inmates to Mini-yard effectively*
- *Unable to React incidents in a timely manner*
- *Unable to conduct mini yards*

[*Sic* throughout]

[15] Ms. Squires worked with the grievor for the first three weeks. When it was determined that he had not acquired the necessary competencies, the three weeks were extended. She worked with him for an additional week or so. Then, as she stated at the hearing, it was clear she could not help him anymore. Ms. Squires added that she would have liked to see the grievor succeed, as any failure reflected badly on her.

[16] The grievor recounted an incident in which Ms. Squires was supposed to assess him. He arrived at the control post somewhat early. The officer in charge was eager to go, and he told the grievor that there would be no problem for the grievor to be in the control post briefly while waiting for others to arrive. According to the grievor, when Ms. Squires arrived, she was extremely angry that he had taken over the post, and she berated him in front of staff and inmates.

[17] I note that this interaction was thoroughly investigated in the course of a harassment complaint the grievor made against Ms. Squires. The investigator concluded that "there is no evidence or witness corroboration to support [the grievor's] account of events". According to the report, none of the staff who was supposedly present remembered Ms. Squires berating the grievor, and as it was early in the morning, the inmates were still in their cells, out of earshot of the control post.

[18] Laura Contini was the deputy warden at EI during the grievor's OJT. She testified that she was made aware of the grievor's difficulties during his OJT towards the end of his first three weeks at EI. He started on October 20, 2014. On November 7, 2014, Ms. Contini was told about his inability to multitask and his difficulties answering the radio, controlling inmate movement, and taking over a control post. On November 10, 2014, she received an assessment report from Correctional Manager Carin Taylor, who was the grievor's direct manager, which mentioned a number of performance deficiencies, as follows.

[19] The weapons check took a long time and was carried out with difficulty. He seemed confused with operating the touch screens and the doors. He had to be reminded several times that staff members were waiting at the doors that he controlled. He had difficulty operating the radio. Two nurses entered the inmate area, but contrary to protocol, the grievor made no radio announcement. He did not know how to manage inmate movement for medical checks and methadone distribution. He failed to watch an officer who was out on the floor with some inmates. He could not understand a memo that the Chaplain had sent concerning visitors to EI.

[20] When taking over One-control, where the tally of inmates is the first concern, the grievor did not know how to handle the tally sheet and the count board. In a subcontrol post, he was unable to respond to a personal alert test. Unarmed staff wear a personal alert device (personal portable alarm, or PPA), to be activated if they find themselves in a dangerous situation with inmates. Officers in the control posts are instructed to react immediately to such alerts. The grievor did not know how to handle inmate movement. Ms. Taylor's report concluded with the following sentence: "After assessing Lloyd Kirlew, it is my belief that he does not possess the skills to become a Correctional Officer."

[21] Ms. Contini held a meeting on November 13, 2014, with the grievor and Éric Gagné, a correctional manager, at which she decided to provide the grievor with one more week of OJT with a designated officer, so that he could improve on the following areas:

1. *Ability to multi-task while in armed post.*
2. *The ability to listen to his communication system.*
3. *Radio procedures.*
4. *Speed of execution.*
5. *Confidence*

[22] Another assessment, carried out on November 14, 2014, notes the grievor's slowness accomplishing routine tasks. According to the author of the report, the slowness, when dealing with the inmates in the subcontrol posts, could lead to serious security incidents. The author concludes that it presents a serious danger.

[23] Included in the respondent's documentation are several reports forwarded to Ms. Contini from different CXs who were tasked with assessing or observing the grievor. They all point to the grievor's inability to multitask, his inefficiency managing inmate movement, his slowness, and his awkwardness checking the weapons at the post.

[24] A week later, Mr. Gagné emailed the following to Ms. Contini: "I am sorry to say but he is not developing like we all had hoped for. He is at the stage he was a week ago & he has showed [*sic*] no improvement whatsoever. We will have to let him go."

[25] The grievor spoke at the hearing of an incident when he was being assessed by Mr. Gagné, and the count at One-control could not be cleared because an officer in the G/H subcontrol had not provided the necessary slip of paper for the count in that range. After some back-and-forth, the officer entered the One-control post, threw the paper with the range count at the grievor, and told the grievor that he was wasting the officer's time. Other officers later told the grievor that the officer had called him the "N-word" and had cursed him all the way back to the officer's G/H control post.

[26] The grievor recounted that people on the radio mocked his Jamaican accent and that they would start their communications with, "Hey, mon."

[27] On November 21, 2014, Dean Lorenson, a CX who signed a report forwarded to Ms. Contini, observed the grievor in a subcontrol post. After noting his difficulties with the radio and some slowness in making entries in the logbook, this assessment does contain the following positive comments:

> *The writer did observe officer Kirlew do some things very well, such as, preplanning the upcoming movements and knowing who is approved for the movement (very slow doing this however the thought process is there and should only get faster), multi-tasking was better than expected as the officer was able to watch range walks, answer the phone and safely communicate with inmates to wait until the walk was over all at the same time. This is skill that a number of senior officers have not been able to master.*

[28] Despite this positive report, by November 24, 2014, after assessments had been made by several people, Ms. Contini believed that the performance deficiencies were such that they posed a risk to EI. She recommended rejecting the grievor on probation. Accordingly, a memo was addressed to him on November 24, 2014. It read as follows:

> *Mr. Kirlew, this is to confirm in writing what was discussed with you on the afternoon of November 24, 2014.*
>
> *On November 24 a meeting was held with you in the office of the Assistant Warden Operations in regards to your progress in the on the job training at Edmonton Institution. The individuals present during this discussion were K. Austin Acting Assistant Warden Operations, C. Taylor Correctional Manager, E. Gagne Correctional Manager and you.*
>
> *The discussion was centered on the most recent assessment of your performance of functions as a Correctional Officer 1. This discussion also referenced back to the end of the normal OJT training and the assessment provided at that time by C. Squires who was coordinating your OJT. The result of that assessment had your OJT period extended and you were assigned to Correctional Manager C. Taylor who conducted an assessment. From the end of that extended OJT assessment it was determined additional OJT was necessary and a further period with different individuals were [sic] provided to conduct the training.*
>
> *At the end of the participation of these individuals you met with A/AWO James and the assessment of performance was arranged to be undertaken with Correctional Manager Gagne.*

> *This last assessment did not reflect the level of performance necessary for Correctional Officers to function at Edmonton Institution.*

[29] The memo went on to state that rejection on probation was being considered but that the decision had to be made at the regional level, not the local level.

[30] The assessment referred to in the memo was carried out by Mr. Gagné. In his report, he pointed out the following deficiencies in the grievor's performance: the weapons check had not been properly done; the count had not been carried out according to policy; the grievor had difficulty multitasking, and slowness was an issue; and equipment and keys had not been verified. The grievor seemed to have difficulty understanding the movement sheet. He had trouble operating the barriers. He had failed to respond to a personal alert from a support staff member in the program area.

[31] On November 25, 2014, after receiving Ms. Contini's memo, in which she stated that she was considering rejecting him on probation, the grievor wrote to Peter Linkletter, the CSC's deputy commissioner, to complain that he was being unfairly dismissed. He had been placed on stores duty pending his dismissal. He complained to Mr. Linkletter about the unfairness of the situation, intimating as follows that he had been subject to discrimination: "I'm a black man of Jamaican background and it seems to me that management will not help me at all …". On that day, Ms. Contini changed her mind about dismissing the grievor and directed that his OJT would continue with other officers.

[32] More negative reports followed. They include a note from Kevin Austin, a correctional manager, concerning Andrew Wood, a union steward, who had volunteered to help train the grievor for two days but who had abandoned doing so after the first day, citing the grievor's slowness and confusion, his lack of reaction when a personal alert was set off, and a general level of discomfort in having the grievor in the control post while an officer was on the range.

[33] A report from another CX-1 concludes that if a serious incident were to occur, the grievor would be unable to control the situation.

[34] Another assessment was conducted by yet another CX-1, who states that additional training would be required for the grievor. According to the report's author, the grievor does grasp the concepts but is slow to execute tasks, is somewhat

confused, and has trouble multitasking.

[35] On November 28, 2014, a new training plan was shared with the grievor and his bargaining agent representatives. The plan covered the period from November 26 to December 15 and provided a defined training schedule for each day. The plan included the following program:

> *Wednesday November 26 - Working on A&B Sub-control and Central Control duties*
>
> *Thursday November 27 - Working with on* [sic] *sub controls, working with a Fire Team Member on fire response, SCBA donning and doffing, sprinkler shut off, fire orders*
>
> *Friday November 28 - Central Control count board process, log book process*

[36] It continued in that way through December 15, covering all responsibilities of a CX-1.

[37] A report from his direct manager, Ms. Taylor, and dated November 30 states that she conducted an assessment on November 28 that took place in One-control, A/B subcontrol, and the industries catwalk.

[38] Her report states that in One-control, the grievor had difficulty carrying out the count of inmates and was slow doing it. He was also slow checking his weapons and had difficulty carrying out the weapons check while also opening doors for staff. He was unable to run the post by himself. When the other officer made suggestions, the grievor responded, “I’ll figure it out”.

[39] This was a common theme during the day, according to Ms. Taylor’s report. The grievor was unable to manage A/B subcontrol and was unsure what to do in the catwalk post. At debriefing, he disagreed with Ms. Taylor’s assessment and repeated that given time, he would figure it out. Ms. Taylor responded that it was not a matter of figuring it out, but rather of learning the different procedures.

[40] A report dated December 4, 2014, by another CX detailed the following “deficiencies of concern” with respect to the grievor: firearms were not checked and he had trouble managing movement, was unable to communicate inmate movement over the radio, and was unable to multitask without being overwhelmed.

[41] On December 10, Mr. Austin assessed the grievor in the subcontrol. Although some improvement was noted (such as asking the outgoing officer about the status of movement on the cellblock and conducting a seven-point safety check on a firearm appropriately), he still made errors with respect to door controls and was slow with multitasking. The report concludes that the grievor is not ready to function as a CX-1.

[42] Ms. Contini stated at the hearing that management at EI wanted the grievor to succeed but that it simply did not work out, despite extensive training. When a new group of recruits arrived at EI, the grievor was integrated into it, to continue his training.

[43] The grievor never claimed to Ms. Contini that he was a victim of discrimination. Ms. Taylor did report to her that she had asked the grievor the question directly, since she had heard from other officers that he had complained of harassment and discrimination. However, he denied it to her. According to Ms. Contini, had she been made aware, she would have acted, since EI has a zero-tolerance policy for any form of discrimination.

[44] Sean Whelan, a CX-2 who was at the time the local president for the bargaining agent (Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN), testified that he became aware that there was dissatisfaction with the grievor's performance. He observed the grievor for about an hour in Two-control, after it had been reported that the OJT had been going on longer than three weeks. He observed that the grievor was not doing too badly but that he had trouble multitasking.

[45] Mr. Whelan asked for other officers to be involved in the grievor's OJT. Management and the bargaining agent agreed to ask Travis Kostiw to take over the grievor's OJT in early December.

[46] Mr. Kostiw testified at the hearing. He is an experienced CX-2, who has been at EI for 16 years. He was a firearms instructor for 10 years.

[47] During a period of six months just before the grievor started to work at EI, Mr. Kostiw was a correctional training instructor at the RCMP depot. He was

the firearms instructor for the grievor during that time, and he had found that the grievor listened well and that he was successful.

[48] When he was asked by both management and the union to help with the grievor's OJT, he accepted the task because he knew the grievor from the training in Regina and had a positive opinion of him.

[49] As Mr. Kostiw trained the grievor, he also assessed him. It soon became obvious to him that the grievor had trouble grasping basic concepts, multitasking, and ensuring safety. Mr. Kostiw mentioned several times the grievor's slowness to react, which irritated the inmates to the point that staff asked that he be removed from one of the units.

[50] The grievor had acquired firearm skills at his core training, but it seemed to Mr. Kostiw that he had regressed. He had trouble carrying out the safety check, and on at least one occasion in front of Mr. Kostiw, he pointed the gun in the direction of a hallway instead of to the floor as a safety precaution. The grievor struggled with the various steps of checking firearms and magazines.

[51] Mr. Kostiw spent 10 days in total training and assessing the grievor. In the end, his recommendation was that the grievor should not be placed in security posts. His inability to multitask made it unsafe for him to be in an armed post.

[52] Mr. Kostiw submitted a detailed report to management. It starts with an assessment carried out on December 1, 2014. The first post is A/B subcontrol, where Mr. Kostiw notes deficiencies and explains how he showed the proper procedure to the grievor. Mr. Kostiw also notes the positive aspects of the grievor's performance, i.e. what he has learned and retained.

[53] On Day 2, in One Control, Mr. Kostiw notes the grievor's difficulty with multitasking. He also notes his slowness, and difficulties with the count process. He does note on the positive side that the grievor counted the institutional count board and compared the counts to the existing count sheet without assistance. The grievor also managed basic multitasking. In subcontrol G/H, Mr. Kostiw notes difficulties with multitasking, but notes good communication with the staff and briefing of the incoming officer.

[54] On Day 3, in One Control, the grievor clears the count by himself, which is positive, but it takes 45 minutes, when it should be cleared in 5 to 10 minutes. Weapons were checked in a reasonable period of time. The grievor has trouble with paperwork, and has trouble locating keys intended for emergency response.

[55] For A/B subcontrol, there is a long list of deficiencies and no positives are reported. The grievor was in that subcontrol for about an hour-and-a-half. Staff asked that he be removed as his slowness created considerable frustration in the inmate population.

[56] After three days, Mr. Kostiw wrote this summary:

> *Lloyd was able to function in One control when it was quiet but is still not confident in completing his tasks. Staff training coordinator Travis Kostiw feels that Lloyd KIRLEWs slow speed at completing observed tasks leads this officer to believe that if greater demands were placed upon him he would be unable to complete the required tasks in the time provided by the post relief schedule for One Control.*
>
> *Lloyd was able to handle minimum amounts of movement within the cell block. As the subcontrol got busier Lloyd was not able to maintain an acceptable pace in the subcontrol and had to be removed at both A/B unit staffs request. Lloyds inability to multi task and prioritize made him unable to function at an acceptable pace. At this point in time staff coordinator Travis KOSTIW does not feel confident in Lloyds ability to function within the demands of Edmonton institutions post requirements. More training is required in the given posts to possibly bring Lloyd KIRLEW up to an acceptable level of competence. Due to the amount of time that Lloyd KIRLEW has been on OJT a basic skill set for competence should already exist with this officer….*
>
> [*Sic* throughout]

[57] The training with Mr. Kostiw continued until December 11, 2014. Every day, he reported on the grievor's OJT, noting both positive actions and deficiencies. A constant remark in his report is the grievor's apparent inability to retain information.

[58] The report ends with Mr. Kostiw's conclusion that the grievor will not be able to function at a safe level within EI. This part of the report reads as follows:

This is my final report/summarization on the OJT for Lloyd Kirlew. I trained and observed Lloyd Kirlew in the majority of the security posts in Edmonton Institution over a period of 2 weeks. Lloyd was referred to me as a staff member who was on OJT for a period of 6 weeks prior to my involvement. My background as an instructor includes Firearms Instructor for the Correctional Service of Canada and an Acting Correctional Training Program Instructor for a 6 month period. My involvement with the CSC spans almost 14 years of service as a CO1 and CO2 with experience in ERT, Union involvement, Firearms Instructor and OSH Co-Chair.

One of the most important posts at Edmonton institution is the subcontrols. The skill-set for running the subcontrols is paramount in working as a Correctional Officer at Edmonton Institution. When in the subcontrol Lloyd fails to discriminate between important and extraneous information and becomes easily sidetracked. Lloyd does not easily identify problems, options or actions when running the subcontrol. Lloyd has yet to run a subcontrol without assistance being required. Lloyd is constantly asking and questioning items that he should be aware of the answers to after the amount of time that has elapsed in training. The fact of the matter is Lloyd has shown that he is incapable of safely running a subcontrol even at the quietest of times. Edmonton Institution runs on a set routine that is dependant on staff implementation at the lowest level. Lloyd has shown an inability to operate by this routine affecting unit and institutional operations. This has been shown time and time again with Lloyds documented deficiencies.

Lloyd has been trained on several catwalks, mobiles, and other static control posts and has demonstrated a lack of retention of information relating to these posts. Lloyds lack of retention coupled with his demonstrated inability to multi task in all given posts could result in serious consequences. These serious consequences in these armed immediate response posts could potentially put staff and inmates at risk unnecessarily. These posts require quick decision making and multitasking abilities to ensure the safety of staff and inmates.

A large concern is Lloyds comments and attitude in regards to staff at Edmonton institution. Lloyd has stated to staff that he "has been ready for this place since day 1 of his OJT". This comment seems to embody Lloyds lack of comprehension in regards to the potential threat level of Edmonton Institution. Lloyd has commented to myself that he has been treated unfairly by both his original OJT training staff Connie Squires and several of the middle management at Edmonton Institution the correctional managers mainly Eric Gagne and Karen TAYLOR. Lloyd has stated that

> *management has kept him on OJT unfairly and that Connie Squires treated him unfairly and different that other OJT staff. Lloyd has also commented that "staff will have to get used to him as he is not going anywhere". This comment shows that Lloyd is not willing to work towards common goals or work in a team driven environment. This lack of ownership for Lloyds noted deficiencies is daily evident as he states repeatedly he has not been shown skills or makes excuses that the staff are at fault for doing things differently, thereby alleviating personal responsibility.*
>
> *My recommendation after two weeks of one on one intensive OJT with Lloyd Kirlew is that in my educated opinion he is not a good fit for security related posts within Edmonton Institution. This opinion is based on Lloyds long list of safety related deficiencies that have been identified in daily reports paired with his general attitude towards Edmonton Institution and its staff. Lloyds inability to operate at an acceptable level of competence after a 8 week period has been daily demonstrated and documented. I do not believe that Lloyd Kirlew will be able to develop the necessary skills to operate at a safe level within Edmonton Institution.*
>
> [*Sic* throughout]

[59] In his testimony at the hearing, Mr. Kostiw repeated his concerns, in particular the grievor's apparent inability to focus on important tasks, such as watching CXs who are with inmates; his inability to learn to do the count properly, despite a great deal of training; his inability to prioritize tasks; and his apparent regression in checking firearms.

[60] On January 8, 2015, Mr. Kostiw witnessed an incident in which the grievor, while carrying out his firearm check, pointed the gun in the direction of the hallway to the next control station. In cross-examination, it was determined that the weapon that had supposedly been pointed in the wrong direction, if loaded, was not chambered. In other words, although it contained ammunition, it could not have been fired without further steps being taken. Therefore, no accidental discharge could have occurred.

[61] Chris Saint, a correctional manager at EI in the segregation unit testified that he was asked by Ms. Contini to assess the grievor; the assessment was carried out on January 8, 2015. In his assessment, Mr. Saint notes a number of deficiencies in the grievor's performance, including the following: the weapons check takes too long, and is performed in an unsafe manner (same incident as above); deficient equipment (only two gas masks instead of eight) is neither noted nor corrected; the count is not

carried out properly, to the point that Mr. Kostiw and Mr. Saint have to take it over; the grievor opens doors without verifying who is going through.

[62] The grievor did not testify about the training with Mr. Kostiw. He did comment about the January 8, 2015, interaction with Mr. Kostiw and Mr. Saint, during which the numbers did not add up for the count. He stated that finally, Mr. Kostiw and Mr. Saint did the count together, excluding the grievor, thus sabotaging his efforts to get it right.

[63] Mr. Saint included the following comments in his assessment:

> *The aforementioned deficiencies have been identified in the past in action plans for Mr. Kirlew to address. It is apparent the work objectives and action plans given to Mr. Kirlew have not been internalized despite instruction as he was unable to demonstrate proficiency in the associated duties as a Correctional Officer I when I completed my assessment.*
>
> *I note the most serious concerns that I observed were pertaining to the Mr. Kirlew's handling of the firearm on post and opening doors without verification of whom was requesting passage through the areas within his control.*
>
> *Judging from Mr. Kirlew's training file he was provided sufficient opportunities and instruction to address deficiencies. I do not believe Mr. Kirlew is able to take over a post as a Correctional Officer I. He has not demonstrated the appropriate skills required.*
>
> *I note that although Mr. Kirlew has passed firearms instruction on the range with an instructor prior to OJT, his associated behaviour of completing a 7 point safety check in an unsafe manner in one control now lends to regression in required safety skill sets, and if permitted to work a post again, he will need to recertify with a weapons instructor.*
>
> [*Sic* throughout]

[64] In fact, the evidence shows that shortly after this assessment, the grievor was taken off post duty and placed in a briefing room to read directives until his dismissal approximately one month later. The grievor testified that he found that situation acutely embarrassing, as CXs came and went in this room, where they had email access, and saw him with nothing to do but read. During this time, Mr. Saint met with the grievor and a union representative, who spoke of a grievance that would be filed. The idea of a grievance did not perturb Mr. Saint, and he let the grievor know as much.

[65] The grievor filed a harassment complaint against Mr. Saint by way of a letter dated January 12, 2015, with further revisions in April and May 2015, after the grievor's dismissal on probation. In a report dated May 16, 2016, the investigator concluded that the complaint was unfounded.

[66] One element of the harassment complaint was that another CX, Frédéric Purtell, alleged that he had overheard Mr. Saint say: "Where is the f---ing [N-word]" ("the FN comment"), meaning the grievor, on the day of the assessment carried out by Mr. Saint, on January 8, 2015. At the hearing, Mr. Saint categorically denied having made such a remark, which he said was completely repugnant to him. He also produced an absence report showing that Mr. Purtell was on leave that day and therefore could not have witnessed such an incident.

[67] Mr. Purtell testified at the hearing. He is a CX-1 at EI. He has been working for the CSC since 2006 and at EI since 2008. He was involved with the union at the time that the grievor was in OJT but no longer is.

[68] On January 8, 2015 (according to the absence report produced by Mr. Saint), he was in fact on union leave, attending to union business at EI. He was walking by One-control on his way to make photocopies. He came across Mr. Saint and heard him say the FN comment. In his testimony, Mr. Whelan also stated that Mr. Purtell was probably at EI attending union business.

[69] Mr. Purtell was directed to an email, dated November 26, 2014, which he had sent to several union local members and that reads as follows:

> ***Lloyd Kirlew (2 wks OJT extension)***
>
> *A lot of staff are coming to ask me why is he back at work? Did he pull a race card? And so forth… All of which I do NOT know?*
>
> *Every officer that came up to me said and I quote: "HE'S F…… DANGEROUS"*
>
> *I told them I or the local are here to help the membership, I told them that a plan that was put in motion and that we would follow through.*
>
> *We have an officer that volunteered for the job, thanks Andrew. Andrew will be with him for the next 2 days until the meeting.*

> *Some of us will have to come to an understanding about this. I do NOT at this time have all the information. It is mostly sensitive and I can NOT speak about it to everyone due to privacy.*
>
> *Rest assured it is being well taken by myself, Sara and other key members.*

[70] Mr. Purtell stated that his email was sent to make the union executive aware of the situation. The goal was to help the grievor, and the email shows there was a plan to help him.

[71] It was established that "Andrew" in the email was Officer Wood. As stated earlier, Mr. Austin wrote a note that indicates that after one day, Mr. Wood no longer wished to volunteer. He found the grievor slow and confused. Mr. Purtell stated that he was not aware of this.

[72] Mr. Purtell stated that he felt sympathy for the grievor. EI had been a steep learning curve for him too, and he had been made very conscious of his (French) accent. He saw no signs that the grievor did not do his job carefully.

[73] In cross-examination, Mr. Purtell acknowledged that he had had some disagreements with Mr. Saint. He also acknowledged that he was not in an armed post and had not been for several periods. It was unclear whether he was in an armed post at the time the grievor was receiving his OJT. Mr. Purtell stated that he had worked in subcontrol G/H now and then during that time but could not recall the exact dates.

[74] Mr. Bernier was EI's warden from December 1, 2014, to October 4, 2016. He testified that was made aware of the grievor's lengthy OJT in mid-January 2015, following the incident in which the grievor had pointed a loaded firearm in a wrong direction. By that time, the grievor had received 11 weeks of OJT, and he was still not performing at a satisfactory level.

[75] Mr. Bernier discussed the case with the CSC's Labour Relations branch, with Mr. Gagné, then Acting Assistant Warden of Operations, and with others who had dealt with the grievor. His main concern was safety for the inmates and the employees. He decided to end the grievor's probation but not before speaking with Mr. Whelan, who confirmed that other employees did not feel safe with the grievor in the control post. According to Mr. Bernier, Mr. Whelan did not oppose the rejection on probation.

[76] At the hearing, when asked for his position on the grievor's rejection on probation, Mr. Whelan responded rather noncommittally that there was "no official position". He said that staff opinions were divided; some said that with time, the grievor might become competent, while others said that he would be better off in a medium- or minimum-security institution. Still others said that he should just "move along" and forget a career as correctional officer.

[77] Mr. Bernier testified as to his main concerns. In addition to firearm safety, the grievor seemed unable to multitask, that is, to handle effectively the different tasks in a control post, including checking firearms and equipment, answering the phone, operating the radio, watching the range, reacting to alerts, and opening and closing barriers.

[78] Mr. Bernier was aware in mid-January that the grievor had claimed that he had been subject to discrimination. He met with the grievor on January 28 to discuss this allegation. The grievor claimed he was being discriminated against because of his age, his Jamaican origin and accent, and his hair in dreadlocks.

[79] Mr. Bernier did not see the discrimination claims as having any basis. According to him, EI is very diversified, with staff of several ethnicities and races.

[80] Mr. Bernier was also aware that the grievor alleged that he was being harassed by being placed in a computer room and told to read directives instead of working control posts. Mr. Bernier stated that it happened from time to time that CXs would be removed from armed posts to do something else, such as read directives.

[81] On February 12, 2015, Mr. Bernier signed a letter of termination stating the following grounds:

> - *You did not successfully complete your on-the-job training despite being afforded an additional 10 weeks of training.*
>
> - *You have not demonstrated the skills needed to be able to take over posts at Edmonton Institution. Several areas of concern were discussed with you, including your inability to multitask, your inability to respond appropriately to the communication system. Your radio procedures, your speed of execution and your lack of confidence. You were afforded numerous remedial opportunities in order to improve in these areas in order to demonstrate your ability to apply*

> *knowledge in the work environment and perform your duties as a Correctional Officer.*
>
> • *Your inability to handle weapons, in that on January 9, 2015, you pointed a loaded weapon down a hallway while doing a weapons check.*

[82] Asked at the hearing to comment on the dismissal letter, the grievor made the following comments:

- About his inability to handle weapons: the grievor stated that the incident did not happen; he did the weapon check "perfectly fine", then put the weapon away.

- About not demonstrating the necessary skills: the grievor stated that this was not true. He added that the respondent seemed not to have taken into account the assessment done by Mr. Lorenson, which was positive.

[83] The grievor filed two grievances alleging discrimination, one during his OJT and the other once he had been dismissed. All the officers that came in after him had finished their OJT and had been placed in posts. He was the only one who had not secured a post. He was also the only one who was black, wore dreadlocks, and spoke with an accent.

[84] According to the grievor, the union had not done anything for him; nor had management, despite his letters to upper management. His conclusion was that the toxic atmosphere at EI prevented officers from talking, even if they knew something was wrong. EI was very racist and very discriminatory.

[85] In cross-examination, it was established that in addition to Ms. Squires and Mr. Saint, the grievor had made harassment complaints against the following persons: Mr. Austin, who had assessed him on December 10, 2014; Ms. Taylor, his immediate supervisor, who had assessed him on November 6 and 28, 2014; Mr. Gagné, who had assessed him on November 13 and 25, 2014; and Mr. Kostiw, who had trained him for two weeks in December 2014 and who had assessed him every day. The complaints against Ms. Squires and against Mr. Saint were investigated, and found not to be substantiated. The other complaints were dismissed without formal investigation.

A. TLS Enterprises Report

[86] During Mr. Whelan's testimony, the grievor introduced a report written at the CSC's request by TLS Enterprises ("the TLS report"). It concerned an independent assessment that was done following requests from the union and the membership because of ongoing and systematic harassment and bullying within EI.

[87] The respondent objected to the report, as it was done after the period covered by these grievances. Mr. Whelan indicated that the problems described in the report dated from a long time before it was prepared.

[88] The report's authors did not testify. Several witnesses were asked to comment on an answer found in Appendix C, "Summary of Results of Employee Interviews", to the following question: "Have you ever witnessed racial harassment or gender harassment?" According to the report, the responses fell into two equal groups: yes, racial and gender harassment had been witnessed, but racial harassment more so; and no, such comments were banter or black humour and were acceptable as a way of coping.

[89] I allowed the introduction of the report, but I have not given it any weight in my decision, since there was no examination or cross-examination of its authors. Moreover, given the small sampling of CXs, I cannot see how I could rely on any of its conclusions. I do, however, have regard for the various comments that were made by the witnesses regarding the presence of racial harassment in EI.

[90] When asked whether they had witnessed racial discrimination or harassment, the respondent's witnesses tended to deny that harassment, discrimination, and bullying took place, since those are entirely contrary to the CSC's code of conduct. If such behaviour occurred, it would be punished.

[91] The grievor stated for his part that EI was rife with harassment and discrimination. Mr. Whelan and Mr. Purtell agreed that there was harassment, discrimination, and bullying but that not everyone did it, just a core group of well-known bullies. Mr. Whelan commented that harassment did occur at EI. He added that given his position, he received many complaints. Some black officers had told him that there was discrimination. However, from his experience, he could not state that black officers would have more difficulty being promoted, but they did seem to come and go

at a higher rate than white officers.

[92] At the hearing, I asked the respondent for employment equity numbers for EI. The numbers were provided, and they show that there is some racial diversity among the staff, including the CXs. A table was provided that shows visible minority representation for the CX group at EI as of March 31, 2015. The representation is 11.1%, while "Workforce Availability" for visible minorities is 2.5%, according to the 2006 Census.

III. Summary of the arguments

A. For the respondent

[93] The deputy head has the authority to terminate the employment of an employee on probation under s. 62 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). Section 211 of the *Act* precludes referring to adjudication a grievance relating to a termination of employment under the *PSEA*. Consequently, an adjudicator has no jurisdiction over such a termination, unless the grievor can establish that the dismissal was in fact a sham or camouflage, and the employer did not have employment-related concerns (see *Jacmain v. Attorney General (Canada)*, [1978] 2 SCR 15).

[94] Although the *Act* has been through several incarnations, the reasoning in *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.) still applies. An adjudicator is entitled to consider whether a rejection on probation was done in good faith, but he or she loses jurisdiction as soon as there is satisfactory evidence "… that the employer's representatives have acted, in good faith, on the ground that they were dissatisfied with the suitability of the employee for the position." As established in *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, the burden is on the grievor to show "… that the termination of employment was a contrived reliance on the new *PSEA*, a sham or a camouflage."

[95] In this case, the respondent thoroughly documented the OJT and the deficiencies that were noted in the assessments. It was concerned by the safety considerations that the deficiencies entailed, including the grievor not reviewing post orders, not communicating effectively on the radio, not performing the firearms check properly, and not attending to a PPA alert. The respondent gave him a second chance by continuing the OJT after November 24, 2014, when a first recommendation of

dismissal had been made. Several of the observation reports were from rank-and-file officers, not managers. They all brought up the same areas of concern: the grievor's trouble with speed, with managing inmate movement, with firearms checks, with basic knowledge, and with radio communications. They also indicated his difficulty accepting and integrating constructive feedback.

[96] Perhaps the most important testimony was that of Mr. Kostiw. The union had chosen him to coach the grievor. He had a positive outlook when he started the coaching. He was responsible for the grievor's OJT for two weeks. He was an experienced officer. His reports concluded that the grievor's performance deficiencies were too numerous to overcome.

[97] The respondent's good faith is established by the evidence. The respondent relied on numerous reports, not on single incidents. It was clear that the grievor was not suitable for the position. Therefore, the Board has no jurisdiction to adjudicate this grievance.

[98] On the issue of discrimination, the respondent's counsel conceded that a finding of discrimination would give the Board jurisdiction to review the dismissal. However, the grievor had to establish a link between discrimination on prohibited grounds and the dismissal, which he did not do.

[99] Unpleasant things might have happened in the workplace, but they did not amount to discrimination being a factor in the dismissal. The deficiencies that had been identified were real, and they were not linked to discrimination. No *prima facie* case was established, as required by the jurisprudence (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 ("*O'Malley*") and *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204).

[100] Even if the grievor's allegations of untoward behaviour by some officers were true, they did not play a determinative role in his assessments nor in management's decision to dismiss him. He claimed that he was treated differently. From all the evidence in the reports, it seems that this was because he was not functioning at the expected level. That was why the OJT was prolonged.

[101] There were certain credibility issues with the grievor's account of some events. He had filed harassment complaints against all his managers; none was founded. Two had been thoroughly investigated by outside investigators. The grievor denied pointing his firearm in the wrong direction while inspecting it on January 8, 2015. Yet, two seasoned officers (Mr. Saint and Mr. Kostiw) had given the same account that he had done so. After training the grievor for 10 days at the union's request, Mr. Kostiw would have had no reason to undermine the grievor.

[102] The grievor also stated that Mr. Saint and Mr. Kostiw had sabotaged the count to make him look bad. This made no sense. The count is of fundamental importance for EI, and two senior officers would not sabotage it to make a trainee look bad. Moreover, the problem with the count had been noted in several other reports, authored by other officers.

[103] The grievor did not report discrimination or harassment to his managers until the end of January 2015, when he knew that he would be dismissed. In his testimony, he presented no real evidence of discrimination, except for his allegation of a comment made by Mr. Saint and overheard by Mr. Purtell. The allegation had little credibility. Mr. Saint categorically denied it.

[104] To conclude, the evidence of discrimination was basically innuendos, not real evidence. There was no indication whatsoever that Mr. Bernier's decision was tainted by discrimination. Rather, it was based on several reports, and notably, the report of Mr. Kostiw, a trainer selected by both management and the union, which concluded as follows: "I do not believe that Lloyd Kirlew will be able to develop the necessary skills to operate at a safe level within Edmonton institution."

B. <u>For the grievor</u>

[105] The issue in this case is not whether racial discrimination was the cause of the dismissal on probation. Rather, the issue is whether racial discrimination was a factor in the dismissal. The evidence shows that it was.

[106] The grievor testified that his race and ethnicity had been mocked. He had been humiliated in January 2015 when for three weeks, he had to sit in the briefing room and read commissioner's directives, where everyone could see him.

[107] The grievor had reported discrimination as early as November 2014, yet the CSC did nothing to address it. At no point did any manager really listen to the grievor to understand what he was going through. That in itself was discriminatory behaviour.

[108] Racial discrimination is often circumstantial, and not directly manifest. It is well established in the case law that there need not be any intention for discrimination to exist.

[109] The grievor cited *Brown v. Commissioner of Correctional Service of Canada*, 2012 PSST 17 at para. 72, for the proposition that "… a complainant may introduce evidence of general personnel practices or of the overall composition of the employer's workforce to demonstrate that the employer is engaging in a pattern or standard practice of discrimination."

[110] There were examples of the grievor being treated differently. He was separated from the other two trainees. Ms. Squires was condescending with him. He clearly recalled an incident in which she yelled at him and kept making buzzer sounds for every answer he gave. Mr. Saint was dismissive when the grievor and his union representative said he would file a grievance.

[111] In the incident reported by Mr. Purtell, in which Mr. Saint allegedly made the FN comment, credibility was on Mr. Purtell's side. Mr. Saint obviously had an incentive to lie about the incident, while Mr. Purtell had nothing to gain by inventing such an interaction.

[112] It was clear that EI was a toxic work environment, as the TLS report showed. Mr. Whelan testified that the union and its members had concerns dating back some time, certainly including when the grievor was doing his OJT. The respondent's witnesses denied the significant harassment problems that had been confirmed by Mr. Whelan and the grievor. This in itself is worrisome. If the decision makers were unwilling to acknowledge the harassment and discrimination, then either at best, they were unaware of the problem, or at worst, they were part of it. This would tend to confirm the discrimination.

[113] There was overtly discriminatory behaviour, such as Mr. Saint's FN comment and another CX being overheard by fellow officers saying the N-word to designate the grievor. The TLS report showed the general discriminatory atmosphere.

Keeping the grievor in the briefing room for three weeks showed discrimination. No other officer or trainee was treated like that. The totality of the evidence amounted to solid circumstantial evidence of discrimination based on race.

IV. Confidentiality order

[114] At the hearing, the respondent's counsel asked to have two documents sealed: the investigation report on the grievor's harassment complaint against Mr. Saint, and the investigation report on the harassment complaint against Ms. Squires. The respondent also wanted to redact certain items in the material before the Board. I asked for written submissions on the request and reserved my decision. Submissions were received from the respondent on July 20, 2017. On July 6, 2017, the bargaining agent had indicated that it had no objection to the request for the confidentiality order from the respondent and that it would not present any further submissions on the matter.

[115] In its submissions, the respondent asked for the redaction of an inmate's name in one of the reports on the grievor's OJT. That name had already been redacted in the version of the document submitted to the Board at the hearing. The name is entirely irrelevant to the context of this hearing. Privacy concerns support its redaction. Since the name was already redacted when that document was presented to the Board, no further order is necessary.

[116] At the hearing, I requested employment equity numbers for EI, which were provided on consent. In addition to the table already mentioned, the document included the number of graduates of the Core Training Program hired by EI in December 2014 (the group that followed the grievor's recruitment) who had self-disclosed as being a member of one of the equity groups. Given the small numbers, the respondent asked that the numbers be redacted to ensure confidentiality.

[117] I agree with the respondent's request to redact the employment equity figures provided at the hearing. Employees self-disclose on belonging to different target groups identified in the *Employment Equity Act* (S.C. 1995, c. 44), on the promise of confidentiality. There is no reason to breach that confidentiality. In any event, the document on the graduates of the Core Training program being hired at EI in December 2014, given the small total number of employees concerned, has not been given any weight in this decision.

[118] The respondent asked that the following exhibits be sealed:

- Exhibit E-1, tab 33, the report of the investigation into the harassment complaint against Mr. Saint;
- Exhibit E-1, tab 34, the report of the investigation into the harassment complaint against Ms. Squires;
- Exhibit E-5, the statement of allegations against Mr. Saint;
- Exhibit E-6, the harassment investigator's notes of the interview of the grievor concerning his allegations about Mr. Saint; and
- Exhibit E-7, a harassment complaint against a CX.

[119] The respondent contends that these are confidential documents that form part of the harassment complaint process, which is intended to be confidential. The persons involved did not appear before the Board, and they are entitled to have their privacy interests protected.

[120] The test to be applied to determine if restrictions to the public's access to exhibits should be made is based on the jurisprudence developed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835; *R. v. Mentuck*, 2001 SCC 76; and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. In *N.J. v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 129 at para. 48, the test, as it applies to the Board, was summarized in the following terms:

> ***48*** *As noted earlier, it is recognized that the open court principle applies to courts and quasi-judicial tribunals. It is also recognized that, in some instances, limits could be imposed on the accessibility to proceedings. The Supreme Court of Canada developed the Dagenais/Mentuck test, which helps when deciding whether restrictions should be imposed on the open court principle. The Dagenais/Mentuck test was reformulated in* Sierra Club of Canada *as follows*:
>
> …
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest … in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the … order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context

> includes the public interest in open and accessible court proceedings.

[121] The respondent cited two decisions, *Albano v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 79, by the Board, and *Martin-Ivie v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 40, by its predecessor the Public Service Labour Relations Board, to show that the Board has ordered that unredacted versions of reports be sealed when they deal with employees who were not represented at the hearing and whose safety, reputation, or privacy interest may be threatened by the public having access to these reports, when the employees have not had the opportunity to present their points of view.

[122] In requesting the sealing of the five exhibits enumerated at paragraph 115, the respondent made the following argument:

> *Each of the above documents is a confidential document that forms part of the harassment complaint process. Pursuant to the Treasury Board Policy on Harassment Prevention and Resolution, the harassment complaint process is intended to be confidential, with information shared on a need to know basis only. The information contained in the above exhibits details allegations of harassment made against witnesses and other non-parties to the adjudication. The nature of the allegations are such that they are highly prejudicial to the interests of the named individuals. The rights of the parties to have harassment investigated and adjudicated in a confidential context would be prejudiced if these documents remain on a publicly accessible Board file, As non-parties to the adjudication, those individuals do not have the ability ot [sic] defend their interests or their reputations. The Board has previously ruled that similar investigatory documents are harmful to privacy interests and ought to be sealed.*

[123] In *Albano*, the adjudicator ordered the sealing of the unredacted investigation report of an incident in which three CXs were involved in the severe mistreatment of an inmate after an incident occurred with another inmate. Those CXs did not testify at the hearing. Obviously, the reputation and safety of both the officers and the inmates were important considerations in weighing the open court principle. In *Martin-Ivie*, the adjudicator justified as follows the sealing of an investigation report about the unauthorized disclosure of protected information that concerned not only the grievor but also three other employees:

> ***4*** *As those employees were not part of the complaint before me, I have concluded that, after a review of the report, to allow it to be open to the public would cause harm to the others mentioned in it. The information, if left unsealed, could be harmful to the reputations of people who are not involved in the complaint before me and who have not agreed to the publication of the findings of the investigation into their activities or had the opportunity to defend themselves before me. Furthermore, it is not in the best interests of the Public Service Labour Relations Board ("the Board"), or those who appear before it, to publish more personal information than required for the purposes of this decision. For those reasons, and consistent with the "Dagenais/Mentuck" test, I ordered Exhibit 3 sealed. A redacted version of the report, filed as Exhibit 1, Tab E, will not be sealed. This will satisfy the need of this Board to be open, transparent and accessible in its proceedings as they relate to the complaint before me.*

[124] The documents that the respondent has asked to have sealed do not raise similar concerns. Exhibit E-1, tab 33, is the investigation report on the grievor's harassment complaint against Mr. Saint. Both the grievor and Mr. Saint testified at the hearing, and each had ample opportunity to present their respective points of view. Other persons are mentioned in the report, some of whom also testified at the hearing. Others did not, but there is nothing damaging to anyone's reputation. Nor is there any information that was not also discussed at the hearing, i.e., the assessment of the grievor and the decisions made when managing the OJT. I understand that the harassment investigation is confidential, but there is nothing confidential in the report.

[125] The same comments apply to Exhibit E-1, tab 34, which is the investigation report on the grievor's harassment complaint against Ms. Squires. She testified at the hearing. Nothing in the report is damaging to anyone's reputation or could raise safety concerns. Again, I do not see confidentiality being a reason to go against the open court principle, since nothing in the report was not also discussed at the hearing.

[126] Exhibit E-5 is a statement of allegations the grievor made in his harassment complaint against Mr. Saint. I fail to see why it should be sealed. It deals with several incidents that were brought up at the hearing. The investigation concluded that those allegations were not sufficient to make a harassment finding.

[127] Exhibit E-6 is the interview notes. Again, it deals with evidence that was before me and that involved the grievor and Mr. Saint. I fail to see any harm arising by keeping the document public. It does no harm to anyone's reputation, and both the grievor and Mr. Saint testified at length before me about the events it covers.

[128] Exhibit E-7 is the grievor's complaint against a CX who did not testify before me about an incident with the count. I have not named that officer in my decision, and I believe the complaint is an attack against this officer's reputation that the officer has not had the opportunity to answer. I believe redacting the name of this officer is sufficient to protect the officer's interests while maintaining the open court principle.

V. Reasons

[129] The Board does not have jurisdiction to hear a grievance against a dismissal during probation. The grievor's dismissal was done under s. 62(1) of the *PSEA*, which provides that the deputy head of an organization, including the Correctional Service of Canada, may notify an employee on probation that his or her employment will be terminated at the end of the designated notice period. According to s. 211(a) of the *Act*, individual grievances about terminations of employment made under the *PSEA* cannot be referred to the Board for adjudication.

[130] However, it has long been established (see *Jacmain* and *Penner*) and followed by the Board and its predecessors (see *Tello* and *Warman v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 103) that an adjudicator will have jurisdiction over a dismissal during probation if the grievor can establish that the termination was done in bad faith or was a contrived reliance on the *PSEA*. To determine if that is the case, the adjudicator may examine a dismissal on probation to determine if it is a sham or a camouflage or was done in bad faith. The respondent's counsel conceded that if discrimination were found, it would be an example of a contrived reliance on the *PSEA*, and the dismissal on probation would not be valid. The grievor's counsel argued that a prohibited ground of discrimination need only be shown to have been a factor in the dismissal, and not the only cause, for the dismissal to be illegal.

[131] In order for the Board to make a finding that discrimination was a factor in the his training and assessment, as he contends, the grievor must first establish a *prima facie* case of discrimination; that is, present evidence that covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in his favour in

the absence of an answer from the employer (see *O'Malley*). In determining whether a *prima facie* case has been established, the respondent's answer to the allegations should not be taken into account (see *Lincoln* at para. 22).

[132] In the present case, the grievor would need to show that the grounds of discrimination that he claimed, which were age, race, and ethnic origin, were factors in his adverse treatment (his prolonged OJT and his dismissal). The grievor raised several alleged instances of discrimination, which I will now address.

[133] I have already stated that I do not give weight to the TLS report, as its evidence was not tested before me. I do note, however, that some of the witnesses spoke of racial harassment occurring at EI. In itself, this does not show that the grievor's difficulties throughout his training were due to discrimination. There are employees of belonging to visible minorities at EI, as the table submitted by the respondent at my request confirms. The witnesses before me all condemned racism. Mr. Whelan did report that some black officers had complained to him about racist remarks, but this alleged racism had not prevented them from securing and keeping their employment at EI. I have no trouble recognizing that racism still exists in Canadian society. That does not mean that discrimination played a role in assessing the grievor. More than a bald assertion is required.

[134] The grievor cited *Brown*, a decision of the former Public Service Staffing Tribunal, for the proposition that circumstantial evidence may be accepted as evidence to infer that discrimination probably occurred. In that decision, the Tribunal ruled as follows that in the end, there was insufficient evidence to show that discrimination was a factor in the respondent's determination that the complainant had failed to qualify for the staffing process:

> *82. In the Tribunal's view, the complainant's circumstantial evidence is insufficient to lead to a finding that discriminatory systemic barriers exist for members of visible minority groups at CSC. Even if this evidence was sufficient to establish that systemic barriers to the advancement of visible minority employees exist at CSC, the complainant has not established a link between his evidence and any evidence of individual discrimination in his case. The complainant has not adduced any evidence that would establish or lead to the inference that his race or colour or ethnic origin were factors in the respondent's determination that he did not achieve the pass mark for two of the essential qualifications. He has not*

> *challenged the assessment board's determination that he did not meet the two essential qualifications. None of his evidence relates to discrimination in the appointment process that is the subject of his complaint.*
>
> [Emphasis added]

[135] The grievor spoke of his age as a factor of discrimination. It was established that he was 49 years old when he started his OJT. In his testimony, he offered no example of age-based discrimination.

[136] The grievor spoke of being discriminated against for being of Jamaican origin, and his only example was of people allegedly mocking his accent when they spoke to him on the radio. I have no reason to doubt that those events occurred. The grievor does have an accent. His recounting of the imitation felt genuine.

[137] The grievor felt belittled on the first day when Ms. Squires talked about his facial hair. She did not deny making such a remark but strongly denied doing it in front of someone else. There was no other evidence that someone had made a comment about another bearded man wearing a turban who had since left EI. The grievor's reaction to the facial hair comment was to explain that he had shaved the night before because he had acquired that habit at the RCMP depot. Mr. Whelan testified that Ms. Squires could be quite strict, which was one of the reasons he thought others should be involved in the training, as they were.

[138] Mr. Purtell testified about hearing Mr. Saint making the FN comment. Mr. Saint categorically denied it. The denial might have been a little too strong and was accompanied by an absence report for Mr. Purtell that was in fact meaningless, since it showed that he had been on union leave. As Mr. Whelan testified, union leave was granted to carry out union business. Mr. Purtell, who dealt with grievance files, could well have been at EI that day to deal with files that remained there. I find it possible that the comment was made and was overheard.

[139] There was also an incident of another officer not cooperating in providing the numbers for the count and being overheard saying the N-word.

[140] Finally, the grievor complained of being placed in a humiliating situation for the last three weeks of his employment, when he was in the computer room where other officers came and went to check their emails and his only task was to read

Commissioner's Directives.

[141] Even if these incidents (the FN comment, the mocking of his accent, the facial hair comment, one officer causing trouble with the count and using the N-word, reading directives for three weeks) are true, I do not believe that they amount to evidence of discrimination as a factor in the grievor's training and assessment. Those facts do not meet the test as set in *O'Malley* or *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, for *prima facie* discrimination. To establish *prima facie* discrimination, the grievor needed to show 1) that he has a characteristic that is a prohibited ground of discrimination under the CHRA, 2) that he suffered adverse treatment, and 3) that there was a link between the two. It is this third criterion that is not met, as I find that even if these alleged facts are believed, they do not establish a connection between the adverse treatment, be it the length of the OJT or the dismissal on probation, and the grievor's age, race or ethnic origin.

[142] Furthermore, even if I had found that the grievor's allegations were sufficient to establish a *prima facie* case of discrimination, the respondent led evidence that convincingly demonstrates that his probation was terminated because of the extensive deficiencies in his performance and that the grounds of discrimination that he has invoked were not in any way factors in the decision to end his employment.

[143] The respondent established that it had major concerns with the grievor's work performance. I note that the grievor did not challenge a number of the statements found in the reports, which were that he did not read the post directives, he had trouble multitasking, he did not react to personal alerts, he had trouble with the counts, and he believed he could figure things out instead of listening attentively to instructions. At no time during his OJT or before me at the hearing did he acknowledge any deficiency in his performance. There were many deficiencies reported by many individuals. I found in particular that Mr. Kostiw's testimony was straightforward and convincing. He had a positive attitude when he began working with the grievor and invested a great deal of time and effort in his OJT, but ultimately concluded that he was not suited to that employment. There is ample evidence to support that conclusion.

[144] Many people, besides Ms. Squires, Mr. Saint, and the officer involved in the count event, participated in the grievor's OJT and assessment. They all came to the same conclusion, which was that the grievor could not safely handle the job of a CX-1.

[145] I note that efforts were made to help him, especially by Mr. Kostiw; and EI as an institution had no interest in seeing him fail, as Mr. Bernier, Ms. Contini, and Ms. Squires testified. EI does have a diversified workforce, and the grievor was offered an indeterminate position following his core training.

[146] Ms. Contini was ready to have him dismissed on November 24, 2014, and a decision was made to give him another chance and further training. That decision in itself contradicts the idea that discriminatory factors were at play. The willingness of management to continue the training, and the efforts made by several people show an intent to help, not hinder, the grievor's employment at EI.

[147] There was one rather positive report, by Officer Lorenson, which the grievor emphasized in his evidence and arguments. I have no doubt that the grievor did learn some tasks during his OJT. Mr. Kostiw also noted positive things in his reports. However, these positive comments were far outweighed by the negative reports. The respondent's concern for the safety of inmates and staff remained and was justified by the numerous concerns expressed by different officers.

[148] The grievor took the position that prolonging his OJT was itself a manifestation of discrimination. I find it entirely improbable that so many people would have conspired to make him fail. Once the letter of offer was issued and once his OJT had started, the respondent and his fellow employees gave him a fair chance to succeed. Again, there might have been some inappropriate comments, but they would not be sufficient to find that any discriminatory grounds played a role in management's decision, after 11 weeks of training instead of 3, to end his probation.

[149] As for his assignment to the computer room near the end of his employment, I have no trouble imagining this was an embarrassing situation, and Mr. Bernier himself, though he said this was not the only time this had been done, did concede that the matter could have been handled better. However, I am satisfied that the discriminatory grounds invoked were not factors in this assignment. His supervisors at this point did not know what to do with an employee who could not be in an armed

post. No doubt it would have been preferable to be placed in stores, as had happened in November, but there was nothing to indicate that the grievor's race or ethnic origin had any link to this treatment.

[150] Similarly, the alleged teasing about his accent was not related to his assessments. The deficiencies noted in his radio use dealt with his tone of voice, his improper use of the codes, and the lack of clarity in his communications. Those remarks had nothing to do with his accent but instead with his handling of the radio.

[151] The grievor disputed the statement in the termination letter about pointing a loaded gun down a hallway. I believe Mr. Kostiw's statement that it occurred, as I found his testimony objective and fair. I understand the grievor's point that a "loaded" gun does not necessarily mean that it would discharge, as the ammunition needs to be chambered. However, as Mr. Kostiw stated, the point of checking weapons is to observe their state, and at all times, safety is paramount. A gun is always pointed in a safe direction while being checked, precisely because it is being checked and its state of readiness is unknown.

[152] I find that the grievor has not established that prohibited grounds of discrimination were factors in his assessment during his OJT or in his dismissal. Accordingly, he has not met his burden of showing that the dismissal on probation was done in bad faith or was a contrived reliance on the *PSEA*. I find that the respondent had valid employment-related reasons to terminate the grievor during his probation period. Therefore, the Board does not have jurisdiction to decide the grievance relating to dismissal on probation.

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

(The Order appears on the next page)

VI. Order

[154] Grievance 566-02-11249, on discrimination, is dismissed.

[155] Grievance 566-02-11250, on the termination during the grievor's probationary period, is dismissed for want of jurisdiction.

[156] The following redactions have been made in the Board's file:

- In the employment equity table: the number of self-reporting graduates of the core training program hired by EI.
- In Exhibit E-7: the name of a CX-2.

September 26, 2017.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board