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File: 466-PP-430

Citation: 2021 FPSLREB 128

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

Before an adjudicator

BETWEEN

DANIJEL MARKOVIC

Employee

and

PARLIAMENTARY PROTECTIVE SERVICE

Employer

and

OTHER PARTIES

Indexed as
Markovic v. Parliamentary Protective Service

In a matter of the *Parliamentary Employment and Staff Relations Act*

Before: Paul Fauteux, adjudicator

For the Employee: Sylvain Beauchamp, counsel

For the Employer: Anne Lemay, counsel

Heard at Ottawa, Ontario,
April 3 to 5, 2019.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Introduction

[1] This case involves determining whether the termination of Danijel Markovic ("the employee") by the Parliamentary Protective Service (PPS or "the employer") was a rejection on probation.

[2] On March 9, 2017, the employer terminated the employee's employment, citing rejection on probation. On March 27, 2017, the employee grieved his termination.

[3] On May 30, 2017, the employer dismissed the grievance at the final level of the grievance process because the rejection on probation was an administrative termination. On June 7, 2017, the employee referred his grievance to adjudication.

[4] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) and the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2), respectively, to the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* (*FPSLRA*).

[5] On March 20, 2019, the employer gave notice that it considered that s. 63(1)(c) of the *Parliamentary Employment and Staff Relations Act* (R.S.C. 1985, c. 33 (2nd Supp.); *PESRA*) did not give an adjudicator jurisdiction to hear a grievance of a rejection on probation. At all relevant times in this case, this provision provided as follows:

> ***63(1)*** *Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> …
>
> ***(c)*** *the termination of employment of the employee, other than rejection on probation in respect of an initial appointment*,
>
> …
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may refer the grievance to adjudication.*

[6] For ease of reading, the term "Board" in this decision refers to both the Public Service Labour Relations and Employment Board and the Federal Public Sector Labour Relations and Employment Board.

II. Background

[7] Some facts and documents have been admitted in this case and can be summarized as follows.

[8] The applicable collective agreement is the one reached between the House of Commons and the House of Commons Security Services Employees Association (SSEA or "the union") in 2014 for the Protective Services bargaining unit ("the bargaining unit"), which expired on March 31, 2017 (Exhibit S-1; "the collective agreement").

[9] On June 23, 2015, ss. 98 to 152 of the *Economic Action Plan 2015 Act, No. 1* (S.C. 2015, c. 36; "the *2015 Act*") came into effect, amending the *Parliament of Canada Act* (R.S.C., 1985, c. P-1) to create the PPS. On the same date, employees covered by the collective agreement became employees of the PPS (s. 100 of the *2015 Act*), and the collective agreement remained in effect and became binding on the PPS as though it were referred to as the employer (s. 101 of the *2015 Act*).

[10] The employee's terms of employment are set out in part in the September 14, 2016, letter of offer that Superintendent Mike O'Beirne sent to the employee, who accepted it on September 15, 2016 (Exhibit S-2), as well as in part in the collective agreement and in part in the *PESRA*.

[11] The letter of offer's main subject was the "[translation] Term appointment as constable", the offer was for "[translation] long-term employment as a constable at the SSG-G group and level with the Parliamentary Protective Service", and the period of employment was "[translation] from September 17, 2016, to September 17, 2017, with the possibility of extension".

[12] Among other things, the letter stated that the job offer was subject to a series of conditions and noted the following: "[translation] … your term appointment may be terminated at any time due to unsatisfactory performance or changes in operational needs".

[13] The employer issued four notices of interview inviting the employee to the following meetings: on December 8, 2016, to "[translation] have you explain why you abandoned your post on November 22, 2016"; on February 23, 2017, to "[translation] find out more about why you abandoned your post on November 22, 2016"; on February 24, 2017, to "[translation] have you explain why you abandoned your post on February 21, 2017"; and on March 9, 2017, to "[translation] discuss the latest incidents involving the abandonment of your post at 180 Wellington" (Exhibit S-3).

[14] At the last meeting, the employer gave the March 9, 2017, termination letter from Superintendent O'Beirne to the employee, advising him that: "[translation] I must terminate your employment on probation as of March 9, 2017" (Exhibit S-4).

[15] On March 27, 2017, the employee grieved his termination, considering it unfounded in facts or in law, and alternatively, disproportionate in view of all the circumstances.

[16] The employee also considered that his termination was void *ab initio* because the employer failed to comply with the rules of procedural fairness that are set out in the collective agreement and because of the role that the employer asked a member of the bargaining unit to play in the disciplinary process, thus contravening clauses 30.04, 35.01, 35.04, and 35.05 of the collective agreement.

[17] The employee sought the following remedies:

(a) that his termination be rescinded and that all related documents be removed from his file;
(b) that all amounts and all salary and benefits be reimbursed retroactive to the date of termination; and
(c) that he be awarded $5000 in damages.

[18] On April 25, 2017, in accordance with clause 36.16 of the collective agreement, SSEA representative Vicky Walcott filed the grievance at the third level of the applicable grievance process (Exhibit S-5), and a grievance hearing was held at that level on the same day.

[19] In the letter dated May 30, 2017, and that Administrative and Staff Officer Robert Graham wrote to the employee, the employer rendered its decision at the third

level of the applicable grievance process (Exhibit S-7), in which it stated the following about the employer:

> [Translation]
>
> … *did not contravene the collective agreement in deciding to terminate your employment on probation. It was simply the application of an administrative measure based on the negative assessment of your performance and your questionable attitude over the eight months in which you worked as a constable.*

[20] In the same letter, the employer dismissed the grievance and the remedies sought.

[21] The following documents were also entered in evidence, by consent, during the case management conference on April 1, 2019:

(a) the employee's file (Exhibit S-8);
(b) the documents that the employer used to terminate the employee (Exhibit S-9);
(c) the patrol reports from the Wellington Building (Exhibit S-17);
(d) the patrol reports from Building C (Exhibit S-18); and
(e) the employer's policy on attire and conduct (Exhibit S-19).

[22] At the hearing before me, the parties also agreed to enter the following documents in evidence:

(a) the suspension letter from one of the employee's colleagues dated July 10, 2017 (Exhibit S-10);
(b) the reprimand letter from one of the employee's colleagues dated January 24, 2018 (Exhibit S-12);
(c) the reprimand letter from one of the employee's colleagues dated March 21, 2017 (Exhibit S-13);
(d) the suspension letter from one of the employee's colleagues dated March 21, 2017, and related documents (Exhibit S-14);
(e) the documents related to the reprimand letter from one of the employee's colleagues (Exhibit S-15); and
(f) the disciplinary sanction from one of the employee's colleagues for abandoning his post on July 13, 2018 (Exhibit S-16).

[23] For the following reasons, I have concluded as follows:

(a) contrary to what the employer claims, the employee is an "employee" within the meaning of the *PESRA*;

(b) contrary to what the employer claims, the employee was not rejected on probation, and therefore, I have jurisdiction to decide the grievance before me;

(c) contrary to what the employer claims, the employee's termination cannot be justified; and

(d) the employee is entitled to the following:

(i) payment of an amount representing the salary and benefits to which he would have been entitled were it not for his termination, from March 9 to September 17, 2017, inclusive, with the usual deductions,

(ii) an amount of $5000 as compensatory damages for psychological harm, and

(iii) an amount of $20 000 as punitive damages.

III. Preliminary objections

A. My jurisdiction to hear the grievance

1. The employer's letter dated March 20, 2019

[24] On March 20, 2019, the employer sent the employee a letter primarily about the documents that he requested for the adjudication hearing, set for April 3 to 5, 2019. That letter included the following:

> [Translation]
>
> *The rejection of Mr. Markovic on probation is administrative, not disciplinary. In accordance with s. 63(1)(c) of the* Parliamentary Employment and Staff Relations Act *and clause 36.20 of the collective agreement, the adjudicator does not have jurisdiction to hear the grievance.*

2. The employee's reply dated March 21, 2019

[25] On March 21, 2019, the employee wrote a letter to the Board's secretariat ("the Registry") about his request to file documents and about the employer's objection to the jurisdiction of an adjudicator to hear the grievance.

[26] I summarize as follows the arguments in that letter on the latter point.

[27] The Board's letter dated June 15, 2017, in which it acknowledged receipt of the grievance and asked the employer to provide documents within 10 days, indicated the following:

> [Translation]
>
> *The employer **must** indicate and file with the Director General, no later than July 27, 2017 (within 30 days of receipt of this letter), any questions about the admissibility of these cases. **Failure to raise an objection within the required time will be interpreted as a waiver by the employer of any admissibility issues and of any objection that could have been raised on such grounds.***
>
> [Emphasis in the original]

[28] The employer did not raise any admissibility objections in the 21 months between the date of that letter from the Board and its own letter dated March 20, 2019, less than 2 weeks before the hearing before me, and did not request that the 30-day deadline be extended.

[29] The employer's objection is inadmissible on its face, as the Board's letter dated June 15, 2017, was clear and confirmed that the penalty for the employer's failure to raise any objections about the admissibility of the grievance within 30 days would amount to estoppel of such an objection.

[30] Therefore, the employer is estopped from claiming that the employee's termination was an administrative measure for which an adjudicator does not have jurisdiction.

[31] That admissibility objection is, at a minimum, covered by the doctrine of "waiver", *a fortiori*, given the Board's letter dated June 15, 2017.

[32] Considering the termination letter, the employee's termination was evidently disciplinary. The nature of the alleged misconduct was disciplinary, and the employer expressly acknowledged that in the termination letter. Moreover, the employer sent the employee "(24) hours' notice[s]" pursuant to clause 35.04 of the collective agreement, which apply to disciplinary sanctions.

[33] The employee was not on "probation" when his employment was terminated, as his employment contract and related contract documents following his completion of

the recruit program indicate that he is a regular employee and do not mention a "probation" or a "probationary" period.

[34] As the Board stated that the adjudication hearing from April 3 to 5 would not be extended, it would be extremely unfair and prejudicial to the employee's right to be heard (*audi alteram partem*) for the employer to be allowed to divert a substantial portion of the adjudication hearing to evidence and arguments supporting that objection.

3. The employer's reply dated March 22, 2019

[35] On March 22, 2019, the employer wrote a letter to the Registry, replying to the employee's letter dated the day before about the request to file documents and about the jurisdiction of an adjudicator to hear the grievance.

[36] I summarize as follows the arguments in that letter on the latter point.

[37] The employment relationship between the parties is governed by the *PESRA*. Section 63 of the *PESRA*, which is similar to s. 209 of the *FPSLRA*, limits an adjudicator's jurisdiction.

[38] The *PESRA* clearly states that a rejection-on-probation grievance cannot be referred to adjudication. It follows that an adjudicator does not have jurisdiction to hear that type of grievance.

[39] The jurisprudence has clearly established that a party cannot waive an objection to the tribunal's jurisdiction and that such a waiver is null and void, as the adjudicator explained in *Algonquin College v. Ontario Public Service Employees Union, Local 415* (2001), 100 L.A.C. (4th) 234, as follows:

> …
>
> *I shall commence with the issue of whether the College has waived the right to assert the jurisdictional issue by failing to raise the objection until the day before the evidence was to commence. The* Dryden Paper *and* Hawker Siddley Canada *cases,* supra*, have established that* ***the principle of waiver does not apply to fundamental issues of jurisdiction. Simply put, a jurisdictional matter cannot be waived by the passage of time or by the failure to raise an objection in a timely manner. Jurisdiction is so fundamental to an adjudicators*** *[sic]* ***power that it cannot be conferred or denied by the conduct of one party.****…*

…

[Emphasis in the original]

[40] In *Canada (Attorney General) v. Boutilier*, [1999] 1 FC 459 (F.C.) ("*Boutilier* (FC)"), the Federal Court Trial Division (as it was known at the time) categorically dismissed Mr. Boutilier's argument that the attorney general's objection to the jurisdiction of an adjudicator, first raised in judicial review, was estopped. The trial judge cited the following excerpt from page 373 of the Federal Court of Appeal's decision in *Byers Transport Ltd. v. Kosanovich*, [1995] 3 FC 354 (C.A.):

> *… This objection cannot be sustained. It is clear from cases such as Pollard that paragraph 242(3.1)(*b*) constitutes a limit on the jurisdiction of the Adjudicator. That limit cannot be ignored simply by being disregarded by the parties or the Adjudicator. The Adjudicator had an obligation in the first instance to consider whether he was barred by paragraph 242(3.1)(*b*) from considering the complaint. He was not excused from considering that question by the silence or the consent, expressed or implied, of the parties. The fact that he did not consider it does not preclude, or excuse, this Court from determining whether he was acting within his jurisdiction.*

[41] The decision of the Federal Court Trial Division in *Boutilier* (FC) was upheld by the Federal Court of Appeal in *Canada (Attorney General) v. Boutilier*, [2000] 3 FC 27 (C.A.) ("*Boutilier* (FCA)"). As a result, an issue relating to the tribunal's jurisdiction can be raised at any time, even in a future application for judicial review.

[42] An adjudicator also ruled on this issue in *Zhang v. Treasury Board (Privy Council Office)*, 2009 PSLRB 22 at para. 54:

> *[54] I now turn to the grievor's submission that the employer has not raised its objection in a timely manner and that it ought to be considered as having waived its right to raise jurisdictional issues. I do not consider that the employer was precluded from raising its objection on June 19, 2008. First, I consider that the hearing before adjudicator Pineau was restricted to preliminary matters about disclosure issues. Therefore, I do not consider that the hearing* per se *of the grievances had commenced. Second, I am bound by* Boutilier v. Canada (Treasury Board) *and* Boutilier v. Canada (Attorney General)*, in which the Federal Court and the Federal Court of Appeal determined that a jurisdictional issue can be raised at any time, even on judicial review.* ***The jurisdiction of an adjudicator has been circumscribed by the legislator namely in section 209 of the* Act*, and the limits to that jurisdiction cannot be ignored or extended by the parties. Therefore, I consider***

> ***that the employer could not have waived its right to raise the preliminary objection with respect to jurisdiction and that it had the right to raise that preliminary objection when it did.***
>
> [Emphasis added]

4. The employee's rejoinder dated March 22, 2019

[43] On March 22, 2019, the employee emailed the Registry in response to the employer's letter that day about the request to file documents and about the employer's objection to an adjudicator's jurisdiction to hear the grievance.

[44] I summarize as follows the arguments in that email on the latter point.

[45] The employer did not give any reason for its 21-month delay. Accepting its position would allow any employer to ignore with impunity the Board's instructions and benefit from doing so by requiring that an employee respond at the last minute to an objection that should have been raised at the earliest opportunity. The employee, who followed the Board's instructions in this case, should not have to pay the price of such a scheme by the employer less than 2 weeks before the adjudication hearing for which he had been waiting 2 years.

[46] The Board's instructions in the June 15, 2017, letter amounted to an "order" within the meaning of s. 10 of the *PESRA*. The employer's failure to comply with that order automatically resulted in its estoppel unless it could demonstrate an absolute inability to act for reasons beyond its control, which it did not even try to do.

[47] The employer confused jurisdiction and admissibility. An adjudicator has the jurisdiction (i.e., the authority) to decide a termination grievance or a "rejection-on-probation" grievance if, as held in *Dyson v. Deputy Head (Department of Fisheries and Oceans)*, 2015 PSLREB 58 at para. 126, the employee "… can establish, on a balance of probabilities, that the reason for the termination was not for a legitimate employment-related reason but for some other contrived reason, disguised discipline, a sham, camouflage or bad faith."

[48] Therefore, the employer's objection did not raise a true question of *vires* but rather a question that pertained exclusively to the characterization of its action, based on the facts, and thus a strict question of the admissibility of the grievance.

[49] That question depends solely on the employer's actions and therefore is not a question of jurisdiction but of admissibility, as demonstrated by the fact that there would be no question of "jurisdiction" if the employer were to admit that the measure it took was "contrived", "in bad faith", "a sham", or "a disciplinary sanction". As that question is under the employer's control, it may waive raising it, which it did by saying nothing for 21 months following the "order" of June 15, 2017.

[50] Therefore, it is not a matter of determining whether an adjudicator has the authority to decide the grievance but rather whether the employer must obtain permission at that stage, despite its conduct, to argue (a) that its conduct does not constitute "termination", or (b) that its conduct toward the employee was not "disciplinary".

[51] None of the cases that the employer cited were related, as is the case at hand, to the conduct of an employer that attempted to ignore a clear "order" such as the one issued on June 15, 2017, declaring it estopped from raising any objection to the admissibility of the grievance, the clear purpose of which is to avoid situations like the one created by the late objection of March 20, 2019. Any interpretation to the contrary would make such an "order" by the Board futile and ineffective.

[52] In addition to the fact that they did not involve any "order" like the one in the June 15, 2017, letter, the cases that the employer cited are easily distinguishable as follows:

(a) *Zhang* and *Algonquin College* did not address any question that was remotely similar to the one that the employer raised; and

(b) *Boutilier* (FC), which dates to 1998, is irrelevant for the following reasons:

(i) it dealt solely with the possibility of raising a question in judicial review that was not raised in adjudication — which is irrelevant to whether an adjudicator has jurisdiction to hear the grievance, and

(ii) the Supreme Court of Canada took a completely different position on the issue in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 25 and 26.

5. The order dated March 28, 2019

[53] On March 28, 2019, after reviewing the previously summarized correspondence, I made the following order in relation to the employer's objection to an adjudicator's jurisdiction to hear this case:

> (a) I would rule on that objection in my written decision based on written arguments that the parties already presented; and
> (b) the hearing from April 3 to 5, 2019, would not address that objection.

6. My decision

[54] For the reasons that follow, I consider that the employer's objection that an adjudicator does not have the jurisdiction to hear the grievance is not truly preliminary. The parties do not agree on all the facts, and I cannot decide the issue without hearing and examining the relevant evidence.

[55] First, I note that the two provisions that the employer cited in its letter of March 20, 2019, to support its objection have essentially the same effect and read as follows.

[56] Section 63(1)(c) of the *PESRA* reads as follows:

> ***63(1)*** *Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> …
>
> ***(c)*** *the termination of employment of the employee, other than rejection on probation in respect of an initial appointment,*
>
> …
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may refer the grievance to adjudication.*

[57] Clause 36.20 of the collective agreement reads as follows:

> *36.20 Where an employee has presented a grievance up to and including the final level in the grievance procedure with respect to:*
>
> …
>
> *(c) termination of employment, other than rejection on probation in respect of an initial appointment,*
>
> …

> *(f) … and the employee's grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to adjudication in accordance with the provisions of the* Parliamentary Employment and Staff Relations Act *and Regulations.*

[58] I note that since a collective agreement cannot amend an Act, this clause has no legal consequence. Therefore, the employer cited it futilely in support of its argument.

[59] More important is that the parties are diametrically opposed on whether the employer's action to terminate the employee was indeed a rejection on probation, i.e., the exception set out in s. 63(1)(c) of the *PESRA*, or whether it was any other type of termination, i.e., the general rule set out in that provision.

[60] I agree with the employee that the issue in this case is the characterization of the employer's action. It is a factual characterization (*Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529 at para. 32) on which my jurisdiction to decide the grievance as an adjudicator pursuant to s. 63(1)(c) of the *PESRA* depends.

[61] Therefore, there is no impediment to my jurisdiction to decide the factual characterization of the employer's action.

[62] The employee essentially alleged that what the employer described as "[translation] a rejection on probation" was in fact a termination within the meaning of s. 63(1)(c) of the *PESRA* and that the ground of that termination "[translation] was not a legitimate employment ground but rather another contrived reason, disguised discipline, a sham, camouflage, or bad faith" (see paragraph 47).

[63] The employer argued that the simple fact that it alleged that the termination was a "[translation] rejection on probation" was enough to render me without jurisdiction in this case and prevent me from deciding whether in fact the employer correctly characterized its action. However, I note that in *Leonarduzzi*, the Federal Court Trial Division held that an adjudicator is not bound by an employer's characterization of an action that it has taken. In paragraph 31 of that decision, the Court recognized that "… Parliament did not prohibit an adjudicator from ascertaining whether a rejection on probation is in reality pursuant to the *PSEA*." In paragraph 33, the Court stated that in requiring that the employer present evidence to support its

claim, the adjudicator "… merely determined the procedure to follow to assess whether statutory exclusion [of a rejection on probation] … applied."

[64] In this case, before determining whether the employee's termination was in fact a rejection on probation, I must hear and examine the relevant evidence. In *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, an adjudicator described as follows the burden of proof that applies to rejection on probation (and the jurisprudence has been consistent on this approach since then):

> *[111] … 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 … The deputy head is still required to tender the letter of termination as an exhibit (normally through a witness) … 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* [authority cited by the employer], *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.…*

[65] If after hearing the evidence from the parties, I find that it was in fact a rejection on probation, s. 63(1)(c) of the *PESRA* will render me without jurisdiction, and I must automatically dismiss the grievance for that reason.

[66] However, if I find that the evidence did not in fact establish a rejection on probation, s. 63(1)(c) of the *PESRA* gives me full jurisdiction to rule on the employee's termination (*Canada (Attorney General) v. Heyser*, 2017 FCA 113). Given that the employer clearly cited its right to terminate the employee on probation, I must allow the grievance on the ground that the employer did not discharge its burden of proof.

[67] I note that the Registry's letter of June 15, 2017, is a form letter that it automatically sends to parties when it opens a file for referral to adjudication under the *PESRA* and that the content of that letter is standard Registry wording. I also note that the letter in question does not contain any order from the Board and does not claim to issue any form of order to the parties from the Board. Lastly, it does not contain any order from an adjudicator in the case before me and does not claim to issue such an order to the parties.

[68] I see no need to comment further on whether, as the employee claimed, the Registry's letter of June 15, 2017, was in fact "[translation] an order from the Board", or whether, as the employer claimed, it can raise an objection to an adjudicator's jurisdiction at any time, despite the letter. I also see no need to comment further on the distinction that the employee made between "[translation] a true question of *vires*" and a mere question of "[translation] admissibility". Those questions do not help clarify the scope of my jurisdiction in this case; quite the opposite. Therefore, I will not rule on those three questions and will simply note that the Federal Court of Appeal held in *Boutilier* (FCA) that an adjudicator must always ensure that he or she has jurisdiction to hear a case.

[69] Second, in my opinion, the decisions that the employer cited are not persuasive in this case for the following reasons.

[70] With respect to *Zhang*, in the excerpt that the employer cited and that was reproduced in paragraph 42 of this decision, the adjudicator states that she is bound by *Boutilier* (FC) and *Boutilier* (FCA), which I will come back to later.

[71] She also notes that "[t]he jurisdiction of an adjudicator has been circumscribed by the legislator namely in section 209 of the [*Public Service Labour Relations Act*], and the limits to that jurisdiction cannot be ignored or extended by the parties."

[72] Lastly, after hearing the employer's preliminary objection about her jurisdiction, the adjudicator examined its merits and found that she was properly seized of the grievances.

[73] With respect to *Boutilier* (FC), I note that the employer cited it incorrectly. Indeed, the excerpt in the employer's letter of March 22, 2019, which was reproduced in paragraph 40 of this decision, is not in that decision, but was taken from the Federal Court of Appeal's decision in *Byers Transport Ltd.*

[74] Therefore, for the previously stated reasons, I found that before determining whether I have jurisdiction to hear and decide the grievance, I must hear and examine the relevant evidence.

B. The admissibility of documents that are not in the employee's file

1. The employee's position

[75] Before doing that, I must deal with a second preliminary objection, the one that the employee raised.

[76] During the case management conference on April 1, 2019, the employee argued that clauses 30.04 and 35.05 of the collective agreement prohibit the employer from using documents that are not in his personnel file.

[77] Therefore, the employee objected to all testimonies about performance issues that were not supported by documents in his personnel file. According to him, because his personnel file contains no documents detailing such problems, such documents cannot be used in a way that would be prejudicial to him.

[78] At that time, I said that I would take the objection under advisement.

[79] At the start of the hearing before me on April 3, 2019, the employee reiterated his general objection to all evidence that the employer could present in contravention of clauses 30.04 and 35.05 of the collective agreement.

2. The employer's position

[80] In its opening statement, the employer responded to that objection as follows:

> (a) Clause 19.01(e) of the collective agreement allows for rejection on probation.
> (b) The employee was rejected on probation. Therefore, article 35 (Suspension and Discipline) — and by implication, clause 35.05 that the employee cited — of the collective agreement does not apply.
> (c) Article 30 (Employee Performance Reviews and Employee Files) — and by implication, clause 30.04 that the employee cited — of the collective agreement does not apply in any way, as it applies only to a formal performance review process.

[81] In the context of its line of argument, the employer added to (c) by arguing as follows.

[82] As the adjudicator's decision in *Communications, Energy and Paperworkers Union of Canada, Local 777 v. Imperial Oil Strathcona Refinery* (2004), 130 L.A.C. (4th)

239, illustrates, the modern principle of interpretation, including the interpretation of a collective agreement, requires reading it as a whole and reading each word in harmony with "the scheme of the agreement", which includes titles and subtitles.

[83] In accordance with the adjudicator's decision in *Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2015 PSLREB 65, the terms of a collective agreement are to be given their ordinary and plain meanings unless there is a valid reason for adopting others. The words must be read in their immediate context and in the context of the collective agreement as a whole. Lastly, those principles of interpretation are to be used in the context of the collective agreement.

[84] Clause 30.04 of the collective agreement is part of article 30, the title of which is "Employee Performance Review and Employee Files". Therefore, this provision is not relevant in any assessment of the employee's fitness but applies only to a formal review process. Clause 30.01(b) refers to a "measurement period" in which the employee's competencies are measured. Clause 30.02 sets out the obligation to provide the employee with the measurement standards that will be used and the measurement process that will be followed.

[85] Mr. Pogrebinsky testified that the PPS did not have a performance review process. Corporal Paul-André Dubuc testified that the PPS wanted to implement a review system, but that "[translation] it had not worked" and that "[translation] it more or less fell through". Therefore, clause 30.04 of the collective agreement cannot apply in this case.

3. The employee's reply

[86] First, the employee responded to the employer's points in its opening statement with a series of arguments that I summarize as follows:

(a) He was not legally in a probationary situation.

(b) The reason for that is that the collective agreement does not provide for or define any probationary period.

(c) Also, the collective agreement does not deny rights to employees who the employer unilaterally determines are on probation.

(d) Clause 19.01(e) is the only provision of the collective agreement that mentions rejection on probation.

(e) That clause deals only with the severance pay to which an employee rejected on probation is entitled.

(f) The *PESRA* is a "[translation] poor cousin" to the *FPSLRA*.

(g) The *FPSLRA* must be read together with the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), which provides that all persons who meet certain conditions are considered on probation.

(h) One mechanism that was not imported from the *PSEA* to the *PESRA* is the very concept of probation.

(i) The *PSEA* does not apply in this case.

(j) Therefore, the employee was not on probation.

(k) Therefore, the exception to the jurisdiction of an adjudicator set out in s. 63(1)(c) of the *PESRA* does not apply.

(l) Therefore, the employee was terminated.

(m) That termination was not justified.

[87] I summarize as follows the employee's arguments in response to the employer.

[88] Clause 30.04 of the collective agreement reads as follows:

> *30.04 A copy of all documents used to measure the competence of an employee at work which are added to the personnel file of the employee* ***shall*** *be given to the employee within ten (10) working days following the filing of the documents in the employee's personnel file.* ***Failing which****, such documents* ***will not*** *be used in a prejudicial manner against the employee.*
>
> *30.04 Une copie de tout document, pouvant servir à mesurer les compétences au travail de l'employé(e), qui est ajouté aux dossiers personnels d'un employé(e)* ***devra*** *lui être remis* [*sic*] *dans les dix (10) jours ouvrables suivant le dépôt du document dans son dossier* ***à défaut de quoi****, le document* ***ne pourra*** *être utilisé d'une manière préjudiciable à l'encontre de l'employé(e).*
>
> [Emphasis in the original]

[89] The clause is clear in both official languages. It imposes 2 distinct obligations on the employer: (1) to place in the employee's file any document "… used to measure the competence of an employee …", and (2) to give such documents to the employee within 10 days.

[90] The obligatory nature of the clause is equally clear, as the parties used the expression "shall" (*devra*), which is imperative, not optional.

[91] The clause does not refer to a formal performance review process, as the employer claimed. Such a proposal invites the adjudicator to modify the collective agreement, which an adjudicator is clearly not entitled to do. Moreover, the title of article 30 does not pertain to a formal performance review process but to "Employee Performance Review and Employee Files".

[92] The sanction set out in clause 30.04 is equally clear: the employer is prohibited from using, "… in a prejudicial manner against the employee", any documents that are not added to the employee's file or that are not given to the employee within 10 days of being added. It is hard to imagine what could be more prejudicial to an employee than losing his or her job.

[93] That is what happened in the employee's case. A simple comparison of the employee's file (Exhibit S-8) and the documents that the employer used to terminate his employment (Exhibit S-9) is sufficient to see that none of those documents were added to his file or given to him within 10 days.

[94] Therefore, the employer clearly contravened clause 30.04 of the collective agreement, meaning that the "prejudicial" measure against the employee in contravention of that clause must be rescinded and all resulting harm remedied.

[95] The sole purpose of that clause is to ensure that employees know that documents can be used against them if they are added to their personnel files and given to them within 10 days. This is a fair prior warning. Employees must be told, "[translation] Caution, this document could be used against you." Unless that warning is given, employees know that any document that might otherwise be given to them cannot be used in a manner that is prejudicial to them.

[96] The employer's contravention of clause 30.04 of the collective agreement has the following five legal consequences:

(a) Any document relating to the employee's performance that is not in his personnel file (Exhibit S-8) is inadmissible as evidence.

(b) An adjudicator has jurisdiction under s. 63(1) of the *PESRA*.

(c) The termination on March 9, 2017, is void *ab initio*, with remedy for the harm caused.

(d) The termination is void *ab initio* under s. 63(1)(c) of the *PESRA*, as Mr. Ritchie, Mr. Vandal, and Mr. O'Beirne clearly used considerations relating to the employee's performance in a prejudicial manner against him.

(e) The employer's characterization of a "rejection on probation" was in bad faith, as it made the decision of March 9, 2017, based on documents that it used in clear contravention of a fundamental article of the collective agreement and in contravention of its *Labour Relations Handbook* (Exhibit S-20), which sets out an obligation of fairness.

[97] That contravention of clause 30.04 of the collective agreement is enough for the adjudicator to allow the grievance, without having to examine the employer's objection on the matter of "rejection on probation".

[98] Clause 35.05 of the collective agreement reads as follows:

> *35.05 The Employer agrees* ***not to introduce as evidence*** *in a hearing relating to disciplinary action any document from the file of an employee, the content of which the employee was not aware at the time of filing or within a reasonable period thereafter.*
>
> [Emphasis in the original]

[99] As the measure taken against the employee is disciplinary and the employer failed to communicate to the employee or the union the contents of the documents used to terminate his employment (Exhibit S-9), the employer cannot introduce those documents as evidence before the adjudicator; nor could it do so during the different internal stages, including at the hearing of the third level of the grievance process.

[100] The employer is prohibited from doing indirectly what cannot be done directly. Therefore, it also cannot introduce as evidence the content of the documents used to terminate the employee (Exhibit S-9) when the documents themselves cannot be introduced. Any other interpretation would render clause 35.05 without any meaningful effect.

4. My decision

[101] Unlike the employer's objection that an adjudicator has no jurisdiction to hear the grievance, the employee's objection that clauses 34.04 and 35.05 of the collective

agreement prohibit the employer from using documents that are not in his personnel file is actually preliminary.

[102] First, I note that it is not strictly necessary that I rule on the employee's preliminary objection to decide the grievance. For the reasons set out in paragraphs 59 to 61 of this decision, I must determine whether the employee's termination was in fact a rejection on probation. My jurisdiction in this case rests solely on that issue. According to *Tello*, the employer must establish that the employee was on a probationary period and that it terminated the employee's employment during that period. The documents and testimonies to which the employee objects cannot help the employer meet that burden of proof.

[103] If the employer discharges its burden of proof, then the employee must establish on a balance of probabilities that the termination of his employment was a contrived reliance on the authorities that the employer cited, a sham, or camouflage. In other words, the employee must provide sufficiently clear and convincing evidence (*F.H. v. McDougall*, 2008 SCC 53 at para. 46) that the decision to terminate his employment was not based on a bona fide dissatisfaction as to his suitability (*Tello*, at para. 111).

[104] Should that be the case, nothing would preclude the employee from introducing as evidence relevant documents and testimonies supporting his own arguments to establish his case, including documents and testimonies relating to performance issues that are not supported by documents in his personnel file, which he objects to the employer using.

[105] Although for those reasons, I do not need to formally rule on the employee's preliminary objection in the case before me; nevertheless, I feel that it is appropriate and useful to make some observations about clauses 30.04 and 30.05 of the collective agreement, given the scope and content of the parties' submissions in that respect.

[106] I agree with the employee that the employer cannot introduce as evidence the documents that it used to terminate his employment (Exhibit S-9) or the content of those documents in a manner that is prejudicial against the employee, for the reasons that he stated before me.

[107] I add that the employer cannot introduce as evidence documents that are not relevant to its burden of proof in this case, i.e., establishing that the employee was on a probationary period and that the termination occurred during that period.

[108] Although the employer correctly cited the principles of interpretation applicable to collective agreements in general, the application of those principles to the collective agreement relative to this case does not support the employer's conclusions.

[109] The argument that clause 30.04 of the collective agreement applies only to a formal performance review process is specious for the following reasons.

[110] First, the ordinary meaning of the terms "Employee Performance Review and Employee Files", the title of article 30, can certainly include but is not limited to a formal review process.

[111] Second, clauses 30.01(b) and 30.02 of the collective agreement, which the employer cited to support its claim, change nothing.

[112] Those clauses read as follows:

> *30.01 … (b) The Employer's representative(s) who measure the employee's competence must have observed or been aware of the employee's work behaviour and performance for the measurement period.*
>
> …
>
> *30.02(a) Prior to a competency measurement, the employee shall have access to:*
>
> *(i) the measurement standards that will be used;*
>
> *(ii) the measurement process that will be followed …*
>
> …

[113] The fact that clause 30.01(b) of the collective agreement refers to a "measurement period" in which the employee's competencies will be measured, and the fact that clause 32.02 sets out the obligation to provide the employee with the measurement standards that will be used and the measurement process that will be followed, do not at all support the employer's claim. Specifically, those elements are not a valid reason to adopt a meaning other than the ordinary meaning of the terms "Employee Performance Review and Employee Files".

[114] Third, interpreting the terms in the title of article 30 to give them a meaning other than their ordinary meaning to artificially limit them to the case of a formal review process, as the employer suggested, would amount to amending the collective agreement. Section 67(2) of the *PESRA* reads as follows: "No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award."

[115] Fourth and lastly, the evidence showed that establishing a performance review process "[translation] had not worked" and that "[translation] it fell through". The employer cannot invoke that failure to argue that clause 30.04 of the collective agreement cannot apply in this case: *nemo auditur propriam suam turpitudinem allegans* (no one can be heard to invoke his own turpitude).

[116] That said, clause 30.04 of the collective agreement, cited in paragraph 88 of this decision, is perfectly clear in both official languages. It imposes 2 obligations on the employer — placing in the employee's file "… all documents used to measure the competence of an employee at work …", and giving the employee such documents within 10 days.

[117] The sanction set out in clause 30.04 of the collective agreement is equally clear: the employer is prohibited from using "… in a prejudicial manner against the employee" any documents that are not added to the employee's file or that are not given to the employee within 10 days.

[118] The purpose of that clause is also clear to ensure the following:

(a) that the employee is aware that a document has been added to his or her personnel file and that it may be used in a prejudicial manner against him or her;

(b) that any documents that are not added to the employee's file cannot be used in a prejudicial manner against him or her; and

(c) that any documents that are added to an employee's file but of which he or she does not receive a copy within 10 days also may not be used in a prejudicial manner against him or her.

[119] Therefore, clause 30.04 of the collective agreement supports the employee's assertions that the employer cannot introduce as evidence documents relating to his performance that are not in his personnel file.

[120] However, this clause would not prevent the employee from introducing such documents as evidence himself.

[121] The employer made no mention of clause 35.05 of the collective agreement, citing only clause 30.04 in its arguments in response to the employee's preliminary objection to any evidence that the employer could introduce in contravention of clauses 30.04 and 35.05 of the collective agreement.

[122] However, I note that just as clause 30.04 of the collective agreement prohibits the employer from using "… in a prejudicial manner against the employee" and thus introducing as evidence a document that may be used to measure the competence of the employee at work that was not added to the employee's file or that was added but of which a copy was not given to the employee within 10 business days of being added, clause 35.05, cited in paragraph 98 of this decision, also prohibits the employer from introducing such a document as evidence "… in a hearing relating to disciplinary action …".

[123] As I noted in paragraph 59 of this decision, the parties disagree on whether the employer's action to terminate the employee was a rejection on probation, and thus an administrative measure, or another form of termination, and thus a disciplinary measure. Moreover, as I explained in paragraphs 64 to 66 of this decision, before deciding whether the employee's termination was in fact a rejection on probation, I must hear and examine the relevant evidence.

[124] Therefore, on the matter of the employer's alleged contraventions of clauses 30.04 and 30.05 of the collective agreement, I will stop for now. I will have the opportunity to revisit that matter in the part of the decision on the remedies to which the employee is entitled.

IV. The relevant legal issues

[125] After dealing with the two preliminary objections and hearing the parties' evidence and arguments, I consider that the legal issues that I must determine can be summarized as follows:

(a) Was the employee's termination a rejection on probation?

(b) If the employee's termination was not a rejection on probation, is the employee entitled to the remedies that he seeks?

A. Was the employee's termination a rejection on probation?

1. Summary of the evidence

[126] Given that by consent, the adjudication hearing took place over a period of three days, the parties submitted a relatively large amount of documentary and testimonial evidence to me. Therefore, the following paragraphs do not summarize all the evidence but rather the evidence that I consider most relevant to understand the context of this case and to answer the aforementioned questions.

[127] Sergeant Jason Presley testified as follows:

(a) He drafted the February 3, 2017, email (Exhibit E-6) in which he informed his superiors that the employee, who was under his supervision, was five minutes late that day.

(b) To his knowledge, it was the only day that the employee was late.

(c) No incidents requiring his intervention (an attack, etc.) occurred in those five minutes.

(d) He did not remember asking the employee why he was late.

(e) The reasons for his being late would likely be relevant.

(f) He did not have any employees under his supervision whom he considered "[translation] on probation".

(g) Therefore, he had not received any PPS training on supervising those employees, including monitoring, discipline, coaching, and whether to treat them differently from other employees.

(h) He very rarely filed lateness reports like the one dated February 3, 2017, and had filed only seven or eight in the previous year.

(i) He could not say exactly how many lateness reports he had filed in his career for officers whom he considered on probation.

(j) To his knowledge, no one at the PPS had ever been disciplined for being late.

[128] Acting Sergeant Eric Fortin (a corporal at the time of the events) testified as follows:

(a) He wrote the October 6, 2016, email (Exhibit E-4A) in which he informed his superiors of what he considered failures in a patrol that the employee carried out on October 3, 2016.

(b) He believed that the employee lied to him, orally and in his patrol notes, because he had personally seen Member of Parliament (MP) Shields on his subsequent patrol, and the employee had not indicated that he had seen him on his.

(c) The employee was "[translation] on a probationary period".

(d) All the supervisors know "[translation] that common practice is to have a 12-month probationary period" before obtaining an indeterminate contract with the PPS.

(e) Patrol is not an exact science and "[translation] can be fluid".

(f) He had not asked Constable Nicolas Boulerice to conduct a patrol in the area of the employee's patrol to verify the time that it should have taken.

(g) The length of a patrol can vary from one person to another.

(h) MPs move about.

(i) Therefore, it was possible that MP Shields was somewhere else at the time of the employee's patrol.

(j) It was also possible that the employee had not lied to him about his patrol.

(k) The employee had been on the job for only a month or two at the time.

(l) He was beginning the 12-month probationary period that precedes the offer of a term contract.

(m) At the start of that period, a person is not the "top" constable.

[129] During his examination-in-chief, Sergeant Matthew Ritchie testified as follows:

(a) He had been Acting Division Commander since October 29, 2018.

(b) On November 22, 2016, Sergeant Lyne Ouellet drafted a report on an abandonment of post that occurred that day (Exhibit E-5A).

(c) According to the PPS's policy on attire and conduct (Exhibit E-10A, page 12, 5th point), "[translation] abandoning an operational post is a serious offence".

(d) Superintendent Vandal asked him to handle the matter.

(e) On November 22, 2016, Corporal Dubuc sent him a report stating in part that an officer "[translation] had left the post [and] Officer Markovic … confirmed that he went to the restroom, effectively also abandoning his post" (Exhibit E-5B).

(f) On December 7, 2016, he sent the employee a 24-hour notice of a meeting "[translation] to have [him] explain why he abandoned [his] post on November 22, 2016" (Exhibit E-5C).

(g) At the meeting on December 8, 2016, the employee stated that 3 other constables were present when he left the command post at the north Wellington entrance to go to the restroom.

(h) On December 15, 2016, Corporal Dubuc emailed him to report on his meetings with the 4 constables in question to verify their respective versions of the facts, which they shared with him orally and by email (Exhibit E-5D).

(i) Although the employee said that 3 other constables were at the command post when he went to the restroom, 2 of them said that only 2 were there.

(j) On February 22, 2017, he sent the employee a second 24-hour notice of a meeting "[translation] to get more information about why you abandoned your post on November 22, 2016" (Exhibit E-5E), given the "[translation] completely different versions" of the facts that the employee and 2 other officers had given.

(k) His investigation of another officer found that that officer had abandoned his post for about 20 seconds to help MPs in the elevator who were unable to access the upper floors and, as a result, a reprimand had been placed in his file.

(l) He was unable to complete his investigation of the employee's abandonment of his post on November 22, 2016, and therefore could not recommend a disciplinary decision because the employee abandoned his post a second time.

(m) That second incident occurred on February 21, 2017, and was reported in an email sent that day by another officer to Sergeant Robert Couture (Exhibit E-8A).

(n) In that email, the other officer stated that the employee had given him the patrol officer keys at 05:57, saying that the officer who was to take over was late, and had left the building, leaving the other officer alone in the building and without a patrol officer for 8 minutes.

(o) On February 22, 2017, Sergeant Ritchie sent the employee a 24-hour notice of a meeting "[translation] to have you explain why you abandoned your post on February 21, 2017" (Exhibit E-8B).

(p) On February 24, 2017, he drafted a summary of his meeting with the employee that day (Exhibit E-8C).

(q) At that time, the employee admitted that he left his post too early and said that he knew that he should not have left before his relief arrived.

(r) However, he claimed that 2 other officers were partly responsible for the situation because they had not given him all the information about who was relieving him and had not stopped him when he left.

(s) At that meeting, Sergeant Roch Lapensée, the employee's union representative, argued that the employee had worked about 155 hours over the previous 3 weeks and that the night shift often caused errors in judgment owing to a lack of sleep.

(t) Sergeant Richie had checked that the times were accurate, but noted that the 152 hours worked included voluntary overtime.

(u) He concluded from his 3 meetings with the employee that he blamed his colleagues instead of admitting his mistakes and taking responsibility.

(v) On February 24, 2017, Sergeant Ritchie sent a note to Superintendent Vandal (Exhibit E-9A) to inform him of 2 incidents in which the employee had abandoned his post and to recommend a disciplinary sanction based on those and other incidents.

(w) That note stated that several incidents involving the employee had required coaching.

(x) It also stated that because of his repeated mistakes, the employee had lost the trust and respect of PPS staff.

(y) It concluded that the employee's probation should be terminated right away.

(z) On February 27, 2017, Sergeant Ritchie emailed Superintendent Vandal (Exhibit E-4E) to say that the employee's patrol reports for February 11, 17, 18, 19, and 20, 2016, were not credible because they indicated that he had patrolled the 6th and 7th floors in 20 minutes or less and that "this again puts his integrity in question".

(aa) In his email exchange with the employee (attached to his email to Superintendent Vandal), Sergeant Ritchie asked him if he knew that there was a 7th floor in the Wellington Building and the employee said that he did.

(bb) In the same email exchange, Sergeant Ritchie asked the employee to confirm whether the hours indicated in his patrol report for the 6th floor included the 7th floor, and he replied that they did.

(cc) Sergeant Ritchie's note to Superintendent Vandal on February 24, 2017, stated that the employee was "[translation] on probation" because it was common knowledge that the first year of employment with the PPS is a probationary year.

(dd) That period is used to assess the candidate to determine whether he or she meets the PPS's expectations.

(ee) "[Translation] It is harder [to terminate the employment of a PPS member] when probation has ended because they become a permanent or indeterminate employee".

[130] On cross-examination, Sergeant Ritchie testified as follows:

(a) The employee received coaching on more than one occasion.

(b) No one assessed the coaching results.

(c) No one told him that it did not go well or that the coaching was unsuccessful.

(d) The purpose of coaching was to help the employee progress.

(e) Coaching is training that a person with more experience gives to a person with less experience.

(f) A person receives coaching throughout his or her career.

(g) Section D of the notice of interview (Exhibit S-3) states that the employee has the right to be accompanied by a representative.

(h) Abandoning a post does not lead to disciplinary sanctions in all cases.

(i) The employee stated that he abandoned his post on November 22, 2016, because he needed to use the restroom.

(j) Sergeant Ritchie did not question that information at the time and also had no reason to question it at the time of the adjudication hearing.

(k) Had the employee told him that he had urgent gastric problems and did not have the time to wait because he would "[translation] go in his pants" if he did not immediately go to the restroom, it might have changed his assessment of the case.

(l) When he wrote his note on February 24, 2017 (Exhibit E-9A), he did not have a copy of the emails from Sergeant Presley (February 3, 2017, Exhibit E-6) and Corporal Fortin (October 6, 2016, Exhibit E-4A), but he had been "[translation] brought up to speed in discussions with other supervisors".

(m) When asked to specify how that occurred, he replied: "[translation] I chat with my people" and "[translation] we have opportunities to discuss problem cases as colleagues" with those he met with every day.

(n) During those meetings, no one said that the coaching given to the employee was unsuccessful.

(o) Those meetings were not reported to the employee.

(p) The PPS had 200 to 250 employees.

(q) Four of them had lost confidence in the employee.

(r) Between December 8, 2016, and February 23, 2017, he met with the other constables involved the first time that the employee abandoned his post.

(s) He did not meet with the other constables involved the second time that the employee abandoned his post "[translation] because the employee admitted that he abandoned his post".

(t) Four days after February 24, 2017, when he recommended that the PPS terminate the employee's employment, he emailed Superintendent Vandal the information that was in the employee's patrol reports (Exhibit E-4E).

(u) When asked why he sent that email, he replied: "[translation] It's not my job to terminate an employment; I don't stop doing my work after my recommendation".

(v) On February 24, 2017, at 13:08, he began the email exchange with the employee, which he then forwarded to Superintendent Vandal (Exhibit E-4E).

(w) When asked if it was to consolidate his file, he replied: "[translation] No, it was because patrol officer reports were missing".

(x) When asked if it was just a coincidence that he was trying to generate evidence, he replied: "[translation] Yes".

(y) Patrols do not always take the same amount of time because sometimes there are people in the offices.

(z) He did not remember previously seeing the PPS's policy on attire and conduct (Exhibit S-20), the PPS had not given him a copy, he did not consult it before drafting his note on February 24, 2017, and he had not received any training on that policy.

(aa) As he noted in his summary of the February 24, 2017, meeting, the employee "reluctantly took responsibility" for leaving the building too early on February 21, 2017.

(bb) The employee might not have been entirely responsible for that.

(cc) He considered that the employee had been on the job for just 5 months.

(dd) In such cases, one does not expect performance that is comparable to one's own but rather to that of colleagues with comparable experience.

(ee) In addition, as he noted in his summary of the February 24, 2017, meeting, the employee said that he received a call advising him that his relief had arrived.

(ff) Therefore, he could leave, which Sergeant Ritchie never questioned.

(gg) He had been involved in the investigation process that led to discipline against another officer in the form of a reprimand letter (Exhibit S-10).

(hh) The actions of which the other officer was accused were the same as those in the employee's case; that is, abandoning a post, "[translation] but there are grey areas".

(ii) The last paragraphs of the previously mentioned letter reflected the progressive nature of the disciplinary process: "[translation] … you will receive just a reprimand letter … [and] any further actions of that type will lead to a termination of employment …".

(jj) Another officer had also received a 24-hour notice for abandoning his post, but Sergeant Ritchie did not know if he was disciplined.

[131] On re-examination, Sergeant Ritchie testified as follows:

(a) The reprimand letter to another officer (Exhibit S-13) for abandoning his post on November 22, 2016, stated that "[translation] … any such incident … may result in … rejection on probation, as you are still in your probationary period …" because he was in his first year of employment.

(b) The other officer received only a reprimand letter for abandoning his post on November 22, 2016, because "[translation] there are grey areas and it depends on the situation".

(c) In that case, the other officer left his post "[translation] with some ability to see and hear" to help MPs who were unable to use the elevator; he admitted his mistake and promised that it would not happen again.

[132] During his examination-in-chief, Superintendent O'Beirne testified as follows:

(a) The PPS was created following the attack on the Parliament of Canada in 2014 and combined the security services of the House of Commons, the Senate, and the Royal Canadian Mounted Police RCMP in a single service.

(b) The three pillars of the PPS's strategy are protection, detection, and response.

(c) The PPS has a mandate to protect the Government of Canada, Senators, Members of Parliament, visitors, and employees on Parliament Hill and, more generally, to protect Canada and its reputation strategically.

(d) The PPS *Delegation of Human Resources Management Authorities Matrix* (Exhibit E-11) at page 2, point 7, states that "rejection during probation" is the responsibility of the PPS's director and that therefore, he was the only person who held that authority in 2017.

(e) The employee's offer letter that he signed on September 14, 2016 (Exhibit S-2), was for only one year because all PPS officers are on probation for one year after graduating from the recruit training program.

(f) He was involved in reviewing that letter.

(g) The reason for stating that "[translation] it should be noted that your term appointment may be terminated at any time due to unsatisfactory performance or changes in operational needs" in that letter was to draw the attention of PPS constables to the fact that their performance must be satisfactory.

(h) There was no guarantee of employment after the one-year term set out in the letter of offer.

(i) All PPS employees received the same letter of offer, including a one-year term, subject to satisfactory performance.

(j) According to the PPS's policy on attire and conduct (Exhibit E-10B), page 11, section 3.3, point 8, abandoning an operational post is a serious offence.

(k) Superintendent Vandal informed him of irregularities in the employee's patrols on November 25, 2016, as he noted in his agenda on that date (Exhibit E-9C).

(l) Superintendent Vandal again informed him of irregularities in the employee's patrols and his abandonment of his post on December 21, 2016, as he noted in his agenda on that date (Exhibit E-9C).

(m) He discussed the employee's case with Superintendent Vandal again on March 1, 2017, as he noted in his agenda on that date (Exhibit E-9C), at which time he received the recommendations.

(n) Superintendent Vandal provided those recommendations in a draft note that day (Exhibit E-9B), which concluded that the PPS should terminate his employment.

(o) He had never seen such a sequence of events involving a single constable in such a short period.

(p) That is why he accepted the recommendation that the employee be "rejected on probation".

(q) Therefore, he signed the employee's letter advising him that he was terminating his employment on probation (Exhibit E-3).

(r) In making his decision, he had only the aforementioned note from Superintendent Vandal; he had none of the documents that the PPS had presented as "[translation] relevant to the decision to reject Mr. Markovic on probation" (Exhibit S-9).

(s) The fact that the employee was on probation was not a factor in the decision to terminate his employment.

(t) The PPS used the fact that the employee was on probation as a means to terminate his employment and, had there been other options, the PPS might have explored them.

[133] On cross-examination, Superintendent O'Beirne testified as follows:

(a) He could not remember if the union had been involved in drafting the PPS's letter-of-offer template.

(b) He worked for the PPS from May 21, 2015, to September 2017.

(c) During that period, he terminated only two employments, including one while "on probation".

(d) The union objected to its members being involved in the disciplinary process, as set out in the PPS's *Delegation of Human Resources Management Authorities Matrix* (Exhibit E-11).

(e) The reprimand letter from Superintendent Vandal to another officer (Exhibit S-10) was likely brought to his attention, as a disciplinary sanction was clearly required in the circumstances.

(f) That other officer was the son of Superintendent Marc St-Pierre, whom Superintendent O'Beirne knew and who worked for the PPS at the same time that he did.

[134] The employee informed me of, and the employer confirmed, the following:

(a) He had withdrawn Exhibit S-11.

(b) He had asked Superintendent Daniel Coutu not to testify.

(c) He had admitted that if other officers who had been disciplined were to testify, they would likely say that they considered themselves on probation, and that for that reason, they would not be called to testify.

[135] When his cross-examination resumed, Superintendent O'Beirne testified as follows:

(a) He could not remember whether the facts in the reprimand letter from Superintendent Coutu to another officer (Exhibit S-12) had been brought to his attention.

(b) He also could not remember whether the facts in the reprimand letter from Sergeant Ritchie to another officer (Exhibit S-13) had been brought to his attention, but he now saw the connection to the employee, as it related to an abandonment of a post.

(c) He admitted that "there's some parallel" between the other officer's serious offence and the employee's first alleged abandonment of his post.

(d) He agreed that the reprimand letter to the other officer was appropriate discipline in that case, given all the circumstances.

(e) The disciplinary sanction that Superintendent Coutu imposed on another officer on March 21, 2017 (Exhibit S-14), had been brought to his attention because it was a serious offence (s. 86(1) of the *Criminal Code*, storing a firearm in a careless manner or without reasonable precautions for the safety of other persons).

(f) However, he would hesitate to rank that offence and the employee's alleged abandonment of his position in order of importance.

(g) He was not prepared to say that the other officer's alleged offence was more serious than abandoning a post, as both breaches "[translation] were based on completely different sets of circumstances".

(h) The discipline against the other officer was a five-day suspension.

[136] During his examination-in-chief, Denis Pogrebinsky testified as follows:

(a) The files of PPS employees all contained "conclusive legal documents", such as letters of offer, formal disciplinary assessments, and anything that must go with employees when they change services.

(b) Those files do not contain all the feedback that employees receive, as work observations were kept in the supervisors' work files.

(c) Those files were commonly called "shadow files", a term that Mr. Pogrebinsky did not like, preferring "managerial files".

(d) Human Resources was not involved at all in managing those files.

(e) The PPS had no formal performance review system.

[137] On cross-examination, Mr. Pogrebinsky testified as follows:

(a) He was not involved in the employee's file.

(b) His colleague Shawn Garby, whose duties were substantially the same as his at the time of the adjudication hearing, was involved in the employee's file.

(c) He was quite familiar with the content of the collective agreement (Exhibit S-1), although he had not been involved in negotiating it.

(d) The concept of probation was not mentioned in it but was, in his opinion, included in the management rights recognized in article 5, under the "residual rights doctrine".

(e) Clause 19(e) of the collective agreement referred to the severance that is paid to an employee with more than one year of continuous employment who is rejected on probation.

[138] During his examination-in-chief, Sergeant Lapensée testified as follows:

(a) He was the president of the SSEA.

(b) He was present at the first 3 meetings to which the employee had been called by a notice of interview, and Ms. Wilcott, the union vice-president, was at the 4th.

(c) He had attended hundreds of those types of meetings.

(d) Their purpose was usually to gather information to make a decision and allow the person in question to speak about what had happened.

(e) Notices of interview were issued in circumstances that might not lead to discipline, for instance, to get information from witnesses.

(f) The individuals who received notices of interview did not receive them for any reasons other than discipline.

(g) The employee was a person involved, not a witness.

(h) He was not given any documents at those meetings.

(i) He had consulted the employee's file a few weeks after his termination in 2017.

(j) The employee's file introduced as evidence (Exhibit S-8) appeared to contain all the documents in the file that he consulted in 2017.

(k) There was nothing else in the latter file.

(l) Mr. Garby told him that there was no other file for the employee.

(m) None of the documents that the employer used to terminate the employee (Exhibit S-9) were in the file that he consulted in 2017.

(n) He had done hundreds of patrols throughout his career.

(o) Coaching involved trying to share his experience with his subordinates.

(p) There was no training on how to give coaching.

(q) It differed for everyone and was left to each person.

(r) He had patrolled the Wellington Building.

(s) How long a patrol takes "[translation] varies according to each person's abilities; how long it takes is never precise' some are faster and some slower; being done faster does not mean that it was done wrong; the time is not important, what's important is that it is done".

(t) It is not just the pace of walking or movement that affects how long a patrol takes.

(u) If MPs are still in the offices, it causes additional delays because the officer has to return several times in the evening.

(v) The patrol reports for Wellington (Exhibit S-17) clearly show that the time varies on each floor for each patrol officer.

(w) "[Translation] It can take 10, 15, 20, or 22 minutes, there is no requirement".

(x) The time varies for everyone in all the Parliament buildings.

(y) The same thing is seen in the patrol reports for Building C (Exhibit S-18).

(z) It is normal for it to vary that way, for all kinds of reasons.

(aa) He was involved in discussions with the PPS about the role of non-commissioned officers in imposing discipline.

(bb) The PPS's *Delegation of Human Resources Management Authorities Matrix* (Exhibit E-11), in section II (labour relations), point 3 (discipline), under points (a), (b), and (c), indicates that oral reprimands, written reprimands, and suspensions of up to 5 days were imposed by sergeants and corporals.

(cc) To Michel Duhaime, the PPS's director at the time, he brought up that sergeants and corporals were all union members, which would cause conflicts of interest for them.

(dd) Mr. Duhaime referred him to Jean Forgues, who informed him in an email that suspensions of up to 5 days would no longer be imposed by union members but that oral and written reprimands would continue to be, which was grieved.

(ee) The employer's *Labour Relations Handbook* (Exhibit S-20) sets out progressive discipline.

(ff) In his opinion, the most serious disciplinary offences were any that involved firearms.

(gg) The reason is that they are dangerous, which is why the laws are strict on their use, storage, maintenance, and so on.

(hh) An "[translation] employee on probation" with the PPS means an employee in a term position.

(ii) "[Translation] Being on probation" has no meaning other than the position's term.

(jj) In the previous 12 months, no other PPS employees had lost their jobs as the employee did.

(kk) Since the PPS was created in 2015, only 2 or 3 employees had lost their jobs.

(ll) Once new recruits have completed the 8- to 9-week training program, they are offered a term position, which is normally for 12 months.

(mm) Once those 12 months have passed, the new recruits are offered an indeterminate position.

(nn) Such an offer is not guaranteed, but "[translation] everyone goes through that stage without issue".

(oo) No one has ever completed the 12 months and then not obtained an indeterminate position, either in the PPS or in the House of Commons Protective Service that preceded it.

[139] On cross-examination, Sergeant Lapensée testified as follows:

(a) Since 2017, an employee on "[translation] probation" has meant that the employee held a term position.

(b) He reviewed the documents that the employer used to terminate the employee (Exhibit S-9), including the email dated February 21, 2017, in which another officer asked his superiors if he could stop working with the employee because of safety concerns.

(c) He was familiar with the PPS's policy on attire and conduct (Exhibit E-10A), which, at page 12, point 5, stated that abandoning an operational post is a serious offence.

(d) The patrol of an entire floor is not timed, and "[translation] there is no standard written anywhere".

[140] On re-examination, Sergeant Lapensée testified as follows:

(a) He received a copy of the email dated February 21, 2017, from the other officer (Exhibit S-9, page 16).

(b) Before March 20, 2019, the date of the employer's letter to the employee including the documents that the employer used to terminate his employment (Exhibit S-9), he had seen or received only the following of those documents:

(i) at page 53, Mr. Graham's letter of May 30, 2017, dismissing the employee's grievance at the third level of the grievance process, a copy of which was sent to Ms. Wilcott,

(iii) at page 47, the SSEA's grievance submission at the third level of the grievance process,

(iii) the interview notice, and

(iv) the grievance.

[141] In her examination-in-chief, Ms. Wilcott testified as follows:

(a) The notice of interview dated February 22, 2017 (Exhibit S-3), states on the second-last line that it must "[translation] in theory" be placed in the employee's personnel file.

(b) She said "in theory" because she could not remember seeing that document when she consulted the employee's personnel file with Sergeant Lapensée on March 21, 2017, at 16:00.

(c) Mr. Garby initiated that consultation.

(d) The comments in the file were relatively positive and indicated that the employee was improving.

(e) There was nothing particularly negative in the file.

(f) She felt uncomfortable that the file was extremely thin and asked Mr. Garby if that was everything.

(g) He replied that it was and that there was nothing else.

(h) The union filed a grievance, but the third-level hearing on April 25, 2017, did not at all go as she expected.

(i) She was "[translation] somewhat taken aback" when she saw the thickness of the employer's file about the employee.

(j) The union requested a copy of that file, but the employer refused.

(k) She told Mr. Garby and Mr. Graham that the file was not the one that she and Sergeant Lapensée had seen in the employee's personnel file.

(l) Mr. Garby and Mr. Graham replied that it was their notes and that it belonged to them.

(m) Before March 20, 2019, she had not seen the documents that the employer used to terminate the employee (Exhibit S-9) except for the grievance, the email from another officer, the SSEA's third-level grievance submission, and the letter of May 30, 2017, which Mr. Graham wrote to the employee.

(n) The other documents that the employer used to terminate the employee's employment were not in the employee's personnel file that she consulted with Sergeant Lapensée on March 21, 2017.

(o) While working at the Operational Communications Centre ("OpsCC"), she had often heard mocking of the employee.

(p) The employee's colleagues attacked his person and his intelligence.

(q) She might have been a bit more sensitive to that type of thing because she was a woman.

(r) She has had heard many things in her career, but stated: "[translation] it bothers me when employees are gratuitously attacked".

(s) A small group had taken a disliking to the employee and decided to target him.

(t) That type of problem occurred in almost all recruit groups.

(u) The PPS "[translation] is a particularly difficult environment", and she sometimes intervened.

(v) It is "[translation] an environment of guys, small groups, cliques".

(w) "[Translation] When the members of a clique decide to attack someone they feel is weaker, it works very well".

(x) Around February 23 or 24, 2017, Sergeant Ritchie went to the OpsCC, which he often did because he was friends with several constables.

(y) On that occasion, Sergeant Ritchie discussed the employee with Constable Daniel Plouffe and his colleague Dubé, who were sitting at the front of the OpsCC.

(z) Ms. Wilcott was sitting behind them, and their conversation "[translation] drew [her] attention because Mr. Markovic was mentioned, and [she] found the discussion content inappropriate".

(aa) There was no whispering, and she clearly heard Sergeant Ritchie tell Constable Plouffe the following, referring to the employee: "[translation] I'm trying to make him lose his job, and I want to be sure that our versions are consistent".

(bb) At the time, she kept that comment to herself, stating: "[translation] like many other inappropriate comments that I hear".

(cc) When she learned of all the documents that the employer used to terminate the employee, including the emails and "[translation] briefing notes" (Exhibit S-9), she was dumbfounded because what she considered, at the time, an inappropriate comment had just changed everything.

(dd) "[Translation] For two years, I thought that Sergeant Ritchie was simply one actor among many, but I realized that he might have been the main actor in everything that was going on, and that really bothered me".

(ee) She had never made a complaint against a colleague, and that is not what she wanted to do at the adjudication hearing; she stated:"[translation] but I didn't know that Mr. Ritchie was involved; his name was never mentioned at the third level".

(ff) When she read all the documents that the employer used to terminate the employee (Exhibit S-9), she stated: "[translation] for me, it was clear; there was a desire to [trap] Mr. Markovic, and I found it disgusting".

(gg) The emails in which the employee was questioned about his patrol reports also "[translation] affected [her]" because she had also sometimes gone too fast early in her career as a constable.

(hh) "[Translation] It was clear to me that another constable was being attacked, as I had often seen happen".

(ii) "[Translation] If we started checking everything, we could conclude that we all lack integrity".

(jj) "[Translation] Based on the emails and discussions that I know of, there was a collective effort to get him to lose his job for what I think are not very good reasons".

(kk) "[Translation] The versions had to be coordinated so that his [the employee's] version would not be accepted".

[142] On cross-examination, Ms. Wilcott testified as follows:

(a) She drafted the third-level grievance submission (Exhibit S-9, page 47), which represented the SSEA's position, including the facts section on page 2.

(b) She went with the employee to the meeting on March 9, 2017, because the notice of interview (Exhibit S-3) stated that its purpose was to "[translation] discuss the latest incidents involving the abandonment of a post at 180 Wellington".

(c) If it had said "[translation] to make a decision" like other notices of interview that she had seen, Sergeant Lapensée would have gone.

(d) She signed the grievance on February 27, 2017 (Exhibit E-1).

(e) She did not report the conversation, noted earlier, between Sergeant Ritchie and Constable Plouffe when she managed the employee's grievance file because of this: "[translation] I have heard a lot worse than that", but she did so after seeing the documents that the employer used to terminate his employment because she has "[translation] limits".

(f) "[Translation] I have no interest in saying what I came here to say today".

(g) She heard many people say that they were trying to make the employee lose his job, not just Sergeant Ritchie and not just at the OpsCC, but more generally in the course of her work.

(h) She did not say anything about it earlier because she did not believe that it was relevant.

(i) During the third-level hearing, the employer said that it had "[translation] a large file" on the employee but did not mention Sergeant Ritchie.

(j) Before reviewing the documents that the employer used to terminate the employee, she did not know that a sergeant who conducts an interview after a 24-hour notice subsequently investigates and makes a recommendation.

(k) She was not sure who else was in the OpsCC at the time of the noted conversation between Sergeant Ritchie and Constable Plouffe.

[143] On re-examination, Ms. Wilcott testified as follows:

(a) Over 50 people in the PPS had made similar comments about the employee.

(b) It was not just "[translation] I'll make him lose his job" but "[translation] disgraceful comments", like "[translation] I hope they kick him out".

(c) She had heard similar comments about other officers.

(d) While the employee was in training, he was mostly "[translation] the butt of the joke", and to some extent, so was another officer.

(e) The PPS "[translation] is a rather difficult environment, quite macho".

(f) "[Translation] When a small group of people decides to attack someone, it quickly escalates".

(g) "[Translation] Suddenly, everyone is talking about it", and "[translation] it's word of mouth".

(h) She questioned her friends and asked them, "[translation] why do you call him a sucker?".

(i) They replied, "[translation] I heard this or that".

(j) "[Translation] It goes fast, very fast, and it can go off the rails".

(k) She had seen it before; she found it "[translation] really deplorable" and "[translation] maybe not so funny" because "[translation] that individual is a person and may be fed up".

(l) Because of what she described as "[translation] her maternal instinct" at the adjudication hearing, she did not want to give more specific examples of what was being said "[translation] behind the employee's back" because she did not want to hurt him.

[144] During his examination-in-chief, Acting Sergeant Dubuc (a corporal at the time that the facts occurred) testified as follows:

(a) He managed the performance of the constables that he supervised "[translation] to some extent, but that had more or less dropped off".

(b) He did assessments primarily for new recruits "[translation] in the first year of probation".

(c) "[Translation] If I saw an error, I coached right away and made a note in the 'shadow file' to have some substance to put in the final assessment".

(d) It might be "[translation] small mistakes or a general deficiency".

(e) "[Translation] Not every instance of coaching was necessarily recorded; it depended on the seriousness".

(f) He was the employee's immediate supervisor.

(g) He received and read a copy of the October 6, 2016, email from Corporal Eric Fortin to Sergeant Michel Morin (Exhibit E-4A).

(h) He drafted the note about the coaching session that he gave the employee on February 17, 2017, because he felt that some floors could not be properly patrolled in just 10 minutes (Exhibit E-4D).

(i) He emailed Sergeant Ritchie on November 22, 2016, to report 2 incidents of abandoning a post, 1 by the employee, and the other by another officer (Exhibit E-5B).

(j) He emailed Sergeant Ritchie on December 15, 2016, and attached the emails that he had received from other officers about the posts abandoned on November 22, 2016 (Exhibit E-5D).

(k) When he taught, he stated that a constable must not abandon his or her post, and that for some posts, he or she must remain on site even if there is a fire alarm.

(l) He was able to convince another officer, who was initially reluctant, to write the email of February 21, 2017, in which he reported that the employee had abandoned his post for 8 minutes (Exhibit E-8A).

(m) He and Sergeant Morin did not confront the employee about that abandonment at the breakfast after the night shift because "[translation] we did not want to discuss it outside work hours".

[145] On cross-examination, Acting Sergeant Dubuc testified as follows:

(a) He assumed that many constables had received parking violations.

(b) "[Translation] [He] could not remember" if he had been involved in the employee's "Constable Intake Program".

(c) It was "[translation] possible" that he was involved only in the drill and the changing of the guard.

(d) In his email to Sergeant Ritchie on November 22, 2016 (Exhibit E-5B), he wrote that he caught another officer "[translation] in the act [of] trying to leave early without authorization".

(e) The other officer had left the building.

(f) He could not say how leaving the building without authorization differed from abandoning a post.

(g) He also could not say whether leaving the building without authorization was a disciplinary matter.

(h) He left the matter to Sergeant Ritchie.

(i) He read the email of November 22, 2016, in which the employee explained that he had given his patrol officer keys to another officer and had gone to the restroom because he "[translation] really had to go" (Exhibit S-9, page 36).

(j) He was told that the employee had given the keys to someone before going to the restroom.

(k) He had coached the employee on his patrols.

(l) It had gone fairly well.

(m) He had no information to indicate that the employee's patrols had gone badly after that.

(n) On reading the patrol reports from the Wellington Building, he saw that while the employee had patrolled the 6th, 5th, and 4th floors in 12, 12, and 16 minutes respectively on February 11, 2017 (Exhibit S-9, page 21), he had taken 20, 27, and 28 minutes on February 17, 2017, the day on which Sergeant Dubuc had coached him, 6 days after the facts of which he was accused (Exhibit S-9, page 22); 20, 20, and 30 minutes on February 18, 2017 (Exhibit S-9, page 23); 18, 18, and 25 minutes on February 19, 2017 (Exhibit S-9, page 24); and 15, 14, and 29 minutes on February 20, 2017 (Exhibit S-9, page 25).

(o) When asked if that meant that the coaching had been successful and that no problems were identified afterward, he replied, "[translation] evidently, he's doing his job".

(p) On reading the patrol reports from the Wellington Building, he noted that Constable Brière had taken only 11 minutes to patrol the 2nd basement on February 11, 2017 (Exhibit S-9, page 21).

(q) When asked if that was long or short, he replied with this: "[translation] I would have to check".

(r) On reading the patrol reports from the Wellington Building, he also noted that Constable Germain had taken 30 minutes to patrol the same floor (2nd basement) on February 17, 2017 (Exhibit S-9, page 22).

(s) He acknowledged that there was "[translation] quite a range" between those 2 patrol times for the same floor by 2 different patrol officers.

(t) When asked to explain that major difference, he first replied that he would need to see the backs of the reports but then found that nothing specific was recorded there (Exhibit S-9, pages 26 to 30).

(u) He had not coached Constable Brière or Constable Germain.

(v) He had never patrolled the Wellington Building, and therefore, he could not say how long it had taken him.

(w) Eleven minutes per floor did seem too fast to him, even though that was how long it took Constable Brière.

(x) He did not know if other teams kept “shadow files”.

(y) He did not know who came up with the idea to create them.

(z) He could not say when those files had been created.

(aa) It was plausible that it was around 2015.

(bb) He was promoted to Corporal in 2014, but did not remember if “shadow files” existed at that time.

(cc) He did not know if Sergeant Ritchie had access to them.

(dd) He had no reason to doubt that the employee was absent from his post on November 22, 2016, because he went to the restroom “[translation] in a hurry”.

(ee) When informed that the employee would testify that during the breakfast on February 21, 2017, Sergeant Morin told him “[translation] you abandoned your post again and we will discuss it when you return from your 6 days off”, he replied, “[translation] doesn’t ring a bell”.

[146] During his examination-in-chief, the employee testified as follows:

(a) The offer letter (Exhibit S-2) was the only document that he received after he graduated from the training program on September 14, 2016.

(b) He met with his sergeant (Morin) and his corporal (Dubuc) during his first week of work.

[147] The employer cross-examined Ms. Wilcott again. It told her that Sergeant Ritchie would return and say that he never made the comment that she reported. In response, she “[translation] absolutely” maintained her testimony.

[148] Under re-examination again, Ms. Wilcott testified as follows:

(a) She had nothing to gain from her testimony the day before, but “[translation] rather, something to lose”.

(b) “[Translation] We’re living in a time when everything is known the moment it is said”.

(c) "[Translation] My statements were repeated to Ritchie and Plouffe, and they will contradict me".

(d) "[Translation] That will surely come back on me".

(e) "[Translation] I'm prepared to live with that".

[149] Under examination again, Sergeant Ritchie testified as follows:

(a) As he indicated in his note about the employee abandoning his post on February 27, 2017 (Exhibit E-8C), the employee "[translation] reluctantly took responsibility", and therefore, he discussed it with Constable Plouffe.

(b) He did not remember when that conversation took place but stated this: "[translation] [it was] possibly at the OpsCC or in my office".

(c) He did not tell Constable Plouffe that he was trying to make the employee lose his job.

(d) "[Translation] That was my recommendation", but he stated: "[translation] I do not recall saying that it was my goal".

(e) "[Translation] In those words, no, but it was my recommendation".

(f) "[Translation] It might have been misinterpreted".

(g) His discussions with Constable Plouffe in the hallway before testifying again at the adjudication hearing were not about his testimony.

[150] When he was cross-examined again, Sergeant Ritchie testified as follows:

(a) He did not send a 24-hour notice to Constable Plouffe because the employee admitted to abandoning his post.

(b) In speaking with Constable Plouffe, he stated: "[translation] I wanted to be sure that he said the same thing".

[151] During his examination-in-chief, Sergeant Plouffe testified as follows:

(a) He remembered having a conversation with Sergeant Ritchie about the employee around February 2017.

(b) His memory of that conversation was that it was "just to get the facts of the situation at Wellington".

(c) He did not remember where that conversation took place.

(d) Sergeant Ritchie "[translation] at no time" told him that he was trying to make the employee lose his job because "[translation] he would never speak that way".

(e) "[Translation] I don't remember … if it happened" that the conversation was about the fact that "[translation] it would be a good idea to coordinate our versions".

(f) In the hallway before testifying, he and Sergeant Ritchie did not discuss the adjudication hearing, "[translation] just our families".

[152] When his examination-in-chief resumed, the employee testified as follows:

(a) In his meeting with Corporal Fortin on October 3, 2016, he explained that the MP that Corporal Fortin had seen was not there when he went by and that he did not know why.

(b) He went through all the floors and did not see anyone.

(c) When he saw someone, he noted it in his patrol reports.

(d) He did not see Sergeant Ritchie's note of February 21, 2017, about abandoning his post (Exhibit E-8C) until March 20, 2019.

(e) Before March 20, 2019, of the documents that the employer used to terminate his employment, he had seen only the following (Exhibit S-9): Sergeant Morin's email of February 15, 2017, about the parking violations (page 15), his email exchanges with Sergeant Ritchie on February 27, 2017, about his patrols (pages 8 to 20), his patrol reports (pages 21 to 25), the email of November 22, 2016, which Corporal Dubuc had requested about abandoning his post that day (page 36), the 4 notices of interview that he received (pages 39 to 42), his grievance (pages 47 to 52), and the third-level decision (pages 53 to 54).

(f) Before March 20, 2019, he had not seen Sergeant Ritchie's email to Superintendent Vandal dated March 29, 2017 (page 35).

(g) He was dismissed on March 9, 2017.

(h) A few days after he met with Corporal Fortin on October 3, 2016, possibly on October 10, 2016, Sergeant Morin met with him to discuss an email that Corporal Fortin had sent him.

(i) There was no follow-up with Corporal Fortin after that.

(j) On November 22, 2016, the employee "[translation] urgently had to go 'number two'" when he returned from his break.

(k) Three other officers were present.

(l) He gave the keys to a first officer and went to the restroom for about 10 or 15 minutes.

(m) When he returned, Corporal Dubuc was there and explained that he was not pleased that the employee had abandoned his post.

(n) The employee "[translation] was not aware that the other guys were not at the post".

(o) The first officer had left, a second officer wanted to leave earlier, and a third officer apparently remained alone.

(p) In the meantime, MPs were unable to go upstairs because the elevator was not working.

(q) Thus, the third officer left for 20 to 30 seconds to use his elevator pass.

(r) When he returned, the Division 3 Sergeant questioned him.

(s) On December 7, 2016, the employee received a 24-hour notice of a first interview on December 8, 2016, about abandoning his post on November 22, 2016, which he attended with Sergeant Ritchie, a Human Resources representative, and his union representative.

(t) At that time, "[translation] there was a long sermon" from Sergeant Ritchie, he explained; Sergeant Ritchie noted it with the person from Human Resources and said "[translation] OK, it's fine".

(u) On February 3, 2017, he was 5 minutes late to 131-C because the shuttle arrived at the Centre Block at 09:00, and it took him 5 minutes to change, load his weapon, and put his gloves and food in the constables' room.

(v) He apologized to his colleague Presley for being late, and Presley said nothing.

(w) His sergeant spoke to him about it, he said "[translation] sorry, it won't happen again", and his sergeant replied "[translation] OK, no problem".

(x) As for the parking violations that Sergeant Ritchie noted on February 24, 2017 (Exhibit E-9, page 44), given how hard it is to find parking downtown, "[translation] it's often preferable to get a $25 ticket than to be reprimanded for arriving late".

(y) Individuals with more experience than he suggested it to him, saying "[translation] many people do it", including "[translation] almost everyone on [my] team".

"[Translation] The sergeant then asked them to stop doing that", so "[translation] we parked 4 or 5 kilometres away and arrived 1.5 to 2 hours before work".

(z) On February 17, 2017, during his only coaching session with Corporal Dubuc, the latter came to see him because he found that his patrols were too short, and he explained that he looked at his watch, took notes, and applied everything that he learned.

(aa) The employee offered to have Corporal Dubuc go with him to see how he patrolled, but he replied that he did not have the time.

(bb) Corporal Dubuc had asked him if he was lying.

(cc) The employee replied 3 times that he had no interest in lying, that he enjoyed his job, and that he had fought to get it.

(dd) Corporal Dubuc still did not believe him.

(ee) The employee told him this: "[translation] unless you want me to cut off my hand and give it to you, I don't know how to explain to you that I'm not lying".

(ff) As for the second alleged abandonment of his post on February 21, 2017, another officer told him this that morning: "[translation] I saw your relief; he is here, and he is waiting for you".

(gg) It was Constable Alarie.

(hh) The employee and the other officer wished each other a good weekend, and the employee went upstairs to get his bag.

(ii) He went back to the locker room and looked for Constable Alarie, but did not see him.

(jj) He asked the other constables, who told him that they had seen Constable Alarie but that he left.

(kk) The employee went to the lounge; Constable Alarie was not there, but he saw a patrol officer's bag and thought that it was his.

(ll) He gave the keys to another officer, said to him to "[translation] tell Alarie that he's late", and left.

(mm) The other officer said "OK".

(nn) The other officer did not say "[translation] stay here and wait for Alarie to arrive".

(oo) The other officer never told him that he no longer wanted to work with him.

(pp) The other officer never told him that he was a risk.

(qq) On February 22, 2017, the employee received notice of a second interview on February 23, 2017, about abandoning his post on November 22, 2016,

which he attended with Sergeant Ritchie, a Human Resources representative, and his union representative, Sergeant Lapensée.

(rr) At that time, Sergeant Ritchie asked him about abandoning his post on November 22, 2016, and did not believe his version because the others gave a different version.

(ss) "[Translation] I told him that I don't lie, I love my job, and what I said was my perception".

(tt) "[Translation] I told him to watch the videos".

(uu) His relief arrived 5 minutes after he left.

(vv) Sergeant Ritchie said "[translation] OK, it's fine, no problem".

(ww) On February 22, 2017, the employee also received notice of a meeting on February 24, 2017, about abandoning his post on February 21, 2017, at which he explained what he had just said at the adjudication hearing.

(xx) Sergeant Ritchie noted what the employee said and said to him, "[translation] OK, have a good day".

(yy) Sergeant Ritchie did not tell him then or at any other time that he would recommend that the employee lose his job.

(zz) On March 9, 2017, at about 11:00, the employee received a notice of an interview at 14:30 that day (i.e., 3.5 hours before, not 24).

(aaa) He understood from the notice that it was "[translation] to discuss the latest incidents involving the abandonment of a post at 180 Wellington".

(bbb) He went to the interview with Ms. Wilcott, in uniform and with his weapon.

(ccc) At the interview, Superintendent Vandal explained to him that his employment was being terminated and gave him the termination letter (Exhibit S-4).

(ddd) It lasted only 1 or 2 minutes; the employee began to cry with his head down, and Superintendent Vandal left.

(eee) When the employee raised his head, Sergeant Morin was there and told him that he would accompany him to the cloakroom and take his weapon and go to the Centre Block to get his bag.

(fff) Once out of Parliament, at the corner of Wellington and O'Connor Streets, Sergeant Morin told him to breathe, that he would be back, and that he would write an email to Superintendent Vandal to tell him that everything had gone well.

(ggg) Unemployed, the employee found a new job at Tim Horton's, where he made $11 or $11.50 per hour.

(hhh) He remained there for just 3 months because he did not like the work, and he lost his apartment because he could no longer pay the rent.

(iii) He then found a job as a security guard and was still working in that position at the time of the adjudication hearing.

(jjj) Losing his job meant that he lost his salary and his apartment and that he had to put his plan to buy a house and start a family on hold until he had more money and a stable job.

(kkk) As a security guard, he was not making much money: $17.49 per hour, compared to about $30 per hour at the PPS, which amounted to a salary of $53 231, plus benefits, as stated in the confirmation-of-employment letter dated January 27, 2017 (Exhibit S-8, page 35).

(lll) He had been mocked at the PPS, which hurt him.

(mmm) He did not realize that so many people there did not like him.

(nnn) He had been told a few times "[translation] you're an immigrant, go back to your country" because he had come from Serbia and was born in Slovenia.

(ooo) They mocked him by calling him over the radio and saying nothing when he responded.

[153] On cross-examination, the employee testified as follows:

(a) He read his grievance (Exhibit E-1) before signing it and agreed with its content.

(b) He reread the "[translation] The facts" section on pages 1 and 2 of his grievance and still agreed with its content.

(c) In October 2016, Corporal Fortin reminded him of the importance of doing proper patrols.

(d) He did not know that Corporal Fortin had emailed Sergeant Morin to complain about his patrols.

(e) Sergeant Morin spoke to him about it and did not tell him that he did not believe him but that he would discuss it with Corporal Fortin.

(f) He told Sergeant Morin that he was doing his patrols properly, the way that he had learned to do them in the recruit training program.

(g) In December 2016, Sergeant Morin told him that he thought that his patrols were short.

(h) The employee told him again that he was doing his patrols properly, in the way that he had learned to do them in the recruit training program.

(i) In February 2017, during a discussion in the hallway, Corporal Dubuc told him that his patrols were too short.

(j) The employee did not think that there was a problem with his patrols because he was doing them properly and applying what he learned in his recruit program.

(k) He had also done everything that he learned in his training on the day that Corporal Fortin saw an MP whom the employee did not see while doing his patrol.

(l) He received Sergeant Ritchie's email of February 24, 2017, about his patrols (Exhibit E-4E).

(m) He was aware that there was a 7th floor in the Wellington Building and had patrolled it, as he stated in response to that email.

(n) He said that he preferred to receive a parking violation than to arrive late because the recruit courses had stressed the importance of arriving on time.

(o) When asked if he was on probation, he replied with: "[translation] I had a 12-month term contract".

(p) His grievance stated on page 2 that "[translation] the employer's representative terminated my probationary period" because he and his colleagues had been told throughout their recruit course that "[translation] you are on probation, you have to prove yourself, and you have 12 months to do it".

[154] On re-examination, the employee testified as follows:

(a) He still agreed with the "[translation] The facts" section on pages 1 and 2 of his grievance.

(b) He still agreed with the remedies on page 3 of his grievance, including rescinding his termination.

2. The employer's position

[155] For the first time in its arguments, the employer submitted that the employee worked for the PPS for less than six months, from September 17, 2016, to March 9, 2017, as evidenced by his offer letter and termination letter (Exhibits E-2 and E-3).

Therefore, the definition of employee in s. 3(c) of the *PESRA* excludes the employee because he had less than six months of service.

[156] Even if he were an employee, s. 63(1)(c) of the *PESRA* creates an exception to the right of an employee to refer to adjudication any grievance of termination in the case of a rejection on probation.

[157] Moreover, the jurisprudence clearly states that grievances must be interpreted broadly but that the adjudicator is bound and limited by the grievance. An adjudicator's jurisdiction does not extend to issues that are not raised in the grievance.

[158] Contrary to the SSEA's claims, whether the employee was "[translation] on a probationary period" or on "[translation] probation" is not at issue in this grievance.

[159] The employee and the union even admitted that in the statement of grievance (Exhibit S-1).

[160] During the third-level grievance hearing, the union admitted again that the employee was on a probationary period (Exhibit E-12A).

[161] In *Ontario Public Service Employees Union v. George Brown College* (grievance No. 99B557, 20001204, unpublished arbitration award (Ontario)), cited in *Ontario Public Service Employees Union v. Fanshawe College* (2002), 113 L.A.C. (4th) 328 at para. 16, an arbitrator found as follows:

…

> *… The Union is not to be permitted at a later date, just prior to arbitration, to completely change horses in midstream and raise issues not contemplated by the grievance, which are not consistent with the language of the grievance, which cannot reasonably be included in the grievance and which are entirely separate and distinct from the subject of the original grievance.*

…

[162] In paragraph 13 of *Fanshawe College*, the arbitrator considered the statement of grievance and remedies sought as evidence of the scope of the grievance, as follows:

> … ***The acid test is whether an issue not encompassed within the grievance that requires the calling of evidence and the***

> ***making of legal submissions has been raised.*** *Without restricting the authority of an arbitrator to fashion an appropriate remedy at the conclusion of a case, which may or may not differ from the remedy sought,* ***it is the statement of grievance read in conjunction with the remedy sought that defines the essential nature of the grievance and the issues that have been raised by the grievance, thereby allowing an arbitrator to decide if a grievance has been improperly expanded.***
>
> [Emphasis in the original]

[163] In *Canadian Union of Public Employees, Local 4705 v. Greater Sudbury Hydro Plus Inc.* (2003), 121 L.A.C. (4th) 193 at para. 17, an arbitrator found that the union was trying to expand the scope of the grievance and explained as follows:

> *… To include an issue through a "liberal reading", I must be able to conclude that the employer reasonably should have understood upon reading the grievance that the issue in question was part of the grievance. I am unable to reach that conclusion in this case. The grievance was very specific about the right violated. It was about bumping rights. It was open to the union to clarify or amend the grievance during the grievance procedure to include additional claims. There is no suggestion that this was done.*

[164] The fact that the employee was on a probationary period was never disputed.

[165] The union's position contradicted the wording of the grievance and the SSEA's statement at the third level of the grievance process. Therefore, the parties clearly did not consider that wording when filing the grievance.

[166] The onus was on the union to prove that the termination was discriminatory or in bad faith.

[167] The landmark decision pertaining to the role of an adjudicator in a rejection on probation is *Canada (Attorney General) v. Penner*, [1989] FC 429 (C.A.). That case involved an application for judicial review to reverse the decision of an adjudicator who found that since Mr. Penner's rejection on probation was related to certain disciplinary incidents, he had jurisdiction to hear the grievance. The adjudicator then sought to determine whether the termination should be replaced by a less-severe disciplinary sanction.

[168] In its decision, the Federal Court of Appeal referred to that of the Supreme Court of Canada in *Jacmain v. Attorney General (Canada)*, [1978] 2 SCR 15, as follows:

…

> *[17] It is clear that five of the nine judges who rendered this* Jacmain *judgment expressed the opinion that 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. But I simply do not see how this* Jacmain *judgment can be interpreted as lending support to the proposition that an adjudicator acting under section 92 of the P.S.S.R. Act would have jurisdiction to intervene against a rejection on probation pursuant to section 28 of the P.S.E. Act, on the sole basis that the motives behind the employer's decision were somehow linked to the misconduct or misbehaviour of the employee and could therefore have given rise to disciplinary measures.…*
>
> *[18] The basic conclusion of the* Jacmain *judgment, as I read it, is that an adjudicator appointed under the P.S.S.R. Act 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.…*
>
> *[19] … Neither the function of a probationary period nor the structure of the legislation can be reconciled with the proposition that disciplinary discharge and rejection for cause are not mutually exclusive concepts. One is the ultimate sanction imposed by management for serious misbehaviour, the other is a termination of employment based on a bona fide dissatisfaction with suitability. 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.*
>
> *[20] … It seems to me that … Parliament … has not wanted such a scheme to interfere with the discretion and authority of management in selecting employees who will appear fully suitable for the positions to be occupied in its permanent staff, a discretion and authority which would be seriously and unrealistically impaired if cause for rejection were limited to strict technical qualification.*

…

[169] Although *Penner* deals with a different statutory regime, involving the *PSEA* and the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35; *PSSRA*), it is also relevant to

the legal situation pursuant to the *PESRA*, as s. 63(1) of that Act does not allow a rejection-on-probation grievance to be referred to adjudication.

[170] That is confirmed in *Canada (Attorney General) v. Herrera-Morales*, 2017 FCA 163 ("*Herrera-Morales* (FCA)"). That case involved an application for judicial review of a decision under the *Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10; *RCMPA*).

[171] At that time, the *RCMPA* had two separate parts: Part V on discharge and demotion, and Part IV on discipline. In particular, the *RCMPA* provided limited rights in cases of rejection on probation, but a hearing for matters of discipline. The employee was rejected on probation, and the decision maker referred to *Penner* to find as follows:

> (a) the decision to terminate the employment was based on the employee's performance;
> (b) the same behaviour can lead to discipline or to the conclusion that the employee is unsuitable for the position; and
> (c) an administrative decision on the employee's suitability for the position must not be confused with discipline.

[172] In revoking the decision in *Herrera-Morales* (FCA) and confirming the initial decision, the Federal Court of Appeal noted that the initial decision maker was aware that the statutory regime before it differed from the one in *Penner*.

[173] In *Monette v. Parks Canada Agency*, 2010 PSLRB 89 at para. 39, the Parks Canada Agency cited *Penner* in that although the *PSEA* did not apply in that case, the adjudicator had to dismiss the grievance if the rejection on probation was based on employment-related reasons. However, s. 13(1)(b) of the *Parks Canada Agency Act* (S.C. 1998, c. 31; *PCAA*) gave the Parks Canada Agency the authority to establish standards, procedures, and processes governing staffing, including the appointment, lay-off, or termination of employment otherwise than for cause, and s. 13(2) stated that the *PSSRA* did not affect the right or authority of the chief executive officer to deal with the matters referred to in s. 13(1)(b).

[174] Section 5(3) of the *PESRA* states that "[n]othing in this Part shall be construed to affect the right or authority of an employer to determine the organization of the employer and to assign duties and classify positions of employment", which is a broader authority that what is conferred by ss. 13(1)(b) and 13(2) of the *PCAA*.

[175] The adjudicator noted in paragraph 40 of *Monette* that the legal framework of the *PCAA* was comparable to that of the core public administration. In paragraph 41, he also adopted Parks Canada Agency's reasoning that he had to dismiss the grievance for want of jurisdiction if he found that its decision to reject Mr. Monette on probation was based on employment-related reasons. In the end, in paragraph 46, he concluded that in that case, there was in fact an employment-related reason to reject Mr. Monette on probation, and that therefore, he had no jurisdiction to decide the grievance.

[176] The role of an adjudicator is set out as follows in *Premakanthan v. Deputy Head (Treasury Board)*, 2012 PSLRB 67 at para. 52:

> *[52] … In cases involving rejection on probation, it is not the role of an adjudicator to revisit the appropriateness of the deputy head's dissatisfaction with an employee's suitability to perform the duties of his of her position by reassessing the employee's performance or behaviour and by substituting the adjudicator's assessment for that of the deputy head; nor is it the role of an adjudicator to assess the employee's performance during his or her tenure or the validity of his or her justifications. The role of an adjudicator is to ensure that the rejection on probation is what it appears to be and that a deputy head's decision to end an employee's employment during a probationary period was not a contrived reliance on the* PSEA*, a sham or a camouflage.*

[177] For that reason, the employer maintained that the only issue before me is whether the employee's rejection on probation was based on a bona fide determination by the employer of his suitability to perform the duties of his position.

[178] In support of its claim that the answer to that question must be positive, the employer referred to the following series of events, beginning with the fact that it was essential to understand the environment in which the employee worked, to understand why his multiple violations were considered a risk.

[179] Superintendent O'Beirne testified about the circumstances leading to the creation of the PPS, the three pillars of its strategy, and its mandate.

[180] On the matter of security, Superintendent O'Beirne, Corporal Fortin, and Sergeant Ritchie testified that for security, it was important to carry out patrols.

[181] Superintendent O'Beirne, Sergeant Ritchie, and Corporal Dubuc testified that it is important not to abandon a post, which was confirmed in the employer's policy on attire and conduct (Exhibit E-10A, section 3.3, point 8).

[182] Corporal Dubuc testified that a constable must not abandon his or her post, even for a fire alarm.

[183] All the employer's witnesses confirmed that in the first 12 months of employment in the PPS, all employees are subject to a probationary period and are employed on a term basis.

[184] Although the collective agreement does not set out a specific period of probation, it explicitly refers to the existence of a probationary period, as follows:

(a) Clause 19(e) of the collective agreement refers to the severance that an employee with more than one year of continuous employment and who is rejected on probation receives.

(b) Clause 36.20 reiterates s. 63(1)(c) of the *PESRA* and provides that an employee cannot refer to adjudication a grievance about his or her termination if it is a "… rejection on probation in respect of an initial appointment …".

(c) In Appendix B, which outlines the deferred salary leave plan, the "Eligibility" section provides that "[a]ll indeterminate staff who have completed their probationary period are eligible to apply", thus showing that the parties considered the existence of a probationary period.

[185] As the arbitrator noted as follows at paragraphs 40 and 41 of *Imperial Oil Strathcona Refinery*, the collective agreement must be interpreted as a whole:

> *40 The modern Canadian approach to interpreting agreements (including collective agreements) and legislation, is encompassed by the modern principle of interpretation which, for collective agreements, is:*
>
> > *In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.*
>
> *41 Using this principle, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional intention of the parties where none existed, but recognizes their*

> *intention if an intention can be shown. The principle also looks into the entire context of the agreement to determine the meaning to be given to words in dispute.*

[186] The applicable statutory regime, the *PESRA*, provides for the possibility of a probationary period.

[187] Although the letter of offer (Exhibit E-2) does not contain the term "probation" or *stage*, it states that the employer can terminate the employment "[translation] due to unsatisfactory performance".

[188] In *Nagribianko v. Select Wine Merchants Ltd.*, 2016 ONSC 490 ("*Nagribianko* (ONSC)"), the employment contract of Mr. Nagribianko, who was not unionized, which Select Wine Merchants Ltd. terminated, referred to a six-month "probation", but the trial judge found that that term was ambiguous. The Ontario Superior Court of Justice, whose decision was confirmed by the Ontario Court of Appeal in *Nagribianko v. Select Wine Merchants Ltd.*, 2017 ONCA 540, found that the trial judge erred in law in interpreting the contract.

[189] At paragraph 25 of *Nagribianko* (ONSC), Select Wine Merchants Ltd. argued that the existence of a probationary period was a question of fact. Therefore, it was not a legal question, as the SSEA claimed.

[190] At paragraph 28 of *Nagribianko* (ONSC), the Ontario Superior Court of Justice, citing *Salah v. Timothy's Coffee of the Word Inc.*, 2010 ONCA 673 at para. 16, stated the following:

> *[28] In interpreting a contract, the question the Court should ask is what reasonable persons in the same circumstances as the parties would have understood the contract to mean. The subjective intentions of the parties are irrelevant. The goal is to ascertain the objective intent of the parties through the application of legal principles of interpretation. …*

[191] At paragraphs 40 and 41, it added the following:

> *[40] A reasonable person in the same circumstances as the Respondent/Plaintiff would have understood the term "probation" to mean a period of tentative employment during which Select would determine whether the Respondent/Plaintiff would be a suitable employee and would decide whether or not to make him a regular/non probationary employee.*

> *[41] On his own evidence, the Plaintiff /Respondent understood that during the 6 month probationary period he would be at risk. He may have believed that the employer would find him to be a suitable employee, but a reasonable person in those circumstances would also have understood that that might not happen.*

[192] All the employer's witnesses testified that the initial 12-month term employment was a probationary period.

[193] Ms. Wilcott testified that the employee was on probation (Exhibit E-12A).

[194] The employee admitted that all the other officers to whom he wanted to compare his breaches would testify that they considered themselves on probation.

[195] An adjudicator acknowledged the concept of a probationary period in *Ricard v. Canada Border Services Agency*, 2014 PSLRB 72 at para. 119. She explained its purpose 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 do. 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. In* McMath v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 42, the adjudicator held that even in cases of culpable misconduct that would normally give rise to a disciplinary response, the employer can choose to reject a probationary employee on probation if the misconduct leads to concerns about the employee's suitability. As noted as follows in* Fell*, at paragraph 113:*
>
> > *… it is not the role of an adjudicator to second-guess an employer's judgment about what conduct on the part of a probationary employee should be considered relevant to an evaluation of the suitability of the employee for long-term employment, or to decide how much weight should be attached to particular incidents….*

[196] The evidence showed that the employee had problems with his patrols.

[197] He was coached in October 2016, a few weeks after he started work, about the fact that his patrols were incomplete.

[198] Corporal Dubuc testified that he offered coaching to the employee in February 2017 about the duration of his patrols.

[199] Sergeant Ritchie noted in late February 2017 (Exhibit E-4E) that the employee's patrol reports were incomplete and sought to find out if he knew that the Wellington Building had a seventh floor.

[200] The employee never admitted that he carried out incomplete patrols and tried to cover up his mistake of not patrolling the seventh floor of the Wellington Building by saying that the time that he indicated was for patrolling the sixth floor, including the seventh floor. That explanation seemed unlikely given the time that it took to patrol two floors.

[201] The employee suggested that the patrol time varies, and based on his patrol reports (Exhibit E-4E), he claimed that he patrolled the 6th and 7th floors of the Wellington Building in under 20 minutes on 3 occasions. However, other PPS employees' reports that he submitted (Exhibit S-17) clearly show that the 6th and 7th floors take other patrol officers over 20 minutes, sometimes up to 35, and the reports do not note any incidents, doors, or individuals.

[202] Sergeant Lapensée confirmed that a patrol officer must take a certain amount of time to ensure a proper patrol.

[203] At the adjudication hearing, the employee raised questions about training. The employer noted that in *Dyck v. Deputy Head (Department of Transport)*, 2011 PSLRB 108 at para. 111, an adjudicator declined to rule on the relevance of training to decide whether a rejection on probation complied with the jurisprudence and the applicable texts. The employer argued that that question was also not relevant in the case at hand.

[204] The employee abandoned his post for the first time in November 2016, supposedly because he "[translation] really had to go", and he received coaching from Corporal Dubuc at the time of the incident.

[205] The employee had a first interview with the union and Sergeant Ritchie, who was investigating and trying to determine what had happened.

[206] Sergeant Ritchie explained that the employee denied abandoning his post, leading him to expand the scope of his investigation.

[207] Sergeant Lapensée confirmed that the employee had the opportunity to explain his version of the facts.

[208] Before the investigation of his first abandonment of post even finished, the employee abandoned his post again in February 2017, leaving his colleague alone in the building.

[209] The employee was called to a second meeting about the first incident but again did not give any reasons, such as supposed gastric problems, to explain his actions.

[210] In his meeting about the second abandonment of his post, the employee said that he had been relieved. However, Sergeant Ritchie's report (Exhibit E-8C) explained that the relief procedure includes handing over keys and briefing the relieving officer.

[211] The same report notes that the employee had no reason to leave early, that he had "reluctantly" taken responsibility for leaving his post early, but that he tried to put some of the blame on his colleagues, saying that they should have tried to stop him.

[212] The employee had also received three parking violations and was five minutes late one day, which was a security risk. In short, in less than six months, he had been the subject of "[translation] many problems".

[213] Sergeant Ritchie wrote a note on February 24, 2017 (Exhibit E-9A), as requested by Superintendent Vandal, who was unable to testify, although the employer "[translation] would have liked to have his testimony".

[214] Superintendent Vandal had planned a trip out of the country before the dates of the hearing before me were confirmed. Counsel for the PPS did not request a postponement in December 2018, and when it did, it was refused.

[215] Counsel for the employee emailed a summons to Superintendent Vandal, who did not respond. That summons was not valid because it was not served in person, in accordance with federal court rules, which the Board's website states apply.

[216] Therefore, there is no reason to draw a negative inference from Mr. Vandal's absence, as the employee requested.

[217] Sergeant Ritchie's note (Exhibit E-9A) and testimony confirm that it was not a breach that led him to recommend terminating the employee's probationary period but rather the fact that he did not admit fault for the breaches and that he tried to blame others, as well as their repetitive nature. He seemed incapable of learning from his mistakes and did not understand the seriousness of the breach, and PPS employees no longer trusted him.

[218] Superintendent O'Beirne confirmed that it was after the overall assessment of the employee's suitability that he accepted the recommendation for rejection on probation and that it was based on the employee's inability to meet the PPS's expectations for carrying out his duties, his responsibilities, and the importance of his role and his refusal to take responsibility for his breaches.

[219] The facts in this case greatly resemble those cited by the Federal Court of Appeal at paragraph 45 of *Herrera-Morales*:

> *[45] … This is one of those cases where I find the discharge of the member is definitely necessary. This is not a case where Cst. Herrera-Morales made an isolated and understandable error in judgment. There are multiple and progressively serious incidents where Cst. Herrera-Morales demonstrated his repeated failure to follow the RCMP Core Values of honesty and integrity, even in the face of sincere guidance and advice on these most basic values. It is my view that the RCMP can teach a person about police ethics, but not about moral fabric. We do not employ a person and teach them to be honest. We employ an honest person and teach them to be a Mountie.*

[220] The employer concluded that the employee lacked integrity, security awareness, and common sense.

[221] The employee's case differs from that of other PPS employees who have faced discipline because of the repetitive nature of the employee's breaches and his "[translation] lack of participation, lack of responsibility, and lack of admission of wrongdoing".

[222] The reprimand letter written on July 10, 2017 (Exhibit S-10), to a constable who was on probation and who had falsified a patrol report and slept at work for about two hours mentioned his "[translation] cooperation during the interview" as a mitigating circumstance.

[223] The letter of March 21, 2017, imposing a five-day suspension on another constable (Exhibit S-14) who was on probation and who had placed his unloaded weapon in an open, unlocked gym locker, which could have led to criminal prosecution, stated that Superintendent Coutu had considered "your honesty and your length of service".

[224] The reprimand letter written on February 15, 2017, to another constable (Exhibit S-15) who was on probation and who had abandoned his post stated that Sergeant Ritchie "[translation] … appreciated your honesty in the meeting".

[225] The reprimand letter written on January 24, 2018, imposing a one-day suspension on another constable (Exhibit S-12) who was on probation and who had submitted a sick leave request that was "[translation] fraudulent [and that] clearly showed a lack of integrity and professionalism" stated "[translation] your cooperation during the interview and your lack of a disciplinary file" as mitigating factors.

[226] The reprimand letter written on July 13, 2018, to another constable (Exhibit S-16) who had abandoned his post was not relevant because he was not on probation.

[227] The employee's incompetence posed a security risk for the PPS.

[228] Article 35 of the collective agreement does not apply because it deals solely with discipline. The employee was not subject to such measures because the rejection on probation was an administrative decision.

[229] *Penner* confirmed that the same behaviour can lead to disciplinary sanctions or an administrative decision. Therefore, the decision to reject the employee on probation was not a disciplinary decision.

[230] On the matter of Ms. Wilcott's allegations of the employer's bad faith, she testified that she heard 50 or so individuals make disgraceful comments about the employee and overheard a conversation that she understood to mean that Sergeant Ritchie was trying to make him lose his job, about 2 weeks before he was let go.

[231] However, Ms. Wilcott was at the termination meeting and tasked with the file but never thought again about that conversation or any of the other disgraceful comments until preparing the adjudication file "[translation] when she was certainly informed of the legal test for rejection on probation".

[232] Ms. Wilcott's version of the facts is unlikely.

[233] The employer asked me instead to accept the testimonies of Sergeant Ritchie and Corporal Plouffe, which followed his own, "[translation] as they were consistent with the rest of the evidence".

[234] Therefore, according to the employer, the grievance must be dismissed.

3. The employee's position

[235] The employee began his argument by stating again his position on the employer's objection to my jurisdiction, which I addressed in paragraphs 24 to 74 and will not address again.

[236] He went on to state that "[translation] probation does not exist" and that it was the employer's sole focus. The employer does not have the right to do whatever it wants and clearly acted in bad faith, which falls primarily on Sergeant Ritchie's shoulders.

[237] As an adjudicator, I am sitting *de novo*, not in judicial review, and even in the employer's extremely narrow vision of my jurisdiction, I have full jurisdiction to determine the legality of its behaviour. The fact that Superintendent O'Beirne did nothing more than rubber stamp the rejection that Sergeant Ritchie recommended changes nothing.

[238] The employee replied as follows to the employer's argument that he did not have employee status, which he described as "[translation] the new rabbit pulled out of the hat today".

[239] First, clause 2.01(e) of the collective agreement (Exhibit S-1) defines an employee as follows: "'Employee' means a person so defined by the *Parliamentary Employment and Staff Relations Act* who is a member of the bargaining unit".

[240] Superintendent O'Beirne's letter to the employee on June 23, 2016 (Exhibit S-8, pages 82 and 83), in which he informed him that that he was chosen to take part in the final stage of the constable recruitment process, indicated that throughout that training program, he would receive an annual salary of $49 631 for 35 hours of work per week. In other words, the employee already had employee status while in training.

[241] Also according to the letter of June 23, 2016, the training program was to last nine weeks, from July 11 to September 16, 2016.

[242] The termination letter of March 9, 2017 (Exhibit E-3), noted that in the employment letter of September 14, 2016, the employee was offered an appointment as a constable from September 17, 2016, to September 17, 2017.

[243] Therefore, the employee had two contracts with the PPS and had over six months of continuous service at the time that his employment was terminated.

[244] A contrary interpretation, which would require that the counter reset to zero with each contract, was absurd. The employer's argument was contradictory and farfetched, as it did not claim that the employee was not subject to the collective agreement and clearly lacked any factual basis.

[245] Second, with respect to my jurisdiction to hear the grievance, the employer claimed that this case concerned only s. 63(1)(c) of the *PESRA*, specifically the exception in that paragraph that excludes rejection on probation from a termination grievance when that termination is a rejection on probation. The employee obviously argued otherwise that there was no rejection on probation and that therefore, I have jurisdiction to hear the termination grievance.

[246] However, regardless of whether his termination was administrative or disciplinary, I have jurisdiction to hear the grievance under s. 63(1)(a) of the *PESRA*, which provides for adjudication over the interpretation or application of a provision of a collective agreement with respect to the employee.

[247] Section 63(1)(b) of the *PESRA* also gives me jurisdiction to hear the grievance because the termination was a "disciplinary action". Sergeant Ritchie took the strictly disciplinary route in the employee's case, as his note of February 24, 2017 (Exhibit S-9, page 44), clearly indicated at the outset. That letter stated that his purpose was "to provide my recommendation for a disciplinary measure".

[248] Under s. 63(1)(b) of the *PESRA*, the termination resulted in the employee's indefinite "suspension", as well as a "financial penalty", as he was left without a salary.

[249] Based on that, the employee concluded that I have jurisdiction to hear the grievance under ss. 63(1)(a), (b), and (c) (as the exception in the latter does not apply) of the *PESRA*.

[250] He stated that the employer's theory of the case could be summarized as "[translation] searching for the lost probation" and that the employer asked me to add, or read in, to the collective agreement a provision indicating that all term contracts create periods of "probation" and at the same time to eliminate, or read out, provisions not supporting that, in particular clause 30.04.

[251] Thus, the employee presented his own theory of the case, with the following three elements:

(a) The end of his employment was a termination without merit, for which the Board has jurisdiction pursuant to s. 63(1)(c) of the *PESRA*.
(b) If the termination was a "rejection on probation", it must be rescinded because of the factual circumstances explained later, all pursuant to s. 63(1)(c) of the *PESRA*.
(c) His termination must, in any case, be cancelled *ab initio* because the employer breached the fundamental provisions of the collective agreement, pursuant to s. 63(1)(a) of the *PESRA*.

[252] First, the end of employment decided on March 9, 2017, was a termination. As that termination was evidently carried out for unfair and insufficient reasons, it must be rescinded, and the employee must be reinstated, with full compensation, for the following reasons:

(a) The employer failed to abide by the principle of progressive discipline.
(b) The employer failed to abide by the prohibition of discriminatory actions (double standard).
(c) The employer failed to abide by the rule not to involve unionized staff in the disciplinary process.
(d) The employer failed to abide by clauses 30.04 and 35.05 of the collective agreement.

[253] With respect to that first ground, the employee does not believe that he was on "[translation] probation" within the meaning of s. 63(1)(c) or on a "[translation]

probationary" period within the meaning ordinarily employed in the jurisprudence, for the following reasons:

(a) Section 28 of the *PSEA* does not apply.

(b) The *PESRA* contains no equivalent to s. 28 of the *PSEA*.

(c) There is no law that determines that PPS employees must be on "probation" after recruit training.

(d) Therefore, it must be a contractual situation.

(e) The S-1 collective agreement does not define "probation" and does not state anywhere that a term contract must be imposed after recruit training or that such a contract is subject to a period of "probation".

(f) The employee's contract of employment (Exhibit S-2) also does not provide for such a period of "probation". Superintendent O'Beirne testified that the sentence on the second page ("[translation] it should be noted that your term appointment may be terminated at any time due to unsatisfactory performance or changes in operational needs") was simply intended "to impress upon the new employees that they need to perform in a satisfactory manner". The employer can do that just as easily for indeterminate employees, and that sentence in no way creates a period of "probation". If Mr. O'Beirne, who assisted in revising that document, had felt that that sentence subjected the employee to a period of "probation", he would have said so in responding to the very clear questions that he was asked in that respect.

(g) Because there is no probationary period in the *PESRA*, in the collective agreement, or in the contract of employment, the employer is "[translation] searching for the lost probation period".

(h) Probation does not exist in law, it does not exist in facts, and it exists only here: "[translation] in the employer's wavering hope that I accept its farfetched argument".

(i) The employer confused two distinct concepts, "term contract" and "probation".

(j) In labour law, a term contract is not associated with a period of high vulnerability in terms of job security.

(k) Authors Brown and Beatty hold that a probationary period must be set out in the collective agreement because it is exceptional.

(l) In the case at hand, there is no probation within the legal meaning of the term, as the collective agreement is silent in that respect (hence the employer's "reading in" request).

(m) In *Syndicat des Cols Blancs de Gatineau Inc. v. Dubois*, 2010 QCCS 2564 at para. 25 (employee's book of authorities, tab 13), the Superior Court of Québec rescinded the arbitrator's decision because "[translation] his method, namely, to add to or to modify the collective agreement, leads the Court to conclude that his decision does not have the qualities of reasonableness and that he has exceeded his jurisdiction".

(n) That decision shows that I cannot modify the collective agreement by adding articles that are not there or by removing articles that are there.

(o) However, this is what the employer asked me to do when it stated that clause 30.04 of the collective agreement (Exhibit S-1, page 40) pertains solely to a formal performance review process, which would constitute "reading in" because the collective agreement does not say that anywhere.

(p) Moreover, I must restrictively interpret s. 63(1)(c) *in fine* because it is an exception to the rule due to this:

(i) Parliament's legislative technique in 1987 is questionable;

(ii) it renders an adjudicator without jurisdiction, who would otherwise have jurisdiction with respect to a termination, be it administrative or disciplinary; and

(iii) the right to effective recourse in the case of termination has been recognized many times by the Supreme Court of Canada, including in the latest trilogy in 2015.

(q) Employees' subjective belief has no bearing; what matters is the objective legal reality. It is clear from the evidence that employees confuse the terms "term contract" and "probation".

[254] On the importance of the concept of probation being set out in the collective agreement, the employee referred me to the following doctrine: Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, Thomson Reuters, Volume 1, pages 7-232.2c-d, 7-232.3, and 7-232.6-7 (employee's book of authorities, tab 12).

[255] Also on that first ground, the employee considers that the termination was a disciplinary action that in addition to being void *ab initio* was unfounded for the following reasons:

(a) The principle of progressive discipline was not followed.

(b) The employer clearly discriminated in the disciplinary sanctions (double standard).

(c) The employee's alleged breaches do not even objectively come close to the beginning of the beginnings of misconduct that could justify termination — the ultimate sanction in labour law.

[256] The disciplinary nature of the action stems from all the alleged acts, the nature of the behaviour, and a set of characteristics that all point in 1 direction:

(a) By definition, lateness is a disciplinary matter.

(b) Abandoning a post, described as "[translation] a serious offence" in the employer's policy on attire and conduct (Exhibit S-19), cannot be anything but a disciplinary matter.

(c) The employee's alleged lack of integrity and the allegation that he lied (which he refutes in paragraphs 290(f) and (t)) can lead only to disciplinary, not administrative, action.

(d) Throughout the evidence, the employer presented the alleged inconsistencies in patrols and rounds as breaches.

(e) The existence of coaching changes nothing, as Sergeants Ritchie and Dubuc testified that people can be coached their entire career and that it does not mean that they learn something new.

(f) Even Superintendent Vandal sent a "[translation] 24-hour notice" to the employee for his termination meeting on March 9, 2017 (Exhibit S-3), even with the following:

(i) it is clear that such notice and the right to SSEA representation exist under the collective agreement only for disciplinary actions; and

(ii) Superintendent Vandal sent that 24-hour notice to the employee at the very end of the process, after Sergeant Ritchie's note, after his own note, and after Superintendent O'Beirne's decision.

(g) Therefore, it is clear that for the employer, the meeting on March 9, 2017, was to impose a "disciplinary action" on the employee, namely, his termination. That stems from clause 35.04 of the collective agreement, which states as follows:

> *When an employee is required to attend a meeting,* ***the purpose of which is to interview the employee for possible disciplinary action or to render a disciplinary decision concerning the***

> ***employee**, the employee is entitled to have, at their request, a representative of the Association attend the meeting. **The Employer shall normally provide twenty-four (24) hours' notice of such meeting.** The notice may be waived, reduced or increased by mutual agreement between the Employer and the employee and where appropriate, the Association's representative.*
>
> [Emphasis in the original]

[257] By summoning the employee to a disciplinary meeting, the employer implicitly acknowledged that it was about to take disciplinary, not administrative, action against him.

[258] In his note of February 24, 2017 (Exhibit S-9, page 44), Sergeant Ritchie very clearly indicated that his "purpose" was "to provide my recommendation for a disciplinary measure based on these incidents **and various others**" [emphasis in the original], thus targeting all "incidents" of which he was aware at that time (including the patrols), and recommended that "his probation be terminated immediately".

[259] Even disregarding that, the employee's termination can, at the very least, be considered a mixed action (disciplinary and administrative), as even the termination letter (Exhibit S-4) clearly confirmed that "[translation] such incidents normally lead to disciplinary action". In that situation, I must apply the test of disciplinary termination.

[260] Even if I were to conclude that the termination was purely administrative, which is not apparent from the evidence, it is clear that the principles enabling the employer to proceed with such administrative termination (the *Edith Cavell* principles) were not met, not to mention that the facts show that the employee committed none of the breaches that were described to Superintendent O'Beirne.

[261] Second, even if the termination on March 9, 2017, was a "rejection on probation in respect of an initial appointment", the rejection must nonetheless be rescinded for the following reasons:

(a) It amounted to disguised discipline.

(b) It was an action taken in bad faith.

(c) The employer completely failed its obligation to provide training.

(d) The employer clearly acted to avoid the adjudicability of the grievance, hoping to circumvent the hearing at the last minute.

[262] The fact that the employee's termination was disguised discipline has been demonstrated.

[263] It is also clear that the action was taken in bad faith because until February 24, 2017, Sergeant Ritchie treated the case as a completely disciplinary manner. It was not until later that "[translation] the rocket" completely altered course, as Mr. Garby from Human Resources recommended, because as Superintendent O'Beirne testified, "rejection on probation" was the path of least resistance.

[264] This is clear from the note of February 24, 2017 (Exhibit S-9, page 44), the cornerstone of this entire case, in which Sergeant Ritchie stated that the "purpose" was "to inform you of two separate incidents in which constable Markovic abandonned [*sic*] his poste [*sic*] and provide my recommendation for a disciplinary measure based on these incidents and various others" and at the end of which he recommended "that his probation be terminated immediately".

[265] Sergeant Ritchie is the only person who can find incriminating and exculpatory facts about the employee. On receiving his note on March 1, 2017, Superintendent Vandal sent his own note to Superintendent O'Beirne (Exhibit S-9, pages 45 and 46), who used some of its content and added the following paragraph:

> [Translation]
>
> *Labour relations considerations: "The employer has much more flexibility during the probationary period. A disciplinary measure is not needed to dismiss someone. A rejection on probation is administrative and can be carried out for a number of reasons, such as repeated lateness, poor performance, inability to follow orders, difficulty getting along with colleagues, poor attitude, and so on. The only thing that must be avoided at all costs is discrimination based on sex, race, religion, sexual orientation, etc., and for good reason." (Shawn Garby)*

[266] How does one explain the employer's complete about-face in characterizing the action just six days later, if not by the incorrect and harmful intervention of Mr. Garby, who did not testify before me, suggesting that the employer would be in a better position if it argued that the employee had not been the subject of a disciplinary sanction, but rather a "rejection on probation"?

[267] And even despite Mr. Garby's intervention, it was not a "rejection on probation" that Mr. Vandal recommended in his note of March 1, 2017 (Exhibit S-9, pages 45 and 46) but rather "terminating his employment with **PPS**" [emphasis in the original].

[268] And it was the same Superintendent Vandal who chose to go golfing in Florida over explaining and defending his actions before me and who sent the employee a 24-hour notice of a disciplinary sanction on March 9, 2017 (Exhibit S-3, page 2), indisputably making the action of March 9, 2017, disciplinary.

[269] Even if the evidence were not as clear as it is, it would make sense at least for me to "[translation] **draw a negative inference**" [emphasis in the original] from Superintendent Vandal's decision not to come testify before me, even though, as the employer admitted and as stated in an email, he had received the summons, "[translation] **and to conclude on a balance of probabilities that everyone in authority at the PPS"** [emphasis in the original], except Shawn Garby, who was not in authority and who also did not come to testify before me, "[translation] **felt without the least doubt that the action taken on March 9, 2017, was in fact a disciplinary termination**" [emphasis in the original].

[270] The employee asked me to draw a second negative inference from Mr. Garby's decision not to testify before me and noted that I had told the employer that it could have subpoenaed him.

[271] It is difficult in that context to argue that the employer's objective was not to render inarbitrable with a "[translation] **false characterization**" [emphasis in the original] a situation that from the outset and according to all the people who were involved was treated as disciplinary.

[272] In other words, "[translation] altering the course of the rocket", as Mr. Garby recommended, served just one purpose: to circumvent the adjudicability of the employee's termination.

[273] Moreover, it is clear that Sergeant Ritchie persisted in the case without any justification, as detailed in the following.

[274] The jurisprudence indicates that even in a rejection on probation, I have jurisdiction to determine whether it amounted to disguised discipline, a sham, a camouflage, or a decision made in bad faith.

[275] In support of that assertion, the employee cited the following decisions:

(a) Paragraphs 155 and 156 of the Board's decision in *Dyson*:

> *[155] While an employer is entitled to set rules, policies, procedures and codes of conduct, they may not be used in bad faith or as a sham or camouflage. If the employer sets a rule as to the start time for work, yet does not enforce it for any of its employees, it would be bad faith if it only enforced it to justify the rejection on probation of an employee, citing it as a legitimate employment-related reason.*
>
> *[156] As I have found that the decision to reject the grievor was done in bad faith and not based on a bona fide dissatisfaction as to the grievor's suitability, I have jurisdiction.*

(b) Paragraphs 12 and 13 of the Federal Court's decision in *Canada (Attorney General) v. Dyson*, 2016 FCA 125 (employee's book of authorities, tab 12):

> *[12] It is well-settled law that "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" (*Canada (Attorney General) v. Penner, *[1989] 3 F.C. 429 (C.A.), [1989] F.C.J. No. 461 at para. 17). Thus, it was open to the adjudicator to inquire as to whether the "employer had used rejection on probation as a sham to camouflage another reason for the dismissal and had therefore acted in bad faith" (*Kagimbi FCA *at para. 2) and, on that basis, assume jurisdiction under paragraph 209(1)(*b*).*
>
> *[13] In the present case, I am of the view that, confronted with the lack of evidence and the absence of facts provided by the DFO, it was reasonable for the adjudicator to find that the employer acted in bad faith.*

(c) The following paragraphs of the Board's decision in *Dhaliwal v. Treasury Board (Solicitor General of Canada - Correctional Service)*, 2004 PSSRB 109 (employee's book of authorities, tab 3):

> *…*
>
> *[79] … The test or procedure/principles adopted by the Treasury Board with respect to the principles of fairness are:*

> • the duty to act in good faith;
>
> • the duty to fully inform the employee of what is required from him or her;
>
> • the duty to inform the employee that he or she is not meeting the requirements of the position, and to inform him or her of the nature of the deficiency and what the consequences will be if he or she continues to fail to meet the requirements of the position;
>
> • the duty to provide the employee with the opportunity to make the necessary adjustments to meet requirements;
>
> • the duty to assist the employee in making these adjustments; and
>
> • the duty to explore reasonable alternative solutions before demoting the employee or terminating his or her employment.
>
> …
>
> *[92] Prior to making and rendering a decision, it is incumbent on the decision-maker to seek out and know the facts. It is my belief that the Warden based his decision on honesty of intention; however, it was not based on all of the relevant facts.*
>
> *[93] I therefore conclude that although there may have an employment-related issue, the employer has failed to abide by its own document, which establishes principles of fairness and defines good faith. I also conclude that the grievor has met its burden in establishing bad faith, as there was a lack of diligence by the employer that would have given the grievor an opportunity to discuss, defend or make the necessary adjustments to meet the requirements of his position.*
>
> …
>
> *[95] I would note that in* The Encyclopaedia of Words and Phrases Legal Maxims*, 47th Cumulative Supplement, March 2004, Volume 2, under the term "good faith and fair dealing", it states:*
>
> > The obligation of good faith and fair dealing (which is incumbent on an employer in relation to the dismissal of an employee without cause) is incapable of precise definition. However, at a minimum, I believe that **in the course of dismissal employers** ought to be candid, reasonable, honest and forthright with their employees and **should refrain from engaging in conduct that is** unfair or is in bad faith by being, for example, misleading or overly insensitive.
> >
> > …
>
> [Emphasis added]

(d) Paragraphs 284 and 363 of the Board's decision in *Frezza v. Deputy Head (Department of National Defence)*, 2018 FPSLREB 18 (employee's book of authorities, tab 4), and the *a contrario* reading of the former:

> *[284] In* Kagimbi v. Canada (Attorney General)*, 2014 FC 400, in upholding the PSLRB's decision, the Federal Court stated that the* PSEA *had been drafted in such a manner as to provide the employer with a great deal of flexibility during the probation period "… precisely so that it can evaluate the skills of a potential employee." The Court went on to state that the employer's decision to dismiss the employee was a decision that was made in good faith; "… i.e. that it was based on dissatisfaction as to the employee's abilities to do the work in question."*
>
> …
>
> *[363] I find that the grievor's employment was terminated for reasons other than any that were legitimate and employment related. The rejection on probation was a sham, a camouflage, and done in bad faith, and it amounted to disguised discipline of the grievor. …*

(e) Paragraph 32 of the Board's decision in *Smith v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 126 (employee's book of authorities, tab 6):

> *The employer assessed the grievor's behaviour during her probationary period and determined that, for a number of reasons, she was not suitable for continued employment as a correctional officer. The grievor did not satisfy me that there was any bad faith on the part of the employer that could lead me to the conclusion that its grounds for the rejection on probation were a contrivance,* ***a sham or a camouflage designed to avoid adjudication****. Given those facts, I must conclude that I am without jurisdiction to hear this grievance against the grievor's rejection on probation.*
>
> [Emphasis in the original]

[276] With respect to procedural fairness and good faith, the employee referred me to Bernier, Linda, et al., *Les mesures disciplinaires et non disciplinaires dans les rapports collectifs de travail*, Les Éditions Yvon Blais, 2nd ed., updated 2013-2, no. 3.065 (employee's book of authorities, tab 11).

[277] The *PESRA* covers both disciplinary and administrative terminations, as shown in the following excerpts from the Board's decision in *Groulx v. the Senate of Canada (Gentleman Usher of the Black Rod)*, 1991 CPSSRB No. 77 (QL) (employee's book of authorities, tab 5):

…

> *Counsel for the employer argued that the termination in this case was an administrative termination, not a disciplinary one. Therefore 63(1)(c) has no application to the instant case. In his view, this section is meant to apply only to terminations for disciplinary reasons. I do not agree.*
>
> *Section 63 sets out the types of grievances an employee may refer to adjudication as well as some limitations placed on certain references to adjudication. For example, Section 63(1)(b) provides that for a grievance based on disciplinary action to be referrable to adjudication, it must have involved suspension or a financial penalty.*
>
> *A reading of Section 63(1)(c) reveals that any grievance relating to termination of employment for any reason may be referred to adjudication, other than for the reason of rejection on probation in respect of an initial appointment. There is nothing in sub-paragraph (c) to suggest that there exists any pre-condition tying the termination to some disciplinary reason before a grievance based thereon could be referred to adjudication. I believe the language is simple and clear.*
>
> *Notwithstanding, I have referred to the Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-45, an Act respecting employment and employer and employee relations in the Senate and House of Commons and found specific exchanges on this very point. The following extract from Issue No. 7, Thursday June 5, 1986, involving the then Honourable Ray Hnatyshyn, President of the Queen's Privy Council for Canada and Ms Sheila Copps, at pages 7:9 and 7:10, is directly on the point ….*
>
> …
>
> *On the basis of the above extract, it seems plain that the legislators intended that employees covered by the PESRA would have the right to refer to adjudication a grievance in respect of termination of employment irrespective of whether the termination was the result of a disciplinary action.*
>
> …

[278] The jurisprudence clearly states what discipline means, as shown in the following decisions:

(a) The following excerpts from the Federal Court's decision in *Canada (Attorney General) v. Frazee*, 2007 FC 1176 (employee's book of authorities, tab 7):

> …
>
> *[19] Whether an employer's conduct constitutes discipline has been the subject of a number of arbitral and judicial decisions from which several accepted principles have emerged. A useful summary of the authorities is contained within the following*

passage from Brown and Beatty, Canadian Labour Arbitration (4th ed.) at para. 7:4210:

…

In deciding whether an employee has been disciplined or not, arbitrators look at both the purpose and effect of the employer's action. The essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part by punishing the employee in some way. An employer's assurance that it did not intend its action to be disciplinary often, but not always, settles the question.

Where an employee's behaviour is not culpable and/or the employer's purpose is not to punish, whatever action is taken will generally be characterized as non-disciplinary. On the basis of this definition, arbitrators have ruled that suspensions that required an employee to remain off work on account of his or her health, or pending the resolution of criminal charges, were not disciplinary sanctions. Similarly, transfers and demotions for non-culpable reasons, the revocation of a civil servant's "reliability status", financial levies that were compensatory rather than punitive, shift assignments designed to facilitate closer supervision, and deeming an employee to have quit his or her employment, have all been characterized as non-disciplinary. For the same reason, counselling and warning employees about excessive but innocent absenteeism have generally not been regarded as disciplinary. On the other hand, it has been held that even where an employee falls ill during the course of serving a disciplinary suspension and is in receipt of sick pay benefits for part of the time he or she is off work, that hiatus will not alter the disciplinary character of the employee's suspension.

A disciplinary sanction must at least have the potential to prejudicially affect an employee's situation, although immediate economic loss is not required. Suspensions with pay, which have the essential objective of correcting unacceptable behaviour, for example, would still be regarded as disciplinary even though they do not sanction the employee financially.

[Footnotes omitted]

…

[22] It is not surprising that one of the primary factors in determining whether an employee has been disciplined concerns the intention of the employer. The question to be asked is whether the employer intended to impose discipline and whether its impugned decision was likely to be relied upon in the imposition of future discipline …

[23] It is accepted, nonetheless, that how the employer chooses to characterize its decision cannot be by itself a determinative factor. The concept of disguised discipline is a well known and a necessary controlling consideration which allows an adjudicator to look

behind the employer's stated motivation to determine what was actually intended. …

[24] The problem of disguised discipline can also be addressed by examining the effects of the employer's action on the employee. Where the impact of the employer's decision is significantly disproportionate to the administrative rationale being served, the decision may be viewed as disciplinary … However, that threshold will not be reached where the employer's action is seen to be a reasonable response …

[25] Other considerations for defining discipline in the employment context include the impact of the decision upon the employee's career prospects, whether the subject incident or the employer's view of it could be seen to involve culpable or corrigible behaviour by the employee, whether the decision taken was intended to be corrective and whether the employer's action had an immediate adverse effect on the employee ….

…

(b) The following excerpts from the Board's decision in *Gauthier v. Deputy Head (Department of National Defence)*, 2013 PSLRB 94 (employee's book of authorities, tab 8):

…

[71] As the Federal Court points out in Basra, *I must ask myself, in light of the facts that have been presented to me, what was the employer's intention when it made its decision to demote Ms. Gauthier. Each fact taken on its own is not enough to convince me that the employer's intention to demote Ms. Gauthier was disciplinary, but an analysis of all those facts together clearly points to disciplinary intent.*

[72] First, the employer considered Ms. Gauthier's behaviour to be deviant. …

…

[75] Far be it from me to conclude that the employer's decision is a sham. Nonetheless, the overwhelming evidence leads me to believe that the decision to demote Ms. Gauthier on grounds of performance conceals the disciplinary intent by changing the appearance of the situation (camouflage) and using a clever and disguised way (camouflage) to justify incompetence, which was initially deemed by the employer to be voluntary deviant behaviour. I certainly do not want jump to conclusions about the employer's intent by concluding that there was intent to deceive, but ultimately, that is what happened.

…

(c) Paragraph 18 of the Federal Court's decision in *Canada (Attorney General) v. Basra*, 2008 FC 606 (employee's book of authorities, tab 10):

> *[18] In other cases* [than Frazee], *the Federal Court has noted that the employer's stated intention is not determinative, and adjudicators may have to consider whether what is apparently an administrative action is in actual fact "disguised discipline". This involves an assessment of all the surrounding facts and circumstances ….*

[279] Third, and despite the first two elements, the termination on March 9, 2017, must be rescinded because the employer did not respect the mandatory provisions of the collective agreement, rendering that measure void *ab initio*.

[280] On the consequences of the employer's failure to exercise its disciplinary authority in accordance with the procedural requirements imposed by the collective agreement, including nullity *ab initio*, the employee referred me to *Brown and Beatty*, pages 1 to 18 (employee's book of authorities, tab 12).

[281] On the "balance of probabilities" standard that the employer must meet by proving that it acted in accordance with the terms of the collective agreement when exercising its disciplinary authority, the employee referred me to the same authority, at pages 7 to 30.

[282] Specifically, the employer violated the following clauses of the collective agreement, each of which can be applied on its own to rescind the termination: 30.04, 35.01, and 35.05.

[283] In paragraphs 88 to 97, I summarized the employee's oral arguments about clause 30.04 of the collective agreement, and I will not return to them.

[284] With respect to clause 35.01 of the collective agreement, the employee began by reproducing its wording, which reads as follows:

> *35.01 It is recognised by the parties that discipline should normally be **progressive** and the aim is that of **correction**. Discipline will be applied **fairly** and for **just cause**.*
>
> [Emphasis in the original]

[285] In the case at hand, the employer violated that clause in these four principal ways:

(a) It circumvented the principle of progressive discipline.
(b) It had a unionized employee help orchestrate the employee's termination.
(c) The note of February 24, 2017 (Exhibit S-9, page 44), was unfounded, unfair, inequitable, and in bad faith.
(d) It overtly discriminated in the disciplinary actions that it took, to the employee's detriment.

[286] First, it is clear that progressive discipline was not employed, even assuming that the employee's conduct was reprehensible. The evidence shows that at most, the employee should have received written reprimands for the alleged "[translation] abandonments of post", if he were actually responsible. Instead, the employer completely ignored the principle of progressive discipline, which is very clearly set out in clause 35.01 of the collective agreement and went directly to the most-severe sanction, namely, termination. In acting that way, the employer "[translation] went from 0 to 100 in a fraction of a second".

[287] With respect to progressive discipline, the employee referred me to *Bernier*, nos. 3.005 and 3.09 (employee's book of authorities, tab 11).

[288] Second, the employer asked and allowed a member of the SSEA to play a key role in this affair, namely, Sergeant Ritchie, who instigated and orchestrated the employee's termination. Sergeant Ritchie was the only person who had the facts, and the subsequent decision makers (Superintendents Vandal and O'Beirne) relied entirely on his recommendations without questioning them.

[289] However, it was clearly unfair to the employee to have a unionized employee (who was promoted a few months later) play a disciplinary role, an employee who had received no training of any kind and who in all likelihood was trying to advance his own career by taking a hard-line position against the employee.

[290] Third, Sergeant Ritchie's investigation was clearly unfair and in bad faith, and it sought to bring down the employee rather than objectively reveal the facts. This seems evident based on the following facts:

(a) Sergeant Ritchie did not investigate the employee's lateness on February 3, 2017 (Exhibit E-6). Sergeant Presley never asked the employee why he was late — he was late by only 5 minutes, and there were no consequences. Based on the employee's testimony, which was not contradicted, this incident was in no way an offence. The only offence was Sergeant Ritchie including it in his note of February 24, 2017 (Exhibit S-9, page 44), in a clear attempt to artificially inflate the file that he was creating against the employee. The note also incorrectly refers to several incidents of "arriving late for posts", while the evidence shows that there was only 1, which was not investigated.

(b) The employee's alleged abandonment of his post on November 22, 2016, was not an offence that could be legitimately raised against him. First, he did not abandon his post but gave the keys to another constable who remained to protect the post. Moreover, the employee had urgent biological reasons that forced him to leave. Although those reasons, which were beyond his control, were never questioned by anyone, they were not considered or even mentioned in Sergeant Ritchie's note (Exhibit S-9, page 44).

(c) That note made no mention of the fact that as he testified, Sergeant Ritchie never received any negative feedback after the employee's "coaching" sessions.

(d) Sergeant Ritchie testified that he based his report on the statements of 3 or 4 colleagues, without verifying their content, in relation to an equally serious allegation that the employee had "lost the trust and respect of PPS staff". There is a massive difference between the vague comments of 3 or 4 colleagues and the concept of "PPS staff", which refers to 220 to 250 people. It is also hard to see that statement as anything other than an attempt to artificially inflate the file against the employee.

(e) Sergeant Ritchie testified that his note was also based on hallway gossip, which he also did not verify and that was also not documented. It is clumsy and shocking. The inclusion of hearsay in a report with consequences as serious as termination is by nature a wilfully harmful act of such gross negligence that I cannot tolerate it in any way. That alone, even without considering the other elements, shows the biased, bad-faith, and profoundly unfair nature of the employee's termination.

(f) On cross-examination, Corporal Fortin (the author of Exhibit E-4A) admitted that he did not ask Constable Boulerice to check if, as the employee stated,

the MP was on another floor. Corporal Fortin also admitted that it was in fact a possibility and that it led him to reconsider his statement that the employee "[translation] was lying" and "[translation] lacked integrity" and to state at the hearing before me "[translation] that Mr. Markovic might not have been lying".

(g) Mr. Fortin's honesty brought credit to his testimony, and an experienced officer like Mr. Ritchie should have asked Mr. Fortin that question before blindly making such a serious accusation that the employee had provided "questionnable [*sic*] information provided on patrol reports" (Exhibit S-9, page 44).

(h) Another disturbing fact is that all the witnesses confirmed that patrols are not an exact science and that the time that they take can vary considerably depending on a number of factors. Why not mention that fact in Mr. Ritchie's report, if not wilful ignorance?

(i) The non-commissioned officers team's use of "shadow files" is a practice that is not only troubling in terms of the principles of fairness that must govern labour relations and that are set out in the employer's *Labour Relations Handbook* (Exhibit S-20) but also a complete and flagrant violation of clauses 30.04 and 35.05 of the collective agreement, in addition to being in direct conflict with the principles of good faith.

(j) How can a "shadow file" be allowed to be compiled against an employee without his knowledge and without the union's knowledge and then be used to terminate the employee without showing him that file and without at least giving him or the union 1 last opportunity to dispute its contents? And what about the employer's use of that shadow file without showing the contents to the union at the 3rd level of the grievance process?

(k) That practice justifies my most-severe intervention to have it cease permanently.

(l) The PPS did not prove the alleged parking violations in Sergeant Ritchie's note (Exhibit S-9, page 44), and therefore, they must be set aside. Those allegations must be set aside also because according to Sergeant Dubuc's and the employee's testimonies, such violations were very common across the team.

(m) With respect to the second alleged abandonment of his post, no one — including Sergeant Ritchie — questioned the fact that he had been relieved by phone by Constable Racine (Exhibit S-9, page 43, paragraph 2). However, this

fact was completely hidden in Sergeant Ritchie's note of February 24, 2017 (Exhibit S-9, page 44).

(n) How does one explain that Sergeant Ritchie made the effort to verify the versions of all the others involved in the first "abandonment of post" but that when he met with the employee on February 24, 2017, about the second "abandonment of post", he failed to do the same verifications and instead rushed to prepare a memo that day recommending "a disciplinary measure based on these incidents and several others"? Why not clearly establish the facts instead of rushing and jumping to conclusions, if not because Sergeant Ritchie certainly did not want to risk his file being less unfavourable toward the employee?

(o) Why did Sergeant Ritchie write that the employee "refuses to take responsibility for his actions" in his note of February 24, 2017 (Exhibit S-9, page 44), when in another note that day (Exhibit S-9, page 43), he stated that "Constable Markovic reluctantly took responsibility", if not to make an unfair accusation against the employee that he clearly knew was wrong?

(p) Similarly, why not mention the mitigating circumstances surrounding the second incident in the note of February 24, 2017 (Exhibit S-9, page 44), such as the 152 to 155 hours worked in the previous 3 weeks?

(q) Why present coaching sessions as inherently negative, when all the credible witnesses, including Sergeant Dubuc, indicated that employees need coaching throughout their career?

(r) The issue is not whether a mistake was made but whether it was corrected. None of the witnesses testified that the employee had not benefited from the coaching sessions and improved what he was asked to improve, not even Sergeant Ritchie. On cross-examination, Sergeant Dubuc pointed to improvements, which were also evident from the documentary evidence (Exhibit S-9, pages 21 to 30).

(s) In light of that, how does one explain the allegation in Sergeant Richie's report (Exhibit S-9, page 44) that "Constable Markovic seems incapable of learning from his mistakes" other than simply viewing it as the gratuitous, false, and misleading statement that it is?

(t) On cross-examination, Sergeant Dubuc also testified that he had never patrolled the Wellington Building, that patrol times varied considerably among constables, and that he had never completed any verifications or

coaching of the other constables (Brière and Germain), which showed that his assessment that the employee was "lying on the report" (Exhibit E-4D) was simply false and unfounded.

(u) In his note of February 24, 2017, Sergeant Ritchie stated that the employee's "actions have demonstrated a lack of integrity", but the evidence shows otherwise.

(v) He stated that "his actions have demonstrated a lack of … security awareness and common sense" but provided nothing to support those gratuitous allegations.

(w) He stated that "he does not meet PPS standards" but failed to indicate which ones.

(x) He stated that the employee "is detrimental to the service as a whole" in an effort to denigrate him.

(y) How does one explain that another constable received no discipline for abandoning his post? That another constable received only a written reprimand for abandoning his post? That for objectively very serious acts, another constable — a superintendent's son — received only a reprimand letter? That for a firearm offence under the *Criminal Code*, another constable received a 5-day disciplinary suspension?

(z) And for needing coaching in the early stages of his work as a constable, for allegedly abandoning his post twice, and for having parking violations like many other colleagues, the employee was terminated?

(aa) And how does one explain that if Sergeant Ritchie was so confident in the strength of his allegations, he felt obliged to "[translation] add a layer" by initiating an email exchange with the employee about his patrols the same day of his note to Superintendent Vandal, which he presented to him 3 days later as additional incriminating evidence (Exhibit E-4E)?

(bb) All those facts indelibly cement Ms. Wilcott's testimony that the employee was unfairly targeted for absurd, unfounded reasons and that the orchestrator of that hostility was Sergeant Ritchie who on February 23 or 24, 2017, bragged to a colleague that he was going to make "[translation] Markovic lose his job" and that "[translation] their versions had to be the same".

[291] Ms. Wilcott testified truthfully, compellingly, and against her interests. Sergeant Ritchie wants to be a boss, is only acting in his current position, and therefore, has an interest in denying what Ms. Wilcott claims to have heard.

[292] The detail in Ms. Wilcott's testimony was remarkable, and no one categorically denied it. The excuses in Sergeant Ritchie's and Sergeant Dubuc's testimonies do not carry weight, given the clarity of her testimony.

[293] In light of the foregoing, there is only one possible conclusion from Sergeant Ritchie's note of February 24, 2017 (Exhibit S-9, page 44): it was a biased, partial accusation made in bad faith that not only is based on facts that were contradicted before me but also contains allegations that Sergeant Ritchie knew or ought to have known were false or incorrect and that were made for the sole purpose of harming the employee.

[294] Sergeant Ritchie demonstrated wilful ignorance. He included only negative points in his note to paint the darkest picture possible of the employee.

[295] That note, based on false allegations, had cataclysmic consequences for the employee; because of it, this conscientious employee lost his job, had to set aside his dreams, and had to go from job to job pending the resolution of his grievance.

[296] And that note from Sergeant Ritchie was the entire basis for Superintendent O'Beirne's decision of March 9, 2017, to terminate the employee based on the "recommendation for a disciplinary measure based on these incidents and various others".

[297] How can Superintendent O'Beirne's decision stand if its foundation is rotten and crumbling?

[298] Superintendent O'Beirne certainly cannot be faulted for relying on information that he received from his subordinates. Superintendent O'Beirne was correct in finding that the facts that were reported to him were serious. They were just false.

[299] But that is not the issue. This case is not about Superintendent O'Beirne personally. Instead, I must determine *de novo*, in light of all the evidence, whether the employer's actions were justified.

[300] The answer to that question is unquestionably "No." This case revealed a complete failure to respect the most fundamental principles of labour law.

[301] Lastly, it is clear that no mitigating circumstances were considered with respect to the employee. His case was looked at from just one angle — the wrong one. Even Superintendent O'Beirne testified that "probation was not a factor". How can the fact that an employee is still learning in the first months of employment not be considered a mitigating circumstance?

[302] That is especially true when the employer considers it a mitigating circumstance for other employees (Exhibits S-13, S-16, and S-10). Why would the employee, a new employee who is still learning, not benefit from the same leniency as those other three employees?

[303] On the importance of mitigating factors, the employee referred me to the following authority: *Bernier*, nos. 3.485 et seq. (employee's book of authorities, tab 11).

[304] All the aforementioned information demonstrates beyond a doubt that the employer failed to comply with its duty under clause 35.01 of the collective agreement to act "fairly and for just cause" with respect to the employee.

[305] According to the employee, I have jurisdiction under s. 63(1)(a) of the *PESRA* to determine whether the employer correctly applied clause 35.01 of the collective agreement.

[306] Fourth, the employer's double standard in disciplinary actions leads to exactly the same result, namely, the reversal of the termination of March 9, 2017.

[307] In support of that assertion, the employee reiterated the following:

(a) For abandoning his post, another constable received a written reprimand (Exhibits S-13 and S-15), signed by Sergeant Ritchie.

(b) For abandoning his post, another constable also received a written reprimand (Exhibit S-16).

(c) For abandoning his post, which is a "[translation] serious offence" according to the employer's policy on attire and conduct (Exhibit S-19, page 10, point 4), another constable received absolutely nothing.

(d) For fraudulently claiming that he was sick, another constable received a written reprimand (Exhibit S-12).

(e) For committing a firearm offence deemed an objectively serious breach of the *Criminal Code* and confirmed as such by Sergeant Lapensée based on his 33 years of service, another constable received a 5-day suspension.

(f) For "[translation] falsifying a patrol report", sleeping for 2 hours in an MP's office (which in labour law is referred to as "time theft" and can lead to immediate termination), his lack of integrity, and his "[translation] neglect of his duties", all in a situation involving a theft in an MP's office, another constable — the son of a superintendent — received a written reprimand letter (Exhibit S-10).

[308] Except for 1, all those individuals were on 12-month term contracts, like the employee was, and were in his recruit course.

[309] The PPS showed leniency to all those individuals. For actions that were objectively light years from the seriousness of some of those that they committed, the employee had his employment terminated.

[310] The discrimination that the PPS showed in its treatment of the employee can be expressed in a single Latin saying: *res ipsa loquitur* (the thing speaks for itself).

[311] Superintendent O'Beirne's clear stubbornness in his testimony, denying the evidence that a criminal offence relating to the storage of firearms is objectively more serious than simply abandoning a post, is not convincing, especially for a career RCMP officer. Moreover, Superintendent O'Beirne spent only about 2 years with the PPS. Sergeant Lapensée's testimony, who spent 33 years in the House of Commons and with the PPS, carries considerably more probative force.

[312] On the prohibition of discrimination in sanctions, the employee referred me to *Bernier* nos. 3.085 and 3.097 (employee's book of authorities, tab 11).

[313] With respect to clause 35.05 of the collective agreement, the employee started by repeating that it reads as follows:

> *35.05 The Employer agrees* ***not to introduce as evidence*** *in a hearing relating to disciplinary action any document from the file of an employee, the content of which the employee was not aware at the time of filing or within a reasonable period thereafter.*
>
> [Emphasis in the original]

[314] The employer did not dispute my jurisdiction to interpret the collective agreement.

[315] However, the employer completely disregarded clause 35.05 of the collective agreement because nothing in the documents that the PPS used to terminate the employee (Exhibit S-9) was in the employee's file (Exhibit S-8).

[316] Ms. Wilcott consulted the employee's file (Exhibit S-8) on March 21, 2017, and it did not contain anything negative. She asked Mr. Garby if there was anything else, and he replied that there was nothing.

[317] At the third-level hearing, seeing that the employer had a large file, she requested a copy of it and was refused. A request letter and a disclosure order were needed for the employee to finally be able to review its contents, almost two years later.

[318] According to the employee, I have jurisdiction under s. 63(1)(a) of the *PESRA* to determine whether the employer correctly applied clause 35.05 of the collective agreement.

[319] The employee asked me to allow the grievance based on three factors:

(a) First, the end of the employee's employment on March 9, 2017, amounted to termination without cause, for which the Board has jurisdiction under s. 63(1)(c) of the *PESRA*.
(b) Second, even if the termination amounts to a "rejection on probation", it must be rescinded because of the factual circumstances explained in the previous paragraphs, pursuant to s. 63(1)(c) of the *PESRA*.
(c) Third, in any case, the termination must be rescinded *ab initio* because the employer breached the fundamental provisions of the collective agreement, pursuant to s. 63(1)(a) of the *PESRA*.

[320] In conclusion, the employee stated that the intimidation, lies, and fabrications against him had no place in a 21st-century workplace.

4. The employer's reply

[321] It was agreed at the hearing, which by consent was limited to three days, that the employer was entitled to a one-page reply, and that the employee reserved the right, as needed, to provide a brief rejoinder.

[322] I summarize as follows the employer's reply, which was just over one page.

[323] No negative inferences can be drawn from the absences of Mr. Vandal and Mr. Garby. The employer considered that it did not need to call them as witnesses because they were unavailable at the time of the hearing.

[324] The employer's arguments about Mr. Vandal are set out in paragraphs 213 to 216 of this decision.

[325] The employee never said that he wanted to question Mr. Garby or alleged that Mr. Garby played a role in his termination. He subpoenaed many people and could have subpoenaed Mr. Garby himself if he felt that his testimony was needed. As he did not, he cannot argue now that a negative inference should be drawn from Mr. Garby's absence.

[326] Mr. Markovic was not an "employee" within the meaning of the *PESRA*. During the recruit program, Mr. Markovic took part "[translation] in the final stage of the constable recruitment process" (Exhibit S-8, page 82). An individual does not become an employee during a recruitment process. That was confirmed by Mr. Lapensée, who testified that he does not meet with recruits to welcome them as SSEA members until they have completed their probations.

[327] The employee's argument that his termination was carried out in bad faith is based entirely on the testimony of Ms. Wilcott, who claimed to have heard numerous negative comments about him. Based on that allegation, he tried to convince me that he was a victim of collusion and that his colleagues, led by their "[translation] orchestrator", Sergeant Ritchie, made a collective effort to get rid of him.

[328] No evidence was presented to support Ms. Wilcott's testimony. Sergeant Fortin testified that he had never heard such comments. The employee also had not heard any. On the contrary, Corporal Dubuc testified that the entire team went to breakfast together at the end of their shifts, suggesting good team spirit.

[329] For all those reasons, the employee's theory that the decision to reject him on probation was made in bad faith must be dismissed.

[330] It was an overall assessment of all the employee's breaches that led to his rejection on probation, including his refusal to accept responsibility for his breaches. Other employees' breaches are in no way comparable, and the factors mitigating their misconduct are explained in paragraphs 222 to 225. No other employees had repetitive breaches.

[331] A sergeant member of the bargaining unit does not have the authority to reject an employee on probation (Exhibit E-11). Sergeant Ritchie testified that he handled two investigations, as Superintendent Vandal assigned him to do.

5. The employee's rejoinder

[332] The employee responded by noting the excessive length of the employer's reply, contrary to the agreement made and the instructions given.

[333] He also said that the employer had added a case that clearly it did not have at the hearing. In that respect, he said that he had agreed to allow the employer to send its reply to me in writing after the hearing solely for convenience of scheduling and to respect the legal contract on the conduct of the day, not to give the employer a chance to enhance its reply with new jurisprudence. However, the employer clearly did that by submitting not the reply that it would have submitted to me at the hearing and that it was unable to submit for lack of time but an improved version that was based on additional research.

[334] The employee considered that that was a new attempt by the employer to amend the procedural agreements and submitted the following rejoinder on the points addressed in the employer's reply.

[335] With respect to the negative inferences, the employee stuck to his arguments about Mr. Vandal, which are stated in paragraphs 268 and 269. With respect to Mr. Garby, the employer appeared to forget that it was responsible for defending Mr. Garby's actions to support its defence system based exclusively on "rejection on probation". That onus fell solely on the employer, and it has only itself to blame for choosing not to have Mr. Garby testify, as he was the architect of the "[translation] rocket's altered course".

[336] Throughout his recruit period, the employee (a) was subject to PPS authority and (b) was paid, as stated in his hiring letter of June 23, 2016 (Exhibit S-9, page 82). Moreover, on October 3, 2016, after the letter of September 16, 2016, the PPS confirmed to the employee "[translation] the extension of your regular employment with the Parliamentary Protective Service" [emphasis added by the employee] (Exhibit S-8, page 42). It seems absurd that the employer tried to claim that a person who has "regular employment" might not be an "employee". The employer also specifically wrote otherwise on August 16, 2016 — before the letter of September 16, 2016 — when it stated that Mr. Markovic "has been a short-term **full time** employee of the Parliamentary Protection Service since July 11, 2016" [emphasis in the original] (Exhibit S-8, page 76). Thus, not only is it clearly a frivolous and groundless argument, it also reveals an equally delusional and desperate effort by the employer to convince me not to examine the merits of its conduct toward the employee.

[337] The employer's bad faith is by no means based solely on Ms. Wilcott's testimony, which is beyond reproach in terms of credibility, unlike the employer's untenable suggestions to the contrary, but on the entirety of the facts and in particular the 28 facts set out in paragraph 290, including Ms. Wilcott's impeccable testimony.

[338] Those facts are also of dual relevance, demonstrating the employer's bad faith, sham, and camouflage for the purposes of the "rejection on probation" argument, and for the purposes of the employee's argument about the employer's violation of clause 35.01 of the collective agreement.

[339] The employer's argument that a sergeant (Mr. Ritchie) does not have the authority to terminate another unionized member is disingenuous because (a) the employer's conduct in all aspects must be examined, and (b) it is clear that Mr. Ritchie's note was both the foundation and in fact the entire edifice on which Mr. Vandal and Mr. O'Beirne relied, and it is indisputable that that note was incorrect, misleading, and constructed to be artificially and untruthfully detrimental to the employee. That action must be condemned unequivocally, and punitive damages are necessary.

6. My decision

[340] As previously stated, the employer terminated the employee's employment on March 9, 2017, citing rejection on probation. On May 30, 2017, the employer dismissed

the grievance at the final level of the grievance process because rejection on probation allegedly corresponded to an administrative termination. In adjudication, the employer objected to the jurisdiction of an adjudicator to decide the employee's grievance pursuant to s. 63(1)(c) of the *PESRA* because the termination of employment was allegedly a rejection on probation. After the evidence was completed, the employer also objected, for the first time, to the jurisdiction of an adjudicator to hear the grievance because the employee was allegedly not an employee pursuant to s. 3 of the *PESRA*.

[341] At all relevant times in this case, the definition read as follows:

> …
>
> **employee** *means a person employed by an employer, other than*
>
> …
>
> ***(c)*** *a person employed on a casual or temporary basis, unless the person has been so employed for a period of six months or more,*
>
> …
>
> *and for the purposes of this definition a person does not cease to be employed by an employer by reason only of the person's discharge contrary to this Part or any other Act of Parliament ….*
>
> …

[342] The first issue to be determined is whether the employee is an "employee" within the meaning of the *PESRA*. If he is, and if I find that this case involved a rejection on probation, s. 63(1)(c) of the *PESRA* will render me without jurisdiction and I must automatically dismiss the grievance on that ground, as I stated in paragraphs 65 and 66. If, on the other hand, I find that the evidence does not in fact establish a rejection on probation, then s. 63(1)(c) of the *PESRA* gives me full jurisdiction to rule on the employee's termination (see *Heyser*). Since the employer clearly invoked its right to reject the employee on probation, I must allow the grievance on the ground that the employer did not discharge its burden of proof.

[343] For the reasons that follow, I conclude that the employee is an "employee" within the meaning of the *PESRA*, that the termination of the employee's employment was not a rejection on probation, and that the termination was not justified.

[344] The evidence shows that the employer initially hired the employee on June 23, 2016 (Exhibit S-8, page 82), as part of the recruit program. That program lasted nine

weeks, from July 11 to September 16, 2016. The employee was under the employer's authority throughout the program and was paid by the employer. It is clear that on July 11, 2016, the employee became "a person employed by an employer …" as the term "employee" is defined in s. 3 of the *PESRA*. It is also clear that as of July 11, 2016, the employee was a person employed "… on a casual or temporary basis …" within the meaning of s. 3(c) under the definition of "employee".

[345] On August 16, 2016, the employer wrote to the employee to confirm his status as "a short-term full time employee of the Parliamentary Protection Service since July 11, 2016" [emphasis in the original] (Exhibit S-8, page 76).

[346] On September 14, 2016, the employer gave the employee a letter of offer entitled, "[translation] Term appointment to the position of constable", for "[translation] long-term employment as a constable at the SSG-G group and level with the Parliamentary Protective Service", and the period of employment was "[translation] from September 17, 2016, to September 17, 2017, with the possibility of extension". I note that that letter of offer was presented to the employee while he was in the recruit program and that the employment offered began the day after that program ended. I note that the letter of offer made no mention of the employee being subject to a probationary period. Lastly, I note that the employer admitted that fact in its oral arguments. It is clear that the employee continued to be a "person employed by an employer …" as the term "employee" is defined in s. 3 of the *PESRA*. It is also clear that the employee continued, uninterrupted as of July 11, 2016, to be a person employed "… on a casual or temporary basis …" within the meaning of s. 3(c) under the definition of "employee".

[347] On October 3, 2016, after the letter of offer of September 14, 2016, the employer confirmed to the employee "[translation] the extension of your **regular employment** with the Parliamentary Protective Service" [emphasis in the original] (Exhibit S-8, page 42).

[348] Since the employee was a "person employed by an employer …" without interruption as of July 11, 2016, as the term "employee" is defined in s. 3 of the *PESRA*, and as of that date, was a person employed without interruption "… on a casual or temporary basis …" within the meaning of s. 3(c) under the definition of "employee", I find that the six-month exception set out in that paragraph with respect to the

jurisdiction of an adjudicator ceased to apply to the employee on January 11, 2017, and that on that date, the employee became an "employee" pursuant to s. 3. Therefore, I dismiss the employer's objection that an adjudicator does not have jurisdiction to decide the grievance because the employee was not an employee within the definition of "employee" in s. 3.

[349] On March 1, 2017, Superintendent Vandal prepared a note to Superintendent O'Beirne (Exhibit S-9, pages 45 to 46) that contained the following paragraph:

> [Translation]
>
> *Labour relations considerations: "The employer has much more flexibility during the probationary period. A disciplinary measure is not needed to dismiss someone. A rejection on probation is administrative and can be carried out for a number of reasons, such as repeated lateness, poor performance, inability to follow orders, difficulty getting along with colleagues, poor attitude, and so on. The only thing that must be avoided at all costs is discrimination based on sex, race, religion, sexual orientation, etc., and for good reason." (Shawn Garby)*

[350] Eight days later, the employer terminated the employee's employment, claiming that it was a rejection on probation.

[351] According to *Tello*, to support its objection to the jurisdiction of an adjudicator in a case of rejection on probation, the employer must establish that the employee was on a probationary period and that it terminated the employee's employment during that period. However, the evidence before me shows the opposite. Again, as the employer admitted in its arguments, the employee's last offer did not state that he would serve a probationary period.

[352] It is true that several witnesses indicated their common perception that officers hired by the employer on a temporary basis for 12 months served a "probationary period". But such a perception, however common it may be, is not a legal source — it cannot define the rights and obligations of the PPS as an employer or limit the rights and obligations of any colleagues as employees. I previously indicated that the terms of employment applicable to the employee were set out in part in the letter of offer of September 14, 2016 (Exhibit S-2), in part in the collective agreement, and in part in the *PESRA*. None of those documents state that the employee would serve in a probationary period.

[353] I find that the employee was not subject to a probationary period, that the termination of his employment was not a rejection on probation, that s. 63(1)(c) of the *PESRA* does not render an adjudicator without jurisdiction to decide the grievance, and that I have full jurisdiction to rule on the employee's termination (see *Heyser*). Therefore, I dismiss the employer's objection to my jurisdiction.

[354] In so doing, I answer the question left unanswered in paragraphs 122 and 123 about the relevance of clause 35.05 of the collective agreement. As the termination of the employee's employment was not a rejection on probation, it was another form of termination. Therefore, it was in fact a disciplinary sanction, not an administrative measure as the employer argued. Therefore, clause 35.05 of the collective agreement fully applies in this case, the consequences of which I will return to later when analyzing whether the employee is entitled to the remedies he seeks.

[355] I add that as the Federal Court of Appeal confirmed in *Heyser*, I cannot allow the employer to establish before me a ground of termination based on discipline or the employee's performance. The employer chose to cite rejection on probation at the time of the termination, but the conditions for a rejection on probation were not met. Under the circumstances, the rejection on probation that the employer cited at the time of the termination actually amounted to constructive dismissal without cause. It was really a contrived reliance on the employer's rights, a sham, or camouflage. The constructive dismissal of the employee resulted from an illegitimate exercise of the employer's rights, which cannot be justified in any circumstances. Thus, once in adjudication, the employer cannot attempt to establish a different ground of termination than what it relied on in its initial decision.

[356] Therefore, I allow the grievance, as the employer did not discharge its burden of proof.

B. Is the employee entitled to the remedies that he seeks?

1. The employer's position

[357] After asking me to dismiss the grievance, the employer argued that in the alternative, reinstating the employee was not possible.

[358] In support of that position, it cited paragraph 5 of a decision that it referred to as "De Havilland" but that is not in its book of authorities and on which it gave me no other information.

[359] On that basis, which is unclear at best, the employer submitted that I should consider the following factors:

(a) SSEA members confirmed that the employee's colleagues did not trust him.
(b) He posed a security risk.
(c) He still did not agree that he had problems with his patrols.

[360] In addition, the employee was a term employee and was dismissed about six months before the end of his term. If I were to find that the PPS had no grounds for rejection on probation, he should receive compensation equivalent to the rest of his contract (about six months).

[361] In support of its argument that if I do not dismiss the grievance, the balance of the term would be appropriate compensation, the employer cited *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28 at para. 57, in which the Supreme Court of Canada restored the majority decision of an arbitration board, substituting an award of four months' notice for the reinstatement.

[362] The employer maintained that it did not commit any advertent, malicious, or outrageous act and that therefore, punitive damages are not justified (*Sather v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 45 at para. 186).

2. The employee's position

[363] Given all the facts that did not come to light until March 20, 2019, in the "shadow file" (Exhibit S-9) and that were revealed at the adjudication hearing, the employee amended the remedies that he seeks, as follows:

(a) a payment of $30 000 as damages to the employee "[translation] for the stress, inconveniences, and unacceptable treatment that he suffered while he was employed and after he was terminated" (instead of the $5000 stated in the grievance); and
(b) an order that the Parliamentary Protective Service pay the employee $20 000 in punitive or exemplary damages.

[364] The employee stressed that only two weeks before the adjudication hearing, on March 20, 2019, on receiving Exhibit S-9, did he understand the extent of the plot against him and the hidden nature of the documentation that the employer considered "[translation] relevant to the decision to reject [him] on probation". That unexpected discovery supports the increase in the amount sought for damages and the new request for punitive damages.

[365] Considering all the circumstances, the employee also sought his immediate reinstatement "[translation] to an indeterminate position as constable" to avoid any similar moves against him by the employer in the future.

[366] The employee conceded that his reinstatement could be found inappropriate but argued that the onus for that rests on the employer. In that respect, he cited the same paragraph 57 of *Alberta Union of Provincial Employees* that the employer had cited, noting that the Supreme Court of Canada had restored the arbitration board's decision because it disagreed with the arbitral jurisprudence requiring "a finding of exceptional circumstances prior to substitution of remedy". According to the employee, it means that the basic remedy in this case is the right to employment and therefore, reinstatement.

[367] At the end of his arguments, the employee added a conclusion that I find implicit in the grievance before me, namely, "[translation] allow the grievance".

[368] Essentially, he maintained but reworded a conclusion sought in his grievance, namely, to "[translation] [o]rder the Parliamentary Protective Service to fully award Mr. Markovic his entire salary and other benefits since March 9, 2017, with interest at the legal rate" (in the grievance, the conclusion read as follows: "[translation] that all amounts, salary, and benefits be reimbursed retroactive to the termination date").

[369] At the end of his arguments, the employee did not reiterate the first conclusion sought in the grievance before me, namely, "[translation] that the disciplinary action, i.e., my termination, be rescinded and that all related correspondence, notes, and documents be removed from my file".

3. My decision

[370] As previously stated, the employee sought the following remedies in his grievance:

(a) that his termination be rescinded and that all related documents be removed from his file;
(b) that all amounts, salary, and benefits be reimbursed retroactive to the termination date; and
(c) that he be awarded $5000 in damages.

[371] At the adjudication hearing, the employee amended the remedies he seeks as follows:

(a) that his termination be rescinded and that all related documents be removed from his file;
(b) that all amounts, salary, and benefits be reimbursed retroactive to the termination date;
(c) that he be awarded $30 000 in damages; and
(d) that he be awarded $20 000 in punitive or exemplary damages.

[372] I previously found that the employee's termination was wrongful, and I order the employer to remove from the employee's file any mention of his rejection on probation.

[373] In this case, the employer wrongfully terminated the employee's employment. Although an indeterminate employee is usually entitled to reinstatement (see *Gannon v. Canada (Attorney General)*, 2004 FCA 417), the employee in this case was not an indeterminate employee. The last letter of offer clearly stated a term position of one year, from "[translation] September 17, 2016, to September 17, 2017, with the possibility of extension". Although the possibility of an extension of employment was considered, it does not amount to a guaranteed extension of employment. In any event, no evidence was presented to support the conclusion that the employee's term employment would have been extended had he not been wrongfully terminated.

[374] Contrary to what the employee argued, reinstatement to deter the employer from behaving similarly in the future is not a relevant consideration in determining an appropriate remedy for the wrongful termination in this case. An appropriate remedy must seek to repair a wrong, to compensate for a loss. Any consideration seeking to deter is instead relevant in analyzing punitive damages. The employee seeks such damages, and I will address that request later.

[375] A term employee who was wrongfully dismissed is entitled to reinstatement only when the term of his or her employment has not ended. In the circumstances of this case, the employee's term position ended on September 17, 2017. Therefore, reinstatement is no longer possible. However, the employee is entitled to be reinstated to a situation equivalent to the one in which he would have been had he not been wrongfully terminated. In this case, it means the right to the salary and benefits that he would have received during the portion of his term that was not completed on the date of his wrongful termination.

[376] The employee seeks "[translation] interest at the legal rate" on the payment of the salary and benefits that he would have received had he not been wrongfully terminated. However, in *Canada (Attorney General) v. Nantel*, 2008 FC 84, the Federal Court decided that "… there is no implied power to award interest under the *PSLRA* or the collective agreement …" and that therefore, the adjudicator had no power to award interest in that case. The same principles apply to the grievance before me.

[377] Moreover, although s. 226(2)(c) of the *FPSLRA* now specifically provides for the power to award interest in cases of termination, demotion, suspension, or financial penalty, the *PESRA* does not contain a similar provision. In fact, the *PESRA* does not set out the power to award interest in any proceedings. Therefore, I dismiss the employee's claim for interest.

[378] Consequently, I order the employer to pay the employee an amount equal to the salary and benefits to which the employee would have been entitled had his employment not been terminated, from March 9 to September 17, 2017, inclusive, with the usual deductions.

[379] As the parties made no submissions about how to calculate the amounts in question, I encourage them to meet to come to an agreement on the amount that the employer must pay the employee. In case the parties fail to reach an agreement, the Board will remain seized of this matter for 60 days after the date of this decision.

[380] The employee also claimed damages. In his grievance, he quantified those damages at $5000. However, in his arguments at the adjudication hearing, the employee increased that claim to $30 000. The employer did not respond to the increase in damages sought by the employee at the adjudication hearing.

[381] In his arguments, the employee stated that he seeks damages "[translation] for the stress, inconveniences, and unacceptable treatment that he suffered while he was employed and after he was terminated".

[382] The grievance before me challenges the rejection on probation cited by the employer. The employee's treatment in the course of employment is not part of the grievance, and that issue cannot be referred to adjudication. Therefore, I will not rule on the claim for damages in relation to that treatment.

[383] However, with respect to the damages resulting from the termination, I understand that the employee is essentially seeking compensation for psychological injury resulting from his wrongful termination. The employee's evidence shows that his termination led to the loss of his apartment and prevented him from buying a house and starting a family. I also note that in his arguments, the employee referred to the extent of the plot against him and the secret documentation that the employer considered "[translation] relevant to the decision to reject [him] on probation".

[384] In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 98, the Supreme Court of Canada held that "… in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive …". The Supreme Court of Canada confirmed that principle in *Honda Canada Inc. v. Keays*, 2008 SCC 39, in which it stated that compensatory damages for psychological injury arising from a breach of that obligation are recoverable.

[385] I previously found that the rejection on probation cited by the employer actually amounted to constructive dismissal without cause. Therefore, it is clear that by acting that way, the employer was not candid or honest with the employee. The employer also did not avoid "[translation] … behaving unfairly or acting in bad faith by being, for example …" misleading. Therefore, I do not hesitate to find that the employer breached those obligations toward the employee.

[386] It is true that the employee submitted limited evidence of psychological injury to support his claim for compensatory damages. However, I find that evidence credible and I note that the employer did not try to contradict it. I also note that the employer

did not present any arguments on the matter of compensation for psychological injury arising from the termination but simply ignored the matter.

[387] The undisputed evidence before me shows that the employee suffered psychological injury, and I agree that that injury arose from the employer's conduct in the wrongful termination. In light of the limited evidence before me, I see no justification to increase the amount sought for compensatory damages for psychological injury. Therefore, I order the employer to pay the employee $5000 as initially claimed, which I believe is appropriate under the circumstances.

[388] Lastly, the employee seeks $20 000 in punitive damages. Although his grievance does not claim any such damages, the employee claimed those damages in his arguments at the adjudication hearing. The employer had the opportunity to respond to the claim for punitive damages and simply offered a terse denial.

[389] Clearly, the employee could not seek punitive damages when he filed his grievance, or even during the grievance process in which the employer decided the grievance at the final level, as the employer had not yet displayed the conduct alleged by the employee; no one is required to do the impossible. The employee sought punitive damages at his earliest opportunity, which was at the adjudication hearing.

[390] In *Tipple v. Canada (Attorney General)*, 2012 FCA 158, the Federal Court of Appeal had to determine whether an adjudicator has the authority to award damages for abuse of process. The Court confirmed the existence of such authority as follows in paragraphs 29 to 31 of its decision:

> *[29] As a general rule, courts and adjudicative decision makers have the inherent authority to control their own process and to remedy its abuse. This inherent authority includes, in an appropriate case like this one, the right to require the reimbursement of expenses necessarily incurred by a party as the result of abusive or obstructive conduct by an opposing party.*
>
> *[30] In this case, the adjudicator found that PWGSC had engaged in obstructive conduct by failing repeatedly to comply with orders for the disclosure of information, causing Mr. Tipple to incur unnecessary legal expenses to enforce the adjudicator's orders. PWGSC argued in this Court that it did comply, and so it did, eventually. However, the record justifies the adjudicator's conclusion that PWGSC displayed a pattern of late and insufficient compliance, which was remedied only after constant pressure from Mr. Tipple's counsel.*

> *[31] In my view, it was reasonable for the adjudicator to find as a fact that the failure of PWGSC to comply on a timely basis with the adjudicator's disclosure orders resulted in an unwarranted financial burden on Mr. Tipple, and to conclude that the burden should in fairness be borne by PWGSC. In the highly unusual circumstances of this case, the adjudicator's award of damages for obstruction of process was a lawful and reasonable exercise of the adjudicator's authority to control the adjudication process.*

[391] Although in *Tipple*, at the adjudication hearing, Mr. Tipple claimed damages for abuse of process based on his employer's conduct at that hearing, and although the damages that the employee seeks in the case before me are punitive damages, the fact remains that in both cases, the damages are at least in part for conduct at the adjudication hearing. Therefore, I find that in these circumstances, I have the authority to decide the employee's claim for punitive damages.

[392] I must now determine whether the employer's conduct justifies awarding punitive damages and if so, determine their extent.

[393] I must express that I am perplexed by the employer's objections to the jurisdiction of an adjudicator to hear this grievance; i.e., this case involved a rejection on probation, and the employee was not an "employee" as that term is defined in s. 3 of the *PESRA*. I already dismissed those objections and will not return to them.

[394] I cannot blame the employer for using the legal defences available to it, but I am struck by its inability to prove the essential facts to support the defence that it chose to invoke. Although I must assume the employer's good faith, I was shocked by its strategic choices in its defence, particularly as those choices sought to render the employee without any recourse before me.

[395] I note the employee's allegation that just two weeks before the adjudication hearing, on March 20, 2019, and two years after he was wrongfully terminated on March 9, 2017, was he finally able to review the documents that the employer considered relevant to the termination (Exhibit S-9). He had requested those documents at the hearing on March 25, 2017, at the final level of the grievance process, at which time his request was denied. The employee submitted that it was not until he had those documents that he understood the extent of the plot against him and the hidden nature of the documentation that the employer considered "[translation] relevant to the decision to reject [him] on probation". I also note that the

employer did not deny those allegations. That unexpected discovery supports increasing the amount sought for damages and the new request for punitive damages.

[396] I previously ruled on the matter of compensatory damages for psychological injury and do not need to return to that matter.

[397] Before me, the parties extensively debated the application of clauses 30.04 and 35.05 of the collective agreement on the administration of evidence in this case. In paragraph 124, I indicated that I would come back to the issue in my analysis of the remedies, and in paragraph 354, I stated that clause 35.05 of the collective agreement fully applies in this case.

[398] Moreover, as I summarized in paragraphs 284 to 312, the employee explained at length the different ways that the employer also violated clause 35.01 of the collective agreement, an allegation that the employer once again chose to ignore.

[399] It is undeniable that the employer produced evidence at the adjudication hearing that was not relevant in deciding whether the employee was rejected on probation. Instead, the evidence pertained to the employee's performance and his compliance with the employer's standards of conduct. That would not have had any impact had the employer not used that evidence to attempt to justify its decision to reject the employee on probation. It is in that light that compliance with the requirements of the collective agreement for the use of documents becomes important in this case.

[400] Clauses 30.04 and 35.05 of the collective agreement, which were cited in paragraphs 88 and 89 of this decision, clearly indicate the restrictions by which the employer agreed to abide in its use of documents relating to performance or discipline. Clause 30.04 states that before me, the employer can use a document pertaining to the employee's performance only if it gave that document to the employee within 10 days of adding it to the employee's file. However, the undisputed evidence before me indicates that more than 2 years after the wrongful termination, the employer gave the employee documents about performance that were not in his personnel file and that he was unaware of before then.

[401] Similarly, clause 35.05 of the collective agreement prohibits the employer from using before me a document that it did not place in the employee's file and give to the

employee at that time or within a reasonable period after that. However, at the adjudication hearing, the employer introduced as evidence Exhibit S-9, which contains documents that were not placed in the employee's file and were not given to the employee at that time or within a reasonable period after that.

[402] Therefore, I find that the employer clearly violated both clauses 30.04 and 35.05 of the collective agreement.

[403] I agree with the employee that the employer cannot indirectly do what clause 30.04 of the collective agreement directly prohibits it from doing, namely, introducing as evidence documents about the employee's performance that were not given to the employee in accordance within the time prescribed, or testimonial evidence to the same effect.

[404] I find it surprising that before me, the employer attempted to portray the employee as an officer with performance problems, justifying the termination due to unsatisfactory performance, when the procedure that it chose to use did not require any such evidence. All that that description of the employee created was an overall impression that he did not deserve to continue working. However, I need not decide this issue.

[405] Whether the employee's performance was satisfactory is irrelevant to the question of whether he was rejected on probation. All that the evidence in question established is that the employer believed that the employee did not deserve to work the uncompleted portion of his term contract, namely, less than six months. In the circumstances of the case before me, this evidence was certainly prejudicial to him.

[406] In hindsight, it is clear to me that the employer abused the fact that I took the employee's objection to the admissibility of the evidence under advisement in a manner that was prejudicial to the employee.

[407] It is also concerning that the employer waited until the 11th hour, and waited for a disclosure order from me, to share with the employee the information that it refused to share with him for more than 2 years.

[408] Therefore, to determine whether punitive damages are warranted in this case, I must consider the following:

(a) my conclusions set out in paragraph 355 as follows:

(i) under the circumstances, the rejection on probation cited by the employer at the time of the termination actually amounted to constructive dismissal without cause,

(ii) it was really a contrived reliance on the employer's rights, a sham, or camouflage, and

(iii) the constructive dismissal of the employee resulted in an illegitimate exercise of the employer's rights, which cannot be justified under any circumstances;

(b) the questionable nature of the employer's objections in this case to block the jurisdiction of an adjudicator to hear this grievance, and its inability to prove the facts necessary to support those objections;

(c) that those objections sought to render the employee without recourse before me;

(d) that the employer abused the flexibility given to it at the adjudication hearing to introduce as evidence, in a manner that was prejudicial to the employee, documents relating to his performance, even though it had not given the employee those documents within the period set out in the collective agreement; and

(e) that those documents were given to the employee more than two years after his wrongful termination.

[409] Such conduct is outrageous and offends my sense of justice. Therefore, I am of the opinion that the employer's conduct before and during the adjudication hearing justifies punitive damages.

[410] What should the amount of the punitive damages be in this case? The employee claims $20 000. However, I must determine the minimum amount that is sufficient to deter the employer from repeating its reprehensible behaviour, considering other remedies that I have awarded (see *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, and *Performance Industries Ltd. v. Sylvan Lake Golf and Tennis Club Ltd.*, 2002 SCC 19). That is not an easy task and is not an exact science.

[411] I previously ordered that the employer pay the employee an amount representing the salary and benefits to which he would have been entitled had his employment not been terminated, from March 9 to September 17, 2017, inclusive, with the usual deductions. I also awarded $5000 in compensatory damages for

psychological injury. Are those orders enough to deter the employer from repeating its reprehensible behaviour? I do not believe so.

[412] Although I must always be guided by the sound management of public funds, I cannot ignore the fact that the employer is a federal institution that is well known to the public. As such, like any other federal institution, the employer must be a model for other employers in the country. The employer's behaviour in this case, if not sufficiently sanctioned, could lead other employers to act in a similar manner. Considering the employer's resources, what minimum amount in punitive damages would suffice to deter it from repeating its reprehensible behaviour? Too small an amount would not be a deterrent and could be considered a simple business expense.

[413] The employer decided to challenge the grievance at adjudication and incurred legal fees as part of that challenge. The employer clearly considers that such fees are simply a business expense. That situation points to its ability to pay.

[414] The employee alleges that $20 000 is an appropriate amount considering the circumstances. I cannot say with certainty that $20 000 is the minimum amount that is needed to achieve the desired deterrent or if a larger amount would be more appropriate to send the employer a clear message of censure. However, the rules of law prohibit me from awarding more punitive damages than what the employee seeks. Therefore, I order the employer to pay the employee $20 000 in punitive damages.

V. Conclusion

[415] For the reasons stated in this decision, I have concluded as follows:

(a) The employee is an "employee" within the meaning of the *PESRA*.
(b) The termination of the employee's employment was not a rejection on probation.
(c) The termination is not justified.
(d) The employee is entitled to the following:
    (i) payment of an amount representing the salary and benefits to which he would have been entitled had his employment not been terminated, from March 9 to September 17, 2017, inclusive, with the usual deductions;
    (ii) $5000 in compensatory damages for psychological injury; and

(iii) $20 000 for punitive damages.

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

(The Order appears on the next page)

VI. Order

[417] I dismiss the employer's objection to the jurisdiction of an adjudicator to decide the grievance because the employee is not an employee as that term is defined in s. 3 of the *PESRA*.

[418] I dismiss the employer's objection to the jurisdiction of an adjudicator to decide the grievance because the termination was a rejection on probation.

[419] The grievance is allowed.

[420] I order the employer to remove from the employee's file any mention of his rejection on probation.

[421] I reject the employee's claim for interest.

[422] I order the employer to pay the employee an amount equal to the salary and benefits to which he would have been entitled had his employment not been terminated, from March 9 to September 17, 2017, inclusive, with the usual deductions.

[423] I encourage the parties to meet to come to an agreement on the amount that the employer must pay to the employee under the previous paragraph. In case the parties fail to reach an agreement, the Board will remain seized of this matter for 60 days following the date of this decision.

[424] I dismiss the modified remedies sought by the employee for damages.

[425] I order the employer to pay the employee $5000 in compensatory damages for psychological injury.

[426] I declare that I have the authority to decide the employee's claim for punitive damages.

[427] I order the employer to pay the employee $20 000 in punitive damages.

November 22, 2021.
FPSLREB Translation

Paul Fauteux,
adjudicator