Date: 20200323

Files: 566-02-14455

Citation: **2020 FPSLREB 29**

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

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BETWEEN

JAMES KOT

Grievor

and

DEPUTY HEAD
(Royal Canadian Mounted Police)

Employer

Indexed as
Kot v. Deputy Head (Royal Canadian Mounted Police)

In the matter of an individual grievance referred to adjudication

Before: Linda Gobeil, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Himself

For the Employer: Joel Stelpstra, counsel

Heard at Ottawa, Ontario,
June 17 to 20 and July 2 and 3, 2019.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] In September 2017, the Public Service Alliance of Canada (“the bargaining agent”) referred the grievance to the Federal Public Sector Labour Relations and Employment Board (“the Board”). The grievance alleged that when the Royal Canadian Mounted Police (“the employer” or RCMP) terminated the employment of James Kot (“the grievor”) while he was on probation, it violated s. 209(1) (b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the *Act*”). As a remedy, the grievor asked to be reinstated.

[2] In January 2019, counsel for the grievor informed the Board that she was no longer representing him. The grievor was therefore representing himself at the hearing.

[3] The termination-on-probation letter, dated April 28, 2017, provided reasons and specified that the grievor received pay in lieu of notice. It reads as follows:

> …
>
> *TERMINATION ON PROBATION*
>
> *Dear Mr. Kot:*
>
> *As indicated in your letter of offer, your appointment to the Public Service on May 9, 2016 was subject to a 12-month probationary period in accordance with the governing Treasury Board Regulations.*
>
> *During the course of your employment with the RCMP, you received a written reprimand on August 10, 2016 as a result of refusing to follow instructions and making disrespectful comments to your supervisor. Further to this event, on March 9, 2017, the employer was made aware of a complaint from a* member of the public pertaining to your conduct in a private matter in relation to your persistent and *inappropriate communication with the company. You contacted the company repeatedly from your RCMP email and telephone, pressing the company to cease its alleged “illegal activity”. You were asked by the owner of the company to stop making further veiled threats towards the company and future developments, but you continued to communicate with the company. Your behaviour was inappropriate and does not reflect the core values of the RCMP.*
>
> *As a Public Service Employee of the RCMP, you are required to conduct yourself in a manner consistent with the values and expected behaviours as set out in the Values and Ethics Code for*

> *the Public Sector and the Code of Conduct for Public Service Employees of the RCMP. Your failure to meet these requirements has led to the determination that you are not suitable for your position.*
>
> *Therefore, in accordance with the authority delegated to me by the Commissioner, and under section 62 of the Public Service Employment Act, you are hereby terminated during the probationary period from your position of Laboratory Attendant, due to your unsuitability.*
>
> *You are relieved of all your duties effective immediately and should not report to the office from this date onward. In accordance with Section 62(2) of the* Public Service Employment Act, *you will, however, benefit from one [sic] month notice period and will be paid until May 26, 2017 inclusively.*
>
> *You have the right to file a grievance. Should you wish to do so, you may contact the USGE local 70005 at* ***local_70005@rcmp-grc.gc.ca***
>
> *Yours sincerely,*
>
> *C/Supt. Wade Oldford*
>
> *Acting Assistant Commissioner, Forensic Science and Identification Services*
>
> [Emphasis in the original]

…

[4] The hearing lasted 6 days. As indicated, the grievor represented himself. As will be detailed later in this decision, the employer filed 4 exhibits, with attachments, and the grievor filed 50.

II. Disclosure of documents

[5] Since throughout the hearing, the grievor maintained that he did not receive all the relevant documents, I believe that it is important at the outset of this decision to review the chronology of the document disclosure events in this matter.

[6] The hearing was originally scheduled for April 16 to 20, 2018. In preparation, the bargaining agent's representative at that time, made a request for documents. The employer sent them. In March 2018, the grievor made an access-to-information (ATIP) request under the *Access to Information Act* (R.S.C., 1985, c. A-1), which provided him with additional documents. The hearing was postponed following the death of the death of the grievor's father. It was rescheduled for October 22 to 26, 2018.

[7] On September 25, 2018, the grievor's counsel at that time contacted the employer's counsel about the documents that the grievor had received in March 2018.

Counsel for the grievor asked that 12 pages of them, which had been redacted, be provided “clean”. The employer’s counsel provided the clean versions to the grievor’s counsel by October 2018.

[8] On October 16, 2018, at my request, a pre-hearing conference was held, at which the grievor’s counsel requested a postponement of the upcoming hearing because of medical concerns. The request was granted, but no mention of documents was made; nor was any additional request made for them.

[9] New hearing dates were set for June 17 to 21, 2019. On February 28, 2019, the grievor made a second ATIP request for documents. On March 25, 2019, he emailed the employer’s counsel, requesting an unredacted version of the documents. Counsel replied that the documents he had received were not “redacted” but that the format was “bizarre”.

[10] On April 8, 2019, as per the Board’s document exchange policy, the employer sent a list of all documents that might be relevant to the June 2019 hearing. On April 15, 2019, the grievor asked the employer’s counsel for other documents that were not on the list. On April 29, 2019, the grievor confirmed that he had received the requested documents from the employer’s counsel.

[11] On May 30, 2019, the grievor asked for a new set of documents, including on the mental health of one of the employer’s proposed witnesses, and asked if a workplace study was available. Counsel informed him that he believed that the request was not relevant.

[12] On June 11, 2019, during another pre-hearing conference involving the grievor and the employer, I made the following order:

> *The Board orders that the respondent provide to the grievor, **by 12:00p.m. EST on June 13, 2019,** all documents (including notes, emails) on the grievor’s personnel file as well all documents (including notes, emails) covering the period of April 2016 to January 2017 referring to a probationary period for the grievor.*
>
> [Emphasis in the original]

[13] Counsel for the employer did not object to the order; he indicated that those documents had already been produced.

[14] The hearing started on June 17, 2019. On the morning of June 20, the grievor indicated that just the night before, he received 268 pages in response to his February 28, 2019, ATIP request. Counsel for the employer argued that the documents were essentially the same as those that had already been provided to the grievor or his former counsel. I granted the grievor an adjournment to allow him sufficient time to review them and to see if he had not already received any of them.

[15] At the resumption of the hearing on July 2, 2019, the grievor indicated that the 268 pages contained 11 emails that he had not seen before. He wanted to adduce 9 of them into evidence, which I allowed (Exhibits BA-41 to 50). I also allowed him to comment on them.

[16] In his comments, the grievor insisted that the employer did not call the authors of the emails, especially Diane Brady, Staffing Advisor with Human Resources (HR), and Sophie Melanson, Human Resources Assistant, as witnesses to explain how they handled delivering an amended offer letter to him dated December 20, 2016, which was emailed to him on January 4, 2017.

[17] The grievor pointed out that in her email dated June 19, 2017, Ms. Brady admitted that neither she nor Ms. Melanson had explained the content of the amended offer letter to him. He insisted that nobody told him about, let alone explained to him, the inclusion of the paragraphs in the amended letter dealing with a probation period and an oath affirmation.

[18] The employer's counsel admitted and it is not in dispute that nobody from the RCMP pointed out or explained to the grievor the addition of the probation paragraph in the amended offer letter of December 20, 2016.

[19] At the end of the hearing, I went over this chronology with both parties. No objection was raised about its accuracy. Therefore, I am satisfied that in a timely fashion, the grievor received the documents that he asked for or those that might have been relevant to the hearing.

III. Background and the employer's objection to jurisdiction

[20] The facts leading to the grievance can be summarized as follows.

[21] The grievor was an employee of the Department of Transport (DOT). In 2013, he was informed that his position was no longer required. He was laid off in May 2015, after two years of education leave, per his collective agreement. He was then placed on a laid-off priority list in accordance with then s. 41(4) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, and 13; *PSEA*). The RCMP hired him as a civilian employee through an offer letter dated April 28, 2016. His start date was May 9, 2016.

[22] The original offer letter did not refer to a probation period or to an oath because in the RCMP's view at that time, the grievor was considered as hired from within the public service, and his salary was calculated accordingly. However, after the grievor made queries about his salary, the employer realized in fall 2016 that he should have been considered as hired from outside the public service, since he had been laid off by his previous employer and had laid-off priority status when the RCMP hired him (Exhibits E-7, BA-47, and BA-48).

[23] In the circumstances, since the grievor was now considered as hired from outside the public service, the employer agreed that he was entitled to a salary above the minimum. On January 4, 2017, it emailed him the amended offer letter, which included not only a salary above the minimum but also paragraphs about him being on probation and needing to take an oath.

[24] Things started to become difficult between the grievor and his then-supervisor from the start. In February 2017, a series of events led to his rejection on probation on April 28, 2017. It is not contested that he received compensation in lieu of notice under s. 62(2) of the *PSEA*.

[25] The grievor filed a grievance against his rejection on probation.

[26] On October 27, 2017, the employer objected to the Board's jurisdiction to hear the grievance because the grievor had been rejected on probation under s. 62(1) of the *PSEA* and because s. 211 of the *Act* prevents the Board from having jurisdiction over a termination effected under the *PSEA*.

IV. Summary of the evidence

[27] The grievor's request for the exclusion of witnesses was granted.

A. **For the employer**

[28] In his opening statement, counsel for the employer maintained that I do not have jurisdiction to hear the grievance since it involves a rejection on probation under s. 62 of the *PSEA* and not a termination under the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*). Counsel for the employer insisted that the grievor was not suitable to work for the RCMP and that while the evidence would demonstrate culpable behaviour on his part; it still would not make the rejection disguised discipline.

[29] The employer reviewed the grievor's employment history and stated that the DOT had laid him off. As a result, he ended up on a priority list of laid-off persons, and the employer hired him as one in April 2016, with a starting date of May 9, 2016. According to counsel for the employer, the fact that the grievor had been on a priority list following his layoff meant that he was hired from outside the public service. Therefore, the rules to apply were different than had he been hired via an internal appointment from inside the public service.

[30] Counsel for the employer stated that the grievor first received an offer letter on April 28, 2016, from the RCMP that was intended for an internal appointment. As a consequence, it referred to neither a probation period nor an oath. Moreover, since the grievor was considered hired from inside the public service, his salary was calculated accordingly. Later, in November 2016, when the grievor raised the issue that his salary should be higher, the employer realized that an amended offer letter should be issued that would reflect not only the right salary but also contain references to the fact that the grievor was on probation for one year from his start date with the RCMP.

[31] Counsel for the employer maintained that a probation period is statutory and that it cannot be waived, so it is immaterial whether it was mentioned in the initial offer letter.

[32] Counsel for the employer indicated that the evidence would show that the grievor was hired as a laboratory assistant, classified at the EG-1 group and level, from a laid-off priority list. From the beginning, he did not take directions well from his then-supervisor, Maureen Proulx, Manager of the Evidence Management Section of the National Forensic Laboratory Service in Ottawa. It resulted in an incident on July

22, 2016, in which he sent her a disrespectful email, for which he received a reprimand letter on August 10, 2016, from Ms. Proulx's supervisor, Francois Proulx, general manager of the National Laboratory Services in Ottawa ("Mr. F. Proulx"). Counsel for the employer stated that after that incident, Ms. Proulx left the workplace for two weeks on sick leave and then on her return did not want to supervise the grievor any longer.

[33] Counsel for the employer indicated that the incident with Ms. Proulx was not relevant to the decision to reject the grievor during his probation. According to the employer, the events of February 2017 were the reason for the rejection.

[34] Counsel for the employer stated that the evidence would demonstrate that in March 2017, the RCMP received a complaint from a member of the public about the grievor's conduct. The complaint stated that he had been hostile and aggressive in his personal dispute with that person and his wife and that several times, he communicated using the employer's phone and his employer email address, which led the recipients to believe that he was acting as a member of the RCMP.

[35] Counsel for the employer stated that the evidence would demonstrate that by his repeated actions, the grievor brought his employer disrepute, which was incompatible with the RCMP's mandate. In the circumstances, it had no choice but to reject him on probation, for which it had a bona fide reason. Since it was done under s. 62 of the *PSEA*, counsel for the employer maintained that I did not have jurisdiction to deal with the grievance.

[36] Four witnesses testified for the employer. Wade Oldford, acting Assistant Commissioner in charge of Forensic Science and Identification Services, was the first. He testified for a total of 3 hours, including 1 hour and 15 minutes of cross-examination.

[37] As of the events at issue, Mr. Oldford was also Director General, National Forensic Laboratory Services. He explained that in that position, he oversaw the RCMP's three public laboratories, which are in Ottawa, Edmonton and Vancouver. He explained that when the grievor joined the RCMP, he reported to the site operation manager in the Evidence Management unit, Ms. Proulx, who in turn reported to the Ottawa laboratory's general manager, Mr. F. Proulx, who in turn reported to Michael Rannie, Mr. Oldford was Mr. Rannie's direct supervisor. Mr. Oldford explained that

those who work in the Evidence Management unit at the laboratories are the custodians of evidence that comes to the RCMP. After triage, the evidence is routed to specific RCMP sections, such as DNA or Firearms.

[38] The hearing was the first time Mr. Oldford met the grievor. He had never before seen the grievor. He indicated that he first heard about the grievor in the spring of 2016, when he and his staff discussed hiring an employee for the Ottawa laboratory.

[39] Mr. Oldford explained that the RCMP's HR branch prepared the grievor's initial offer letter and that he only signed it. The letter specified that the grievor had been laid off and that he was on priority status as of his hiring but did not mention a probation period (Exhibit E-1, tab 3).

[40] Mr. Oldford indicated that shortly after Mr. Rannie and Mr. F. Proulx informed him that there were issues with employees in the Evidence Management unit in the Ottawa laboratory and that the grievor had trouble following the established protocols.

[41] As for the reprimand letter, Mr. Oldford testified that he had been made aware at that time through a briefing, probably from Mr. Rannie and Mr. F. Proulx, that the grievor was refusing to follow instructions and that he had used improper language in his email to Ms. Proulx of July 22, 2016 (Exhibits BA-18 and E-1, tab 5).

[42] Mr. Oldford indicated that since the grievor was having issues in the Evidence Management unit, management looked for an assignment for him to another RCMP area where he might be better suited. It was then decided to assign him to the Fleet Management unit, which was still part of the RCMP but was in a different building, from September 12, 2016, to January 11, 2017. It was extended to May 12, 2017, but the grievor was rejected on probation on April 28, 2017 (Exhibit E-1, tab 6).

[43] Mr. Oldford testified that when the employment offer was made to the grievor on April 28, 2016, he was made aware that the grievor was on a priority list following a layoff (Exhibit E-1, tab 3), and that he was told about an issue with the grievor's salary in late 2016 when the grievor raised the fact that when he was hired, he had been promised that his salary would be the same as it was before the DOT laid him off (Exhibit BA-3).

[44] Mr. Oldford explained that when the grievor's salary issue was examined, it was realized that in fact he had been an external hire since he had been laid off and therefore was no longer an employee when the RCMP hired him in April 2016. As a consequence, his initial salary should have been at a higher rate on the applicable pay scale instead of at the minimum. Mr. Oldford explained that when someone is hired from outside the public service, the employer has more discretion with respect to salary, which may start higher on a pay scale.

[45] On December 13, 2016, on being informed that the grievor had in fact been an external recruit, Mr. F. Proulx requested that the grievor's salary be adjusted accordingly and that he receive the maximum rate on the pay scale (Exhibits E-1, tab 8, and BA-43).

[46] Mr. Oldford testified that during the discussion about adjusting the grievor's salary to the pay-scale maximum, it was decided that the original offer letter should be amended to reflect the facts that the grievor had been hired from outside the public service and that his salary was higher. Mr. Oldford indicated that he signed the amended offer letter on December 20, 2016. In addition to the new salary, which was higher than the one stated in the original offer letter, were two new paragraphs, one indicating that the grievor was on probation for 12 months, and one on an oath. The revised letter was emailed to the grievor on January 4, 2017. The grievor signed it without raising any questions on January 6, 2017 (Exhibit E-1, tab 9).

[47] Mr. Oldford testified that after the grievor was seconded to the Fleet Management unit, things were fine for a while, but that they became difficult in 2017. Mr. Oldford indicated that he was made aware then that a complaint had been filed against the grievor by a member of the public. The complaint followed a dispute, outside working hours, between the grievor and a parking management company and the landlord who hired them, following the towing of the grievor's car while he played hockey.

[48] Mr. Oldford indicated that the complaint was about the nature of and the aggressive language that the grievor used with the parking management company and the property manager involved and the fact that he used his RCMP email address and its phone during his dispute, which led them to believe that he was an RCMP officer.

[49] Mr. Oldford indicated that he realized that the grievor behaved the same with members of the public as he did with his colleagues in the Evidence Management unit. Moreover, since the grievor had used the RCMP's email system and its phone, Mr. Oldford understood that the complainants questioned whether the grievor was acting on his own in the dispute or on behalf of the RCMP. As a result, Mr. Oldford was of the view that it put the employer in a difficult position and that the grievor should not have used the RCMP's property in his dispute.

[50] Mr. Oldford testified that he was then of the view that by his actions, the grievor had breached the RCMP's *Public Service Employee Code of Conduct*, specifically clause 4.1.1, titled "Respect and Courtesy" (Exhibit E-1, tab 9, page 59). Mr. Oldford maintained that the people involved in the dispute with the grievor believed that because he was using the RCMP's phone and email account, he represented the RCMP. His aggressive tone damaged the RCMP's relationship with the public.

[51] In cross-examination, Mr. Oldford admitted that he never met or discussed these issues directly with the grievor and that he based his decision on information and briefing received by his direct report. Mr. Oldford agreed that before April 2016, the Evidence Management unit had had some labour relations issues and some retention problems because of the classification level. According to him, the Vancouver and Edmonton laboratories also had retention issues, for the same reasons.

[52] When he was asked to explain how the grievor refused to follow instructions, Mr. Oldford explained that for instance, the grievor did not follow the policies on signing in the laboratory or cell-phone usage.

[53] Mr. Oldford admitted that two other draft offer letters had been composed before the amended one of December 20, 2016, that HR had prepared the drafts, and that he had had no input into their preparation or into the amended offer letter. He insisted that the amended letter was in no way meant as a means to terminate the grievor. He maintained that it was prepared to correct the grievor's pay rate and since that was being done, it was decided to include the standard paragraphs on probation and oath. He also could not state whether it was a normal practice to prepare drafts before preparing a final version of an offer letter (Exhibits BA-1 and BA-2).

[54] When Mr. Oldford was asked about how the grievor should have known that he was on probation when the employer had not even been aware of it before it issued the amended offer letter (Exhibit BA-3), he maintained that only when the pay issue surfaced in late 2016 did HR realize that the grievor was not a public-service employee following his layoff and therefore that it should apply the rules for an employee arriving from outside the public service, which meant imposing a probation period.

[55] Mr. Oldford indicated that he did not know how the amended offer letter was delivered to the grievor or whether the grievor was informed verbally of the inclusion of the probation paragraph.

[56] Corporal Gabriel Letourneau was the employer's second witness. He had worked as an RCMP officer for 10 years on Parliament Hill. He testified on June 17, 2019, for 1 hour and 45 minutes, which included 30 minutes of cross-examination.

[57] Cpl. Letourneau testified that on March 9, 2017, he was refueling his police car at the corner of Bank and Gladstone streets in Ottawa. He was approached by Marc Proulx ("Mr. M. Proulx"), the owner of a parking management company named Park Safe Inc. He indicated that he was in a situation with someone whose car had been towed a few days earlier and who was unhappy about having to pay for the towing.

[58] Mr. M. Proulx indicated that the person was continually sending him and his wife intimidating emails that appeared to come from the government. Mr. M. Proulx explained that the individual was not happy about having his car towed and that he wanted to be reimbursed the towing and impound fees. Mr. M. Proulx showed Cpl. Letourneau one of the emails, which indicated that the sender was the grievor and that his email address was James.Kot@rcmp-grc.ca.

[59] Mr. M. Proulx called his wife, Marcie Tilley. She explained to Cpl. Letourneau that she and Mr. M. Proulx were continually receiving aggressive and belligerent emails and calls from the grievor following the towing of his car on February 22, 2017. Ms. Tilley explained that she was upset and aggravated with the emails and calls since she believed that they were from an RCMP officer. She indicated that she and Mr. M. Proulx had been under the impression that the grievor was either an RCMP officer or someone in a position of authority at the RCMP.

[60] Cpl. Letourneau then called his supervisor, Inspector Marie-Claude Côté, who informed him that while the grievor was a public servant with the RCMP, he was not a police officer or a person in authority with the RCMP. Inspector Côté indicated that she would raise the matter with the grievor's supervisor. Nonetheless, Mr. M. Proulx and Ms. Tilley decided to make a public complaint against the grievor (Exhibit E-1, tab 10).

[61] Cpl. Letourneau also asked Mr. M. Proulx, Ms. Tilley, and the Park Safe Inc.'s towing operator who towed the grievor's car, to each draft an affidavit of what happened that night. Cpl. Letourneau also received a copy of a file about a complaint the grievor made with the Better Business Bureau against Park Safe Inc. on March 8, 2017, alleging that its towing on February 22, 2017, had been illegal. He had used his RCMP email address (Exhibit E-1, tab 11).

[62] Cpl. Letourneau indicated that he also contacted Ralph Montone, the property manager of Main and Main, which owned the parking lot from which the grievor's car was towed. While he did not speak to Mr. Montone, he received from him as well as from Mr. M. Proulx and Ms. Tilley copies of the emails they had received from the grievor following the towing of his car. Several of those emails had been sent from his RCMP email address.

[63] Cpl. Letourneau believed that anyone receiving the grievor's emails likely assumed he was an RCMP officer.

[64] Since the grievor was not an RCMP member, Cpl. Letourneau referred the matter to the Ottawa Police Service for investigation. A detective from that force then took over the police investigation (Exhibit E-1, tab 11).

[65] Ms. Proulx also testified for the employer. She testified on June 18, 2019, for 2 hours and 50 minutes, including 2 hours and 20 minutes of cross-examination.

[66] Ms. Proulx is now the acting manager of the RCMP's Firearms area and it's Toolmark Identification Program. She has 28 years of service with the RCMP. In 2016, she was the team leader of the RCMP's Evidence Management unit of the National Forensic Laboratory Services in Ottawa. As such, she oversaw a team responsible for receiving and then cataloguing exhibits in the RCMP's database. The grievor reported to her. In turn, she reported to Mr. F. Proulx, a distant relative of her husband with

whom she never socialized. In addition to the grievor, five other employees reported to her.

[67] Ms. Proulx explained that in 2016, there was a vacancy in her unit, and that HR identified the grievor as a priority candidate on the public service layoff priority list. Since he was on that list, no technical assessment was made. He was considered suitable for the job in the evidence laboratory. As such, on April 28, 2016, he was offered the position with the May 9 start date. Given that he was a new employee, he was to take a training program, to ensure that expectations would be met. The RCMP's policy centre had developed the training program. A lead trainer, Maggie Schmidt, was assigned to him to help with the objectives and timelines.

[68] Ms. Proulx testified that initially, nothing indicated any training challenges. However, after a while, she began to notice delays.

[69] Until July 2016, interactions with the grievor were cordial and professional. However, he and a colleague, Mashal Dawkins, also in training, continued to perform tasks together despite having been told that to avoid delays, the work should be done by the person to whom it was assigned and not by two people. Ms. Proulx then sent the grievor a reminder to that effect on July 22, 2016. An hour later, he replied with his version of the event. He referred to the fact that two employees had had miscarriages in the last year and stated that thus, it "… would be advisable to rethink what delays the training process" (Exhibit BA-18).

[70] Ms. Proulx testified that she was taken aback by the grievor's reply, especially with the miscarriages reference. She indicated that she perceived the email as a lack of respect for her and as insubordination. She testified that she felt attacked. She emailed her supervisor, Mr. F. Proulx, about it and took two weeks of sick leave, from July 25 to August 8, 2016, because of the email's insensitivity (Exhibit BA-22). Mr. F. Proulx handled the situation while she was away. By her return from annual leave on August 30, 2016, the grievor had been assigned elsewhere, to the RCMP's Fleet Management unit. As indicated, he received the reprimand letter for his email.

[71] In cross-examination, Ms. Proulx confirmed that the grievor had been social and cordial at a lunch with staff that he had suggested take place (Exhibit BA-4). As to why she emailed him on June 8, 2016, about using a cell phone when all he did was take a call on June 7 about his father being admitted to the hospital, she testified that she

had been concerned about the volume of the phone and that she had not known that his father was sick (Exhibits BA-7 and BA-11).

[72] As for the progress of the grievor's training, Ms. Proulx indicated that a meeting was held on June 15, 2016, with him for an update on it. She stated that in her view, some little things should have been completed (Exhibit BA-12). She indicated that while she thought that his training was progressing up to July 22, 2016 (Exhibits BA-13 and BA-14), she maintained in cross-examination that he continued not to follow instructions. When she was asked for specifics, she mentioned that he continued to team up with his colleague, Ms. Dawkins, on some tasks and that he would do what he wanted to, despite instructions. According to Ms. Proulx, she made requests of him, to which he did not respond. As an example, she mentioned a request about doing the performance evaluation online. She testified that she had to try several times before he answered her (Exhibits BA-15 and BA-15A). As another example, she mentioned that in her view, he would not follow the established process to request leave. Ms. Proulx also indicated that in August 2016, Ms. Schmidt, the grievor's trainer, raised a number of issues about his training and concluded that she no longer wanted to be his trainer (Exhibit BA-20).

[73] Ms. Proulx agreed that during summer 2016, staff turnover was high and that things had become stressful even before the grievor's arrival. She also admitted to being overwhelmed by the situation.

[74] Benoit Ouellette was the last employer's witness. Mr. Ouellette is the Fleet Manager in the Transport Management unit at Headquarters. He testified on June 18, 2019, for 1 hour and 30 minutes, including 50 minutes of cross-examination.

[75] Mr. Ouellette's main role was purchasing vehicles and handling their management.

[76] He indicated that Mr. F. Proulx approached him in the fall of 2016. He was looking for an assignment for the grievor. The grievor was assigned to the Fleet Management unit initially for September 12, 2016, to January 11, 2017, under the supervision of Richard Leduc, who reported to Mr. Ouellette. That assignment was extended and was to cover January 12 to May 12, 2017. The grievor did not complete it because of his rejection on probation on April 28, 2017 (Exhibit E-1, tab 6).

[77] Mr. Ouellette testified that on March 14, 2017, his director general, Milton Jardine, informed him that a public complaint had been filed against the grievor. Since the grievor was gone for the day, a decision was made to meet with him the next day.

[78] At the meeting, Mr. Jardine and Mr. Ouellette explained to the grievor that a complaint had been filed against him and that it had been alleged that he had used the RCMP's computer and his RCMP email address in his private dispute with a member of the public (Exhibit E-1, tab 10). Mr. Ouellette indicated that he did not know much about the complaint except that it dealt with using an RCMP computer following a dispute about towing. He testified that he and Mr. Jardine ordered the grievor to stop using the RCMP's computer, his RCMP email address, and the RCMP's phone for his personal use, for which he received a confirmation letter on March 16, 2017. Nathalie Guilbault, director of the Material and Moveable Assets Program, was copied on it. She emailed the grievor on March 24, 2017, informing him that Constable Christopher Brophy from the RCMP would interview him to gather facts about the improper use of RCMP materials. Cst. Brophy's report was issued on March 27, 2017 (Exhibit E-1, tabs 12 to 14).

[79] Mr. Ouellette agreed that during the first assignment with Fleet Management, the grievor's performance was good and that there were no issues with his work, which is why his assignment was renewed on January 12, 2017.

[80] Mr. Ouellette also admitted that once the issue of using the RCMP's phone and email address was raised with the grievor on March 15, 2017, he apologized for his actions, and that until his termination, he continued his good performance (Exhibit E-1, tab 18).

B. **For the grievor**

[81] In the grievor's opening statement, he indicated that the RCMP hired him as a priority employee on May 9, 2016. He had been employed with the DOT. He stated that before being terminated on April 28, 2017, he had accumulated about 10 years of public service and that before then, he had worked in the private sector.

[82] He began by stating that he had apologized for his mistakes and that he had accepted responsibility for his actions (Exhibit E-1, tab 18). The employer had failed to demonstrate that it had cause for his termination. He stated that the evidence that

would be adduced through two witnesses and his testimony would demonstrate that the employer's decision to terminate his employment was nothing but a sham.

[83] Paolo Marcantonio was the grievor's first witnesses. He testified on June 18, 2019, for 35 minutes, which included 5 minutes of cross-examination.

[84] Mr. Marcantonio was the manager of the Scotiabank branch that the grievor's car was towed from on the night of February 22, 2017. Mr. Marcantonio indicated that he did not know the grievor and that he has met him only once. He agreed to testify because other complaints had been received about vehicles being towed away at night (Exhibit BA-24). The Ottawa Citizen newspaper published an article about Park Safe Inc. towing cars from parking lots at night (Exhibit BA-26).

[85] Mr. Marcantonio explained that his branch rented its Preston street premises in Ottawa and that it had some designated parking spots reserved for clients. Over the years, the branch had allowed parking in those spots at night. However, the building was sold, and the new landlord, Main and Main, and its property manager, Mr. Montone, no longer allowed after-hours parking. Mr. Marcantonio testified that the new owner had hired Park Safe Inc. to manage the parking lot and had allowed it to tow cars after hours. Mr. Marcantonio provided a sketch of the parking lot (Exhibit BA-27).

[86] Mr. Marcantonio indicated that he had provided the grievor with Mr. Montone's phone number and that in no way had the grievor tried to lead him to believe that he was acting on behalf of the RCMP (Exhibit BA-23).

[87] Ms. Dawkins also testified for the grievor on June 19, 2019, for 1 hour and 15 minutes. She was not cross-examined.

[88] Ms. Dawkins is now a full-time RCMP employee classified at the CR-04 group and level. In the summer of 2016, she was part of the Federal Student Work Experience Program (FSWEP). After a positive assignment in HR, she decided to use her science skillset and joined the Evidence Management unit of the National Forensic Laboratory Services in Ottawa as a contractual employee.

[89] While Ms. Dawkins had no difficulties with the training material, she did encounter problems with the hyperlinks in it, which were always broken. Because of

that, she needed help. She indicated that when she asked questions, she was often referred to the manuals.

[90] Ms. Dawkins testified that while the first two weeks of training went well in the Evidence Management unit, she then started to notice that the environment was hostile and that her comments were often not taken well. She pointed out that Ms. Proulx and Ms. Schmidt had an animosity, which made things more difficult. According to Ms. Dawkins, the fact that teamwork was not encouraged in the Evidence Management unit contributed to the stressful environment and explained the employee retention problem.

[91] Ms. Dawkins stated that when the grievor joined the Evidence Management unit in the summer of 2016, both Ms. Proulx and Ms. Schmidt told her to stop having discussions with him, because it made others feel isolated.

[92] Referring to the incident of July 22, 2016, for which the grievor received the reprimand letter, Ms. Dawkins explained that she was pregnant at that time and that she had to retrieve some DNA evidence from the freezer; she did not feel well that morning. She asked for the grievor's help. She also had to retrieve some firearms from a high shelf. Again, he helped. Ms. Schmidt observed everything and reported it to Ms. Proulx, who, a few minutes later, told Ms. Dawkins and the grievor to stop working together (Exhibit BA-17).

[93] Ms. Dawkins testified that on June 15, 2016, the grievor was called to a meeting with Ms. Proulx and that she overheard Ms. Proulx telling him that his attention to detail needed to improve if he wanted to continue to work in the laboratory.

[94] Ms. Dawkins maintained that the grievor was never rude or unprofessional; it was quite the opposite in that he often offered to help his colleagues.

[95] At the end of July 2016, Ms. Dawkins raised concerns about morale in the Evidence Management unit and about her situation with acting Superintendent Manon McSween-Séguin (Exhibit BA-29).

[96] The grievor was the last witness. He testified in chief on June 19, 2019, for 4 hours, which included being cross-examined for 1 hour and 10 minutes.

[97] He indicated that he had studied mechanical engineering at Algonquin College in Ottawa and that before being hired by the RCMP, he had worked at the DOT. Before that, he was a consultant in the private sector. In 2013, he was notified that his DOT position was being abolished. Under the workforce adjustment provisions of his collective agreement at the time, he received two years of education leave. Then in May 2015, he was laid off and placed on a priority list of laid-off persons that was to last one year. In September 2015, the RCMP contacted him, and he received the job offer of April 28, 2016, in the Evidence Management unit as a laboratory attendant classified at the EG-1 group and level. The starting date of May 9, 2016, was just a few days before his priority status was to end (Exhibit E-1, tab 3).

[98] The grievor first had contact with Mr. F. Proulx on September 21, 2015. RCMP management interviewed him in October 2015. He had met the suitability test and had provided references. His priority status was to expire in May 2016, and he finally received the job offer on April 28, 2016, with the agreed starting date of May 9. In April 2016, he raised the salary issue in the meeting with Mr. F. Proulx, who then promised him that the RCMP would match his DOT salary.

[99] The grievor indicated that he was on training when he joined the Evidence Management unit. His work involved retrieving evidence, taking courses on how to deal with firearms, etc. He did much learning on the job. He had problems with the laboratory system. He also shadowed the work being done by his trainer, Ms. Schmidt, who was not easy. When he had a question, her standard answer was, “You should know that.”

[100] The grievor explained that as of the week of June 6, 2016, he had been on the job for five weeks. One day, he had to exit the laboratory to take a call. On his way out, he removed his gloves. His phone was in a pocket of his laboratory coat. The call was about his father who had just been admitted to a hospital. Ms. Proulx was there and told him to attend to his father. The following day, he received an email from her telling him to turn down the volume of his phone and stating that cell phones were not allowed in the laboratory (Exhibits BA-7, BA-8, and BA-10).

[101] On June 10, 2016, the grievor took a day off to attend the funeral of a friend’s father. He informed Ms. Proulx in the morning that he would not be at work that day. She asked why he did not inform her in advance (Exhibits BA-9 and BA-10).

[102] During that period in June, the grievor asked Mr. F. Proulx about his salary. The grievor claimed that while he did not receive a breakdown of his salary because of the problems with the Phoenix pay system, it appears nevertheless that he was not receiving the salary that Mr. F. Proulx had promised him.

[103] As for the work in the Evidence Management unit, the grievor testified that he and his colleagues, Ms. Dawkins and Cheryl Radmore, had problems with how training was done in the laboratory.

[104] On June 28, 2016, the work environment issue, the training difficulty, and the cell phone use were brought to the attention of his bargaining agent representative, Patrick Goudreault (Exhibit BA-30). On July 6, 2016, a meeting was held involving him, the grievor, Mr. F. Proulx, and Ms. Proulx, which resulted in a training schedule being developed. Even with the new schedule, the grievor claimed that the trainer, Ms. Schmidt, became more involved and more negative about his work. In August 2016, Ms. Schmidt updated Ms. Proulx on the grievor's training. She raised a number of issues (Exhibit BA-20). On March 8, 2017, he filed a harassment complaint against Ms. Proulx. It was denied in November 2017 (Exhibit BA-39).

[105] Returning to the incident that culminated in the reprimand letter, the grievor explained that on July 22, 2016, he returned to the office after a couple of days off. Ms. Dawkins, who was pregnant, felt chilled. She asked him for help retrieving evidence from a freezer. Ms. Schmidt observed everything and reported it to Ms. Proulx, who scolded him and Ms. Dawkins for working together again.

[106] The grievor explained that he took offence to Ms. Proulx's reaction since Ms. Dawkins was pregnant and did not feel well that day. He indicated that the situation had reminded him of a painful family event that he and his wife had gone through a few years earlier. That is why he sent the July 22 email referring to miscarriage (Exhibit E-1, tab 4). He explained that he had had no malicious intent in sending the email. He explained that he was then called to a meeting with Mr. F. Proulx about it. According to the grievor, Mr. F. Proulx was angry about the email and told him that he was behind in his training compared to others at the Edmonton and Vancouver labs (Exhibit BA-32). As for the reprimand letter he received on August 10, 2016, the grievor testified that his bargaining agent told him that it was not a big deal; therefore, he did not grieve it.

[107] As for his salary, the grievor indicated that he received information from Ms. Brady in HR's staffing section. While she did not solve the salary issue, he indicated that contrary to the position that is now taken by the RCMP, she acknowledged that he was already a public-service employee when the RCMP hired him in May 2016 (Exhibit BA-33). However, it should be noted that on November 22, 2016, while asking Mr. F. Proulx about his salary with respect to matching his DOT salary, the grievor raised the fact that it appeared that he had been hired as a new employee and that his appointment to the RCMP had not been done as a transfer (Exhibit E-1, tab 7).

[108] On January 4, 2017, the grievor testified that he received a call from Ms. Melanson from HR asking him to sign the amended offer letter, which included his adjusted salary and the new paragraphs, one about him being on probation, and one about an oath or solemn affirmation. He insisted that at no time did Ms. Melanson, Ms. Brady, or anyone else from the RCMP mention anything about him being on probation. All he understood was that his salary had finally been adjusted above the minimum. Nevertheless, he signed the amended letter on January 6, 2017 (Exhibits BA-42, BA-48, and E-1, tab 9).

[109] The grievor testified that in January 2017, he had been on assignment to the Fleet Management unit since September 2016 and that it was extended until May 12, 2017 (Exhibit E-1, tab 6). Things were going well enough that he had discussed with Mr. Ouellette the possibility of a permanent deployment there.

[110] On February 22, 2017, the grievor indicated that he went out to play hockey with friends early that evening. He parked on the Scotiabank premises on Preston Street as he had done before, and nothing seemed out of the ordinary. His car was towed while he was away.

[111] The next day, he approached Mr. Marcantonio, who provided him with the parking management company's name, Park Safe Inc., and the property manager's name, Mr. Montone. The grievor then returned to work and called Mr. Montone from the RCMP's phone. He testified that Mr. Montone asked for his email address. Since his home computer was under repair, the grievor gave him his RCMP email address, which the grievor said was a mistake (Exhibit BA-37).

[112] In his testimony, the grievor admitted to and apologized for sending emails to Mr. Montone, Ms. Tilley, and the Ottawa Citizen using his RCMP email address. He

indicated that he often wrote them from work, at lunchtime, for which he had the flexibility. As for the calls purportedly made from the RCMP's phone, the grievor stated that he made most of them from his cell or his home phone.

[113] The grievor insisted that he always conducted himself professionally and that he never intended to make people believe that he was an RCMP officer.

[114] The grievor stated that once Mr. Ouellette and Mr. Jardine informed him about the public complaint, he immediately ceased and apologized to Mr. Jardine for his actions (Exhibit E-1, tab 18). At Ms. Guilbault's request, he then met with Cst. Brophy, who was tasked with gathering the facts of the alleged improper use of RCMP materiel. Cst. Brophy interviewed the grievor on March 27, 2017, and concluded that the grievor had misused RCMP property (Exhibit E-1, tabs 14 and 15).

[115] The grievor also mentioned that the Ottawa Police Service contacted him. It considered the matter a civil dispute and thus closed its case.

[116] In conclusion, the grievor apologized for his errors and insisted that Mr. M. Proulx had been hostile and in denial. The grievor insisted that he made the vast majority of the calls from his home phone or cell phone, that he always made it clear that it was a personal matter, and that he never tried to make people believe that he was an RCMP officer. He indicated that he always behaved civilly and that he was a respected contributor to his community, as was reflected in some local newspapers (Exhibit BA-40).

[117] When he was questioned by counsel for the employer, the grievor agreed that when he met with Cst. Brody on March 27, 2017, Cst. Brody read the grievor his written notes, and that the grievor signed them (Exhibit E-1, tab 14).

[118] Cst. Brody's notes indicated that the grievor admitted to sending some 23 emails using his RCMP email address to, collectively, Mr. Montone, Ms. Tilley, the Ottawa Citizen, Scotiabank, and the City of Ottawa. The grievor maintained that he had never intended to use his RCMP email account or its phone in hopes of receiving a favourable outcome in his dispute with Park Safe Inc. and Main and Main. After the interview, Cst. Brody concluded that the emails were aggressive and confrontational.

[119] As for the phone calls from the RCMP's landline, the grievor admitted to Cst. Brody that when he made them to Mr. Montone or Ms. Tilley, he knew that their call

displays would show "RCMP" as the caller. He admitted to making no effort to block the RCMP's phone from displaying who was calling. This was contrary to when he called them from his home; he blocked his number so that the receiver would not know who was calling. The receiver's display would indicate "Unknown Caller". He explained that he did it so that no return call would disturb his ailing wife (Exhibit E-1, tab 14).

V. Summary of the arguments

A. For the employer

[120] Counsel for the employer pointed out that the grievor was rejected on probation under s. 62(1) of the *PSEA* and that he was not terminated under the *FAA*. As such, the employer had wider discretion. Moreover, counsel for the employer insisted that despite the fact that some discipline might have occurred in the short period that the grievor worked for the RCMP, this case is based on his unsuitability to work for the employer. The employer insisted that there was no evidence of conspiracy or bad faith on the employer's part. There was a legitimate reason to reject him on probation; by his actions, he brought disrepute to his employer. As a result, clearly, there was an employment-related reason to reject him on probation. As a consequence, the employer argued I do not have jurisdiction over the matter, as stated in s. 211 of the *Act*.

[121] Counsel for the employer provided an overview of the jurisprudence dealing with rejections on probation dating to *Jacmain v. Attorney General*, [1978] 2 S.C.R. 15, which confirmed an employer's right to reject an employee during a probation period. The employer also referred me to *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529, which made it clear that the burden of proof is on the employee rejected on probation to demonstrate that the employer's decision was a sham. Counsel for the employer maintained that that is not so in this case; the grievor did not demonstrate that the employer's actions could be considered camouflage.

[122] Counsel for the employer argued that even with a disciplinary issue, the employer still has the discretion to choose to reject an employee on probation unless bad faith is proven, which was not in this case. Counsel referred me to *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134. While that decision dealt with the new *PSEA* as amended in 2005, it did not fundamentally alter the law. This was

also confirmed in *Warman v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 103.

[123] According to the employer's counsel, a rejection does not have to be about the employee's performance. Thus, in this case, the fact is that the grievor's performance might not have been an issue when he was assigned to the Fleet Management unit. Nevertheless, the evidence showed that by his actions, he was clearly not suitable to work for his employer; see *D'Aoust v. Deputy Head (Department of Public Works and Government Services)*, 2015 PSLREB 94.

[124] With respect to the evidence, the employer argued that while Mr. Oldford never met the grievor before deciding to reject him on probation, nevertheless, his management team had appropriately briefed him that the grievor would not take direction from his supervisors. Counsel for the employer made the point that Mr. Oldford and the grievor's managers had been quite patient and accommodating; they provided him with an assignment when things became difficult in the Evidence Management unit and had even envisaged making the assignment permanent if not for his actions in February and March 2017, which led to his rejection on probation (Exhibit E-1, tab 10).

[125] Counsel for the employer pointed out that Mr. Oldford testified that the grievor's conduct of using his RCMP email address and its phone in his personal dispute with third parties brought disrepute to the RCMP. Counsel for the employer stressed the fact that Mr. Oldford was right to believe that Mr. M. Proulx, Ms. Tiley and Mr. Montone could have reasonably assumed that when they received a call displaying "RCMP" as the caller or received an email from the RCMP email address, in fact, it was an RCMP officer calling or writing to them. The fact that the grievor knowingly used the RCMP's phone and computer, by which he made the recipients believe that the RCMP was part of the dispute, caused the problem. Counsel for the employer referred me to *Apenteng v. Deputy Head (Canada Border Services Agency)*, 2017 PSLREB 58 at para. 95, as follows:

> ***95*** *I am of the view that the respondent was rightfully concerned by these facts, particularly the exchange in which Mr. Apenteng sought to recover his investment with MacDoff in an email that had his signature block with his title and the CBSA's logo. It is reasonable to believe that the email could have been seen as intimidating and that it could have misled the recipient into*

> *believing that the CBSA was after him in relation to MacDoff's freight-forwarding activities.*

[126] Counsel for the employer referred me to the RCMP's employee code of conduct and indicated that the grievor clearly breached it in his exchanges with the parking management company owners and Mr. Montone. The fact that the grievor used his employer's resources in his litigation with third parties certainly caused damage to the RCMP's reputation, as clearly stated in the rejection-on-probation letter (Exhibit E-1, tab 2).

[127] Counsel for the employer reviewed Cpl. Letourneau's testimony and pointed out that he had no interest in this case. Mr. M. Proulx approached him with questions about receiving emails and calls from the RCMP. After carrying out a verification and realizing that the grievor was not an RCMP member, Cpl. Letourneau thought that it reflected poorly on the RCMP. After taking a look at the complaint, he referred it to his superiors and to the Ottawa Police Service. On that point, counsel for the employer insisted that the emails sent to Park Safe Inc. and Mr. Montone speak for themselves and are often very aggressive, are disrespectful, pretend to state the law, and often mislead the recipient to believe that they came from the RCMP (Exhibit E-1, tab 15).

[128] Based on those facts alone, counsel for the employer argued that clearly, there was a suitable employment-related reason to reject the grievor on probation.

[129] Addressing the issue of whether the grievor was on probation when his employment was terminated on April 28, 2017, the employer's counsel reviewed the facts and the law related to the grievor's layoff from the DOT and his subsequent RCMP employment.

[130] Counsel for the employer pointed out the grievor's position at the DOT was declared surplus in 2013. He then went on education leave for two years. In 2015, the DOT laid him off, and he was placed on a laid-off priority list for one year, in accordance with s. 41(4) of the *PSEA*.

[131] Counsel for the employer stressed the fact that in 2015, the effect of being laid off by the DOT was that the grievor ceased to be an employee, in accordance with s. 64(4) of the *PSEA*, which reads as follows: "An employee ceases to be an employee when the employee is laid off."

[132] In support of his argument, counsel for the employer pointed out the wording in s. 41(4) of the *PSEA*, in which it refers to someone who has been laid off and who is on a priority list as a "person" and not as an "employee". In contrast, in s. 41(1), it refers to an "employee" when dealing with someone who has not been laid off and who still enjoys "employee" status. Those provisions read as follows:

> ***41 (1)*** *When an employee on leave of absence …*
>
> *…*
>
> ***(4)*** *Priority for appointment over all other persons shall be given … to a person who is laid off pursuant to subsection 64(1).*

[133] Therefore, the employer's counsel concluded, the grievor was on probation under s. 61(1) (a) of the *PSEA* when his employment was terminated at the RCMP, despite the fact that the initial offer letter was silent about a probation period.

[134] I asked counsel whether the employer could have waived the probation period since the initial offer letter did not mention anything about one, and it was admitted that no one from the RCMP drew the grievor's attention to the inclusion of one in the amended offer letter.

[135] Counsel for the employer indicated that the employer could not have waived the 12-month probation period since it is the law, and everyone hired from outside the public service has to serve one under s. 61(1)(a) of the *PSEA*.

[136] In support of his argument that the employer could not have waived the probation period, counsel referred me to *Hicks v. Treasury Board (Human Resources Development Canada)*, PSSRB File No. 166-2-27345 (19970425), [1997] C.P.S.S.R.B. No. 43 (QL), and *Morin v. Treasury Board (Fisheries and Oceans Canada)*, 2004 PSSRB 168.

[137] According to counsel for the employer, the grievor could not invoke the doctrine of estoppel in this case since estoppel cannot be used to overcome the law, which the Supreme Court of Canada decided in *Immeubles Jacques Robitaille inc v. Québec (City)*, 2014 SCC 34.

[138] As for the length of the probation period, since the RCMP is an organization named in Schedule IV to the *FAA*, the employer's counsel pointed out that it is 12 months, under the *Regulations Establishing Periods of Probation and Periods of Notice of Termination of Employment During Probation* (SOR/2005-375; "the *Probation Regulations*").

[139] Counsel for the employer argued that in the circumstances, it is immaterial whether the initial offer letter mentioned a probation period. Since the RCMP recruited the grievor from outside the public service, he had to serve his 12-month probation that was effective May 9, 2016, his first day with the RCMP. Therefore, his probation period was to finish on May 9, 2017, and he was terminated on April 28, 2017.

[140] Referring to the evidence, counsel for the employer insisted that the testimonies of Mr. Oldford and Ms. Proulx as well as the grievor's actions in February and March 2017 demonstrated that he did not take directions well. And while one may occasionally use the employer's email or phone, in this case, it went well beyond acceptable use.

[141] The grievor knowingly used his RCMP email address to intimidate Mr. M. Proulx, Ms. Tilley and Mr. Montone. He also used it with third parties such as the City of Ottawa and the Ottawa Citizen. As for his phone calls, as Cst. Brody noted in his fact-finding report, when the grievor called Mr. M. Proulx, Ms. Tilley and Mr. Montone, he made sure to block his home phone number so that they would not know who was calling, but he did not bother to take the same precaution when using the RCMP's phone. As a result, "RCMP" appeared as the caller on the phone display when he called about his dispute. All this, plus the aggressive bullying tone he used in emails he sent from his RCMP email address, clearly demonstrated that he was unsuitable as an RCMP employee. His behaviour tarnished its image; he made decisions incompatible with the RCMP.

[142] Counsel for the employer pointed out that it cannot be said that the grievor's actions were done on the spur of the moment. As demonstrated by the numerous emails he sent to those involved in his towing dispute, it went on for some time. He stopped only when the Ottawa Police Service told him to (Exhibit E-1, tab 15).

B. **For the grievor**

[143] It is to be noted that in his argument, the grievor made several references to facts that were not adduced in evidence and to "situations that were not raised in his testimony." Counsel for the employer raised no objection in this regard.

[144] At the beginning of his arguments, the grievor explained that he wanted to divide them into the following four sections:

- the workplace;
- the towing incident;
- the salary issue; and
- the termination.

1. The workplace

[145] The grievor explained that after he was laid off from the DOT in 2013, and after two years of education leave, he ended up on a priority list in 2015. He was referred to the RCMP for possible employment. He met first with Mr. F. Proulx for an interview. He was then declared successful after he provided references and his security clearance was validated. He received the original offer letter just three days before his priority status was to expire.

[146] In his first days of working as a laboratory attendant, the grievor started the training period with Ms. Schmidt. She was his designated trainer. He was to complete 11 courses during the training period. From the beginning, he noted problems with many hyperlinks in the training modules. He informed his supervisor, Ms. Proulx, but she simply downplayed them. Despite the challenge of the training, he indicated that by the end of the 5th week, he had completed the 11 courses, including the one on firearms.

[147] He insisted that during that period, shadowing Ms. Schmidt was difficult. His questions to her were met with criticism.

[148] He testified that during the months of June and July 2016, things were difficult and stressful at his work.

[149] The grievor mentioned that on June 6, 2016, he was in the laboratory and had forgotten that he had brought his cell phone. It rang, and he exited the laboratory to take the call. He was informed that his father had been admitted to a hospital. When he returned to the laboratory, Ms. Proulx told him to take the rest of the day off to attend to his father. The next day, the grievor left his cell phone on his desk before entering the laboratory. He did not realize that it was not on silent mode, which prompted Ms. Proulx to email him about the use and the volume of cell phones. He

reminded her that no cell phone policy was in place, so therefore, there was none to breach. Moreover, he questioned why, given his parents were aged and sick, he did not qualify for special circumstances related to the use of a cell phone (Exhibits BA-7, BA-8, BA-10, and BA-11). He suggested that the fact that she was disturbed by a ringing phone showed that she had difficulty coping and that she took it out on her employees. He also indicated that the other labs allowed employees to carry their cell phones inside.

[150] The grievor also spoke of the situation involving the death of his friend's father, in which he had little time to inform Ms. Proulx that he would not be at work that day. On the morning of the funeral, which was a Friday, he emailed her that he would be absent and explained why. Upon his return to work the following Monday morning, he had received an email from her criticizing him for not letting her know about his absence sooner (Exhibit BA-9).

[151] As for how his training was going, the grievor explained that while a few mistakes might have been made, doing so was normal, given that he was in training. Specifically addressing Ms. Proulx's email, in which after meeting with the grievor she raised some issues about his training on June 15, 2016, he indicated that one had to consider that the assessment was made just a week after the hospitalization of his father. (Exhibit BA-12). Moreover, at the meeting, he attempted to discuss with Ms. Proulx some of the issues with the training method, but she dismissed his remarks. He indicated that in the following days, he took the attention-to-detail test and scored 17 out of 20, which, contrary to what Ms. Proulx had said, indicated that he was doing well.

[152] The grievor argued that he tried to improve things in his workplace. He decided to involve his bargaining agent representative and emailed him on June 28, 2016, asking for help with that improvement.

[153] The grievor argued that he wanted to discuss the harassment that he had been subjected to, with respect to the cell phone, and that he continued to be subjected to criticism from both Ms. Proulx and Ms. Schmidt. He explained that at that point, he was concerned. So were others; for instance, Ms. Radmore also had encountered problems in the workplace and had decided to transfer out of it. And Ms. Dawkins

had expressed her concerns to Supt. McSween-Séguin about mistreatment and harassment in the workplace (Exhibits BA-29 and BA-30).

[154] The grievor stated that in July 2016, a meeting was held involving him, Mr. F. Proulx, Ms. Proulx, and Mr. Goudreault. He indicated that he raised the cell phone issue as well as the specific issues with the training material and the hyperlinks. He indicated that at the end of the meeting, Mr. Goudreault congratulated him for his positive approach.

[155] Despite everything, the grievor argued that his supervisors did not try to improve matters and that things went from bad to worse. He argued that Ms. Proulx and Ms. Schmidt continued to be “on his case” and that they were not prepared to help. They remained critical of his performance (Exhibits BA-14, BA-15, BA-15A, and BA-20).

[156] The grievor insisted that before his arrival, Ms. Proulx had admitted that the team was stressed and that management had difficulty retaining staff. So, it was unfair to blame him (Exhibit E-1, tab 8).

[157] Addressing the specific July 22, 2016, incident, which motivated the reprimand letter, he maintained that all he did that day was help a colleague who was pregnant and not feeling well retrieve some exhibits from the laboratory freezer. He argued that when Ms. Proulx found out, she scolded him for what he had done. He stated that she should not have reacted that way because all he had done was for a brief moment help a colleague who needed it.

[158] The grievor argued that he wrote his email on the spur of the moment and that what probably triggered his reaction was the fact that Ms. Dawkins’ situation reminded him of what he and his wife had gone through a few years earlier (Exhibit E-1, tab 4). He maintained that being blamed for helping a colleague in a difficult situation was completely unfair and that claiming that his email was proof of insubordination was an exaggeration (Exhibits BA-18 and BA-22).

2. The towing incident

[159] Addressing the towing incident, the grievor pointed out that in February 2017, he was on assignment to the Fleet Management unit. On the evening of February 22, his wife encouraged him to go out for a drink at a restaurant after the hockey game.

He indicated that as he had done for years without a problem, he parked on the Scotiabank premises after hours while at the restaurant. He stated that he did not know that the bank's premises were under a new management that did not allow parking after hours. Moreover, because of snow, he did not see any no-parking signs.

[160] The grievor explained that when he left the restaurant, he discovered that his car had been towed. He called Park Safe Inc. and spoke with the owner, Mr. M. Proulx, who was belligerent. The grievor finally recovered his car but only after paying for the tow.

[161] The grievor argued that Park Safe Inc.'s actions were not unusual and that Mr. Marcantonio told him on February 23 that the bank had received many complaints from customers who, just like the grievor, had had their cars towed. The grievor argued that that was evidence that Park Safe Inc. had acted illegally and that he had been within his rights to challenge what it had done (Exhibits BA-23, BA-24, and BA-25).

[162] The grievor insisted that when he contacted Mr. M. Proulx to protest that Park Safe Inc. had removed his car, he did not have his home computer, which was being repaired (Exhibit BA-37). He argued that that shows that he never planned to use the RCMP's computer to intimidate a third party. While he admitted that he had erred by using the RCMP's computer and his RCMP email address, he maintained that he did not realize that things would escalate and insisted that at no time did he indicate that the RCMP was involve in the dispute. He had always made it clear that it was a personal matter. He referred me to the testimony of Mr. Marcantonio, who had indicated that the grievor had never made him believe that the RCMP was involved in the dispute.

[163] The grievor insisted that while he was persistent in his efforts to recover the money that was illegally taken from him when his car was towed, he was never rude and aggressive while dealing with Mr. Montone and the parking management company. He insisted that once Mr. Jardine and Mr. Ouellette informed him of the complaint against him, he immediately apologized, ceased, and desisted (Exhibit E-1, tab 18).

[164] As for the phone calls he made from the RCMP's landline that displayed the RCMP as the caller, the grievor maintained that Mr. Montone had provided him with

Ms. Tilley's cell phone number. He also maintained that when he called his wife from his work, his home phone showed "Unknown Caller". Therefore, he naturally assumed that that was the case when he called Ms. Tilley or Mr. Montone. As for when he called them from his home, he indicated that he made sure to block his identity since he did not want them to call back and disturb his sick wife. He again insisted that he never tried to make people believe that the RCMP was involved in his calls.

[165] Reviewing Cpl. Letourneau's testimony, the grievor argued that, just as was Mr. Oldford testimony, it was based on hearsay, and therefore, I should not give it much weight. For instance, the grievor pointed out that Cpl. Letourneau never took a statement from him even though he took them from others.

[166] The grievor ended this segment of his arguments by urging me to conclude that while he made a mistake by using the RCMP computer, he never intended to mislead anybody by trying to make them believe that the RCMP was behind his actions. He also pointed out that the harassment complaint that he filed against Ms. Proulx on March 8, 2017, probably prompted the employer's decision to reject him.

3. The salary issue

[167] The grievor stated that when he received confirmation of his salary on October 26, 2016, he realized that it was not the amount that he had agreed to with Mr. F. Proulx before being hired (Exhibit BA-1).The grievor pointed out that when he inquired about it on November 22, 2016, he was told that indeed, he had been a public-service employee when the RCMP recruited him (Exhibit BA-33). To him, the RCMP tried to change its position by claiming that he was an outside hire so that it could argue that he was on probation and therefore that it could terminate him. Only shortly after November 22, 2016, was it brought to his attention that he had been a new employee when the RCMP hired him (Exhibit E-1, tab 7).

[168] The grievor indicated that only on January 4, 2017, did he receive a new offer letter that included the right salary but also the two new paragraphs, one stating that he was on probation, and the other one referring to an oath or affirmation (Exhibit E-1, tab 8). He pointed out that only after his termination was he made aware of the three draft offer letters. While the first and third drafts included paragraphs about a probation period, the second one did not (Exhibits BA-2 and BA-36).

[169] Again, the grievor insisted that when the amended offer letter dated December 20, 2016, was sent to him on January 4, 2017, no one told him about the change to his status or pointed out to him that the amended letter contained the new paragraph about probation.

[170] The grievor maintained that he was hired through an internal process and that had he realized that he was on probation, he would have never signed the amended offer letter (Exhibits E-1 tab 9, BA-42, BA-43, BA-47, and BA-48). He maintained that the RCMP made a mistake and that it wanted him to pay the price. It would have been nice had he received an explanation from either Ms. Brady or Ms. Melanson as to what really happened with the mix-up with the offer letter. Unfortunately, none was provided (Exhibits BA-46 and BA-48).

4. The termination

[171] The grievor argued that he should not have been terminated and that throughout this matter, the RCMP acted completely unfairly and in bad faith.

[172] Reviewing Mr. Oldford's testimony and his justification for the termination, the grievor insisted that I should give little weight to his testimony since Mr. Oldford had never met the grievor, and he based his decision only on what others had reported to him. Therefore, his decision was based on hearsay and cannot be relied on.

[173] For the grievor, the evidence on his performance is also weak. He invited me to take into account that he was a trainee and that as such, mistakes did happen. He also stressed the fact that the information and material needed to carry out the work was not always adequate, which his supervisor, Ms. Proulx, who was clearly stressed and overwhelmed, would simply dismiss instead of trying to resolve. The grievor made the point that during his stay in Evidence Management, he received mixed messages about his performance, which was, at the least, not helpful. He mentioned the feedback from Ms. Schmidt, who was sometimes positive, and sometimes critical (Exhibits BA-20 and BA-31).

[174] The grievor indicated that he should not be held responsible for his superiors' inability to maintain a harmonious workplace. There were issues in the Evidence Laboratory before he arrived. He pointed out that a good work environment makes quite a difference. For instance, he did very well in his assignment to the Fleet

Management unit under Mr. Ouellette's supervision. He questioned why his excellent work under Mr. Ouellette was not considered before his employment was terminated.

[175] The grievor argued that the RCMP wanted to get rid of him for what happened when he was in the Evidence Management unit and that to that end, it used the pretext that he was on probation. That was a sham or a camouflage of its true intention. According to him, at the last minute, the RCMP inserted the paragraph stating that he was on probation just to discharge him. That was completely bad faith on its part.

[176] The grievor maintained that the probation paragraph was hidden in the amended offer letter, the purpose of which ostensibly was to deal with his salary. That shows the employer's ill intentions toward him.

[177] The grievor challenged the explanation of counsel for the employer that there was no need to include the reference to probation in the letter since probation is clearly statutory. For the grievor, the RCMP would not have gone to the trouble of issuing a new letter referring to probation if doing so made no difference. He stated that a probation period is solely to the employer's benefit; it is certainly not to the employee's benefit. He referred me to *Wallace v. United Grain Growers Ltd.*, [1997] S.C.R. 701, which dealt with the impact of an employment loss.

[178] The grievor argued that a probation period should be set out at the beginning of an employee's employment, not after the employment has started, and that it has to be discussed with the employee at that beginning and not eight months later.

[179] Moreover, the grievor argued that nothing in the *PSEA* prevented the employer from choosing to "opt out" of the probation period requirement. In other words, the employer could have reduced or even waived it. He explained that for instance, it is different from the *Ontario Residential Tenancies Act, 2006*, S.O. 2006 c. 17, which states that sometimes, specific legislative provisions cannot simply be departed from. He insisted that the probation period under the *PSEA* can be waived.

[180] The grievor reviewed the jurisprudence cited by the employer's counsel and dismissed it because it was not relevant or because contrary to it, his termination was not really based on a bona fide dissatisfaction as to his suitability for employment, but was a disguised disciplinary action.

[181] In the grievor's view, his case is also different from the RCMP's submitted case law in the sense that the RCMP acted mainly on hearsay.

[182] The grievor referred me to jurisprudence that in his view is more applicable to the facts of this case. For instance, he compared his emails to Mr. M. Proulx and Mr. Montone and argued that their tone was not as aggressive as the one referred to in *Air Canada v. CUPE - Air Canada Component*, 2011 CanLII 81802 (ON LA). He also referred me to *International Brotherhood of Electrical Workers, Local 353 v. Ainsworth Inc.* (2016), 266 L.A.C. (4th) 67.

[183] With respect to document production, the grievor insisted that he might not have received all the relevant documents and referred me to *A.B. v. Treasury Board (Royal Canadian Mounted Police)*, 2016 PSLREB 23.

[184] He concluded by asking me to declare that the RCMP's actions were a sham and done in bad faith and that he should not have been rejected on probation.

C. **Employer's rebuttal**

[185] Counsel for the employer pointed out that the grievor never applied on an internal appointment process at the RCMP. Since he was no longer an employee when the RCMP hired him, he was simply on a priority list following his layoff. Even though he was assessed, no selection process was run.

VI. Reasons

[186] As indicated, at the outset, counsel for the employer raised an objection to the Board's jurisdiction to hear this grievance because the grievor was rejected on probation under s. 62(1) of the *PSEA* and because s. 211 of the *Act* states that the Board has no jurisdiction over a termination made under the *PSEA*.

[187] With respect to probation, the *PSEA* states as follows at s. 62(1)(a):

> ***62 (1)*** *While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*
>
> ***(a)*** *the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act *…*
>
> …

> *and the employee ceases to be an employee at the end of that notice period.*

[188] The *Probation Regulations* provide that in the grievor's case, the probation period is 12 months.

[189] In addition, s. 211(a) of the *Act* reads as follows:

> ***211** Nothing is section 209 or 209.1 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 *….*

[190] Therefore, under the *PSEA,* the grievor could be rejected on probation provided that it occurred within his12-month probation period. The Board does not have jurisdiction over a termination done under the *PSEA*.

[191] As for the applicable jurisprudence, it is fair to say that over the last few years, the approach to follow in rejection-on-probation cases has been fairly consistent.

[192] A review of the case law under the *Act* (as amended in 2005) makes it clear that the Board has no jurisdiction over a rejection on probation unless there is evidence that the employer's decision to reject the employee was in fact a contrived reliance on the *PSEA*, a sham or a camouflage. As for the burden of proof, once the employer demonstrates that the employee was terminated while on probation and that notice or pay in lieu of notice has been provided, the burden of proof then shifts to the employee to demonstrate that the employer's decision was in fact a contrived reliance on the *PSEA*, a sham or camouflage. *Tello*, one of the Board's leading decisions on the issue, certainly offers a good overview of the principles applicable to a rejection on probation, as follows at paragraph 111:

> ***111** In my view, the change between the former* PSEA *and the new* PSEA*, when viewed in the context of the recent jurisprudence of the Supreme Court of Canada on the appropriate approach to public employment, does not significantly alter the substance of the approach that adjudicators should take to grievances involving the termination of a probationary employee. However, the omission of the words "for cause" in section 62 of the new* PSEA *does change the burden of proof requirements. The burden of proof on the deputy head has been reduced. The deputy head's burden is now limited to establishing that the employee was on probation, that the probationary period was still in effect at the time of termination and that notice or pay in lieu has been*

> *provided. The deputy head no longer has the burden of showing "cause" for the rejection on probation. In other words, the deputy head does not have the burden of establishing, on a balance of probabilities, a legitimate employment-related reason for the termination of employment. However, the Treasury Board* Guidelines for Rejection on Probation *require that the letter of termination of employment of a probationary employee set out the reason for the decision to terminate employment. The deputy head is still required to tender the letter of termination as an exhibit (normally through a witness) to establish that the statutory requirements of notice and probationary status have been met. That letter will usually state the reason for the decision to terminate the employment of the probationary employee. The burden then shifts to the grievor. The grievor bears the burden of showing that the termination of employment was a contrived reliance on the new* PSEA*, a sham or a camouflage. If the grievor establishes that there were no legitimate "employment-related reasons" for the termination, (in other words, if the decision was not based on a bona fide dissatisfaction as to his suitability for employment:* Penner *at page 438) then the grievor will have met his burden. Apart from this change to the burden of proof, the previous jurisprudence under the former* PSEA *is still relevant to a determination of jurisdiction over grievances [sic] against a termination of a probationary employee.*

[193] The principles enunciated in *Tello* have been followed in many other decisions, such as *Warman*, *Ricard v. Deputy Head (Canada Border Services Agency)*, 2014 PSLRB 72, and *Le Page v. Canada Revenue Agency*, 2015 PSLREB 13.

[194] While the jurisprudence has been consistent in recent years as to rejections on probation, this case is particular in the sense that the grievor challenged the very basis of the employer's position, which is that he was hired from outside the public service and that he was on probation when his employment was terminated. Moreover, he maintained that in fact, he was disciplined for what happened when he was under Ms. Proulx's supervision in the Evidence Management unit. In his view, this is a disciplinary matter over which I have jurisdiction, and the termination was a contrived reliance on the *PSEA*, a sham or a camouflage orchestrated by the RCMP to get rid of him.

[195] The issues in this case are as follows:

A. Was the grievor hired from outside the public service in April 2016?
B. If so, was the grievor on probation under s. 61(1) of the *PSEA*?
C. As a subsidiary argument, by not including a reference to probation in its initial offer letter, is the RCMP deemed to have waived the probation period?

D. If the grievor was on probation, was the rejection on probation a contrived reliance on the *PSEA*, a sham or a camouflage?

A. **Was the grievor hired from outside the public service in April 2016?**

[196] The undisputed evidence is that in 2013, the DOT informed the grievor that his services were no longer required. He then went on a two-year education leave provided under his then collective agreement. In 2015, he was laid off under s. 64(1) of the *PSEA* and then was placed on laid-off priority status for one year under s. 41(4). So in April 2016, when the RCMP recruited him, he held priority layoff status, but that was after he had ceased to be an employee under s. 64(4) of the *PSEA*. That section is quite clear as follows about the effect on an employee of being laid off: "An employee ceases to be an employee when the employee is laid off."

[197] In addition, when s. 64(4) is read in conjunction with s. 41(4), which uses "person" as opposed to "employee" to describe the priority of someone laid off, it leaves no doubt that the grievor was no longer a public-service employee when he received his offer letter on April 28, 2016.

[198] Therefore, I conclude that once he was laid off, the grievor ceased to be an employee in 2015 and that he was hired from outside the public service on April 28, 2016.

[199] I am comforted in my finding by the recent judgment, of the Federal Court, in *Canada (Attorney General) v. Santawirya*, 2019 FCA 248, in which the issue of whether Ms. Santawirya could have filed a grievance after being laid off. The Court considered the effect of being laid off under s. 64 of the *PSEA* and concluded as follows at paragraph 15:

> *[15] Subsection 64(4) is a clear expression of Parliament's intention with respect to whether a person with lay-off priority status is an employee. There is no doubt or uncertainty about its meaning or the scope of its application. Parliament has decided that a person who is laid off under subsection 64(1) of the PSEA ceases to be an employee….*

B. **Was the grievor on probation under s. 61(1) of the *PSEA*?**

[200] Normally, this would be an easy question to answer. Section 61(1) of the *PSEA* makes it clear that a person appointed from outside the public service is on probation:

> ***61 (1)*** *A person appointed from outside the public service is a probation for a period*
>
> > ***(a)*** *established by regulations of the Treasury Board in respect of the class of employees of which that person is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act …
> >
> > …

[201] In the grievor's case, the probation period is 12 months, per s. 2(1) of the *Probation Regulations*. The normal practice is that an employee from outside the public service hired by an organization listed in Schedule I or IV to the *FAA* will receive an offer letter that among other things, will point out to the employee that he or she is on probation for 12 months.

[202] However, in this case, the original offer letter of April 28, 2016, did not refer to probation; the evidence is that the RCMP erroneously thought that the grievor was an internal recruit. The evidence is also that nobody from the RCMP told him that he was on a one-year probation. Moreover, when the amended offer letter was sent to him, no one expressly pointed out to him that a new paragraph, about probation, had been added. This is unfortunate.

[203] As a result, the grievor claimed that he was not on probation when his employment was terminated. Counsel for the employer maintained that it is immaterial whether the original offer letter stated that there was a 12-month probation period since s. 61(1) of the *PSEA* makes it clear that a person appointed from outside the public service is on probation, and a clear and unambiguous statutory provision cannot be ignored.

[204] I have to agree with the employer that once it is established that the person at issue was appointed from outside the public service, as in this case, a probation period automatically applies. As indicated, s. 61(1) of the *PSEA* is quite clear and cannot be overlooked. Even if the original offer letter was unfortunately silent about probation, it remains that the law is very clear that a person hired from outside the public service is on probation, in this case for 12 months. In my view, the fact that the original offer letter was sadly erroneous and did not refer to probation cannot grant the grievor substantive rights in light of the very clear requirements of s. 61(1).

[205] In *Morin*, the adjudicator had to decide whether the grievor in that case could rely on a mistake in his offer letter. Just as in this case, Mr. Morin argued that he was

not on probation when his employment was terminated. The facts of that case are essentially that the original offer letter indicated that Mr. Morin would be on probation for 12 months from the date on which he was hired. However, Mr. Morin was hired as part of a career-progression program, approved by the Public Service Commission, which stated that he would be on probation until appointed to a higher level that went beyond the 12 months stipulated in the original offer letter. As in the present case, once management realized the mistake, it issued an amended offer letter that made it clear that the probation period was longer than the 12 months initially stated. He signed the amended letter and did not raise any questions. The adjudicator held as follows at paragraphs 22 and 24:

> ***22*** *Rather, the question is to determine whether the grievor can rely on a letter sent by the employer informing him, mistakenly, that he would be considered to be on probation for the entirety of his employment until the completion of 12 months, contrary to what is set out in the Act and the FOCPP approved by the PSC.*
>
> *…*
>
> ***24*** *The wording of the letter dated July 29, 1999, and the fact that his superiors allegedly led him to believe that his probationary period ended in 12 months are not enough to give him entitlements. The decision in* Hicks *(*supra*) is along the same lines.*

[206] Therefore, I conclude that the grievor was on probation when his employment was terminated in April 2017.

C. As a subsidiary argument, by not including a reference to probation in its initial offer letter, is the RCMP deemed to have waived the probation period?

[207] As indicated, I believe that the requirements of s. 61(1) of the *PSEA* make it clear that every appointment from outside the public service includes a probation period. As such, I am of the view that the argument that the RCMP waived its right to a probation period cannot be invoked against an express legislative provision such as s. 61(1). Again, the regrettable fact that the original offer letter did not mention anything about probation is not enough to bestow rights inconsistent with the express provision of s. 61(1).

[208] I note that paragraph 61(1) (a) of the *PSEA* clearly provides for the probation period to be established by regulations. Regulations are taken in accordance with stringent procedural and legal requirements. An employer’s discretion to establish a period of probation, or no period of probation, is not contemplated in s. 61 of the

PSEA and would not meet the stringent procedural and legal requirements that apply to taking regulations.

[209] The grievor also argued that, had he known that he would be subject to a probation period, he would not have signed the amended offer letter. As the probation was set by legislation, and its length was set by regulation, the grievor's consent was not needed.

D. If the grievor was on probation, was the rejection on probation a contrived reliance on the *PSEA*, a sham or a camouflage?

[210] As indicated, the jurisprudence on rejections on probation is clear in that the employer first must demonstrate that the termination occurred during the probation period and that the grievor was given notice or was paid in lieu of notice. The burden then shifts to the grievor to show that the rejection was not based on a bona fide dissatisfaction with his suitability for employment but rather that it was a contrived reliance on the *PSEA*, a sham or a camouflage.

[211] While the jurisprudence is clear about the employer's and employees' respective burdens of proof, it should be noted that it is also unambiguous that it is not sufficient for an employer to state that an employee was rejected on probation to avoid the Board's scrutiny. The Board is within its jurisdiction to examine really why the employee was terminated before concluding whether it has jurisdiction to dispose of the grievance on its merits. As stated as follows by the Supreme Court of Canada in *Jacmain*, at page 42:

> *… Although I agree that, in the case of a probationary employee rejected by the deputy head under s. 28, an adjudicator has jurisdiction to inquire whether what is in form of a rejection is in substance a disciplinary dismissal, I cannot agree that this does invest the Adjudicator with jurisdiction to review the deputy head's decision as to the suitability of the employee.*

[212] This reasoning was also followed in In *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), in which the Federal Court of Appeal stated as follows:

…

> ***17****… an adjudicator seized of a grievance by an employee rejected on probation is entitled to look into the matter to ascertain whether the case is really what it appears to be. That would be an application of the principle that form should not take precedence*

> *over substance. A camouflage to deprive a person of a protection given by statute is hardly tolerable.…*
>
> *…*

[213] I have already found that the grievor was terminated while he was on probation. The evidence also shows that he received pay in lieu of notice. However, the grievor has not established that the employer's decision to terminate him was not based on a bona fide dissatisfaction with his suitability for employment but that his was a contrived reliance on the *PSEA*, a sham or a camouflage.

[214] Throughout the hearing, in support of his argument that the employer's rejection decision was a ruse, the grievor maintained that the RCMP tried to punish him for his behaviour while he was in the Evidence Management unit and that therefore, this is a disciplinary matter, over which I have jurisdiction. While it is true that there were issues between him and Mrs. Proulx in the Evidence Management unit for which he received the reprimand letter, the evidence revealed that management decided to move forward and assign him to the other unit, under Mr. Ouellette's supervision. The evidence is that things worked out well to the point that the grievor's assignment was renewed and that it was even envisaged to make the assignment permanent.

[215] So in December 2016, when the amended offer letter was issued, the evidence was that management was moving to keep the grievor on staff. It did not seek to ambush the grievor; to the contrary, talks were underway to make him a permanent member of the Transport Management unit.

[216] Only in March 2017, when it was made aware of the grievor's actions through a public complaint, did the RCMP realize that he was using an RCMP email address and phone in his personal dispute with members of the public. At that point, the decision was made reject him while he was still on probation. While the RCMP could have decided to discipline him, it was also open to it to reject him on probation. As is known, just because an employee's actions could have been sanctioned by discipline does not mean that the employer could not have rejected the employee on probation and that its decision was necessarily a contrived reliance on the *PSEA*, a sham or a camouflage. Thus, situations in which an employee's behaviour could attract discipline may, in appropriate circumstances, nevertheless also be cause for a rejection on probation. *D'Aoust* states the following at paragraph 133:

> ***133*** *I find, based on the grievor's own [sic] written statements and testimony, that the employer had grounds on which it could have disciplined the grievor but chose not to. This does not, however, transform his release on probation into disguised discipline or established that the employer acted in bad faith. (*Ricard v. Deputy Head (Canada Border Services Agency*), 2014 PSLRB 72). Just because an employee could be disciplined for culpable behaviour does not mean that the employer cannot choose to reject that employee on probation rather than impose discipline.*

[217] As mentioned, things changed in February 2017 after the incident involving the grievor and public parties outside work hours. His car was towed on February 22, which started his private dispute with the parking management company and the property manager of the parking lot that hired it. It is a private dispute, and I will not address its merit.

[218] The evidence was that during his dispute, the grievor emailed third parties from an RCMP computer, thus using his RCMP email address. As a result, the parking management company owners claimed that they thought that he was an RCMP officer. He also made calls from the RCMP's landline to them, with the result that sometimes, their phone display indicated that the RCMP was calling.

[219] In his testimony and arguments, while the grievor admitted to and apologized for using his RCMP email address in his dispute with private citizens, he maintained that he did so because his home computer was under repair and that he never intended to make people believe that he was an RCMP officer.

[220] In his interview with Cst. Brody, the grievor admitted to some 23 occasions on which the RCMP email address was used in his dispute. As for calling the private citizens involved in the dispute using the RCMP's landline, he did not deny doing so. He explained that he did not know that those he called saw the RCMP as the caller on their phone displays. Again, in his interview with Cst. Brody, he confirmed blocking his name when he called from his home but admitted to not doing so when he called from the RCMP's phone (Exhibit E-1, tab 14, page 2).

[221] When faced with this situation, I can understand that the RCMP had some serious concerns with the grievor's actions, especially since he apparently dragged it into his dispute with members of the public. Despite his statement that he never intended by using his RCMP email address and its phone to make people believe that he was an RCMP officer, I have some doubts. Mr. M. Proulx certainly thought so when

raising the matter with Cpl. Letourneau. I would add that it is common knowledge that the RCMP is Canada's national police force and that chances are that anybody receiving a call or an email ostensibly from the RCMP might very well be intimidated and assume that the caller is an RCMP officer.

[222] The grievor maintained that he used his employer's computer because his computer was broken. Even if that was true, and while I agree that it might be tolerated for employees to use, on occasion, their employers' computers, using an RCMP email address is certainly not encouraged when engaging in a personal dispute with third parties. The same goes for the phone; employees should not use an RCMP phone in litigations with third parties. On that point, I note that according to Cst. Brophy's note, the grievor made the effort to block his home number when he made calls as part of his dispute. While he said that he did that to protect his ailing wife from being disturbed by return calls, I note that he did not take the same precaution when calling from the RCMP's phone (Exhibit E-1, tab 4, page 2).

[223] Therefore, I understand why when it was made aware that the grievor had used its email address and phone during his dispute with private citizens, the RCMP questioned his suitability for employment in its organization.

[224] The probation period provided for in the *PSEA* consists of time for the employer to assess whether an employee is suitable to its organization. *Ricard* indicated as follows:

> *…*
>
> *[119] A probationary period is designed to give an employer time in which to assess a new employee's suitability for a position. For that reason, probationary employees do not enjoy the same job security as permanent employees. Both* Penner *and* Tello *make it clear that the assessment of an employee's suitability is not limited to work performance or production but may also relate to character or general suitability.…*
>
> *…*

[225] I conclude that the grievor has not met his burden of proof to demonstrate that the employer's decision to terminate his employment was not based on a *bone fide* dissatisfaction with his suitability for employment, but that it was a contrived reliance on the *PSEA*, a sham or a camouflage. For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[226] The objection to jurisdiction is allowed.

[227] The grievance is dismissed.

March 23, 2020.

Linda Gobeil,
a panel of the Federal Public Sector
Labour Relations and Employment Board