Date: 20240419

Files: 566-02-12947 and 566-02-12948

Citation: 2024 FPSLREB 56

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

MATHIEU DUPUIS-BEAUCHESNE

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Dupuis-Beauchesne v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Kim Patenaude, counsel

For the Employer: Marc Séguin, counsel

Heard at Toronto, Ontario,
July 8 and 9, 2021, and October 18 to 20, 2022.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Mathieu Dupuis-Beauchesne ("the grievor") was rejected on probation from his trainee position in the Officer Induction Development ("the OID") program, classified at the FB-02 group and level, of the Canada Border Services Agency ("the employer", "the Agency", or "CBSA") for knowingly attempting to avoid paying taxes on imported automobile parts. The employer maintained that the grievor's actions were incompatible with his duties as a trainee in the OID program. On September 20, 2016, the grievor referred to adjudication his grievances against his rejection on probation.

[2] The employer submitted that the Federal Public Sector Labour Relations and Employment Board ("the Board") is without jurisdiction in this matter, as the rejection on probation was a termination of employment under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "*PSEA*"). The grievor was provided with a letter informing him of the reason for the rejection on probation within the probationary period, and he was provided with pay in lieu of notice, as required by the *PSEA*. Under s. 211 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "*FPSLRA*"), a grievance against such a termination cannot be referred to the Board for adjudication.

[3] The grievor responded that his grievances against his rejection on probation fall within the parameters of s. 209(1)(b) of the *FPSLRA* and that they constituted disciplinary action resulting in termination or financial penalty. He maintained that the termination of his employment was disguised discipline and that consequently, the Board has jurisdiction to hear the matter. He maintained that there was no legitimate employment-related reason for the rejection on probation, which was made in bad faith.

[4] For the reasons that follow, the employer's objection is allowed. I find that the grievor's rejection on probation was done pursuant to s. 62 of the *PSEA* and for a legitimate employment-related reason. Therefore, the Board does not have jurisdiction over it.

II. Summary of the evidence

A. The training on the *Values and Ethics Code for the Public Sector* and the Agency's *Code of Conduct*

[5] The grievor was offered a full-time indeterminate appointment at the FB-02 group and level, effective January 12, 2015. The offer letter was signed by Jennifer Richens, Acting Director General, Training and Development Directorate, Human Resources Branch, CBSA. The appointment was conditional upon the grievor signing the letter's Appendix A and satisfying all its requirements. Notably, the letter referred to the *Values and Ethics Code for the Public Sector* and the CBSA's *Code of Conduct* and the *Policy on Conflict of ethics*. It specified that the probationary period was for one year or for the duration of the OID program, whichever was longer, excluding all periods of leave without pay. The grievor signed and accepted the offer on December 18, 2014. On the same day, he signed an oath that he would faithfully and honestly fulfil the duties as an employee of the federal public service of Canada.

[6] Ms. Richens testified at length about the OID program. The trainees go through an 18-week in-residence training on the customs side and immigration and are trained in primary inspections ("primary") and secondary inspections ("secondary"). The program encompasses ethical, theoretical, and practical training. The grievor was trained on the obligation to disclose the personal importation and exportation of goods and on how to perform searches. When a trainee becomes a border services officer ("BSO"), they are responsible for the safe passage of legitimate goods and services and persons into Canada. They are the first contact with Canada, and they are expected to perform their duties with integrity. They are the Agency's guardians and as such are held to a high standard. It is of utmost importance that they be trustworthy and accountable. The entire OID program is focused on those values. In addition to the OID training is an ethical component that all trainees must pass before becoming indeterminate BSOs.

[7] Ms. Richens explained that trainees learn to interface with travellers and to refine their reading of body language to determine if a traveller is being truthful. They develop questioning capabilities to pull information out of travellers. Their purpose is to enforce the legislation applicable to customs and immigration primarily, but it is also commercial. The trainees have the power to seize goods or impose penalties, depending on the situation.

[8] She described the difference between the primary and secondary inspection lines. The primary inspection line is the first point of contact, at which travellers are required to explain the nature of their travel, the goods that are being brought back, and the value of those goods. The trainees must determine if the traveller is a legitimate person returning with legitimate goods and whether they meet the personal exemption threshold for taxes and duties. The traveller has the onus of disclosing the value of the goods and making any required currency adjustments. The traveller has the obligation to be prepared with supporting documentation with respect to the value of the goods.

[9] If there is a suspicion or other indicator that the traveller is concealing goods or is otherwise not being truthful, the traveller is referred to the secondary inspection line. The secondary inspection line is a deep dive into what the traveller initially disclosed. It is in a separate area that does not impede traffic in the primary inspection line. Its purpose is to allow for a more in-depth investigation.

[10] Ms. Richens emphasized that the integrity of the Agency's BSOs is of the utmost importance and that it is critical that the BSOs' values and ethics align with those of the Government of Canada. The OID program and the offer letter made this explicit to the grievor. The expected behaviour of honesty and integrity is a condition of employment. In her view, his actions displayed a lack of honesty and integrity.

[11] For Ms. Richens, the purpose of the probation period is to ensure that the proposed employee meets the job requirements, that they are a right fit, and that they have the requisite knowledge, skills, and abilities. The OID program guide lays out the requirements, the length of the program, and how a trainee exits the program, among other things. If a trainee fails to meet the program's requirements, their status upon acceptance into the program determines their program exit. For recruits like the grievor who enter the program from outside the public service, the deputy head can establish that they are rejected on probation if they do not meet the program's requirements. All recruits are required to sign an oath that they will faithfully and honestly fulfil the duties that are devolved upon them by reason of their employment. In the grievor's case, the deputy head determined that he had violated the oath, and he was rejected on probation.

B. The grievor's reliability status was suspended and subsequently reinstated, but the Agency proceeded with an administrative investigation

[12] On January 9, 2015, the grievor was informed that his security clearance had been suspended. Because it is a condition of employment, he was not able to commence employment on the date indicated in his offer letter. She informed the grievor that he could contact Elizabeth Whalen, Manager, OID program, Human Resources Branch, CBSA, for more information. Ms. Whalen was David Akerley's counterpart in handling the recruitment side of the OID program. The grievor was put on notice that were his reliability status not reinstated, the employment offer would be rescinded.

[13] Ms. Richens recalled signing the letter setting out the indefinite suspension without pay. It informed the grievor that an administrative investigation would be launched into an incident that took place on December 29, 2014, concerning allegations that he knowingly avoided paying duties and that the Agency made a forced recovery at its port of entry in Prescott, Ontario. The letter alleged that the grievor made a false declaration and that he undervalued auto parts (a rear bumper) that he imported for his vehicle. He indicated that the value was USD$250. Only after the BSO pressed him did he declare that the actual value of the bumper was USD$599. Given the nature of the allegations and his duties as a trainee, the Agency had serious concerns about the grievor's integrity. Specifically, Ms. Richens wrote that these actions violated article 3 of the *Values and Ethics Code for the Public Sector* and articles 4 and 12 of the Agency's *Code of Conduct*.

[14] The preliminary investigation conducted by Mr. Akerley, Manager, OID Program, Human Resources Branch, CBSA, determined that a full administrative investigation by the Agency's internal investigation team was warranted. The grievor had just successfully completed 22 weeks of training. For Ms. Richens, the fact that his integrity was called into question warranted a full administrative investigation, to determine if the bond of trust was broken. The investigation took place while he was suspended without pay.

[15] The investigation revealed that the grievor had under-declared an auto part and that he had had no documents to support his claim when he arrived at the CBSA's Prescott Port of Entry. The grievor knew that the onus was on him to provide supporting documentation. He was trained in that respect. As a trainee, he was held to

a high standard. Ms. Richens explained that it is not the undervalued declaration that was problematic but the fact that the grievor had potentially lied to a fellow BSO. The Agency is responsible for Canada's safety and security, and its officers are held to a high standard.

[16] The grievor had recently been trained on the "Code of Conduct Revised: 2012 - Office of Values and Ethics - Version: June 2014". He was aware of the expectations of a trainee in private, off-duty conduct and outside agency activities and of the necessity to respect those values. At all times, trainees are expected to conduct themselves with respect, integrity, and professionalism. They are always officers, whether on or off duty. This incident was considered an off-duty integrity issue. Neglect of duty was included in the letter because it sets out the expected conduct for all CBSA employees. As a trainee or BSO, an employee must be aware of and always follow the applicable laws, rules, regulations, and policies. The grievor had just finished the OID program; he was aware and would have known the questions to come when crossing the border. He would have known that the officer would look for indicators and the consequences of making a false declaration. For Ms. Richens, it was unfathomable that the grievor would jeopardize his position at the start of his career for such a small amount. For her, there was a neglect of duty, which is why it is referenced in the letter.

[17] Ms. Richens then referenced article 3 of the *Values and Ethics Code for the Public Sector*, which was also mentioned in the letter that informed the grievor of his suspension. Integrity is the cornerstone of governance, and the ethical standards required of a public servant include conserving and enhancing the honesty of the federal public sector and always acting with integrity. Other members of public who under-declare are subject to penalties; so are CBSA employees.

[18] In cross-examination, Ms. Richens was questioned on the timeline with respect to the suspension of the grievor's reliability status and his suspension without pay pending the outcome of the administrative investigation. His security clearance was suspended on January 5, 2015, and was subsequently reinstated on February 20, 2015. The suspension without pay during the administrative investigation began on March 23, 2015. She was not involved in the investigation of the grievor's reliability status. Those matters are handled by the CBSA's Security Directorate ("Security").

[19] In cross-examination, Ms. Richens stated that she was aware of the February 20, 2015, letter pertaining to the reinstatement of the grievor's reliability status that occurred after he explained the events that took place on December 29, 2014. She indicated that it was determined that nonetheless, an administrative investigation was required, to understand more deeply what had taken place.

[20] Mr. Akerley conducted the administrative investigation. Ms. Richens recalled that a management team meeting was held with Human Resources and Security to discuss the elements that had come to light at that time, and it was decided that it should proceed to a full administrative investigation. They discussed the grievor's rebuttal, dated January 14, 2015, to the security investigation. No one felt the need to go back to him to verify anything in his rebuttal. Management concluded that it required an administrative investigation, even if Security recommended reinstating the grievor's reliability status. Management determined that it had to understand what had happened, at the base level. As of mid-August 2015, Ms. Richens was no longer involved in the investigation.

[21] In cross-examination, Ms. Richens was asked about her actions in following up with the administrative investigation. She confirmed that she was not kept informed of the investigation and that investigators are independent. They did not discuss their findings with her. The totality of the information collected in the security investigation and the administrative investigation formed the basis of the final decision to reject the grievor on probation.

[22] She stated that she followed up with respect to the administrative investigation in a general nature. This matter was not the only administrative investigation she was involved in within Security. There were always several things going on, and she recalled that Security was short-staffed and that it was a busy time for Security. She agreed that it took longer than desired but Security does pride themselves on thoroughness, and it wanted to make sure that the report produced was complete.

C. The administrative investigation revealed that the grievor knowingly attempted to avoid paying taxes on imported auto parts

[23] The employer called BSO Trevor Kennedy as a witness. On December 29, 2014, he was the primary BSO at the CBSA's Prescott Port of Entry. As the first point of contact for persons arriving in Canada, a primary BSO has a set list of questions to ask

travellers when they make their declarations. These are prompting questions to generalize the encounter with the individual; e.g., how long the person has been absent, whether they are a Canadian citizen, what was the purpose of their visit, and whether they have controlled substances or purchases to declare. With this information, the BSO decides whether to refer the person to secondary or to allow them into Canada.

[24] There is usually not much interaction between the BSO in primary and the driver of the vehicle who wants to enter Canada. Typically, it is routine; the driver provides a declaration for all the travellers in the vehicle and answers the primary BSO's questions. The answers determine whether the BSO will release the individual or send them to secondary for the mandatory payment of duties when the BSO suspects a potential contravention of regulations. If a BSO feels reasonably confident that a contravention of the *Customs Act* (R.S.C., 1985, c. 1 (2nd Supp.)) has occurred, the BSO may investigate further.

[25] On December 29, 2014, BSO Kennedy witnessed the grievor arriving at the primary inspection line in his Jeep. He asked the grievor the usual routine questions. BSO Kennedy recalled that the grievor stated that he lived in Gatineau, Quebec, at the time and that he had gone to a postal outlet to pick up a package. He declared the value of a Jeep bumper at approximately USD$250. Mr. Kennedy was suspicious about the value that the grievor declared. When suspicion arises about a declaration, a mandatory referral is made to secondary for further questioning with respect to the payment of duties and taxes.

[26] BSO Kennedy explained that in 2014, a secondary referral form was called an "E-67" referral. He referred the grievor to secondary, and he filled out the E-67 form. Depending on the circumstances, BSO Kennedy would have used his discretion to either pass the slip on to the officer in secondary or give it to the traveller to hand to the secondary officer; both were acceptable practices. In the grievor's case, he does not remember what he did with the referral slip. He referred the grievor to secondary because he suspected that he had undervalued the bumper. BSO Kennedy stated that he has significant experience with imported automotive parts. Based on his experience working at several other ports of entry, his assessment was that the grievor had undervalued the part.

[27] BSO Kennedy based his assessment on the value of the item on what he had experienced over the course of his career. The amount that the grievor declared did not seem right. It seemed low. BSO Kennedy recalled that the conversation with the grievor went on for a few minutes. He would have asked the grievor additional questions. He asked the grievor if he had a receipt. The grievor did not have one. As a matter of routine, BSO Kennedy would always ask for proof of the value of the item being imported. If the traveller did not have proof, then it raised questions of truthfulness. BSO Kennedy wanted to confirm the grievor's declaration that nothing suspicious was happening.

[28] BSO Kennedy could not recall the grievor's demeanour. His interaction with the grievor was of a short duration. He asked the grievor the usual questions. He could not recall all the details of his interactions with the grievor. BSO Kennedy stated that he followed up with his counterpart in secondary to determine the outcome of the grievor's declaration, which was how he found out that the grievor was a recent graduate of the OID program.

[29] In cross-examination, BSO Kennedy agreed that the standard practice now is to take notes when suspicion arises about a traveller's declaration but that in 2014, the primary officer did not take notes. In 2014, the focus was ensuring the consistent flow of traffic; therefore, the BSOs at primary did not take notes and simply referred some travellers to secondary. In his view, there was no point taking notes after the fact. What transpired after his interaction with the grievor was not relevant to him.

[30] In cross-examination, BSO Kennedy was asked about the E-67 form used when referring a traveller to secondary. BSO Kennedy could not recall what he did. Usually, in the event of a seizure under the *Customs Act*, the form is kept as evidence, but this was a forced collection, which equates to a verbal warning and the payment of taxes and duties. So, the E-67 form would have been destroyed. In the case of a forced collection, the E-67 form is not required. The secondary officer would destroy it and not keep it because no seizure took place.

[31] Further in cross-examination, BSO Kennedy stated that the use of cellphone receipts was not a common practice in 2014. Now it is more routine for individuals to have electronic receipts. But in 2014, a paper copy of an invoice was required, to refute any suspicion. If the person does not have a receipt or has insufficient paperwork, BSO

Kennedy agreed that in some cases, it would be acceptable to go online to find the cost of the good. He agreed that a quick Google search is acceptable to obtain a general idea and to determine if the declaration is accurate when compared to other similar products. If a traveller can find a similar item at the same price, then the traveller receives the benefit of the doubt. In the grievor's case, the grievor did not show him anything; it was a verbal declaration of USD$250. BSO Kennedy did not recall a formal interview with any investigator from Professional Standards.

[32] In cross-examination, BSO Kennedy was asked about the grievor's travel history, which was referenced in an email dated May 13, 2015, and is in the investigation report, at page 99. He stated that he knew Perry Birtch but not the investigator Diane Vallières. He was familiar with the travel documents used in secondary. The email referred to a report of all the grievor's border crossings. The email from James Forget to Mr. Birtch clearly indicated that the date in question was December 19, 2014. The time of the referral was approximately 15:14. Mr. Forget wrote that BSO Kennedy was working in the secondary lane on that day and that he referred the grievor for the payment of duties and taxes. The email further indicated that BSO Kennedy did not mark the E-67 for secondary examination.

[33] When cross-examined on the reasons that the grievor was not referred to secondary on December 29, 2014, BSO Kennedy stated that he did not recall the details of his shift on that date. He could not confirm if he worked on that day. He added that over 100 travellers a day can be processed and that he could not recall any distinguishing events. BSO Kennedy stated that sometimes, he is on primary, and that sometimes, he is on secondary. He is also an immigration officer. The BSOs rotate constantly between posts, and its up to management to decide where they are stationed for a specific hour. He did not recall any interactions with the grievor other than for the imported bumper.

[34] The employer called BSO Eric Charlebois, who was on shift on December 29, 2014. He explained that travellers are sent from primary to secondary with an E-67 form, which is the traveller's declaration of goods purchased across the border. The BSO at secondary prepares and produces a B-15 form when duties and taxes are collected from a traveller. BSO Charlebois identified the B-15 form that he filled out and that was in the investigation report. He recalled that the grievor was transferred to secondary and that he was the officer on duty there at that time. The grievor gave him

an E-67 form for an automobile part with a declared value of USD$250. The grievor did not have a receipt or any proof of payment except for a picture on his phone. BSO Charlebois was not satisfied with the grievor's declaration. The grievor told BSO Charlebois that in the CBSA's training program in Rigaud, Quebec, proof from the Internet of a good's value is acceptable. That was when he knew that the grievor was a recent graduate.

[35] BSO Charlebois felt that he had reasons to doubt the declared value. When the grievor presented him with an online picture of a bumper valued at USD$250, he was not convinced. BSO Charlebois has extensive experience with auto parts' importation and their value. The Prescott Port of Entry is known for the purchase and importation of auto parts. The grievor understood the risks of making a false declaration. He provided the grievor with several opportunities to tell him the actual value of the bumper. He questioned the grievor multiple times on that actual value, but the grievor continued to maintain that it was worth USD$250. BSO Charlebois reiterated the consequences of making a false declaration. The grievor stated that he understood the consequences.

[36] BSO Charlebois gave the grievor another opportunity to declare the actual value of the bumper as if he were in primary. The grievor still did not change his declaration. He invited the grievor to search his vehicle for the receipt. The grievor searched his vehicle but could not locate a receipt or bill of lading. There was no documentation in the box.

[37] At that point, BSO Charlebois knew that the grievor was not being completely forthright. He recalled telling the grievor that he would search his phone and that he would contact the supplier to find out the actual value of the bumper. He reiterated to the grievor that he simply had to pay the actual taxes and duties on the bumper and that there would be no other consequence. Finally, the grievor admitted that he had paid USD$599 and showed BSO Charlebois a picture of the actual bumper that he had purchased online.

[38] BSO Charlebois recalled that the grievor told him that he felt stupid for making a false declaration. Given the nature of the incident and the fact that a recruit was involved, BSO Charlebois alerted his superintendent. BSO Charlebois understood the consequences on the grievor, but he had given the grievor multiple opportunities to

remake his initial declaration. BSO Charlebois stated we would not be here today had the grievor been honest and declared the actual amount. The grievor was persistent throughout that the value was USD$250; he never stated that he was unsure of the amount.

[39] BSO Charlebois was convinced that something was amiss when he saw the box that contained the bumper. He asked the grievor for the shipping label or the receipt. The grievor stated that it did not have one. BSO Charlebois noticed that the box had a clear envelope glued on it in which the shipping label and receipt are usually situated. The envelope had been opened but was empty. He did not need to speak with the supplier because he had the serial number, and when he typed the information into Google, BSO Charlebois saw that the price was not USD$250. He then provided the grievor with another opportunity to tell the truth and assured the grievor that he would not seize the bumper but simply require him to pay the taxes and duties. That was when the grievor admitted to him that the actual amount he paid was not USD$250. BSO Charlebois felt that he had offered all the opportunities to the grievor to be honest in his declaration.

[40] In cross-examination, BSO Charlebois recalled that the grievor had mentioned that he had already declared two of the three parts that he had purchased on December 19, 2014. He recalled that the grievor had told him that the BSO had accepted his verbal declaration. When he returned from searching the grievor's vehicle, he did not recall if he asked the grievor if he smoked. He also did not recall questioning the grievor about the tires on his Jeep. He was sure that the grievor told him that he felt stupid and not that the situation was stupid. He affirmed that he always told travellers that he would contact suppliers to obtain the accurate value of the imported parts. This was a proven tactic to obtain an honest declaration from travellers.

[41] The statement that he provided the investigator was accurate. He did not recall that the grievor informed him that the bumper was the third and final piece of the three items that he had purchased. Officer Charlebois pointed out the bumper that he found online, and the grievor agreed that it was the same as the one he had purchased. He did not recall any explanation from the grievor that he had received a rebate on the parts or any explanation as to how the grievor had arrived at a USD$250 declaration. The grievor paid customs in the amount of CAD$34.81 on the full amount of USD$599.

[42] Mr. Akerley, Manager in the OID program, testified that he was responsible for the OID program, which comes after the training program that the recruits complete in Rigaud. At that time, he reported to Ms. Whalen, who reported to Kirsten Parfitt, Acting Director, National Recruitment and Professional Development Division, CBSA. The objective of this second part of the training program as a whole is to ensure a smooth transition into the field in a priority port of entry. Once recruits complete the program in Rigaud, if they still meet all the conditions of employment, they become a probationary employee for the length of the OID program. Most recruits must relocate after the Rigaud training. In certain circumstances, the probationary period can extend beyond the 12 months, up to 18 months.

[43] The grievor never physically reported to Pearson International Airport in Toronto on January 12, 2015, as indicated in his offer letter. The FB-02 position that he was set to occupy was in training and development. Upon their successful completion of the probationary period, trainees from outside of the public service are either promoted to an indeterminate position or if they are not suited to one, they are let go, or they find another position. The trainees must meet all the requirements of the overall program to be appointed to a regional BSO position. If they pass the probationary period and they meet all the requirements of the position, they are appointed to an FB-03 position.

[44] Mr. Akerley became involved when the director of the CBSA's Prescott District received information about the grievor. The grievor was a recruit. As the OID program manager, he was responsible for ensuring that the appropriate bodies were consulted and that the appropriate actions were taken to address the complaint. Mr. Akerley played a facilitative role and did not decide to reject the grievor on probation. However, his involvement was necessary because it involved a trainee's off-duty conduct. He was involved in the fact-finding that led to the Protection Service Integrity (PSI) report.

[45] Alexandre Lefebvre, Superintendent for the CBSA's Prescott Port of Entry, received the complaint from BSO Charlebois on December 29, 2014. The fact-finding report is in an appendix to the investigation report. It was a neutral process that collected information on what had transpired. Normally, the fact-finding is done locally, but because the complaint concerned a recruit's off-duty conduct, the OID program was responsible for the initial fact-finding.

[46] Although he was not involved in the PSI report, he facilitated the process. The information took some time to gather and was completed in July, but the report was not completed until October. He was not involved in the production of the report. His role was only to ensure that the investigator had access to all the information they needed. His role was to facilitate the investigation. The investigation report cannot be shared until it is vetted. He did not recall how he received the report, but he recalled having viewed it. Once the report is vetted, it is provided to the grievor for comments. He recalled his email to the grievor of December 7, 2015.

[47] Mr. Akerley recognized the notes that he took at the December 23, 2015, meeting, which the grievor attended with his union representative. Mr. Akerley was accompanied by a CBSA senior labour relations advisor. The purpose of the meeting was to allow the grievor to confirm that he had received the investigation report and to provide him with an opportunity to read it and to add or clarify any information. The meeting was very collegial and lasted approximately 50 minutes. The grievor identified different areas of the report that were missing information. After the meeting, the senior labour relations advisor contacted the company from which the grievor purchased the auto parts. He recalled the email exchange between the senior labour relations advisor and the company representative. The representative was asked how the purchase was done and if there had been a rebate. It was important to clarify the incident to understand the transactional process and the grievor's declaration at the border.

[48] The email exchange with the vendor made it clear that three items were purchased at full price; there was no rebate. The grievor was charged the full price and paid for the items at the full price. For each item, he received a free item. The vendor responded to the senior labour relations advisor's email by detailing the purchase and the items that were provided for free. The amounts of those items were then reduced from the purchase price of the auto parts. The grievor purchased three car parts and received three free items for paying the full price. The amounts of the free items were then separately deducted from the auto parts. The invoice details the cost of each auto part and the cost of the free items that were then deducted from the cost of the auto parts. The invoice is attached as Annex 12 to the grievor's statement dated January 13, 2015. Mr. Akerley stated that all the items purchased, including the free ones, should have been declared. The obligation on the traveller is to declare all products. Further to the grievor's comments, and after the PSI report was considered, the outcome was the

recommendation that the grievor be rejected on probation based on the consequences of his actions of not making a full declaration and his lack of suitability for the position. The employer determined that the bond of trust was broken because of his violation of the *Values and Ethics Code for the Public Sector* and the *Code of Conduct*.

[49] Mr. Akerley referred to the "Guidelines for Termination or Demotion for Unsatisfactory Performance; Termination or Demotion for Reasons Other than Breaches of Discipline or Misconduct; and Termination of Employment During Probation", specifically section 3(c), which provides a list of the criteria considered when the decision was made to reject the grievor on probation. Mr. Akerley was part of the team that wrote the "Officer Induction Development Program Suitability Review" for the grievor's officer trainee position. This document was prepared for the director general of training and development, who has the final authority to decide a recommendation to reject a trainee on probation.

[50] The recommendation to reject the grievor on probation was based on the facts of the case. In making his declaration, the grievor deducted the value of the gifts from the purchase price of the automobile parts. He should have understood that gifts do not reduce automobile parts' value. He knew that all purchases outside Canada must be declared, including gifts. The only logical explanation is that the full amount should have been declared. If the grievor claimed the gift as a rebate on or as a reduction of the value of the auto part, the logical flow would have been to declare the gift and its value. Even if it was a gift, the grievor would have known from his training that it was taxable and that it had to be declared. The ultimate price he declared was USD$250. There is no logical link between that declared amount and the value of the gift that he received for that auto part. As an Agency agent, he should have come prepared.

[51] The grievor was given several opportunities to make an honest declaration. The BSO training stipulates that when they cross the border into Canada, all travellers are expected to come prepared with the required documents. The grievor's story always stayed the same, even though he knew the price that he had paid. He never declared the real amount of USD$599; even the gift should have been declared. All of it was taxable, which he knew, and he should have known to declare it honestly. Moreover, he was given several opportunities to change his declaration.

[52] Mr. Akerley referred to the OID program outline, including the values and ethics of disclosing wrongdoing. All recruits are required to take this training and pass it before being posted as an FB-02. The recruits understand the requirements of making a declaration with proper documentation when crossing the border. It is emphasized that as BSOs, they enforce the law and therefore are required to uphold the law and conduct themselves in a manner that maintains Canadians' confidence in the law. Recruits are trained in calculating duties and taxes. They learn how to calculate customs and excise duties, the excise tax, the goods and services tax (GST), and the harmonized sales tax (HST) according to the *Customs Tariff* (S.C. 1997, c. 36), *Customs Act*, the CBSA's "D memoranda", *Excise Tax Act* (R.S.C., 1985, c. E-15), *Excise Act* (R.S.C., 1985, c. E-14), and *Excise Act, 2001* (S.C. 2002, c. 22). They learn how to operate the system.

[53] In cross-examination, Mr. Akerley was asked about the fact-finding report in the PSI report. Superintendent Lefebvre did not interview the grievor. He did not know what other document Superintendent Lefebvre would have consulted when preparing the initial fact-finding document. He was not aware if the senior labour relations advisor's email exchange with the auto-parts vendor was shared with the grievor or if the grievor was given an opportunity to comment on it.

D. The grievor consistently denied attempting to avoid paying taxes on the imported auto parts

[54] The grievor testified that he purchased front and rear bumpers and sliders for his new Jeep on November 28, 2014. He purchased them over the phone and paid via PayPal. The total amount was USD$1557. The invoice is in an appendix to the PSI report. The grievor used the website MyUSaddress.ca to receive these items that arrived from the United States. The claim receipt for MyUSaddress.ca is in an appendix to the PSI report and indicates the size of the package, the item number, and the total amount he paid for it. It does not list the items in the package separately.

[55] On December 17, 2014, the vendor informed him that one of the items that he had purchased was on back order and that it would contact him as soon as it was received. The grievor stated that a couple of days later, he drove across the border to the MyUSaddress warehouse to pick up the package, which contained the front bumper and the sliders. When he examined the packaging, he saw that there was no packing

slip. He thought that it was odd but because the order was incomplete, he thought that the packing slip would come on the next package.

[56] When he crossed the border and arrived at primary, he told the BSO that he was bringing in a partial order of two of the three items that he had purchased, and he showed the BSO the PayPal receipt, but it did not contain a breakdown of each item's cost. The grievor offered to show online the parts he had purchased to the primary BSO, who referred him to secondary. The grievor repeated the same thing to the BSO at secondary, except that that BSO agreed that the grievor could show him online proof of the cost of the front bumper and the sliders. He showed the BSO the front bumper and the sliders on the vendor's website. The grievor paid the duties and the taxes on them based on the online amounts. The CBSA declaration, the "Casual Goods Accounting" document, indicates that he paid CAD$48 in taxes on USD$959 of value in duty for auto parts.

[57] On December 19, 2014, the vendor emailed the grievor, informing him that the rear bumper would be delayed. The vendor mentioned that it would add something extra for the wait. On December 24, 2014, the grievor was notified that MyUSaddress had received the final part of the shipment. On December 29, 2014, he went to pick up the last of the three auto parts. When he picked up the package from MyUSaddress, he could not locate a packing slip or receipt. The grievor claimed that at that point, he had paid most of the taxes on his purchase of December 19, 2014. He said that he knew that he had to come up with an amount to declare at primary. The only receipt he had was the original PayPal receipt for all three parts in the amount of USD$1557. He stated that he wanted to be accurate and that he had already paid most of the taxes on December 19, 2014. The grievor said that he looked up the part online and that the value of the bumper was USD$399, which included the USD$200 discount that he had received.

[58] The grievor was again referred to secondary because he did not have a receipt. He recalled meeting with BSO Charlebois and telling him that he was bringing back USD$250 worth of parts from a previous order that he had purchased. The grievor told BSO Charlebois that he did not have a paper copy of the receipt or the packing slip but that he estimated the value to be around USD$250. The grievor offered to go online to show him the cost of the bumper. BSO Charlebois refused and insisted on a paper copy of the receipt. The grievor searched his car again for a receipt but could not find one.

BSO Charlebois insisted that he would search the grievor's car himself. BSO Charlebois was gone for approximately 20 to 30 minutes while searching the grievor's vehicle. When BSO Charlebois returned, he told the grievor that he had something more to worry about, like marijuana. The grievor vehemently denied having any marijuana. He felt startled at that point because it was an illegal substance, and he feared the potential criminal charges that could be laid against him. BSO Charlebois even questioned the grievor about the tires on his vehicle; he stated that the tires looked new, and he implied that the grievor had purchased them and had had them installed in the United States. The grievor was able to demonstrate that the tires had been purchased and installed in Quebec. BSO Charlebois did not know what to do with the grievor's situation and consulted his supervisor. He did not believe that the grievor paid USD$250 for the bumper, and the supervisor stated that the grievor should be treated like anyone else crossing the border.

[59] BSO Charlebois did not believe that the grievor had paid USD$250 for the bumper. The grievor had previously mentioned that he just completed the Rigaud training. He was caught red-handed and could not provide a receipt for the value of the parts; he felt stressed. As he scrolled through the vendor's website on his phone, the grievor saw that the value of the part was USD$599 and not USD$399. The grievor submitted that both parts looked the same online and that he received the wrong part. He undervalued the part by mistake. It was the first time that he had purchased and did not receive a packing slip. The grievor agreed that the value of the part was in fact USD$599. The grievor stated that he felt stupid and that he should have known better and should have been better prepared. He stated that he felt that his integrity had been attacked when BSO Charlebois raised potential allegations that he was in possession of marijuana.

[60] The grievor mistakenly referenced a picture of the bumper that he had purchased. The picture from the Internet indicated that it was a "Jeep Wrangler JK Rear Bumper - Mauler Stubby", sold at USD$399. The actual bumper that he purchased was a "Jeep Wrangler JK Rear Bumper - Crusader" tire carrier sold at USD$599. The grievor paid the taxes on USD$599 or the actual price that he paid. He confirmed that he paid the taxes on the free gifts that he received when he picked them up from across the border in February 2015.

[61] The grievor recalled receiving an email from the CBSA about an important package that he would receive through the mail. He was expecting to report to work in Toronto, Ontario, on January 12, 2015. When he received the letter, he was vacationing in Florida with family. His mother phoned him to let him know that he had received a letter in the mail. The grievor asked her to open it and to read it to him. The letter informed him that his security clearance had been suspended following an incident at the border. At that point, he cut his trip short and returned home. He contacted the point of contact in the letter. The person told him not to report to work and to wait for further instructions. At that time, his security clearance had been suspended.

[62] The grievor was asked to provide his version of the events that transpired on December 29, 2014. He addressed his letter and supporting documentation to the *Agent de sécurité du ministère, La sécurité et la Direction des normes professionnelles à l'Agence des services frontaliers du Canada*. He explained why he did not have an invoice for his purchase. He contacted the vendor and asked why he was not provided with an invoice. The vendor indicated that it had gone "green" and that only an email was sent to confirm the purchase. He never received the email because of a glitch in the system. After he made his explanations, his security clearance was reinstated, on February 20, 2015.

[63] The grievor contacted Ms. Whalen, to let her know that his security clearance had been reinstated and that he was ready to return to work. He told her that he was ready to start the next day. Ms. Whalen indicated that they would get back to him. They met on March 23, 2015, when she informed him that he would be investigated further. The letter indicated that a fact-finding would take place, to determine if he was still suitable to remain in the program. The grievor stated that he was puzzled by the fact that a different CBSA organization would conduct a second investigation. He was concerned by the fact that he was still on leave without pay and that another investigation was to take place.

[64] The grievor obtained union representation, and in May 2015, he met with the employer to provide his side of the story. The allegations were the same, and he provided the same version of the facts to the investigator. The grievor recalled that it was a long, stressful meeting that lasted over an hour. The grievor had another meeting with the investigator in the middle of June 2015. The investigator wanted proof of and the phone records of his call to the vendor and of his purchase of the

auto parts using PayPal. As indicated in the PSI report, the grievor sent the investigator a copy of the emailed invoice he received from the vendor on June 18, 2015. After his meeting with the investigator in July 2015, he did not hear back from her. Every other week, the grievor called, to follow up, because he was still paying for his apartment in Toronto. He was told that the investigation would be complete within a week or two, but it ended up taking all summer. Only in December 2015 did he receive an email from Mr. Akerley stating that the report was finalized and that he would have the opportunity to read and comment on it.

[65] The grievor was accompanied by his union representative when he met with Mr. Akerley and the labour relations advisor on December 23, 2015. The grievor was provided with an opportunity to clarify or to add to the report. He could not read some parts because they had been redacted. He recalled being given the opportunity to add information in response to BSO Charlebois's statement. He wanted to highlight the fact that he had been stressed and overwhelmed because of BSO Charlebois's accusations that he had possessed marijuana. The grievor wanted to make it clear that it had been an honest mistake on his part and that he did not try to evade paying taxes or to lie about his purchases. He disagreed with BSO Charlebois's statement that he was arrogant during questioning at the border crossing. In February 2016, his employment was terminated.

[66] The grievor was not provided with an opportunity to comment on the labour relations advisor's email to the vendor of January 6, 2016, with respect to the purchase that the grievor had made. He had not seen the email before the hearing. It does not represent what he discussed with the vendor when he purchased the auto parts. The description of the sale of the auto parts is not what was explained to him when he made the purchase.

[67] The grievor referred to the letter rejecting him on probation, which states that he knowingly attempted to avoid paying taxes on automobile parts. In his view, he could not have knowingly attempted to avoid paying taxes because he did not have the cost breakdown of the automobile parts that he had purchased. He did not have the itemized list, and there was no cost breakdown. To him, it was an honest mistake; he mistakenly identified the wrong bumper. He stated that he was happy to pay taxes on the right bumper and the gifts but that he did not have all the information. He had only the PayPal receipt, and the mistake he made of selecting the wrong bumper

amounted to CAD$20. He worked his entire career to lose a job for which he had just graduated from the training; he lost his reputation and pride for something so small. He would not have risked his career to avoiding paying that CAD$20.

[68] During the entire time he was being administratively investigated, he was on leave without pay, which was from the end of December 2014 to January 6, 2016. He lived with his parents during that time but kept an apartment in Toronto in case he was called back to work. The grievor had savings from his time working overseas. He also worked different contracts. The apartment rental in Toronto was $900 a month. He tried to sublet it, but it did not work out. He was hopeful that he would go back to work.

[69] In cross-examination, the grievor stated that it was an honest mistake. Nonetheless, the employer put to him that all travellers entering Canada are responsible for properly declaring and identifying the items they are bringing in. The grievor agreed.

[70] The employer further put to him that it was his responsibility to properly declare and identify the rear bumper. He further stated that he had to chase after the vendor to obtain an invoice and that he did not obtain it until January 2015. When asked why he did not wait to receive the invoice before crossing the border, the grievor responded that he did not know when it would come to him. He felt that the PayPal invoice was sufficient. Typically, the packaging includes a packing slip. When he picked up the bumper from the warehouse at MyUSaddress, there was no packing slip. He would have had to call the vendor and ask it to email him the invoice. The warehouse is located five minutes from the border and primary. The grievor agreed that it was his responsibility, that he owned his decision, and that he should have been better organized. Had he left the package at the warehouse, he would have been charged four more hours for the warehouse to hold it.

[71] In cross-examination, the grievor stated that he understood that he had benefited from a discount. When he placed the call for the purchase, he was at the Rigaud college. He understood from his conversation with the vendor that he would receive a discount as the purchase was made on Black Friday.

[72] The grievor was questioned about when he crossed the border on December 19, 2014. He paid taxes on the parts that he declared at over USD$900. The BSO did not

convert the amount to Canadian dollars. It should have been converted but was not. The grievor recognized that he should have been better prepared.

[73] On December 29, 2014, the grievor was hoping that the BSO on duty would accept online proof, as did the BSO on December 19, 2014. When he left the warehouse without an invoice and no packing slip and only the PayPal receipt, he was hoping that he could simply use the vendor's website as proof of the bumper's cost. The grievor searched for the bumper's cost on his phone while waiting in line to go through primary. Looking back on the situation, he rushed himself at the last minute. He could have taken better measures to make sure that he had the proper documentation before crossing the border. When he returned in February to pick up the gifts that he had received, he declared them and paid the taxes.

III. Reasons

A. The Board's jurisdiction on rejections on probation

[74] The Board derives its authority from the *FPSLRA*. Section 209 provides for the types of grievances that can be referred to the Board. The grievor referred his grievances pursuant to s. 209(1)(b).

[75] Section 211 prohibits referring to adjudication grievances about rejections on probation and states as follows:

211 *Nothing in section 209 or 209.1 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*	***211*** *Les articles 209 et 209.1 n'ont pas pour effet de permettre le renvoi à l'arbitrage d'un grief individuel portant sur :*
(a) *any termination of employment under the* Public Service Employment Act *….*	***a)*** *soit tout licenciement prévu sous le régime de la* Loi sur l'emploi dans la fonction publique […]

[76] In this case, the employer argued that the rejection on probation was done for an employment-related reason per s. 62 of the *PSEA* and that it was not disciplinary. It requested that I reject the grievances on the basis that the Board does not have jurisdiction, per s. 211 of the *FPSLRA*.

[77] The Board does not have jurisdiction to hear a grievance against a termination that resulted from a rejection on probation under the *PSEA*. The Treasury Board, as the

employer, has the right to impose a probation period to determine the suitability of employees new to the federal public service. The jurisprudence provides a narrow possibility for the Board to intervene when a grievor maintains that their rejection on probation was not done for an employment-related reason.

[78] For the rejection on probation to be lawful, the employer must provide the grievor with a termination letter setting out its reason for its decision. The employer asserted that the rejection on probation was related to the grievor's conduct when he knowingly attempted to avoid paying taxes on imported auto parts. The grievor denied the allegation and alleged that the rejection was made in bad faith.

[79] The employer provided the grievor with notice, in accordance with s. 62 of the *PSEA*. As indicated in the letter of rejection on probation, the employer provided notice of the reason for the termination of the grievor's employment within his probationary period, on February 19, 2016. The employer's investigation concluded that the grievor had knowingly attempted to avoid paying taxes on auto parts that he imported on December 29, 2014. The grievor was provided with 30 days of pay in lieu of notice. I find that on their face, the employer's actions met all the requirements of s. 62.

[80] The parties agreed on the applicable legal framework for rejections on probation. The Board's jurisprudence in this respect is well settled. In *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529, the Federal Court stated this at paragraph 37: "… Specifically, the employer need not establish a *prima facie* case nor just cause but simply some evidence the rejection was related to employment issues and not for any other purpose." That principle was reaffirmed in *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, in which an adjudicator under the predecessor *Public Service Labour Relations Act* had to determine if the legislative changes to the *PSEA* had changed the analysis for a rejection on probation. The adjudicator wrote as follows:

…

> *112 As I have concluded earlier in this decision, the provisions of the new* PSEA *have changed the burden of proof for cases involving the termination of employment of probationary employees.* ***The deputy head no longer has the burden of proving a legitimate employment-related reason for the termination of employment****, apart from providing the letter of termination which sets out the reason for its decision.* ***The burden is on the grievor to show the deputy head's contrived reliance***

> ***on the new* PSEA *or that the rejection on probation was a sham or a camouflage.*** *A termination of employment not based on a bona fide dissatisfaction as to suitability (or for no legitimate "employment-related reason") would be a contrived reliance on the* PSEA*, a sham or a camouflage.*
>
> …
>
> [Emphasis added]

[81] Once the employer has established that the grievor was given notice of the reason for the termination of their employment within the set probationary period, and the grievor was provided with pay in lieu of the notice, the grievor must then prove on a balance of probabilities that there were no legitimate employment-related reasons for the termination or that the rejection on probation was a contrived reliance on the *PSEA*, a sham, or a camouflage, or made in bad faith to hide an unlawful termination.

[82] In response to the employer's objection, the grievor submitted that his grievances against the rejection on probation fall within the parameters of s. 209(1)(b) of the *FPSLRA* and that the rejection constitutes a disciplinary action resulting in termination or a financial penalty. The grievor denied the investigator's findings that he knowingly attempted to avoid paying taxes on imported auto parts. He maintained that the termination of his employment was disguised discipline and that consequently, the Board has jurisdiction to hear the matter.

[83] The concept of an "employment-related reason" has since been clarified as a *bona fide* dissatisfaction with an employee's suitability or ability to perform the duties of the employee's position; see, for example, *Ondo-Mvondo v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 52, *Tello*, *Premakanthan v. Deputy Head (Treasury Board)*, 2012 PSLRB 67, *Kagimbi v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 19, *Kagimbi v. Canada (Attorney General)*, 2014 FC 400, *Kagimbi v. Canada (Attorney General)*, 2015 FCA 74, *Bell v. Staff of the Non-Public Funds, Canadian Forces*, 2020 FPSLREB 14, *Kot v. Deputy Head (Royal Canadian Mounted Police)*, 2020 FPSLREB 29, and *Rouet v. Deputy Head (Department of Justice)*, 2021 FPSLREB 59.

[84] The parties agreed that the Board's jurisdiction in this matter depends on whether the grievor's termination by way of the rejection on probation resulted from a disguised disciplinary action or a contrived reliance on the *PSEA*. To establish the

Board's jurisdiction, the grievor had to prove that on a balance of probabilities, there was no legitimate employment-related reason for the rejection on probation but that it was a disguised disciplinary action, sham, or camouflage, or made in bad faith to hide an unlawful termination.

[85] Therefore, the issues to be determined are whether the grievor knowingly attempted to avoid paying taxes and whether that constituted a legitimate employment-related reason to reject him on probation.

B. Was the rejection on probation based on a *bona fide* dissatisfaction with the grievor's suitability or ability to perform the duties of his position?

[86] I find that the rejection on probation was based on an employment-related reason and that it was not a sham, camouflage or made in bad faith. The letter of rejection on probation indicates that the employment-related reason for the rejection was for knowingly attempting to avoid paying taxes on imported auto parts that the grievor initially declared as having the value of USD$399 and for which he claimed to have received an approximately USD$200 rebate.

[87] The grievor claimed that he rounded the amount up and that he declared the value at USD$250. After being questioned by BSO Charlebois, he indicated that he had made a mistake and that the cost of the auto part was in fact USD$599, minus the rebate. That is consistent with the grievor's testimony and that of BSO Charlebois. The only inconsistency in the evidence was the grievor's characterization of his actions as being an inadvertent mistake when he declared the part as valued at USD$250 and his reasons for doing so.

[88] The employer argued that it need establish only that the rejection on probation was done for an employment-related reason. It relied on the principles established in *Leonarduzzi* and maintained that an employer need not make a *prima facie* case that a grievor was terminated for just cause. It advanced that a distinction must be made between "an employment-related reason" and "just cause".

[89] According to the employer, the rejection on probation was not a disciplinary action in this case. The employer referenced *Canada (Attorney General) v. Penner*, [1989] 3 FC 429 (C.A.), and *Tello* and stated that it is widely accepted that adjudicators have no jurisdiction to inquire into the adequacy and the merit of an employer's reason to reject an employee on probation as soon as they are satisfied that indeed,

the decision was founded on a real cause for the rejection, which was a *bona fide* dissatisfaction as to the employee's suitability.

[90] The employer referred to the Supreme Court of Canada's decision in *Jacmain v. Attorney General (Canada)*, [1978] 2 SCR 15, in which the Court stated that once the employer tenders credible evidence pointing to some cause for the rejection on probation that is valid on its face, the discharge hearing on the merits comes shuddering to a halt. The adjudicator, at that moment, loses any authority to order the grievor reinstated on the footing that the employer did not establish just cause for the discharge. As stated in *Leonarduzzi*, the employer reminded the Board that when determining whether there is an employment-related reason, the Board's role is not to substitute its judgment for that of the employer.

[91] The grievor agreed that the case law is well settled and that there is no ambiguity as to the application of the legal framework to grievances against rejections on probation. He had the burden of showing that there was a contrived reliance, sham, or camouflage, or made in bad faith and that the rejection on probation was not based on a *bona fide* employment-related reason. If the grievor can demonstrate that the rejection on probation was made in bad faith, then the Board must allow the grievances.

[92] The grievor maintained throughout that he did not knowingly attempt to avoid paying taxes. I cannot accept his explanation. Doing so would be in complete disregard of the evidence adduced at the hearing. Throughout, the grievor stated that he attempted to prove the cost of the rear bumper by referencing it on the vendor's website, which BSO Charlebois refused to consider. The grievor stated that while sitting in his car waiting to go through primary, he scrolled through the website to find the rear bumper that he had purchased online.

[93] The PSI report contains two screenshots of rear bumpers. One is for a "Mauler Stubby Rear Bumper - JK Wrangler", valued at USD$399, and the other is for a "Crusader Rear Mid Width Bumper - JK Wrangler", valued at USD$599. The grievor stated that he mistakenly referenced the initial bumper at USD$399 minus the rebate that he had received. He claimed that he received an approximate USD$200 rebate and that he rounded the amount up and declared the value at USD$250. He did not provide

any details to support his explanation. This is not substantiated anywhere in the documentation that he provided or in the investigation report.

[94] The grievor did not explain why he could not have simply referred to his PayPal receipt when he attempted to bring the rear bumper across the border and to explain to BSO Charlebois the cost breakdown and the fact that he had already brought two of the three parts across the border. He could have simply subtracted the amount on which he paid taxes on December 19, 2014, to determine the remainder of the taxes to be paid. On a balance of probabilities, I do not find it credible that he mistakenly referenced the "Mauler Stubby Rear Bumper - JK Wrangler", valued at USD$399, and not the "Crusader Rear Mid Width Bumper - JK Wrangler", valued at USD$599. The grievor knew which bumper he had purchased. He had purchased the larger bumper. They are very different. I cannot accept his explanation that it was an honest mistake.

[95] The employer submitted that since *Tello*, a deputy head is no longer required to provide a specific reason; there is only a requirement to provide an employment-related reason. There is no requirement to demonstrate just cause for a rejection on probation. I agree that a just cause is no longer required.

[96] The grievor may feel that the employer's decision to reject him on probation was excessive. Unfortunately, as described clearly in the case law, it is not the test. By his own admission to BSO Charlebois, the grievor was a recruit; he had just graduated from Rigaud. As Ms. Richens and Mr. Akerley clearly stated, recruits understand the requirements of making a declaration with proper documentation when crossing the border. The BSOs enforce the law and therefore are required to uphold the law and conduct themselves in a manner that maintains Canadians' confidence in the law. Recruits are trained in calculating duties and taxes on goods. They learn how to calculate customs and excise duties, the excise tax, the GST, and the HST according to the *Customs Tariff*, *Customs Act*, D memoranda, *Excise Tax Act*, *Excise Act*, and *Excise Act, 2001*. They learn how to operate the system. The grievor was recently trained and knew better. He admitted as much in his testimony.

[97] The grievor had signed an oath. He did not provide any valid reason for not arriving at the border better prepared. I accept Ms. Richens' position that for her, this represented a neglect of duty.

[98] The grievor advanced that the rejection on probation was made in bad faith because the employer approached the investigation with a closed mind. He maintained that it failed to question him about the auto-parts purchase and his follow-up communications with the vendor during the investigation. He was not provided with an opportunity to comment on the senior labour relations advisor's email exchange with the vendor.

[99] If in fact procedural unfairness occurred, it was corrected by this hearing. As the grievor's representative is aware, hearings before the Board are *de novo*. See *Patanguli v. Canada (Citizenship and Immigration)*, 2015 FCA 291 at paras. 38 to 42, which confirmed that a hearing before the Board is a hearing *de novo*. The employer is not required to establish just cause; nor is it required to afford a higher degree of procedural fairness during an investigation of a potential rejection on probation. Its failure to question the grievor on his follow-up communications with the vendor is not detrimental to the finding that he was neglectful and untruthful when he imported the last of the three auto parts. It does not negate the employment-related reason for the rejection on probation.

[100] The grievor accused the employer of causing a significant delay in the conduct of the investigation and a delay rejecting him on probation. His reliability status was revoked in January 2015 and was reinstated in February 2015. He remained suspended without pay and continued in that state until he was informed in March 2015 that another investigation would be conducted. The administrative investigation began in March 2015, but it took another two months to interview the grievor. He was interviewed only in May 2015.

[101] By July 2015, the investigator had all the evidence required to complete her report. However, the grievor did not receive a copy of the report until five months later, in December. Only at the end of December did the grievor, accompanied by his union representative, meet with Mr. Akerley and the senior labour relations advisor and receive opportunity to comment on the report. Two months later, the grievor was rejected on probation, in February 2016.

[102] The employer provided no reasonable explanation as to why it took so long to reject the grievor on probation. He maintained that he was financially prejudiced because of the delay. It is unfathomable that the entire process took 14 months, when

only 3 individuals had to be consulted. They were 14 months of limbo and stress for the grievor and 12 months of paid rent for an apartment he did not use because the employer constantly reassured him that he would receive the results soon. The employer's assertion that it prides itself on thoroughness is disingenuous because the investigation was complete as of July 2015.

[103] The grievor argued that it is well established that a delay can be considered when assessing an appropriate penalty. He submitted that the delay is evidence of bad faith on the employer's part. He relied on the findings in *Paglia v. Canada Revenue Agency*, 2020 FPSLREB 67 at paras. 247 to 253, where the adjudicator determined that a delay can indeed vitiate the employer's right to discipline an employee.

[104] The jurisprudence indicates that the factors to consider are the length of the delay, the reasons for it, and whether it caused any prejudice to the grievor. In some cases, a delay makes mounting a defence difficult or impossible, while in others, a grievor can view the delay as a condonation of their actions, making subsequent disciplinary actions unfair. Sometimes, the sheer length of the delay alone will void any discipline.

[105] The adjudicator in *Baptiste v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 127 at para. 331, found that the employer in that case had not been as diligent as could it have been and that the delay had caused prejudice to the grievor, as the grievor had been left in limbo for a significant period. The adjudicator reduced the length of the suspension.

[106] In *Chouinard v. Treasury Board (National Defence)*, [1983] C.P.S.S.R.B. No. 146 (QL), given that the employer had waited eight-and-a-half months after the alleged offences to impose discipline, the adjudicator found that the delay was unreasonable and unwarranted and that it had prejudiced the grievor into thinking that they had been pardoned.

[107] The same principle was applied in *Da Cunha v. Treasury Board (Employment and Immigration Canada)*, [1993] C.P.S.S.R.B. No. 181 (QL). In that case, the employer took an inordinate amount of time before discharging the grievor, a six-month delay occurred, and the grievor suffered agony due to uncertainty. The delay was a factor in the decision to rescind the termination and to substitute a lengthy suspension for it.

[108] In *Ontario Public Service Employees Union v. Ontario Public Service Staff Union*, [2011] O.L.A.A. No. 191 (QL), the Ontario Labour Relations Board determined that the employer failed to provide sufficient justification for its delays pursuing its investigation and finalizing the imposition of discipline on the grievor. The termination was rescinded because of prejudice to the grievor in defending themselves against the allegations of wrongdoing.

[109] In the case at hand, the employer took 14 months from the date on which the grievor's reliability status was revoked to the date on which he was rejected on probation. This was an inordinate amount of time; the employer was required to act with due diligence. For all those reasons, the grievor maintained that the employer acted in bad faith and that the Board should uphold the grievances.

[110] The grievor no longer seeks reinstatement but instead an award of damages in the amount of the cost of the rental agreement for the apartment that he was forced to rent and keep during the administrative investigation. He testified about the multiple times he followed up with the employer every other week because he was still paying for the apartment in Toronto. He asked if he should find another job because he could not afford to pay for the apartment. The grievor submitted that I should exercise my authority under s. 228(2) of the *FPSLRA* and award him the cost of the rent that he was forced to pay while he waited for the employer to complete the investigation.

[111] The employer relied on the Board's findings in *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33 at paras. 160 to 162, and stated that the mere fact of being on probation is sufficient warning that performance-related concerns could result in a rejection on probation. The employer is not required to provide any notice. The grievor's actions were not trivial, and the employer's investigation was not arbitrary. Although I can appreciate the stress and financial difficulties that the grievor found himself in when he was suspended without pay pending the investigation's outcome, the fact remains that he was a probationary employee.

[112] Although I agree that the employer took an inordinate amount of time to complete the investigation, it does not amount to bad faith as defined in the jurisprudence. The delay completing the investigation did not amount to a sham, camouflage, or made in bad faith. To find that the rejection on probation was a sham,

camouflage or made in bad faith, the reason for the rejection on probation must have been something completely different than was indicated in the letter rejecting the grievor on probation or worse, evidence that the grievor was a target of a capricious manager or colleagues. There was no such evidence in the circumstances of this case. The jurisprudence that the grievor submitted on delay was in the context of disciplinary action and has no bearing in the context of this rejection on probation.

[113] In *Penner*, the Federal Court of Appeal determined that a decision maker "… 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." The Court also stated as follows:

> … [a decision maker] *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.…*
>
> …

[114] Therefore, the Board must examine the circumstances that led to the rejection on probation to ascertain whether the employer relied on a *bona fide* dissatisfaction with the grievor's suitability to perform the duties of his position. In the case at hand, as mentioned earlier, by his own admission, the grievor agreed that he could have been better prepared when he imported the last of the three auto parts. He made a false declaration. As a recruit, making a false declaration at the border is a valid employment-related reason that justifies a rejection on probation.

[115] *Leonarduzzi* also applied the findings in *Penner* to the effect that an employer must adduce satisfactory evidence that it rejected an employee on probation, in good faith, and on the ground that it was dissatisfied with the employee's suitability for the position. Once the employer has met its initial burden, then it falls on the employee to establish that on a balance of probabilities, the alleged rejection on probation was really a disguised disciplinary action, camouflage, sham, or made in bad faith and that it was not done for a legitimate employment-related reason. The grievor was not able to establish that the rejection on probation was really for reasons other than an employment-related reason.

[116] Moreover, I find that the grievor's claim for damages on account of the delay rejecting him on probation is too remote. There is no evidence to support that the employer was negligent in conducting its investigation or that it deliberately delayed the investigation to cause the grievor financial harm. For all the reasons mentioned earlier, the grievor did not establish that the employer did not have an employment-related reason to reject him on probation, and the grievor's actions were incompatible with the duties and responsibilities expected of a trainee in the OID program. The Board does not have jurisdiction.

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

(The Order appears on the next page)

IV. Order

[118] The Board does not have jurisdiction.

[119] The grievances are denied, and the file is ordered closed.

April 19, 2024.

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board