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*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

DR. MING ZHOU

Grievor

and

NATIONAL RESEARCH COUNCIL OF CANADA

Employer

Indexed as

Zhou v. National Research Council of Canada

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: John A. Mooney, adjudicator

For the Grievor: Jon Peirce, The Professional Institute of the Public Service of
Canada

For the Employer: Laura B. Stewart, counsel

Heard at Ottawa, Ontario,
March 31 and April 1 and 2, 2008.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Dr. Ming Zhou (“the grievor”) was a research officer in the RO classification group in the Photonics Systems group of the Institute for National Measurement Standards (INMS) at the National Research Council (NRC or “the employer”). He was first hired on a short-term basis on October 22, 2001. He was appointed as a term employee on January 21, 2002, and that term appointment was extended three times. The final extension ended on December 29, 2006.

[2] On December 12, 2006, the grievor presented a grievance to the employer grieving, among other matters, the non-renewal of his employment contract. His grievance reads in part as follows:

...

B) I grieve the non-renewal of my term contract with the National Research Council as a form of disguised discipline and reprisal. Had I not been repeatedly harassed by my supervisor . . . and had the harassment investigation noted below in ‘C’ been completed in a more timely fashion, I would almost certainly have received a continuing appointment to NRC years ago. (Please note that . . . has, in the harassment report, been found guilty on ten counts of harassment, one of which was singling me out for differential treatment by giving me only a term contract, very early in my NRC career, when others hired at almost the same time as I was were given continuing appointments, and another of which was repeatedly promising me a continuing position at NRC).

...

[3] The grievor asked that the following corrective measures be implemented:

...

C) To be made whole. A continuing or term position at NRC, and an apology from NRC management for the inordinate delays in completion of the harassment investigation, and for its eventual failure to implement the report. Full implementation of the harassment report.

...

[4] The grievance was presented up to the final level of the grievance process, but it was not dealt with to the grievor's satisfaction. The grievor referred it to adjudication on May 1, 2007 under paragraph 209(1)(b) of the *Public Service Labour Relations Act (PSLRA)*.

[5] In this case, some of the evidence concerns allegations of harassment against the person who supervised the grievor during most of his employment at the NRC. I have decided not to name that supervisor because that person was not present at the adjudication hearing, nor was I informed whether that person was given notice of the hearing. I have therefore omitted that person's name throughout this decision or referred to that person as the "the grievor's supervisor" or "his supervisor."

II. Summary of the evidence

[6] Dr. Marie D'Iorio, Director General, Institute for Microstructural Sciences (IMS), NRC, testified for the employer. She has been the director general of that institute for the last five years. There are 19 institutes at the NRC. The IMS employs approximately 150 scientists and technicians, 30 of whom are students. At any given time, 20% to 30% of that staff are hired on a term basis.

[7] Dr. D'Iorio described the grievor's employment history. The grievor was a research officer in the Photonics Systems group, INMS. The grievor worked in chemicals and materials as they relate to photonics science. The grievor was first employed in that position as a short-term employee from October 22, 2001 to January 18, 2002 (Exhibit E-2). The grievor's supervisor signed the letter of offer.

[8] The grievor was then given a three-year term appointment beginning January 21, 2002 and ending January 21, 2005 (Exhibit E-3). The grievor obtained the appointment through a competitive process. The grievor's supervisor signed the letter of offer.

[9] On August 25, 2004, the grievor was offered a one-year extension of his term appointment to January 21, 2006 (Exhibit E-4). The extension was made because the INMS was undergoing a restructuring in the summer of 2004. Sherif Baraket, Interim Director General, INMS, NRC, signed the letter of offer. On July 4, 2005, the grievor was offered a second extension of his employment, to March 31, 2006 (Exhibit E-5). Dr. D'Iorio authorized that extension as indicated in the letter of offer. The grievor was

granted a third extension of his employment on January 26, 2006 (Exhibit E-6) which prolonged it to December 29, 2006.

[10] Dr. D'Iorio pointed out that the letters of offer for the second and third extensions (Exhibits E-5 and E-6) contained the following paragraph:

...

This offer of extension to your term employment carries no commitment whatsoever that your employment with NRC will extend beyond this period.

...

[11] The grievor testified. He gave a short history of his education and experience before working for the NRC. He received a bachelor's degree in chemistry in 1984 and a master's degree in chemistry in 1987, both from the University of Science and Technology of China. In 1995, he obtained a doctoral degree in chemistry from the University of Montpellier II in France. In 1996, he was a Humboldt Research Fellow at the University of Freiburg in Germany. He came to Canada in 1998. From January 2000 to October 2001, he worked in Ottawa in the private sector for Zenastra Photonics Inc. as a research scientist. His area of specialization is bio-sensing used in photonics technology. Photonics can be applied in the areas of communications, medicine, environmental monitoring, water inspection and drug discovery.

[12] The grievor filed in evidence his performance reviews covering the annual periods from April 2002 to December 31, 2005 (Exhibits G-4 to G-7). He testified that he had received the highest ratings in each review. The highest rating in the first year was "superior," but the NRC changed the rating scale in the following years, making the highest rating "fully satisfactory." The grievor stated that there were never any concerns with his performance.

[13] The grievor met his supervisor in the summer of 2001. The grievor's supervisor was responsible for the Photonics Systems group, but there was no one left in that group since all of the employees had accepted work in the private sector. In his first three months of employment with the NRC in the fall of 2001, the grievor was assigned to several projects. He interviewed candidates for employment in the Photonics Systems group, purchased equipment to rebuild that group and performed day-to-day operational tasks. During that time, he made a great contribution to the NRC. The

rebuilding of the Photonics Systems group was largely based on proposals that he had made. The grievor was then offered a three-year term employment with the NRC as indicated above.

[14] During his employment at the NRC, the grievor received several outside employment offers. He received one offer from a company in Germany, another from a high-tech company in Montreal, another from an organization in Singapore and another from the University of Freiburg in Germany. The grievor turned all of them down because the grievor's supervisor indicated to him that his term position would be converted to a continuing position.

[15] During the grievor's employment with the NRC, the grievor's supervisor made several references to his intention to convert the grievor's position to a continuing position. The grievor's supervisor made that promise 10 times but never carried it through. Sometimes, the grievor's supervisor made the promise in front of other colleagues. For example, in February 2004, the grievor's supervisor held a meeting with several members of his staff to discuss the annual performance review of employees. At that meeting, the grievor's supervisor stated that he would start the process of converting the grievor's term employment into a continuing position.

[16] The grievor gave several examples of incidents where his supervisor humiliated and embarrassed him. He described a shouting incident that occurred four months after he joined the NRC. His supervisor had asked him to prepare a cost estimation for the preparation of a working room. The grievor sent an email to persons who could help with that preparation and to his supervisor, inviting them to a meeting to discuss that matter. Soon after, the grievor's supervisor called the grievor and shouted the following at him: "What are you doing?" The grievor's supervisor was furious and said in that telephone conversation that the grievor had no authority to call a meeting. The grievor's supervisor said that the grievor could contact those persons but that he could not call a meeting with them. The grievor's supervisor said that the grievor should not try to do such things and that such behaviour was "no good for me and it's no good for you."

[17] The second shouting incident occurred in September or early October 2003. Dr. Sadiq Hasnain, a manager at the IMS, sent the grievor an email asking for information about his work in biophotonics. The purpose of his inquiry was to include that information on an Industry Canada website. The grievor provided the information

to Dr. Hasnain. When the grievor told his supervisor what he had done, his face turned purple, and he shouted the following: “You have no authority to tell him anything about our project, he has no authority to ask you anything about your project, and you are going to pay for that.”

[18] Besides the shouting incidents, the grievor’s supervisor subjected him to several other humiliating experiences. One occurred in 2002, soon after the grievor started working at the NRC. The grievor needed a laptop to do his work and proposed to his supervisor a laptop purchase of under \$2000 through Public Works and Government Services Canada. The grievor’s supervisor thought that it was too expensive and suggested that the grievor go to Future Shop. When the grievor arrived at Future Shop, the store manager said that he had to call someone at the NRC to confirm the grievor’s identity. When the manager called the grievor’s supervisor, the grievor’s supervisor answered that he could not say anything over the phone. The grievor felt humiliated. The grievor’s supervisor made other suggestions for the laptop. The grievor finally bought a laptop, but it took nearly 20 hours over four months to do so. The grievor felt very bad about the situation. That computer was essential to the performance of his work, and not having one affected his proficiency.

[19] Another embarrassing incident occurred at the end of 2002. The grievor’s supervisor urged the grievor to invite a professor from the University of Toronto to Ottawa to give a seminar at the NRC. After everything was arranged, the grievor’s supervisor questioned the grievor on his justification for the invitation and refused to pay the costs of the professor’s travel and accommodation for one night, which probably would have totalled \$500. In the end, the professor cancelled the trip. The grievor felt very embarrassed at having been forced to treat the professor in that manner.

[20] The grievor’s supervisor embarrassed the grievor again in February 2004 at a staff meeting. The NRC had a working agreement with the Government of Taiwan. The participants at that meeting were discussing a potential collaborative research proposal with a professor in Taiwan. The grievor had written the proposal. At that meeting, the grievor’s supervisor said that the grievor’s work was irrelevant. The grievor felt hurt.

[21] Another humiliating experience occurred in April 2004. The grievor and his supervisor had a meeting with three teachers of Algonquin College to discuss a

student training program. The grievor had been supervising a student in that program. When the grievor answered the teachers' questions about the program and the student that he supervised, the grievor's supervisor constantly rudely interrupted the grievor, criticized him and even shouted at him. After the meeting, Dr. G. Xiao, one of the teachers, told the grievor that he had never seen such behaviour from a manager.

[22] The grievor felt threatened by his supervisor. In May 2004, he met with him to discuss his employment status. The grievor's supervisor told the grievor to stop building a case against him. The grievor's supervisor said, "if you fight me, I'll fight you." When the grievor reminded his supervisor that he had promised to provide him with continuing employment, he said, "promise doesn't mean commitment."

[23] The grievor's supervisor threatened the grievor a second time that same month. He went to the grievor's office and asked the grievor if he had discussed any office matters with a third party. The grievor answered that he had discussed his employment status and harassment situation on March 15, 2004, with Dr. Peter Hackett, Acting Director, INMS, and later with his bargaining agent representative, Jon Peirce. The grievor's supervisor stated that if the grievor talked to third parties, he would not talk to him anymore and would not give him a good reference for future employment.

[24] The grievor's testimony then turned to his harassment complaint. He met Dr. Hackett on March 15, 2004, to voice his concerns with his employment status and his supervisor's management style. Dr. Hackett said that he would look into those matters. After that, Mr. Peirce organized a meeting with Gerry Gauthier of the Employee Relations Office in the Human Resources Branch to discuss those same matters. The grievor stressed to Mr. Gauthier that his main concern was his employment status. The grievor's term appointment was to end in January 2005, so there was not much time to resolve that matter. Mr. Gauthier stated that the NRC could not do anything regarding the employment issue before the grievor filed a formal harassment complaint and suggested that he do so. The grievor then asked Mr. Gauthier how long it would take to complete the investigation. Mr. Gauthier answered that the Harassment in the Workplace policy ("the harassment policy"; Exhibit G-10) required that the investigation be completed within three months. The grievor stated that that was too long since his term employment would end in January 2005.

[25] During that same meeting, Mr. Gauthier suggested that the grievor look at the job postings of other NRC institutes. Mr. Gauthier gave the grievor a list of the names of the directors general at the NRC.

[26] In August 2004, the grievor filed a harassment complaint by sending an email to Steve Blais, the manager of the Employee Relations Office in the Human Resources Branch. His allegations dealt with: his employment status and other harassment issues, such as the humiliation and embarrassment he suffered under his supervisor's direction. The grievor requested that his employment status be dealt with separately. Later, the grievor requested several times to Louis Séguin, the manager of the harassment investigation, that his employment status be treated separately because it was more important than the harassment issues, given that his employment would soon end.

[27] The grievor's representative referred me to the harassment policy (Exhibit G-10). It provides that management should separate the alleged harasser and the alleged harassed person. The relevant section of that policy reads as follows:

...

10.2.6.7 *The responsible DG may take appropriate measures without prejudice to have the respondent and the complainant physically and hierarchically removed from one another during the complaint resolution process. The responsible DG may also request the removal of a person working on NRC premises when it is felt that it is in the best interest of NRC.*

...

[28] The grievor testified that Mr. Séguin sent him an email on March 16, 2005 to inform him that he could not separate the grievor's employment status issue from the other harassment issues in the harassment investigation (Exhibit G-11). The grievor later met with Mr. Séguin to discuss his employment status, but Mr. Séguin stated that he had no control over the situation. Mr. Séguin stated that if the grievor had concerns over his employment status, he could file a grievance. The grievor decided to file a grievance by sending an email to Dr. Pierre Coulombe, the president of the NRC (Exhibit G-12), instead of using the formal grievance document format. On July 8, 2005, Patricia Mortimer, Secretary General, NRC responded on behalf of Dr. Coulombe.

Ms. Mortimer wrote that the grievor's concerns would be addressed after the harassment investigation was completed (Exhibit E-1, Tab 6).

[29] The grievor added that the employer did nothing to improve his situation other than to offer him the services of a counsellor through the Employee Assistance Program.

[30] The grievor's employment ended on December 29, 2006. The harassment report was issued after the grievor's departure. The grievor received no compensation or remedy for the harassment that he suffered; he did not even receive an apology. The grievor added that had he known that he would not receive a remedy regarding his employment status, he would not have filed the harassment complaint.

[31] The grievor stated that the experience had a negative impact on his career development. The grievor's supervisor forced him to not contact other people, so he lost many job opportunities. The grievor also lost a lot of time dealing with the harassment complaint.

[32] The incidents and experiences described above also had a great impact on the grievor's financial situation. His salary at the NRC was approximately CAN\$95,000, plus a retention bonus. His current salary at the Chinese Research Institute in China is approximately CAN\$25,000. He has to rent an apartment in China and keep a house in Ottawa since his young family still lives in Ottawa. The grievor's children cannot move to China since they were educated in Ottawa. The grievor also has to travel from China to Canada to visit his wife and children. The grievor had to borrow money to pay expenses, and he fears that he might lose his house.

[33] In cross-examination, the grievor stated that he had read and accepted the letters of offer for his term appointments and extensions (Exhibits E-2 to E-6).

[34] The grievor answered several questions put to him by the employer's representative regarding the chronology of events. The grievor filed a complaint with the Canadian Human Rights Commission (CHRC) in September or October 2004. After filing that complaint, he received two extensions of his employment contract with the NRC. As to the harassment complaint, the grievor filed it in August 2004 and received two employment extensions after that date.

[35] With respect to the grievor's supervisor's departure, the grievor stated that his supervisor left the workplace in the summer of 2004. The grievor did not report to him after that. The grievor reported to a new group leader starting in August 2004. In November 2005, the grievor received a letter from Dr. D'Iorio that specified that he would report directly to her from then on. The grievor added that the fact that he did not see his supervisor did not mean that he would not come back.

[36] Turning to the matter of competitions, the grievor stated that he could have applied for positions in other institutes at the NRC. He did apply to one competition in October 2005 but was not successful. The grievor did not apply to other competitions because he gave up seeking other employment and did not meet the education and experience requirements of some of the other positions that were posted.

[37] Lorna Jacobs testified for the employer. Since 1984, she has worked as a human resources generalist in the Human Resources Branch at the NRC. Ms. Jacobs explained how staffing is carried out at the NRC. The different ways of staffing positions are set out in the *Human Resource Manual* of the NRC (Exhibit E-7). Clause A.2.1.1.30 of the Annex of Chapter 2 of that manual provides that there are three types of tenure at the NRC. Employees may be appointed on a short-term basis, a term basis or a continuing basis. The same clause provides that a change of tenure can only be implemented through an appointment action.

[38] Ms. Jacobs referred me to the table in Annex 2.2-B of Chapter 2 of the *Human Resource Manual* that sets out the four situations in which the employer can make an appointment without a competition. The first one is when the employer makes a deployment or a lateral transfer. However the NRC cannot use those staffing actions if they result in a change of tenure, which is what would have happened if the grievor had been deployed or transferred to a continuing position, since he was a term employee.

[39] The second situation in which the NRC can make an appointment without competition is where it is in the best interest of the NRC. That would be an exception to the general rule that appointments are made through a competitive process. One example could be where the candidate's knowledge or capabilities are essential to the NRC.

[40] The third situation listed in the *Human Resource Manual* is where the appointment is made in the context of a pilot training program. That program was in force in the late 1990s, and it was not open to employees who were represented by the Professional Institute of the Public Service of Canada, as was the grievor's case. Finally, the fourth situation is for short-term appointments, of a maximum of three months. Ms. Jacobs concluded by stating that the grievor was not in any of those situations. The NRC, therefore, could not appoint the grievor to a continuing position without a competition.

[41] The note after clause 2.1.2.2 of Chapter 2 of the *Human Resource Manual* specifies that if the provisions of that chapter relating to staffing conflict with the content of a collective agreement, then the content of the collective agreement applies. Ms. Jacobs then referred me to the *Agreement between the National Research Council Canada and The Professional Institute of the Public Service of Canada* for the Research Officer and the Research Council Officer groups (expiry date: 19 July, 2007) ("the collective agreement"; Exhibit E-1, Tab 7), which was in force at the time that the grievor was employed. The grievor was part of the Research Officer group. Clause 2.01 of the collective agreement provides that "[a]ll vacant continuing RO/RCO positions will be advertised internally." Thus the employer has to fill those positions through competitive processes, and if not, the bargaining agent could complain that the employer violated the collective agreement.

[42] Ms. Jacobs met with the grievor in 2004 and told him that he could apply to competitions for continuing positions.

[43] Ms. Jacobs examined and listed all of the vacancies at the NRC that occurred since November 2001, (Exhibit E-8). She then compared the grievor's job resume to the screening criteria established for those positions and concluded that the grievor would have been screened in to eight competitions other than the one that he applied for. The grievor did not apply to any of those eight competitions. The grievor did apply to one competition on the list, but he did not qualify for the position. According to Ms. Jacobs, if the grievor was not appointed to a continuing position, it was largely his doing since he did not apply for the continuing positions that were advertised.

[44] Turning to the matter of the harassment report, Ms. Jacobs stated that Margaret Michaels, an independent investigator, was assigned to carry out the harassment investigation. Ms. Michaels started the investigation early in 2005. The

reason that the investigation took so long to complete is that the grievor's supervisor left the workplace in June 2004 on sick leave. The grievor's supervisor did return at the end of 2005, but only for a short time, since he left the NRC permanently on February 1, 2006. The investigator made several attempts to obtain his cooperation but was without success. Mr. Séguin decided in the spring of 2006, to release the harassment report without the benefit of the grievor's supervisor's input since it was not possible to obtain his comments. Although the harassment report was completed in the spring of 2006, it was only issued officially on November 30, 2006.

[45] Regarding the grievor's reporting relationship, Ms. Jacobs testified that in July or August 2004, Dr. Hackett appointed Dr. Frank Zhang as the group leader of the grievor's group. To Ms. Jacobs' knowledge, the grievor never reported to his supervisor after June 2004.

[46] With respect to the harassment policy, Ms. Jacobs stated that it requires that the employer provide a workplace free of harassment. That was accomplished in June 2004 when the grievor's supervisor left the workplace. Corrective action following a harassment report can include providing the harasser with remedial training and disciplining the harasser.

[47] In cross-examination, Ms. Jacobs stated that that the organization chart still listed the name of the grievor's supervisor until the grievor left the NRC. In fact, however, the grievor did not report to his supervisor. Dr. Zhang was the group leader when the grievor's supervisor left the workplace.

[48] During Ms. Jacobs' cross-examination, the grievor's representative asked to file in evidence two excerpts of an investigation report made by the CHRC and dated October 30, 2007 (Exhibit G-14). The employer's counsel objected on the grounds that they were not relevant since they related to a complaint filed by a person who is not part of this grievance. The grievor's representative responded that they were relevant since they showed a pattern of abusive behaviour by the grievor's supervisor toward his employees. I stated that I would take the objection under advisement and rule on that matter later when I drafted my decision on the merits of the grievance.

[49] I have decided that I will allow that evidence because those two excerpts are relevant to this grievance. One of the main facts in issue in this grievance is the manner in which the grievor's supervisor treated the grievor. The excerpts contain

statements made by Ms. Jacobs to the CHRC investigator, on the manner in which the grievor's supervisor managed his employees. The second excerpt is also relevant for another reason. It deals with Ms. Jacob's state of mind when she speaks negatively of the grievor's supervisor, so it touches on her credibility when she testifies as to the grievor's supervisor's actions in this grievance. The excerpt shows that she fears retaliation by the grievor's supervisor if she testified regarding his actions. Since one of the purposes of cross-examination is to challenge the credibility of a witness, the excerpt is relevant to her credibility regarding her testimony on the grievor's supervisor. Furthermore, since Ms. Jacobs was testifying at this hearing, she could correct any misinterpretation of what she said to the CHRC investigator. I will reproduce here only the more relevant parts of those excerpts:

...

143. According to Ms Jacobs, another aspect of the pattern of the Director's behavior toward people is to impose his will and take advantage of them when they are most vulnerable.

...

...

154. Ms Jacobs admitted her own fear of retaliation for having spoken up in this investigation and said that it is based on a history of the Director suing those who oppose him. Long ago when the Director was being represented by his union in his own human rights complaint, Ms Jacobs stated that a fellow union member voiced his opinion in a meeting that he did not believe that the union should be spending so much of the union dues on the Director's complaint. That union member was sued by the Director. Ms Jacobs also recounted that . . . filed a complaint of harassment against the Director at a time when the definition of harassment was not as broad as it is now. The internal investigator determined that she had not been harassed but commented negatively about the Director's management style. After . . . complaint was deemed unfounded, the Director sued her for defamation of character. She developed a stress-related illness and ended up selling her house and moving back to Britain.

...

[50] Dr. D'Iorio was called back to testify for the employer. She gave more details on the grievor's employment and his harassment complaint. With respect to performance reviews, she explained that in the year 2002-2003, the scale to assess employee

performance had five levels. The “superior” rating was not the highest rating level as the grievor contended. The highest rating was “outstanding.” Thirty to forty percent of employees in the IMS received that rating. The rating scale was changed for the 2003-2004 annual performance review. Since then, there have been only three rating levels, and the highest is “fully satisfactory.” In the IMS, 99.4% of employees received that rating. The expectation for research officers is that they will be fully satisfactory.

[51] Ottawa is one of five cities in Canada that are clusters for companies using photonics. There are 90 companies in Ottawa working in that area, and together they employ more than 10 000 employees. More than 80 000 persons work in the high-tech industry, such as in telecommunications or in medicine, in Ottawa. Two universities in Ottawa have centres or programs dealing with photonics, the University of Ottawa and Carleton University. The Université du Québec en Outaouais also has a program in photonics. Algonquin College also has such a program.

[52] In December 2005, Dr. D’Iorio discussed with the grievor the matter of the end of his employment. The grievor’s term was to end on March 31, 2006. The grievor had not been looking for work. The grievor asked for a further extension of his term appointment to the end of December 2006 so he would have time to look for work and wind down his project. Dr. D’Iorio found that request to be reasonable and agreed to extend the grievor’s employment to December 29, 2006. Usually, research officers are given six months to wind down their operations. Dr. D’Iorio added that research officers also use that time to write scientific papers and give presentations.

[53] The NRC did not continue the grievor’s activities after he left the NRC and did not hire anyone to replace him. The grievor’s project was no longer part of the NRC’s research activities.

[54] In December 2005 and afterwards, Dr. D’Iorio discussed upcoming appointment processes with the grievor and encouraged him to apply for those positions. She made it clear to him at that time and often afterwards that the only way to obtain a continuing position was through a competitive process. Several positions opened up that year. In Dr. D’Iorio’s view, the grievor should have applied to those competitions. Had he applied, he would have had a priority over candidates who did not work at the NRC since the collective agreement provided that candidates working at the NRC are considered first for vacant positions.

[55] Dr. D'Iorio was aware that the NRC can make an appointment without competition when it is in the best interest of the NRC, as indicated in the *Human Resource Manual* (Exhibit E-7). To her knowledge, that authority had never been used since she joined the NRC in 1983.

[56] Dr. D'Iorio explained how she separated the grievor from his supervisor. The last time that the grievor's supervisor worked with the grievor was June 2004. The grievor's supervisor then left the workplace on sick leave. The grievor made his harassment complaint in August 2004. From December 2004 to November 2005, the grievor reported to another group leader. In November 2005, she wrote to the grievor to inform him that he would report directly to her from that point. At the same time, Dr. D'Iorio wrote to the grievor's supervisor to inform him that the grievor did not report to him and that he should not speak to the grievor. The grievor's supervisor returned to the NRC on November 1, 2005, and left the NRC permanently at the beginning of 2006. During that brief return, the grievor's supervisor reported to her. The grievor's supervisor worked, in total, 30 days after his return in November 2005, since he only worked on alternate days.

[57] Dr. D'Iorio stated that it was not necessary to move the grievor since he did not work on the same floor as his supervisor. The grievor's supervisor had three offices. Dr. D'Iorio closed two of them after June 2004. When the grievor's supervisor returned to the NRC for a three-month period at the end of 2005, he occupied the office in front of Dr. D'Iorio on the first floor of the building in which she works. The grievor worked on the third floor of that same building.

[58] Dr. D'Iorio turned to the follow-up to the harassment report (Exhibit E-1, Tab 5). The harassment report concluded that 10 of the grievor's allegations of harassment were founded. Since the grievor's supervisor was not at the workplace when the harassment report was issued in November 2006, Dr. D'Iorio wrote to him on January 26, 2007 to inform him that the NRC accepted the findings of that report and that corrective and/or administrative measures would be discussed on his return to work (Exhibit E-9).

[59] Dr. D'Iorio had three options for dealing with the grievor's supervisor following the issuance of the harassment report. The first one was to ask the grievor's supervisor to undergo training. She contemplated using that option on the grievor's supervisor's return to the workplace. The second option was to discipline the grievor's supervisor.

Dr. D'Iorio planned to take that option when the grievor's supervisor came back to work. She could not discipline him in his absence since he had the right to make representations on any proposed disciplinary measure. A third option was to suspend his supervisory powers. That option was not feasible at that time since the grievor's supervisor was absent from the workplace. There was no supervisory power to suspend. Dr. D'Iorio added that she never took any of the actions listed above since the grievor's supervisor never came back to the workplace after the harassment report was issued.

[60] Dr. D'Iorio added that corrective action also included separating the grievor from his supervisor. In her view, that had been accomplished since the grievor's supervisor had been absent from the workplace since June 2004.

III. Summary of the arguments

A. For the grievor

[61] The grievor's representative submitted that the NRC's failure to renew the grievor's term appointment and to appoint him to a continuing position were disguised disciplinary actions and actions of reprisal made in bad faith.

[62] The NRC cannot have it both ways. If the grievor's supervisor did have the power to hire an employee to a continuing position, he abused that power by promising the grievor repeatedly that he would provide him with continuing employment. If the grievor's supervisor did not have that power, he is guilty of misleading the grievor and outright dishonesty.

[63] The grievor's representative submitted that an action of reprisal does not have to be made by senior management to be attributed to the employer. The evidence shows that the grievor's supervisor told the grievor in May 2004 that if the grievor fought him, he would fight back. Soon after that, the grievor's supervisor threatened the grievor that he would provide him with a poor employment reference.

[64] The employer failed to implement its harassment policy (Exhibit G-10). That policy specifies the following:

...

10.2.10.2 *Managers and supervisors are responsible and will be held accountable for:*

...

- b) fostering a work environment which is free of discrimination, offensive behavior and harassment;*
- c) abstaining from harassment and prohibiting employees from harassing other employees;*
- d) dealing at once and in an appropriate manner with any case of apparent harassment which comes to their attention, whether or not there has been a complaint. . . .*
- e) ensuring that no retaliation occurs against persons involved in harassment complaints;*

...

[65] The grievor's representative argued that the NRC acted in bad faith by not preventing or stopping the grievor's supervisor from harassing the grievor. The responsibilities set out above apply whether or not the employee files a formal harassment complaint. The grievor brought his harassment situation to the NRC's attention as early as March 2004, a very long time before he was physically and hierarchically separated from his supervisor. The separation did not really occur until November 2005. Yet, the harassment policy provides that managers are responsible for dealing with a harassment situation in as timely a manner as possible. When the grievor approached the NRC in March 2004, it should have separated the grievor from his supervisor. The NRC's only reaction was to inform the grievor that he could file a harassment complaint.

[66] Although the grievor's supervisor was not at the workplace, his name remained listed in the NRC's organization chart during the grievor's employment. Ms. Jacobs testified that the grievor's supervisor's name was not taken off the organization chart until he left the NRC permanently on February 1, 2006. The grievor did not know when his supervisor would come back and feared that it could happen at any time.

[67] The grievor's supervisor's abusive behaviour was highlighted in the CHRC's investigation report. That report contains Ms. Jacobs' testimony, stating to the investigator that she feared retaliation by the grievor's supervisor if she testified regarding his actions. The report indicates that the grievor's supervisor had a pattern of a long history of abusive behaviour. His behaviour was well known to the NRC.

[68] The grievor's representative noted that there was no follow-up to the harassment report. The grievor's supervisor was not disciplined. Unfortunately, the grievor's supervisor will never be disciplined since he is no longer employed by the NRC.

[69] The NRC never provided a remedy to the grievor for having endured his supervisor's harassment. The grievor's employment ceased, and he received no compensation, not even an apology.

[70] What is shocking in this case is that Dr. D'Iorio testified that the harassment policy does not provide a remedy if an employee is harassed. If that is so, the harassment policy is only a paper tiger. Why would a person file a complaint if there were no remedy possible? The grievor testified that had he known that there was no remedy to his harassment complaint, he never would have made the complaint. In the grievor's view, such a remedy included addressing his employment status.

[71] The employer's actions had a detrimental effect on the grievor's employment prospects, his financial situation, his mental health and his family life.

[72] The grievor's representative referred me to *Longpré v. Treasury Board (National Defence)*, 2004 PSSRB 81. In that case, the adjudicator ruled that he had jurisdiction to hear the grievance because the decision not to renew the employee's appointment was made in bad faith.

[73] The grievor's representative also referred me to *Laird v. Treasury Board (Employment and Immigration)*, PSSRB File No. 166-02-19981 (19901207). In that case, a term employee had been laid off. The adjudicator ruled that he had jurisdiction to hear the matter since the layoff constituted a disguised disciplinary action.

[74] Another case in point is *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.). The judge in that case held that an adjudicator can take jurisdiction if the employer acted in bad faith in rejecting an employee on probation.

B. For the employer

[75] The employer's counsel argued that I do not have jurisdiction to hear this grievance. In her view, the NRC's decision not to renew the grievor's appointment did not constitute a termination of employment within the meaning of paragraph 209(1)(b) of the *PSLRA*.

[76] The employer's counsel noted that the reason the NRC insists that the grievor's employment status and the harassment situation are separate issues is because, legally, they are two different issues.

[77] The employer's counsel highlighted the main facts of this grievance. She noted that the last two extensions of the grievor's employment specifically stated that the extensions did not carry any commitment to further employment (Exhibits E-5 and E-6). The grievor testified that he read that paragraph and accepted the extensions.

[78] When the grievor asked for an extension of his employment in December 2005, so that he could work during a full calendar year in 2006, Dr. D'Iorio thought that the request was reasonable. This gave the grievor time to wind down his project and write papers. She also encouraged the grievor to use that year to look for other employment.

[79] The employer's counsel noted that Dr. D'Iorio, not the grievor's supervisor, decided not to renew the grievor's employment contract. Dr. D'Iorio made that decision after she began supervising the grievor.

[80] The employer's counsel also commented on the grievor's purported reliance on the grievor's supervisor. The grievor's supervisor could not make promises of continued employment since vacancies in continuing positions must be filled through competitive processes. The grievor stated that that he did not know that the grievor's supervisor could not grant him continuing employment. However, the grievor had a profound distrust of his supervisor. The grievor spent several hours at the hearing describing a number of incidents that gave rise to his distrust. The grievor is saying that he relied on the promises of a person that he did not trust.

[81] The employer's counsel noted that the *Human Resource Manual* and the collective agreement provide that the only way an employee can be appointed to a continuing position is through a competition. To have given the grievor a continuing

appointment without requiring a competitive process would have violated the provisions of both documents.

[82] The employer gave the grievor ample information on competitive processes. Mr. Gauthier, Ms. Jacobs and Dr. D'Iorio met with the grievor several times and encouraged him to apply to competitions. Mr. Gauthier suggested that the grievor not limit himself to the IMS and gave him a list of the directors general of all of the institutes at the NRC.

[83] The grievor could have applied to many competitions during his employment at the NRC. The NRC's analysis of the competitions held during that period shows that the grievor would have been screened in to eight competitions, other than the one to which he applied. The analysis was performed taking the grievor's experience in photonics into account. The number of competitions in which the grievor could have applied would be even greater if his broader experience were considered. However, the grievor only applied to one competition. Unfortunately, he did not meet the minimum requirements of the position.

[84] The employer's counsel also addressed the harassment complaint. The grievor met with Dr. Hackett in March 2004 to discuss the harassment situation. By June 2004, the grievor's supervisor was gone. From that time on, the grievor enjoyed a harassment-free workplace.

[85] An employer has various ways of dealing with a substantiated allegation of harassment. The employer can re-educate the harasser, discipline them or suspend their supervisory duties if they have any. But to take those steps, the harasser must be in the workplace. How can a person who is not in the workplace be disciplined? It would be astounding, from a procedural fairness point of view, to discipline an employee in his or her absence. It also does not seem to make much sense to suspend a person who is not in the workplace. The employer intended to impose sanctions against the grievor's supervisor when he returned to work. Ironically, the grievor's supervisor's failure to return to the workplace was the most effective way of dealing with the harassment situation. Since the grievor's supervisor was not at the workplace, he had no opportunity to harass the grievor.

[86] The employer's counsel noted that the grievor wants compensation for having been harassed. The harassment policy requires that when a person alleges that he or

she is being harassed, the employer must conduct an investigation into the allegation. The NRC did carry out that investigation. The harassment policy requires that the employer take steps to ensure that the workplace is free from harassment. The NRC had fulfilled that obligation by providing the grievor with a harassment-free workplace since June 2004. The harassment policy does not provide for compensation. It does not say that a person who has been harassed is entitled to anything other than a workplace free from harassment.

[87] The employer's counsel addressed the law applicable to this case. She submitted that in this grievance, there was no termination of employment; the grievor's employment ceased because the term of his appointment had expired. If the employer's action does not constitute a termination of employment, the employer's motivation in not renewing the grievor's employment is not relevant to the issue of jurisdiction. If this is not a termination of appointment, an adjudicator cannot consider the issue of bad faith. The employer's counsel referred me to the following two cases that, in her view, stand for that proposition: *Pieters v. Treasury Board (Federal Court of Canada)*, 2001 PSSRB 100, and *Marta v. Treasury Board (Royal Canadian Mounted Police)*, 2001 PSSRB 31.

[88] The employer's counsel also argued that if I find that the grievor's employment did cease by way of a termination of employment within the meaning of paragraph 209(1)(b) of the *PSLRA*, and if I find that bad faith can give me jurisdiction over this matter, the employee must prove that bad faith. In law, good faith is presumed. On that issue, the employer's counsel referred me to *Keuleman v. Canada Revenue Agency*, 2006 PSLRB 40.

[89] The employer's counsel submitted that the grievor must not only prove that the employer acted in bad faith, he must also prove that there is a causal connection between the employer's decision not to appoint the grievor and the alleged bad faith. The employer's decision must have been taken in response to the grievor's behaviour. If there is no nexus, the adjudicator does not have jurisdiction to hear the grievance.

[90] In this grievance, there is no nexus between the NRC's decision not to renew the grievor's appointment and the grievor's supervisor's behaviour. There is no evidence that the decision was made in response to any of the grievor's actions. There was no issue with the grievor's work performance; he received good evaluations. He was not replaced by anyone and no one took over his duties. The most telling evidence of the

absence of bad faith is that the NRC extended the grievor's term employment twice after he filed a harassment complaint and twice after he filed a complaint with the CHRC.

[91] The employer's counsel also referred me to the following cases, which deal with the issue of the employer's refusal to renew an employee's appointment: *Savic v. Canadian Food Inspection Agency*, 2001 PSSRB 104; *Khinda v. Canada Customs and Revenue Agency*, 2005 PSLRB 71; and *Monteiro v. Treasury Board (Canadian Space Agency)*, 2005 PSSRB 27. The employer's counsel also referred me to *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139, where the adjudicator held that in cases of rejection on probation, the employee has the burden of proving that the rejection was done in bad faith. On the issue of damages, the employer's counsel referred me to *Chénier v. Treasury Board (Solicitor General Canada — Correctional Service)*, 2003 PSSRB 27.

[92] Turning to the matter of remedy, the employer's counsel pointed out that I have no jurisdiction to appoint the grievor to a position. On that issue, she referred me to *Foreman v. Treasury Board (Indian and Northern Affairs Canada)*, 2003 PSSRB 73.

[93] The employer's counsel also addressed the matter of mitigation of damages. The grievor did not necessarily have to go to China to seek employment. Dr. D'Iorio gave evidence that Ottawa is a hub for photonics companies in Canada. There are 90 companies in Ottawa that employ over 10 000 employees. There is no evidence that the grievor ever applied for any position in those companies. The grievor said that it would be difficult to secure employment without a reference from his supervisor, but there is no evidence of that. There is also no evidence that he tried to get a reference from other persons working at the NRC.

[94] The employer's counsel concluded that I do not have jurisdiction to hear this matter. The decision not to renew the grievor's appointment does not constitute a termination of employment. If there was bad faith, it cannot give an adjudicator jurisdiction over the non-renewal of an appointment. If I decide that the employer's action does constitute a termination of employment, and if I decide that bad faith can give me jurisdiction over this matter, I should still reject the grievance since there is no nexus between the decision not to renew the grievor's term employment and the grievor's supervisor's behaviour.

C. Grievor's reply

[95] The grievor's representative maintained that an adjudicator has jurisdiction to hear a grievance relating to the non-renewal of an appointment when the employer acted in bad faith, as is the case in this grievance.

[96] The grievor's counsel pointed out that the NRC is assuming that there is a firewall between the grievor's supervisor and the employer. The employer's representative admitted that the grievor's supervisor harassed the grievor, but argued that the NRC was not responsible for the consequences of the grievor's supervisor's actions. That shows bad faith on the part of the NRC.

[97] The employer's arguments are a bit schizophrenic. On one hand, Mr. Séguin said that the issue of employment status and harassment could not be separated. In his email dated March 16, 2005, he wrote ". . . I am unable to 'split' your complaint in two and deal with the employment component of your complaint separately from the overall harassment, for the reason that I see them as part of the same issue" (Exhibit G-11). Ms. Mortimer, in her letter to the grievor, also treated the employment status issue as part and parcel of the harassment complaint (Exhibit E-1, tab 6). In contrast, the employer's counsel argued at this hearing that the two issues must be separated. Which will it be? What Mr. Séguin and Ms. Mortimer said or what the employer's representative argued at this hearing?

[98] The grievor's representative did not agree that the workplace was free of harassment as of June 2004. The grievor feared further harassment since he did not know whether the grievor's supervisor would come back.

IV. Reasons

[99] The grievor has referred his grievance to adjudication pursuant to paragraph 209(1)(b) of the *PSLRA*, which reads as follows:

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

...

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

...

[100] The grievor grieved the non-renewal of his term contract with the NRC and its failure to appoint him to a continuing position in that agency. The grievor contends that the decision not to appoint him was a disguised disciplinary action and an action of reprisal made in bad faith. The grievor is of the view that had he not been repeatedly harassed by his supervisor, and had the harassment investigation been completed in a more timely fashion, he would have been appointed to a continuing position with the NRC.

[101] It is common ground that the grievor was harassed by his supervisor. A harassment investigation concluded that the grievor's supervisor harassed the grievor repeatedly. The employer accepted the conclusions of that report. The grievor also testified to all those incidents at this hearing, and the employer did not challenge his testimony on those matters. The harassment included the grievor's supervisor repeatedly leading the grievor to believe that he would be appointed to a continuing position, shouting at him several times, sometimes in front of colleagues, humiliating him in front of teachers from Algonquin College by constantly interrupting him during a meeting, and embarrassing him by constantly changing his mind with respect to the purchase of a laptop computer. Following the issuance of the harassment report, the grievor did not receive compensation from the employer for the harassment he endured; nor did he get an apology.

[102] The employer contends that I do not have jurisdiction to decide this matter because its decision not to appoint the grievor does not constitute a termination of employment within the meaning of paragraph 209(1)(b) of the *PSLRA*. I agree that I can only take jurisdiction over this matter if the decision not to renew the grievor's appointment constitutes a termination of appointment within the meaning of that paragraph.

[103] The issue of whether the failure to renew an appointment constitutes a termination of appointment was canvassed by the Public Service Staff Relations Board (the "PSSRB"), the predecessor to the Public Service Labour Relations Board (the "PSLRB"), in *Pieters*. In that grievance, the adjudicator ruled that the non-renewal of an appointment does not constitute a termination of employment:

...

[45] *The first thing I must determine is whether the employer's failure to renew the grievor's term contract is a "termination of employment" within the meaning of subparagraph 92(1)(b)(ii) of the PSSRA. I do not believe it is for the following reasons. No action was required on the employer's part, as would be the case, for example, in the rejection on probation or the lay-off of an employee, to bring the grievor's employment to an end. Rather, it came to an end by virtue of the provisions of his term contract and by virtue of section 25 of the Public Service Employment Act. I believe that support for this conclusion can be found in the decisions of the Federal Court of Appeal in Dansereau v. National Film Board, (supra), and Eskasoni School Board/Eskasoni Band Council v. MacIsaac, (supra).*

[46] *When faced with a grievance against the employer's failure to renew a term contract, adjudicators have consistently found that they do not have jurisdiction to determine the matter under the relevant provisions of the PSSRA: Hanna, (supra), Blackman, (supra), Beaulieu, (supra), Lecompte, (supra), and Marta, (supra). . . .*

...

[Emphasis added]

[104] In *Monteiro*, an adjudicator of the PSSRB came to the same conclusion. The adjudicator ruled that the non-renewal of an employment contract does not constitute a termination of employment. A termination of employment implies a decision by the employer to terminate an employment that would otherwise have continued to exist:

...

[11] *The jurisdiction conferred on an adjudicator by section 92 is quite narrow and may not be broadened, even by consent of the parties. This jurisdiction is limited, first, to the interpretation or application of a collective agreement and, second, to disciplinary action, termination of employment, or demotion. According to the wording of his grievance, Mr. Monteiro contests the termination of his employment. I must therefore begin by determining whether the employer's decision not to renew the grievor's employment contract constitutes either a "termination of employment" within the meaning of paragraph 92(1)(b) of the PSSRA or, as Mr. Monteiro claims in his grievance, a constructive dismissal. I do not believe that this is the case, for the following reasons.*

[12] *First, the employer did not have to take any specific steps to that end, as it would have had to do, for example, to send the grievor for training, or to lay him off in order to terminate his employment. The evidence has established that Mr. Monteiro's employment ended in accordance with the provisions of his term employment contract and section 25 of the PSEA. I consider that the Federal Court of Appeal decisions in Dansereau v. National Film Board, [1979] 1 F.C. 100, and Eskasoni School Board/Eskasoni Band Council v. MacIsaac, [1986] F.C.J. No. 263 (C.A.) support this finding. The concept of termination of employment implies a unilateral decision by an employer to terminate an employment contract that would otherwise have continued to exist.*

...

[Emphasis added]

[105] The jurisprudence of the PSSRB on this issue is quite constant. In *Savic*, the adjudicator decided that the non-renewal of the grievor's term appointment did not constitute a termination or a disciplinary action for the purpose of section 92 of the *Public Service Staff Relations Act*, the predecessor to the *PSLRA*:

...

[35] *Dr. Savic's employment relationship with the C.F.I.A. came to an end pursuant to the provisions of the terms of her contract of employment. . . I am satisfied that the circumstances of the grievor's case do not constitute "termination" or "disciplinary action" within the meaning of Section 92 of the P.S.S.R.A.*

...

[106] In *Kerr-Alich v. Treasury Board (Department of Social Development)*, 2007 PSLRB 33, the adjudicator of the PSLRB stated that the non-renewal of term appointments is normally outside the jurisdiction of an adjudicator (paragraph 162).

[107] In *Dansereau v. National Film Board*, [1979] 1 F.C. 100, the Federal Court of Appeal also concluded that an adjudicator does not have jurisdiction over the decision not to renew an employment contract. In that case, the employee had argued that the non-renewal of his term appointment constituted a lay off. The Court rejected that argument and decided that the employee had not been laid off but that his employment had ceased by the operation of the terms of his contract.

[108] The jurisprudence of the Federal Court, the PSSRB and the PSLRB has therefore established quite clearly that the non-renewal of a term appointment does not constitute a termination of employment. In this case, the grievor's employment contract expired at the end of its term, and the employer decided not to make another appointment. There was no termination of employment within the meaning of paragraph 209(1)(b) of the *PSLRA*.

[109] The grievor argues that I have jurisdiction over this matter if the decision not to renew the grievor's term appointment or to appoint him to a continuing position was a form of disguised discipline or was done in bad faith. The employer, on the other hand, argues that bad faith cannot operate to give me jurisdiction over the non-renewal of an appointment. In *Pieters*, the adjudicator decided that the employer's motivation for not renewing a term contract is irrelevant to determining the adjudicator's jurisdiction:

...

[46] . . . In *Laird*, (*supra*), although the employer's decision to lay off a term employee prior to the end of her contract was motivated by bad faith, the adjudicator found that he only had jurisdiction to award the grievor compensation for the balance of her term. Under the circumstances, the employer's motivation for not renewing Mr. Pieters' term contract is irrelevant to the determination of the adjudicator's jurisdiction. Those decisions which the grievor relied on to establish that an adjudicator would have jurisdiction to hear and determine Mr. Pieters' grievance, provided he could establish bad faith on the employer's part, relate to lay-off or rejection on probation, both of which require the employer to take some action to terminate the employee's employment.

...

[Emphasis added]

[110] I need not decide, however, whether I can take jurisdiction if a decision not to appoint a person is made in bad faith, since in this grievance there is no evidence that the employer acted in bad faith by refusing to re-appoint the grievor to a position at the NRC. The bad faith to which the grievor alludes relates to the manner in which his supervisor treated him and the employer's reaction to the grievor's supervisor's behaviour. The evidence, however, shows that there is no causal relationship between

the grievor's supervisor's behaviour towards the grievor and the decision not to appoint the grievor to a term or a continuing position. The grievor's supervisor had left the workplace in June 2004, so he was not at work when the decision not to re-appoint the grievor was made in December 2005. At that time, the employer had formally rescinded the grievor's supervisor's supervisory responsibilities with respect to the grievor. Dr. D'Iorio and Ms. Jacobs testified that the grievor's supervisor played no part in the decision not to re-appoint the grievor. It was Dr. D'Iorio, not the grievor's supervisor, who decided not to re-appoint the grievor to a new term.

[111] There is also no evidence that the grievor's supervisor's harassment of the grievor affected in any way Dr. D'Iorio's decision not to appoint the grievor to a position at the NRC. The evidence indicates that Dr. D'Iorio decided not to reappoint the grievor because the employer decided not to continue the grievor's project. When the grievor left, no one took over his activities. Therefore, there is no evidence that Dr. D'Iorio acted in bad faith in deciding not to appoint the grievor.

[112] With respect to the matter of appointing the grievor to a continuing position, there is an added and even more compelling reason that I cannot conclude that the employer acted in bad faith in refusing to make such an appointment. The employer could not have appointed the grievor to a continuing position through a without competition process, as the grievor wished. Doing so would have infringed the provisions of the *Human Resource Manual* of the NRC (Exhibit E-7) and the collective agreement. The *Human Resource Manual* sets out the situations where an appointment without competition can be made, and the grievor was not in any of those situations. Clause 2.01 of the collective agreement (Exhibit E-1, Tab 7) provided that "[a]ll vacant continuing RO/RCO positions will be advertised internally." The only way to be appointed to continuing positions at the NRC was to participate in competitions carried out for those positions. The grievor did not apply to the competitions that were carried out during his employment at the NRC except to one competition, for which he did not qualify.

[113] There is no merit to the argument that the failure to renew the grievor's appointment constituted disguised discipline. As stated above, it was not done in reaction to any of the grievor's actions but because the employer decided not to pursue his project.

[114] There is no evidence to support the proposition that had it not been for the delays in producing the harassment report, the grievor would have obtained a continuing appointment. As indicated above, the only way the grievor could have obtained a continuing position was by applying to a competitive process, which he did not do, save one competition in which he was disqualified because he did not meet the minimum requirements established for the position, despite having been advised and counselled to do so on many occasions and by many people.

[115] To summarize the above, I do not have jurisdiction to hear this grievance since the employer's decision not to appoint the grievor to another term position or a continuing position does not constitute a termination of employment within the meaning of paragraph 209(1)(b) of the *PSLRA*. With respect to the issue of bad faith, I need not decide whether bad faith gives me jurisdiction over this matter since there was no causal relationship between the grievor's supervisor's behaviour toward the grievor (i.e., the bad faith to which the grievor alludes) and the decision not to appoint the grievor to either a term or a continuing position. The grievor's supervisor played no part in that decision. Dr. D'Iorio made that decision, and there is no evidence that Dr. D'Iorio acted in bad faith. Dr. D'Iorio could not have appointed the grievor to a continuing position through a non-competitive appointment process since doing so would have infringed both the provisions of the *Human Resource Manual* and the collective agreement. The non-renewal of the grievor's appointment was not done in reaction to any of his actions but because the employer decided not to pursue his project.

[116] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[117] The grievance is dismissed.

July 8, 2008

**John A. Mooney,
adjudicator**