

RECEIVED

By GALLOCH at 12:01 pm, Nov 03, 2021

WATERLOO REGIONAL POLICE SERVICE DISCIPLINARY HEARING

IN THE MATTER OF

POLICE CONSTABLE JESSE FOSTER #1299

AND THE WATERLOO REGIONAL POLICE SERVICE

CHARGES:

- 1. UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY—UNLAWFUL OR UNNECESSARY ARREST**
- 2. UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY—EXCESSIVE USE OF FORCE**

PENALTY DISPOSITION

BEFORE: SUPERINTENDENT (RETIRED) DEBRA PRESTON

APPEARANCES:

COUNSEL FOR THE PROSECUTION: MS. JESSICA BARROW

COUNSEL FOR THE DEFENCE: MR. BENJAMIN JEFFERIES

COUNSEL FOR THE PUBLIC COMPLAINANT: MR. DAVIN CHARNEY

Released Electronically: November 2, 2021

PENALTY DISPOSITION

Constable Jesse Foster (1299)

DATE: November 2, 2021

Superintendent (Ret'd) Preston: Before moving forward, I wish to thank Ms. Jessica Barrow, Mr. Ben Jeffries, and Mr. Davin Charney, for their work on this matter. Their professionalism and experience contributed to this penalty disposition.

On August 3, 2021, Police Constable Foster, badge number 1299, was found guilty of Unlawful or Unnecessary Exercise of Authority---Unlawful or Unnecessary Arrest and Unlawful or Unnecessary Exercise of Authority—Excessive Use of Force contrary to the *Police Services Act* (PSA).

Prosecution Submissions

The Service prosecutor entered the following documents:

- Constable Foster's Human Resource File (Exhibit 13)
- Prosecution Book of Authorities (Exhibit 14)
- Affidavit and Media Booklet (Exhibit 15)
- OPC Letter & training records (Exhibit 17)

Public Interest

As outlined in Ceysens' Legal Aspects of Policing (Exhibit 14, Tab 12), the case of Schofield and Metropolitan Toronto Police, O.P.C. 1984, notes that a misconduct disposition "must impress the public that...conduct on an officer's part must attract appropriate sanctions". As outlined in Andrews and Midland Police Service, OCPC, 2002 (Exhibit 16, Tab 2), the Commission noted, "...the penalty must ensure public confidence in their police force".

There must be a level of correlation between the public impact of the offence and the disposition as it relates to the misuse of police power. As noted in Wiles and Durham Regional Police Service, OCPC, 2014 (Exhibit 14, Tab 10), the Commission commented,

Police, by reason of their responsibilities, are given extended rights over and above those accorded to the general public. When these rights are abused the whole policing system is brought into disrepute and its effectiveness threatened. The Police Service must, therefore, zealously ensure its officers are not unlawfully or unnecessarily exercising authority or harassing the general public (Tab 10).

The ability to trust police officers to not act beyond their clearly defined powers of arrest and use of force goes to the heart of the relationship between the public and the police. The public must be able to trust the police to respect the confines of their authorities, to respect the Charter rights of the community, and to limit the arrest and use of force to circumstances when they are required. The public needs to be assured that this type of behaviour that strikes at the core of trustworthiness of police is taken seriously.

This incident had a very traumatizing impact on Ms. Broomes, on her trust of the police, and her safety in her hometown. Constable Foster essentially ignored his training, the limits of his police authorities, and the rights and liberties of Ms. Broomes. There must be some correlation between the intense and long-lasting impact of Constable Foster's impact on Ms. Broomes and the penalty received.

Seriousness of the Misconduct

As noted in Ceysens Legal Aspects of Policing, "In matters involving performance or competence, inexperience in the police force, and inexperience in the function in question, may constitute a mitigating factor" (Exhibit 14, Tab 12). The prosecutor submitted that there can be no mitigating value attributed to inexperience or lack of training in this matter. Also noted by Ceysens is that a violation of Charter rights may aggravate a penalty or that tribunals have concluded that one particular misconduct was more serious because the Respondent officer held a rank, had many years of service or specialized experience.

As noted in Blowes-Aybar and Toronto Police Service, OCPD, 2003, (Exhibit 14, Tab 1), the Commission commented, "an unlawful or unnecessary arrest is a serious matter to the complainant, and to society as a whole". In Suleiman and Ottawa Police Service,

OCPC, 2011 (Exhibit 14, Tab 5), the Commission set out the comments of the hearing officer as,

The Canadian Charter of Rights and Freedoms guarantees the right of Canadians to be free from unlawful search, seizure, and detention. These fundamental protections are the foundation of a truly democratic society and form the basis of policing law and regulation. Without important safeguards such as these, liberty from the excesses of policing cannot be ensured.

Further, the Commission noted that an unlawful search violates basic human rights and unlawful arrest is a serious matter.

In Venables and York Regional Police Service, OCCPS, 2008 (Exhibit 14, Tab 8), the facts of which are more serious than those of Constable Foster, the Commission noted the six principles of policing as set out in the *PSA*:

1. The need to ensure the safety and security of all persons and property in Ontario.
2. The importance of safeguarding the fundamental rights guaranteed by the Canadian Charter of Rights and Freedoms and the Human Rights Code.
3. The need for co-operation between the providers of police services and the communities they serve.
4. The importance of respect for victims of crime and understanding their needs.
5. The need for sensitivity to the pluralistic, multiracial, and multicultural character of Ontario society; and
6. The need to ensure that police forces are representative of the communities they serve.

The prosecutor asserted that Constable Foster violated the safety, security, and fundamental rights of Ms. Broomes. This is serious misconduct. His actions do not constitute a momentary lack of judgement. It took 40 minutes from when Constable Foster followed her car to when Ms. Broomes was released. At no point did Constable Foster realize that he had mis-stepped, that Ms. Broomes had been mistreated and correct his action.

In Constable Foster's initial training workbook, the core values of the WRPS are listed. The Prosecutor noted the values of diversity, education, integrity, and respect for life which set the stage for how Constable Foster is to present himself as a member of the Service.

Constable Foster completed his initial training at the Ontario Police College in March 2011. He completed 26x90 minute training sessions dedicated to the *Highway Traffic Act* (HTA) where he learned how to enforce the Criminal Code, the *HTA*, and the *Compulsory Automobile Insurance Act* (CAIA) to ensure public safety and reduce collisions. This training included arrest, conducting traffic/vehicle stops, and dealing with drivers in a professional manner. (Exhibit 17A).

Constable Foster was provided adequate training. He received 9x90 minute training sessions relating to Diversity and Professional Practice. He received 1x90 minute session on Policing and Changing Demographics, and 1x90 minute session on Human Rights and Responsibilities. At the outset of his police training Constable Foster received training relating to the topics at issue in his interaction with Ms. Broomes. He had eight years experience at that time. He was tested and met the standard at the Ontario Police College.

During his probationary training, Constable Foster reviewed several policies relevant to this misconduct, namely: arrest, bias-free policing, traffic management, traffic law enforcement and road safety plan, suspect apprehension pursuits and use of force. (Exhibit 13, Tab C-1). Other training included resolution techniques, identification of committed provincial offences and use of discretion in taking appropriate action (caution, charge, arrest). His coach officer noted that "Constable Foster has had many opportunities to exercise his arrest authorities and shows confidence when doing so" (Exhibit 13, Tab C-1).

In his probationary constable workbook #2, his coach officer noted, "Jesse Foster is very knowledgeable and knows where to research proper authorities if necessary. During our coaching period together, we had the opportunity to make over 20 arrests..." (Exhibit 13, Tab C-2). Constable Foster has shown he can discern or research the relevant authorities. His coach officer also noted, "We conducted many traffic stops and subject

stops to assist in building his confidence and ability to speak to many different members of the public”.

While at OPC, Constable Foster received training in Powers of Arrest, Intro to Law, HTA, HTA seminar, review, and an exam. He also received Implicit Bias training, de-escalation and use of force training and in 2014, he received diversity, bias-free policing, and anti-discrimination training, arrest, and investigative detention. The Prosecutor highlighted that Constable Foster was involved in 42 HTA charges over a three-month period in 2014. There is no doubt that Constable Foster was experienced, trained, and was able to approach the situation properly and legally. Training was not an issue. It is a fundamental part of a police officer’s job to know when he can or cannot stop, arrest, or detain someone and his disregard for his training, his authorities and his duties is serious.

Recognition of the Seriousness of the Misconduct

Constable Foster was entitled to mount a defence, and this cannot be viewed as an aggravating factor. He cannot get the mitigation of acknowledging responsibility either.

Employment History

Constable Foster has no discipline history. He was employed for eight years at the time of the misconduct. This is a mitigating factor.

Potential to Reform or Rehabilitate

As noted by Ceysens, “this consideration speaks to the issue of likelihood of re-occurrence and is closely connected with employment history. Logically, a respondent officer whose misconduct was ‘clearly out of character’ will have a higher potential to rehabilitate (Exhibit 13, Tab 12). There is no evidence that Constable Foster is a bad candidate for rehabilitation. He has no prior misconduct and has not behaved in a manner that suggests he is not able to be rehabilitated. There has been a substantial disregard for training with no acknowledgement of responsibility for his actions so there is limited evidence that there is rehabilitative potential. This is a neutral factor.

Effect on the Police Officer and his Family

There is no relevance to his family as there has been no evidence to suggest there has been any economic hardship that resulted from these circumstances.

Deterrence

Constable Foster needs a reminder of the importance of respecting and awareness of his legal authorities. This penalty should remind other members that violations of individual rights and freedoms and disregard for training and expertise has consequences. Specific and general deterrence are relevant to a disposition analysis.

Damage to the Reputation of the Police Service

There has been significant reputational damage because of this misconduct. There are 21 unique articles and three other media sources that have referred to Constable Foster's misconduct. Media has been present and have reported on this hearing. This causes significant reputational harm to the police service for an officer to disregard his training and police authorities and cause considerable harm to a member of the public. Having this information in the public is harmful to the reputation of the police service. The outcome of this hearing has faced some criticism, and there has been a lawsuit that must be litigated. There has been a documentary that featured Ms. Broomes. This misconduct created widespread reputational impact. The officer's actions caused considerable public scrutiny, have questioned the integrity, training, and biases of the police service, and resulted in considerable reputational damage. This is a significant aggravating factor.

Consistency of Disposition

In *Blowes-Aybar*, the officer and his partner stopped a citizen on his bike for *HTA* offences. The citizen was arrested for public intoxication. The hearing officer determined the individual was not intoxicated and the arrest was unlawful. The citizen slept on the floor in the cells overnight. Constable Blowes-Aybar had no prior misconduct at the disposition hearing. The Commission disagreed with a reprimand and ruled a four-day suspension was appropriate. The prosecutor argued the circumstances in this case are more serious. The case involving Constable Foster involved the use of force that was not

present in *Blowes-Aybar* which elevates the seriousness although there are elements that overlap.

The case of Fenton and Toronto Police Service, OCPC, 2017 (Exhibit 14, Tab 2) is a G20 case which involved two mass arrests of protesters. The hearing officer and the Commission concluded there was no evidence these were problematic protesters so each of the arrests was unlawful. The third charge related to one of the groups being left outside for hours in bad weather awaiting the outcome of their arrest. It was determined there was discreditable conduct related to mismanagement of the arrested individuals. The Commission considered the level of training that Superintendent Fenton received on relevant G20 issues. He had not been adequately guided by his executive team, he had an extensive disciplinary-free work history, and the extensive number of individuals impacted resulted in a penalty of a forfeiture of 20 days for each of the three charges. The distinguishing factors include the number of individuals impacted, the difference in the use of force between the cases, and the complex and challenging history with the G20 protesters. This case involved a very senior officer involved to the extent he guided lower-ranking officers. We typically see more severe penalties for higher-ranking officers. Constable Foster cannot be compared to the seniority of the Superintendent, but we do not see the significant level of mitigation as it relates to their work history.

In Mulville and Azaryev and York Regional Police Service, OCPC, 2017, both officers were found guilty of unlawful or unnecessary arrest and one officer was found guilty of discreditable conduct. The officers were dispatched to a house party due to complaints received and entered the home without invitation. One person filmed the officers and continuously interrupted their discussion with the homeowner. After several warnings to stop the intrusions, she was arrested and placed in the rear of the scout car without being told the reason for the arrest. The arrest was deemed unlawful as the officers had no appropriate authority to enter the home or conduct the arrest.

This case did not involve any use of force and the ability to enter the home was questionable. The Commission lowered the penalties—one officer received a reprimand and the other officer received training. This case is at the lowest end of the spectrum.

In Pereira and Hamilton Police Service, OCPC, 2018 (Exhibit 14, Tab 4), the Commission confirmed the penalty of 50 hours for a finding of guilt of unnecessary use of force involving a superior officer. This is included to demonstrate potential penalties along the spectrum from reprimand to demotion.

In *Suleiman*, the individual was arrested, taken behind a store, and strip searched contrary to Service policies. Two of the three parties shared the submission to penalty and the Commission upheld that penalty. The officer had a significant discipline history which is not present in the case involving Constable Foster. The Commission imposed a forfeiture of eight days or 84 hours. The case of Constable Foster does not have prior misconduct but does involve excessive use of force which resulted in bruising and an exasperation of an existing injury.

In Turgeon and Ontario Provincial Police, OCPC, 1999 (Exhibit 14, Tab 6), the officer and his partner stopped a vehicle and found the driver was unlawfully at large and without a licence. He was apprehended and the officer used excessive force which included pushing him against the van causing the youth to hit his head, threatened to take him to a selected area to make him talk and hit him in the face. The penalty of a forfeiture of 10 days was upheld.

This level of aggression or intentional violence is not present in the case involving Constable Foster. The use of force was not proportionate to the incident, but it was not nefarious as noted in *Turgeon*. The prosecutor asserted that *Turgeon* had more serious elements but there is the second finding of guilt as far as an unlawful arrest.

In Turpin and Durham Regional Police Service, OCPC, 2016 (Exhibit 14, Tab 7), the officer was criminally convicted as well found guilty of discreditable conduct and unlawful or unnecessary exercise of authority through the *PSA*. The *PSA* charges relate to two separate incidents where the officer used excessive force on two different individuals. The first was a threat to punch a person's teeth through the back of his head and grounding him twice resulting in a cut to his eye. The second incident involved the grounding of a prisoner which resulted in two black eyes. The officer had a significant

misconduct history, and the dismissal was upheld by the Commission. This forms the very outside of the range and demonstrates how far we are from where our penalty should be.

In *Venables*, the officer approached an arrested person in the rear of a police cruiser, punched him in the head and made a racial slur. His dismissal was upheld. He did not have a misconduct history, but the intentional and aggressive nature of the violence and discrimination warranted a significant penalty.

In Vogelzang and Ontario Provincial Police, OCPC, 2012 (Exhibit 14, Tab 9), the officer was found guilty of one count of unlawful or unnecessary exercise of authority. An individual was advised to pull over and provide his documentation. The driver was ultimately arrested for breach of the peace and a search of his vehicle was conducted. The hearing officer concluded there was no reasonable evidence to substantiate the belief that the driver was a risk/threat to the public. In the case of Constable Foster, there was a subjective concern, but objectively there was no evidence that an arrest was warranted. There was no use of force in the case of *Vogelzang* which minimizes the severity of that misconduct. The conviction and penalty of 24 hours was upheld by the Commission. The Commission cited some comments from the hearing officer which are relevant to the case of Constable Foster. These include the fact that the individual was deprived of his freedom, handcuffed, and placed in the cruiser, his vehicle was searched, and the arrest was unlawful. The intrusiveness of the arrest extended to his property. Police are afforded significant powers to remove an individual's freedom and it is for this reason they are expected to exercise their arrest authorities with the greatest due diligence, care, and caution.

The case of *Wiles* is a dismissal case and demonstrative of the outside of the range of penalties. He was found guilty of unnecessary exercise of authority and unnecessary use of force. The officer ran after a young male, kicked in the door to his house and placed him under arrest under the Mental Health Act. He grounded the young male three times. Constable Wiles had two previous *PSA* convictions and a criminal conviction.

In Wong and Toronto Police Service, OCPC, 2015 (Exhibit 14, Tab 11), an individual was arrested for wearing a bandana during the G20 protests. His belongings were searched,

and he was in custody for 28.5 hours. There was no use of force as noted in the case of Constable Foster; however, this person's liberties were removed for a considerable period. The officer only received a one-day forfeiture.

The cases situated at the low level do not involve both unnecessary use of force and unlawful arrest. The cases involving high-level demotions and dismissal are far more serious in terms of extensive misconduct history, or the aggressive, violent, or criminal conduct. The prosecutor submitted that the minimum penalty when considering all the specific facts of the case is in the range of eight to 10 days forfeiture. It is the Service's submission that additional training is warranted as Constable Foster did not demonstrate an appreciation for his conduct and has not acted consistent with the training he has been provided. He should be ordered to attend additional training on dealing with the public and unconscious bias, as well as *HTA* and investigative detention as the articulation piece was lacking in this case.

Counsel for Public Complainant Submissions

Impact on Ms. Broomes

Ms. Broomes has suffered psychological harm. She gets panic attacks when driving and she sees the police. She has been diagnosed with the complex post-traumatic stress disorder, suffers from insomnia and anxiety which affects her memory. She has a physical injury to her right arm, continues to experience numbness in the arm, cannot straighten it, has difficulty lifting and believes that her arm would have healed better/differently if not for the arrest. This incident was life-changing and has affected her ability to work and her relationships with her family. She has required therapy and incurred significant legal expenses. Ms. Broomes had to self-fund her representation. She has put herself out there publicly to draw attention to this issue for altruistic reasons in the hope of making broader, systemic change to policing. She has subjected herself to public scrutiny, hearing opinions and seeing negative comments in media articles. She has been brave for bringing her story forward. Her sense of safety with the police has been undermined and she does not feel that she can rely on the police to assist her.

Ms. Broomes has a continued belief that this case was about race which also undermines Ms. Broomes sense of safety. Whether the penalty is five to twenty days, the result is going to be unsatisfactory as the punishment does not fit the crime. The prior decisions have failed to hold police accountable for their misconduct and whatever decision is reached will continue to undermine public confidence in policing

Media

Counsel acknowledged the hearing has been very public, the finding of misconduct has harmed Constable Foster's reputation and the effect of publicity has been significant on him. This plays a role in both specific and general deterrence which has given some level of control to the complainant. The media were aware of this case as they were invited to the hearing by Counsel as the public should appreciate the findings of guilt and how it will impact the reputation of the officer which is positive in terms of deterrence.

Training

Counsel agreed that Constable Foster did not comply with his training, but he did not agree that the officer was highly trained or received extensive training as officers are not highly trained in general. He supports any measure that would require Constable Foster to receive additional training as he would for any officer.

The reputational damage to the service is warranted and Counsel did not agree that Constable Foster's conduct should be looked at in isolation, such as a rogue officer. The training he received is not sufficient and was the responsibility of the organization.

Defence Counsel Submissions

Defence counsel entered the following exhibit:

- Defence Book of Authorities (Exhibit 16)

Public Interest

Counsel asserted that the public interest is not a relevant consideration. The Prosecutor conflated the public interest consideration with the seriousness of the misconduct and

reputational damage. The fact that this is serious misconduct which caused reputational damage does not engage the public interest consideration. Ceysens notes that the public interest consideration is engaged where the misconduct created a demonstrable risk. The nature of the misconduct engages a specific consideration.

Seriousness of the Misconduct

The misconduct before the Tribunal is serious misconduct as defined by the Commission. The Prosecutor highlighted cases along the spectrum from a reprimand to serious dismissal cases. This is a case with several mitigating features. My finding underscored the fact that this was not an intentional act, it was not malicious or made in bad faith. This was not a course of action that Constable Foster set out to do. My finding supported the fact that the force used by Constable Foster was not proportionate to the nature of the issue. This is not an officer who lost control, or struck Ms. Broomes, or acted outside of his authority. He attempted to bring this physical encounter to an end in a calm and professional manner.

Recognition of the Seriousness of the Misconduct

Constable Foster has the right to make full answer and defence to any allegation of misconduct. He availed himself of that right. This factor cannot be viewed as an aggravating factor, nor is it a mitigating factor. The Commission has accepted this position as outlined in Batista and Ottawa Police Service, OCCPS, 2007 (Exhibit 16, Tab 1) wherein they stated, “All of these actions were his right. Constable Batista cannot be penalized for so doing. Rather, he is not entitled to any mitigation that flows from a guilty plea and clear acceptance of responsibility”.

Employment History

A long period of service without any record of discipline or misconduct will operate as a mitigating factor. Constable Foster was hired by the WRPS in December 2010. He was sworn in as a police constable on April 13, 2011. At the time of this incident, Constable Foster had six years of service and was a first-class constable. He achieved all his regular promotional advancements without issue. He has an unblemished record. His

commendations and letters of credit are highlighted (Exhibit 13, Tab G). Constable Foster is entitled to mitigation for his prior unblemished service.

Potential to Reform or Rehabilitate

The Commission has emphasized the importance of rehabilitation in *Andrews*, wherein they noted, “Unless the officer is beyond rehabilitation, the door should be kept open for the officer to be rehabilitated and the penalty should be tailored to provide him the opportunity to do so”. The parties agreed this is not a dismissal case so we must find the training and tools that will allow Constable Foster to move forward and continue to be a contributing member of the WRPS.

Defence counsel noted that I found that Constable Foster did reflect on many areas where he would have done things differently and found that Constable Foster is someone who understood the need to learn from this experience. Counsel asserted that Constable Foster will learn from the circumstances that brought him before the Tribunal and he will be a better police officer for doing so. The potential to reform is a mitigating factor.

Impact on the Police Officer and His Family

More than four years have passed since the incident in July 2017. Mr. Charney fairly acknowledged the significance of the prosecution on Constable Foster and the significance of the time that has passed. Constable Foster has lived and worked under a shadow for a four-year period which has impacted his mental health and this Tribunal acknowledged the impact that the delay has had on Constable Foster. Counsel asked for the Tribunal to be mindful of the effect and impact the lengthy prosecution has had on Constable Foster by way of a mitigating consideration.

Consistency of Disposition

Mr. Jeffries acknowledged the cases as outlined by the Prosecutor.

He asserted that the case of Johnson and Durham Regional Police Service, OCCPS, 2020 (Exhibit 16, Tab 3) is the most relatable to the case before this Tribunal. The officer responded to a call for two males reportedly fighting. Once on scene, he came upon the

complainant and asked him to attend the scout car for a pat down search. The complainant refused and walked away. The officer deployed his pepper spray on two occasions, chased the complainant and forced him to the ground. The complainant was handcuffed, and the officer struck him in the head. The strike was captured on video.

The officer was charged with unlawful or unnecessary exercise of authority. The officer denied striking the complainant. The officer was convicted and was given a penalty of a forfeiture of 24 hours. The conviction and disposition were appealed and both appeals were dismissed by the Commission. The Commission, in confirming the penalty, noted the hearing officer's conclusion that the matter was aggravated by the assault on the complainant who was handcuffed and prone on the ground. This aggravating factor does not exist in the case before this Tribunal. At no time did Constable Foster strike or use force on Ms. Broomes while she was handcuffed or prone. Upon review of the video, I will find a professional officer who, notwithstanding the fact that he stepped outside the scope of this authority, endeavoured to end the physical interaction with as little harm or force as possible. The penalty of 24 hours in this case should provide significant guidance. The absence of the second element is offset by the fact that we do not have the assault after the person was handcuffed, prone and otherwise detained.

The case of *Turpin* involved two separate occurrences with assaults on individuals in police custody, handcuffed, premeditated, malicious and bad faith. The officer was criminally convicted with a prior disciplinary record for related misconduct which distinguishes this case from that of Constable Foster.

In *Venables*, the officer approached the back of the cruiser, made a racial slur, and punched the arrested party in the head. He was handcuffed, compliant and suffered a split lip and chipped tooth. The officer was criminally charged and plead guilty to common assault. This case is unrelated to the facts in the case before this Tribunal.

The case of *Wiles* involved an unlawful entry into a residence and an unlawful or unnecessary exercise of authority, unlawful arrest. The officer had two prior instances of misconduct which involved violent assaults on persons in custody. He had a previous

criminal conviction and by way of progressive discipline he was demoted from first to second-class constable for 15 months. This was a dismissal case.

The circumstances in the *Wiles*, *Turpin* and *Venables* cases are far removed from that of Constable Foster.

The *Fenton* case involved the unlawful arrest of 450 protesters. The officer was a senior officer, and this is a fundamentally different case. The 20 hours imposed for each count radically distorts the difference between the circumstances with Constable Foster and Ms. Broomes.

In *Turgeon*, the officer pushed the youth against the side of a van, threatened to take him to a secluded location and make him talk. While at the station, the officer hit the complainant in the face. The penalty of 10 days or 80 hours was upheld by the Commission. This was a violent, premeditated unprovoked assault perpetrated on a young person. The seriousness of the misconduct in *Turgeon* is fundamentally different from the case involving Constable Foster.

The *Suleiman* case involved a strip search behind a convenience store. The invasive nature of the strip search was commented on by the Commission and distinguishes this case from case involving Constable Foster. This invasive strip search justified the 64-hour penalty. This significant and aggravating case is not a good guide post in assessing the appropriate decision.

The *Pereira* case is not a penalty decision. It is an appeal to the Commission based on an allegation of bias against the hearing officer. No submissions about an appropriate penalty were made and the Commission confirmed the 50 hours imposed by the hearing officer. We cannot look at this decision as a guide post to compare to the circumstances before this Tribunal.

The *Blowes-Aybar* case involved an individual who was unlawfully arrested and detained, slept on the floor overnight and received a penalty of four days or 32 hours. Ms. Broomes was detained for approximately 30 minutes.

In *Mulville*, one officer received a reprimand and the second officer received further training. An individual was unlawfully arrested, detained, and never advised of the reason for the detention or her rights, and the Commission upheld a reprimand in that case.

The *Vogelzang* decision is akin to the case before the Tribunal. There was a traffic stop based on erratic driving behaviour, the complainant was detained for 10 minutes in the rear of the cruiser and subject to an unlawful search. There was the added seriousness which extended from the breach of a person to the search of the person's property which is absent in this case. The officer was assessed 24 hours.

In *Wong*, the complainant was arrested and detained for 28.5 hours which resulted in a forfeiture of one day or eight hours.

The decisions in *Blowes-Aybar*, *Mulville*, *Vogelzang*, *Wong* and *Johnson* are the guide by which this Tribunal should inform itself.

Specific and General Deterrence

These factors should not be over-emphasized given that my finding was that the misconduct was not intentional, not motivated by malice or bad faith. Training with respect to the *HTA* and/or investigative detention is a greater tool for addressing specific deterrence considerations and reform and rehabilitation considerations. General deterrence has value as officers must be mindful in educating themselves about conducting themselves within the parameters of their arrest authority. Constable Foster did not set out to create this scenario. Deterrence is better obtained by education rather than the imposition of an especially harsh penalty.

Effect of Publicity

Much of the media scrutiny and headlines refer to the allegation of racial profiling. This media attention has spanned a four-year gap under which Constable Foster provided service to the WRPS and has lived in the community. For four years, he has been branded in the headlines as a person who racially profiled an individual that he dealt with in his professional capacity. He has borne that public humiliation and he was tried and convicted in the court of public opinion before his hearing began. This has taken an immense

emotional and personal toll on Constable Foster to get to the point where he could tell his story, defend himself and respond to the allegations. Whatever sentence is imposed will pale in comparison to what Constable Foster has been through from an emotional standpoint.

In the case of Gauthier and OCPC, 2015 (Exhibit 16, Tab 4) the Commission noted public humiliation in the media to be a mitigating factor. The Commission commented,

I agree with the Chief's submission that he has already paid a high price for his actions, including great stress and embarrassment to himself and his family, public humiliation in the media and of course the stain that has been created on an otherwise admirable career and reputation...It is clear that the Chief enjoys a reputation of respect and trust by many officers, administrators and citizens of Timmins...I note that the Chief has been subjected to public scrutiny that has likely caused stress to both himself and his family.

The prosecutor submitted that the public media attention ought to be treated as an aggravating factor given the damage to the reputation of the police service. After reading the headlines in the news over a four-year period and considering the emotional toll of that media on Constable Foster, the stress, the embarrassment to his family, the public humiliation of being involved in this prosecution, especially with respect to an allegation of racial profiling, should constitute a mitigating factor.

Defence counsel submitted that 24 hours is the appropriate penalty in the case involving Constable Foster and spoke about the value of training in investigative detention and the *HTA* as Constable Foster rehabilitates himself and addresses these discipline issues.

Prosecution Reply

With respect to training, you cannot separate from the overall narrative that this was an incident that involved people of different races. It related to how Constable Foster dealt with a member of the community where he failed to open the lines of communication and approached Ms. Broomes in an aggressive way which is relevant to determining the degree to which he can deal with members of the public and from a penalty perspective, how to address that failure. To the degree that Constable Foster received training on

issues relating to his arrest powers and disregarded them, that training is relevant to his rehabilitative potential and to the penalty.

The public interest is engaged in this situation where an officer abused his police powers and unlawfully arrested a member of the public. The public should be able to trust police officers will only engage their police powers that are intrusive and restrictive in appropriate circumstances. The public interest is a relevant and important factor in this case.

None of the cases submitted are completely on point which is why this Tribunal must look at the entire spectrum and discern which facts are on point and where this case falls. The *Johnson* case does not involve excessive or unlawful use of authority; it involves excessive use of force. It is no more applicable than the other cases before the Tribunal. In the cases with lower penalties, there is one small element of unlawful behaviour in an otherwise lawful interaction with the police which is different than the case involving Constable Foster.

From beginning to end, Constable Foster did not comply with his training or police authorities. I found that he conflated his *HTA* and Criminal Code authorities. His entire interaction was unlawful which makes his case more serious than the lower end of the spectrum.

The prosecutor agreed that there has been an impact on Constable Foster due to the prosecution and media attention which has been difficult for him. To a certain extent, this was a situation of Constable Foster's own making. This would not have happened if Constable Foster complied with his police duties.

Constable Foster is a WRPS police officer, a representative of the WRPS, he represents its interests when he interacts with the public and any reputational damage that is done to Constable Foster also turns on the WRPS. The prosecutor's submission remains that the WRPS was subjected to a high level of public scrutiny, reputational damage and this is an aggravating factor.

Decision and Analysis

Police officers are entrusted with significant authority, and that authority has a corresponding requirement for accountability. The public has an interest in ensuring that our police officers perform their duties in keeping with applicable procedures and legislation while taking all steps to ensure public and officer safety. That accountability to the Service and the public includes the requirement that officers work within the confines of the law and know the authorities that govern their actions.

Public Interest

The public interest is very relevant, if not at the heart of this matter. The community must have faith that officers have the requisite knowledge, skills, and abilities to fulfill their duties, and the confidence to exert their authority correctly depending on the scenarios they face. In short, the public must have clear expectations that police officers will perform their assigned duties diligently and according to law. Police officers are empowered by law with extraordinary powers of arrest and detention. They are entrusted to protect the rights and freedoms of the public and must be prudent in their application of the law. Constable Foster's actions fell short in these areas. It was his responsibility to continually assess the situation as it unfolded, look for options, and operate under the appropriate statute. His goal was to identify and detain the driver of the van, but he incorrectly used his authorities to achieve that goal. Police officers are authorized by law to use force to affect a lawful purpose, but that use of force must be lawful and proportionate to the circumstances. This was not a case of Constable Foster assaulting a handcuffed and vulnerable person, as noted in *Venables* and *Turpin*, but the force used was not justified or proportionate to the circumstance he faced. The public interest was engaged when Ms. Broomes was pushed and held against her vehicle and ultimately grounded and handcuffed, simply for taking her son to work.

Defence counsel noted that it is the nature of the misconduct that engages a specific consideration. I find that an officer who is found guilty of making an unlawful arrest and using force to effect the arrest while disregarding his training and available options rightfully engages the public interest. There was a demonstrable risk and outcome to Ms.

Broomes because of their interaction and this should be a concern for those involved, the community, and the organization. I find the public interest is an aggravating factor.

Seriousness of the Misconduct

When an unlawful arrest is made, a person's liberty is taken away and, however brief, forms serious misconduct. This premise is supported by the Commission in *Blowes-Aybar* where they note, "an unlawful or unnecessary arrest is a serious matter to the complainant and to society as a whole" (Exhibit 14, Tab 1). I agree that Constable Foster's physical actions were not borne out of malice, and he did not lose control or strike Ms. Broomes, but when officers use force to make an unlawful arrest, the seriousness of that misconduct is elevated. I found that Constable Foster did not have good and sufficient cause for the arrest. It was Constable Foster's actions, along with his initial investigation, that contributed to the series of poor decisions and once on that path, Constable Foster did not consider other options. He made very clear choices in this interaction contrary to other available information. Good judgement and level-headedness are fundamental requirements of the public office that a police officer holds. Officers must continually assess the situation and be willing to disengage or use other options if the scenario changes. The conduct of Constable Foster is serious, and it detracts from the organizational commitment to professionalism. Professional behaviour works together with the Service's core values and both are essential elements of public trust.

I agree that there must be a correlation between the intense and long-lasting impact of Constable Foster's actions on Ms. Broomes and the penalty received; however, that correlation must be kept in context. Ignorance of the law or the application of the law is not acceptable. Constable Foster was an experienced officer at the time of this incident. He received training on the application of the statutes and in this case, his actions were not reasonable or warranted given the circumstances. As I noted in my decision, there were options available to the officer. Constable Foster is responsible for how he handled the interaction and not de-escalating the situation.

Constable Foster was not an inexperienced officer at the time of this incident as noted in his HR file (Exhibit 13) and letters from the Ontario Police College (Exhibit 17, A-B).

Constable Foster had a variety of experiences in his probationary constable period which included many *HTA* experiences. His coach officer described where to access various policies and procedures in the division and in the scout car. His coach officer noted that Constable Foster had many opportunities to exercise his arrest authorities and showed confidence when doing so. He completed traffic stops to enhance his communication skills. His goal at the end of his first phase of training was to “continue to gain confidence while interacting with the public. Exercise proper police powers and gain as much knowledge as I can through practice and other senior officers” (Exhibit 13, Tab C2). He completed the General Investigation training course on April 21, 2017 (Exhibit 13, Tab E).

Although I do not have his most recent performance appraisals, I find that Constable Foster had the requisite training on the proper use of his authorities. A significant amount of time is rightfully dedicated to teaching officers’ proper communication and how to diffuse situations involving members of the community. Time is also spent reminding officers of their organizational obligation to the citizens within the community, and this training refers to how officers conduct themselves in keeping with their Oath of Office, faithfully, impartially, and according to law (Exhibit 13, Tab A). The Service’s core values are taught to members from the moment they join the organization (Exhibit 13, Tab C1). These values remind everyone to always be a good role model, demonstrate patience and flexibility.

I disagree with Mr. Charney that police officers, in general, are not highly trained. We may differ with respect to how officers are trained, or the type of training received, but upon review of the officer’s HR and training file, Constable Foster had the requisite training and tools when he engaged with Ms. Broomes. I found that the arrest of Ms. Broomes was not borne out of malice, but it was certainly more than an error in judgement. I also do not find that Constable Foster is a ‘rogue’ officer by any stretch, which is supported by his HR file.

A member of the community had her liberty removed. Her Charter rights were breached, and she was mistakenly labelled as having been involved in a weapons call. This is an event in Ms. Broomes life that cannot be fully remedied or made whole. There is no

penalty that can 'right the wrong' as experienced by Ms. Broomes or restore her faith in the policing profession. The seriousness of the misconduct is an aggravating factor.

Recognition of the Seriousness of the Misconduct

Constable Foster had the right to participate in a full hearing in response to the misconduct allegations. This is a neutral factor as noted in *Batista*.

Employment History

Constable Foster was sworn in as a police constable on April 13, 2011. At the time of this incident, Constable Foster had six years of service and was a first-class constable. He was reclassified from fourth to first-class constable at the appropriate times in his career without incident. He presents with no prior discipline history.

In his advancement to 2nd class constable, his staff sergeant described Constable Foster as a solid officer who carried out his duties in a friendly and professional manner. He was a role model with an interest in being a coach officer (Exhibit 13, Tab B2). His coach officer made the following comments at the end of the initial training period,

Foster had good self-control and he remained calm and professional throughout. Jesse was very respectful in his dealings with police and non-police personnel. Jesse is forthright and fair in his dealings with the public. He is not arrogant or belligerent and treats everyone with equal respect and dignity no matter how uncooperative a person may be. He demonstrated commitment to the community by joining the Lions Club, and made regular appearances at two public schools (Exhibit 13, Tab D1)

I received only one annual performance appraisal for the years 2013-2014 (Exhibit 13, Tab D). In this appraisal, Constable Foster met the standard in five core competencies and twelve additional competencies. His supervisor and staff sergeant had positive comments about his performance. He also has an extensive training record (Exhibit 13, Tab E).

Constable Foster received three letters of appreciation from the community. One community member wrote about Constable Foster's professionalism in response to his van being entered. The officer received a second letter from a ride-along who spoke

about the confidence and courage displayed by Constable Foster. The writer noted that the officer was a passionate and driven individual, was knowledgeable and attentive to his surroundings. Further, he received a letter of appreciation for his participation in a community picnic which helped build positive relationships between the Service and the community (Exhibit 13, Tab G).

As noted in his recruit documentation, Constable Foster joined the Lions Club at an early stage which demonstrated his desire to become part of the community. He also took responsibility for two schools in his sector.

Constable Foster's personal file paints the picture of a dedicated member. His service to the community and furthering his post-secondary education is positive. He comes before the Tribunal with a clear employment record. His employment history is a mitigating factor.

Potential to Reform or Rehabilitate

In assessing this factor, I take into consideration Constable Foster's work ethic before the interaction and the belief that past performance is a good indicator of future performance. I have no reason to believe that Constable Foster will not continue to operate in a positive manner once this matter is resolved. His employment record and work in the community make him a suitable candidate for rehabilitation. Constable Foster presents with an unblemished work history and good personal file. His actions leading up to the misconduct appear to be positive and consistent. I found that Constable Foster has reflected on what he would have done differently on July 29, 2017, and I believe that he will learn from this experience.

Although I do agree with the prosecutor that there was a substantial disregard for his training, the fact that Constable Foster has not publicly acknowledged responsibility for his actions was within his rights, and this does not speak to any limited evidence of rehabilitative potential. This factor is closely tied with an officer's employment history. Given his performance prior to the misconduct and his acknowledgement that he has reflected on what he would have done differently, I find this is a mitigating factor.

Deterrence

General Deterrence

The public's trust and confidence can, at times, be fragile, which is why it is up to every member of the organization to ensure their conduct is beyond reproach and they work in association with the higher standard to which they are rightfully held. This penalty provides direction to all members that they must stay current in their legislative authorities. It should also serve as a reminder that the arrest of any person is a significant action against that person and should not be performed casually or without proper evidentiary foundation. Any violation of an individual's rights and freedoms and disregard for training will be treated seriously by the Service. As the Commission noted in *Andrews*, a penalty must deter others and prevent a re-occurrence of the conduct.

Specific Deterrence

Police officers receive specialized training in use of force and resolving conflict. By stepping outside of his authority, Constable Foster's actions caused irreparable harm to a member of the community. Any penalty I impose must specifically send a strong message to Constable Foster that his misconduct was not in keeping with what was expected of him as a police officer. Additionally, mandatory training will form part of this decision to ensure that Constable Foster is provided the necessary tools and support to move forward successfully. One area of training will focus on conflict resolution and de-escalation which must include communication involving all members of the community.

Damage to the Reputation of the Police Service

It is the expectation of the Service and the community that police officers will not overstep their authority or use force that is deemed to be unnecessary or unlawful. Constable Foster's actions created a negative image of the WRPS, when he disregarded his training and the rights and freedoms of Ms. Broomes. Officers must always demonstrate integrity as they are the Service's ambassadors to the community. The damage to the reputation of the Service started the morning of his interaction with Ms. Broomes and became widespread with the event highlighted in the news and reported on by many media outlets,

both in print, electronic, and reposted in other mediums. I find there was significant damage to the reputation of the Service, and this is an aggravating factor.

Effect of Publicity

Police services and its members are highly vulnerable to public opinion, and officers must hold themselves, and be held, to a higher standard in their professional encounters with the public. When the action of an officer is debated in the media, it creates doubt and uncertainty. I read all the media articles submitted (Exhibit 15). Many of the articles centred on the racial profiling allegation, the lawsuit, repeated the testimony of the parties, or outlined my findings. This case started to appear in the media articles I received in 2019. I was not surprised at the media interest in this case once it was before the Tribunal, and I was not surprised that the media interest was generated, in part, by counsel for the complainant. The publicity around this case has caused damage to the reputation of the Waterloo Regional Police Service which is an aggravating factor. This event and the opinion of the complainant have been live issues in mainstream news media for at least two years. The effect of such publicity has also caused considerable stress and embarrassment for Constable Foster for those two years, due to seeing his actions debated publicly without the opportunity to respond. The Commission, in *Gauthier*, referred to public humiliation in the media to be a mitigating factor.

Mr. Charney acknowledged the public nature of this hearing, and that my finding of misconduct has harmed Constable Foster's reputation. He also acknowledged the effect of publicity has been significant on him. He cited the public nature of this hearing as giving power back to the complainant wherein it acts as deterrence for Constable Foster.

I agree that the public should be aware of misconduct issues involving the holder of any public office. I have concerns about the public humiliation, embarrassment, and mental health impact experienced by Constable Foster due to the continued public debate in the media. Assessing a penalty, which considers deterrence is my responsibility, and ensuring the correct messaging is provided to all WRPS members rests with myself and the organization. I have mentioned on numerous occasions that I have no doubt that this process has impacted Ms. Broomes and Constable Foster. The delay, with the hope of

an in-person hearing, added to that pressure. The Service has suffered reputational harm, which is an aggravating factor, but I have also considered a degree of mitigation given the impact on Constable Foster. I anticipate that this event will continue to receive more media attention once this decision is released. As noted, there is no penalty that can take back what Ms. Broomes lost on that morning but working within the process and having a voice in the penalty disposition were important avenues for the complainant to have input into change. Ms. Broomes opinion on penalty would have assisted me in this decision.

Impact on the Officer and his Family

Any penalty I impose will impact Constable Foster in that he will now have a *PSA* finding against him. It will affect his professional reputation as he will be required to disclose this finding when he is called to testify in court. He will further be required to forfeit time off as part of his penalty that could have been spent with his family. There will be an ongoing financial impact until this matter is completed. All these things are the result of the actions of Constable Foster and must be borne by him. I am mindful there has been a personal toll through stress, a lengthy prosecution and the continued publicity on Constable Foster and the impact on his mental health as noted earlier.

Consistency of Discipline

The prosecutor submitted 11 cases for consideration. I am familiar with the majority of the cases, especially those arising from the G20 protest. Defence counsel acknowledged these cases and submitted five additional cases. Counsel for Ms. Broomes did not submit cases for consideration and did not take a position on penalty. His position is no penalty will return Ms. Broomes' sense of safety and whatever decision is reached will continue to undermine public confidence in policing. I find this unfortunate as this process wants, and is designed, for the public complainant to have a voice at all stages.

The case involving Supt. Fenton is distinguishable. He was the officer-in-charge of a large-scale event and he was found guilty of two counts of unlawful arrest for 'boxing in' a crowd of people at two locations and discreditable conduct for failing to monitor their well-being given adverse weather conditions. His penalty was varied by the Commission

to 20 days for each act of misconduct. This case involves an officer of a higher rank, and the facts of this case are significantly different than the case involving Constable Foster.

The case involving *Venables* is also distinguishable. The officer made a racial slur and punched a handcuffed prisoner in the head while he was seated in a police vehicle. Although the officer did not have a misconduct history, the violent nature of his actions warranted a penalty of dismissal which was upheld by the Commission. I agree that this case is unrelated to the facts of the case before this Tribunal.

The circumstances in *Wiles* are far removed from that of Constable Foster and this case is also distinguishable. The officer was found guilty of unnecessary exercise of authority and unnecessary use of force wherein he grounded a young male three times. He had two previous yet similar *PSA* convictions and a criminal conviction, all of which are absent in the case involving Constable Foster. This was a dismissal case which is not a consideration.

The *Turpin* case involved assaults on individuals in police custody and in handcuffs. The officer was criminally convicted and had a disciplinary record which is absent in the case involving Constable Foster. As noted, Constable Foster's actions were not premeditated. This case is distinguishable.

The case of *Pereira* is also distinguishable. The focus of this appeal was on the decision of the Hearing Officer where he dismissed the officer's motion to recuse himself. The underlying decision for the three counts of misconduct was not provided. I found this appeal was not helpful in my decision.

In *Blowes-Aybar*, a cyclist was stopped for an HTA infraction and unnecessarily or unlawfully arrested for public intoxication. The cyclist spent the night on the floor in the bullpen. The officer had a good record, with letters of appreciation from the public and excellent comments by fellow officers. He was also involved in community causes. On appeal, the officer was assessed a penalty of a four-day suspension. Although I acknowledge there are similarities between the cases, Constable Foster was also found guilty of Excessive Use of Force which is absent in the *Blowes-Aybar* case and elevates the severity of the facts. Ms. Broomes was deprived of her liberty for 30 minutes. Any

deprivation of liberty is a significant Charter violation which cannot be measured by minutes, but rather by the impact on the individual. I find that the conduct of Constable Foster was more than a momentary error in judgment as the errors kept accumulating. Although his actions were not deliberate, they were continual in nature. On more than one occasion, Constable Foster could have diffused the situation, and certainly could have used his discretion by not issuing the offence notices. I find the case of *Blowes-Aybar* instructive given the similarities, although the fact pattern in Constable Foster is more significant.

The case of *Mulville* involved a noisy party. The officers entered a residence without permission and not in 'hot pursuit'. A young person continually interrupted the officer's investigation. The youth was arrested, not given the reason for the arrest or her rights to counsel. She was handcuffed and placed in the rear seat of the police vehicle. The original penalty was varied to a reprimand for one officer and training for another officer.

I agree that this case is at the lowest end of the spectrum. The officers entered the house without permission which made any subsequent arrest unlawful. The similarities include an individual who was unlawfully arrested, not given the reason for the arrest or her rights to counsel. When I analyze how the events in *Mulville* unfolded compared to the actions of Constable Foster, it appears to lean more towards a lapse of judgment versus a constellation of factors that were preventable. The case of *Mulville* did not involve any use of force which elevates the seriousness of the misconduct.

The level of force used in the case of *Turgeon* is distinguishable from that of Constable Foster. In *Turgeon*, the youth was pushed against a van where he hit his head, and he was struck in the face while at the station. I agree that the use of force in the case involving Constable Foster was not proportionate to the incident, but it was not reprehensible as observed in *Turgeon*. The Commission upheld the penalty of ten days. The *Turgeon* case does not involve an unlawful arrest.

In *Vogelzang*, the officer was found guilty of one count of unlawful or unnecessary exercise of authority. A driver was arrested for breach of the peace and the hearing officer found there was no evidence that the driver was a threat to the public. There was no use

of force in *Vogelzang*. The conviction and penalty of 24 hours was upheld by the Commission. As noted by the prosecutor, the Commission noted that the driver was unlawfully arrested, deprived of his freedom, handcuffed, and placed in the police cruiser. I found that Constable Foster did not conduct an *HTA* vehicle stop. The similarity involves the handcuffing and detention of Ms. Broomes in a police cruiser. Defence counsel noted the added seriousness of the search of the individual's property which is absent from the case involving Constable Foster. What is also absent is the use of force experienced by Ms. Broomes. The Commission noted that there is little forgiveness in the public sphere when police get it wrong. This was evidenced by the impact on the reputation of the police service and on Constable Foster himself.

The case of *Wong* is a G20 case that involved an unlawful arrest where the individual was held in custody for 28.5 hours. This was considerably longer than the Charter breach involving Ms. Broomes. There was no use of force in the *Wong* case. The officer received a forfeiture of one day or eight hours. There are significant differences between the two cases. The *Wong* case involved direction from a supervisor which ultimately resulted in the arrest, and the length of time that it took to reach the prosecution stage with no legitimate reason. Although I recognize the individual spent significantly more time in custody, the fact patterns are very different, and this case is distinguishable.

The *Suleiman* case is also distinguishable. This involved a joint submission by two parties that was upheld by the Commission. The differences include the officer had a significant disciplinary history which is not present in the case involving Constable Foster. The focus of this decision was more on the invasive strip search in a public location which justified the penalty of 64 hours. One difference is the *Suleiman* case did not involve any use of force.

In *Johnson*, the officer attended a fight call. An involved party refused to attend the scout car upon demand and walked away. The officer used his pepper spray twice, chased the complainant and grounded him. The complainant was handcuffed and struck in the head. The interaction was captured on video. The penalty of 24 hours was upheld by the Commission. They cited the hearing officer's conclusion that the matter was exacerbated

by the assault on a handcuffed person on the ground which is absent from the case involving Constable Foster.

In the case before this Tribunal, Ms. Broomes initially engaged with Constable Foster. She walked toward Constable Foster when asked until she was told that she or her vehicle were involved in a weapons call. She was ultimately grounded and handcuffed. In assessing the cases submitted, the differences involve the level of force used on the involved parties and the lack of the second element of excessive or unlawful use of authority or unlawful arrest. I understand Mr. Jeffries' position that Constable Foster did not strike or deploy his use of force options on Ms. Broomes, as found in *Johnson*, but she did suffer minor injuries and most likely exacerbated an existing injury. As noted in my decision Constable Foster used the least amount of force possible throughout his interaction with the complainant, but he failed to comply with his training and police authorities. The entirety of their interaction was built on an unlawful arrest and excessive use of force which makes this case more aggravating than the lower-end submissions. This was not a momentary lapse or a small segment of a larger interaction. His entire interaction was troubling, and the outcome was a member of the community was pushed into a vehicle, grounded, handcuffed, and held in custody, and all she did was take her son to work. She was not involved in a fight or criminal activity, as outlined in *Johnson*.

It is well known and articulated that consistency of discipline is the hallmark of fairness. Prior case decisions act as a guide towards fairness in assessing a penalty. This decision should not come down to the number of minutes or hours a person spent in custody, the degree of injury sustained or lack thereof, or the type of force used. If so, penalty decisions will never evolve, consider current circumstances, or the uniqueness of situations. In the historical cases provided, while assessing the parallels of the nature of the unlawful arrest and/or unlawful or unnecessary use of force in comparison to the matter before me, I noted there was a wide range of the type of misconduct involved. I found the nature of the misconduct in the cases presented to be distinct from the matter before me though they did provide insight into the wide range of conduct and penalty.

The prosecutor sought a penalty of a forfeiture of 8-10 days with training and defence counsel sought a penalty of 24 hours. Counsel for the complainant did not suggest a

penalty range which is unfortunate. I am left to balance all the relevant mitigating and aggravating factors as well as to consider all the circumstances and arrive at a penalty which is proportionate to the misconduct. This penalty disposition meets the test in *Andrews* of addressing public confidence in the Service.

I encourage Constable Foster to continue to review and consider his authorities and take part in the training portion of this penalty decision with an open mind and with the view of making sound decisions in difficult circumstances. Based on his employment history, I am confident that he will continue to have a positive career.

I have carefully reviewed the evidence and considered the submissions of all parties to determine a penalty.

The penalty in this matter imposed under Section 85(1)(f) of the *Police Services Act* is:

1. For Unlawful or Unnecessary Exercise of Authority—Unlawful or Unnecessary Arrest and Excessive Use of Force (concurrent), a forfeiture of eight days.
2. Constable Foster must attend the following in-class and/or scenario-based training as provided by the Waterloo Regional Police Service, or if not available, attend the Ontario Police College, another police service, or an accredited external training program which encompasses the following topics.
 - a. Conflict Resolution and De-escalation Techniques involving interaction with all members of the community.
 - b. Investigative Detention
 - c. *Highway Traffic Act* and Criminal Code Powers of Arrest

Debra Preston
Superintendent (Retired)
Hearing Officer

Sent electronically: November 2, 2021

References

Andrews and Midland Police Service, OCPC, 2002 (Exhibit 16, Tab 2)

Batista and Ottawa Police Service, OCCPS, 2007 (Exhibit 11, Tab 1)

Blowes-Aybar and Toronto Police Service, OCPC, 2003, (Exhibit 14, Tab 1)

Fenton and Toronto Police Service, OCPC, 2017 (Exhibit 14, Tab 2)

Gauthier and OCPC, 2015 (Exhibit 16, Tab 4)

Johnson and Durham Regional Police Service, OCCPS, 2020 (Exhibit 16, Tab 3)

Mulville and Azaryev and York Regional Police Service, OCPC, 2017 (Exhibit 14. Tab 3)

Ontario Police College BCT Training Program (Exhibit 17-17B)

Pereira and Hamilton Police Service, OCPC, 2018 (Exhibit 14, Tab 4)

Schofield and Metropolitan Toronto Police, O.P.C., 1984 (Exhibit 14, Tab 12)

Suleiman and Ottawa Police Service, OCPC, 2011 (Exhibit 14, Tab 5)

Turgeon and Ontario Provincial Police, OCPC, 1999 (Exhibit 14, Tab 6)

Turpin and Durham Regional Police Service, OCPC, 2016 (Exhibit 14, Tab 7)

Venables and York Regional Police Service, OCCPS, 2008 (Exhibit 14, Tab 8)

Vogelzang and Ontario Provincial Police, OCPC, 2012 (Exhibit 14, Tab 9)

Wiles and Durham Regional Police Service, OCPC, 2014 (Exhibit 14, Tab 10)

Wong and Toronto Police Service, OCPC, 2015 (Exhibit 14, Tab 11)