Date: 20200609

File: 566-02-12713

Citation: 2020 FPSLREB 64

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

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

BETWEEN

MARIAM MALIK

Grievor

and

DEPUTY HEAD (Canada Border Services Agency)

Respondent

Indexed as
Malik v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Leon Presner, paralegal, and Sophie Levy-Presner, consultant

For the Respondent: Richard Fader, counsel

Heard at Toronto, Ontario,
January 20 to 22, and, by teleconference, February 12, 2020.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor was employed as an indeterminate FB-02 (border services) officer trainee with the Canada Border Services Agency (CBSA) in the Officer Induction Development (OID) Program from January 13, 2014, until the termination of her employment on June 15, 2015, which she grieved. As of her termination, she was on probation.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board (PSLRB) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40; *EAP No. 2*) also came into force (SI/2014-84). Pursuant to s. 396 of the *EAP No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) as that Act read immediately before that day.

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

[4] This grievance is dismissed for the reasons that follow.

II. Preliminary issues

A. Confidentiality orders

[5] A part of this grievance relates to the search and seizure of items in the car of the grievor's brother. The police officer involved in this seizure testified, and the occurrence report was admitted as an exhibit. The police officer is now an undercover officer. The parties agreed that the officer's identity should not be revealed in this

decision and that the general occurrence report that refers to the officer should be sealed, in accordance with the test established in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and *R. v. Mentuck*, 2001 SCC 76, known commonly as the "*Dagenais/Mentuck*" test.

[6] In *Canada (Attorney General) v. Philps*, 2019 FCA 240, at par. 23, the Federal Court of Appeal relied on the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at paragraphs 48 and 53, where the Supreme Court considered its jurisprudence relating to publication bans in the criminal context in *Dagenais* and *Mentuck*, for determining whether to redact names in a proceeding before the Board. The Supreme Court held that in administrative proceedings, confidentiality orders should not be issued unless the order is necessary to prevent a serious risk to an important interest in the context of litigation because reasonably alternative measures will not prevent the risk. The Court also held that the risk in question must be "real and substantial". In addition, the salutary effects of the confidentiality order, including the effects on the right of litigants to a fair trial, must outweigh its deleterious effects, including the effects on the right to free expression.

[7] In *Mentuck*, the publication ban request related to the identities of undercover police officers, among other facts. In applying its test, the Court addressed the names and identities of undercover police officers as follows:

> *46 However, I accept that the publication of the names and identities of the officers in question* ***would*** *create a serious risk to the efficacy of current, similar operations. Given that the officers involved appear to go by their real names in the course of this undercover work, publishing their names could very easily alert targets that their apparent criminal associates are in fact police officers. Furthermore, since the operations in question have already been commenced, it would obviously be unreasonable for officers to adopt pseudonyms now. The targets already know their real names. Accordingly, I agree with Menzies J. that a ban on the publication of officers' names is necessary and that there is no reasonable alternative.*
>
> [Emphasis in the original]

[8] I therefore find that the anonymization and sealing order are necessary to prevent a serious risk to an important interest (police operations) that outweighs the right of the public to know the identity of the police officer and there is no other reasonable alternative to anonymizing the decision and sealing the exhibit. I find that

the risk in question is "real and substantial". I also find that the salutary effects of the confidentiality order, including the effects on the right to a fair hearing, outweigh its deleterious effects, including the effects on the right to free expression.

[9] Accordingly, I have identified the police officer in this decision by the initials "A.B." I have also ordered that the occurrence report be sealed.

B. Grievance report

[10] The grievor disclosed to the employer as part of her case a grievance report prepared by her former representative on this grievance, which was the bargaining agent for the Border Services (FB) Group. The employer did not object to the introduction of this report and relied on it in its final arguments.

[11] It is unusual for a grievance report to be introduced as evidence. This grievance report identifies the strengths and weaknesses of the grievance before the Board. It is the former representative's assessment based on his/her review of the facts as set out by the grievor. The former representative's assessment of the merits of a grievance is not relevant in the evidence portion of a grievance hearing as it is simply the former representative's assessment. In this sense, it is more like submissions. Accordingly, it is not relevant evidence to the issues in the grievance before me and I have given it no weight.

C. Witnesses

[12] There was no request for an exclusion of witnesses. Four witnesses testified for the employer, and the grievor testified.

[13] A witness for the employer was not available on the scheduled hearing days. The employer reserved its right to contact the witness by teleconference after the scheduled hearing days concluded. The grievor consented to this approach. After the hearing dates concluded, the employer's counsel advised that it did not need to call the witness.

III. Summary of the law relating to the termination of probationary employment

[14] The employer relied on s. 62 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) to terminate the grievor's employment. That section provides as follows:

> ***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*, or*
>
> ***(b)*** *the notice period determined by the separate agency in respect of the class of employees of which that employee is a member, in the case of a separate agency to which the Commission has exclusive authority to make appointments,*
>
> *and the employee ceases to be an employee at the end of that notice period.*
>
> ***Compensation in lieu of notice***
>
> ***(2)*** *Instead of notifying an employee under subsection (1), the deputy head may notify the employee that his or her employment will be terminated on the date specified by the deputy head and that they will be paid an amount equal to the salary they would have been paid during the notice period under that subsection.*
>
> [Emphasis in the original]

[15] The application of this provision is commonly referred to as a "rejection on probation".

[16] The *FPSLRA* sets out the jurisdiction to refer an individual grievance to adjudication. Section 211 states that any termination of employment under the *PSEA* cannot be referred to adjudication.

[17] The jurisdiction of the Board to hear a rejection-on-probation grievance is limited. The Federal Court, in *Chaudhry v. Canada (Attorney General)*, 2007 FC 389, set out the limited basis of the Board's jurisdiction as follows:

> *[51] In these circumstances, the employer satisfied the adjudicator that it had met the burden of proof which required it to show some evidence of an employment-related reason for a rejection on probation. In this regard see* Canada (Attorney General) v. Leonarduzzi *(2001), 205 F.T.R 238, at para. 37, where Lemieux J. wrote:*
>
> > *Specifically, the employer need not establish a prima facie case nor just cause but simply some evidence the rejection was related to employment issues and not for any other purpose.*
>
> …

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

[18] *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, at paragraph 111, sets out the shifting burdens of proof in a rejection on probation grievance. The employer must show that i) the grievor was on probation, ii) the probationary period was still in effect at the time of the termination, iii) she was given notice or compensation in lieu of notice, and iv) she was provided with a letter stating why she was rejected on probation. The burden then shifts to the grievor to demonstrate that the decision to terminate her employment by way of a rejection on probation was a sham, camouflage, or contrived reliance on the *PSEA* or that it was done in bad faith.

IV. Summary of the evidence

[19] The employer relied on the grievor's removal of protected documents from the workplace when she was a summer student (before her appointment as an FB-02 officer trainee) to support the rejection on probation. While she acknowledges that the documents were in her possession, she maintains that they ended up in her possession inadvertently. Her position is that she was rejected on probation based on discriminatory grounds and because she made a complaint about being photographed by the news media while on duty.

[20] In the summary of evidence, I set out the grievor's background and an overview of the CBSA's OID program. I then summarize evidence on her performance assessments during the probationary period. I then summarize the alleged employment-related reason for the rejection on probation, the investigation of the allegation, and the termination of employment. I then turn to the allegations of a breach of human rights and the events that she relied on to support her position that the rejection on probation was a sham or camouflage.

[21] In her testimony, the grievor referred to a narrative document that she had prepared. The employer did not object to her reliance on it and it was entered as an exhibit.

A. Background

[22] The grievor self-identifies as a Muslim and wears a hijab. She was employed by the CBSA as a summer student in 2012. In that role, she worked in the CBSA's Corporate Services branch at Pearson International Airport ("Pearson").

[23] Sharnreet Sandhu was the superintendent of Corporate Services at Pearson in the summer of 2012. She testified that the role of Corporate Services includes managing employee performance-management agreements and learning plans. She testified that the role of a summer student was as a "floater" and covering for those on leave. The role also involved clerical duties such as filing and photocopying. Superintendent Sandhu testified that the role included filing performance-management documents, as well as entering data in an electronic database related to learning plans.

[24] The grievor testified that she was not given any training on the handling and storage requirements for sensitive information. Superintendent Sandhu testified that all summer students were provided with orientation training that would have included training on security and the high level of confidentiality required in the position. She also recalled meeting with the summer students and explaining the high level of confidentiality required of them.

[25] The grievor was selected for the Officer Induction Training Program (OITP) in 2013, which is an online learning program followed by an 18-week in-residence program at the CBSA College in Rigaud, Quebec. This portion of the training program is unpaid, and the participants are not employees until they graduate.

[26] The grievor graduated from the OITP in December 2013 and was offered a full-time appointment as an FB-02 officer trainee, starting January 13, 2014. Her work location was at Pearson in the Passenger Operations District.

[27] The offer letter stated that the grievor was subject to a probationary period for the duration of the OID program or twelve months, whichever was longer, excluding any periods of leave without pay, full-time language training or leave with pay in excess of thirty consecutive days, in accordance with s. 61 of the *PSEA*. The duration of the OID program is a minimum of 12 months and a maximum of 18 months. Its length can be extended on a case-by-case basis at management's discretion. At 12, 15, and 18 months, the officer trainee is evaluated based on an evaluation package. To be eligible

for promotion, trainee officers are required to present evidence supporting their competency development, undergo a performance questionnaire quarterly review, and present proof of their successful completion of all core training. This evaluation package is reviewed by the Merit Review Board (MRB) and then the MRB provides a recommendation for promotion, further development, or for removal from the program. If at the time of the presentation of the Evaluation package the officer trainee has consistently demonstrated all required competencies and meets the FB-03 merit criteria, she will be recommended for appointment to a permanent FB-03 position.

[28] If an officer trainee is not successful at the 12-month mark or at the 15-month mark, an enhanced developmental plan is put together in consultation with the trainee, the OID program unit, and the trainee's superintendent (supervisor). The plan is designed to support the trainee in developing the appropriate competencies and in performing at the required level. The officer trainee is then reassessed after an additional 3-month period (15 months and 18 months). If a trainee is not successful at the 18-month review, he or she is subject to removal from the OID program.

B. Performance during probationary period

[29] The grievor's employment was not terminated because of her performance during the probationary period. I have included a summary of her performance only for the purpose of explaining the extension of her probationary period up to the time of the termination of her employment. She did not agree with some of the performance evaluations and provided testimony explaining the context of the evaluations and her explanations. In light of the fact that her performance during the probationary period was not a ground for her rejection on probation, I have not summarized that testimony.

[30] In the grievor's enhanced performance-development plan dated November 28, 2014 , it was noted that her performance to that date did not meet the requirements for appointment to the FB-03 level. It stated that "significant improvement" needed to be demonstrated for her to be considered for appointment at the 12-month mark of the OID program.

[31] In the quarterly review dated December 20, 2014, the superintendent noted that the grievor had demonstrated some improvement over the previous quarter. The

superintendent also noted that if she continued the momentum, she would meet all the expectations set out in the enhanced performance-development plan.

[32] On January 15, 2015, the grievor was advised by Human Resources that she would continue in the OID program until the next time for assessment (at the 15-month mark), on April 13, 2015.

[33] An Enhanced Performance Development Plan was prepared on February 4, 2015 and signed by the grievor on March 4, 2015.

[34] The grievor was provided with a Performance Questionnaire prepared by her superintendent on April 2, 2015. It noted improvements in those areas that had been identified as requiring improvement as well as an isolated incident of poor performance that had not reoccurred (the superintendent noted that the grievor had "learned from her mistake"). The questionnaire was mostly positive and ended with "Good work Mariam!!"

[35] On April 29, 2015, the grievor wrote an email to the OID program team noting that the 15-month assessment period had passed (April 13, 2015) and asking about the status of her participation in the OID program. On May 1, 2015, she received the following reply:

> *…Senior management has advised us of a pending Labour Relations / Personal Security Investigation currently under way that needs to be resolved before proceeding with your acting assignment process under the OID Program.*
>
> *We will keep up-dated as the situation develops. …*

[36] The grievor received no other performance evaluation after this period and her evaluation package was not reviewed by the MRB.

C. The alleged employment-related incident

[37] On January 25, 2015, Constable A.B. stopped the grievor's brother in his vehicle when the constable noticed that it had no visible licence plate. The occurrence report notes that on approaching the car, the constable first noticed a "strong odour" of marijuana (a controlled substance at that time). When the driver opened his window, the constable reported that there was evidence of marijuana, in plain view. He arrested the occupants of the car and conducted a search of the vehicle, which turned up a box

that contained performance evaluations of FB officers from 2012 on letter-sized paper. The evaluations were marked “Protected” and contained the officers’ names as well as their personal record identification (PRI) numbers. The documents filed as exhibits in this hearing had the PRI numbers redacted. The parties agreed that the PRI numbers in the documents seized by Constable A.B. had not been redacted.

[38] At the hearing, Constable A.B. identified the documents that he had retrieved from the vehicle. He testified that he was concerned enough about them to continue the investigation at the police station. The CBSA was contacted by a colleague of his and advised of the seized documents, which were returned to the CBSA the following day. The grievor’s brother was not charged with any drug offences and was released

[39] In cross-examination, Constable A.B. was asked if the arrest had been lawful. He stated that he believed so. He disagreed with the assertion made by the grievor’s representative that he had not had sufficient grounds for an arrest. He also disagreed with the assertion that he needed a warrant to conduct a search of the vehicle.

[40] Superintendent Sandhu testified that a PRI is a unique identifier. She also testified that performance evaluations were normally done on legal-sized paper. Superintendent Matthew Forrest, Superintendent of Corporate Operations, testified that a PRI is used to obtain salary information, for letters of employment, and for applying to other positions. He also stated that the performance evaluations contained phone numbers, which, along with an employee’s name, could be used in identity theft. The performance evaluations that were filed as exhibits in this hearing do not contain phone numbers of the employees – either their office phone number or their home phone number.

[41] On February 17, 2015, the grievor received an emailed notification from Superintendent Forrest of a fact-finding meeting “regarding a security issue” on February 23, 2015. She was advised of her right to have a bargaining agent representative attend the meeting with her, in light of the fact that disciplinary action might result.

[42] The grievor testified that when she received the notification, she was not aware of any security issues. She spoke to her bargaining agent representative, who asked if she was aware of any incident that management would want to investigate. She replied

that she was not aware of any incident. She testified that she did not have regular communications with her brother before the incident.

[43] Superintendent Forrest testified that the grievor's representative did not ask for particulars before the meeting but that if he had, Superintendent Forrest would have explained "as far as [he] could".

[44] The fact-finding meeting took place on February 23, 2015. Superintendent Forrest was accompanied by a note-taker. The grievor attended with her bargaining agent representative. Superintendent Forrest prepared notes of the interview based on his notes and those of the note-taker immediately after the interview.

[45] The grievor was advised by Superintendent Forrest that her brother had been arrested for the possession of marijuana, and she was shown the police report of the arrest. She told Superintendent Forrest that she was completely unaware of the arrest. She also told him that the car referred to in the police report was her brother's and that she had never driven it to work. Superintendent Forrest then told her about the employee evaluations found in the trunk of the car. In his disciplinary report, he set out the grievor's reaction to being told that the documents had been found in her brother's trunk as follows:

…

> *… Mariam claimed to have no idea of the occurrence. When presented with the documents that were found in the vehicle she claimed to recognize what they were and has handled them often, but claimed to never have seen these ones before. When asked why these documents were in the back of the vehicle, Mariam offered no explanation. She offered no clarification of how the documents were moved from the CBSA premises to that vehicle or why they would be reproductions of the originals… When asked directly if she removed the photocopied* [sic] *and then removed the documents from the workplace, Mariam denied the allegation. When asked how they would be in her/her brother's possession she offered: "Like I said, I have no idea. I can't speak to if I unknowingly took them."*
>
> *… At the end of the interview she speculated that it may have been a mistake on her part but was reminded that she still needed to report these incidents to management.*

…

[46] The grievor testified that the first time she learned of the incident involving her brother was at the fact-finding meeting. She testified that she was "dumbfounded"

when informed by Superintendent Forrest. She also testified that she was truthful in her answers at the meeting.

[47] Superintendent Forrest testified that in the fact-finding interview, there was no emotion in the grievor's voice. In his disciplinary report, he expressed the opinion that she had not taken any responsibility for her actions or expressed any genuine remorse.

[48] At the fact-finding meeting, the grievor was asked what she would have done had she been aware that the documents had left the CBSA's offices. She replied that she would have immediately reported it to Superintendent Sandhu. She testified that at the end of the meeting, she was advised that the investigation would continue but that it was unlikely that she would have to speak to the investigators again.

[49] Superintendent Forrest testified that the grievor or her bargaining agent representative could have provided further information after the fact-finding interview but did not. The grievor testified that at the end of her interview, she was under the impression that no more was required from her in the investigation.

[50] After the fact-finding interview of February 23, 2015, the grievor confronted her brother about the arrest and about the documents being found in the trunk of his car. She testified that there were items of hers, including a box of school documents, from 2012 in the trunk of his car. She had moved in June 2014 and testified that she had asked her brother to move some of her belongings. The box was left behind in the trunk. She testified that it mostly contained university assignments, readings, exams, and notes.

[51] The grievor testified that she must have picked up the documents at work inadvertently while putting her schoolwork in her bag and then shoved the pile of papers (the schoolwork and the performance evaluations) in a box and forgot them. The grievor testified that she had made a mistake in removing the protected documents from Pearson, stating, "I'm human." She denied "knowingly" taking them.

[52] Superintendent Sandhu testified that she did not understand how the grievor could have taken the performance appraisal documents inadvertently. She testified that the photocopier was not near a workspace and that once photocopied, the documents were supposed to be filed. The original documents were then sent to the CBSA's Regional Headquarters. Superintendent Sandhu also testified that she had

never seen the grievor studying while at work. In cross-examination, Superintendent Sandhu stated that it was possible that the grievor could have picked up the documents inadvertently.

[53] Superintendent Forrest provided his disciplinary report to management on March 5, 2015. He recommended that in light of the seriousness of the grievor's conduct, her security clearance be revoked and that her employment be terminated, as the CBSA could "… no longer trust or support her decision making ability". He testified that he had no further involvement in the decision to terminate her employment.

[54] On March 31, 2015, William Sawchuk, Senior Investigator, Personnel Security Screening Section, advised the grievor that a security interview was required. She was also provided with a "Security Interview Notification" that her reliability status or security clearance was to be reviewed "… as a result of concerns which have come to our attention". The purpose of the interview was "… to provide [her] an opportunity to provide information in a forthright and honest manner with respect to the concerns that have arisen and to answer all questions truthfully". She was also advised that she could be accompanied by an observer, who was not allowed to interfere in any way with the interview process.

[55] The interview took place on April 9, 2015. The grievor brought a bargaining agent representative as an observer. The grievor told Mr. Sawchuk that the only plausible explanation of how the performance evaluations ended up in her possession was that she might have accidentally taken them off the premises along with her school materials.

[56] Mr. Sawchuk spoke to Superintendent Forrest about Superintendent Forrest's fact-finding meeting with the grievor. Superintendent Forrest testified that it was a brief conversation and that he was not aware of the contents of any security report. He testified that the disciplinary investigation was segregated from the security investigation, and vice-versa, for the investigations not to influence each other. He testified that he had no knowledge of Mr. Sawchuk's interview of the grievor.

[57] The grievor testified that her impression was that the security investigation was connected to the fact-finding investigation.

[58] On June 2, 2015, the grievor was advised of a disciplinary meeting scheduled for June 3, 2015. On that day, Christine Durocher, Director, Passenger Operations, advised her that "… additional information has come to management's attention which requires further consideration and validation" and that the disciplinary meeting was postponed. The grievor testified that she was never told what additional information had come to management's attention.

[59] The disciplinary meeting took place on June 15, 2015. The grievor had a bargaining agent representative with her. She was presented with a letter terminating her employment, signed by Jennifer Richens, Acting Director General of the CBSA's Training and Development Directorate. The letter stated as follows:

> *…*
>
> *…Throughout the course of the meeting with management* [February 23, 2015 fact-finding] *you denied having taken the protected documents, offered no explanation as to how the documents could have been removed from CBSA premises and had "no idea" as to how they came to be in the vehicle.*
>
> *As an employee of the CBSA you occupy a position of authority and have access to protected information and systems. With authority comes the expectation that your decisions and actions will be guided by the Agency's Code of Conduct and values, including integrity.*
>
> *Based on a thorough review of this case, I am satisfied that you were made aware of the allegations and that you had the opportunity to present information to management that you wished to have considered prior to a decision being made. I find on the balance of probabilities that you removed protected documents from CBSA premises without authorization, failed to properly secure the documents and allowed them to be viewed by unauthorized persons. Moreover, the findings listed above along with your conduct during the investigation of the incidents are contrary to the* Code of Conduct *and demonstrate a lack of integrity that has irrevocably damaged the bond of trust that is fundamental to the employer-employee relationship.*
>
> *Consequently, in accordance with the authority delegated to me by the Deputy Minister, and pursuant to section 62 of the* Public Service Employment Act*, please be advised that your employment is hereby terminated effective the date of receipt of this letter during the probationary period from your position as a CBSA Officer Trainee. As of the date of receipt of this letter, you are no longer authorized to report for duty, however, pursuant to section 62(2) of* Public Service Employment Act*, you will be paid 30 days in lieu of notice.*
>
> *…*

[60] Ms. Richens testified that she first became aware of concerns about the grievor when she was asked to review the documentation for the grievor's rejection on probation. She reviewed the report prepared by Superintendent Forrest as well as the police report. She testified that this information gave her "grave concerns". She testified that her decision to reject the grievor on probation was not a disciplinary decision but was based on integrity.

[61] In cross-examination, Ms. Richens explained her reference in the termination letter to the grievor's conduct during the investigation. She stated that she relied on the fact that the grievor expressed no remorse and took no responsibility for her actions.

[62] Ms. Richens was asked by counsel for the employer why the grievor was allowed to stay in the workplace until the termination of her employment, given the concerns about her integrity. Ms. Richens stated that due process had to be followed.

[63] Ms. Richens testified that it was normal to carry out two investigations — one for security, and the other with respect to labour relations — and that they would be parallel and separate. She testified that she had not seen the security investigation report before preparing for this hearing.

[64] The grievor testified that she believed that the employer would have considered the security investigation, as it contained her side of the story.

[65] Ms. Richens testified that she had never met the grievor and that she had never seen the grievor before the hearing. She testified that she was shocked to hear the allegation of racism in a document that the grievor had provided to the Canadian Human Rights Commission (CHRC; discussed later in this decision). She testified that she had thought that the name "Malik" was of Hungarian origin, based on her experience, and that she had not been aware that the grievor was Muslim or wore a hijab.

[66] In cross-examination, Ms. Richens noted that in the grievor's performance assessments, some areas for improvement had been identified.

[67] The grievor contacted Mr. Sawchuk after her termination of employment, and she testified that he told her that he would not complete his investigation or issue a

report because her employment had been terminated. She did obtain a “Security Review Investigation Report” through an access-to-information request. The report, dated May 5, 2015, was signed by Mr. Sawchuk as well as others in the Personnel Security Screening Section but ultimately was not signed off by the Departmental Security Officer. Mr. Sawchuk’s recommendation was that the matter be referred to the Security Review Committee for consideration of a possible suspension of the grievor’s reliability status.

[68] The grievor testified that the work environment at Pearson was toxic and alleged that colleagues had made racist comments to her.

D. Complaint of CBC coverage, and CHRC complaint

[69] To place in context the grievor’s evidence relating to her complaint about the coverage of her by the Canadian Broadcasting Corporation (CBC) and her human rights complaint to the CHRC, it is necessary to first set out the events of January 2014.

[70] Shortly after she started working at Pearson, on January 29, 2014, the grievor was asked if she would be willing to appear in a video being prepared by the CBSA called, “Arriving by Air”. She signed a consent and waiver form, allowing the CBSA to film her. The release was specific to that video. The name tag on her uniform was changed. The video was shown on terminal screens at Pearson commencing in December 2014. The grievor testified that she agreed to appear in it in “the interests of being a team player”.

[71] The grievor testified that in the first week of March of 2015, a CBSA representative approached her, accompanied by a camera operator, while she was working at a booth in Primary Inspection. She was asked if she minded if she was put in “a couple of shots” while working. She testified that she was not informed about the purpose of the “shots” or that the camera operator was from the CBC.

[72] The grievor was on leave from March 8 to 18, 2015, and had limited Internet access then. She testified that on March 10, 2015, she was advised by a friend that her photo was the main image in an online CBC article entitled, “March Break 2015: How to avoid an airport meltdown”. She testified that friends of hers shared the article on Facebook and “tagged” her. She also testified that the article was posted on the CBC Facebook page and that there were a large number of comments from the public, many

of which were discriminatory. She provided some of the comments at the hearing. The photograph of her clearly shows her name tag on her uniform.

[73] The grievor testified that on or about April 3, 2015, she met with Acting Chief David Berndt to express her concerns about her personal safety as well as what she felt was a lack of consent. She followed up with an email to him in which she stated that had she been advised that the photograph of her would be used by the CBC, she would not have agreed to it. She also stated in the email that given the current anti-Islamic sentiment around the world, she did not appreciate being put in a national news article. She noted that although she had not experienced any specific threats, it was a safety concern for her, as she often worked late.

[74] Ms. Durocher replied to the grievor on April 15, 2015, stating that it was the CBSA's intention to meet with her and to provide a more fulsome response once inquiries had been completed.

[75] On May 20, 2015, Ms. Durocher provided the following email response:

> *I am writing you further to my email of April 20, 2015 concerning the CBC video taping of "March Break 2015". As the Director of Passenger Operations District, my first and foremost concern is the safety of the staff and, in this regard, I had A/Chief Berndt meet with you to discuss precautions you may take, as you raised concerns.*
>
> *A/Chief Berndt met with you on May 2, 2015 and discussed your concerns, as well as, precautions you may consider. A/Chief Berndt has confirmed that he discussed the tools that have been developed to assist officers with safety concerns when not at work. He has advised me that you understood the precautions available, however, your main concern with the matter was related to your not fully understanding the purpose of the video footage. In this regard, I have followed up with Communications and they have confirmed that you did provide verbal consent and were advised that CBC was taking the footage for a March break video.*
>
> *Communications has confirmed that only volunteers that consent/agree to be filmed and have their names visible are used in video footage. They have assured me that if an individual expresses any concerns with being taped they will guarantee that they are not included in the footage. However, I understand that in this particular incident you did not fully understand what the footage was being used for and, therefore I have requested that a more thorough discussion and/or consent is required before future taping occurs at Passenger Operations District.*

> *I understand that you have not had any specific threats stemming from this video footage and would request, that if you do, that you advise Management immediately.*
>
> *…*

[76] The grievor requested a meeting with Ms. Durocher, whose assistant scheduled one for June 2, 2015. The grievor reiterated her concerns to Ms. Durocher about the CBC article and the use of her image. She testified that she expressed her dissatisfaction with the CBSA investigation and the response to her concerns.

[77] Following the meeting, the grievor wrote to Ms. Durocher on June 15, 2015, denying that she had provided consent for the taping. She stated, "I cannot understate how upsetting this matter is to me, given the other stressors I am currently facing …".

[78] Ms. Richens testified that she had no knowledge of the CBC article until making her preparations for this hearing. She testified that she was not made aware of this issue and that it did not factor into her decision to terminate the grievor's employment.

[79] The grievor testified that she believed that someone would have mentioned her complaint about the CBC coverage to Ms. Richens but admitted that she had no proof.

[80] The grievor filed a complaint with the CHRC on June 15, 2016, a year after her termination. She alleged that she had been discriminated against on the grounds of race, colour, and religion by how she was treated in an adverse, differential manner and by the termination. In a report dated June 26, 2018, the CHRC determined that it was "… plain and obvious that this complaint cannot succeed". The report recommended that the complaint be dismissed as frivolous, under s. 41(1)(d) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[81] The grievor was given an opportunity by the CHRC to respond to the report. She provided it with undated submissions. A significant part of her submissions consists of argument. I have summarized the relevant parts of her argument in the summary of the arguments section later in this decision. In her submissions, she wrote about the finding of the protected documents in her brother's car and corrected the statement in the CHRC report that she had removed protected documents from the workplace while she was on probation, as follows:

> *…The respondent says that the investigation determined that the complainant had removed protected documents from the workplace while she was a probationary officer trainee. This statement is not true. Not once did I remove a single document while I was an officer trainee. I unknowingly took paperwork home that I assumed was my own coursework, in 2012, while I was an administrative student. I moved in 2014 and had asked my brother to help me move some of my belongings to my new residence; these belongings included a box full of academic coursework. I was unaware that there were protected CBSA documents in that box, with my coursework.*

[82] Later in her response, she stated that she agreed that there was evidence of negligence on her part in 2012 but that there was no evidence of malfeasance.

[83] The CHRC reviewed the submissions and dismissed the complaint on September 28, 2018. The grievor did not apply for a judicial review of the CHRC's decision.

V. Summary of the arguments

[84] The following is a summary of the arguments made at the hearing, in addition to additional submissions made by teleconference call on February 12, 2020.

A. For the employer

[85] The employer submitted that I did not have jurisdiction over this grievance and that the proper procedure for the grievor was a judicial review application to the Federal Court.

[86] The employer referred me to *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), and *Tello*. It stated that it was required only to provide an employment-related reason for the termination of the grievor's employment. In this case, it submitted that it had an employment-related reason and that the grievor had admitted her negligence in her CHRC submissions.

[87] The employer submitted that the removal of the performance appraisals from the workplace was a serious issue. It did not have to prove any intent to remove them. In the alternative, it argued that it was more likely than not that the grievor knew about the existence of the documents. The employer submitted that the chain of events as described by the grievor was not plausible.

[88] The employer also submitted that the grievor's discrimination allegations were simply wild allegations without any substantive support. The employer also noted that the grievor demonstrated a lack of remorse for her actions.

[89] The employer submitted that it had met its burden of proof and that the grievor had not met her burden to show that the termination of employment was a sham. The employer noted that the decision-maker, Ms. Richens, was not aware of the grievor's issues with the CBC. There was no evidence to support retaliation by the CBSA for her raising those issues.

[90] The employer submitted that the discrimination issues raised by the grievor had been addressed by the CHRC and had been dismissed. It submitted that these issues should not be relitigated and relied on the principle of issue estoppel; see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44. The employer stated that these were the same issues and the same parties and that the grievor was estopped from raising these issues in this proceeding.

[91] In the alternative, the employer stated that Ms. Richens knew only the grievor's gender and that she was not aware of the grievor's race or religion. The employer submitted that there was no basis for determining that the termination of employment was tainted by discrimination.

[92] In conclusion, the employer submitted that the grievor had failed to meet her burden and that the grievance should be dismissed.

B. For the grievor

[93] The grievor submitted that the termination of employment was done in bad faith and that it was a planned and purposeful act. She stated that her probationary status was improperly extended in bad faith.

[94] The grievor submitted that the arrest of her brother and the search of his car were illegal. She submitted that the police officer did not have probable cause to search the vehicle.

[95] The grievor submitted that the testimony of Superintendent Forrest was not reliable. He testified that he was not aware of the security investigation, but there is evidence that he had a detailed conversation with the security investigator.

[96] The grievor submitted that the security investigation report contained information that would not support a termination of employment and that Ms. Richens should have considered it.

[97] The grievor doubted that Ms. Richens was not aware of the issues the grievor raised about the CBC report. She stated that it was likely that Ms. Richens was informed of it by Ms. Durocher.

[98] The grievor alleged that the CBSA promoted racism and that she experienced racism from both passengers and CBSA employees.

[99] The grievor submitted that her situation has many similarities to those raised in *Niedermeiser and Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File No. 166-02-27859 (19971022), [1997] C.P.S.S.R.B. No. 111 (QL). In that case, protected documents were found in the grievor's boyfriend's car, and a suspension was substituted for a termination of employment. The only difference, the grievor submitted, was that she was on probation and had been deliberately kept on it.

[100] The grievor submitted that the true motive for her termination was the fact that she had raised issues about her privacy and compromised safety as a result of the CBC's publication of her image. She also questioned the seriousness of the employer's stated reason for the termination, since she had been permitted to continue working after it became aware that the protected documents had been in her possession.

[101] The grievor submitted that she was honest, forthright, reliable, and consistent in her testimony. She submitted that her termination was tainted by bias, racism, and a lack of due process. She submitted that she should be reinstated and fully compensated.

C. The employer's reply submissions

[102] The employer submitted that there were many issues related to the grievor's performance in December 2014 and that for that reason, her probation was extended. The employer submitted that the next window for ending the probationary period was at the 18-month mark.

[103] The employer submitted that the *Niedermeiser* case did not involve a rejection on probation. It submitted that the lengthy suspension substituted in that case

bolstered the employer's case that the reason for the rejection on probation was employment-related.

D. Submissions on pre-employment conduct

[104] I requested further submissions from the parties relating to a decision of the PSLRB on pre-employment conduct and a rejection on probation, namely, *Doucet v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 145. Those submissions were made on February 12, 2020, by teleconference call.

[105] In *Doucet*, the employer discovered that the probationary employee had engaged in an inappropriate relationships with inmates while working on a casual basis and before commencing her probationary period. The adjudicator issued a preliminary decision, holding that the employer could not rely on evidence from before the grievor's probationary period.

[106] In that case, the adjudicator determined that the grievor did not know of the rule against inmate relationships when she was employed on a casual basis. The rule had not been clearly communicated to her and there was no evidence that the grievor was presumed to have known that rule. The adjudicator also determined that the employer could have discovered the behaviour when it interviewed her for her appointment as a probationary employee. The adjudicator then held that the employer could not rely on the grievor's pre-employment conduct in its decision to reject her on probation.

[107] The employer submitted that *Doucet* was wrongly decided. It stated that neither of the elements (knowledge of the rule and discoverability of the misconduct) addresses whether the decision to terminate was a disguised disciplinary measure, i.e., a sham or camouflage. Counsel noted that the adjudicator stated explicitly (at paragraph 65), "My role as an adjudicator is to determine whether the evaluation method was fair and reasonable …". To support this proposition, the adjudicator cited two arbitration decisions in which there is no equivalent to ss. 209 or 211 of the *PSLRA*; i.e., the arbitrators had jurisdiction to consider the reasonableness of the rejection on probation. Counsel submitted that the adjudicator in *Doucet* was categorically wrong in her assessment of her role under the *PSLRA*.

[108] In the alternative, the employer stated that the decision in *Doucet* was distinguishable on the facts. In the case before me, counsel for the employer said that the grievor had testified that she was aware of the confidentiality rules and the rule against removing such documents from the workplace. Counsel also submitted that their removal was not something that the employer could have been aware of at the time the grievor was recruited.

[109] In the further alternative, the employer submitted that the proposition that pre-employment matters are "irrelevant" to the assessment during the probationary period (see paragraph 70 of *Doucet*) is without a logical foundation. Its counsel submitted that nothing in the jurisprudence or leading labour law texts dealing with the issue of probation stands for the proposition that the discovery of pre-employment evidence relating to suitability cannot be relied upon to reject on probation. Nothing in the *PSEA* limits the evidence that a deputy head can rely on when rejecting someone on probation. Counsel submitted that the employer's position was that there is no basis in law or logic to suggest that the discovery of evidence from the pre-employment period during the probationary period must be ignored when determining a person's suitability for a job.

[110] The employer submitted that the *Doucet* decision should be given no weight.

[111] The grievor submitted that she should have been assessed solely on her performance during the probationary period. She submitted that the employer did not question her performance during the probationary period.

VI. Reasons

[112] For the reasons set out in this section, I have determined that the employer had an employment-related reason for terminating the grievor's employment during the probationary period and that the grievor did not meet her burden of showing that the rejection on probation was a sham or camouflage. Therefore, I have determined that the grievance must be dismissed.

[113] I have not addressed the employer's position that the appropriate forum for challenging the reasonableness of a termination of employment while on probation is the Federal Court. My role as a panel of the Board is to determine if I have jurisdiction

over the grievance before me. It is not appropriate for me to suggest an alternate forum for addressing a grievor's issues.

[114] Some of the evidence in this hearing related to the grievor's overall performance during her probationary period. The grounds set out in the termination letter did not include any performance-related concerns during the probationary period. Therefore, the evidence of Ms. Richens relating to "other performance concerns" is not relevant to her decision to terminate the grievor's employment. I find that the evidence on the grievor's performance during the probationary period is relevant only with respect to her allegations of bad faith and to providing context for her position on the law.

[115] The grievor made allegations at the hearing about discrimination being a factor in her termination of employment. The employer submitted that she was prevented from relying on these allegations because of issue estoppel. *Danyluk* establishes three preconditions for the operation of issue estoppel: (1) the same question has been decided in earlier proceedings, (2) the earlier decision was final, and (3) the parties to that decision or their privies are the same in both the proceedings. If these three preconditions are met, the decision maker must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

[116] In this case, the parties are the same, and the decision was final (the grievor did not refer the CHRC's decision for judicial review). However, I do not find that the CHRC decided the same question. It addressed discrimination allegations in employment, but it did not squarely address the issue in this grievance — whether the employer appropriately terminated the grievor's probationary employment. In addition, I am not being asked to determine the grievor's rights under the *CHRA* but to determine whether the employer acted in bad faith by terminating her employment. Therefore, I find that issue estoppel does not apply in the circumstances of this grievance.

[117] The grievor made allegations of discrimination in the workplace, including of anti-Muslim comments and a toxic workplace. I have not considered them, for two reasons. Firstly, the grievance did not allege human rights discrimination and simply referred to the disciplinary action, so the issue of discrimination on the basis of race or religion is not properly before me. Secondly, these allegations were raised for the first time in this grievance process at the hearing.

[118] The grievor alleged that the search of her brother's car was illegal. In light of her admission that the protected documents had been removed from the workplace in 2012, whether they were obtained improperly is not relevant to this proceeding.

[119] The basis for determining my jurisdiction over a rejection on probation was succinctly stated as follows in *Penner* where the Federal Court of Appeal referenced *Jacmain v. Attorney General*, [1978]:

> *…*
>
> *… 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. In fact, we there approach the most fundamental legal requirement for any form of activity to be defended at law, which is good faith.…*
>
> *… an adjudicator … is not concerned with a rejection on probation, as soon as there is evidence satisfactory to him that the employer's representatives have acted, in good faith, on the ground that they were dissatisfied with the suitability of the employee for the position.…*
>
> *…*
>
> *… It may be that this dissatisfaction with suitability arose from misconduct or misbehaviour by the employee, but that does not render the dissatisfaction any less real and legitimate nor does it permit us to confuse the rejection with a disciplinary sanction.*
>
> *…*

[120] The assessment steps in the OID program came to a halt for the grievor on May 1, 2015, when she was advised that the labour relations and personal security investigations needed to be resolved prior to proceeding with the OID program process. The grievor's employment was terminated before the end of the 18-month probationary period.

[121] The employer has met its initial burden as set out in *Tello*. The grievor was on probation, the probationary period was still in effect at the time of termination and her employment was terminated within the probationary period. There is no dispute that she received compensation in lieu of notice, in accordance with the *PSEA*. She was also provided with a letter outlining the reason for the termination.

[122] The burden then shifted to the grievor to demonstrate that the termination was not for an employment-related reason but was exercised in bad faith or was a sham. The grievor's burden is described as follows in *Tello* (at paragraphs 110 and 111):

> *[110] If a deputy head terminates the employment of a probationary employee without any regard to the purpose of a probationary period — in other words, if the decision is not based on suitability for continued employment — that decision is one that is arbitrary and may also be made in bad faith. In such a case, the termination of employment is not in accordance with the new* PSEA.
>
> *[111] … 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 against a termination of a probationary employee.*

[123] The grievor argued that her probationary period was unnecessarily extended before her termination. I do not have jurisdiction over the management of a probationary process. My jurisdiction is limited to determining if the rejection on probation was a sham or camouflage. Performance issues were identified in November 2014, before the discovery that the protected documents had been removed, and the grievor received an enhanced performance plan. There was a further enhanced performance plan prepared in February 2015, after the discovery of the documents. Although her performance had improved, as evidenced by her last evaluation by her superintendent, the evaluation process was put on hold due to the ongoing fact-finding investigations. This was a legitimate action by the employer, in light of the allegations relating to her previous employment as a student. She was rejected on probation prior to the next stage of the evaluation process (at 18 months). The grievor has not convinced me that the extension of her probationary status was done in bad faith. The suspension of the evaluation at the 15-month period was for an employment-related reason.

[124] The grievor admitted that she had protected documents in her possession since 2012. She testified that she must have inadvertently put them in her bag with her

school texts and then placed the contents of the bag in a cardboard box. The box then ended up in her brother's car when she moved in 2014. The employer suggested that this was implausible.

[125] In cases involving probation, a decision-maker need only determine if the factor relied upon by the employer is an employment-related reason. This is not a disciplinary grievance in which determining whether conduct was inadvertent or deliberate would be necessary to assess the appropriateness of the discipline. However, I find it plausible that the documents ended up in the grievor's bag without her making a conscious decision. But she remains responsible for failing to discover them and then inadvertently storing them in her brother's car.

[126] I do not need to determine whether the grievor intended to remove protected documents from the workplace. It was her responsibility not to have protected documents in her possession. She appeared to recognize her negligence of not checking her bag or the box that she put them in. I am satisfied that the employer had an employment-related reason for the rejection on probation.

[127] In the termination letter, Ms. Richens also referred to the grievor's conduct during the investigation as having been contrary to the CBSA's "Code of Conduct". The letter refers to the grievor having denied taking the documents and having offered no explanation as to how they could have been removed or how they came to be in her brother's car.

[128] This allegation is not an accurate reflection of the content of the fact-finding interview. Although the grievor offered no explanation, she did not deny that she had taken them. She stated in the fact-finding interview that the removal of the documents might have been a mistake on her part. This is not a denial that she removed them from CBSA premises.

[129] In addition, I accept that it is plausible that the grievor did not know how the documents ended up in her possession. In fact, at the hearing, she was still only speculating on how they ended up in her possession. However, she has consistently accepted that they were in her possession inadvertently.

[130] I will also address the statement of Superintendent Forrest that the documents could have resulted in identity theft. In my view, that statement is speculative and

based on an underlying assumption (the presence of personal phone numbers) that is not supported by the evidence.

[131] In *Tello*, I found that the employer does not have to prove all the allegations it relied on in a rejection on probation. The requirement is for it to provide an employment-related reason. In this case, it did not establish that the grievor denied taking the documents. However, I find that it still had an employment-related reason for the rejection on probation.

[132] The grievor asserted that Ms. Richens should have considered the security investigation interview in her decision making. The fact-finding process for human resources purposes is kept separate from security investigations at the CBSA, which was done in this case. The testimony of Ms. Richens was clear that she did not review any of the security investigation documents (the interview or the draft report). The content of the security interview and the fact-finding interview are roughly similar.

[133] The grievor speculated in the fact-finding interview that the removal of the protected documents might have been “a mistake on her part”. In the security interview, she provided more details when she speculated that she might have accidentally taken them off the premises along with her school materials. Apart from setting out the possible way in which the documents ended up in her possession, the essence of her response was the same in both investigations — she mistakenly took them.

[134] I find that the information from the security investigation was not materially different from the information obtained through the fact-finding investigation.

[135] The employer relied largely on the removal and discovery of the protected documents as the basis for the grievor’s termination of employment. As noted, the grievor’s action took place before she was hired as an FB-02 officer trainee.

[136] *Doucet* is the only decision in the federal public sector that squarely addresses the issue of pre-employment conduct in rejection-on-probation cases. The employer suggested that *Doucet* was wrongly decided. I find that I do not need to address that allegation, as the facts in the grievance before me are distinguishable from those in *Doucet*.

[137] In *Doucet*, the adjudicator found that the employer could have discovered the grievor's inappropriate behaviour before she was hired. In this case, the grievor admitted that she did not know about having the documents in her possession until the fact-finding interview in February 2015. Therefore, the employer could not have possibly discovered this pre-employment conduct until contacted by the police in January of 2015.

[138] The grievor relied on *Niedermeiser* to support her position that the termination of her employment was excessive. *Niedermeiser* related to the termination of employment of an employee who was not on probation. The analysis of a grievance of a rejection on probation is fundamentally different from the analysis of a disciplinary termination of employment. Therefore, I find that that decision is of no relevance in the grievance before me.

[139] The grievor also argued that the employer could not have had real concerns about her integrity and reliability as she was allowed to continue with her regular duties and had continued access to protected documents and databases after the employer was advised of the removal of documents. In a grievance of termination for misconduct, the fact that the grievor was allowed to stay in the workplace would be a factor in determining rehabilitative potential. However, during the probationary period, the same disciplinary principles do not apply. In a rejection on probation, the employer needs to have an employment-related reason. The strength of that reason is not relevant.

[140] The grievor alleged that the real reasons for her termination were the issues she raised with the CBSA about the CBC's use of her image. I first note that the employment-related reason for the rejection on probation arose before she was photographed. The fact-finding report and Superintendent Forrest's recommendation were also prepared before she raised concerns about the CBC photograph. She alleged that Ms. Richens must have known about her dissatisfaction with the CBSA as to how the matter was handled. However, Ms. Richens denied any knowledge of the complaint, and the grievor did not establish any evidence that this was a factor in Ms. Richens' decision to terminate the grievor's employment.

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

(The Order appears on the next page)

VII. Order

[142] The grievance is dismissed.

June 9, 2020

Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board