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File: 566-02-1631

Citation: 2009 PSLRB 175

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

AHMED MAQSOOD

Grievor

and

TREASURY BOARD
(Department of Industry)

Employer

Indexed as
Maqsood v. Treasury Board (Department of Industry)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Beth Bilson, adjudicator

For the Grievor: Himself

For the Employer: Adrian Bieniasiewicz, counsel

Heard at Ottawa, Ontario,
September 14 to 16, 2009.

I. Individual grievance referred to adjudication

[1] On April 11, 2007, Ahmed Maqsood ("the grievor") was rejected on probation from his position as a senior trademarks examiner within the Trade-marks Branch of the Canadian Intellectual Property Office (CIPO) of Industry Canada ("the employer").

[2] Counsel for the employer raised an objection to my jurisdiction to consider the grievance. He argued that the probationary appointment in question is permitted and defined under the *Public Service Employment Act*, S.C. 2003, c.22, ss.12,13 ("the *PSEA*"). Section 211 of the *Public Service Labour Relations Act*, S.C. 2003, c.22, s.2 ("the *PSLRA*"), specifically bars reference to adjudication for a termination of employment under the *PSEA*. Counsel for the employer acknowledged that an adjudicator would have jurisdiction only if the rejection on probation were a "sham or a camouflage" and if the employer did not make the decision to reject him in good faith, as the grievor alleged. I reserved my decision on the jurisdictional objection pending hearing the evidence and arguments.

II. Summary of the evidence

A. For the employer

[3] The first witness for the employer was Geneviève Côté-Halverson, Manager of Examination Services, who was the grievor's direct supervisor. Ms. Côté-Halverson said that the job of trademarks examiners is to screen applications for the registration of trademarks to determine whether they comply with the regulatory requirements for registration and whether they are consistent with the form used by the Trade-marks Branch. If the examiner determines that changes are required to permit registering the trademark, he or she advises the applicant of the changes needed. Examiners also assess revised applications.

[4] In February 2006, the grievor was notified (Exhibit E-19) that he had been successful in his application for an indeterminate position as a senior trademarks examiner. He started on May 8, 2006, as one of a group of approximately 12 new trademarks examiners.

[5] Ms. Côté-Halverson gave evidence concerning the training and assessment process for those new employees. All the new trademarks examiners spent the first eight weeks of their employment in classroom training that is designed to provide them with the technical and policy background they need to carry out their

responsibilities. Following the eight weeks, there was a one-month period where the employees were asked to review applications as they had been taught and to consult with each other about them. At that point, the quality of their work was not assessed by their supervisors, although they were invited to ask questions and to consult with more experienced examiners.

[6] After the classroom training and beginning with the one-month "free period," the new examiners were each assigned to work in consultation with one of four coaches. After the one-month "free period," the coaches evaluated their work in the context of benchmarks laid out in a document entitled "Performance Standards for Trade-Marks Examiners" (Exhibit E-1). The document indicated that they would be expected to examine a number of files each day, a number that escalated over the ensuing months of the probationary period, and that they were expected to achieve an error rate of under 10 percent beginning in the fourth month of their employment. The document also indicated other characteristics that would be observed, including "good comprehension of the Trade-marks Act and Regulations," "good quality of communication," "ability to manage personal workload efficiently," "good rapport with colleagues, clients and management," and "ability to react calmly and perform effectively in difficult situations." The coaches were assigned to new examiners each month so that each probationary employee would experience working with different coaches and so that different assessment perspectives could be applied to their work.

[7] Ms. Côté-Halverson testified that, depending on the employer's assessment of the performance of probationary employees according to the benchmarks, they might be permitted to work independently before the probationary period ends. That status was granted to several members of the grievor's group. Other employees were monitored throughout the probationary period, and the grievor and one other examiner were ultimately rejected on probation.

[8] Ms. Côté-Halverson commented on the reports about the grievor (Exhibits E-2 to E-10) that the coaches completed and stated that she had been unable to find any reports for the grievor for October 2006. After examining the reports, she commented that the grievor never succeeded in meeting the quantitative expectations set out in the performance standards and that on only one occasion did he succeed in meeting the standard for "deficiency-free" performance.

[9] Ms. Côté-Halverson's evidence was that, in September 2006, when the grievor's coach was Alexandra Normandin, she had discussions with him about the performance concerns that the reports seemed to indicate. At that time, she said, her objective was to understand the source of his difficulties. The grievor expressed some reservations about his relationship with that particular coach, who was also assigned to him in October 2006. As a result, Ms. Côté-Halverson assigned him to a different coach, Lynn Pelletier, in October.

[10] Ms. Pelletier coached the grievor for two months. From the November 2006 report, Ms. Côté-Halverson concluded that Ms. Pelletier had made some changes to her assessments following discussions with the grievor, that is, that she had accepted his explanation for things that she had originally noted as deficiencies. Despite the changes, the grievor did not meet the qualitative or quantitative performance standards.

[11] The grievor was assigned to a new coach, Crystal Laine, in December 2006. Ms. Côté-Halverson said that she met with the grievor that month and was more specific about the concerns with his performance. He was assigned to a new coach, Roger Hollett, in January 2007, and was assigned to Ms. Laine again in February. The reports from the coaches continued to identify performance issues, and Ms. Côté-Halverson said that she specifically addressed a number them with the grievor. Although the grievor testified that the instructors in the training course, and some of the coaches, had told him that the performance standards were not important and that he should not worry about their quantitative aspects, Ms. Côté-Halverson said that that was not consistent with the practice for probationary employees. She could not imagine that any of the coaches would have told the grievor that he could ignore the performance standards, and indeed, the grievor's failure to meet the quantitative expectations was a recurring theme in the coaches' reports.

[12] In March 2007, she concluded that a new approach was necessary. She allocated five applications per day from the pool of applications selected by the grievor and indicated to him that he should submit those applications to her at the end of each day. She would then discuss the files with him and have him explain the process of analysis that he had used in evaluating each file. Asked in cross-examination whether she intended to demean him or to set him apart by taking over coaching the grievor and devising a process different from the one that he had been following, she replied

that her intention was to get to the bottom of any difficulties that were preventing him from performing effectively. She felt that she would not be able to provide him with appropriate support unless she understood how he was approaching the examinations. However, when she first met with him to start the new process, the grievor indicated that he was not comfortable with the approach and requested an opportunity to discuss it with Lisa Power, Director of the Branch. When the process came to that premature end, Ms. Côté-Halverson said that no further new files were assigned to the grievor, although he was able to continue on the files that he had already had been working on. She said that, in her discussion with the grievor at that point, she tried to make clear the seriousness of his situation and to emphasize the link between the employer's conclusion that he was not meeting the performance standards and the final decision as to whether he would complete probation. She said that, before then, she had tried to give the grievor positive advice and encouragement in an effort to assist him in meeting the standards but that, at that point, she thought that it was necessary to make it clear to him that his employment was in jeopardy.

[13] She consulted with Ms. Power about the grievor's performance issues and determined that he should be rejected on probation. Ms. Côté-Halverson signed the letter of April 11, 2007, advising the grievor of his termination. She was briefly acting as the director in Ms. Power's absence.

[14] Ms. Power also testified on behalf of the employer. She said that she had three or four conversations with Ms. Côté-Halverson about the grievor's performance and that she reviewed the coaches' reports. She also had three conversations with the grievor, who expressed concern that his performance was not being evaluated appropriately. She testified that there was no other reason for the grievor's rejection on probation than his poor performance. She discussed, with human resources staff, a draft of the letter rejecting him on probation and approved having it sent in her name.

B. <u>For the grievor</u>

[15] The grievor testified. He described his previous career experience, which included working as a teacher and a military officer, and stated that, although he had considered applying for a number of managerial positions in the federal public service, he had been advised that he would not be eligible for them because of the language requirements. He applied for the trademarks examiner position to gain entry to the public service, and he hoped to improve his language skills so that he could advance.

[16] He stated that, from the beginning of his employment in the Trade-marks Branch, he was badly treated. He alleged that it was clear from an early point that his superiors, notably Ms. Côté-Halverson, were trying to find reasons to get rid of him and to ensure that he would not successfully complete the probationary period.

[17] He said that his experience with the eight-week training period was difficult because of his medical condition. He was eventually provided with an appropriate chair, although it took some time to arrange, and the first instructor had permitted him to exit the class at regular intervals to do stretches and to ease his discomfort. However, the next instructor required him to obtain permission to leave the room on each occasion, which he found embarrassing and discriminatory. He raised the issue with Ms. Côté-Halverson, who said that it was up to the instructor to set the absence policies for the class. The grievor said that he was also embarrassed during that period because he was subjected to ridicule when he refused sweets provided by the instructor. He explained that he was a practising Muslim and did not know what was contained in the sweets. Other students laughed at him and said, "You won't die."

[18] Another incident during the training period occurred when the instructor commented about research, which piqued the grievor's curiosity and led him to ask a staff member in the Branch about whom he could speak with about the research process. He was referred to someone, and met with him, not realizing that he was speaking with a senior official of the Branch. One of the coaches, Ms. Normandin, took him to task for his approach. She indicated that he should have consulted with his supervisor or with one of the coaches before proceeding as he did. He felt intimidated and felt that Ms. Normandin was angry with him and that she was offended that he had not raised his questions with her.

[19] The grievor did not accept Ms. Côté-Halverson's testimony that he had been assigned Mr. Hollett as a coach when the eight-week classroom training ended. He said that, in fact, the trainees were advised that they could consult any coach. They did not know who would be reviewing their files, which he found very confusing.

[20] The grievor testified that he fully understood how to approach files at the end of the training. He did not accept that the written performance standards established clear expectations. He did not agree that the ratings established by the coaches according to the standards represented a fair and equitable evaluation of his actual performance. As for the coaches' reports, he said that he disagreed with many of the

notations that indicated some deficiency in his work. He said that many of the issues on which he differed with the coaches were "grey areas" in which his judgment was as equally as acceptable as theirs and that those judgments should not have been noted as indicating that he was not performing well. He presented me with documents (Exhibits G-1 to G-14) purporting to show that he had in fact achieved a high standard of deficiency-free examinations. He said that the training instructors and the coaches had always told him not to pay any attention to the quantitative aspects of the standards but instead to focus on achieving a high qualitative standard.

[21] The grievor's evidence was that Ms. Côté-Halverson and Ms. Normandin were hostile to him from the beginning and that they put enormous pressure on him with respect to the standards. Although he tried to explain how he had assessed particular files, they were not interested in listening to him. He thought that they were trying to show that he was incompetent. When he put forward alternative interpretations of the criteria used in assessing applications, they brushed it aside. In a meeting with Ms. Côté-Halverson and Ms. Normandin in September or October 2006, he described Ms. Côté-Halverson as "shouting" and said that, when he contested an interpretation of a term, she "threw down" the file and left the room.

[22] The grievor described his relationship with Ms. Pelletier and Ms. Laine as slightly better. Indeed, in November and December 2006, both Ms. Pelletier and Ms. Laine told him that he was doing much better, and his recollection was that Ms. Pelletier said that he "should meet expectations."

[23] In January, Mr. Hollett was assigned as the grievor's coach. According to the grievor, he received no feedback at all from Mr. Hollett until the very end of the month. He discussed some files with Mr. Hollett, which the grievor said was not helpful. For example, Mr. Hollett indicated to him that he should be writing letters in a particular way. The grievor said that it was essentially the same way he was already writing them, and Mr. Hollett became offended. In January 2007, Ms. Côté-Halverson initiated a discussion with him in which she said that he was still failing to meet the performance standards and that his error rate was high. He pointed out that Ms. Laine had congratulated him on improving his error rate. A few days later, he encountered Ms. Côté-Halverson in the hallway, and that she said she was encouraged by hearing from Ms. Laine that his error rate was better.

[24] At the beginning of January 2007, the grievor pointed out to Ms. Côté-Halverson that a number of the examiners who had started at the same time as him had been allowed to proceed independently, without having to submit their files to the coaches. He said the he was ready for that, and that he should be allowed to work independently. Ms. Côté-Halverson said that she thought that he should have an opportunity to have feedback from all the coaches and indicated that he should work with Mr. Hollett through January.

[25] The grievor said that in January 2007 Ms. Côté-Halverson became angry with him because of his criticism of Mr. Hollett and that she accused him of disputing the "integrity of the coaches." In her testimony, Ms. Côté-Halverson said that she did not raise this specific issue with the grievor but that she met with all the trainee examiners because she had heard that there was talk among the trainees of coaches not assessing them fairly. She advised them that their allegations were serious and that they should not engage in such casual discussions.

[26] In March 2007, Ms. Côté-Halverson informed the grievor that she would be working directly with him. The grievor told her that he thought that he should be working independently in any case but that, if he needed a coach, he could work with one of the other coaches. He told her that he thought that it was discriminatory that he was the only person asked to work directly with her. She told him that she expected him to provide five files at the end of each day and she would discuss them with him.

[27] The grievor said that one of the things that he found insulting about the process was that Ms. Côté-Halverson was selecting the files for him, rather than allowing him to pick the files himself as other employees were allowed to do. Ms. Côté-Halverson's testimony was that the grievor was allowed to pick a pool of files in the normal fashion and that all she did was to sort them into groups of five and ask him to do those five files in one day. The grievor also said that on the first day Ms. Côté-Halverson asked him, in the presence of other employees, why he had not yet produced the files, which he found embarrassing.

[28] The next day, the grievor met with Ms. Côté-Halverson to discuss the files. She asked him to explain why he had done things in a particular way. According to the grievor, she said the following: "I have to check your brain." The grievor said that he found that offensive and that he was insulted. Ms. Côté-Halverson said that he had to do as she said and that, if he did not comply, there could be serious consequences for

his employment. The grievor said that he wanted to talk to Ms. Power and that he arranged an appointment with her. He did work on some further files, but Ms. Côté-Halverson said that she would not assign him further files unless he was willing to follow the process that she had set out.

[29] Ms. Power said that it was her understanding that Ms. Côté-Halverson was attempting to find a way to evaluate the grievor's performance. He complained that Ms. Côté-Halverson was not directly coaching anyone else, which offended him. He also said that his performance had been improving and alluded to Ms. Laine's comments. When he saw the reports that Ms. Laine had actually submitted, he was "shocked" to see that she had recorded that he was still failing to meet the standards for errors. He asked Ms. Power if his files could be reviewed by a third party outside the CIPO. His request was refused.

[30] The grievor met with other senior officials in other parts of the department in an attempt to persuade them to intervene. One of those initiatives led to a further meeting with Ms. Power, at which she informed him that the decision had been made to reject him on probation.

III. Summary of the arguments

A. For the employer

[31] Counsel for the employer argued that an adjudicator under the *PSLRA* does not have jurisdiction over a rejection on probation grievance, which simply grieves a decision by the employer to reject a probationary employee for not meeting the standards of performance that the employer is fully entitled to articulate.

[32] Section 209 of the *PSLRA* provides in part 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;*
>
> . . .

[33] However, counsel for the employer pointed out that section 211 of the *PSLRA* specifically excludes the right provided in section 209 in the case of a termination of employment under the *PSEA* and that section 62 of the *PSEA* explicitly provides for rejection on probation in this case.

[34] Counsel for the employer argued that an employer has broad discretion during a probationary period to dispense with the services of an employee, which is consistent with differentiating the employee's employment status during the probationary period from permanent employment. In *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), the Federal Court of Appeal made the following comment:

. . .

> *. . . As was said by Heald J. [[1977] 1 F.C. 91 (C.A.) sub nom. Attorney General of Canada v. Public Service Staff Relations Board, at page 100], and approved by de Grandpré J. in his reasons in Jacmain (at page 37) "the whole intent of section 28* [now section 62 of the *PSEA*] *is to give the employer an opportunity to assess the employee's suitability for a position. If, at any time during that period, the employer concludes that the employee is not suitable, then the employer can reject him without having the adjudication avenue of redress.*

. . .

[35] Although the employer's right to reject on probation is limited by an obligation to act in good faith, counsel for the employer argued that the burden on a grievor who wishes to demonstrate that the decision was a "sham" is extremely heavy. He argued that the grievor has not succeeded in showing that the employer did anything other than arrive at a judgment in good faith that the grievor had failed to meet the set performance standards.

B. <u>For the grievor</u>

[36] The grievor said that he had never been properly assessed. The document setting out performance standards was a "sham," and it permitted those who wanted to get rid of him to arrange it so that he would not be successful. In many cases, the coaches refused to accept his explanations for his evaluations and recorded many of his judgments as errors just because they did not agree with his interpretations. In some cases — notably for Ms. Normandin and Mr. Hollett — the coaches were actively

hostile to him, and it was clear from an early point in his relationship with Ms. Côté-Halverson that her intention was to get rid of him. The grievor denied that the decision to reject him on probation was made in good faith and argued that, on that basis, an adjudicator has jurisdiction to allow the grievance and to reinstate him in his position.

IV. Reasons

[37] The argument and authorities submitted on behalf of the employer clearly set out the legal principles surrounding the jurisdiction of adjudicators under the *PSLRA*. As noted earlier, the courts have accepted that an employer's decisions about a probationary employee may rest on a different rationale than those concerning permanent employees. Although an employer is bound to make the decision to reject an employee on probation in good faith, it is only required to show that there is an employment-related reason for the rejection, not that there is "just cause" in the sense required in many other employment settings. In *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529, the Federal Court stated the following:

. . .

> *[37] . . . the employer need not establish a* prima facie *case nor just cause but simply some evidence the rejection was related to employment issues and not for any other purpose.*

. . .

Decisions of the Public Service Labour Relations Board reflect that understanding of the nature of the employer's obligation in the case of a rejection on probation; see, for example, *Ondo-Mvondo v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 52, and *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33. In *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139, the adjudicator stated the following:

. . .

> *[76] . . . As noted above, the employer does not need to prove that each and every one of its listed reasons for rejection on probation is well-founded; it only needs to show "an employment-related reason. . . ."*

. . .

Thus, even if the employer makes errors in drawing the conclusions that lead to the decision to reject on probation, the rejection will still not be subject to challenge if the reasons for the decision relate to employment.

[38] When the employer puts forward an employment-related reason — in this case the grievor's failure to meet the expected performance standards — the burden falls on the grievor to demonstrate that the reasons for the rejection on probation are a "sham or camouflage" and that the employer acted in bad faith. As the adjudicator pointed out in *Owens* at paragraph 74, that is a very difficult standard for the grievor to meet. It requires the grievor to demonstrate not simply that a different judgment might have been made but that the employer was merely constructing the employment-related rationale to disguise motives that had nothing to do with the grievor's suitability for the job.

[39] I have concluded that the grievor failed to satisfy the onus of showing that the employer acted in bad faith in deciding to reject him on probation. The employer articulated performance standards, including qualitative and quantitative measures, for use as benchmarks of an employee's progress through the probationary period. Those standards required a demonstration of increasing proficiency over the probationary period, and the degree to which employees were meeting the standards was assessed frequently by the coaches. Each employee was subject to assessment by a number of coaches in order to allow for the different perspectives that coaches might have about the work of an individual.

[40] It is clear from his testimony that the grievor did not agree that the performance standards articulated by the employer constituted a meaningful measure of his progress. He questioned the usefulness of the coaching he received and asserted that the coaches' reports were not accurate representations of his actual performance.

[41] Throughout the probationary period, the grievor was encouraged to discuss with the coaches their criticisms of the judgments he had made, which he did on a number of occasions. In general, he did not accept their views.

[42] An employer is entitled to define the expectations according to which the suitability of a probationary employee will be assessed and to formulate the process for determining whether the employee meets those expectations. In this case, the employer had set out criteria in written form and had used the coaching system to

provide employees with feedback and assessments of their progress in satisfying those criteria. I do not agree that the standards were meaningless or that they did not establish a comprehensible criteria that could be used to assist in gauging the progress of employees.

[43] Although the standards were not applied rigidly, and contained qualitative criteria intended to capture more intangible characteristics, I do not accept the grievor's statement that he was told to "ignore" the quantitative criteria. From the earliest coaches' reports and his discussions with Ms. Côté-Halverson, it was clear that his apparent inability to handle the required number of files was a concern. The grievor disputed the number of files actually counted in September 2006, but even if one accepts that the September report was inaccurate, the evidence shows that the number of files he handled was a continuing issue.

[44] The grievor attempted to demonstrate that the calculations of his deficiency-free rates in the reports were inaccurate by presenting documents that purported to show that his judgments had been right and that those of the coaches had been incorrect. There certainly were occasions when the coaches accepted the grievor's judgment after a discussion with him, but in the final analysis, the coaches were responsible for assessing whether the grievor met the performance standards. In numerous instances, they concluded that he had made errors. The grievor's statement that he was right and that the coaches were wrong does not advance his case. For one thing, it is difficult to find credible a statement that the grievor's judgment of numerous issues was more likely to be correct than that of several senior employees with experience in the trademarks field. In any case, the question is not whether there were occasions on which a judgment of the employer was in error, but rather whether there is any indication that the decision to reject the grievor on probation was made in bad faith.

[45] The grievor alleged that Ms. Côté-Halverson was hostile to him from the outset and that she was determined to find a way to get him out. In support of that claim, he pointed to the occasion when he had complained to her that the instructor in the training course was requiring him to ask permission to leave the room, which he found embarrassing and offensive, given that he had a medical reason for leaving. She refused to intervene, saying that it was up to the instructor to set policies in the classroom. Although there might have been different ways for Ms. Côté-Halverson to

approach the issue, there is nothing inherently objectionable in her response to the grievor. Generally, an instructor is in charge of the proceedings in the classroom, and the grievor did not indicate that he raised his reasons for objecting to the policy with the instructor.

[46] In support of his assertion that Ms. Côté-Halverson was singling him out and seeking to get rid of him, he described the event in March 2007 when she advised him that a different approach to assessment would be used, which would be based on discussions of a limited number of files. She said that she would be taking over his assessments and that his discussions would be with her. He found that offensive and demeaning, in part because he would be the only probationary employee whom she dealt with directly. More importantly, she asked him to explain his judgments, and said that she "needed to get inside his brain." He refused to participate in that form of "coaching."

[47] Ms. Côté-Halverson's testimony was that, in the grievor's case and for some of the other trainees, it was clear that the usual coaching format was not bringing about the desired progress. Since it was close to the end of the probationary period, she decided that some new approach would have to be taken to give them an opportunity to succeed in their probations. She thought that, if the coaching process focused on eliciting explanations from the trainees of the analytical process that they had used to make their judgments, it might be possible to provide them with the assistance they required to make modifications to their approaches and to meet the standards. With respect to the grievor, she decided that, since he had criticized the coaches' reports, she would take direct responsibility for coaching him.

[48] I do not accept that there was anything sinister about Ms. Côté-Halverson's initiative. She singled out the grievor for her special attention because she identified a significant shortfall in his performance according to the standards and because his relationship with the other coaches had not always been smooth. It was a final effort on her part to give him an opportunity to meet the standards before the end of the probationary period. Whether or not she actually said that she wanted to "get into his brain" in those words, she was not attempting to exercise some kind of mind control over him but was simply trying to understand the reasoning process he was using to arrive at the judgments he made in examining applications. When she told the grievor that he was required to obey her, she was making a legitimate effort to bring to his

attention the consequences of refusing to comply with a legitimate employer request. By not cooperating with her instruction to provide an explanation of how he had arrived at the judgments that he made, he was frustrating an attempt to understand and assess his work. In the absence of that opportunity, Ms. Côté-Halverson had only the existing written and verbal reports from the coaches to use as the basis for assessing the grievor's performance. It is not surprising that those led her to the decision to reject the grievor on probation.

[49] The grievor said that the demeanour of Ms. Côté-Halverson and of some of the coaches, particularly Mr. Hollett and Ms. Normandin, in dealing with him were indicative of their fundamental hostility towards him. From the evidence, it seems likely that there were occasions on which Ms. Côté-Halverson and others reacted to the grievor with impatience and spoke to him sharply. However, I am not prepared to read into this that they were hostile towards him in the sense that they wished to get him out of the Branch. On the described occasions, the grievor challenged their authority and their judgment, refused their advice, or accused them of being unfair to him. It was to be expected that they would react with some frustration. They continued to try to offer him advice about how he could modify his performance to meet the standards. Ms. Côté-Halverson made a last effort in March 2007. The grievor clearly regarded that effort as a further instance of her aversion to him, but I have found that it was a sincere attempt on her part to ascertain whether there was yet something that could be done to make it possible for him to meet the performance standards.

[50] The grievor also mentioned a number of incidents that he interpreted as evidence of a discriminatory attitude to his religious beliefs or his ethnicity. He did allude to this in his grievance, and gave notice of this allegation to the Canadian Human Rights Commission as required where a grievance raises an issue of discrimination on a ground prohibited under the *Canadian Human Rights Act*. His descriptions of some of the comments made to him by co-workers suggest that they may have been thoughtless or inconsiderate, although a number of the examples he gave sound more like instances of sincere and well-intentioned curiosity on the part of his colleagues. In any case, there was no evidence at the hearing that anyone responsible for directing his work or assessing his performance participated in any of the incidents, that they were present on any of these occasions, or that they were or should have been aware of any of the conduct the grievor cited as objectionable.

[51] My conclusion is that the grievor has failed to show that the employer acted in bad faith. Therefore, I lack jurisdiction to deal with the grievance.

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

(The Order appears on the next page)

V. Order

[53] The employer's objection concerning my jurisdiction is allowed.

[54] The grievance is dismissed.

December 14, 2009.

Beth Bilson,
adjudicator