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



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

BETWEEN

BOUBACAR BAH

Grievor

and

**DEPUTY HEAD
(Canada Border Services Agency)**

Respondent

Indexed as

Bah v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Himself

For the Respondent: Patrick Turcot, counsel

Heard by videoconference,
February 8 to 10 and March 28 to 30, 2022.
[FPSLREB Translation]

REASONS FOR DECISION**FPSLRB TRANSLATION**

I. Individual grievance referred to adjudication

[1] In June 2014, Boubacar Bah (“the grievor”) participated in a firearms course offered by the Canada Border Services Agency (“the employer” or CBSA), where he works as a superintendent (at the FB-05 group and level) at Pearson International Airport. For the purposes of this decision, although the Treasury Board of Canada is the grievor’s legal employer, the CBSA is considered the employer, given the powers that the Treasury Board delegated to it.

[2] The course was scheduled for June 2 to 25, 2014. On June 17, 2014, the grievor was dismissed from it. The course supervisors alleged that he had committed too many safety violations to continue. He accepted the decision and returned to Toronto. On his return, after receiving the report from David Elliott, who was the course’s acting operational supervisor, management tasked Chief John Maric with investigating the circumstances of the grievor’s dismissal. The grievor was called to an interview, and then, having seen the reports that had been submitted about his participation in the course, provided Mr. Maric with his allegations, which refuted many of the statements in the reports. In particular, he raised discrimination allegations. Mr. Maric continued with his investigation, interviewed other witnesses, and determined that the grievor had engaged in misconduct. On March 4, 2015, he gave the grievor a disciplinary letter that imposed on him a three-day suspension.

[3] This grievance is about that disciplinary action. According to the grievor, it was unjustified and discriminatory. The grievance was referred to adjudication on October 26, 2015, before the Public Service Labour Relations and Employment Board, which became, under *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), the Federal Public Sector Labour Relations and Employment Board (“the Board”).

II. Summary of the evidence

[4] Given the rather conflicting evidence, I will present each witness’s testimony separately. To the extent that there are contradictions, I will draw conclusions from the facts to decide which version seems most likely to me.

A. The employer's evidence

[5] The employer called nine witnesses. Their testimonies are presented in the following order: first, three course participants, Karrie Roman-Anger, Katherine Moser, and Lori Douglas; then, three course instructors, Donald Daley, Meaghan Martinho, and Kirk Hinch; and finally, three members of management, Johanne Simoneau, Martin Boudreault, and John Maric.

1. Karrie Roman-Anger

[6] Ms. Roman-Anger has worked for the CBSA since 2001. She is a criminal investigator. The firearms course was a requirement of her job. She had already attempted to take the course in British Columbia but had to leave after being injured. She then enrolled in the course in Prince Edward Island, which she found excellent.

[7] According to her, the instructors were very professional and very respectful. They treated the participants like adults and provided them with a great deal of support, including overtime, so that they would succeed.

[8] The 24 participants were divided into 2 groups. Sometimes the 2 groups were combined but generally were separated. The firing range had 12 lanes. When a group practised on the firing range, the other group practised defence-and-control techniques in a gymnasium.

[9] A range officer directed the firing range, and every two participants had one line instructor.

[10] On the firing range, the grievor was in the 12th lane. Ms. Roman-Anger was in the 10th lane. She heard these instructions, repeatedly given to the grievor: no finger on the trigger, watch for movement, and pay attention to the gun's direction.

[11] Ms. Roman-Anger, who already had some anxiety about the firing range, found it very annoying to hear the same instructions repeated. She considered asking to be moved but said that it would not have been fair to the person who would have replaced her.

[12] Practising after course hours was encouraged. The participants had mock plastic guns to practise their defence-and-control movements. They had received specific

instructions to treat the mock weapons as if they were real, to develop good habits, including never pointing the weapon at themselves or someone else.

[13] Ms. Roman-Anger testified that during those practices, she had seen the grievor not pointing the weapon safely and had pointed it out to him.

[14] Ms. Roman-Anger also testified that the time on the firing range was shortened due to the grievor's behaviour. He arrived without the required equipment, and they had to wait for him to return with it. Sometimes, the practice had to be interrupted to recall the safety rules; the interruptions were often due to the grievor's safety violations.

[15] Not only the grievor made safety mistakes. All participants were set straight at one time or another. However, for him, the mistakes did not appear to be corrected.

[16] In addition, Ms. Roman-Anger clearly heard the grievor comment at breakfast one morning that there was no evidence that he was making so many mistakes and that it was his word against the instructor's. His comment rather shocked her — it seemed essential to her, in the very tense context of firearm use, to follow the instructors' instructions as closely as possible and to not question their judgment. She was so shocked that she reported it to the instructor and included it in the report that she later submitted to the program's operational supervisor, Mr. Elliott.

[17] Ms. Roman-Anger was aware that two other participants had departed, but she did not know the details. According to her, those individuals had difficulty following the course. When they left, the participants were simply told that they had left. When the grievor left, it was the same announcement — they were told that he had left, with no other explanation.

[18] Ms. Roman-Anger was asked to respond to comments that the grievor attributed to a line instructor, Ms. Martinho, in his replies to the investigation. He made three comments, which according to him showed that Ms. Martinho was sexist and racist. The first two were rude words that according to him, refer to the sexuality of Black men. The third related to a remark that Ms. Martinho made to him that his fly was down. She reportedly told him in a loud voice, provoking widespread laughter, "Boubah! Pull down your zipper! We don't want you to pull anything but your gun here!"

[19] Ms. Roman-Anger, who had often heard Ms. Martinho's instructions to the grievor, testified that she heard nothing of the sort. She said that she was surprised by the foul language attributed to Ms. Martinho. According to her, Ms. Martinho was extremely professional and serious at all times. In addition, during her entire stay, Ms. Roman-Anger never heard the slightest denigrating or racist remark from anyone. Given the general atmosphere, which was both welcoming and professional, such comments would have been highly inappropriate and certainly reason for dismissal.

2. Katherine Moser

[20] Ms. Moser has been working for the CBSA since 2000. In 2014, during the course, she was a criminal investigator. Because carrying firearms had become a condition of employment, she had to take the firearms course.

[21] She carefully read the instructions sent in advance of the course — the items to bring, the firearms rules, the travel arrangements, and the course schedule.

[22] She found the course stressful but excellent. For most participants, failure could have resulted in losing their jobs. In addition, they had to learn a significant amount of new content and to practise many new techniques. The main goal was to learn how to handle a gun safely.

[23] She recalled that three people left the course, including the grievor. They were simply told that those people had left, with no more details. However, she knew that the grievor had to leave after an incident that she witnessed and reported. She no longer remembered whether she had been asked to write a report, but she recalled wanting to document the incidents that she had witnessed. The report was sent to Mr. Elliott on June 16, 2014, the day before the grievor's dismissal.

[24] In her report, Ms. Moser described an incident that took place that same day, June 16, 2014.

[25] Behind the firing range, located in the basement of the building, was a room in which participants could sit between two practices. It was also where the participants loaded their guns. It was rather large, with concrete walls. At the centre was a large table with magazines and bullets. Along the walls all around the room were tables and chairs where the participants could sit.

[26] That morning, most of the participants had left the firing range to go to the room and wait for some participants to finish their practice. On leaving the firing range, the participants had to show an instructor that their weapon was unloaded, with the magazine removed and no round chambered. Once the weapon was checked, it had to be placed in its holster. When the participants were in the back room without an instructor, unholstering weapons was strictly prohibited. When the incident occurred, no instructor was in the room.

[27] Ms. Moser noticed that the grievor, who was facing her from the other side of the large table, seemed to be practising his shooting by making a gun with his hands. A few moments later, when she looked at him again, he had taken his gun out and pointed it at the wall, his finger on the trigger. This deeply troubled Ms. Moser — it was against the safety rules that they had been taught over the past two weeks. He returned his gun to its holster, and she then noticed that the magazine was loaded. He then took the gun out again and pointed it at the wall, with his finger on the trigger. At that moment, Ms. Moser caught Ms. Douglas's attention, who was right next to the grievor, and indicated to Ms. Douglas that the gun had a magazine inserted. Ms. Douglas reacted immediately by shouting at him to drop the gun. He froze for a few moments, then dropped the gun's magazine on the table and put the gun back in its holster. Ms. Moser noted in her report how upset Ms. Douglas seemed; she was shaking and had tears in her eyes.

[28] In her report, Ms. Moser mentioned her fear during the incident. She added that her reaction was due to the accumulation of incidents involving the grievor that she had witnessed. In particular, she mentioned numerous repeated orders from Ms. Martinho for him not to put his finger on the trigger. She also stated that he failed to obey the range officer's orders by shooting his gun when the order to fire had not been addressed to him.

[29] She criticized him for delaying the firing-range exercises by not following instructions immediately and by arriving at the practice without the necessary equipment (e.g., he was missing his key, wore running shoes instead of his boots, and his service belt was not well organized).

[30] Most importantly, according to Ms. Moser's report, the grievor did not handle his weapon safely, which made everyone nervous and wasted their time. According to

her, his inattention added to her anxiety around firearms. Her husband is a police officer, and the killings of police officers in Moncton that summer had particularly affected her.

[31] Additionally, Ms. Moser testified that aside from everything involving gun safety, she got along well with the grievor. They had a cordial relationship, and she was happy with being able to practise her French with him.

[32] When asked about Ms. Martinho's racist, sexist, or denigrating comments, Ms. Moser did not recall anything of the sort.

[33] In cross-examination, Ms. Moser said that the grievor was not the only one who made mistakes, that he was not aggressive, and that she did not have access to the other participants' learning logs, meaning that she could not know what the instructors wrote about the grievor.

3. Lori Douglas

[34] Ms. Douglas has been an acting supervisor of criminal investigations in Toronto for two years. Her substantive position, which she held in 2014, is as a criminal investigator. Carrying a firearm is a condition of employment, so the firearms course was mandatory for her.

[35] She testified that she read the instructions before leaving. She also testified that the course was difficult and stressful, probably the most difficult one she had taken at the CBSA. However, it was very well organized, and all necessary information was provided.

[36] She was in the same group as the two earlier witnesses and the grievor. She remembered that on the first day, he arrived without his safety vest, he often arrived late, and if he arrived on time, he had to correct something — find his key, retrieve his shoes for the gym, or tuck his shirt into his pants. That last detail struck her, as the uniform-wearing rules are very strict.

[37] She also wrote a report about the June 16 incident at Mr. Elliott's request, to whom she had first reported verbally. She would have written it anyway, she added, because the incident had such a devastating effect on her.

[38] Ms. Douglas told the hearing exactly what Ms. Moser did about the incident, so I will not repeat it. However, I must clarify that Ms. Douglas's tone was quite different from Ms. Moser's. While Ms. Moser recounted the incident calmly, eight years after the events, Ms. Douglas was still gripped with emotion and could not hold back her tears. Ms. Moser was afraid, but Ms. Douglas was terrified, which was doubtlessly explained by her proximity to the grievor. She testified that she was truly afraid of dying, and that thought still shakes her.

[39] As soon as the range officer, Mr. Daley, entered the room, she told him everything. He immediately accompanied her to Mr. Elliott's office, so that she could report it to him.

[40] She also heard the grievor's remark that it would be his word against the instructor's, which deeply shocked her. The instructors acted only in the interests of ensuring everyone's safety. To her, casting doubt on the instructor's words seemed to mean that he did not take the safety violations seriously.

[41] When asked whether she knew the grievor before the 2014 course, she answered in the negative. However, it was highly likely that he had worked with her twin sister, Lisa Douglas, who worked at Pearson Airport in the 1990s.

[42] She knew that two people had left the course, because they had talked about it. Nothing was negative; simply put, they were not ready for such a course.

[43] When the grievor left, she was told that he was leaving and that it would ensure her safety. Nothing was negative about him; it was simply that the participants' safety was paramount.

[44] It was clear to Ms. Douglas that the grievor repeatedly broke the firearm-handling safety rules. In addition to the June 16 incident, he talked about the safety violations he had received for having his finger on the trigger and had stated that it was his word against the instructor's. She had seen him pointing his weapon at himself with the trigger unlocked. His generally inattentive attitude toward firearms greatly worried her.

[45] She had no memory of Ms. Martinho allegedly making inappropriate remarks. All the instructors behaved very professionally.

4. Donald Daley

[46] Mr. Daley works for the CBSA. Currently, he is a coordinator in the Encrypted Radio Section. His substantive position is as a border services officer in Moncton.

[47] In 2014, he had been a firearms-course trainer for about two years. He had taken the use-of-force and firearms accreditation program and was a range officer. He supervised the line instructors and ensured the participants' safety.

[48] The range officer manages the shooting. The range officer instructs the line instructors by intercom — the number of rounds, the number of seconds, the firing sequence, etc. The range officer is behind the line instructors, for an overall view of the participants.

[49] At Mr. Elliott's request, he prepared a report about his interactions with the grievor at the moment of his departure.

[50] At the hearing, Mr. Daley testified on the contents of his report.

[51] From the start, Mr. Daley had the impression that the grievor was not prepared. On the first day, the grievor asked him if he had to have his safety vest and his service belt; in other words, he did not read the instructions, which were very specific about that.

[52] Also on the first day, the grievor left behind both weapons that he had been given for the course (a live and a deactivated pistol). The instructions were very clear — he had to know where his weapons were at all times, either with him or locked inside a locker.

[53] On the third day (June 4, 2014), the grievor did not wear his uniform, contrary to the instructions. When he returned in uniform, he did not have the right boots, and his shirt was not tucked into his pants.

[54] On June 5, after taking his weapon out of the box, the grievor moved around the room with it in his hand. That was against the safety instructions — the weapon had to be in its holster at all times, except when an instructor gave the order to unholster it.

[55] On June 9, the grievor forgot to put away his deactivated pistol.

[56] The grievor committed many safety violations, and the firing-range practice was slowed down because many times, they had to wait for him to be ready.

[57] On June 13, after many violations, Mr. Daley decided that allowing the grievor to practise at the firing range was not safe. The grievor left the range with an instructor, Mr. Hinch, who instructed him for half a day.

[58] The grievor's learning log lists safety violations. As the range officer, Mr. Daley had to sign them. In his report, Mr. Daley cited 13 violations. There are 10 signed sheets, but one of them includes several violations. At the hearing, Mr. Daley was asked if that number was unusual. He replied that it happens to those who ultimately fail the course.

[59] In addition to the safety violations, the learning log includes performance deficiencies, which can affect firearms training. For example, several times, the grievor was criticized for missing the keepers on his service belt that hold it to the inner belt. The keepers maintain the service belt in place, which carries the firearm and other tools. Otherwise, access to the weapon and ammunition is impeded.

[60] The range officer gives the order to shoot. It is important to pay attention to the orders. Sometimes, the grievor fired even though the order to shoot had not been addressed to him.

[61] In turn, Mr. Daley reported the June 16, 2014, incident. He testified that had he been in Ms. Douglas's place, seeing a gun loaded with a magazine pointed at a concrete wall, he would have been terrified. After two weeks of training, the grievor had no excuse for not knowing the safety rules, particularly the one for not unholstering a live weapon unless an instructor was present.

[62] Mr. Daley did not find credible the grievor's allegations with respect to the racist or sexist remarks that Ms. Martinho allegedly made. He knows her and respects her professionalism.

[63] In cross-examination, the grievor asked Mr. Daley whether the grievor made mistakes, like everyone does. Mr. Daley replied in the negative, and said not like everyone. According to him, the grievor made more mistakes and, above all, repeated the same ones.

[64] In short, according to Mr. Daley, the grievor did not seem to take safety seriously.

5. Meaghan Martinho

[65] Ms. Martinho is now a criminal investigator in the Toronto area. Starting in 2013, she was an instructor in the use of force and firearms, after taking many training courses.

[66] She started as an instructor in the firearms course in Prince Edward Island in January 2014. She was a line instructor for the grievor and Bruce Scott, another participant, during the second week of the course, from June 9 to 12. On June 13, the grievor was removed from the firing range and assigned to another instructor, Mr. Hinch.

[67] Ms. Martinho also wrote a report at Mr. Elliott's request.

[68] On June 9, the practice began late because the grievor's service belt was not organized properly, which Ms. Martinho found strange because since he had reached the second week, it should have been organized.

[69] She was struck by the grievor's lack of interest and his inability to remember the steps of how to handle a firearm. It was new for most of the participants, but by the second week, everyone had learned, except the grievor.

[70] Ms. Martinho had to ask the range officer to wait — everyone had to be ready at the same time. The grievor struggled to keep up and did not follow the safety instructions, in particular by putting his finger on the trigger much too early. The firing session was disrupted, and she could not give due attention to the other participant she oversaw, Mr. Scott, because all her attention was focused on the grievor, to keep him from making serious mistakes that could have had safety consequences.

[71] At the hearing, Ms. Martinho went over the following safety violations and performance deficiencies in the grievor's learning log for the days on which she was his line instructor:

- June 9, several violations: crossing the firing line twice, finger constantly on the trigger during transitions, finger on the trigger when the firing stopped, and pointing the gun in the wrong direction, at himself.
- June 11: firing three times after the stop bell, finger on the trigger while reloading, and no idea of tactical reloading.
- June 12: technical errors at step 5, did not follow orders at the firing range, fired when a different participant was ordered to, and pulled the trigger after the final bell.

[72] As for the learning log, Ms. Martinho found that without a doubt, the grievor was the most dangerous participant she had encountered. The tension on the firing range was palpable. His firearm handling was not at all safe. And he made no progress — he repeated the same mistakes. He just seemed not to listen.

[73] She mentioned the zipper incident. According to her, while checking the grievor's service belt, she told him privately and discreetly that his fly was down. He did not react other than to pull up his zipper. Only at the last feedback session did he tell her, slightly menacingly, that he had been insulted.

[74] Ms. Martinho categorically denied the racist and sexist remarks that the grievor attributed to her. She stated that they would be completely contrary to her personality and her ideas.

[75] According to Ms. Martinho, the grievor's departure from the course did not differ from those of other participants who left for some reason. The participants were simply informed that the person had left, with no further explanation.

6. Kirk Hinch

[76] Mr. Hinch has been a border services officer in Alberta for 30 years. He has been a line instructor since 2012. He has only a vague memory of the grievor, since the events dated to nearly 8 years before. As part of preparing his testimony, he reread the notes he made at that time in the grievor's learning log.

[77] On June 13, 2014, the grievor was removed from the firing range to practise with Mr. Hinch. Many deficiencies had to be corrected; he had to practise reloading the weapon, reorganize the keepers on the service belt, and not point the weapon unsafely.

[78] Mr. Hinch noted that the grievor made progress during the day and that he no longer put his finger on the trigger. He recommended that the grievor return to the firing range the following Monday (June 16). But he noted four safety violations and a

performance deficiency. In his opinion, such a high number of safety violations after two weeks of training was abnormal.

7. Johanne Simoneau

[79] In June 2014, Ms. Simoneau was the administrative supervisor of the firearms course in Prince Edward Island. She was responsible for all the logistical details of the participants' stay, but responsibility for the training as such was with Mr. Elliott, then the acting operational supervisor. Her testimony was based on the report she submitted to him on June 17, 2014.

[80] She met the grievor for the first time late on the second day of her stay, to have him fill out administrative documents. She encountered him from time to time.

[81] Late in the day on June 12, 2014, she and Mr. Elliott met with the grievor. Mr. Elliott wanted to talk to him about the concerns that the participants and instructors had expressed about him. Ms. Simoneau was present to translate to French should the grievor seem to have any comprehension problems.

[82] In the meeting, Mr. Elliott talked about the grievor's late arrivals, the fact that he often did not seem ready because he was missing a piece of equipment (his boots, his running shoes, the key for the firearm's lock, and his poorly organized service belt). The grievor acknowledged some mistakes but did say that they were not repeated.

[83] Mr. Elliott raised the issue of the grievor's alleged comment to at least two participants that it would be his word against the instructor's. The grievor denied saying it but added that the instructor criticized him for having his finger on the trigger even though it was false.

[84] Ms. Simoneau was present when Mr. Elliott met with the grievor after the June 16 incident. In addition to her and Mr. Elliott, also present were Mr. Daley and Jamie Moore, the operational supervisor whom Mr. Elliott replaced during that time. Mr. Elliott asked the grievor if it was true that he had taken out his weapon in the room behind the firing range. The grievor replied that he had, just to practise. Mr. Elliott then told him that he would recommend his dismissal, to which the grievor responded by asking whether he could take a return flight that evening. Mr. Elliott told him that a procedure had to be followed and that in the meantime, he had to return to his room.

[85] The grievor's live weapon had already been seized, but he still had his deactivated pistol. Mr. Elliott and Ms. Simoneau accompanied him, to retrieve it. They first went to the firing range, where the grievor had left his equipment bag. They then went to his room. His magnetic card did not work. He left his bag on the floor to go to reception, to sort the problem with the magnetic card. When he returned to his room, once the door was unlocked, Mr. Elliott asked him for his deactivated weapon. The grievor then pointed to his equipment bag to show that the gun was inside.

[86] Mr. Elliott asked him why he did not simply hand over the deactivated weapon as soon as he had retrieved his equipment bag at the firing range. The grievor had no reply, except to say that he kept everything in his equipment bag, to not forget anything. Ms. Simoneau noted in her report that by doing so, he had just committed two more safety violations (leaving the weapon unsupervised at the firing range and again in front of his room door, to retrieve another magnetic card).

[87] Ms. Simoneau attended the meeting with Mr. Boudreault, the training director. Because he was in Halifax, he participated by telephone. The meeting was held in French.

[88] According to Ms. Simoneau, the grievor's departure was organized in the same way as for the other participants who had to leave the course. She and Mr. Elliott met with the participant, and Mr. Boudreault had to approve the dismissal from the course.

[89] At the June 16 and 17 meetings, nobody mentioned discrimination at all. The grievor's only comment about the instructors was that they were all very attentive and professional.

8. Martin Boudreault

[90] Mr. Boudreault was responsible for three CBSA training centres, including the firearms training centre in Prince Edward Island. He received a report from Mr. Elliott around mid-June 2014 that called for the removal of one of the participants as a result of unacceptable behaviour and safety violations.

[91] Mr. Elliott provided many specific examples of problematic behaviour in preparation for the call that took place on June 17 at 10:30 a.m. Mr. Boudreault deemed that Mr. Elliott's safety concerns were well founded. He knew Mr. Elliott well and trusted his skill and judgment.

[92] The June 17 meeting was held to hear the grievor's views about Mr. Elliott's recommendation to dismiss him from the course. After hearing the grievor, Mr. Boudreault determined that the grievor had to be dismissed.

[93] It appears that some uncertainty arose as to the authority to dismiss the grievor from the course. Larry Murphy was the head of the Atlantic Region, and he delegated a representative for the June 17 call. Mr. Boudreault saw that as an endorsement of any decision he would make. In the end, Mr. Murphy also approved the decision.

[94] At the hearing, Mr. Boudreault explained the reasons for his decision to dismiss the grievor, which were the deficient performance, such as delays and failures to have the necessary equipment at the desired time, and the safety violations, e.g., leaving the pistol unsupervised, keeping a finger on the trigger, pointing the barrel in the wrong direction, and unholstering the weapon without supervision or authorization. The delays and forgotten equipment may appear minor, but they impacted the other participants and their learning. The course was very busy, and time was short.

[95] The email exchange with Mr. Murphy seemed to imply that Mr. Boudreault made the decision to dismiss the grievor for misconduct. Mr. Boudreault and Mr. Elliott agreed to provide a report to the authorities at Pearson Airport for a follow-up of the situation. However, Mr. Boudreault testified that when the decision was made, on June 17, 2014, it was an administrative dismissal, mainly motivated by security concerns, and not a disciplinary dismissal. He explained that participants who are not Atlantic Region employees, as was the grievor, cannot be subject to disciplinary action imposed by that region.

[96] Mr. Boudreault stated that racism or sexism was never discussed during the interview and that the grievor did not comment on it. Had that been the case, he would have certainly noted it in his interview notes, which were adduced into evidence at the hearing.

9. John Maric

[97] Mr. Maric has been one of 10 operational chiefs at Pearson Airport since 2007. He has known the grievor for a long time and worked with him in the past. Currently, they do not work in the same unit.

[98] Mr. Maric testified that when the grievor returned from the firearms course, he was tasked with investigating the facts of the grievor's dismissal, to determine whether disciplinary action was warranted.

[99] He spoke with those responsible in Prince Edward Island and received written reports from different witnesses. He met with labour relations advisors, who helped him formulate questions for the grievor's interview and those that followed.

[100] The allegations that justified the investigation were serious, according to Mr. Maric. Too many safety violations occurred to let the matter drop. Mr. Maric also took a firearms course. He stressed the importance placed on firearm safety from day one.

[101] Mr. Maric met with the grievor for an interview on July 20, 2014. As of that date, the grievor had not received copies of the different witnesses' reports; he received them after that.

[102] The grievor confirmed that he did not read the course instructions before leaving, despite the fact that the email with them described them as very important.

[103] In the interview, Mr. Maric told the grievor what had been said about him, mentioning the delays and safety violations. In his responses, the grievor downplayed his delays, omissions, and safety violations. He contradicted Ms. Douglas's claim about the June 16 incident — he did not have his finger on the trigger, and he unholstered his weapon only because he saw others doing the same thing. According to him, he forgot his gun only once.

[104] After the interview, the grievor sent written representations to Mr. Maric, which were dated the same day. He explained the different things of which he was accused as follows:

- Forgetting his vest: the uniform department forgot to include it.
- Wearing boots: he forgot them only once and did not understand why some participants did not wear boots.
- Forgetting his key: only once.
- Making unfavourable comments about the instructor: he categorically denied doing so.
- The June 16 incident: he unholstered his weapon because others had also done so.

[105] Overall, according to the grievor, an investigation into the facts was initiated because he made some mistakes that are normal for a beginner. Other than those mistakes, everything went very well, and the atmosphere was cordial and positive.

[106] In his representations, the grievor added that he was the victim of racial and ethnic discrimination. A white participant told Mr. Elliott that he had his finger on the trigger during the June 16 incident, and Mr. Elliott believed her. He, a Black participant, tried to explain to Mr. Elliott that he had seen other participants doing the same thing; Mr. Elliott did not even listen to him.

[107] In August 2014, the grievor made other written representations to Mr. Maric, after receiving Mr. Elliott's report. They will be revisited when the grievor's testimony is addressed, since at the hearing, he stated that he still maintained his representations and that they were part of his testimony. His representations contradicted a large part of Mr. Elliott's report and supported his argument that he had been the victim of discrimination. He also mentioned that only some participants' reports had been received, and so the image of his participation was distorted.

[108] Mr. Maric took the discrimination allegations seriously and conducted other interviews to complete his investigation. In fact, he interviewed other course participants.

[109] Ultimately, all the information gathered from the interviews convinced him of the version of the facts in Mr. Elliott's reports. The grievor tended to downplay his mistakes and his responsibility. Mr. Maric was of the view that disciplinary action was necessary. The disciplinary letter, which imposed a three-day suspension, reflected the findings of his investigation. Here are a few excerpts:

...

You have been found to be in violation of the CBSA Directive on Agency Firearms and Defensive Equipment, the CBSA Standard Operating Procedures on Agency Firearms and Defensive Equipment, the CBSA Uniform Policy and Standards of Appearance while participating as a candidate at the DFC. Having reviewed the matter, I find you committed numerous Safety Violations and displayed Performance Deficiencies while attending at the DVC, which put others at risk and demonstrated a failure to consider the health, safety and security of your colleagues.

In addition, your actions at the DFC did not demonstrate the high standards expected of all employees of the Agency. Your behaviour, which included lateness, inappropriate comments, failure to abide by appearance standards and/or policies an inattentiveness, also violated various provision [sic] of the CBSA Code of Conduct, including but not limited to our value of Professionalism and of particular concern given your role as a member of management, the expectations set out in the Code for Leadership Conduct.

...

[110] In cross-examination, Mr. Maric stated that he had always had a good relationship with the grievor and that he was rather surprised at the allegations that he had to investigate.

[111] The investigation satisfied him that indeed, misconduct had occurred. The safety violations were too serious; for example, the pistol that was abandoned several times, and above all, the unholstering in the room behind the firing range, along with the general inattention that resulted in violations of the CBSA's *Code of Conduct* and other codes.

[112] The investigation was thorough — he had never carried out so many interviews for an investigation of facts. When asked how he could be sure of the facts on which he relied, since he had not been present at the course, Mr. Maric replied that the different testimonies had too many common traits and too much consistency. He would have had to believe the grievor's version that everyone was lying, which, according to Mr. Maric, was highly unlikely.

[113] Again, in cross-examination, the grievor raised other subjects with Mr. Maric unrelated to the events at the firearms course.

[114] Thus, Mr. Maric confirmed that despite his request, the grievor was never called on to replace him on an acting basis during his absences. According to Mr. Maric, the director decides, not him. He also stated that other Black superintendents had been appointed on an acting basis and mentioned two racialized persons' names.

[115] The grievor also raised the matter of a poster intended for border services officers that depicts the suspicious behaviour to look out for when travellers arrive. It turns out that all the characters in the suspect poster are Black.

[116] The grievor brought management's attention to the poster, which, according to him, was clearly racist. Mr. Maric testified that he completely agreed and that he immediately contacted the other chiefs, to have it removed. And finally, he was furious when the poster reappeared some time later.

[117] Finally, the grievor asked him if he was currently under investigation for discriminatory behaviour, to which Mr. Maric replied, "Yes, it's your complaint." The complaint was about the poster, which Mr. Maric maintained he had nothing to do with.

B. The grievor's evidence

[118] The grievor testified and called the following people as witnesses: Chera Harpreet, John Luty, and Zoran Kostic, colleagues from Pearson International Airport; and two course participants, Marie-Josée Rwagafilita and Bruce Scott.

1. Chera Harpreet

[119] Mr. Harpreet has been a border services officer since 2006. He works at Terminal 3 of Pearson Airport. The grievor is his immediate supervisor. He said that he had an excellent relationship with him, as did other employees. The grievor was always available to talk to his subordinates.

[120] Mr. Harpreet testified that he was surprised to learn that the grievor had been suspended for three days. He has never witnessed the slightest behavioural issue by the grievor.

[121] Mr. Harpreet is a member of the Occupational Health and Safety Committee. In that capacity, he conveys diverse concerns to the grievor, who then transmits them to the chiefs' level. Some problems are solved; others are not.

[122] Mr. Harpreet spoke of the investigation into the suicide of a CBSA employee at Pearson Airport. Senior management did not want the union involved in the investigation, but the Occupational Health and Safety Committee insisted that the union participate. The committee conducted the investigation; it resulted in several recommendations. Some have been implemented, while others are still awaiting implementation.

[123] Mr. Harpreet indicated that several factors played a role in this case. While not causal, a culture of fear was apparently a factor; that is, a certain lack of trust keeps employees from complaining, and problematic situations persist. Those who dare complain suffer the consequences; either disciplinary action is imposed under any pretext, or a lack of advancement opportunities appears.

[124] When asked about the poster with Black suspects, Mr. Harpreet replied that in fact, it appeared twice. It was removed the second time, after the union intervened.

[125] When asked about whether he thought that the grievor was on a blacklist, which would explain why he never received an opportunity to be an acting chief, Mr. Harpreet replied that he did not know and that he had no idea how management made its decisions.

2. John Luty

[126] Before working for the CBSA, Mr. Luty was a firefighter for 15 years. He studied labour relations and standards for occupational health and safety. He worked for the CBSA from February 2001 to November 2017; he is now retired.

[127] Mr. Luty started as a clerk. In 2004, he joined the health and safety committee and stayed on it for 10 years. His first concern was the fact that at the time, Pearson Airport had no fire evacuation plan.

[128] He has known the grievor since 2003. At the end of his employment, the grievor was his immediate supervisor. He pointed out how the grievor always supported his employees.

[129] When asked about his reaction to the grievor's three-day suspension, he stated that something was amiss. If a real danger had been present, then why was no investigation held into occupational health and safety?

[130] Additionally, the condemnation of the grievor's behaviour was also curious — on the contrary, his behaviour had always been impeccable, particularly with his employees.

[131] He returned to the fact that safety-related criticisms arose but that no investigation was launched to that effect. In his view, one would have been mandatory under the *Canada Labour Code* (R.S.C., 1985, c. L-2).

[132] When asked about the work atmosphere in 2014, he replied that discipline was particularly problematic. Management tended to impose disciplinary action rather than trying to understand the underlying problems. And a double standard was in place. An employee would be punished for an action, but management would be forgiven for it; for example, helping a friend or parent through customs control.

[133] Mr. Luty concluded his testimony by adding that he disagreed with the grievor on one point. According to the record, he had received 11 safety warnings; he should have been removed sooner.

3. Marie-Josée Rwagafilita

[134] Ms. Rwagafilita has been a CBSA border services officer at Pearson Airport since April 2012. She does not work in the same terminal as the grievor.

[135] In September 2014, she was asked to meet with Mr. Maric. It was unclear that it was an investigation of the grievor. Ms. Rwagafilita attended the same firearms course as did the grievor but was in the other group. She encountered him the day he left, and she was somewhat worried about him. He told her not to worry, since for him, the firearms course was not a job requirement.

[136] In Mr. Maric's notes of his interview of Ms. Rwagafilita, this remark became, "he didn't care". Ms. Rwagafilita testified that she practised with the grievor, which showed that he took the course seriously.

[137] Mr. Maric asked her if she had witnessed racism (Ms. Rwagafilita is African and of Rwandan origin). She replied in the negative but stated that her experience was not necessarily the same as the grievor's.

[138] After she returned from the course, one of her colleagues asked her what had happened, because according to that colleague, the grievor claimed that he was the only Black individual present at the course. Ms. Rwagafilita found it surprising because three Black individuals from Pearson Airport attended the course.

[139] She was unaware that the grievor was disciplined after returning from the course. She did not know what to think of it; she was surprised. She thought that her interview with Mr. Maric was a simple conversation.

[140] In cross-examination, she testified that she asked whether the interview was about the grievor, and Mr. Maric replied that it was. Her suspicion arose from the fact that he asked questions about whether racist behaviour had occurred, and she had heard that the grievor had claimed that he was the only Black person at the course.

[141] When asked whether the grievor told her about discrimination during the course, she replied that she was not personally friends with him and that such a conversation required a deeper relationship. So, they never talked about discrimination. Additionally, she added, he is a superintendent. He would talk about that with his superior, not a border services officer.

4. Zoran Kostic

[142] Mr. Kostic is a superintendent at Pearson Airport and therefore has the same rank as the grievor. He has known the grievor for a long time; they started together in the 1990s at Customs and Excise, a CBSA predecessor agency. He has much respect for the grievor, who is easy to approach and open-minded.

[143] He took the firearms course in Ottawa in 2014. The course was good, but it was a challenge — it truly required investment. Like all the other participants, he made mistakes. The instructors pointed them out and told him how to improve.

[144] A few times, he has held an acting chief position, including replacing Mr. Maric. He was offered dates, was asked if he was interested, and that was all. He confirmed never seeing the grievor hold an acting chief position.

[145] He was asked about the grievor's relationship with senior management since the grievor was a superintendent. Mr. Kostic replied that the relationship seemed tense and uneasy, but he could not say more. He said that it seemed that a communication failure took place, but he did not know the details. He had no idea why the grievor was not offered the acting position, since they had the same work experience. He had the impression that a chief could choose who would replace him or her, from a conversation he apparently had with the director. He never verified with a chief to find out whether the chief did in fact have that authority.

[146] The grievor asked him whether he recalled seeing as acting chiefs the racialized persons that Mr. Maric mentioned. Mr. Kostic replied that he did not recall.

[147] He was very surprised to learn that the grievor had been disciplined for his misconduct during the firearms course. His experience at the course was that errors were corrected, and it was never a matter of discipline but of training.

[148] For his part, his view was that discipline depended on the facts. He had never felt pressure to impose it if it was not justified.

5. Bruce Scott

[149] Mr. Scott has been a border services officer at Pearson Airport since 1987. He was part of the grievor's group at the firearms course in Prince Edward Island in 2014.

[150] A few Toronto participants (including Mr. Scott and the grievor) had delayed departure flights, such that instead of arriving at suppertime on Sunday evening (the course started at 8:00 a.m. Monday morning), they arrived at the facility where the course was being held at 6:00 a.m. Monday morning and were seriously sleep-deprived. They were told to rest until the course resumed at 1:00 p.m. and that they would receive the Monday morning instructions at the end of the day.

[151] The afternoon course seemed to go quickly; he had the feeling that he had to catch up to the others but could not. That impression lasted for some time.

[152] At the firing range, Mr. Scott was in the lane immediately adjacent the grievor's; they had the same line instructor. Mr. Scott commented on the following passage in Mr. Elliott's report:

...

That afternoon [June 12] candidate Bruce Scott came to see me in my office, he was visibly upset about having to be next to Mr. Bah on the range, due to his unsafe handling. Stating that he felt that he was not receiving the instruction he needed because his line officer, Meaghan Martinho, had to be focused on Mr. Bah [sic] pistol handling....

...

[153] Mr. Scott testified that he did not talk about unsafe handling but said that he did not have enough supervision to progress. His concern was not a safety issue but a lack of training for himself.

[154] He did not notice that the grievor acted differently than the others did. He focused on his own difficulties. He did not witness the grievor allegedly pointing his gun in an unsafe direction or allegedly leaving his pistol unattended.

[155] He had significant difficulty with the course, but his mistakes were corrected, and in the end, he passed. He never witnessed the grievor make negative remarks about the instructors.

[156] He no longer remembers whether he learned from another participant or an instructor that the grievor had left the course. He had been placed in the other group. Only at meals did the two groups encounter each other.

[157] He practised defence-and-control exercises with the grievor and recalled that at least once, Ms. Roman-Anger joined them. He did not witness the grievor pointing his imitation weapon in the wrong direction.

[158] He remembered only one delay by the grievor, when he had not worn the right shoes.

[159] He did not remember Ms. Martinho saying anything remotely inappropriate. That would have been contrary to his impression of her, which was very professional. She gave instructions in a very loud voice, to the point that he was not always certain whether she was talking to him, the grievor, or both of them.

[160] In re-examination, the grievor asked a question about the firing range's lane partitions. Mr. Scott said that he could not be sure that he heard all the conversations.

6. The grievor's testimony

[161] At the hearing, I asked the grievor whether the oath to tell the whole truth and nothing but the truth covered the written representations that he sent to Mr. Maric as part of his investigation. He said that it did.

[162] The grievor testified that he was considered a leader in his workplace. He had disputes with the employer (a staffing complaint and grievances) and incidents in which he was wrongly accused of facilitating the passage of a friend's son by having him avoid secondary inspection.

[163] He takes his superintendent duties very seriously. He noted that border services officers had a great deal of anxiety about the firearms course, which was mandatory for everyone except those who had been hired before the cut-off date. He was exempt from carrying a weapon and therefore from the course for that reason, but he thought that as a superintendent, he should set an example for his employees and register.

[164] Two days before he left for the course, he suffered an acute attack of the sciatic nerve, which sent him to emergency. He did not want to drop out of the course, given the costs already incurred. The doctor gave him a medical note to explain the situation if necessary; he was also prescribed medication that could cause drowsiness.

[165] He received the course instructions one month before his departure. He skimmed through them; there was a large amount of information. He had to concentrate a great deal just to buy his ticket, given the new computer system. He read the instructions only once he was on the plane and only then realized that he should have brought his safety vest. Upon arriving, he made arrangements to have it sent, and in the meantime, he was loaned another one.

[166] The delayed flight meant that he got no sleep during the night between Sunday and Monday. He rested some on Monday morning, but everything went very quickly. The classes were very intense and he did his best to follow along.

[167] It is true that he made a few mistakes, but once corrected, he did not repeat them.

[168] He was surprised to hear that Ms. Moser was afraid of him. In fact, she drove him into town so that he could rent a car. He knew Ms. Douglas and had worked with her in the cargo area. It had been her and not her twin sister. They had had disagreements in the past.

[169] He was very surprised to be called to Mr. Elliott's office to be reproached for a remark he allegedly made (that he should be believed instead of the instructor). He mentioned that he never said that and that it was misunderstood.

[170] He took the course seriously and practised. In addition, with Mr. Hinch, he practised well, which Mr. Hinch noted.

[171] In the June 16 incident, he unholstered his pistol because he had seen others doing so. He was taken to see Mr. Elliott, who was very angry and did not want to hear the grievor's explanations. It appeared that the decision to dismiss him from the course had been made.

[172] The situation upset him. To him, all his efforts seemed a waste of time and energy.

[173] The grievor testified about his relationship with Mr. Maric. They participated in the same staffing process that led to Mr. Maric being appointed chief in around 2007. The grievor failed, which he challenged before the Public Service Staffing Tribunal. The complaint ended in a settlement.

[174] Mr. Maric never helped the grievor advance his career and never asked the grievor to replace him on an acting basis. According to the grievor, this refusal has a racial aspect, since Mr. Maric also did not call on other Black individuals to replace him. There is also the issue of the poster with the Black suspects; Mr. Maric did not act as soon as he was informed of it.

[175] According to the grievor, Mr. Maric's investigation of the facts must be understood in that context. In the July 20, 2014, interview, the grievor acknowledged his mistakes and stated that the instructors were competent and that he was embarrassed by failing.

[176] After receiving Mr. Elliott's report, he realized that discrimination had occurred. All the participants made mistakes, but only he was blamed for them. Some made statements that were not credible, like Ms. Douglas's, which was that he pointed his pistol at others, or Ms. Martinho's, which according to him were the worst statements.

[177] All the reports that Mr. Elliott requested were prepared after the grievor was dismissed from the course.

[178] The report that Mr. Elliott sent to the Pearson Airport authorities was dated June 18, 2014. On that date, he received reports from some participants and instructors, some of whom testified at the hearing. Mr. Maric's investigation confirmed Mr. Elliott's assertions, which essentially form the basis of the disciplinary action, although it was Pearson Airport management's decision.

[179] Mr. Elliott's report begins with the late arrival of four Toronto participants, including the grievor, due to their flight. They were allowed to sleep during the morning and had to appear at 1:00 p.m. The grievor and another Toronto participant arrived at the class 15 minutes late and without safety vests, which they were told to retrieve. On their return, the grievor said that he did not have his vest and that he did not think that he needed it.

[180] The grievor admitted that he did not have his vest when he arrived, but he had it sent from Toronto, and in the meantime, he was loaned one. In short, according to him, the omission had no consequence. He denied arriving late for class and said that he was always on time. The course log mentions that he forgot his vest and arrived late.

[181] On the first day, Mr. Elliott noticed that the grievor had left his pistol lying around. He asked Mr. Daley to remind the grievor that at all times, the pistol had to be either with the participant or locked in a locker.

[182] The grievor said that he only forgot his key, only once.

[183] The incident is mentioned in the course log that Mr. Elliott kept. To the extent that the log is made up of notes from that time and is based on instructor reports, I consider it objective, and I prefer its contents to the grievor's testimony.

[184] According to the report, the grievor informed an instructor that he had had a back problem the weekend before. Mr. Elliott met with the grievor and read the medical note, which said that he had to be careful and monitor the situation for the next week. Mr. Elliott asked the grievor if he would be able to take the course, which was quite physically demanding. The grievor replied that the situation was improving day by day and that he would be able to take it.

[185] The grievor criticized Mr. Elliott for talking about a back problem when his problem was with his sciatic nerve. The grievor claimed that Mr. Elliott did not read the doctor's note. I think that he read it. He asked the grievor whether he would be able to take the course, to which the grievor replied that he would. Since the sciatic nerve is part of the spinal column, I do not think that it is a mistake to speak of a back problem.

[186] According to the report, in the following days, the grievor was constantly late and ill-prepared for the firing and defence exercises. On June 3, he showed up late and without his running shoes for the defence exercises, which the instructor noted. The grievor claimed that it was false.

[187] On June 4, the grievor arrived at the firing range without his safety glasses and had to retrieve them. He wore his uniform but without the regulation boots. He had to retrieve them. He did not contradict those statements, which came from Mr. Daley's notes.

[188] On June 5, the grievor showed up without full equipment; he was not wearing his inner belt. In the loading room, he took out his pistol without permission, did not place it in its holster once the lock was removed, and pointed it in unsafe directions. Those facts also came from Mr. Daley's notes.

[189] The grievor's version is that he said that he made those mistakes only once and that they were learning mistakes. He claimed that he did not have to return to his room to retrieve things; however, the learning log indicates the contrary.

[190] The grievor never denied his learning log's contents, in which the instructors added the training highlights, and the participant signed it every day. However, three notes in his log stated that he arrived unprepared for the class such that he had to remedy the situation — he showed up in uniform, but without his boots; he showed up another time without his inner belt and with the keepers misplaced; and he showed up at the firing range without the keys for the pistol lock.

[191] In fact, according to the learning log, the mistakes were repeated. The service belt with faulty keepers was mentioned on June 5 and 13, the weapon's dangerous orientation was mentioned several times, and the grievor committed a safety violation by pointing his weapon, with its magazine, at a wall on June 13, thus before the June 16 incident.

[192] On June 5, Ms. Roman-Anger spoke to Mr. Elliott about the fact that during practices outside class hours, the grievor pointed his (imitation) weapon in unsafe directions. She said that she felt nervous and worried about being on the firing range with him.

[193] The grievor contended that that was false. He never practised with Ms. Roman-Anger. In fact, at the hearing, Mr. Scott, a witness whom he called, confirmed that he had at least one practice with the grievor and Ms. Roman-Anger.

[194] On June 9, Mr. Elliott encountered the grievor in a corridor, even though he should have been at the firing range since 1:00 p.m. The grievor said that he had to find his keys for the pistol lock. Mr. Daley informed Mr. Elliott that day that the grievor had left his deactivated pistol at the firing range without securing it. It had to be placed in a locked locker.

[195] On June 10, the grievor went to Mr. Elliott's office to retrieve his pistol. Mr. Elliott tried to make him understand that he could not leave his pistol unattended.

[196] On June 12, two participants spoke separately with Mr. Elliott, informing him that the grievor had said that for safety violations, it was the participant's word against the instructor's. One of the two, Ms. Moser, complained that by arriving for class unprepared, the grievor wasted other people's time.

[197] The grievor denied saying it. I must say that it would be curious if both participants (Ms. Moser and Ms. Roman-Anger) testified that way were it not true. It is possible that a communication failure occurred and that they interpreted a remark by the grievor that meant something different. Overall, I do not think that the incident is very important. I accept that it appears that the grievor did not make much progress with Ms. Martinho, against whom the remark was allegedly directed.

[198] According to Mr. Elliott's report, on that same day, Mr. Scott spoke to Mr. Elliott and said that he was very much disturbed to be the grievor's neighbour on the firing range, given his unsafe pistol handling.

[199] At the hearing, Mr. Scott testified that he never told Mr. Elliott that he feared for his safety. However, he confirmed that he told Mr. Elliott that he did not receive enough instruction time because the instructor had to focus on the grievor.

[200] I think that Mr. Elliott's version incorporated what he heard about Ms. Martinho in Mr. Scott's complaint, which was that he did not receive enough instruction. I agree that Mr. Scott did not complain about the grievor's unsafe handling.

[201] In his report, Mr. Elliott indicated that he decided to meet with the grievor, to talk to him about all the problems identified to that point, which were being late and unprepared and having a poorly organized service belt at least four times, according to the instructors. In his report, Mr. Elliott noted that the grievor replied that it happened only once. At the meeting, the grievor said that he now understood that he should not leave the pistol unattended. He denied saying what some participants reported, which was that it was his word against the instructor's.

[202] On June 13, the grievor was removed from the firing range and was assigned Mr. Hinch as a special instructor.

[203] Mr. Elliott recounted the June 16 incident and the interview in his office that immediately followed it. According to his report, the grievor reportedly answered Mr. Elliott's questions as follows: Did you unholster in the back room? Yes. Did you have permission? No. Did you put a magazine in the pistol? Yes. In front of an instructor? No. Was the magazine empty? Yes. Did you put your finger on the trigger of the pistol with a magazine? Yes.

[204] According to the grievor, Mr. Elliott gave him no opportunity to say that he had seen others doing the same things.

[205] At the hearing, the grievor did not ask the two witnesses to the incident whether other participants had allegedly taken out their pistols without an instructor present.

[206] Mr. Elliott then informed the grievor that he would request that the grievor be dismissed from the course, to which the grievor allegedly replied, "[translation] Can I take a flight tonight?" He denied saying it, but both Ms. Simoneau and Mr. Elliott witnessed it. Mr. Daley, who was outside the room, also heard it. I do not believe that three witnesses would make up such a remark.

[207] Mr. Elliott reported the equipment-bag incident, in which the grievor left his deactivated pistol behind a few times. The grievor said that he had been in a state of disarray.

[208] On the whole, Mr. Elliott's report was based on the learning log, the course log, and the instructors' notes made in the moment.

III. Summary of the arguments

A. For the employer

[209] The grievor filed a discrimination grievance against Mr. Elliott and Mr. Boudreault. It proceeded through all the steps of the procedure and was denied at the final level on April 27, 2015. The grievor did not apply for judicial review. Thus, the decision is final. Therefore, it must be understood that in this grievance, the discrimination allegation is against Mr. Maric, who conducted the investigation and imposed the three-day suspension as the disciplinary action.

[210] The employer recalled the rule in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), which is when faced with a contradiction, the decision maker chooses the most plausible version, taking all the facts into account.

[211] The employer's witnesses relied heavily on notes taken at the time, unlike the grievor's witnesses. That casts no doubt on their good faith, but over time, memories fade.

[212] The Board has consistently applied the test in *Wm. Scott & Co. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 Can. LRBR 1, to assess disciplinary action. The test can be summarized as follows: Was there misconduct that warranted disciplinary action? If so, was the disciplinary action excessive? If so, what disciplinary action would be just and equitable?

[213] The many safety violations are proved: the finger on the trigger, the direction of the gun, and abandoning the firearm at least four times. The grievor's behaviour was inappropriate. He caused delays and setbacks in training (short-sleeved shirt, wrong footwear, and no key for the gun lock). Three people testified to hearing him say, "It's her word against mine." According to the rule in *Faryna*, it seems improbable that three different people would testify to the same thing.

[214] Initially, the grievor did not read the detailed instructions. He claimed that the only impact was the forgotten vest, which was quickly remedied. In fact, it led to other consequences — he did not read the instructions and policy on using a service firearm, and he made uniform mistakes, which took time away from the others and could have been avoided had he read the instructions. Failing to read the instructions in fact betrayed his lack of diligence.

[215] The employer cited a few decisions that support the disciplinary action imposed.

[216] *Dawson v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 12, dealt with disciplinary action imposed on a correctional officer for his inattention during and lack of cooperation with training for renewing his use-of-force and firearm certification. He received a four-day financial penalty, which was justified, according to that Board.

[217] In *Eden v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 37, an FB-05-level supervisor received a 10-day suspension for failing to secure his service weapon, ammunition, and pepper spray. The employer considered being a supervisor an aggravating factor, since that meant that he was supposed to set a good example for his subordinates. Mr. Eden acknowledged his fault, but his opinion was that the penalty was too harsh. The adjudicator substituted a 5-day penalty for it. The misconduct deserved a penalty, but the 10-day penalty was too severe. It was an isolated incident, and Mr. Eden's disciplinary record was clean.

[218] The employer noted that according to *McEwan v. Deputy Head (Immigration and Refugee Board)*, 2015 PSLREB 53, a long career can be both a mitigating and an aggravating factor. That Board stated as follows at paragraph 129 of that decision:

... A lengthy career, particularly one at an executive level, brings with it a higher level of expectations. While that career is a mitigating factor, it is a double-edged sword, and it can be an aggravating factor... In this case, I conclude that it is an aggravating factor, given her lengthy service and knowledge of the Code.

[219] In this case, the three-day suspension is not disproportionate. The grievor was negligent in his attitude with respect to the course. The fault is all the more serious because, as a manager, he was supposed to set an example.

[220] Moreover, the employer's view is that the discrimination allegation was not proved. According to *Moore v. British Columbia (Education)*, 2012 SCC 61, first, the grievor had to demonstrate *prima facie* discrimination, which has three components: he has a characteristic that is one of the grounds of discrimination under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; CHRA), he suffered an adverse impact from an

action of the employer, and the protected characteristic was a factor in the adverse impact he suffered.

[221] The grievor is Black and of African descent. His colour and ethnic background are prohibited grounds of discrimination under the *CHRA*. The employer imposed a disciplinary action against him, a three-day suspension without pay, which caused him to suffer an adverse effect.

[222] However, the third component is not met; the grievor's race or ethnic origin and the disciplinary action for misconduct are not linked.

[223] In particular, the employer noted in that respect *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, and *Kirlew v. Deputy Head (Correctional Service of Canada)*, 2017 FPSLRB 28.

[224] The grievor spoke of senior management's involvement, but there is no evidence of it. The employer cited *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, in support, particularly the following sentence, at paragraph 41: "There must be something in the evidence, independent of the Complainant's beliefs, which confirms his suspicions." Mr. Maric clearly explained his role, the investigation he conducted, and the conclusions he reached. The grievor did not establish that discrimination was a factor. The employer found serious deficiencies in his course participation and determined that it was unacceptable.

[225] The grievor argued that he was treated differently, for example, from the other two participants. In fact, nothing is known of what happened to them, except that they left because they had difficulties with firearms. The grievor did not establish that their departures were any different than his.

B. For the grievor

[226] According to the grievor, the disciplinary action was unjustified and constituted differential treatment based on discriminatory grounds.

[227] He was accused of learning errors; others also made them. Learning errors cannot be considered faults.

[228] He admitted that he did not read the instructions in advance, but the only impact was that he had to have his vest sent. While waiting, it was replaced with a borrowed one.

[229] He was also accused of dangerous behaviour. He admitted to being in the wrong with respect to the June 16 incident, but there is no evidence that it was very serious. He aimed at a wall, and the gun had no bullets. It is true that he was instructed not to do it, but there was no real danger.

[230] The grievor's behaviour was also criticized. However, all the witnesses agreed that he was always polite and respectful.

[231] According to him, there is no evidence that he did not listen; on the contrary, he did his best. When he was informed of a mistake, he corrected it and did not repeat it.

[232] The three participants' testimonies are unreliable. They had an interest in giving testimony that would enhance them in the employer's eyes. But the grievor was not given any benefit of the doubt.

[233] The grievor did not challenge the decision to dismiss him from the course. The problem is everything that followed. When two other participants departed, no reports were requested. In the grievor's case, Mr. Elliott requested reports after he left. Participants who wanted to pass the course had an interest in giving Mr. Elliott the report he wanted.

[234] While the other candidates left discreetly, it was not so for him. Mr. Elliott told Ms. Douglas that she could be at peace once the grievor left. That is defamation. In addition, the meeting with the grievor took place with Ms. Simoneau, Mr. Daley, and Mr. Moore present. It was a form of public humiliation.

[235] The employer did not prove the misconduct. Clearly, it was discrimination. The employer falsified the witnesses' statements. Consequently, the grievor claimed compensation under ss. 53(2)(e) and (3) of the *CHRA* for pain and suffering and for the employer's wilful and reckless conduct.

[236] In that respect, the grievor cited *Turner v. Canada Border Services Agency*, 2020 CHRT 1, in which the Canadian Human Rights Tribunal (CHRT) found that

Mr. Turner, a Black man, had been discriminated against when he was excluded from a staffing process that the CBSA had conducted.

[237] The CHRT stated that the discrimination against Mr. Turner was unconscious. Everyone spoke highly of Mr. Turner, and his performance evaluations were very positive. But the selection board members rejected his application because, according to the CHRT, they had been unconsciously affected by the negative stereotype "... of the lazy, incompetent, dishonest black male ...".

IV. Analysis

[238] The grievor made two main arguments in this grievance: first, he challenged the disciplinary action, which he stated was unjustified. Second, he alleged that the employer behaved discriminatorily by imposing that action on him. Although the two issues are related, I think it is more logical to deal with them separately. I will start with the discrimination issue, since the grievor had to present *prima facie* evidence that the disciplinary action was tainted by discrimination. However, even if I find that there was no *prima facie* discrimination, I must analyze the disciplinary action to determine whether the employer proved that it was merited and proportional.

A. Was the disciplinary action discriminatory?

[239] The discrimination analysis is based on the test set out as follows in *Moore*, at para. 33:

... to demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a prima facie case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[240] First, *prima facie* discrimination must be present. Although I note that the first two components are present, I cannot conclude that the third is present, which would be a link between the grievor's race or ethnic background and the disciplinary action.

[241] The grievor cited *Turner*, which I read carefully. In fact, a large number of decisions involved Mr. Turner. His complaint was about two staffing processes in 2005.

Only in 2020 did he finally win his case, after many twists and turns before the CHRT, the Federal Court, and the Federal Court of Appeal.

[242] In my view, the fundamental question in *Turner* was that discrimination can be difficult to discern. Nobody made racist or derogatory remarks about Mr. Turner. Nobody excluded him from staffing processes because he is a Black man. According to the CHRT, his exclusion took place because the selection board members unconsciously attributed stereotypical characteristics to him. The CHRT found that the selection board members assessed Mr. Turner negatively after reading emails from his supervisor, who referred to a “[translation] perception” that Mr. Turner abused leave. From there, a link was made to the stereotype of the lazy Black man.

[243] It seems to me that the discrimination finding also hinged on the fact that the justification for excluding Mr. Turner was not absolutely solid in the first staffing process. In the second, the CHRT found that there was no discrimination because the exclusion explanation was plausible.

[244] In this case, I have nothing that would indicate the idea of unconscious stereotyping. The facts alleged against the grievor are concrete and objective and were detailed in the disciplinary letter, including safety violations, performance deficiencies, delays, inappropriate comments, and failing to comply with the dress code. Although the grievor challenged those allegations, there is no vague impression of incompetence, as in Mr. Turner’s case.

[245] From the outset, I note that I do not doubt that racism exists in the workplace. I agree with the grievor that a poster showing suspicious behaviour, illustrated only by Black persons, is problematic.

[246] However, it is not enough to make a racism allegation, even in an environment in which racist acts are seen; allegations directed at a particular person (in this case, Mr. Maric) must still be supported by evidence. I know that racism can be subtle, but a mere allegation is not enough (see *Filgueira*). As the Supreme Court indicated in *Bombardier*, at para. 88, “Evidence of discrimination, even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct.”

[247] The grievor gave examples that according to him, established that Mr. Maric’s investigation was tainted by racism. Unfortunately, there are too few connections for

me to find what he suggested to me. His disputes with senior management and the fact that he was never appointed as an acting chief might have many explanations. Once again, the racism allegation is not enough.

[248] The grievor did not satisfactorily establish that Mr. Maric was either directly or indirectly responsible for the poster. He reported the poster to Mr. Maric, who removed it. I cannot see that the poster and the decision to take disciplinary action are linked.

[249] The grievor also insisted that he was not treated in the same way as the other two participants who left the course before it ended. In fact, he knows nothing about what happened to them when they returned to work. He also does not know how their meetings with Mr. Elliott went before they departed.

[250] I do not see it as public humiliation that certain people were present in Mr. Elliott's office when he met with the grievor and informed the grievor of his decision to recommend his dismissal. Ms. Simoneau was the administrative director; she would have had to take care of the logistical details. Mr. Daley was the range officer; he saw the grievor during his learning. Mr. Moore was the operational supervisor whom Mr. Elliott had temporarily replaced; he had to be aware of the decisions made during the course, for which he was ultimately responsible.

[251] The witnesses who were at the course no longer recall how they learned of the grievor's departure. The announcement was made quietly and without explanation. The only one to whom somewhat more was said was Ms. Douglas, who had been terrified by the grievor's actions. It was normal to reassure her.

[252] In short, I do not find that the grievor suffered adverse treatment due to his race or ethnic origin. His evidence does not permit making any tangible inference that his race or ethnic origin was a factor in the impugned conduct, in the decision to dismiss him from the course, or in the decision to impose disciplinary action.

[253] I find that there is no *prima facie* discrimination according to the *Moore* test.

B. Was the disciplinary action justified?

[254] According to the *Wm. Scott* test, the adjudicator reviewing an impugned disciplinary action must ask three questions: Was there misconduct that merited

disciplinary action? Was the disciplinary action excessive? If so, what disciplinary action would be just and equitable?

[255] The grievor maintained that misconduct cannot be mentioned in his case; no one can be punished for mistakes made while learning.

[256] I agree with the grievor on that point. Had he been punished for making mistakes while learning, it would be unfair.

[257] However, this is not what I understood from the disciplinary letter. He was criticized for not complying with the CBSA's codes of conduct on firearms, dress, and professionalism.

[258] The grievor was blamed not for learning errors but for his general attitude with respect to the course and his lack of seriousness and professionalism.

[259] It began with him not reading the instructions in preparation for the course. According to the grievor, it was of little importance as the only impact was that he forgot his vest, which was a blunder quickly corrected. He was loaned a vest, and he had his own sent from Toronto.

[260] In fact, he also forgot his service belt and some equipment. He did not read the policies on using firearms and the care that had to be taken to ensure their safety during the course. He did not understand the importance of wearing his uniform correctly and wearing running shoes for the defence exercises. In short, he was not ready for the course, and the consequence was much greater than forgetting a vest — several times, people had to wait for him to be ready, to start the practice. Many mistakes could have been avoided by reading the instructions carefully.

[261] The instructors noted repeated errors. The grievor maintained that he never repeated the same mistake. That is false. Despite an initial warning about his weapon and that he had to never leave it unattended (on the first day, and that time, it was not held against him), he did it again, at least four times. He was repeatedly told that his belt was not organized as it should have been. He was repeatedly told that his weapon was not being pointed safely.

[262] To all this, the grievor replied that it is normal to make mistakes. It is not normal to not correct them if one truly acts in good faith.

[263] With respect to the culminating incident on June 16, 2014, the grievor maintained that it was exaggerated and that ultimately, no one was in danger. The course teaches otherwise. It was repeatedly stressed that a firearm is dangerous and that it must be treated as such. He also contended that he did so because he saw others do it. He did not ask the two witnesses to the incident any questions about it; he was unable to name the people or situate them. That statement directly contradicted the instructions given, the instructors' (such as Mr. Daley's) expectations, and simple common sense.

[264] I must say that I was struck by the grievor's lack of sensitivity to Ms. Douglas's reaction. He regretted taking out his weapon because doing so was not permitted. At no time, including at the hearing, did he say that he regretted frightening Ms. Douglas to such an extent. He argued that he was treated discriminatorily because she was reassured by being informed about his departure; he never understood why she needed reassuring. However, as I recall from Mr. Daley, a strapping fellow experienced in handling firearms, he would have been "terrified" to see what Ms. Douglas had seen, which was the grievor, finger on the trigger, pointing a gun with a magazine inserted at a concrete wall.

[265] Not all the errors for which the grievor was blamed were learning errors; after 24 years of service, he had to have known how to wear his uniform correctly. After receiving strict instructions on handling weapons safely, his lack of judgment when he pointed his weapon at the wall on June 16 is blameworthy.

[266] The grievor argued that it was enough to dismiss him from the firearms course. Punishing him was unnecessary. I must say that the lack of seriousness demonstrated during the course warranted the employer considering the situation. The grievor participated as a CBSA employee, and the rules of discipline apply to all employer activities.

[267] The grievor pointed out flaws in the investigation, and on some points, I agree with him. Mr. Elliott attributed to Mr. Scott a fear of the grievor that Mr. Scott did not confirm at the hearing. Mr. Maric attributed statements to Ms. Rwagafilita that the grievor did not take the course seriously, which she denied at the hearing. Is that enough to raise doubt about Mr. Maric's entire investigation and findings? I do not think so.

[268] Mr. Scott was not prepared to say that he was afraid of the grievor's behaviour in his weapons handling. That said, many other participants said it bluntly as did some instructors. However, Mr. Scott confirmed that Ms. Martinho focused all her efforts on the grievor, such that Mr. Scott felt neglected and short on instruction.

[269] The lack of seriousness was evident in all kinds of behaviour (the footwear, the service belt, forgetting the weapon, and repeated mistakes on the firing range). The grievor simply did not appear to focus on what he had to do. He repeated the fact that he had a sciatic nerve problem and that he had to take medication. It is not clear whether he considered it an excuse, but in my view, if the medication truly hindered his performance, he was entirely responsible for it. It was up to him to use his judgment and not take such a dangerous course if he could not dedicate his full attention to it.

[270] The grievor attacked Ms. Martinho's credibility, attributing statements to her that frankly, I do not believe. All the witnesses who were questioned about her, including the grievor's witnesses, spoke of her rigour and professionalism. Everyone expressed surprised that she allegedly said such things. In his argument, the grievor referred only to the zipper incident but did not otherwise seem to question Ms. Martinho's professionalism. The remark attributed to her about the zipper seems particularly unlikely to me. Why would she have said "pull down", when she and the grievor agreed that she had pointed out that his zipper was not pulled up? She said that she did so discreetly, and I believe her. No witness confirmed such a remark in a raised voice or widespread laughter. In fact, the grievor made a good effort to demonstrate that the partitions between the participants on the firing range prevented others' conversations from being heard. I think that it is much more likely that he did not like being told that. As for the other racist or sexist remarks that Ms. Martinho allegedly made, I find them completely unbelievable. The grievor mentioned them only after reading Mr. Elliott's report. Ms. Martinho's report is not flattering, but it aligns with the learning log, which the grievor in no way contradicted.

[271] The grievor stressed that his participation in the course was not mandatory. It was nevertheless a course given by the employer, as part of all border services officers' training (grandfathering exceptions aside). His lack of seriousness, starting with failing to read the instructions, is striking. It led to repeated errors.

[272] I find that the employer was right to follow up once the grievor returned to Toronto. I also find that Mr. Maric conducted the investigation in good faith. It was not without errors, but taken together, the testimonies become overwhelming for the grievor. I did not note any hostility toward him; it was quite the contrary. The witnesses agreed that he was pleasant and that so was his company. However, his behaviour during the course was disturbing, to say the least.

[273] I find it strange that three independent witnesses reported that the grievor allegedly said something like it's my word against hers. I am prepared to grant him that a communication failure about it might have taken place. I am not prepared to conclude that three witnesses lied under oath. In any case, enough misconduct indicators are evident, even without including that remark.

[274] In short, I conclude that misconduct occurred and that the main points in the disciplinary letter, as follows, appear proven to me:

- A contravention of the CBSA's *Directive on Agency Firearms and Defensive Equipment* and the CBSA's *Standard Operating Procedures on Agency Firearms and Defensive Equipment* by forgetting several times to store his weapon safely.
- A contravention of the CBSA's *Uniform Policy and Standards of Appearance* by failing to learn the uniform requirements before the course, by neglecting to organize his service belt, and by failing to present an impeccable image, in line with the CBSA's expectations.
- Safety violations: while some at the beginning were attributable to learning, the repeated errors, particularly the June 16 incident, were serious.
- Performance deficiencies: I note his lack of preparation several times (lock key, uniform, footwear, and safety glasses). He never explained why his service belt was not organized properly, even after receiving several reminders.
- A violation of the CBSA's *Code of Conduct*. His attitude was unprofessional, which is all the more troubling because he is a manager and thus supposed to lead by example.

[275] Still to be determined is whether the action was excessive. The employer weighed the aggravating and mitigating factors. The fact that the grievor is a superintendent, and therefore in a leadership role, is an aggravating factor. However, his years of service without discipline are a mitigating factor. For my part, I am struck by his recklessness; he truly did not appear to recognize that his behaviour, in particular the culminating incident of pointing a weapon with a magazine inserted at a concrete wall, alarmed and disturbed those near him.

[276] To me, the grievor's lack of remorse is an important factor when determining whether the penalty was excessive. He regretted not passing the course but seemed unprepared to take responsibility for that failure. Above all, he was not prepared to acknowledge the effect of his carelessness on others and the real fear that he had caused Ms. Douglas.

[277] The employer presented me with two decisions that call into question the disciplinary action imposed following firearm-related misconduct. In *Eden*, the employer imposed a 10-day penalty, which the adjudicator reduced to 5 days, for failing to lock up a service weapon. The penalty was reduced because it was too punitive, but the seriousness of leaving a service weapon behind was not in doubt. In this case, several times, the grievor simply failed to secure the 2 service weapons that had been assigned to him.

[278] In *Dawson*, the employer imposed a four-day penalty (which the Board upheld) for Mr. Dawson's inattention and lack of cooperation during a use-of-force and firearm certification renewal course. I do not think that the grievor in this case demonstrated such lack of cooperation, but his inattention and his failure to understand its impact remain.

[279] For all the reasons in the suspension letter, and for the grievor's failure to fully realize his effect on others, I find that the disciplinary action, the three-day suspension, was not excessive.

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

(The Order appears on the next page)

V. Order

[281] The grievance is denied.

June 28, 2022.

FPSLREB Translation

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