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File: 566-02-1827

Citation: 2009 PSLRB 52



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

JEAN-DANIEL ONDO-MVONDO

Grievor

and

**DEPUTY HEAD
(Department of Public Works and Government Services)**

Respondent

Indexed as

Ondo-Mvondo v. Deputy Head (Department of Public Works and Government Services)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: [Marie-Josée Bédard, adjudicator](#)

For the Grievor: [Himself](#)

For the Respondent: [Stéphane Bertrand, counsel](#)

Heard at Ottawa, Ontario,
March 9 to 11, 2009.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] On February 6, 2006, the grievor, Jean-Daniel Ondo-Mvondo, was appointed to an indeterminate position at the Department of Public Works and Government Services (“the respondent” or “the employer”). The appointment was made under the Compensation Officer Apprenticeship Program (COAP). The purpose of the program, which the employer implemented as a succession plan for the Compensation Sector workforce, is to recruit and train staff members to meet future organizational needs.

[2] COAP participants are recruited from inside and outside the public service. Mr. Ondo-Mvondo was recruited from outside the public service. Participants are appointed to the AS group and are expected to progress from the AS-02 to the AS-05 level over the course of the 48-month program. Those who successfully complete all phases of the COAP are offered a permanent AS-05 position. COAP participants recruited outside the public service are on probation for the entire 48-month period.

[3] On September 13, 2007, Mr. Ondo-Mvondo was dismissed while on probation. The letter of dismissal reads as follows:

[Translation]

This is further to several meetings you attended with manager Jeff Marcantonio and coach Mirelle Diotte as well as with Tammy Labelle, Director, Pension Services Directorate, about your internship as an AS-02 junior compensation officer (intern) under the Compensation Officer Apprenticeship Program (COAP). In those meetings, you were given feedback on your performance, including your shortcomings and the need for corrective action.

In light of the evaluation by your coach and manager, your performance is unsatisfactory and does not meet the requirements of your position. The reasons for our decision were provided to you by your coach and manager and were recorded in the reports that you became aware of on October 30, 2006 (with Louise Mailloux), February 27, 2007 (with André Charbonneau), June 12, 2007 (with Mirelle Diotte and Jeff Marcantonio) and September 12, 2007 (with Mirelle Diotte).

Moreover, I consider that your ability to abide by the current rules is also unsatisfactory, which I conclude because your supervisors were required to caution you about your behaviour towards women. In addition, we provided you with a copy of the harassment policy in June 2006, despite which another incident occurred that led to the harassment

complaint that was brought to your attention at the meeting of July 3, 2007 (with Tammy Labelle and Jeff Marcantonio). The complaint led me to conclude that there had been misconduct on your part. Your behaviour also affected your ability to maintain good interpersonal relations with your colleagues.

Consequently, under the authority delegated under subsection 62(1) of the Public Service Employment Act, I am informing you by this letter of the decision to terminate your employment during your probationary period. Therefore, your last day of work will be Thursday, September 13, 2007, and you will receive two weeks' salary in lieu of notice.

[4] On September 24, 2007, Mr. Ondo-Mvondo filed a grievance challenging his dismissal. It reads as follows:

[Translation]

...

On September 13, 2007, I received a letter from Ms. Gail Sherman, Director, Pay Policies and Training Services Directorate, notifying me that she was terminating my employment during my probationary period.

I believe that my dismissal is unjustified, arbitrary, discriminatory and disciplinary.

I am also of the view that my employer is in breach of article 17 of my collective agreement because I was never given advance notice that assistance was available from my union. In addition, my union was not notified of my impending dismissal.

Finally, I firmly believe that the reasons that the employer gave to justify my dismissal are defamatory, that they are damaging to my reputation, that they imperil my career in the public service and that they cause me grievous harm.

...

[5] The corrective measures that the grievor seeks include being reinstated retroactively to his position without loss of salary and a payment of \$40,000 for damage to his reputation and as compensation for the physical harm and anguish that he allegedly suffered. He also requests that his employer acknowledge that it did not comply with the collective agreement. Finally, he asks to be reinstated in a workplace free from harassment and discrimination.

[6] In February 2008, Mr. Ondo-Mvondo's bargaining agent, the Public Service Alliance of Canada ("the Alliance"), decided not to refer Mr. Ondo-Mvondo's grievance to adjudication. In a letter to the Alliance's national representative dated February 7, 2008, of which the Public Service Labour Relations Board ("the Board") has a copy on file, Nathalie St-Louis, Grievance and Arbitration Analyst, Representation Section, gave the following reasons for the Alliance's decision:

[Translation]

...

*Given that the grievance deals with a dismissal during a probationary period, an adjudicator appointed by the Public Service Labour Relations Board does not have jurisdiction to hear that type of grievance. Under section 211 of the Public Service Labour Relations Act, a grievance for termination during probation under subsection 62(1) of the **Public Service Employment Act** may not be referred to adjudication.*

...

For an adjudicator to have jurisdiction to hear Mr. Ondo-Mvondo's grievance, it must be demonstrated that the employer acted in bad faith with the intent of disciplining Mr. Ondo-Mvondo by dismissing him while on probation. Therefore, Mr. Ondo-Mvondo has the burden of proving that the employer acted in bad faith. Evidence of intent to take disciplinary action, as adjudicator Galipeau heard in Rinaldi (Board File No. 166-2-26927), would have to be adduced.

"If you establish that the termination of the employment was not a genuine layoff but rather a decision made in bad faith, a ruse, a disciplinary dismissal in disguise, then I would be willing to say that subsection 92(3) of the Public Service Staff Relations Act does not prevent me from having jurisdiction. . . ."

Nothing in the file leads us to believe that Mr. Ondo-Mvondo's termination of employment while on probation was a decision that was made in bad faith or that was discriminatory.

...

[Emphasis in the original]

[7] Despite the bargaining agent's refusal to refer his grievance to adjudication,

Mr. Ondo-Mvondo chose to represent himself and referred his grievance to adjudication on February 25, 2008 under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (“the Act”), which deals with disciplinary action including termination.

[8] On May 20, 2008, the employer wrote to the Board, raising two objections to the jurisdiction of an adjudicator to hear Mr. Ondo-Mvondo’s grievance. In its first objection, the employer indicated that the grievor’s allegations that the employer had presumably breached article 17 of the collective agreement were not adjudicable because Mr. Ondo-Mvondo was not represented by his bargaining agent. The employer’s objection is based on subsection 209(2) of the Act, which reads as follows:

209.(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

[9] In its first objection, the employer also dealt with a particular corrective measure sought by the grievor in the following terms:

[Translation]

...

Moreover, as a corrective measure, Mr. Ondo-Mvondo requests, among other things, damages of \$40,000. The PSLRB now authorizes an adjudicator to interpret and apply the Canadian Human Rights Act and, hence, to award damages and interest. However, it must first be demonstrated that the harassment and discrimination provisions of the collective agreement were breached. The bargaining agent’s support must also be obtained, which Mr. Ondo-Mvondo does not have.

...

[10] In its second objection, the employer claimed that an adjudicator did not have jurisdiction to rule on a grievance for a termination under probation. The employer’s objection is based on section 211 of the Act, which reads as follows:

211. Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to

(a) *any termination of employment under the Public Service Employment Act*

. . .

[11] On June 6, 2008, Mr. Ondo-Mvondo filed his response to the employer's objections about an adjudicator's jurisdiction with the Board. At the same time, he also filed a complaint and a lawsuit against the Treasury Board requesting damages of \$2,200,000 alleging discrimination, defamation, damage to his reputation and honour, grievous injury, nuisance, psychological harassment, and complicity.

[12] In a letter dated July 30, 2008, the Board notified the grievor that it did not have jurisdiction to hear his complaint and lawsuit filed against the Treasury Board. In response to Mr. Ondo-Mvondo's allegations based on the *Canadian Human Rights Act*, the Board offered the following response:

[Translation]

. . .

You are correct in pointing out that, under paragraph 226(1)(g) of the Public Service Labour Relations Act, an adjudicator has the jurisdiction to interpret and apply the provisions of the Canadian Human Rights Act. Nevertheless, the adjudicator can exercise his or her jurisdiction only when hearing a grievance, not a complaint. Therefore, you are entitled to raise arguments based on the Canadian Human Rights Act with respect to your grievance, although the adjudicator may not hear a complaint as such.

. . .

Moreover, please note that, if you intend to raise a matter related to the interpretation of the Canadian Human Rights Act once your grievance has been referred to adjudication, you are required to notify the Canadian Human Rights Commission of your intent by submitting Form 24, which is in the schedule to the Public Service Labour Relations Board Regulations. . . .

. . .

[13] On August 6, 2008, Mr. Ondo-Mvondo filed the appropriate notice with the Canadian Human Rights Commission (CHRC), and on August 14, 2008, the CHRC notified the Board that it did not intend to submit any comments during Mr. Ondo-Mvondo's grievance hearing.

[14] The hearing began with a pre-hearing conference during which I set out the limited parameters of my jurisdiction. First, I reiterated that I had no jurisdiction over the complaint and lawsuit that Mr. Ondo-Mvondo filed against the Treasury Board on June 6, 2008. The grievor indicated to me that he clearly understood the jurisdictional framework of an adjudicator appointed by the Board under the *Act*.

[15] Second, I explained to Mr. Ondo-Mvondo that I did not have jurisdiction over the allegations contained in his grievance that the employer breached certain provisions of the collective agreement. On that matter, I indicated to the grievor that, under subsection 209(3) of the *Act*, a grievance on the application or interpretation of the collective agreement is only adjudicable with the consent of the bargaining agent. That consent had not been granted in this case. Mr. Ondo-Mvondo assured me that he clearly understood that I did not have jurisdiction in that respect.

[16] With respect to the grievance challenging the termination of the grievor's employment while on probation, I explained to Mr. Ondo-Mvondo that the hearing would deal only with the administration of evidence and the presentation of arguments on the objection to my jurisdiction that was made by the employer. On those issues, I set out the limits of my jurisdiction under section 211 of the *Act*, which provides that a grievance on termination of employment during a probationary period may not be referred to adjudication. I outlined the jurisprudence on the matter and informed the parties of some parameters, as follows. The initial burden of proof is on the employer to demonstrate that its decision to terminate an employee on probation was employment-related. Once that has been established, an adjudicator does not have jurisdiction to review the merits or the fairness of the employer's decision. For an adjudicator to have jurisdiction to hear such a grievance, the grievor must demonstrate that his or her dismissal was in fact a subterfuge disguising a dismissal that was disciplinary, discriminatory, arbitrary or in bad faith.

[17] Before summarizing the evidence tendered by both parties, I will summarize the discussions and decisions that occurred when certain witnesses were summoned.

[18] On February 22, 2009, Mr. Ondo-Mvondo requested that the Board issue summonses to 23 persons. In a letter dated February 25, 2009, the Board informed the grievor that I was prepared to issue summonses to the following individuals: Tammy Labelle, Jeff Marcantonio, Mirelle Diotte, Louise Mailloux, André Charbonneau, Debbie Kovacs and Denise Lafortune. The Board added that the relevance of issuing

summonses to the other persons mentioned in his letter would be discussed at the hearing. Summonses were indeed issued, although they were not served by Mr. Ondo-Mvondo in accordance with the *Public Service Labour Relations Board Regulations*.

[19] In an email to the Board on March 3, 2009, the employer's counsel indicated that, in making his case, he intended to take the testimony of certain individuals that Mr. Ondo-Mvondo summoned to appear, namely, Mses. Diotte, Mailloux, Lafortune and Labelle. Hence, he would ensure that those persons would attend.

[20] During the hearing, counsel for the employer determined that Mr. Marcantonio and Ms. Kovacs would also attend, and interpreters were provided to enable Mr. Marcantonio to testify in English. Finally, Mr. Ondo-Mvondo decided not to call Mr. Marcantonio since documents were adduced in evidence on consent in place of his testimony. With respect to the testimony of André Charbonneau, whom Mr. Ondo-Mvondo also summoned, the employer indicated that it was unable to ensure his attendance because he had retired from the public service. Mr. Ondo-Mvondo agreed to forego Mr. Charbonneau's testimony, and certain documents replacing his testimony were filed instead on consent.

[21] During the hearing, Mr. Ondo-Mvondo had the opportunity to explain why he wished to gather the testimony of the other individuals named in his correspondence of February 20, 2009, including Lucy Baker, Gail Sherman, Josianne Clément and 13 of his co-participants in the COAP. After hearing the grievor, I acknowledged that the testimonies of Mses. Baker and Sherman were relevant and stated my willingness to issue subpoenas for them to appear. The employer's counsel then said that he would ensure that Ms. Baker attended the hearing. As for Ms. Sherman, the employer indicated she was on extended sick leave. After discussions between the parties, it was determined that Ms. Sherman's testimony was relevant to the following issues: she had authored the letter of dismissal, she had had a one-on-one discussion with Mr. Ondo-Mvondo and she had attended the meeting with Mr. Ondo-Mvondo and Ms. Baker. After some discussion, it was agreed that the dismissal letter would be adduced in evidence on consent and that the grievor could provide testimony on his one-on-one meeting with Ms. Sherman and convey her remarks. It would then be up to the employer to determine whether it wished to cross-examine Ms. Sherman, in which case the hearing would be adjourned to a later date. Mr. Ondo-Mvondo effectively

conveyed the views attributed to Ms. Sherman, and the employer chose not to cross-examine her. As for the meeting between the grievor and Meses. Baker and Sherman, Mr. Ondo-Mvondo and Ms. Baker had the opportunity to discuss it in their testimony.

[22] I did not deem it appropriate to issue summonses to all the other COAP participants in view of the nature of the hearing, which was limited to dealing with the employer's objection to my jurisdiction.

[23] Ms. Clément's testimony was relevant because she had filed a complaint against Mr. Ondo-Mvondo. However, after some discussion, it was established that the employer's reaction to that complaint was more significant than its content. Ms. Clément's written complaint was adduced in evidence on consent, and I did not issue her a summons.

II. Summary of the evidence

[24] Each party adduced several documents in evidence. Meses. Mailloux, Diotte, Lafortune, Baker, Kovacs and Labelle and Mr. Ondo-Mvondo testified.

[25] The evidence pertained to the two censures that the employer set out in its letter of dismissal, one about Mr. Ondo-Mvondo's unsatisfactory performance and the other about his attitude towards women. Evidence relating to the grievor's performance was not contradictory, although each party draws a different conclusion. As a result, considering the sequence of events and their coherence, I have decided to set out the evidence on the performance-related basis for dismissal without distinguishing that submitted by the employer from that adduced by Mr. Ondo-Mvondo.

A. Evidence on Mr. Ondo-Mvondo's dismissal for unsatisfactory performance

[26] The COAP is governed by written terms of reference describing the program's implementation that are monitored by managers and that are presented and explained to each participant on entering the program. The COAP was designed so that each participant completes 3 assignments of 8 months' duration each and 2 development phases (lasting 8 and 16 months respectively), along with a training program. Training goals are set for each assignment. The participant is monitored and supervised by a coach who periodically assesses the individual's performance and progress. The terms of reference describe what is expected of participants as follows:

...

... Program participants are expected to effectively acquire the skills, knowledge and experience to provide expert advice, interpretation and guidance to the compensation stakeholders, or to provide expertise on the compensation systems development and maintenance and on the use of new technology, or to provide expertise in the compensation training development field including new training technologies. The program strives to give the Program participants varied and well-rounded professional compensation experience through exposure to various situations and disciplines as well as staff work.

...

[27] Participants are admitted to the COAP at the AS-02 group and level. They are assigned to either the pay or the pension section of Compensation Services. Mr. Ondo-Mvondo was assigned to the pay section. Participants may rise to the AS-05 level if they successfully complete the three assignments and the professional development internships. After successfully completing the first two assignments, participants are assessed to determine whether they have met the required competence standards to be promoted to the AS-03 level. If so, they are promoted without competition to an AS-03 (intern) position to complete their third assignment. If they successfully complete the assignment, they are permanently assigned to an AS-03 position and advance in the program by completing the two professional development internships. They are promoted to the AS-04 level after the first internship and to the AS-05 level after the second. Should a participant not acquire the skills and knowledge needed to meet the standards of competence (i.e., if he or she does not achieve a “Very Good” rating in the evaluation) of the particular level, he or she can receive up to eight months of on-the-job training.

[28] Section 6.2 of the terms of reference provides that “...employees recruited from outside the Public Service... are on a probationary period for the duration of the program i.e., 48 months and would be rejected on probation should they not be successful.” According to section 6.3, a participant recruited from outside the public service who does not meet the competence standards after receiving on-the-job training and additional coaching may be rejected for cause while on probation under subsection 28(2) of the *Public Service Employment Act (PSEA)* (which has become subsection 62(1)).

[29] Assignment managers are responsible for finding assignments for participants under their direction, establishing clear objectives and appointing coaches to participants. They are also responsible for monitoring and assessing participants' performance. The coaches support participants in performing their ongoing activities.

[30] Under the terms of reference, a work plan must be established during the first month of each assignment and accepted by the participant, the coach and the assignment manager. The work plan lists learning objectives. Each month, the coach must complete Appendix C, the Monthly Development Program Checklist ("the monthly evaluation"), and specify the participant's learning activities and accomplishments. At the end of an assignment, the coach and the assignment unit manager must complete Appendix D, the Assignment Overall Performance Checklist ("the overall evaluation").

[31] Mr. Ondo-Mvondo's first assignment took place from February 6, 2006 to September 8, 2006, in the Systems Division of the Compensation Sector. Ms. Mailloux was his coach. The senior program manager (team leader) at that time was Ms. Kovacs. Ms. Lafortune replaced her in June 2006.

[32] Ms. Mailloux testified, and several documents were adduced in evidence during her testimony. She explained that her duties regarding Mr. Ondo-Mvondo included establishing a work plan with learning objectives, assigning work, providing guidance and coaching, supervising, and evaluating his performance and development. A work plan including specific learning objectives was established and signed by Ms. Mailloux and Mr. Ondo-Mvondo on or about February 9, 2006.

[33] Ms. Mailloux explained that, each month, she evaluated the grievor's performance and the level he achieved with respect to each learning objective, after which she met with him to discuss his results. She and Mr. Ondo-Mvondo had to sign the evaluation. It was then forwarded to the team leader. The situation was normal in February 2006, although the monthly evaluation mentioned certain shortcomings.

[34] Things became complicated in March 2006. The evaluation report for that month describes shortcomings relating to two learning objectives. Mr. Ondo-Mvondo refused to sign the report because he disagreed with the evaluation. He stated the following in an email to Ms. Mailloux dated April 12, 2006 on the meeting scheduled that day to review the evaluation:

[Translation]

...

I have read the evaluation and have the following reservations:

1. The evaluations are liable to affect my career and, on that note, anything is possible should one wish to harm or cause problems to an employee.

2. Generally speaking, in the public service, some things should not be included in an evaluation unless one wishes to harm an employee, mainly for reasons unrelated to his or her performance... Furthermore, the wording of an evaluation is important....

For those reasons, I have reservations about the evaluation that you presented. I cannot reasonably be expected to assist you in wrongly evaluating me....

...

[35] Faced with that reaction, Ms. Mailloux suggested a meeting with Mr. Ondo-Mvondo, Ms. Kovacs and a labour relations representative to review the participant's performance and the coach's role and to discuss problems and the phases of the program to come.

[36] Evaluation reports for April and May 2006 detail that the grievor failed to meet certain learning objectives. Ms. Mailloux and the grievor signed them. The evaluation report for June 2006 describes unsatisfactory performances in several areas. In her testimony, Ms. Mailloux stated that the grievor continued to demonstrate the shortcomings observed since the start of the assignment. Mr. Ondo-Mvondo signed the June 2006 evaluation report. The July 2006 evaluation report also describes several shortcomings and unsatisfactory performances in several areas. Mr. Ondo-Mvondo signed that report.

[37] Ms. Mailloux took annual leave in August 2006. On August 17, 2006, she notified Mr. Ondo-Mvondo by email of the work he was to perform during her absence and informed him that Ms. Lafortune would replace her as coach during her absence. On her return, she reviewed the work performed by Mr. Ondo-Mvondo and completed the evaluation report for the period from August 1 to September 8, 2006. The report lists several deficiencies and unsatisfactory elements.

[38] Because the grievor's assignment was ending, Ms. Mailloux also performed an overall evaluation of his performance and completed the overall evaluation report. She also completed the evaluation report based on AS-03 standards of competence showing that Mr. Ondo-Mvondo did not meet those standards with respect to several sub-competencies. The evaluation report states that, while some learning objectives were achieved in a satisfactory or entirely satisfactory manner, performance with respect to two objectives and three sub-objectives was unsatisfactory.

[39] A meeting was scheduled for October 31, 2006 with Mr. Ondo-Mvondo, Ms. Mailloux and Ms. Lafortune to review the grievor's overall performance evaluation during his first assignment.

[40] Ms. Lafortune and Mr. Ondo-Mvondo exchanged emails before the meeting. The following are excerpts from those emails:

Excerpt of an email sent by Ms. Lafortune to Ms. Mailloux and Mr. Ondo-Mvondo on October 26, 2006, at 11:26:

[Translation]

...

I intend to call a meeting for Monday, October 30, 2006 at 13:30 (invitation to follow) to discuss Appendix D (Overall Performance Checklist) and the competency evaluation tools following your first assignment. Please note that the meeting is mandatory so that you can respond to the participant's questions and concerns.

Jean-Daniel,

If you feel the need to be accompanied by a representative, you have the right to request that a union representative accompany you. Please notify me so that I may reserve a room of appropriate size for all participants.

Excerpt of an email sent by Mr. Ondo-Mvondo to Ms. Lafortune and Ms. Mailloux on October 26, 2006 at 12:05:

[Translation]

...

Could you please clarify your reference to my possible need to be accompanied by a representative?

If we consider that you stated that the meeting's purpose was the objectives of the evaluations (which I refer to as feedback reports that, in my opinion, should not contain a rating, as it skews their purpose) and the role of the coach, which you defined at the last COAP meeting, I should not feel the need to be accompanied by a representative, unless something escapes me?

At the start of my assignment with Louise under Debbie Kovacs, whom you replaced (and whom I am copying in the interest of transparency), I was effectively compelled (I never made such a request) to meet a staff relations representative, although I was unsure why I should do so, what role that person was to play, or why or how that had come about?

However, it is a well-known fact that one acquires the reputation of a problem employee when one meets with staff relations or union people

Once again, considering only the purpose of the meeting as you mentioned below, the purpose of the evaluation and the coach's role as you mentioned at the last COAP meeting, then this meeting should not be confrontational nor instil fear.

Furthermore, at the end of my assignment I made available to management (I copied you on my email) all my work on the drive . . . so that you may evaluate and compare the work done with the objectives (included in the file saved on the drive).

. . .

Excerpt of an email sent by Ms. Lafortune to Mr. Ondo-Mvondo on October 26, 2006 at 15:47, with a copy to Ms. Mailloux:

[Translation]

Jean-Daniel,

I do not anticipate a confrontation; in fact, quite the opposite. We will jointly review Appendix D and the competency evaluation tools with the coach appointed for your first assignment.

My role as team leader is to take the necessary steps to assist in the participant's success (excerpt from the "terms of reference": If the Program Participant has not met the competencies at the appropriate level, up to eight months of on-the-job training will be provided). Thus, with the coach's assistance, we shall be in a position to identify your strengths and weaknesses and assist you on the road to success.

My sole aim was to notify you of your rights as an indeterminate employee.

I will bring to the meeting a copy of the objectives of your first assignment, Appendix D and the “competency evaluation tools” document for review.

[41] The meeting was held on October 30, 2006, after which Ms. Mailloux and Mr. Ondo-Mvondo exchanged the following emails:

Excerpt of an email sent by Ms. Mailloux to Mr. Ondo-Mvondo on October 31, 2006 at 09:40, with a copy to Ms. Lafortune:

[Translation]

...

*I am enclosing the evaluations we reviewed together at our meeting yesterday afternoon. The following comment was added to the **Overall Assignment Performance Checklist - Objective #2**: “These duties will be re-evaluated over the next assignments.”*

Jean-Daniel, the following is a summary of our feedback as given at the meeting:

Your interpersonal relations are excellent, and you work well in a team. You follow up very well with your colleagues and have an excellent grasp of compensation management. You demonstrate a strong ability to organize your work and set your priorities. Spelling and grammar were always correct in the documents you drafted. You willingly recommend changes and request feedback on your performance, which is of great benefit within an organization.

Recommendations to improve your performance in subsequent phases:

- Analysis: ensure that everything is logical, that the options and the proposals are not contradictory, and that all comments and analyses are verifiable in an official document. Correctly identify the important facts in a document in order to properly determine the impacts.

- Writing Help: review document-development criteria at the beginning and at the end of your work to confirm that you have complied with the directives and that the document is complete.

- Review your work to identify and remedy errors. A single

mistake can affect 270 000 accounts and is liable to have a tremendous impact, so document accuracy is paramount.

- Work more independently, show initiative and perform more research on Web lists to gain broader and more in-depth knowledge of compensation.

- Use the tools available to you to complete your work accurately.

...

[42] Ms. Mailloux testified that she had coached four persons before Mr. Ondo-Mvondo and that she coached three others after him. She indicated that her experience with the other participants had been completely different since shortcomings identified early in their assignments were later remedied, whereas Mr. Ondo-Mvondo maintained the same failings throughout his assignment. She added that, in her opinion, the grievor understood the duties that he was required to perform and the direction that he received. She added that he was aware of performance standards and knew that his performance needed improvement. Finally, she stated that, in her view, Mr. Ondo-Mvondo had received the training and assistance required to enable him to perform his work in a satisfactory manner.

[43] On cross-examination, Ms. Mailloux said that the grievor was a sociable person who communicated easily and that he was capable of grasping her explanations.

[44] In response to a question as to why she involved a staff relations representative in April 2006, Ms. Mailloux replied that, because Mr. Ondo-Mvondo seemed to think following the March 2006 evaluation that she had evaluated him wrongly and wished to hurt his career when her only purpose was to assist him, she felt it was time to involve a human resources person to support the participant.

[45] Despite the problems encountered during his first assignment, Mr. Ondo-Mvondo persevered in the COAP. His second assignment, slated to last from October 6, 2006 to June 8, 2007, was in the Specialized Services Division — Pay and Pensions. The grievor had two coaches during the assignment: Mr. Charbonneau, from October 23, 2006 to January 19, 2007, and Ms. Diotte, beginning on January 20, 2007.

[46] Before beginning his assignment, Mr. Ondo-Mvondo had expressed concerns about it, which are highlighted in the following email exchange with Ms. Lafortune:

Excerpt of an email dated September 22, 2006 at 13:00 to Ms. Lafortune, with copies to Jacques Robert, Ms. Sherman, Ms. Diotte and Ms. Baker:

[Translation]

...

I spoke on the phone with Ms. Mirelle Diotte, whom you identified as my coach for my assignment of October 23, 2006 to June 8, 2007 (session #2) at the Specialized Services Division.

As a result of that conversation, I would appreciate confirmation of the following points:

Mirelle was wondering whether my assignment to this division would count toward completing the program (i.e., I must complete two assignments under the program and be evaluated to move from the AS-02 to the AS-03 level. Mirelle would like to know whether my assignment to her division will be taken into account??).

According to Mirelle's explanation, that question arises from the fact that:

- the division in question is not listed among those available for assignments under the program; and*
- this will be the first time that a recruit will be assigned to that division.*

It would be appreciated if you could resolve our concerns (Mirelle's and mine) by confirming in response to this email that this assignment will count toward completion of the COAP and that it will lead to an evaluation for my promotion from the AS-02 to AS-03 level.

[47] Ms. Lafortune provided the following response to Mr. Ondo-Mvondo:

Excerpt of Ms. Lafortune's email sent October 3, 2006 at 17:01, copied to Mr. Robert, Ms. Sherman, Ms. Diotte and Ms. Baker:

[Translation]

...

I offer the following in response to your concerns.

Your assignment to the Specialized Services Division will be

taken into account. Not all divisions are specifically listed among those included in section 5.3 of the COAP “terms of reference.”

The written exam will test the knowledge that you have acquired since beginning the program for your move from the AS-02 to the AS-03 level.

All Compensation Officer Apprenticeship Program participants must complete 3 sessions of 8 months each during the first 24 months of the program to gain more in-depth knowledge of compensation, e.g., Consultation Services, System Maintenance and Development, Training Course Development and Delivery, Application and Program Support, and Compensation Projects, while taking into account the needs of the organization and the participant’s aspirations.

*In your first assignment under the **Compensation Officer Apprenticeship Program**, you acquired knowledge of consultation services. Your second assignment will familiarize you with systems, while your third will acquaint you with systems maintenance and development techniques. A development program work plan (Appendix B), setting out your assignment learning objectives, will be drawn up jointly by the manager, the coach and yourself at the outset of your second assignment.*

I would like to assure you that you are currently progressing well.

...

[48] Mr. Charbonneau did not testify. However, his evaluation report for October 23, 2006 to January 19, 2007 was adduced in evidence. It rates Mr. Ondo-Mvondo’s performance as unsatisfactory and points out his lack of initiative.

[49] The grievor refused to sign that evaluation report.

[50] Ms. Diotte, Mr. Ondo-Mvondo’s second coach, testified. She stated that her division was highly operational and that its functions included issuing payments to retired members of the Canadian Forces and to members of Parliament as well as processing the pay of the Royal Canadian Mounted Police. She added that it was the first time that a COAP participant had been assigned to her division. However, she had trained and supervised numerous new staff members in the past. She explained that her mandate was to allow Mr. Ondo-Mvondo to learn as many of the division’s

activities as possible. Several “coaches” were assigned to Mr. Ondo-Mvondo during his assignment.

[51] Ms. Diotte stated that she had drawn up a work plan for Mr. Ondo-Mvondo, including learning objectives. She was also responsible for assigning his work and evaluating his performance. She said that she had verbally set out the grievor’s learning objectives at the start of the assignment. It appears that Mr. Ondo-Mvondo signed the adduced work plan on February 20, 2007.

[52] On February 20, 2007, after meeting with Mr. Ondo-Mvondo, Ms. Diotte notified him by email that she wished to clarify the discussions that had occurred at the meeting. In her email, she reiterated to Mr. Ondo-Mvondo her concerns about what she perceived as his lack of initiative and advised him of a meeting that she had had on the matter with human resources representatives. Ms. Diotte also confirmed having requested at the meeting that Mr. Ondo-Mvondo confirm that he clearly understood what was required of him and that he check his work to avoid typographical errors.

[53] Ms. Diotte said that she was initially unaware that she was required to complete a monthly evaluation report for Mr. Ondo-Mvondo. Therefore, her first report covered the period from January 20 to April 30, 2007. Meetings were also held with Mr. Ondo-Mvondo, Ms. Diotte’s manager, Mr. Marcantonio and a human resources representative, Jennifer Touhey, on February 27, March 14 and April 11, 2007, to discuss the grievor’s performance. Summaries of the meetings describing several of Mr. Ondo-Mvondo’s shortcomings and unachieved objectives were adduced in evidence. The evaluation report for the period from May 1 to June 8, 2007 was submitted in evidence as well, and it also describes failings and unsatisfactory issues with Mr. Ondo-Mvondo’s performance. He refused to sign the report.

[54] Ms. Diotte said that she assigned six or seven “coaches” to Mr. Ondo-Mvondo during his assignment, all of whom noted his unsatisfactory performance and lack of interest. Therefore, she decided to take charge and added that she made the same observations. At the end of the assignment, Ms. Diotte completed the overall evaluation report, setting out several unsatisfactory issues. The following are the general comments recorded at the end of the report:

Excerpt of the overall evaluation report for the period from October 23, 2006 to

June 8, 2007:

[Translation]

...

GENERAL

While recognizing that each individual learns in his or her own way, seven persons were assigned to assist Jean-Daniel in successfully performing his duties during his training period at the Specialized Services Division. It was commonly felt that Jean-Daniel seemed to take no interest in compensation work.

...

That said, Jean-Daniel is very gracious toward his colleagues.

During my most recent discussion with Jean-Daniel, he admitted that he finds compensation work extremely detailed and that he preferred work more closely related to his experience as an analyst and project manager.

To assist Jean-Daniel in acquiring the competencies required for the internship program and to given him work more closely related to his experience in analysis and project management, Jean-Daniel will remain at the Specialized Services Division to achieve the necessary skill level before undertaking his next internship under the COAP. Instead, he will be assigned duties more closely related to his analysis and project management abilities.

[55] In view of Mr. Ondo-Mvondo's performance problems and unsatisfactory performance, the employer's opinion was that he did not meet the standards of competence for promotion to the AS-03 level, and it decided to extend his second assignment for three months to enable him to acquire the skills he lacked and to improve his performance. To improve his chances of success, managers assigned Mr. Ondo-Mvondo a job more closely aligned with his interests and previous analyst experience. A meeting was held on June 12, 2007 with Mr. Ondo-Mvondo, Mr. Marcantonio, Ms. Diotte and Ms. Lafortune. Its purpose was to review the grievor's performance evaluation and discuss the extension of his assignment.

[56] Mr. Ondo-Mvondo disagreed with the employer's assessment of his performance and its decision to extend his assignment and to delay his promotion. He and Ms. Lafortune exchanged emails before the meeting of June 12, 2007. The following are

some excerpts of the emails they exchanged:

Excerpt of an email from Ms. Lafortune to Mr. Ondo-Mvondo dated June 8, 2007 at 10:43:

...

I have just been informed by the management of PSD/SSD that a recommendation has been made to postpone your move in another assignment and to provide you with an additional 3 months on-the-job training (in accordance to the Terms of Reference), therefore your assignment will be extended up to September 14, 2007. They will meet with you early next week to provide you with your overall performance assessment and your competence assessment. Also, next week you will receive new objectives for your extended 3 month assignment.

...

[Sic throughout]

Excerpt of an email from Mr. Ondo-Mvondo to Ms. Lafortune dated June 8, 2007 at 11:03:

...

I do not have a problem staying for additional 3 months or more.

But please clearly explain to me what led to that decision and what are the implications of this in my progress within the program (Particularly Is this considered as a new assignment or am I being penalized in my promotion from AS2 to AS3? If so, why?)

...

[Sic throughout]

Excerpt of an email that Ms. Lafortune sent to Mr. Ondo-Mvondo, dated June 8 at 17:30:

...

This is not a new assignment, it's a three-month extension of your current assignment, and, therefore, the knowledge exam will be postponed. Your coach and the assignment manager will meet with you next week to go over Appendix C for May and Appendix D for the entire assignment period, and they will be in a better position to explain the decision.

...

Excerpt of an email that Mr. Ondo-Mvondo sent to Ms. Lafortune on June 11, 2007, with copies to Ms. Baker, Mr. Marcantonio, Ms. Diotte and Ms. Labelle:

[Translation]

...

*The decision to extend my assignment (**and, especially, to delay my promotion**) resembles an unjustified punitive measure.*

My current assignment is supposed to end on June 11, 2007. According to the COAP terms of reference, as of June 12, 2007, I must undergo an evaluation exam (based on what I have learned) with a view to my promotion to the AS-03 level.

*I am currently the latest recruit to the COAP and, **to the extent I am the only person negatively affected**, I also do not accept that rules and procedures are being created only for me and only in my case. Action taken should be based on how the other COAP participants were dealt with.*

I am waiting for management's explanation of the extension of my assignment. As mentioned in my previous email, I have no objection to remaining here for an extra three months, although I do not agree with being penalized for an alleged mistake that I did not commit.

While my assignment may be extended, I must not be penalized by being denied my promotion.

...

[Emphasis in the original]

[57] At the meeting of June 12, 2007, attended by Mr. Ondo-Mvondo, Ms. Diotte, Ms. Lafortune and Mr. Marcantonio, the grievor refused to sign the evaluation reports prepared by Ms. Diotte. The written record of the meeting states that the grievor was informed of his performance problems on several occasions, that he was told that he still did not meet the standards of competence and that, for that reason, his assignment was being extended to allow him to achieve the required skill level.

[58] Following the meeting, Mr. Ondo-Mvondo emailed Ms. Labelle, Mr. Marcantonio, Ms. Diotte, Ms. Lafortune and Ms. Baker, stating the following:

[Translation]

A meeting was held on June 12, 2007 at 14:00 in room 1-045 at Coldrey to discuss my monthly and final assignment evaluations.

...

Following the meeting, and in light of previous meetings that I attended (without understanding their purposes or reasons) with Lucy Baker, Denise Lafortune and Jennifer Touhey from staff relations, it appears obvious that someone is determined to discredit me.

I declare that the evaluation is biased and express reservations on the evaluation itself, the manner in which it was conducted and its content (in my opinion, statements contained in the evaluation are totally unrelated to an objective assessment).

Furthermore, according to normal procedures, I should have discussed this evaluation beforehand with my coach, although no such discussion occurred.

For those two reasons, I refused to sign the evaluation as requested by Denise Lafortune. It should be noted that Mirelle Diotte was also reluctant to sign the evaluation for some time, although she presented it; she asked Denise several times whether she truly wanted her to sign it.

Mirelle Diotte read the evaluation aloud.

Mirelle Diotte said that Tammy Labelle had requested her to include certain remarks in the evaluation (including the remark dealing with formal training courses) (???)

Denise Lafortune also added that the course instructors had notified her of my lack of interest (???)

Although she names no one, Mirelle Diotte said that persons appointed to train/coach me had indicated to her my lack of interest (???)

I raise the following points:

The evaluation notes my lack of interest, although Mirelle Diotte, who is supposed to be my coach, consistently told me (and repeated on several occasions in meetings with Lucy Baker, Denise Lafortune and Jeff Marcantonio) that she had no time for me and that the work performed in that area was strictly clerical in nature. The evaluation also mentions that I applied for jobs. How and why should one evaluate a lack of interest? How many employees and

coaches lack interest in their work and roles? How many employees and coaches apply for positions?

My assignment objectives were defined (at my insistence to Denise Lafortune) only in late March; hence, it was absurd to evaluate me using non-existent objectives.

I reiterate what I said to Denise in my email:

*I do not object to the extension of my assignment...
However:*

As Mirelle herself mentioned, my assignment unit essentially comprises clerks who were given responsibility to coach me (Mirelle herself demonstrated a lack of interest in that regard). It is a frustrating situation in various respects that gives rise to the bad faith in my training and evaluation .

There is absolutely no evidence that I made any mistake that would warrant penalizing me by denying my promotion.

Therefore, there is no reason that I should be the victim of others' frustrations and that I should be penalized in my promotion. There is no reason to delay my promotion unless I obtain assurance that it will be retroactive to June 12.

...

[Emphasis in the original]

[59] On June 13, 2007, Ms. Lafortune responded as follows to Mr. Ondo-Mvondo:

[Translation]

...

Under the terms of reference, we can recommend that a participant's promotion be delayed to enable the individual to acquire additional on-the-job experience and training and to be better prepared to meet the standards of competence to take on the responsibilities of an AS-03-level position. To be promoted to the next level, the participant must meet the competence standards of the COAP terms of reference. Given that your coach has confirmed that you do not currently meet the competence standards of the COAP terms of reference, i.e., you have not achieved a "Very Good" rating, your assignment will be extended. . . According to the COAP terms of reference, if a participant does not achieve a "Very Good" rating during an assignment, he or she is entitled to eight months' additional on-the-job training. . . .

...

This applies to ***all*** COAP participants ***without exception***.

...

[Emphasis in the original]

[60] Ms. Diotte indicated that Mr. Ondo-Mvondo's assignment was extended to give him the opportunity to meet the standards of competence. The work that he was to perform during the extension period consisted of drafting work procedures for the Specialized Services Division. Ms. Diotte established the objectives for the period, and Mr. Ondo-Mvondo signed them at a meeting on June 18, 2007. The meeting was followed by an exchange of emails. The following is an excerpt of an email from Mr. Ondo-Mvondo to Ms. Diotte dated June 19, 2007 at 10:31:

[Translation]

...

Following your verbal suggestion, I amended my work plan as described below. Would you be so kind as to confirm your approval in writing?

Thank you in advance!

Moreover, I wish to point out that, during my information gathering, I went to see Ghislaine Perras (whom I am copying) who told me that it was out of the question for her to teach me anything, given that she was a CR and I was an AS...I remind you that she was my coach during my assignment...I refer to the general spirit prevalent during my assignment (and throughout the program in general)... Therefore, it is unfair to attempt to show that I am unable to achieve a given performance level, to meet some objective or other....

...

[61] Ms. Labelle offered the following response:

[Translation]

This email is in response to your email below.

I approve the content of your work plan shown below. If you wish to further amend it during your assignment, please notify me in writing and your recommendations and suggestions will be considered.

On the challenge raised this morning about your need for information, I remind you that all requests should be directed in writing to me, your coach. I shall see to it that you receive the information you need to further your tasks. That is clearly described in the expectations defined for your assignment.

I would also like to take this opportunity to remind you that your assignment requires that you gather pieces of information from various sources to analyze data and develop procedures. You are expected to draft procedures based on those pieces of information to demonstrate that you have achieved the requisite competence levels in analysis and project management.

...

[62] Mr. Ondo-Mvondo responded as follows to that email:

[Translation]

...

In an atmosphere of bad faith, we all know what gathering information from others might lead to

I wish to remind you of the views that I expressed previously: The purpose of the COAP is absolutely not to attempt to entrap recruits. The primary role of the coaches and all those involved in the program (managers, etc.) is to help recruits progress and not to lay all sorts of traps for them or to seek all sorts of reasons for them to fail. That said, if one knows full well what the obstacles are and the frustrations experienced by some individuals involved in the program and the assignments, one does not blame the recruit; to do so would be to act in bad faith.

...

[63] Ms. Diotte stated that she assessed Mr. Ondo-Mvondo's work based on the draft directives that he submitted. She asserted that, during the extension period, the grievor continued to demonstrate the same shortcomings that he had shown during the assignment. A meeting was held with Mr. Ondo-Mvondo, Ms. Diotte, Ms. Lafortune and Mr. Marcantonio on August 30, 2007 to discuss the grievor's performance and progress. The record of the meeting includes the following points:

[Translation]

...

Meets:

- *Ability to communicate effectively, both orally and in writing.*
- *Interpersonal skills*

Does not meet:

- *Ability to perform analyses.*
- *Ability to plan and organize.*
- *Good judgment*
- *Reliability*
- *Attention to detail*

Development and progress in the program*Progress made since previous meetings:*

To date, Jean-Daniel has met none of the deadlines set for achieving his objective.

[64] The record also mentions Mr. Ondo-Mvondo's lack of initiative.

[65] Ms. Lafortune, team leader since June 2006, also testified. She said that she was responsible for administering the COAP and that, in that role, she negotiated participants' assignments and followed up on performance evaluations and participants' progress. She added that the COAP terms of reference are reviewed with participants when they enter the program and that they are made aware of the implications of not meeting the standards of competence. She stated that she had a more significant and direct involvement in Mr. Ondo-Mvondo's case than she normally would because of his performance problems and shortcomings that persisted over time. She expressed her concern that three different coaches had observed the grievor's significant failings. When failings in a participant are noted, the coach and the team leader attempt to assist the participant. Ms. Lafortune conveyed that, at every meeting she attended with Mr. Ondo-Mvondo, she emphasized the need for performance improvement and reiterated the consequences of not meeting the standards of competence. In her testimony on the extension of the second assignment, she said that Mr. Ondo-Mvondo did not meet the standards of competence to be promoted to the AS-03 level following his second assignment and that the purpose of

the extension was to give him another chance and an opportunity to pursue his learning.

[66] Ms. Lafortune made it known that Mr. Ondo-Mvondo's shortcomings were not remedied during the extension of his assignment. She also pointed out she had notified Ms. Sherman of his performance problems.

[67] In cross-examination, Mr. Ondo-Mvondo asked Ms. Lafortune why he was placed in a pensions branch during his second assignment when he was in the compensation component of the COAP. She replied that Ms. Diotte's branch handles pension and pay matters and that, in her opinion, that work unit was an appropriate place to learn pay administration.

[68] Ms. Labelle, Director, Pensions Administration, Compensation Sector, testified at Mr. Ondo-Mvondo's request. Questioned about her involvement in the grievor's case following his second assignment, Ms. Labelle replied that she had become personally involved in Mr. Ondo-Mvondo's case because of the performance problems that he was experiencing. She also added that she met with the director, Ms. Sherman, to notify her that Mr. Ondo-Mvondo was not achieving the program's objectives.

B. Cause for dismissal related to Mr. Ondo-Mvondo's behaviour

[69] The employer called no witnesses to testify as to the second reason for termination, related to Mr. Ondo-Mvondo's behaviour. Mr. Ondo-Mvondo testified on his own behalf in addition to calling Ms. Baker and Ms. Kovacs.

[70] Documents and emails were also submitted on consent.

[71] The evidence demonstrated that, on June 23, 2006, Mr. Ondo-Mvondo met with Ms. Sherman and Ms. Baker to discuss the Treasury Board's *Policy on the Prevention and Resolution of Harassment in the Workplace*. However, Mr. Ondo-Mvondo and Ms. Baker each have very different versions of the meeting's context and proceedings.

[72] Ms. Baker was a business manager within the Compensation Sector, and her duties included functional responsibility for the COAP. She stated that, in June 2006, Mr. Ondo-Mvondo was invited to meet with her, along with Ms. Sherman, to discuss the harassment policy after two female employees complained of the manner in which Mr. Ondo-Mvondo had approached them. Ms. Sherman and Ms. Baker thus decided to meet

with the grievor to make him aware of the policy and to draw his attention to the fact that his “friendly” approach to women was perhaps inappropriate. His manner was liable to make some people uneasy and uncomfortable, especially since he persistently asked them out. Responding to the question of whether she had received formal complaints, Ms. Baker indicated that the employees concerned had sent her emails. Ms. Baker confirmed that Ms. Kovacs was among the complainants.

[73] Ms. Kovacs testified and acknowledged that she complained that Mr. Ondo-Mvondo had behaved toward her in a manner that she deemed inappropriate and that made her uncomfortable. However, she refused to refer to the grievor’s behaviour as harassment.

[74] Mr. Ondo-Mvondo related the following events that took place in June 2006. He indicated that, on the first occasion, the director, Ms. Sherman, had come to his office to chat and to inquire about his progress in the program. She apparently stated that she was happy to have him as a participant and mentioned that Ms. Kovacs had spoken highly of him. She then apparently asked whether he had received all the documents that are normally distributed to new employees and kept in a binder. After checking the content of Mr. Ondo-Mvondo’s binder, Ms. Sherman apparently said that she would have to provide him with certain missing documents.

[75] Mr. Ondo-Mvondo stated that, in his recollection, Ms. Sherman returned to his office the next day and, after chatting about different subjects, she invited him to her office, where Ms. Baker was waiting. He said that Ms. Baker then allegedly stated that she wished to complete the documentation he had received, at which point she brought up the Treasury Board’s policy on harassment, which all employees should receive.

[76] Mr. Ondo-Mvondo said that he was shocked and that he then asked why he was being given a copy of that policy and whether it was because he was accused of harassment. He added that Ms. Baker had tried to reassure him by confirming that there were no accusations against him and by stating that he was being given the policy because it was to be distributed to all staff. He also said that Ms. Baker then apparently pointed out that the compensation world was predominantly female and that she merely wished to forewarn him. He then requested to receive the policy by email.

[77] Following the grievor's testimony, the employer's counsel re-examined Ms. Baker. She repeated that the purpose of the meeting with Mr. Ondo-Mvondo was not merely to provide him with a copy of the Treasury Board policy like any other employee but rather to discuss with him incidents involving female employees that had been reported. In that context, she and Ms. Sherman wished to sensitize Mr. Ondo-Mvondo to his behaviour and to his approach to women. She stated that Mr. Ondo-Mvondo requested the names of the complainants. She replied that the complainants did not wish to be identified or to file formal complaints and that the purpose of the meeting was to increase his awareness to avoid future problems.

[78] The employer chose not to call Ms. Sherman to give her version of the facts given that she was on leave from work for an indefinite period.

[79] After the meeting of June 26, 2006, Ms. Sherman sent the following email to Mr. Ondo-Mvondo:

[Translation]

...

Following our discussion today, I bring to your attention the Treasury Board Policy on the Prevention and Resolution of Harassment in the Workplace.

...

[80] On June 27, 2007, Mr. Ondo-Mvondo sent the following email to Ms. Sherman and Ms. Baker:

[Translation]

Hello Gail and Lucy!

*I am extremely thankful for our meeting, the purpose of which, if I understood correctly, was not to deal with a real problem but **rather to warn and assist me in preventing situations liable to become problematic . . .***

Many thanks for cautioning me and urging me to be vigilant.

We should all be aware we live in a world where people's motivations are many, not all of which are directly related to the problem or issue that they claim to wish to resolve.

Please, in the future, should you receive any complaint or should any issue be raised concerning me and bearing on

any work-related matter (for which I report to you), I beg you, in the interest of transparency, fairness and justice, to set up a meeting right away for clarification and discussion with all individuals involved (you, the complainants and me).

Given the highly sensitive nature of harassment and its potentially disastrous consequences, it is a very complex matter that must be handled with extreme caution. Particularly:

- 1. It must be ascertained that the matter at issue is indeed harassment;*
- 2. It must be confirmed that all involved (the accusers, the accused and the adjudicator) clearly understand what constitutes harassment; and*
- 3. When dealing with harassment in the workplace, it must be determined that the matter at hand is indeed workplace-related.*

Situations in which everyone makes accusations against everyone else for any reason whatsoever must be avoided.

We must also try to prevent a situation in which someone is clearly trying to make trouble for someone else, where it is obvious that the purpose of an accusation is different from the basis of the accusation.

By the same token, given that all situations may be resolved through transparency, I believe that we should not refrain from socializing in the workplace out of fear of being accused of one thing or another.

I wish to express my heartfelt thanks once again for your caution and assistance in preventing situations that could very well become serious.

I urge you once again to set up a meeting immediately for clarification among the parties involved should you be required to deal with any work-related complaint or issue with respect to me.

[Emphasis in the original]

[81] Documents adduced on consent show that, in June 2007, another female employee brought to the attention of Ms. Diotte and Mr. Marcantonio a situation in which she felt that Mr. Ondo-Mvondo's behaviour and remarks had been inappropriate. The employer conducted an administrative investigation into the complaint and, at a

meeting held on July 3, 2007, Mr. Ondo-Mvondo denied the accusations against him.

III. Summary of the arguments

A. For the employer

[82] The employer submits that Mr. Ondo-Mvondo's grievance is not adjudicable and that he was discharged while on probation in accordance with subsection 62(1) (formerly section 28) of the *PSEA*, which gives the employer the authority to terminate the employment of an employee on probation by reason of the employee's unsatisfactory performance. Section 211 of the *Act* clearly stipulates that a grievance based on the termination of an employee on probation under subsection 62(1) of the *PSEA* cannot be referred to adjudication, despite section 209 of the *Act*.

[83] The employer acknowledges that it has the initial burden of proof to demonstrate that the reason for terminating an employee is truly employment-related when dealing with a grievance challenging termination during a probationary period. Provided that the evidence shows that the termination was employment related, the employer maintains that it is not required to prove that the termination was for cause, and the adjudicator must find that he or she does not have jurisdiction. The employer also maintains that it greatly exceeded the required burden of proof in this instance and that the evidence shows beyond any doubt that Mr. Ondo-Mvondo's termination was related to his unsatisfactory performance.

[84] As for the second reason for discharging Mr. Ondo-Mvondo, which related to his behaviour, the employer maintains that, although his behaviour contributed to the grievor's unsatisfactory performance, it is not the primary reason for his dismissal. The employer argues that, with respect to evidence on the challenge to an adjudicator's jurisdiction to rule on the termination of an employee on probation, it is not up to the employer to demonstrate cause. Furthermore, the employer contends that the testimonies of Ms. Baker and Ms. Kovacs, in addition to the documents adduced, is sufficient in this case to show that incidents involving Mr. Ondo-Mvondo's questionable behaviour toward certain female employees were brought to the employer's attention, acted upon and considered in the decision to terminate his employment.

[85] The employer argues that because the complaint concerning Mr. Ondo-Mvondo's behaviour may be construed as a complaint for misconduct that is liable to entail a

disciplinary sanction does not give an adjudicator jurisdiction nor prevent the application of section 211 of the *Act*. According to the employer, nothing precludes misconduct of a disciplinary nature from constituting a reason for termination on probation under the *PSEA*.

[86] The employer acknowledged that the dismissal of an employee on probation might be adjudicable if the grievor discharges the burden of proof and demonstrates that the dismissal was a subterfuge and a sham that disguises that it was, in fact, disciplinary, arbitrary or discriminatory or in bad faith. The employer asserts that the evidence in no way demonstrates that Mr. Ondo-Mvondo's termination was the result of a subterfuge disguising such a dismissal.

[87] The employer referred me to the following cases: *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529; *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72; and *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.).

B. For the grievor

[88] Mr. Ondo-Mvondo presented his arguments verbally and also referred me to a written submission that he filed with the Board.

[89] The grievor contends that the evidence shows that his termination by the employer was not a discharge on probation but rather a dismissal that was disciplinary, discriminatory or arbitrary or in bad faith and that was completely unrelated to his performance and behaviour. In his view, it is clear that his termination was a subterfuge and a set-up by the employer, that it had decided to get rid of him, and that it then conspired to justify its decision. Mr. Ondo-Mvondo argues that all his performance evaluations were falsified and tainted by bad faith, thus demonstrating that his termination had nothing to do with his performance. The grievor believes that the employer was unrelenting in its efforts against him. He emphasized several elements that he feels demonstrate the employer's bad faith and determination, including the following:

- The performance measures and standards of competence were not clearly established in the COAP, thus giving the employer the latitude to do as it pleased.

- The employer must apply the evaluation tools consistently to all participants, which was not done for the grievor's evaluations.
- Under the COAP terms of reference, the participant must be involved in setting learning objectives; however, he never took part in establishing the learning objectives of his assignment.
- The probationary period for participants from outside the public service is discriminatory since all participants belong to visible minorities. The probationary period should have lasted 12 months, and the employer erred in considering the participant to be an employee on probation.
- The performance evaluations were falsified. It is insulting and wrong for the employer to claim that he was incapable of adequately performing clerical duties since he holds two master's degrees.
- It was unusual that, from the outset, the employer involved people from staff relations in his case.
- The presence of participants from outside the public service, each a member of a visible minority and highly educated, is cause for insecurity and frustration for participants from the public service as well as staff members who deal with the participants, given that they do not possess the same level of skill as outside participants and that they view them as threats to their opportunities for promotion.
- It is preposterous that Ms. Kovacs, who was his team leader at the start of his first assignment and who filed a harassment complaint against him, should remain his superior. She could not be objective and wished to be rid of him.
- It was unusual that, in June 2006, the employer provided him with a copy of the harassment policy via the director; he had nothing to be ashamed of.
- The employer decided that the grievor would complete a second assignment in the pensions area, which was an inappropriate placement completely unrelated to his progression in the COAP. That assignment was contrary to the COAP terms of reference and was not conducted in compliance with its requirements. Ms. Diotte was unsure of his role in her section, and she gave him no attention.

He had nothing to do and was left to his own devices. He was informed of his objectives only in February 2007.

- It was unusual for the directors, Mses. Sherman and Labelle, to become personally involved in a participant's case.
- Ms. Diotte prepared the performance evaluations even though she did not supervise the grievor's work. Rather, his seven different coaches should have assessed his performance.
- He was not consulted before the decision was made to extend his second assignment.
- His second assignment should have been extended for eight months, in accordance with the terms of reference. However, the employer granted only a three-month extension.
- Although the employer extended his second assignment until September 2007, it was clear as early as August 30, 2007 that the employer was determined to terminate his employment.
- The wording of the termination letter shows that the employer wished to do him harm since, in his opinion, there are certain things that an employer should not include in a termination letter without being absolutely certain about them. Nevertheless, the employer accused him of harassment despite the lack of any evidence to show that he had harassed anyone. The false accusations significantly affected his life.

IV. Reasons

[90] An adjudicator has limited jurisdiction with respect to a grievance challenging the termination of an employee on probation. Although a grievor may, under paragraph 209(1)(b) of the *Act*, refer a grievance to adjudication based on a disciplinary action that resulted in termination, section 211 explicitly states that a grievance for a termination under the *PSEA* may not be referred to adjudication. However, under subsection 62(1) of the *PSEA*, a deputy head may notify an employee on probation at any time that his or her employment has been terminated. The evidence in this case clearly demonstrates that Mr. Ondo-Mvondo was an employee on

probation when his employment was terminated on September 13, 2007.

[91] Nonetheless, the mere allegation that an employee was discharged while on probation is not sufficient to trigger the application of section 211 of the *Act* and to deprive an adjudicator of all jurisdiction. It is incumbent on the adjudicator to ensure that the dismissal was indeed a termination of an employee on probation within the meaning of the *PSEA*.

[92] On that subject, in *Leonarduzzi*, a decision rendered under the *Public Service Staff Relations Act*, the Federal Court set out the following:

...

[31] I agree with the Attorney General that Parliament's intent in enacting subsection 92(3) of the PSSRA was to forbid the adjudication by the Board of rejections on probation. However, Parliament did not prohibit an adjudicator from ascertaining whether a rejection on probation is in reality pursuant to the PSEA. . . .

...

[93] Under that decision, an employer who alleges that a dismissal is a termination on probation must meet the initial burden of proof, defined as follows in *Leonarduzzi*: “. . . 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.”

[94] Also in *Leonarduzzi*, the Court stated the following:

...

[42] The respondent submits the employer must make a prima facie case that the grievor was terminated for just cause. This is not so. A distinction must be made between an employment related reason and “just cause”. In Canada (Attorney General) v. Penner, [1989] 3 F.C. 429 (F.C.A.), a case involving the jurisdiction of the Board to hear a grievance of a probationary employee terminated for cause under section 28 of the PSEA. Marceau J.A. stated at page 438:

Other adjudicators have adopted quite a different attitude and accepted that they had no jurisdiction to inquire into the adequacy and the merit of the decision to reject, as soon as they could satisfy

themselves that indeed the decision was founded on a real cause for rejection, that is to say a bona fide dissatisfaction as to suitability. In Smith (Board file 166-2-3017), adjudicator Norman is straightforward:

In effect, once credible evidence is tendered by the Employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes shuddering to a halt. The adjudicator, at that moment, loses any authority to order the grievor reinstated on the footing that just cause for discharge has not been established by the Employer. . . .

[43] Justice Marceau held it was the view Adjudicator Norman expressed above which was the only one authorized by the Supreme Court of Canada's decision in *Re Jacmain v. Attorney General (Canada) et al.*, [1978] 2 S.C.R. 15 and the only one the legislation really supports.

...

[Emphasis in the original]

[95] Once the employer has demonstrated that the termination was employment related, the burden of proof shifts to the grievor, should the grievor wish to establish that his or her dismissal was not a termination within the meaning of the PSEA. The grievor's burden of proof under the circumstances is clearly described in *Chaudhry*:

...

[108] Once the employer has discharged its burden of demonstrating that the rejection was for an employment-related reason, the burden of proof then shifts to the grievor to demonstrate that the employer's actions are, in fact, "a sham or a camouflage" or in bad faith and therefore not in accordance with subsection 28(2) of the PSEA: Leonarduzzi (supra) and Penner (supra).

...

[113] The burden now shifts to the grievor to demonstrate that the rejection on probation is a "sham" or in bad faith. . . .

...

[96] In applying those principles to Mr. Ondo-Mvondo's grievance, I must answer the following two questions:

- Has the employer shown that Mr. Ondo-Mvondo's discharge was employment-related; i.e., was he terminated for cause?
- In the event that the first question is answered in the affirmative, has Mr. Ondo-Mvondo demonstrated that his discharge was, in fact, a subterfuge and a sham disguising that it was disciplinary, arbitrary or discriminatory or in bad faith?

[97] For the first question, in light of the evidence, I find that the employer discharged its initial burden of proof of demonstrating that Mr. Ondo-Mvondo's dismissal was related to his employment. Evidence has abundantly shown that the employer was dissatisfied with the grievor's performance and progress within the COAP. No later than the second month of the grievor's first assignment, his coach noted that his performance was not up to par, and it remained so until the end of his assignment. The evaluation of Mr. Ondo-Mvondo's performance following his assignment shows that the employer was dissatisfied with his work in some respects. The evidence also indicates that the grievor was notified of his shortcomings on several occasions and of the need to improve his performance.

[98] The same situation occurred during the second assignment. Throughout the assignment, the coaches and the team leader observed and pointed out Mr. Ondo-Mvondo's performance failings. The grievor attended several meetings at which the employer set out its expectations and the grievor's failings on the job and notified him of the need to improve his performance. The evidence showed that, on completion of the second assignment, Mr. Ondo-Mvondo did not meet the standards of competence required to continue in the program and to move up to an AS-03-level position, at which time the employer extended his assignment for three months to enable him to attain the required standards. To improve Mr. Ondo-Mvondo's chances of success, the employer designed an assignment more in keeping with his aspirations and experience. However, the evidence shows that Mr. Ondo-Mvondo's shortcomings persisted throughout the extension period and that the employer remained dissatisfied with his performance.

[99] With respect to the second cause for termination, related to the grievor's

behaviour, the employer has not established that he was guilty of misconduct. On the contrary, the evidence showed that the employer was notified of allegations of the grievor's inappropriate behaviour, and his behaviour was indeed among the reasons for his rejection. That evidence is sufficient, considering that the burden of proof, in this case, is on the employer.

[100] Therefore, I find that, *a priori*, the employer has demonstrated that Mr. Ondo-Mvondo's discharge was employment-related, i.e., effectively based on the employer's dissatisfaction with his performance and behaviour.

[101] As previously indicated, once I have determined that the employer discharged Mr. Ondo-Mvondo for employment-related reasons, I do not have jurisdiction to analyze and rule on the appropriate nature of the dismissal.

[102] However, I must determine whether Mr. Ondo-Mvondo has effectively demonstrated that the termination of his employment was a subterfuge disguising a dismissal that was disciplinary, discriminatory or arbitrary or in bad faith. After due consideration, I find that the evidence supports none of those allegations.

[103] On the contrary, the evidence makes it clear that the coaches and managers who dealt with Mr. Ondo-Mvondo acted in good faith and that they made sustained efforts to guide the grievor and to assist him in improving his performance over the course of the COAP. No piece of evidence casts any doubt on the good faith of Mr. Ondo-Mvondo's coaches and managers.

[104] There is nothing to indicate that Mr. Ondo-Mvondo's performance evaluations by the various coaches (Ms. Mailloux, Ms. Lafortune and Mr. Charbonneau) were falsified or that they did not reflect reality. The evidence shows that, on the contrary, the grievor's performance was assessed regularly, extensively and objectively. It also indicates that the grievor challenged his evaluations and his coaches' actions throughout his assignments. He construed the actions of his coaches and managers as machinations to hinder him and to exclude him from the program. However, the evidence simply does not support such allegations.

[105] The evidence does not show that the employer ignored the COAP terms of reference and does not support Mr. Ondo-Mvondo's allegation that the terms of reference did not clearly set out the standards of competence. I recognize that, during

his second assignment, the grievor's written objectives were provided to him at a later date than that scheduled in the COAP terms of reference. According to Ms. Diotte's testimony and the records of the various meetings, the grievor was in fact given work to perform, and his progress was monitored. Nothing leads me to conclude that the delay in providing learning objectives to Mr. Ondo-Mvondo jeopardized his progress or that it was motivated by bad faith and a desire to cause him harm.

[106] The grievor alleges that the internship imposed by the employer was discriminatory. I am unable to conceive how the internship, which was the same for all COAP participants recruited outside the public service, can be considered discriminatory. In any case, Mr. Ondo-Mvondo's internship was as scheduled in the program, and he was aware of its duration when he joined the COAP.

[107] According to the grievor, the direct involvement in his case of the directors, Ms. Labelle and Ms. Sherman, evinces the employer's bad faith. He draws the same conclusion from the participation of Ms. Touhey, representing staff relations. After due consideration, I find that the evidence shows that those persons, along with Ms. Lafortune, took an interest in the grievor's file because he was not progressing normally in the COAP. He was experiencing persistent performance problems, and he maintained a difficult relationship with his coaches, challenging and questioning their assessments of his performance at every opportunity.

[108] Mr. Ondo-Mvondo infers from the complaint that Ms. Kovacs filed against him that she had taken steps to hinder him and to get rid of him. However, the evidence shows that Ms. Kovacs was never directly involved in setting the grievor's learning objectives or in assessing his performance. His objectives were set by his coach, Ms. Mailloux, who also supervised him and evaluated his performance. The grievor also maintained that Ms. Kovacs wilfully selected a second assignment for which he was not suited. On that point, the evidence demonstrates that Ms. Kovacs, who left her position as COAP team leader in June 2006, was not involved in selecting the grievor's second assignment and that, rather, its negotiation fell to her replacement, Ms. Lafortune.

[109] Mr. Ondo-Mvondo claims that his second assignment did not comply with the COAP terms of reference and that it was inappropriate, given his advancement in the program. The evidence does not bear out that allegation. Instead, it showed that Specialized Services Division employees perform duties related to pensions and pay. Both Ms. Diotte and Ms. Labelle stated that the assignment was appropriate and

relevant to the COAP and that the Specialized Services Division was a good place to learn compensation management.

[110] Mr. Ondo-Mvondo blames the employer for not consulting him before extending his second assignment. He also blames the employer for extending his assignment for three months rather than for eight. The evidence shows that the decision to extend the grievor's assignment was made because he had not achieved the performance level required to meet the standards of competence. The assignment was extended to allow him more time to attain the expected level of performance. Under the circumstances, I do not see how prior consultation with the grievor would have been useful nor how it could be construed that the employer was acting in bad faith based on that method of proceeding. With respect to the length of the extension of the assignment, the COAP terms of reference provide that an assignment may be extended for up to eight months, not that any extension must be eight months in duration.

[111] On the second cause for termination, Mr. Ondo-Mvondo argues the burden of proof was on the employer to prove that he was guilty of misconduct and harassment. The employer was required to demonstrate that, as in the case of the reason related to the grievor's performance, the motive related to his behaviour was also founded. The employer showed that Mr. Ondo-Mvondo's behaviour gave rise to complaints, that the complaints were acted on and that the employer determined that the final incident was an act of misconduct. With respect to the employer's burden of proof in this matter, i.e., establishing that the misconduct motive was real and that it was not a sham, the evidence adduced was sufficient. I do not share Mr. Ondo-Mvondo's view that the wording of the termination letter shows that the employer sought to harm him. In my estimation, the letter's wording sets out the employer's true opinion of the grievor's behaviour. As previously stated, once the evidence shows that the employer has truly determined in good faith that Mr. Ondo-Mvondo's behaviour was inappropriate, I am not required to rule on the appropriate nature or on the merits of the employer's subsequent decision.

[112] Therefore, in light of the evidence, I find that the employer has demonstrated that Mr. Ondo-Mvondo's termination was work related. I also find that the grievor has not demonstrated that his termination was a subterfuge or that it was a sham disguising that it was disciplinary, discriminatory or arbitrary or in bad faith.

[113] For these reasons, I find that the termination of Mr. Ondo-Mvondo's

employment while on probation is not adjudicable and that I must decline jurisdiction.

(The Order appears on the next page)

V. Order

[114] The objection to the jurisdiction of an adjudicator is allowed.

[115] The grievance is dismissed.

April 23, 2009.

PSLRB Translation

**Marie-Josée Bédard,
adjudicator**